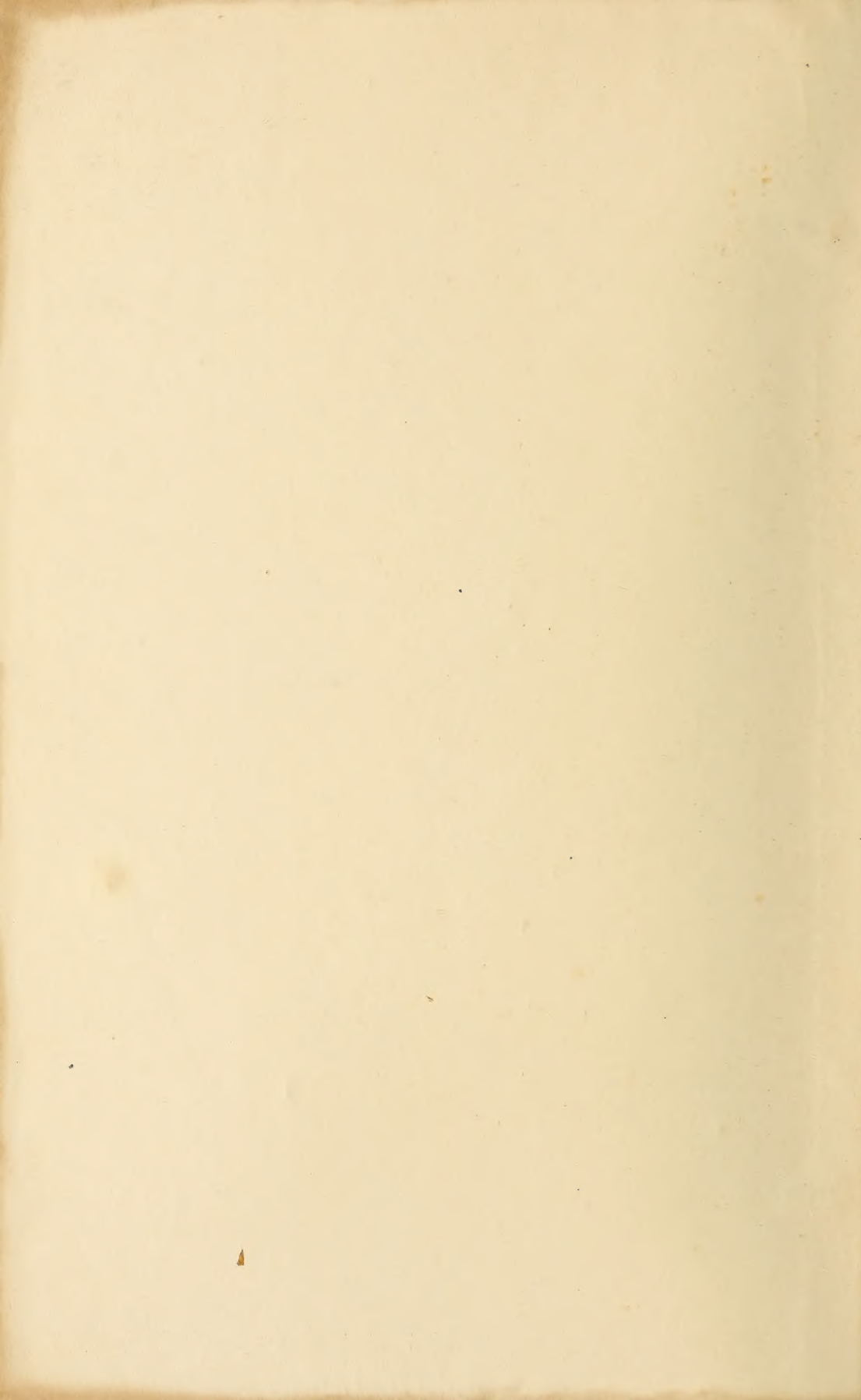





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EDWARD THOMPSON COMPANY.

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PRIVATE ROADS. (See also the titles **HIGHWAYS**, vol. 15, p. 343; **PRIVATE WAYS**, *post.*) — See note 1.

PRIVATE STATUTES. — See the title **STATUTES**.

PRIVATE USE. — See the title **EMINENT DOMAIN**, vol. 10, p. 1043.

1. **Private Roads.** — In *Sherman v. Buick*, 32 Cal. 252, it was held that roads leading from the residences or farms of individuals to the main road which runs through the country, called in the road law *private roads*, were a particular class of highways or public ways over which any one might pass without committing trespass and were to be distinguished from private ways at common law. The court said: "In accurate legal contemplation, the term *private road* involves a contradiction. The term is unknown to the common law. It has its origin in American legislation. It cannot be regarded as having been employed as a substitute for the word 'way,' as used at common law. There was no reason or excuse for such a change in legal terminology. It must be taken, therefore, as an invention, and as having been put to use originally merely for the purposes of demonstration — as giving a name to a certain class of roads differing from another and larger class in respect to the steps to be taken in establishing them in the first instance and of keeping them in repair afterward — differences founded upon the just idea that roads, though public, which mainly subserve the convenience of particular individuals should be made a charge upon them instead of the public at large. For the purpose of distinguishing between such roads and those which subserve equally the interests of all, a name for the former was needed, for the legal term 'highway' was alike applicable to both; hence the terms 'public' and *private roads*. The latter is not to be understood as being synonymous with 'ways' at common law, but as indicating a particular class of highways or public ways over which any one may pass without committing trespass. * * * Roads leading from the main road which runs through the country to the residences or farms

of individuals are of public concern and under the control of the government." See also *Withers v. Road Com'rs*, 3 Brev. (S. Car.) 85, *quoting* Co. Litt. 56a; *Witham v. Osburn*, 4 Oregon 324; *State v. Mobley*, 1 McMull. (S. Car.) 47.

But in *People v. Meyer*, (County Ct.) 26 Misc. (N. Y.) 119, it was said: "Two classes of ways are known to the law, the public way and the private way. The former the law calls a 'highway,' and the latter a *private road*. A highway is what the name signifies — a way for public travel, *i. e.*, a public road. The *private road* is a way for the exclusive use for travel by a particular person or particular persons. It is not for public use in any sense. Over *private roads* the highway authorities have no control."

Private Roads in the Sense of Private Ways. — In a deed the grantor reserved a road. In construing this reservation the court said: "'Road' is generally applied to highway, street, or lane, often to a pathway, or private way, yet strictly it means only one particular kind of way. Its sense in this deed is very clear. Taking the entire clause, with reference to the grant, it means the reservation of a way. This is as plain as if the word 'way' were in place of 'road.' Lawyer and layman alike would understand the word 'road' in this clause in the same sense as it is used in the statutes providing for grant of *private roads*. A *private road* obtained by proceedings under those statutes is a mere way, the owner of the way having no interest in the land. A private way is an incorporeal hereditament of a real nature, entirely different from a common highway; it is 'the right of going over another man's ground.'" *Kister v. Reeser*, 98 Pa. St. 4. See also *West Pike-land Road*, 63 Pa. St. 474. And see the title **PRIVATE WAYS**, *post.*

PRIVATE WAYS.

BY HENRY STEPHEN.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *ABUTTING OWNERS*, vol. 1, p. 224; *CEMETERIES*, vol. 5, p. 789; *EASEMENTS*, vol. 10, p. 397; *HIGHWAYS*, vol. 15, p. 343; *LICENSE (REAL PROPERTY)*, vol. 18, p. 1127; *NUISANCES*, vol. 21, p. 679; *PRESCRIPTION*, vol. 22, p. 1180; *RAILROADS*, *post*.

I. DEFINITION, CHARACTERISTICS, AND DISTINCTIONS — 1. **Definition.** — A private way is a right of passage over or under another person's tenement,

which belongs to and is for the use of individuals, one or more, as distinct from a way that is used by the public in general; and such a way is an easement.¹

2. Characteristics. — A private way is generally regarded as an interest in land,² of an incorporeal character;³ that is to say, ownership of the soil over which the way runs is retained by the owner of the land subject to the way, and in the case of a way running through the land of abutting owners the presumption is that the soil is owned by such abutting owners to the middle of the way.⁴

A Way Is a Discontinuous Easement, since the use of it can be enjoyed only through the direct action of the person entitled to the way when entering upon the land subject thereto.⁵

1. Definition. — *Kripp v. Curtis*, 71 Cal. 62; *Sanxay v. Hunger*, 42 Ind. 44; *Chandler v. Goodridge*, 23 Me. 78; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139; *Kister v. Reeser*, 98 Pa. St. 5, 42 Am. Rep. 608; *Kohler v. Smith*, 3 Pa. Super. Ct. 176; *International, etc., R. Co. v. Bost*, 2 Tex. App. Civ. Cas., § 384; *Boyd v. Woolwine*, 40 W. Va. 282; *Williams v. Western Union R. Co.*, 50 Wis. 71.

Way under Tenements. — *Pomeroy v. Buckeye Salt Co.*, 37 Ohio St. 520; *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619.

A Particular Class of Individuals, as the inhabitants of a village or parish, or the owners or occupiers of certain tenements, may possess exclusive rights of passage. *Bermondsey v. Brown*, 35 Beav. 226, 11 Jur. N. S. 1031; *Garrison v. Rudd*, 19 Ill. 558; *Lanier v. Booth*, 50 Miss. 410; *Campbell v. Kuhlmann*, 39 Mo. App. 628; *Nudd v. Hobbs*, 17 N. H. 524.

Private Ways of Abutting Owners. — See generally the title **ABUTTING OWNERS**, vol. I, p. 225, and *infra*, this title, *Acquisition — Implication*.

Private Ways Distinguished from "Neighborhood Roads" or "Private Paths." — See the title **HIGHWAYS**, vol. 15, p. 352, and **PATH**, vol. 22, p. 506. See also *Pearce v. McClenaghan*, 5 Rich. L. (S. Car.) 178, 55 Am. Dec. 710; *Heyward v. Chisolm*, 11 Rich. L. (S. Car.) 253.

Way Common to Everybody Not Private Way. — *Day v. Allender*, 22 Md. 512.

As to Easements generally, see the title **EASEMENTS**, vol. 10, p. 397.

2. Private Way Is Interest in Land. — *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Ward v. Farwell*, 6 Colo. 66; *Robinson v. Thrailkill*, 110 Ind. 117; *Richter v. Irwin*, 28 Ind. 27; *Talbot v. Thorn*, 91 Ky. 417; *Butt v. Napier*, 14 Bush (Ky.) 39; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Bonelli v. Blake-more*, 66 Miss. 136, 14 Am. St. Rep. 550; *House v. Montgomery*, 19 Mo. App. 170; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804; *Long v. Mayberry*, 96 Tenn. 378. See also the title **EASEMENTS**, vol. 10, p. 403.

Interest in Land Within Statute of Frauds. — See *infra*, this title, *Acquisition — Express Grant or Reservation — In General*.

Way of Necessity Said Not to Be an "Interest in Land." — A statute which provides for the establishment of a right of way by necessity is not unconstitutional as giving the property of one person to another. The statute provides only for the location of a previously existing

right of way, and a right of way "is not any interest in land, but merely an easement, which conflicts not in the slightest degree with the absolute proprietorship of the owner." *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94.

3. Incorporeal Character of Private Way — *Arkansas*. — *Johnson v. Lewis*, 47 Ark. 66.

California. — *Hopper v. Barnes*, 113 Cal. 636; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354.

Illinois. — *Kuecken v. Voltz*, 110 Ill. 264; *Louisville, etc., R. Co. v. Koelle*, 104 Ill. 455.

Indiana. — *Sanxay v. Hunger*, 42 Ind. 44.

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Massachusetts. — *Dennis v. Wilson*, 107 Mass. 591.

Mississippi. — *Lanier v. Booth*, 50 Miss. 410.

New Jersey. — *Riehle v. Heulings*, 38 N. J. Eq. 20.

South Carolina. — *Whaley v. Stevens*, 21 S. Car. 221, 27 S. Car. 549.

Texas. — *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260; *International, etc., R. Co. v. Bost*, 2 Tex. App. Civ. Cas., § 384.

See also the title **EASEMENTS**, vol. 10, p. 399.

4. Ownership of Soil Not in Wayowner. — *Oswald v. Wolf*, 129 Ill. 200; *Morrison v. Skowhegan First Nat. Bank*, 88 Me. 155; *Jones v. Van Bochove*, 103 Mich. 98; *Winston v. Johnson*, 42 Minn. 398; *Graves v. Amoskeag Mfg. Co.*, 44 N. H. 462; *Harris v. Johnson*, 31 N. J. Eq. 174; *Biles v. Tacoma, etc., R. Co.*, 5 Wash. 509. See also *Barlow v. Chicago, etc., R. Co.*, 29 Iowa 276; *Dunstan v. Northern Pac. R. Co.*, 2 N. Dak. 46; and the title **EASEMENTS**, vol. 10, p. 399.

Ownership of Abutting Owner Usque ad Medium Filum Viæ. — See the title **BOUNDARIES**, vol. 4, p. 816, and also the following cases: *Lefavour v. McNulty*, 158 Mass. 413; *Clark v. Parker*, 106 Mass. 554; *Bailey v. Culver*, 84 Mo. 531; *Dodge v. Pennsylvania R. Co.*, 43 N. J. Eq. 351; *Booraem v. North Hudson County R. Co.*, 40 N. J. Eq. 557; *Kings County F. Ins. Co. v. Stevens*, 101 N. Y. 411; *Hennesy v. Murdock*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 276, 137 N. Y. 317; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Ensign v. Lyon*, 1 Lack. Jur. (Pa.) 102; *Bentley v. Root*, 19 R. I. 205; *Kimball v. Kenosha*, 4 Wis. 321.

5. Way Is Discontinuous Easement. — *Worthington v. Gimson*, 2 El. & El. 618, 105 E. C. L. 618; *McPherson v. Acker, MacArthur & M.* (D. C.) 151, 48 Am. Rep. 749; *Cleris v. Tieman*, 15 La. Ann. 316; *Morgan v. Meuth*, 60 Mich. 238; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Shoemaker v. Shoemaker*, (Supm.

Right of Passage Must Be over Another's Tenement. — It is essential to the existence of a private way that the right of passage be over the land of another.¹ A way through a person's own land, over which he has absolute dominion, is not a private way within the proper and legal acceptance of that term, but is a mere path.²

Whether a Private Way Is an Incumbrance upon Land so as to constitute a breach of a covenant against incumbrances, is the subject of discussion elsewhere.³

It Is Essential that a Private Way Have Termini, that is to say, a terminus *a quo*, or the point or place from which the wayowner is to set out in order to use the way, and a terminus *ad quem*, the place where the way is to end.⁴

Way Must Be of Right. — It is essential that there be a right of passage from the terminus *a quo* to the terminus *ad quem*. A revocable permission to set out from one terminus and proceed to the other does not constitute a private way.⁵

3. Distinctions — *a.* **IN GENERAL.** — A way may be appurtenant or in gross, and the distinction between the two kinds is very marked and important,⁶ a conversion of the one into the other being impossible.⁷

b. **WAYS IN GROSS.** — A private way in gross is a mere personal privilege that is generally incapable of assignment and dies with the person who may have acquired it.⁸

c. **WAYS APPURTENANT.** — The Essentials of a Way Appurtenant are that there must be two distinct tenements, the dominant, to which the right of passage belongs, and the servient, upon which the burden or obligation rests,⁹ and

Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 84; Providence Tool Co. v. Corliss Steam Engine Co., 9 R. I. 564; Standiford v. Goudy, 6 W. Va. 364.

Distinction Between Continuous and Discontinuous Easements. — See the title EASEMENTS, vol. 10, p. 405.

1. Right of Passage Must Be over Another's Tenement. — Staple v. Heydon, 6 Mod. 1; Morris v. Edgington, 3 Taunt. 24, 12 Rev. Rep. 579; May v. Smith, 3 Mackey (D. C.) 55; Mitchell v. Seipel, 53 Md. 251, 36 Am. Rep. 404; Oliver v. Hook, 47 Md. 301; Barker v. Clark, 4 N. H. 380, 17 Am. Dec. 428; Stuyvesant v. Woodruff, 21 N. J. L. 133, 47 Am. Dec. 156; Fetters v. Humphreys, 18 N. J. Eq. 260; Wheeler v. Gilsey, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139; Screven v. Gregorie, 8 Rich. L. (S. Car.) 158, 64 Am. Dec. 747; Rightsell v. Hale, 90 Tenn. 556; Brown v. Berry, 6 Coldw. (Tenn.) 98; International, etc., R. Co. v. Bost, 2 Tex. App. Civ. Cas., § 384. And see the title EASEMENTS, vol. 10, p. 402.

2. Path Through Person's Own Property Not Private Way. — Clark v. Boston, etc., R. Co., 24 N. H. 114; De Rochemont v. Boston, etc., R. Co., 64 N. H. 500; Barker v. Clark, 4 N. H. 380, 17 Am. Dec. 428. See generally the title EASEMENTS, vol. 10, p. 419, and HEREDITAMENT, vol. 15, p. 338, note 2.

3. See the title COVENANTS, vol. 8, p. 123.

4. Necessity of Termini. — Garrison v. Rudd, 19 Ill. 558.

Cul-de-Sac No Private Way. — Dennis v. Willson, 107 Mass. 591.

5. Revocable License Not Sufficient. — Garrison v. Rudd, 19 Ill. 558. See also Greenwood Lake, etc., R. Co. v. New York, etc., R. Co., (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 739.

As to Licenses in General, see the title LICENSE (REAL PROPERTY), vol. 18, p. 1127.

6. Way May Be Appurtenant or in Gross. — Johnson v. Lewis, 47 Ark. 66; Hopper v.

Barnes, 113 Cal. 636; Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Kuecken v. Voltz, 110 Ill. 264; Louisville, etc., R. Co. v. Koelle, 104 Ill. 455; Hoosier Stone Co. v. Malott, 130 Ind. 24; Sanxay v. Hunger, 42 Ind. 44; Lanier v. Booth, 50 Miss. 410; Whaley v. Stevens, 21 S. Car. 221, 27 S. Car. 549; Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260; International, etc., R. Co. v. Bost, 2 Tex. App. Civ. Cas., § 384. See generally the title EASEMENTS, vol. 10, p. 403 *et seq.*

7. Conversion of One Kind of Way into the Other Impossible. — Garrison v. Rudd, 19 Ill. 558; Moore v. Crose, 43 Ind. 30; Boatman v. Lasley, 23 Ohio St. 614; Metzger v. Holwick, 6 Ohio Cir. Dec. 794; Mahler v. Brumder, 92 Wis. 477.

8. Characteristics of Private Way in Gross — *California.* — Kripp v. Curtis, 71 Cal. 62.

Illinois. — Willoughby v. Lawrence, 116 Ill. 11, 56 Am. Rep. 758; Kuecken v. Voltz, 110 Ill. 264; Louisville, etc., R. Co. v. Koelle, 104 Ill. 455; Koelle v. Knecht, 99 Ill. 396; Garrison v. Rudd, 19 Ill. 558.

Indiana. — Hoosier Stone Co. v. Malott, 130 Ind. 24; Moore v. Crose, 43 Ind. 30; Sanxay v. Hunger, 42 Ind. 44.

Ohio. — Pomeroy v. Buckeye Salt Co., 37 Ohio St. 520; Boatman v. Lasley, 23 Ohio St. 614.

South Carolina. — Fisher v. Fair, 34 S. Car. 203; Whaley v. Stevens, 21 S. Car. 221, 27 S. Car. 549.

Texas. — Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260.

Way in Gross Descendible and Assignable in Some Jurisdictions. — White v. Crawford, 10 Mass. 183. See also Senhouse v. Christian, 1 T. R. 560, and the title EASEMENTS, vol. 10, p. 404.

9. Dominant and Servient Tenements Necessary. — Wagner v. Hanna, 38 Cal. 111, 99 Am. Dec. 354; Dennis v. Wilson, 107 Mass. 591; Winston v. Johnson, 42 Minn. 398; French v. Williams, 82 Va. 462.

that one terminus of the way must lie on the land to which it is claimed to be appurtenant.¹

Contiguity Not Necessary. — It is not necessary that the dominant and servient tenements should abut upon or adjoin each other.²

Characteristics of Way Appurtenant. — A Way Appurtenant Is an Incident of Land and passes with it whether the land be conveyed for years, for life, or in fee,³ no instrument of alienation separate from that passing the land being necessary,⁴ the grantee of any part of the land, no matter how small, being entitled to the way⁵ unless the rights of others are violated thereby or unless the instrument of alienation provides otherwise.⁶

Moreover, in the Event of an Alienation of the Subject Land by sale or otherwise, the alienee, in the absence of an agreement or stipulation to the contrary, and provided he has notice thereof, takes such land encumbered by the way⁷ and

1. Way Appurtenant Must Have Terminus on Land to Which It Is Appurtenant. — Louisville, etc., R. Co. v. Koelle, 104 Ill. 455; Riehle v. Heuhlings, 38 N. J. Eq. 20; Metzger v. Holwick, 6 Ohio Cir. Dec. 794; Whaley v. Stevens, 21 S. Car. 221, 27 S. Car. 549. But see Horner v. Keene, 177 Ill. 390, in which case a way was held to be appurtenant though there was no terminus on the dominant tenement, because the language used in the grant showed an intention to create an appurtenant way.

As to the Essentials of Easements Appurtenant Generally, see the title EASEMENTS, vol. 10, p. 399 *et seq.*

2. Contiguity Not Necessary. — Guthrie v. Canadian Pac. R. Co., 27 Ont. App. 64.

A Way May Be Appurtenant to an Island notwithstanding that a navigable river lies between the island and the mainland. Private Road Case, 1 Ashm. (Pa.) 417.

3. Characteristics of Way Appurtenant — Alabama. — Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338.

California. — Kripp v. Curtis, 71 Cal. 62.

Georgia. — Ford v. Harris, 95 Ga. 97.

Illinois. — Clarke v. Gaffney, 116 Ill. 362; Kuecken v. Voltz, 110 Ill. 264; Louisville, etc., R. Co. v. Koelle, 104 Ill. 455; Koelle v. Knecht, 99 Ill. 396; Garrison v. Rudd, 19 Ill. 558.

Indiana. — Hoosier Stone Co. v. Malott, 130 Ind. 24; Robinson v. Thrailkill, 110 Ind. 117; Parish v. Kaspere, 109 Ind. 588; Ross v. Thompson, 78 Ind. 90; Moore v. Crose, 43 Ind. 30; Sanxay v. Hunger, 42 Ind. 44.

Kansas. — Edgerton v. McMullan, 55 Kan. 90.

Kentucky. — Burress v. Barbee, (Ky. 1895) 33 S. W. Rep. 412; Gibson v. Porter, (Ky. 1891) 15 S. W. Rep. 871; Combs v. Stewart, 10 B. Mon. (Ky.) 463.

New York. — Bissell v. New York Cent. R. Co., 23 N. Y. 63.

Ohio. — O'Ferrall v. Chase, 7 Ohio Dec. (Reprint) 242, 2 Cinc. L. Bul. 4.

Pennsylvania. — Ehret v. Gunn, 166 Pa. St. 384; Gunson v. Healy, 100 Pa. St. 42; March-Brownback Stove Co. v. Evans, 9 Pa. Super. Ct. 597; Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617.

Vermont. — Goodall v. Godfrey, 53 Vt. 219, 38 Am. Rep. 671.

See also the title EASEMENTS, vol. 10, p. 418.

4. Separate Instrument of Alienation Unnecessary. — Moore v. Crose, 43 Ind. 30.

5. Grantee of Any Part of Land Entitled to Appurtenant Way — District of Columbia. — May v. Smith, 3 Mackey (D. C.) 55.

Georgia. — Taylor v. Dyches, 69 Ga. 455.

Illinois. — Garrison v. Rudd, 19 Ill. 558.

Indiana. — Hoosier Stone Co. v. Malott, 130 Ind. 24.

Iowa. — Brossart v. Corlett, 27 Iowa 288.

Massachusetts. — Leonard v. Leonard, 7 Allen (Mass.) 277; Whitney v. Lee, 1 Allen (Mass.) 198, 79 Am. Dec. 727; Underwood v. Carney, 1 Cush. (Mass.) 285.

Missouri. — Carlin v. Paul, 11 Mo. 32, 47 Am. Dec. 139.

New York. — Lansing v. Wiswall, 5 Den. (N. Y.) 213.

Ohio. — Sach v. Cordes, 5 Ohio Cir. Dec. 67.

Pennsylvania. — Ehret v. Gunn, 166 Pa. St. 384; McMakin v. Magee, 13 Phila. (Pa.) 105, 36 Leg. Int. (Pa.) 124; Walker v. Gerhard, 9 Phila. (Pa.) 116, 30 Leg. Int. (Pa.) 108; Myers v. Birkey, 5 Phila. (Pa.) 167, 20 Leg. Int. (Pa.) 156; Lewis v. Carstairs, 6 Whart. (Pa.) 193; Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617.

West Virginia. — Henrie v. Johnson, 28 W. Va. 190.

Wisconsin. — Reise v. Enos, 76 Wis. 636.

See also the title EASEMENTS, vol. 10, p. 419.

6. Preservation of Others' Rights. — Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617.

7. Effect of Alienation of Subject Land — Alabama. — Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338.

Indiana. — Ellis v. Bassett, 128 Ind. 118, 25 Am. St. Rep. 421; Fankboner v. Corder, 127 Ind. 164; Robinson v. Thrailkill, 110 Ind. 117.

Kentucky. — Kamer v. Bryant, 103 Ky. 723; Burress v. Barbee, (Ky. 1895) 33 S. W. Rep. 412; Thomas v. Bertram, 4 Bush (Ky.) 317; Porter v. Barclay, 7 Ky. L. Rep. 747; Louisville T. P. Co. v. Shadburn, 1 Ky. L. Rep. 325.

Louisiana. — McDonogh v. Calloway, 2 La. Ann. 518.

Massachusetts. — Russell v. Jackson, 2 Pick. (Mass.) 574.

Missouri. — Chase v. Hall, 41 Mo. App. 15.

Nevada. — Lindsay v. Jones, 21 Nev. 72.

Ohio. — Kneisel v. Krug, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38.

Pennsylvania. — Ormsby v. Pinkerton, 159 Pa. St. 458; Grace M. E. Church v. Dobbins, 153 Pa. St. 294, 34 Am. St. Rep. 706; Bennett v. Biddle, 150 Pa. St. 420; Geible v. Smith, 146 Pa. St. 276, 28 Am. St. Rep. 796; Bennett v. Biddle, 140 Pa. St. 396; Pierce v. Cleland, 133 Pa. St. 189; Zell v. Universalist Soc., 119 Pa. St. 390, 4 Am. St. Rep. 654; Cannon v. Boyd, 73 Pa. St. 179; Kraut's Appeal, 71 Pa.

is estopped from interfering with the right of passage.¹

A Way Appurtenant Cannot Be Separated or Transferred Independently of the land in which it inheres.²

d. DETERMINATION OF QUESTION WHETHER APPURTENANT OR IN GROSS — In General — Intention of Parties. — The question whether a way is in gross or appurtenant must be determined by the instrument creating it. Where, however, the instrument contains no declaration of the intention of the parties in regard to the nature of the way, the situation of the property and the surrounding circumstances are to be considered.³

The Terminus ad Quem Is of Especial Significance upon the question whether a way is appurtenant or in gross.⁴ Thus, a way used as the only means of access to a public road or highway is always appurtenant whether it be expressly granted, reserved, or implied.⁵

The Duration of the Right of Passage Is Not a Factor that need be considered. Thus, a way of necessity which rests upon implied grant is always appurtenant although limited by the continuance of the necessity to which it owes its existence.⁶

St. 64; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Wissler v. Hershey*, 23 Pa. St. 333; *Seibert v. Levan*, 8 Pa. St. 383, 49 Am. Dec. 525.

Virginia. — *Scott v. Moore*, 98 Va. 668; *Bond v. Willis*, 84 Va. 796.

West Virginia. — *Shaver v. Edgell*, 48 W. Va. 502.

See also the title EASEMENTS, vol. 10, p. 427.

Application of Rule to Private Stairways. — *Stillwell v. Foster*, 80 Me. 333; *National Exch. Bank v. Cunningham*, 46 Ohio St. 575; *Pierce v. Cleland*, 133 Pa. St. 189.

Application of Rule to Private Corridors in Buildings. — *Pierce v. Cleland*, 133 Pa. St. 189.

1. Alienee Estopped to Deny Way. — *Lindsay v. Jones*, 21 Nev. 72; *Kneisel v. Krug*, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38; *Pierce v. Cleland*, 133 Pa. St. 189; *Kraut's Appeal*, 71 Pa. St. 64; *Weidner v. Dauth*, 21 Pa. Co. Ct. 440; *Bond v. Willis*, 84 Va. 796.

Necessity of Notice. — *Fankboner v. Corder*, 127 Ind. 164; *Porter v. Barclay*, 7 Ky. L. Rep. 747; *Shaver v. Edgell*, 48 W. Va. 502. See also the title EASEMENTS, vol. 10, pp. 427, 428.

Sufficiency of Notice — Open and Apparent Way Sufficient Notice — Illinois. — *McCann v. Day*, 57 Ill. 101.

Indiana. — *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Robinson v. Thraikill*, 110 Ind. 117.

Kentucky. — *Kamer v. Bryant*, 103 Ky. 723.

Pennsylvania. — *Ormsby v. Pinkerton*, 159 Pa. St. 458; *Grace M. E. Church v. Dobbins*, 153 Pa. St. 294, 34 Am. St. Rep. 706; *Bennett v. Biddle*, 150 Pa. St. 420; *Geible v. Smith*, 146 Pa. St. 276, 28 Am. St. Rep. 796; *Bennett v. Biddle*, 140 Pa. St. 396; *Zell v. Universalist Soc.*, 119 Pa. St. 390, 4 Am. St. Rep. 654; *Cannon v. Boyd*, 73 Pa. St. 179; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Seibert v. Levan*, 8 Pa. St. 383, 49 Am. Dec. 525; *Pennsylvania R. Co. v. Jones*, 50 Pa. St. 417; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *McCarty v. Kitchenman*, 47 Pa. St. 239, 86 Am. Dec. 541; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Hunter v. Wilcox*, 23 Pa. Co. Ct. 191.

Virginia. — *Scott v. Moore*, 98 Va. 668.

Notice by Record. — *Willoughby v. Lawrence*, 116 Ill. 11, 56 Am. Rep. 758; *Chase v. Hall*, 41 Mo. App. 15.

Actual Notice Not Essential. — *Wissler v. Hershey*, 23 Pa. St. 333.

2. Way Appurtenant Not Transferable Independently of Land. — *Koelle v. Knecht*, 99 Ill. 396. And see generally cases cited *supra*, this subsection, *In General*.

Way Appurtenant in Nature of Covenant Running with Land. — *Taylor v. Dyches*, 69 Ga. 455; *Sanxay v. Hunger*, 42 Ind. 44; *Moore v. Crose*, 43 Ind. 30.

The Illinois Conveyancing Act (now *Starr & Curt. Annot. Stat.* 1896, c. 30, par. 14), providing that words of inheritance are not essential to create a fee-simple estate of inheritance if a less estate be not limited by express words or do not appear to have been granted, does not enable the owner of land to which a way is appurtenant to transfer the way independently of the land to which it inheres. *Koelle v. Knecht*, 99 Ill. 396.

3. Determination of Question as to Character of Way. — *Russell v. Heublein*, 66 Conn. 486; *Karmuller v. Krotz*, 18 Iowa 352; *Dennis v. Wilson*, 107 Mass. 591; *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 383; *Winston v. Johnson*, 42 Minn. 398.

4. Terminus ad Quem of Significance. — *Dennis v. Wilson*, 107 Mass. 591; *White v. Crawford*, 10 Mass. 183; *Winston v. Johnson*, 42 Minn. 398.

5. Ways by Necessity Always Appurtenant. — *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188; *Kripp v. Curtis*, 71 Cal. 62; *Taylor v. Warnaky*, 55 Cal. 350; *Collins v. Prentice*, 15 Conn. 423; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Logan v. Stogsdale*, 123 Ind. 372; *Dennis v. Wilson*, 107 Mass. 591; *Lathrop v. Elsner*, 93 Mich. 599; *Badeau v. Mead*, 14 Barb. (N. Y.) 328; *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511; *Wissler v. Hershey*, 23 Pa. St. 333; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597. See also *infra*, this title, *Acquisition — Implication — Ways by Necessity*.

A Way from Land to a Public Common is appurtenant to such land. *Rexford v. Marquis*, 7 Lans. (N. Y.) 249.

6. Duration of Right of Passage. — *Dennis v. Wilson*, 107 Mass. 591.

The Inheritable Quality of the Right of Passage will not determine the question. Thus, a right of way may be appurtenant to the life interest of a dower estate and expire with it;¹ or the way may be appurtenant to land held for a term of years.²

No Presumption of Way in Gross. — A right of way will never be presumed to be in gross, where it can fairly be construed as appurtenant to land.³

Use of Words of Perpetuity. — The existence of a way in gross is precluded by the use of words of perpetuity, as where the grant or reservation is to a man, his heirs, and assigns.⁴ Moreover, the principle is carried to such an extent that even though the absence of words of inheritance may afford some ground of inference that the way was intended to be in gross, that inference will be overcome where the facts show that a way was intended and is for the benefit of land, has been so used, and is useless for any other purpose.⁵ Where, however, a way has neither terminus on the premises of the person claiming the right of passage,⁶ and is not essential to the enjoyment of his premises,⁷ it will be considered to be in gross.

II. ACQUISITION — 1. In General. — A private way may be acquired by grant express or implied, by reservation or prescription, or under a statute authorizing its establishment.⁸

1. Inheritable Quality of Right. — *Hoffman v. Savage*, 15 Mass. 130.

2. Appurtenant to Leased Land. — *Thorpe v. Brumfit*, L. R. 8 Ch. 650. But see *Hall v. Armstrong* 53 Conn. 554, in which case a way granted for such time as the grantee should occupy a particular building for a business carried on by him at the time of the grant was held to be in gross.

3. No Presumption of Way in Gross. — *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Taylor v. Dyches*, 69 Ga. 455; *Horner v. Keene*, 177 Ill. 390; *Kuecken v. Voltz*, 110 Ill. 264; *Sanxay v. Hunger*, 42 Ind. 44; *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 383; *Lidgerding v. Zignego*, 77 Minn. 421, 77 Am. St. Rep. 677; *Winston v. Johnson*, 42 Minn. 398; *French v. Williams*, 82 Va. 462. See also the title EASEMENTS, vol. 10, p. 405.

In Partition a way set off to one party over the land of the other is presumed to be appurtenant, unless the contrary clearly appears. *Hopper v. Barnes*, 113 Cal. 636; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Bowen v. Conner*, 6 Cush. (Mass.) 132.

A Division of an Entire Tract by Deed of part from a sole owner with a provision for a way over one lot for the use of the owner of the other creates a way appurtenant. *Dennis v. Wilson*, 107 Mass. 591; *Carlin v. Paul*, 11 Mo. 32, 47 Am. Dec. 139.

4. Use of Words of Perpetuity. — *Hopper v. Barnes*, 113 Cal. 636; *Moll v. McCauley*, 83 Iowa 677; *Mendell v. Delano*, 7 Met. (Mass.) 176; *White v. Crawford*, 10 Mass. 183; *Baker v. Mott*, 78 Hun (N. Y.) 141; *French v. Williams*, 82 Va. 462.

5. Effect of Absence of Words of Perpetuity. — *Hopper v. Barnes*, 113 Cal. 636; *Winthrop v. Fairbanks*, 41 Me. 307; *Smith v. Ladd*, 41 Me. 314; *Dennis v. Wilson*, 107 Mass. 591; *Lathrop v. Elsnor*, 93 Mich. 599; *Lidgerding v. Zignego*, 77 Minn. 421, 77 Am. St. Rep. 677; *Burr v. Mills*, 21 Wend. (N. Y.) 290.

Under Statutes rendering the use of the word "heirs" unnecessary to a conveyance in fee simple, words of perpetuity are of course not requisite to make a way appurtenant. *Kar-*

muller v. Krotz, 18 Iowa 352; *Pierson v. Armstrong*, 1 Iowa 282, 63 Am. Dec. 440; *Beinlein v. Johns*, 102 Ky. 570.

6. Where There Is No Terminus on Land of Claimant. — *Fisher v. Fair*, 34 S. Car. 203. See also *Pym v. Harrison*, 33 L. T. N. S. 796.

7. Where Way Is Not Necessary. — *Ackroyd v. Smith*, 10 C. B. 164, 70 E. C. L. 164, 14 Jur. 1047; *Russell v. Heublein*, 66 Conn. 486; *Garrison v. Rudd*, 19 Ill. 558; *Bean v. French*, 140 Mass. 229; *Fisher v. Fair*, 34 S. Car. 203.

8. Acquisition — In General — California. — *Carey v. Rae*, 58 Cal. 159; *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354.

Indiana. — *Sanxay v. Hunger*, 42 Ind. 44.

Maryland. — *Jay v. Michael*, 92 Md. 198; *Pue v. Pue*, 4 Md. Ch. 386; *Wright v. Freeman*, 5 Har. & J. (Md.) 467.

Massachusetts. — *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

Mississippi. — *Lanier v. Booth*, 50 Miss. 410.

Missouri. — *House v. Montgomery*, 19 Mo. App. 170; *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 91.

New York. — *Boyce v. Brown*, 7 Barb. (N. Y.) 80; *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139.

North Carolina. — *Bordeau v. Williamson*, 2 Hayw. (3 N. Car.) 301.

Ohio. — *Jones Fertilizing Co. v. Cleveland*, etc., R. Co., 2 Ohio Dec. 511.

South Carolina. — *Jeter v. Mann*, 2 Hill L. (S. Car.) 641; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741; *Seabrook v. King*, 1 Nott & M. (S. Car.) 140.

Tennessee. — *Long v. Mayberry*, 96 Tenn. 378.

West Virginia. — *Boyd v. Woolwine*, 40 W. Va. 282.

See also the title EASEMENTS, vol. 10, p. 409 et seq.

By Custom. — In England and some states of the Union a private way may be acquired by custom, which might be defined as a sort of prescription by all of a certain community or place. In New York a way by custom does

The Methods of Acquisition by express grant, by implied grant or implication, and by prescription in their origin resolve themselves into one, namely, grant or reservation. They are all derived from the voluntary grant of the proprietor of the fee, which is presupposed in the case of prescription and inferred in the case of a way by implication. The distinction between them therefore relates more to the mode of proving a right of passage than to the source of title thereto.¹

2. Express Grant or Reservation — *a.* IN GENERAL. — The Formal Requisites of a deed granting a way differ in no respect from those of an instrument conveying any other easement and are the subject of discussion elsewhere.²

Reservation Equivalent to Grant. — A reservation of a way in an instrument by which lands are alienated is equivalent for the purpose of the creation of the right of way to an express grant thereof by the grantee of the lands.³

Decree in Partition. — The decree of a court upon the severance of an estate by partition is equivalent to a grant, and the court may allow a right of way over all the allotments, or it may confine the right of way to one or more of the allotments to the exclusion of the others.⁴

Parol Grants. — Since a private way is generally regarded as an interest in land,⁵ a contract creating the right of passage is within the statute of frauds, and should be in writing,⁶ and at common law must be contained in a deed.⁷

Exceptions to the Rule requiring a written conveyance may arise on the principle

not exist. *Boyce v. Brown*, 7 Barb. (N. Y.) 80. See the title EASEMENTS, vol. 10, p. 406, and generally the title PRESCRIPTION, vol. 22, p. 1185.

Private Way Cannot Be Acquired by Dedication. — *Bermondsey v. Brown*, 35 Beav. 226, 11 Jur. N. S. 1031. See also the title DEDICATION, vol. 9, p. 23.

1. Distinction Only in Mode of Proof. — *Pomfret v. Riccroft*, 1 Saund. 321, note; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Lanier v. Booth*, 50 Miss. 410; *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511.

Prescription Presumptive Evidence of Grant. — *Carey v. Rae*, 58 Cal. 159; *Jav v. Michael*, 92 Md. 193; *Pue v. Pue*, 4 Md. Ch. 386; *Wright v. Freeman*, 5 Har. & J. (Md.) 467. And see the title PRESCRIPTION, vol. 22, p. 1183.

2. Requisites of Deed in General. — See the titles DEEDS, vol. 9, p. 87; EASEMENTS, vol. 10, p. 409 *et seq.*

3. Reservation Equivalent to Grant. — *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354; *Koelle v. Knecht*, 99 Ill. 396; *Jay v. Michael*, 92 Md. 198; *Murphy v. Lee*, 144 Mass. 371; *Baxter v. Arnold*, 114 Mass. 577; *Barnes v. Lloyd*, 112 Mass. 232; *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Brigham v. Smith*, 4 Gray (Mass.) 297, 64 Am. Dec. 76; *Winston v. Johnson*, 42 Minn. 398; *Lanier v. Booth*, 50 Miss. 410; *Huson v. Young*, 4 Lans. (N. Y.) 63; *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511. See also the title EASEMENTS, vol. 10, p. 415 *et seq.*

Reservation of Way Must Be to Party to Grant. — *S. K. Edwards Hall Co. v. Dresser*, 168 Mass. 136. See also *Stockwell v. Couillard*, 129 Mass. 231, and the title EASEMENTS, vol. 10, p. 418.

But a reservation ineffectual because made to a stranger to the grant may be sufficient to give to another notice of such stranger's claim to a way. *Beinlein v. Johns*, 102 Ky. 570.

4. Decree in Partition. — *Hayes v. Di Vito*,

141 Mass. 233; *Greenmount Cemetery Co.'s Appeal*, (Pa. 1886) 4 Atl. Rep. 528; *Henrie v. Johnson*, 28 W. Va. 190. See also the title PARTITION, vol. 21, p. 1169.

5. See *supra*, this title, *Definition, Characteristics, and Distinctions*, 3, *a.* In General.

6. Grant Should Be in Writing — *Arkansas*. — *Johnson v. Lewis*, 47 Ark. 66.

California. — *Wagner v. Hanna*, 38 Cal. 111, 99 Am. Dec. 354.

Colorado. — *Ward v. Farwell*, 6 Colo. 66.

Indiana. — *Richter v. Irwin*, 28 Ind. 27.

Kentucky. — *Talbott v. Thorn*, 91 Ky. 417; *Butt v. Napier*, 14 Bush (Ky.) 39; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400.

Massachusetts. — *Cole v. Hadley*, 162 Mass. 579; *Dyer v. Sanford*, 9 Met. (Mass.) 395, 43 Am. Dec. 399.

Mississippi. — *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550.

New Hampshire. — *Cox v. Leviston*, 63 N. H. 283.

New York. — *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804.

Rhode Island. — *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505.

Tennessee. — *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329.

Canada. — *Huddleston v. Love*, 21 Can. L. T. 447.

See also the titles DEEDS, vol. 9, p. 136; EASEMENTS, vol. 10, pp. 409, 412; STATUTE OF FRAUDS.

Parol Evidence Not Admissible to Prove Way. — *Murphy v. Lee*, 144 Mass. 371; *Collam v. Hocker*, 1 Rawle (Pa.) 108; *Kruegel v. Nitschman*, 15 Tex. Civ. App. 641; *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260. But see *Kirkpatrick v. Brown*, 59 Ga. 450; *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

7. Necessity of Deed. — See *King v. Murphy*, 140 Mass. 254; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505. Also the titles DEEDS, vol. 9, pp. 99, 136, note 1; EASEMENTS, vol. 10, pp. 410, note 1, 412, 413.

of estoppel or part performance in equity.¹ And where under a parol agreement the way has been used for a sufficient length of time, a prescriptive right of way may be gained, and the agreement may be used to rebut the idea of the use being permissive and to establish a right.²

Recording. — Under statutes requiring that an instrument intended to pass an incorporeal hereditament must, to affect subsequent purchasers or creditors, be recorded in the county where such hereditament lies, a grant creating a private way *de novo* is not effective unless an entry thereof appears on the public records.³

b. WHO MAY GRANT, AND EXTENT OF GRANT — In General. — It is not requisite that the grantor of a right of way be the owner of the entire fee, but the grantor cannot grant a way greater in extent or duration than the estate which he has.⁴

The Grantor Need Not Restrict the Way to the Surface of the soil; since the rights of ownership extend indefinitely upward and downward, he may grant a way through vaults and cellars under the surface and through halls and passages above the surface, as well as upon the surface.⁵

3. Prescription or Adverse Use. — The essentials of a title by prescription or adverse use to other incorporeal hereditaments are applicable generally to private ways and are the subject of discussion elsewhere.⁶

1. Exception to Rule — Estoppel or Part Performance. — *Johnson v. Lewis*, 47 Ark. 66; *Durkee v. Jones*, 27 Colo. 159; *Nowlin v. Whipple*, 120 Ind. 596; *Robinson v. Thraillkill*, 110 Ind. 117; *Champion v. Munday*, 85 Ky. 31; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804; *Foster v. Browning*, 4 R. I. 47, 67 Am. Dec. 505. See also the title EASEMENTS, vol. 10, p. 413.

2. User under Parol Agreement. — *McKenzie v. Elliott*, 134 Ill. 156; *Talbott v. Thorn*, 91 Ky. 417; *House v. Montgomery*, 19 Mo. App. 170; *Clawson v. Wallace*, 16 Utah 300.

3. Necessity of Record. — *Armor v. Pye*, 25 Kan. 731; *Hays v. Richardson*, 1 Gill & J. (Md.) 366. See also the title EASEMENTS, vol. 10, p. 410, and generally the title RECORDING ACTS.

4. Who May Grant, and Extent of Grant — In General. — *Newmarch v. Brandling*, 3 Swanst. 99. See also the title EASEMENTS, vol. 10, p. 411.

Various Grantors — Lessee of Land. — *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455. See also *Gayford v. Moffatt*, L. R. 4 Ch. 133; *Newmarch v. Brandling*, 3 Swanst. 99.

Tenant for Life. — *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455. See also *Jay v. Michael*, 92 Md. 198.

Tenants in Common. — See the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 684, and the following additional cases: *Woodworth v. Raymond*, 51 Conn. 70; *Mendell v. Delano*, 7 Met. (Mass.) 176; *Holbrook v. Bowman*, 62 N. H. 313.

5. Grant Need Not Be Restricted to Surface. — *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455.

6. As to Prescription in General. — See the title PRESCRIPTION, vol. 22, p. 1180, and see also the title ADVERSE POSSESSION, vol. 1, p. 875.

Instances of Title to Private Ways by Prescription — England. — *Fahey v. Dwyer*, L. R. 4 Ir. 271.

Canada. — *Guthrie v. Canadian Pac. R. Co.*, 27 Ont. App. 64.

Arkansas. — *Johnson v. Lewis*, 47 Ark. 66.

California. — *Humphreys v. Blasingame*, 104 Cal. 40; *Kripp v. Curtis*, 71 Cal. 62; *Thomas v. England*, 71 Cal. 456; *Barbour v. Pierce*, 42 Cal. 657.

Connecticut. — *Black v. O'Hara*, 54 Conn. 17. **Illinois.** — *Gentleman v. Soule*, 32 Ill. 271, 83 Am. Dec. 264; *Keyser v. Mann*, 36 Ill. App. 596; *Luecken v. Wuest*, 31 Ill. App. 506.

Indiana. — *Fankboner v. Corder*, 127 Ind. 164; *Palmér v. Wright*, 58 Ind. 486.

Iowa. — *Zigefoose v. Zigefoose*, 69 Iowa 391.

Kentucky. — *Young v. Conrad*, (Ky. 1897) 38 S. W. Rep. 497; *Prewitt v. Graves*, (Ky. 1896) 35 S. W. Rep. 263; *Hansford v. Berry*, 95 Ky. 56; *Conyers v. Scott*, 94 Ky. 123; *O'Daniel v. O'Daniel*, 88 Ky. 185; *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84; *Butt v. Napier*, 14 Bush (Ky.) 39; *Thomas v. Bertram*, 4 Bush (Ky.) 317; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400.

Maryland. — *Waters v. Snouffer*, 88 Md. 391; *Cox v. Forrest*, 60 Md. 74; *Browne v. M. E. Church*, 37 Md. 108; *Day v. Allender*, 22 Md. 512.

Massachusetts. — *Hoyt v. Kennedy*, 170 Mass. 54; *Bodfish v. Bodfish*, 105 Mass. 317; *Leonard v. Leonard*, 7 Allen (Mass.) 277; *Blake v. Everett*, 1 Allen (Mass.) 248; *Reed v. West*, 16 Gray (Mass.) 283; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Kent v. Waite*, 10 Pick. (Mass.) 138; *Sibley v. Ellis*, 11 Gray (Mass.) 417; *Hill v. Crosby*, 2 Pick. (Mass.) 466, 13 Am. Dec. 448; *Kilburn v. Adams*, 7 Met. (Mass.) 33, 39 Am. Dec. 754.

Mississippi. — *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *Lanier v. Booth*, 50 Miss. 410.

Missouri. — *Field v. Mark*, 125 Mo. 502; *Nelson v. Nelson*, 41 Mo. App. 130; *House v. Montgomery*, 19 Mo. App. 170.

Nevada. — *Chollar-Potosi Min. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409.

New Jersey. — *Pennsylvania R. Co. v. Hulse*, 59 N. J. L. 54.

New York. — *Ward v. Warren*, 82 N. Y. 265;

4. Implication — *a.* **WAYS OTHER THAN WAYS OF NECESSITY.** — Authorities differ as to whether, apart from ways of necessity, a way can be created by implication.¹ For the method of creation by implication has been held to be confined to continuous and apparent easements, and by the general current of authority a right of way is not included in these classes.² Yet the tendency of modern cases seems to be to consider ways as capable of being created by implication, and this may be attained either by holding that a way may become a continuous and apparent easement,³ or by declaring that discontinuous easements may fall within the rule,⁴ or by broadening the meaning

Flora v. Carbean, 38 N. Y. 111; *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Longendyck v. Anderson*, (Supm. Ct.) 59 How. Pr. (N. Y.) 1; *Veeder v. Relyea*, 70 Hun (N. Y.) 541; *Townsend v. Bissell*, 6 Thomp. & C. (N. Y.) 565.

North Carolina. — *Ray v. Lipscomb*, 3 Jones L. (48 N. Car.) 185; *Smith v. Bennett*, 1 Jones L. (46 N. Car.) 372.

Ohio. — *Pavey v. Vance*, 56 Ohio St. 162; *Young v. Spangler*, 1 Ohio Cir. Dec. 636, 2 Ohio Cir. Ct. 549.

Pennsylvania. — *Kurtz v. Hoke*, 172 Pa. St. 165; *Workman v. Curran*, 89 Pa. St. 226; *Pierce v. Cloud*, 42 Pa. St. 102, 82 Am. Dec. 496; *Steffy v. Carpenter*, 37 Pa. St. 41; *Okeson v. Patterson*, 29 Pa. St. 22; *Garrett v. Jackson*, 20 Pa. St. 331; *Esling v. Williams*, 10 Pa. St. 126; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427, 30 Am. Dec. 274.

South Carolina. — *Bailey v. Gray*, 53 S. Car. 503; *Craven v. Rose*, 3 S. Car. 72; *Watt v. Trapp*, 2 Rich. L. (S. Car.) 136; *Smith v. Kinard*, 2 Hill L. (S. Car.) 642, note *a*; *Rowland v. Wolfe*, 1 Bailey L. (S. Car.) 56, 19 Am. Dec. 651; *Turnbull v. Rivers*, 3 McCord L. (S. Car.) 131, 15 Am. Dec. 622; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741; *Golding v. Williams*, *Dudley L. (S. Car.)* 92; *Hogg v. Gill*, 1 McMull. L. (S. Car.) 329.

Tennessee. — *Long v. Mayberry*, 96 Tenn. 378; *Ferrell v. Ferrell*, 1 Baxt. (Tenn.) 329.

Utah. — *Harkness v. Woodmansee*, 7 Utah 227.

Vermont. — *Dodge v. Stacy*, 39 Vt. 558.

Wisconsin. — *Carmody v. Mulrooney*, 87 Wis. 552.

Line of Travel Must Be Certain and Well Defined. — *Bushey v. Santiff*, 86 Hun (N. Y.) 384.

User of Same Strip of Land Necessary. — *Peters v. Little*, 95 Ga. 151.

A Way Owned by One under Grant Does Not prevent other persons from acquiring a prescriptive right to use the way. *Ballard v. Demmon*, 156 Mass. 449.

Ways through Uninclosed Woodland. — In *Pennsylvania*, by the statute of April 25, 1850 (*Bright. Purd. Dig. Laws Pa.* 1894, p. 2083), no private way may be acquired by user where such way passes through uninclosed woodland; but the act is not retrospective. *Fisher v. Farley*, 23 Pa. St. 501; *Okeson v. Patterson*, 29 Pa. St. 22; *Workman v. Curran*, 89 Pa. St. 226; *Peter v. Hunsiker*, 28 Pa. St. 202. Before the statute such a way could have been acquired by user for twenty-one years. *Reimer v. Stuber*, 20 Pa. St. 458, 59 Am. Dec. 744; *Worrall v. Rhoads*, 2 Whart. (Pa.) 427, 30 Am. Dec. 274.

Prevention of Acquisition by User — *Massachusetts.* — Under Pub. Stat. Mass. (1882), c. 122, § 3, the acquisition of a private way by user

may be prevented by the landowner giving notice of his intention to prevent any one from acquiring a right of passage by a user for any length of time. *Ballard v. Demmon*, 156 Mass. 449.

Ways by Prescription Across Location of Railroad. — *Gay v. Boston*, etc., R. Co., 141 Mass. 407; *Turner v. Fitchburg R. Co.* 145 Mass. 433.

The New York Statute Declaring What Is Essential for Adverse Possession, Code Civ. Pro. N. Y., § 372 (see the title ADVERSE POSSESSION, vol. 1, p. 829), is not applicable to a right of passage. *Colburn v. Marsh*, 68 Hun (N. Y.) 269.

Elements of Prescriptive Way under Law of Scotland. — *M'Inroy v. Athole*, (1891) A. C. 629.

1. Ways of necessity are of course created by implication. *Lanier v. Booth*, 50 Miss. 410.

2. See the title EASEMENTS, vol. 10, p. 425, note, and in addition to cases there given see *Glave v. Harding*, 3 H. & N. 937; *Kelly v. Dunning*, 43 N. J. Eq. 62; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 564. See also *Bayley v. Great Western R. Co.*, 26 Ch. D. 443, *per Chitty, J.*

3. **Way Continuous and Apparent by Fencing.** — *McPherson v. Acker*, *MacArthur & M. (D C.)* 158; *Eliason v. Grove*, 85 Md. 215; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577.

A hall-way and stairs are in the nature of a continuous and apparent easement with reference to the demise of rooms in a building. *Ford v. Metropolitan*, etc., R. Co., 17 Q. B. D. 12; *Geible v. Smith*, 146 Pa. St. 276, 28 Am. St. Rep. 796; *Howell v. Estes*, 71 Tex. 690.

4. **Discontinuous Easements Created by Implication.** — Thus, in *Baker v. Rice*, 56 Ohio St. 463, the distinction between continuous and discontinuous easements is disproved as somewhat arbitrary and not uniformly adopted. "The better rule," says *Minshall, J.*, "and the one now more generally adopted, is not to consider the particular kind of easement, but whether it is apparent, designed to be permanent, and reasonably necessary to the use of the premises granted." See also *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *McCarty v. Kitchenman*, 47 Pa. St. 239, 86 Am. Dec. 538; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 573; *Rightsell v. Hale*, 90 Tenn. 556; *Brown v. Berry*, 6 Coldw. (Tenn.) 98; *Scott v. Moore*, 98 Va. 668.

If the Right of Way Is Apparent and Visible, Attached to, Actually Used and Continuously Enjoyed in connection with the property, it passes by implication. *Wetherell v. Brobst*, 23 Iowa 586.

Notice of Way or Means of Notice estops purchaser. *Robinson v. Thraillkill*, 110 Ind. 117;

of "ways of necessity."¹ Under this last principle might be fitly placed those cases which recognize a more liberal rule in dealing with an implied grant of way than when the question is of an implied reservation,² or which recognize a way as created by a partition or other simultaneous alienation of two parts of an estate, when it would not exist upon a conveyance of part and a retainer of part.³ Finally, it may be said that some cases seem to treat the whole question, whether in a particular case a way is reserved or passes, as one of the construction of the instrument in the light of surrounding circumstances for the purpose of ascertaining the intention of the parties.⁴

The Question of the Transfer of Ways as appurtenant to an estate is frequently treated as if it involved the same considerations as the creation of ways. Where rights of way are already in existence or appurtenant to an estate, a conveyance of the estate with appurtenances or by a general description merely carries the easement, if such a construction is in accordance with the intention of the parties.⁵

Thompson v. Miner, 30 Iowa 386. See also *Durel v. Boisblanc*, 1 La. Ann. 407, and the title NOTICE, vol. 21, p. 584.

1. "Ways of Necessity" Liberally Construed. — See statement by Boyd, J., in *Eliason v. Grove*, 85 Md. 227. This principle seems to be illustrated in *Alexander v. Tolleston Club*, 110 Ill. 65; *Durel v. Boisblanc*, 1 La. Ann. 407; *Du Val v. Du Val*, 21 Md. 155. And see *infra*, this section, *Ways by Necessity*.

2. *Connecticut*. — *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Kentucky. — *Lebus v. Boston*, (Ky. 1899) 51 S. W. Rep. 609; *Strohmeir v. Leahy*, (Ky. 1888) 9 S. W. Rep. 238.

Maryland. — *Burns v. Gallagher*, 62 Md. 462; *Jay v. Michael*, 92 Md. 198.

Massachusetts. — *Brigham v. Smith*, 4 Gray (Mass.) 297, 64 Am. Dec. 76.

New York. — *Shoemaker v. Shoemaker*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 80; *Fritz v. Tompkins*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 514.

Vermont. — *Dee v. King*, 73 Vt. 375; *Wilder v. Wheelton*, 56 Vt. 344; *Wiswell v. Minogue*, 57 Vt. 616; *Willey v. Thwing*, 68 Vt. 128.

Virginia. — *Scott v. Moore*, 98 Va. 676.

West Virginia. — *Shaver v. Edgell*, 48 W. Va. 502.

3. Upon Severance of an Estate by Partition between Heirs, a right of way sometimes arises when it would not exist in case of a conveyance of one portion of the premises, because all the heirs come in with equal rights, and distinctions between implied grants and implied reservations are ignored. *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671. See also *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Smith v. Tarbox*, 31 Conn. 585; *Church v. Vonneida*, 6 Phila. (Pa.) 557, 25 Leg. Int. (Pa.) 149; *Wiswell v. Minogue*, 57 Vt. 616; *Murphy v. Lincoln*, 63 Vt. 278. See further the title EASEMENTS, vol. 10, p. 427, and as to the distinction between an implied grant and an implied reservation, see the same title, vol. 10, p. 420 *et seq.*

4. *Bayley v. Great Western R. Co.* 26 Ch. D. 434; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492; *Scott v. Moore*, 98 Va. 668.

Parol Evidence Admitted as Aid to Construction. — See the title PAROL EVIDENCE, vol. 21, pp. 1108, 1113.

5. Appurtenant Ways Pass under the term "appurtenances." *Bruning v. New Orleans Canal, etc., Co.*, 12 La. Ann. 541. See also the title EASEMENTS, vol. 10, p. 420 *et seq.*, and see APPURTENANT, vol. 2, p. 521 *et seq.* Or by general description without such words. *Moll v. McCauley*, 83 Iowa 677; *Thompson v. Miner*, 30 Iowa 386; *Bangs v. Parker*, 71 Me. 458; *Barnes v. Lloyd*, 112 Mass. 232.

Principle — Construction. — The principle is that upon a conveyance of land whatever is in use for it as an incident or appurtenance is presumed to pass with it; but this is a principle of construction, and depends on the intention of the parties as manifested in the deed, and the incidents belonging to the grantor at the time. *U. S. v. Appleton*, 1 Sumn. (U. S.) 492; *Huttemeier v. Albro*, 18 N. Y. 48, *affirming* 2 Bosw. (N. Y.) 546; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804; *Scott v. Moore*, 98 Va. 668. See also *Pomfret v. Ricroft*, 1 Saund. 323, 10 Eng. Rul. Cas. 19; *Sheph. Touchstone* 89; 4 Kent's Com. 467; and the titles INTERPRETATION, etc., vol. 17, p. 26; LEASES, vol. 18, p. 623; and APPURTENANT, *ut supra*.

Conveyance "with All Ways Used or Enjoyed," etc. — A conveyance of one of two adjoining tenements belonging to the same person, if "with all ways used or enjoyed," etc., will carry a road over the tenement retained in favor of the tenement granted, where, if the tenements had belonged to different persons, the road would have been an easement in favor of the tenement granted. *Bayley v. Great Western R. Co.*, 26 Ch. D. 434. And see *Barkshire v. Grubb*, 18 Ch. D. 616; *Kay v. Oxley*, L. R. 10 Q. B. 360; *U. S. v. Appleton*, 1 Sumn. (U. S.) 492, where, however, it was said that had the words "ways," etc., been omitted the result would have been the same.

A reference to an existing way in a grant passes the way even though it is not a way of necessity. *Smith v. Lock*, 18 Mich. 56; *Holloway v. Southmayd*, 139 N. Y. 390; *Newman v. Nellis*, 97 N. Y. 285; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Ranscht v. Wright*, 9 N. Y. App. Div. 108.

Land Sold as Bounded by Street — Grantor Estopped to Deny Way — *United States*. — *Barbour v. Lyddy*, 49 Fed. Rep. 806; *Fitzgerald v. Barbour*, (C. C. A.) 55 Fed. Rep. 440.

Georgia. — *Taylor v. Dyches*, 69 Ga. 455.

On the Severance of a Single Estate, a Way Other than a Way of Necessity cannot, according to many authorities, be created except by employing words sufficient to show an intention to create the way *de novo*.¹

b. WAYS BY NECESSITY — (1) In General. — Where a tract of land is surrounded wholly by other land belonging to the same person, or partly by such land and partly by land belonging to a stranger, and there is no way of getting to the first mentioned tract except over the adjacent or surrounding land of the owner, a severance of the landlocked tract from the rest of the owner's land by a conveyance of either gives rise to a way of necessity in favor of the landlocked tract over the surrounding land of the owner.² Thus,

Maryland. — *Hawley v. Baltimore*, 33 Md. 270.

Massachusetts. — *Loring v. Otis*, 7 Gray (Mass.) 563. But see *Brainard v. Boston*, etc., R. Co., 12 Gray (Mass.) 407, in which case it was said that where the way described as a boundary had never been used as a private way, a conveyance by such description would pass no right of way.

Minnesota. — *Long v. Fewer*, 53 Minn. 156.

New York. — *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804; *Haight v. Littlefield*, 147 N. Y. 338; *People v. Underhill*, 144 N. Y. 316; *Cunningham v. Fitzgerald*, 138 N. Y. 165; *Hennessy v. Murdock*, 137 N. Y. 317; *Smyles v. Hastings*, 22 N. Y. 217; *Huttemeier v. Albro*, 18 N. Y. 48, cited in 23 Am. Rep. 155; *Fonda v. Borst*, 2 Abb. App. Dec. (N. Y.) 155.

Ohio. — *Huelsman v. Mills*, 6 Ohio Dec. (Reprint) 1192, 12 Am. L. Rec. 301; *Kneisel v. Krug*, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38.

Pennsylvania. — *Twibill v. Lombard*, etc., St. Pass. R. Co., 3 Pa. Super. Ct. 487.

Tennessee. — *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

Texas. — *Wolf v. Brass*, 72 Tex. 133.

And see the titles *ESTOPPEL*, vol. II, p. 402; *COVENANTS*, vol. 8, p. 63.

Nonuser of Street by Public Immaterial. — *Barbour v. Lyddy*, 49 Fed. Rep. 896; *Fitzgerald v. Barbour*, (C. C. A.) 55 Fed. Rep. 440; *Hawley v. Baltimore*, 33 Md. 270; *Haight v. Littlefield*, 147 N. Y. 338; *People v. Underhill*, 144 N. Y. 316; *Cunningham v. Fitzgerald*, 138 N. Y. 165; *Lord v. Atkins*, 138 N. Y. 184; *Hennessy v. Murdock*, 137 N. Y. 317; *Huelsman v. Mills*, 6 Ohio Dec. (Reprint) 1192, 12 Am. L. Rec. 301; *Wolf v. Brass*, 72 Tex. 133.

Soil of Street Described Must Belong to Grantor. — *Barbour v. Lyddy*, 49 Fed. Rep. 896; *Fitzgerald v. Barbour*, (C. C. A.) 55 Fed. Rep. 440; *Hawley v. Baltimore*, 33 Md. 270; *Howe v. Alger*, 4 Allen (Mass.) 206; *Kneisel v. Krug*, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38; *Huelsman v. Mills*, 6 Ohio Dec. (Reprint) 1192, 12 Am. L. Rec. 301.

No Way Where Grantor Does Not Own Soil. — *Regan v. Boston Gas Light Co.*, 137 Mass. 37; *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Tobey v. Taunton*, 119 Mass. 404; *Gaw v. Hughes*, 111 Mass. 296; *Fox v. Union Sugar Refinery*, 109 Mass. 202; *Lewis v. Beatie*, 105 Mass. 470; *Howe v. Alger*, 4 Allen (Mass.) 206; *Kneisel v. Krug*, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38.

1. Severance of Single Estate — Creation. — *Barlow v. Rhodes*, 1 Crompt. & M. 438, 3 Tyrw. 280; *Morgan v. Meuth*, 60 Mich. 238; *Fetters*

v. Humphreys, 19 N. J. Eq. 471; *Mahler v. Brumder*, 92 Wis. 477. See also *Moll v. McCauley*, 83 Iowa 681; *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 R. I. 572, and the title *EASEMENTS*, vol. 10, p. 425, note.

Use of Appurtenant, etc. — And in such cases it has been frequently held that general words, such as "appurtenances," are not enough to create a right of way. See *APPURTENANT*, vol. 2, p. 531, note 1, and the following cases: *Harding v. Wilson*, 2 B. & C. 100, 9 E. C. L. 41; *Thomson v. Waterlow*, L. R. 6 Eq. 36; *Brett v. Clowser*, 5 C. P. D. 376; *Roe v. Siddons*, 22 Q. B. D. 224, 60 L. T. N. S. 345; *Pope v. O'Hara*, 48 N. Y. 446; *Longendyke v. Anderson*, 101 N. Y. 629; *Murray v. Ealy*, (Tenn. Ch. 1899) 57 S. W. Rep. 412.

Merger. — So where a way has been extinguished by merger and afterwards a conveyance is made with "appurtenances," or using the words "appertaining" or "belonging," the easement is not revived. *Barlow v. Rhodes*, 1 Crompt. & M. 438, 3 Tyrw. 280.

Appurtenant and Continuous Easements extinguished by unity of title revive again on severance. See the title *EASEMENTS*, vol. 10, p. 434.

Statutory Construction of Deed. — In *Standiford v. Goudy*, 6 W. Va. 364, it was held that the *West Virginia* statute declaring that a deed should be construed to include appurtenances in the absence of an exception contained therein, did not apply to the creation of ways, but was limited to the transfer of those already existing.

2. Ways by Necessity — In General — England. — *Pinnington v. Galland*, 9 Exch. 1; *Bolton v. Bolton*, 11 Ch. D. 968; *Packer v. Welsted*, Sid. (pt. ii.) 39.

Canada. — *Huddleston v. Love*, 21 Can. L. T. 447.

California. — *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77.

Colorado. — *Smith v. Griffin*, 14 Colo. 429.

Connecticut. — *Woodworth v. Raymond*, 51 Conn. 70; *Pierce v. Selleck*, 18 Conn. 321.

Georgia. — *Russell v. Napier*, 82 Ga. 770.

Illinois. — *Oswald v. Wolf*, 129 Ill. 200.

Kentucky. — *Lebus v. Boston*, (Ky. 1899) 51 S. W. Rep. 609.

Louisiana. — *Cahill v. Connelly*, 14 La. Ann. 277.

Maine. — *Stevens v. Orr*, 69 Me. 323; *Allen v. Kincaid*, 11 Me. 156.

Maryland. — *Burns v. Gallagher*, 62 Md. 472; *Mitchell v. Seipel*, 53 Md. 269; *Brice v. Randall*, 7 Gill & J. (Md.) 349.

Massachusetts. — *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572; *Oliver v. Pitman*, 98 Mass. 46; *Randall v. McLaughlin*, 10 Allen

if land purchased be entirely surrounded by lands of the vendor, the law, from the mere fact of the sale and conveyance of land so situated, will imply a grant by the vendor to the purchaser of a right of way over the surrounding land of the vendor to enable the purchaser to have ingress to and egress from his land.¹ So a way by necessity in favor of land retained by the vendor

(Mass.) 366; *Pettingill v. Porter*, 8 Allen (Mass.) 6, 85 Am. Dec. 671; *Carbrey v. Willis*, 7 Allen (Mass.) 364, 83 Am. Dec. 688; *Russell v. Jackson*, 2 Pick. (Mass.) 576; *Viall v. Carpenter*, 14 Gray (Mass.) 126; *Bowen v. Conner*, 6 Cush. (Mass.) 132; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188.

Michigan. — *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

Missouri. — *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456; *Chase v. Hall*, 41 Mo. App. 15.

New York. — *Fritz v. Tompkins*, 168 N. Y. 524; *Mattes v. Frankel*, 157 N. Y. 603, 68 Am. St. Rep. 804.

Ohio. — *Jones Fertilizing Co. v. Cleveland*, etc., R. Co., 2 Ohio Dec. 511.

Pennsylvania. — *Zell v. Universalist Soc.*, 119 Pa. St. 390, 4 Am. St. Rep. 654; *McDonald v. Lindall*, 3 Rawle (Pa.) 495.

South Carolina. — *Jeter v. Mann*, 2 Hill L. (S. Car.) 641; *Turnbull v. Rivers*, 3 McCord L. (S. Car.) 139, 15 Am. Dec. 622.

Tennessee. — *Murray v. Ealy*, (Tenn. Ch. 1899) 57 S. W. Rep. 412.

Vermont. — *Dee v. King*, 73 Vt. 375; *Willey v. Thwing*, 68 Vt. 128; *Murphy v. Lincoln*, 63 Vt. 278; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671; *Smith v. Higbee*, 12 Vt. 113.

Surrounding Land Need Not Be Part of One Estate — Way Across Stranger's Land Never Implied. — *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Clark v. Cogge*, Cro. Jac. 170; *Trump v. McDonnell*, 120 Ala. 200; *Kripp v. Curtis*, 71 Cal. 62; *Kuhlman v. Hecht*, 77 Ill. 573; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748; *Trask v. Patterson*, 29 Me. 499; *Pleas v. Thomas*, 75 Miss. 495; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; *Wooldridge v. Coughlin*, 46 W. Va. 345.

Way by Necessity Can Be Claimed from Grantor Alone. — Where a person voluntarily takes a conveyance of land surrounded on all sides by lands of his grantor and others, he can enforce a way by necessity against none but his grantor. *Kimball v. Cochecho R. Co.*, 27 N. H. 448, 59 Am. Dec. 387; *Linkenhoker v. Graybill*, 80 Va. 835.

Hall Elevators and Stairways. — Where a building is so arranged that there are no means of access to the upper stories except by using hall elevators and stairways on the first floor, a way by necessity to the upper stories arises. *Morrison v. King*, 62 Ill. 30; *Thompson v. Miner*, 30 Iowa 386; *Stillwell v. Foster*, 80 Me. 333; *Benedict v. Barling*, 79 Wis. 551; *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616; *Dillman v. Hoffman*, 38 Wis. 559.

Railroads. — As to ways by necessity in their application to railroads, see *New York*, etc., R. Co. v. Railroad Com'rs, 162 Mass. 81.

Way by Necessity Opening into Road Not a County Road. — A way by necessity may arise although the road to which the way leads is

not a county road, but a road open to the public. *Cheney v. O'Brien*, 69 Cal. 199.

A Way by Necessity Need Not Be Paid For. — *Benedict v. Barling*, 79 Wis. 551. See also *Thomas v. Parott*, 106 Wis. 605.

Statutory Way. — The fact that a statutory way would have to be paid for is not material. *Jay v. Michael*, 92 Md. 198.

1. Way by Necessity over Tenement Retained by Vendor — England. — *Proctor v. Hodgson*, 10 Exch. 824, 24 L. J. Exch. 195; *Bullard v. Harrison*, 4 M. & S. 387, 16 Rev. Rep. 493; *Buckby v. Coles*, 5 Taunt. 311, 1 E. C. L. 115; *Morris v. Edgington*, 3 Taunt. 24; *Holmes v. Goring*, 2 Bing. 76, 9 E. C. L. 324; *Staples v. Heydon*, 6 Mod. 1; *Davies v. Sear*, L. R. 7 Eq. 427; *Skull v. Glenister*, 16 C. B. N. S. 81, 111 E. C. L. 81; *Wheeldon v. Burrows*, 12 Ch. D. 31.

California. — *Barnard v. Lloyd*, 85 Cal. 131; *Kripp v. Curtis*, 71 Cal. 62.

Connecticut. — *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Illinois. — *Kuhlman v. Hecht*, 77 Ill. 573.

Indiana. — *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421; *Logan v. Stogsdale*, 123 Ind. 372; *Steel v. Grigsby*, 79 Ind. 184; *Stewart v. Hartman*, 46 Ind. 331; *Anderson v. Buchanan*, 8 Ind. 132.

Kentucky. — *Estep v. Hammons*, 104 Ky. 144; *Brown v. Burkenmeyer*, 9 Dana (Ky.) 159, 33 Am. Dec. 541; *Hall v. McLeod*, 2 Met. (Ky.) 98, 74 Am. Dec. 400; *Beall v. Clore*, 6 Bush (Ky.) 676; *Thomas v. Bertram*, 4 Bush (Ky.) 317.

Maryland. — *Oliver v. Hook*, 47 Md. 301; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353.

Massachusetts. — *Schmidt v. Quinn*, 136 Mass. 575; *Bass v. Edwards*, 126 Mass. 445; *Oliver v. Dickinson*, 100 Mass. 114; *Leonard v. Leonard*, 2 Allen (Mass.) 543; *Newton v. Newton*, 17 Pick. (Mass.) 207.

Mississippi. — *Pleas v. Thomas*, 75 Miss. 495; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550; *Lanier v. Booth*, 50 Miss. 410.

New Hampshire. — *Kimball v. Cochecho R. Co.*, 27 N. H. 448, 59 Am. Dec. 387.

New Jersey. — *Camp v. Whitman*, 51 N. J. Eq. 467.

New York. — *Smyles v. Hastings*, 22 N. Y. 217; *Outerbridge v. Phelps*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 77; *Holmes v. Seely*, 19 Wend. (N. Y.) 507 (stated under the title EASEMENTS, vol. 10, p. 430, note 4).

Pennsylvania. — *Wissler v. Hershey*, 23 Pa. St. 333; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597.

Texas. — *Kruegel v. Nitschman*, 15 Tex. Civ. App. 641.

Virginia. — *Scott v. Moore*, 98 Va. 676.

West Virginia. — *Boyd v. Woolwine*, 40 W. Va. 282.

Where One as a Trustee Conveys Land to another to which there is no access but over the trustee's land, a right of way passes of

may be implied over land sold.¹

The Presumption of Law is that it was not the intention of the parties that one should convey land to the other in such a way that the grantee could derive no benefit from the conveyance, nor that the vendor should so convey a portion as to deprive himself of the enjoyment of the remainder.²

Necessity Does Not Create Way. — In strictness, however, the necessity does not create the way, but merely furnishes evidence of the real intention of the parties through whose agency the alienation is effected.³

Effect of Statute Authorizing Establishment of Way. — A right to a way by necessity is not affected by the fact that a private way may be laid out under a statute the terms of which do not expressly change the common law as to ways by necessity.⁴

(2) *Method of Alienation.* — The method of alienation to raise or transfer a right of way is not material. It may arise by act of parties owning the land,⁵

necessity as incidental to the grant. *Howton v. Frearson*, 8 T. R. 50.

1. Way by Necessity in Favor of Vendor — *England.* — *Dutton v. Tayler*, 2 Lutw. 1487; *Clark v. Cogge*, Cro. Jac. 170; *Howton v. Frearson*, 8 T. R. 50.

California. — *Taylor v. Warnaky*, 55 Cal. 350.

Connecticut. — *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Hawaii. — *Achi v. Poni*, 5 Hawaii 176; *Kawika v. Pakeokeo*, 5 Hawaii 293.

Massachusetts. — *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43.

Mississippi. — *Pleas v. Thomas*, 75 Miss. 495.

New Hampshire. — *Whittier v. Winkley*, 62 N. H. 338; *Pingree v. McDuffie*, 56 N. H. 306.

Pennsylvania. — *Prowattain v. Philadelphia*, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170.

South Carolina. — *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

Texas. — *International, etc., R. Co. v. Bost*, 2 Tex. App. Civ. Cas., § 384; *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

Vermont. — *Willey v. Thwing*, 68 Vt. 128; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621.

West Virginia. — *Shaver v. Edgell*, 48 W. Va. 502.

Wisconsin. — *Galloway v. Bonesteel*, 65 Wis. 79; *Jarstadt v. Smith*, 51 Wis. 96.

2. Presumption as to Intention — *England.* — *Clark v. Cogge*, Cro. Jac. 170; *Holmes v. Goring*, 2 Bing. 76, 9 E. C. L. 324; *Proctor v. Hodgson*, 10 Exch. 824, 29 Eng. L. & Eq. 453.

California. — *Taylor v. Warnaky*, 55 Cal. 350.

Connecticut. — *Myers v. Dunn*, 49 Conn. 71; *Seeley v. Bishop*, 19 Conn. 128; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Collins v. Prentice*, 15 Conn. 423.

Indiana. — *Stewart v. Hartman*, 46 Ind. 331.

Kansas. — *Mead v. Anderson*, 40 Kan. 203.

Maine. — *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Warren v. Blake*, 54 Me. 276; 89 Am. Dec. 748; *Trask v. Patterson*, 29 Me. 449.

Massachusetts. — *Bass v. Edwards*, 126 Mass. 445; *Buss v. Dyer*, 125 Mass. 287; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

New Hampshire. — *Pingree v. McDuffie*, 56 N. H. 306.

New York. — *Smyles v. Hastings*, 22 N. Y. 217; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *New York L. Ins., etc., Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

Pennsylvania. — *Prowattain v. Philadelphia*, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170.

Vermont. — *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621.

See also the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 26; LEASES, vol. 18, p. 623; and *supra*, this section, *Ways Other than Ways of Necessity*, p. 11.

3. Necessity Does Not Create Way. — *Pomfret v. Ricroft*, 1 Saund. 323; *Dutton v. Tayler*, 2 Lutw. 1487; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511; *Prowattain v. Philadelphia*, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170.

4. Effect of Statute Authorizing Establishment of Way. — *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43. But see *Mead v. Anderson*, 40 Kan. 203, wherein it was said that under some circumstances the right to a way would be such only as was given by statute.

5. Method of Alienation Not Material — *England.* — *Bullard v. Harrison*, 4 M. & S. 387, 16 Rev. Rep. 493; *Proctor v. Hodgson*, 10 Exch. 824, 24 L. J. Exch. 195; *Pomfret v. Ricroft*, 1 Saund. 323, note 6; *Clark v. Cogge*, Cro. Jac. 170; *Holmes v. Goring*, 2 Bing. 76, 9 E. C. L. 324; *Packer v. Welsted*, Sid. (pt. ii.) 39; *Dutton v. Tayler*, 2 Lutw. 1487; *Howton v. Frearson*, 8 T. R. 50.

California. — *Taylor v. Warnaky*, 55 Cal. 350.

Connecticut. — *Woodworth v. Raymond*, 51 Conn. 70; *Myers v. Dunn*, 49 Conn. 71; *Seeley v. Bishop*, 19 Conn. 128; *Collins v. Prentice*, 15 Conn. 423; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Indiana. — *Stewart v. Hartman*, 46 Ind. 331. See also *Ellis v. Basset*, 128 Ind. 121, 25 Am. St. Rep. 421; *John Hancock Mut. L. Ins. Co. v. Patterson*, 103 Ind. 582, 53 Am. Rep. 550.

Kansas. — *Mead v. Anderson*, 40 Kan. 203.

Maine. — *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Warren v. Blake*, 54 Me. 276, 89 Am. Dec. 748.

Massachusetts. — *Bass v. Edwards*, 126 Mass. 445; *Buss v. Dyer*, 125 Mass. 287; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

Mississippi. — *Pleas v. Thomas*, 75 Miss. 495.

by judicial decree or sale under a decree,¹ or by sale under an execution.²

Land Taken by Eminent Domain. — Where a portion of an estate is taken for public purposes, no way by necessity over the portion taken arises in favor of the part remaining, since the taking is by virtue of a power whose exercise has but one limitation — that compensation should be made for the value of what is taken and for the injury to all that remains.³

Whether a Way by Necessity Arises under a Government Grant is a point upon which there are conflicting authorities. On the one hand it has been held that the doctrine as to a way by necessity does not apply where unsettled lands have been granted by a state, since the establishment and maintenance of public roads penetrating every neighborhood and sufficiently numerous to meet the general wants of the citizens are provided by statute;⁴ while on the other hand it is held that a sale of public land by the United States carries with it, where such land is surrounded by other public land, a way to the land bought, upon the principle that a way by necessity exists after unity of possession of the close to which and the close over which the way exists, and after a subsequent severance.⁵

(3) *Essentials of Way by Necessity* — (a) *In General* — **Must Be Founded on Presumption of Grant.** — The owner of land surrounded by land of another is not entitled to a way by necessity over the surrounding land, where the circumstances are such that no grant or alienation in the nature of a grant can be presumed.⁶

Missouri. — *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456.

New Hampshire. — *Pingree v. McDuffie*, 56 N. H. 306.

New York. — *Smyles v. Hastings*, 22 N. Y. 217; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *New York L. Ins., etc., Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

Ohio. — *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511.

Pennsylvania. — *Prowattain v. Philadelphia*, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170. See also *Geible v. Smith*, 146 Pa. St. 276, 28 Am. St. Rep. 796; *Held v. McBride*, 3 Pa. Super. Ch. 155.

Tennessee. — See *Murray v. Ealy*, (Tenn. Ch. 1899) 57 S. W. Rep. 412.

Vermont. — *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621.

Virginia. — *Scott v. Moore*, 98 Va. 676.

West Virginia. — *Wooldridge v. Coughlin*, 46 W. Va. 345.

Alienation under Demise. — *Ford v. Metropolitan, etc., R. Co.*, 17 Q. B. D. 12; *Alexander v. Tolleston Club*, 110 Ill. 65.

Alienation under Devise. — *Bangs v. Parker*, 71 Me. 458; *White v. Crawford*, 10 Mass. 187; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Howell v. Estes*, 71 Tex. 690.

An Equitable Grant with Right to Possession of land may entitle the grantee to a way by necessity. *Simmons v. Sines*, 4 Abb. App. Dec. (N. Y.) 246.

The Lease of Premises which cannot be approached except across the lessor's land gives a right of way to cross it by necessity in order that the tenement may be rendered beneficial. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154. See also the title *LEASES*, vol. 18, p. 624, note.

1. Way by Necessity Implied from Decree of Partition. — *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188; *Post v. Smith*, 35 Conn. 561; *Ritchey v. Welsh*, 149 Ind. 214; *Burress*

v. Barbee, (Ky. 1895) 33 S. W. Rep. 412; *Goodall v. Godfrey*, 53 Vt. 219, 38 Am. Rep. 671. And also *Thompson v. Miner*, 30 Iowa 386; *Durel v. Boisblanc*, 1 La. Ann. 407; and the title *PARTITION*, vol. 21, p. 1169.

A Way by Necessity May Be Implied in Favor of Land Sold under Mortgage Foreclosure over the Homestead of the mortgagor, though the declaration of homestead was filed prior to the decree of foreclosure, and though Civ. Code Cal. §§ 1240-1242, provides that a homestead can be encumbered or conveyed only by an instrument signed by both husband and wife, and is exempt from execution or forced sale. *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77. See generally the title *HOMESTEAD*, vol. 15, p. 662 *et seq.*

2. Sale under Execution. — *Schmidt v. Quinn*, 136 Mass. 575; *Taylor v. Townsend*, 8 Mass. 411, 5 Am. Dec. 107; *Pernam v. Wead*, 2 Mass. 203, 3 Am. Dec. 43; *Russell v. Jackson*, 2 Pick. (Mass.) 574; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

3. Eminent Domain. — *Prowattain v. Philadelphia*, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170; *Tracy v. Atherton*, 35 Vt. 52, 82 Am. Dec. 621. But see *Serff v. Acton Local Board*, 31 Ch. D. 679.

4. Effect of Government Grant. — *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619.

5. Government Grant Carries Way by Necessity. — *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94.

6. Presumed Grant. — *Proctor v. Hodgson*, 10 Exch. 824; *Woodworth v. Raymond*, 51 Conn. 70; *Logan v. Stogsdale*, 123 Ind. 376; *Stewart v. Hartman*, 46 Ind. 331; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120; *Gill v. Trout*, *Tappan* (Ohio) 293. See also *Kuhlman v. Hecht*, 77 Ill. 570, holding that the fact that the land of a grantee is adjoined by land of the grantor lying between the granted land and the public road does not en-

Waiver of Way. — A purchaser is not entitled to a way by necessity in case he has agreed with his grantor, even verbally, not to claim a way.¹

Necessity of Previous Unity of Possession. — No way by necessity can exist over the land of a stranger; in other words, to be entitled to a way by necessity, land over which it is claimed must at some time have been united in possession with the land in respect of which the way is claimed.²

Where There Is Other Access. — A way by necessity cannot exist if the owner of the land for which it is claimed has access thereto through other property of his own³ or by water over which there is a public right to travel,⁴ notwithstanding it might be more convenient to pass over a highway or across the premises of the grantor.⁵

(b) **Necessity — How Created.** — The necessity must be created by the severance of a tract of land,⁶ and not by the party claiming the right.⁷

When Necessity Must Arise. — The authorities are not in unison on the question whether a way by necessity can be presumed when the necessity did not exist at the time of the grant. One line of cases holds that the use made of the land for which the way is claimed at the time of the severance of the dominant and the servient estates does not restrict the way-claimant's rights to such use, but that his rights are coextensive with all the lawful uses of which his land is capable. Thus, it has been held that where the land for which the way is claimed was used at the time of the grant for agricultural purposes,

title the grantee to a way by necessity over such land.

Where Object of Grant Incompatible with Existence of Way. — Seeley v. Bishop, 19 Conn. 128; Prowattain v. Philadelphia, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170.

1. **Waiver of Way.** — Lebus v. Boston, (Ky. 1899) 51 S. W. Rep. 609. See also Haskell v. Wright, 23 N. J. Eq. 389, in which case the grantee accepted a conveyance with a restricted right of way to the land purchased, and it was held that he was not entitled to a way by necessity.

2. **Necessity of Previous Unity of Possession** — England. — Proctor v. Hodgson, 10 Exch. 824, 24 L. J. Exch. 195; Bullard v. Harrison, 4 M. & S. 387, 16 Rev. Rep. 493; Pomfret v. Ricroft, 1 Saund. 323, note 6.

California. — Taylor v. Warnaky, 55 Cal. 350. Connecticut. — Woodworth v. Raymond, 51 Conn. 70.

Indiana. — Logan v. Stogsdale, 123 Ind. 376; Stewart v. Hartman, 46 Ind. 331.

Maine. — Whitehouse v. Cummings, 83 Me. 91, 23 Am. St. Rep. 756.

Maryland. — Oliver v. Hook, 47 Md. 301.

Massachusetts. — Richards v. Attleborough Branch R. Co., 153 Mass. 120; Nichols v. Luce, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

Mississippi. — Pleas v. Thomas, 75 Miss. 495.

Missouri. — Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456.

New Hampshire. — Kimball v. Cochecho R. Co., 27 N. H. 448, 59 Am. Dec. 387; Ellis v. Blue Mountain Forrest Assoc., 69 N. H. 385.

Ohio. — Jones Fertilizing Co. v. Cleveland, etc., R. Co., 2 Ohio Dec. 511.

Virginia. — Linkenhoker v. Graybill, 80 Va. 835.

3. **No Way Where Other Access** — England. — Dodd v. Burchell, 1 H. & C. 113.

Alabama. — Trump v. McDonnell, 120 Ala. 200.

California. — Kripp v. Curtis, 71 Cal. 52; Ramirez v. McCormick, 4 Cal. 245.

Georgia. — Russell v. Napier, 82 Ga. 770.

Maryland. — Burns v. Gallagher, 62 Md. 462.

Massachusetts. — Gayetty v. Bethune, 14 Mass. 49, 7 Am. Dec. 188.

Missouri. — Vossen v. Dautel, 116 Mo. 379; Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456.

New Jersey. — Haskell v. Wright, 23 N. J. Eq. 389.

New York. — Palmer v. Palmer, 71 Hun (N. Y.) 30; Outerbridge v. Phelps, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 77, 13 Abb. N. Cas. (N. Y.) 117; Underwood v. Stuyvesant, 19 Johns. (N. Y.) 181, 10 Am. Dec. 215; Matter of New York, 4 Cow. (N. Y.) 542; New York L. Ins., etc., Co. v. Milnor, 1 Barb. Ch. (N. Y.) 353.

Ohio. — Jones Fertilizing Co. v. Cleveland, etc., R. Co., 2 Ohio Dec. 511.

Pennsylvania. — Ogden v. Grove, 38 Pa. St. 487; M'Donald v. Lindall, 3 Rawle (Pa.) 492.

Texas. — Alley v. Carleton, 29 Tex. 74, 94 Am. Dec. 260.

Application of Principle to Room in House. — Ward v. Robertson, 77 Iowa 159.

No Way Where Other Access Possible. — Buss v. Dyer, 125 Mass. 287; Randall v. McLaughlin, 10 Allen (Mass.) 366; Carbrey v. Willis, 7 Allen (Mass.) 364, 83 Am. Dec. 688; Murray v. Ealy, (Tenn. Ch. 1899) 57 S. W. Rep. 412.

4. **No Way Where Access by Water Possible.** — Hildreth v. Googins, 91 Me. 227; Kingsley v. Gouldsbrough Land Imp. Co., 86 Me. 280; Grammar School v. Jeffrey's Neck Pasture, 174 Mass. 572; Turnbull v. Rivers, 3 McCord L. (S. Car.) 131, 15 Am. Dec. 622.

5. **Convenience of Way Immaterial Where Other Access Possible.** — Kingsley v. Gouldsbrough Land Imp. Co., 86 Me. 279.

As to convenience in general, see *infra*, this subsection, *Necessity*.

6. **How Necessity Created.** — Cooper v. Maupin, 6 Mo. 624, 35 Am. Dec. 456. See also Atchison, etc., R. Co. v. Conlon, 62 Kan. 416.

7. M'Donald v. Lindall, 3 Rawle (Pa.) 492.

the way is not limited thereby, but may be claimed for the necessary accommodation of commercial or manufacturing industries on such land.¹ Another line of cases holds that a way by necessity can be presumed to exist only where the necessity existed at the time of the severance of the two estates.²

Degree of Necessity. — A way by necessity must be one whose use is necessary to the reasonable enjoyment of the property to which it is attached; the fact that the way claimed would be a great convenience is not sufficient.³

5. Under Statute — a. CONSTITUTIONALITY OF STATUTES. — The question

1. Whether Necessity Must Exist at Date of Grant. — *Myers v. Dunn*, 49 Conn. 71; *Whittier v. Winkley*, 62 N. H. 338. See also *Uhl v. Ohio River R. Co.*, 47 W. Va. 59.

2. London v. Riggs, 13 Ch. D. 798; *Schmidt v. Quinn*, 136 Mass. 575. See also *Gayford v. Moffatt*, L. R. 4 Ch. 133.

3. Necessity — Mere Convenience Insufficient — California. — *Kripp v. Curtis*, 71 Cal. 62; *Carey v. Rae*, 58 Cal. 159.

Connecticut. — *Pierce v. Selleck*, 18 Conn. 321.

Indiana. — *Anderson v. Buchanan*, 8 Ind. 132.

Iowa. — *Ward v. Robertson*, 77 Iowa 159.

Kentucky. — *Bowman v. Wickliffe*, 15 B. Mon. (Ky.) 84.

Maine. — *Trask v. Patterson*, 29 Me. 499; *Allen v. Kincaid*, 11 Me. 155.

Massachusetts. — *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572; *Oliver v. Pitman*, 98 Mass. 50.

Missouri. — *Field v. Mark*, 125 Mo. 502; *Vossen v. Dautel*, 116 Mo. 379; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456.

New Hampshire. — *Batchelder v. State Capital Bank*, 66 N. H. 386.

New Jersey. — *Haskell v. Wright*, 23 N. J. Eq. 389.

New York. — *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Outerbridge v. Phelps*, (N. Y. Super. Ct. Spec. T.) 58 How. Pr. (N. Y.) 77, 13 Abb. N. Cas. (N. Y.) 117; *New York L. Ins., etc., Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.

Ohio. — *Jones Fertilizing Co. v. Cleveland, etc., R. Co.*, 2 Ohio Dec. 511; *Gill v. Trout*, Tappan (Ohio) 293.

Pennsylvania. — *Bascom v. Cannon*, 158 Pa. St. 225; *Francies's Appeal*, 96 Pa. St. 200; *Ogden v. Grove*, 38 Pa. St. 487; *M'Donald v. Lindall*, 3 Rawle (Pa.) 492.

Rhode Island. — *Valley Falls Co. v. Dolan*, 9 R. I. 489.

South Carolina. — *Bailey v. Gray*, 53 S. Car. 503; *Screven v. Gregorie*, 8 Rich. L. (S. Car.) 158, 64 Am. Dec. 747; *Seabrook v. King*, 1 Nott & M. (S. Car.) 140.

Texas. — *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

The Necessity Required May Vary with the method in which the way is created. See the title EASEMENTS, vol. 10, p. 420 *et seq.*, particularly pp. 423, 424, where the doctrine of particular jurisdictions is examined. See also NECESSARY, etc., vol. 21, pp. 450, 451.

"In *Hyde v. Jamaica*, 27 Vt. 449, Judge Bennett quotes with approval the statement that 'a way of necessity never exists where a man can get to his own property through his own land, however inconvenient the way through his own land may be.' It is not necessary to inquire whether a way through one's own land must be absolutely impossible. It is clear

that mere inconvenience, however great, will not be sufficient. It is necessity, and not convenience, that gives the right." *Dee v. King*, 73 Vt. 375, *per* Munson, J.

Land Partly Bordering on Navigable Water. — Where one side of the land for which a way of necessity is claimed borders on navigable water, it may be proved (*Kingsley v. Gouldsborough Land Imp. Co.*, 86 Me. 279), but in the absence of proof it will be presumed (*Hildreth v. Googins*, 91 Me. 227), that the approach by water is available and no way of necessity exists over the land. See also *Turnbull v. Rivers*, 3 McCord L. (S. Car.) 131, 15 Am. Dec. 622; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

Underground Way Held Not Necessary, Though More Convenient than Surface Way. — *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619.

Access to All Parts of a Tract, though convenient, is not necessary. *Smith v. Griffin*, 14 Colo. 429; *White v. Bradley*, 66 Me. 254; *Cooper v. Maupin*, 6 Mo. 624, 35 Am. Dec. 456; *Fischer v. Laack*, 76 Wis. 313.

Reasonable as Distinguished from Absolute Physical Necessity has been held sufficient in the case of the creation of a right of way by implied reservation. *Galloway v. Bonesteel*, 65 Wis. 79, 56 Am. Rep. 616. And in the case of such creation by implied grant. *Pettingill v. Porter*, 8 Allen (Mass.) 1, 85 Am. Dec. 671, where the court said: "The word 'necessary' cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor and expense, or by any possibility. * * * Its effect [that of the word 'necessary'] was to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted." See also *Smith v. Griffin*, 14 Colo. 431; *Phillips v. Phillips*, 48 Pa. St. 178, 86 Am. Dec. 577; *Held v. McBride*, 3 Pa. Super. Ct. 155; the definition of NECESSARY, vol. 21, p. 449, especially the quotations in the notes from *Morris v. Edgington*, 3 Taunt. 31; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 448, 13 Am. Dec. 741.

In *Bayley v. Great Western R. Co.*, 26 Ch. D. 452, *Bowen, L. J.*, said: "The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way, or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too." *Compare Dee v. King*, 73 Vt. 375.

Right of Way Necessary for Particular Purpose Only. — *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353.

whether the doctrine of eminent domain justifies the establishment of a private way under statute is discussed elsewhere. Where statutes establishing private ways are looked upon as constitutional it is generally upon the ground that there is a strict necessity for the establishment of a way or upon the ground that the public is in some manner interested in their establishment.¹

Statutory Private Ways as Highways. — In some jurisdictions private ways established under statute are in reality public roads.² Such cases are discussed under another title in this work.³

b. CONSTRUCTION OF STATUTES. — It has been held that statutes authorizing the laying out of private roads should receive an equitable construction.⁴ This, however, does not mean that the interpretation should in any way be strained.⁵

c. PURPOSE AND PLACE OF ESTABLISHMENT — Purpose. — The affording of access from a particular dwelling or land to a highway or place of necessary public resort, or to a private way leading to a highway, is the general object of statutes authorizing the establishment of private ways.⁶

Place. — A statutory way must have a terminus on the land of the person for whose benefit it is laid out.⁷ Holdings from various states are collected

1. Constitutionality of Statutes in General. — See the title EMINENT DOMAIN, vol. 10, p. 1071, and the following additional cases: *Brewer v. Bowman*, 9 Ga. 37; *Bankhead v. Brown*, 25 Iowa 540; *Shake v. Frazier*, 13 Ky. L. Rep. 825, 94 Ky. 143; *Dickey v. Tennison*, 27 Mo. 373.

Establishment of Private Road Justified under Eminent Domain — United States. — *Barnard, Petitioner*, 4 Cranch (C. C.) 294, 2 Fed. Cas. No. 1,000.

California. — *Sonoma County v. Crozier*, 118 Cal. 680; *Geary v. San Diego County*, 107 Cal. 530; *Monterey County v. Cushing*, 83 Cal. 507.

Georgia. — *Chattanooga, etc., R. Co. v. Philpot*, 112 Ga. 153; *Normandale Lumber Co. v. Knight*, 89 Ga. 111; *Bibb County v. Harris*, 71 Ga. 250.

Kentucky. — *Cody v. Rider*, (Ky. 1886) 1 S. W. Rep. 2, 8 Ky. L. Rep. 52.

Michigan. — *Hall v. Pettit*, 88 Mich. 158; *Ayres v. Richards*, 38 Mich. 214.

Pennsylvania. — *Harbaugh's Road*, 8 Pa. Co. Ct. 671.

South Carolina. — *State v. Stackhouse*, 14 S. Car. 417.

Compare *Long v. Commissioners' Ct.*, 18 Ala. 482.

Consent of Owner Waives Unconstitutionality. — *Dempsey v. Kipp*, 61 N. Y. 462; *Miller v. Garlock*, 8 Barb. (N. Y.) 153; *Baker v. Braman*, 6 Hill (N. Y.) 47, 40 Am. Dec. 387.

Ways Opened and in Use for Many Years. — The constitutional prohibition with respect to taking land for private purposes is not applicable where ways have been opened and used for many years. *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139.

Eminent Domain Not Involved. — The method of laying out a private way of necessity under a statute has been held not to involve the right of eminent domain, since it merely locates a way, the right to which has always existed. *Snyder v. Warford*, 11 Mo. 513, 49 Am. Dec. 94.

2. Private Ways Laid Out under Statute Public Roads. — *Roberts v. Williams*, 15 Ark. 43; *Sherman v. Buick*, 32 Cal. 241, 91 Am. Dec. 577; *Boyden v. Achenbach*, 79 N. Car. 539;

Denham v. Bristol County, 108 Mass. 202; *Belk v. Hamilton*, 130 Mo. 292; *Clark v. Boston, etc., R. Co.*, 24 N. H. 114; *Metcalf v. Bingham*, 3 N. H. 459; *Perrine v. Farr*, 22 N. J. L. 356; *Douglas County v. Clark*, 15 Oregon 3. But see *Jacocks v. Newby*, 4 Jones L. (49 N. Car.) 266, in which case it was held that notwithstanding the statute declared that a private way laid out under it should be free for the passage of any person or persons, the wayowner might extinguish and discontinue the way if he should afterwards obtain title to the servient tenement.

3. See the title HIGHWAYS, vol. 15, p. 343.

4. Equitable Construction Given to Statute. — *Lyon v. Hamor*, 73 Me. 56; *Satterly v. Winne*, 101 N. Y. 221; *West v. McGurn*, 43 Barb. (N. Y.) 198.

A Way for the Cultivation of an Estate does not confine the purposes of the way to merely planting purposes. *Littlejohn v. Cox*, 15 La. Ann. 67.

5. Interpretation Must Not Be Strained. — *Bibb County v. Harris*, 71 Ga. 250; *Matter of Sandy Lick Creek Road*, 51 Pa. St. 94; *Palmer's Private Road*, 16 Pa. Co. Ct. 340; *Calhoon's Road*, 8 Pa. Co. Ct. 222.

6. Access to Private Way Leading to Highway. — *Keeling's Road*, 59 Pa. St. 358.

Private Way Authorized from Mine to Railroad Depot. — *Karnes v. Drake*, 103 Ky. 134.

Private Way to Brickyard Not Authorized. — *Bibb County v. Harris*, 71 Ga. 250.

Private Way from Dwelling to Coalbank Not Authorized. — *Calhoon's Road*, 8 Pa. Co. Ct. 222.

General Purposes for Which Way May Be Established. — *Perkins v. Colebrook*, 68 Conn. 113; *Lyon v. Hamor*, 73 Me. 56; *Hall v. Pettit*, 88 Mich. 158; *Ayres v. Richards*, 38 Mich. 214.

Private Way from Turnpike to Creek Not Authorized. — *Matter of Sandy Lick Creek Road*, 51 Pa. St. 94.

7. Statutory Private Ways — Terminus. — *Lyon v. Hamor*, 73 Me. 56.

Nature of Way Awarded — Louisiana. — The place where a statutory way of necessity is to be exercised must be determined by the court with a view to the due convenience of both

in the note.¹

d. WHO MAY ESTABLISH WAY. — The statutes authorizing the establishment of a private way determine who may establish the way. Thus, the power may be exercised by courts, selectmen, or municipal officers, as the case may be.²

e. APPLICATION FOR WAY — (1) *Necessity of Application.* — The statutes usually provide that a way may be established upon application therefor.³

(2) *Sufficiency of Application* — (a) *Form and Verification* — *Writing.* — Where a statute so requires the application should be in writing.⁴

Verification. — In some cases it is requisite that the petition for a private way should be sworn to.⁵

Compliance with Statutes. — A statute authorizing the establishment of a private way must be substantially complied with, but exact and technical accuracy is not expected.⁶

(b) *Essential Averments* — *Necessity of Way.* — Where the statutes authorize the establishment of a private way only in cases of necessity, the petition or application should aver that a way is essential on the ground of necessity.⁷

Description of Way. — The application should describe the way desired with reasonable certainty, a general description from which the way may be located being usually sufficient.⁸

Names of Parties. — The application should specify the names of the owners and occupants of the land over which the way is required⁹ and the person for whose benefit the way is to be.¹⁰

f. NOTICE TO OWNER OR OCCUPANT. — Notice of an application for the

parties. *Littlejohn v. Cox*, 15 La. Ann. 67; *Adams v. Harrison*, 4 La. Ann. 165; *Miller v. Thompson*, 3 La. Ann. 567.

1. *Ways under Surface to Mine Allowed.* — *Keeling's Road*, 59 Pa. St. 358; *Palmer's Private Road*, 16 Pa. Co. Ct. 340, in which latter case it was held, however, that the statute conferred no authority to lay out a private way partly over and partly under the surface to a fire-clay mine.

Way Not to Be Established over Public Road. — *Boyer's Road*, 37 Pa. St. 257.

Whether Private Way over Water. — See *Perkins v. Colebrook*, 68 Conn. 113.

2. *Who May Establish Way* — *Courts.* — *Matter of Jackson*, 1 Penn. (Del.) 10; *Summerville Macadamized, etc.*, *Road Co. v. Deutscher Schuetzen Club*, 62 Ga. 318; *Keller's Private Road*, 154 Pa. St. 547; *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Keeling's Road*, 59 Pa. St. 358; *Matter of Sandy Lick Creek Road*, 51 Pa. St. 94; *Neeld's Road*, 1 Pa. St. 353; *Road in Huntingdon Borough*, 11 Pa. Co. Ct. 119.

Selectmen. — *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Lyon v. Hamor*, 73 Me. 56.

County Court. — *Gibson v. Porter*, (Ky. 1891) 15 S. W. Rep. 871. See also *Hansford v. Berry*, 95 Ky. 56.

Ordinary or County Commissioner. — *Herdon v. Strickland*, 86 Ga. 323.

Commissioners. — *Achi v. Poni*, 5 Hawaii 176.

Inclosure Commissioners. — *Rex v. Wright*, 3 B. & Ad. 681, 23 E. C. L. 159.

Municipal Officers of Town. — *Hall v. Lincoln County*, 62 Me. 325.

3. *Necessity of Application.* — *Perkins v. Colebrook*, 68 Conn. 113; *Hall v. Lincoln County*, 62 Me. 325; *Keeling's Road*, 59 Pa.

St. 358; *Matter of Sandy Lick Creek Road*, 51 Pa. St. 94; *Calhoon's Road*, 8 Pa. Co. Ct. 222. And see the statutes of the various jurisdictions.

4. *Application Should Be Written.* — *Satterly v. Winne*, 101 N. Y. 221.

5. *Verification.* — *Palmer v. Clement*, 49 Mich. 45, holding that the oath may be waived.

6. *General Compliance with Statute Sufficient.* — *Satterly v. Winne*, 101 N. Y. 221.

7. *Necessity of Way.* — *Hall v. Pettit*, 88 Mich. 158; *Barr v. Flynn*, 20 Mo. App. 383.

It Is Sufficient to State Facts Warranting a Conclusion that the way is a necessity. *Green v. Reeves*, 80 Ga. 805.

Where a Way Already Exists under Agreement there is no necessity for a statutory way. *In re Plum Tp. Road*, 31 Pittsb. Leg. J. N. S. (Pa.) 171.

Where the Applicant Can Make a Road on his own land which leads to a public road there is no necessity for a statutory way. *Pousson v. Porche*, 6 La. Ann. 118.

8. *General Prescription Sufficient.* — *Perkins v. Colebrook*, 68 Conn. 113; *Keeling's Road*, 59 Pa. St. 358; *Miller's Road*, 9 S. & R. (Pa.) 35; *Kyle's Private Road*, 4 Yeates (Pa.) 515; *Calhoon's Road*, 8 Pa. Co. Ct. 222.

Particular Description Essential. — *Satterly v. Winne*, 101 N. Y. 221.

The Termini of the Proposed Way should be stated where a way can be opened only for access to a highway or place of necessary public resort, or to a private way leading to a highway. *Keeling's Road*, 59 Pa. St. 358.

9. *Names of Owner and Occupant of Subject Land Should Appear.* — *Satterly v. Winne*, 101 N. Y. 221.

10. *Person to Be Benefited Should Be Named.* — *Fernald v. Palmer*, 83 Me. 244.

establishment of a statutory way must be given to the owner or occupant of the land over which it is proposed to establish the way.¹

Necessity of Written Notice. — In at least one state notice of the proceedings must be in writing.²

Time of Giving Notice. — Any statutory provision relating to the time of giving notice must be complied with.³

Contents of Notice. — The notice should state definitely the time and place at which the meeting of the viewers will be held.⁴

Personal Notice. — Where the statutes or rules so require, personal notice must be given.⁵

Record Must Show Notice. — The record must show that the provisions of the statute with respect to notice have been complied with.⁶

g. COMMISSIONERS OR VIEWERS — (1) *In General.* — Where the way is to be established by a court, the statutes usually provide that all questions respecting the necessity of the way and the compensation to be paid to the owner of the land taken for the purposes of the way shall be determined by commissioners, viewers, or jurors.⁷

(2) *Selection and Appointment of Viewers.* — The persons selected or appointed as viewers must be those contemplated by the statute.⁸ The viewers must be disinterested,⁹ but the fact that a viewer has served in previous ineffectual proceedings taken by the same person to obtain another way

1. **Necessity of Notice.** — *Green v. Reeves*, 80 Ga. 805; *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300; *Fernald v. Palmer*, 83 Me. 244; *Hall v. Pettit*, 88 Mich. 158; *Ayres v. Richards*, 38 Mich. 217; *In re Redstone Tp. Private Road*, 112 Pa. St. 183; *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Kirk's Appeal*, 28 Pa. St. 185; *Private Road in Union Tp.*, 14 Pa. Co. Ct. 436; *Matter of Dennison Tp. Private Road*, 13 Pa. Super. Ct. 227; *Harbaugh's Road*, 8 Pa. Co. Ct. 671; *Road in Kingston*, 5 Kulp (Pa.) 235.

Where the Owner of the Land Is a Minor, notice must be given to his guardian. *Neeld's Road*, 1 Pa. St. 353.

2. **Notice Must Be Written.** — *Hall v. Pettit*, 88 Mich. 158.

Insufficiency of Notice Is Not a Ground of Defense in an action against the person benefited by the establishment of the way to recover compensation awarded for the taking of the land for the way. *Fernald v. Palmer*, 83 Me. 244.

3. **Time of Giving Notice.** — *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300; *Ayres v. Richards*, 38 Mich. 217.

4. **Time and Place of View Should Be Stated.** — *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Kirk's Appeal*, 28 Pa. St. 185; *Harbaugh's Road*, 8 Pa. Co. Ct. 671.

Failure of Notice to Specify Time or Place May Be Waived. — *Green v. Reeves*, 80 Ga. 805.

Maine — **Names of Landowners Affected by Way Need Not Be Inserted in Notice.** — *Fernald v. Palmer*, 83 Me. 244.

5. **Personal Notice Necessary.** — *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Harbaugh's Road*, 8 Pa. Co. Ct. 671; *Private Road in Union Tp.*, 14 Pa. Co. Ct. 436; *Road in Kingston*, 5 Kulp (Pa.) 235.

Personal Notice to Nonresidents Unnecessary — Michigan. — *Hall v. Pettit*, 88 Mich. 158.

Application for Release of Damage Not Personal Notice. — A statement in a report that application was made to the owner of the land for a

release of damages is not equivalent to personal notice upon him. *Harbaugh's Road*, 8 Pa. Co. Ct. 671; *Private Road in Union Tp.*, 14 Pa. Co. Ct. 436; *Road in Kingston*, 5 Kulp (Pa.) 235.

6. **Record Must Show Notice.** — *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Boyer's Road*, 37 Pa. St. 257.

7. **Commissioners or Viewers to Determine Necessity.** — *Matter of Jackson*, 1 Penn. (Del.) 10; *Summerville Macadamized, etc.*, *Road Co. v. Deutscher Schuetzen Club*, 62 Ga. 318; *Robinson v. Robinson*, 1 Duv. (Ky.) 163; *Satterly v. Winne*, 101 N. Y. 221; *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Keeling's Road*, 59 Pa. S. 358; *Neeld's Road*, 1 Pa. St. 353.

Who May Use Way Not Question for Consideration. — *Summerville Macadamized, etc.*, *Road Co. v. Deutscher Schuetzen Club*, 62 Ga. 318.

The Relative Convenience of One Way Over Another, provided more than one way is possible, should be taken into account, and testimony in this regard is admissible. *Perkins v. Colebrook*, 68 Conn. 113.

Reviewers May Be Appointed in Pennsylvania. — *In re Redstone Tp. Private Road*, 112 Pa. St. 183; *Kyle's Private Road*, 4 Yeates (Pa.) 515.

8. **Statutory Requirements.** — *Berridge v. Shults*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 444. See also *People v. Haverstraw*, 151 N. Y. 75.

Number of Viewers. — *In re Plumcreek Tp. Road*, 110 Pa. St. 544; *Exp. Coppock*, 1 Del. Co. Rep. (Pa.) 95.

Record Should Recite Compliance with Statute. — *Hall v. Pettit*, 88 Mich. 158.

9. **Viewers Must Be Disinterested.** — *Lyon v. Hamor*, 73 Me. 56; and see the various state statutes.

The Son or Nephew of the Applicant is not qualified as a viewer. *Lyon v. Hamor*, 73 Me. 56.

to reach the same lands is no ground of objection.¹

(3) *Order for View*. — An order appointing viewers should state facts that will warrant the establishment of a way. Thus, in cases where a way can be opened only for particular purposes, an order for view is defective if it does not state one of those purposes.²

(4) *Report, Inquest, or Return* — *Compliance with Statute*. — The report, inquest, or return should show a substantial compliance with the writ of summons.³

Sufficiency of Report. — The return of the viewers should show that the way is necessary;⁴ should describe it with reasonable certainty,⁵ and should show the amount of damages that will be sustained by the owner of the land through which the way is to be made,⁶ and who shall pay them.⁷

Objections May Be Made to a Report of Viewers in the form of exceptions, remonstrance, or appeal, as the statutes provide.⁸

h. ORDER ESTABLISHING WAY — *Description of Way*. — Those to whom the duty of laying out the way is intrusted must establish the way described in the application, they having no discretion either to refuse to lay out the way, to change its location, or to depart in any respect from the way proposed by the applicants.⁹ Accordingly, the order must give a description of the way that corresponds generally with the description given in the report of the viewers, commissioners, or jury, as the case may be.¹⁰

Gates and Fences. — In *Kentucky* a court, in establishing a way, may, if necessary, require the erection of gates and fences.¹¹

Recording Order. — The statutes sometimes provide for the recording of an order establishing a private way.¹²

i. APPEAL AND CERTIORARI — *Appeal*. — A person not appearing to be affected by the establishment of a private passway, and not a party to the proceeding, cannot sue out a writ of error.¹³

Certiorari. — Where an order for the establishment of the way has been made, certiorari will lie to review the proceedings, in accordance with the principles pertaining to certiorari generally.¹⁴

1. *Previous Service No Disqualification*. — *Palmer v. Clement*, 49 Mich. 45.

2. *Order for View in General*. — *Karnes v. Drake*, 103 Ky. 134.

3. *Report, Inquest, or Return in General*. — *Robinson v. Robinson*, 1 Duv. (Ky.) 163. See also *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

Signing and Sealing Essential under Statute. — *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

The Return of the Summoning Officer should show that those summoned as viewers answer the description of the viewers required by his writ. *People v. Brighton*, 20 Mich. 71.

Time of Making. — In *Pennsylvania* it is requisite that the viewers should report to the next term after their appointment. *Boyer's Road*, 37 Pa. St. 257.

4. *Report as to Necessity of Way*. — *Berridge v. Shults*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 444; *Keeling's Road*, 59 Pa. St. 358; *Matter of Sandy Lick Creek Road*, 51 Pa. St. 94; *Kyle's Private Road*, 4 Yeates (Pa.) 515.

A statement to the effect that the land for which the way is claimed is surrounded by the land of others is, as a rule, sufficient. *Perkins v. Colebrook*, 68 Conn. 113.

A report that there is occasion for a road is sufficient. *Pocopson Road*, 16 Pa. St. 15.

5. *Description of Way*. — *Roche's Private Road*, 10 Pa. Super. Ct. 87.

Necessity of Describing Width of Way. — *In re Plumcreek Tp. Road*, 110 Pa. St. 544.

6. *Damages*. — *Keeling's Road*, 59 Pa. St. 358.

7. *Who Liable for Damage*. — *Private Road Case*, 1 Ashm. (Pa.) 417.

8. *Objections — Exceptions*. — *Matter of Jackson*, 1 Penn. (Del.) 10; *Keller's Private Road*, 154 Pa. St. 547.

Remonstrance. — *Perkins v. Colebrook*, 68 Conn. 113.

Appeal. — 1 Code Ga. (1895), § 664.

9. *Order Must Correspond with Application*. — *Perkins v. Colebrook*, 68 Conn. 113; *Satterly v. Winne*, 101 N. Y. 221.

General Correspondence Sufficient. — *Satterly v. Winne*, 101 N. Y. 221.

10. *Correspondence with Report*. — *Clowes's Private Road*, 31 Pa. St. 12.

The Width of the Way should, in *Pennsylvania*, be fixed by the court on affirming the report of the viewers, but it is not essential that this should be done at the same term. *Private Road in Union Tp.*, 14 Pa. Co. Ct. 436; *Boyer's Road*, 37 Pa. St. 257; *Weaver's Road*, 45 Pa. St. 405; *Road in Kingston*, 5 Kulp (Pa.) 235.

11. *Gates and Fences — Kentucky*. — *Burch v. Blair*, (Ky. 1897) 41 S. W. Rep. 547. See also *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

12. *Recording Order*. — *Hall v. Pettit*, 88 Mich. 158; *Harvey v. Crane*, 85 Mich. 316; *Keeling's Road*, 59 Pa. St. 358.

13. *Appeal*. — *Rout v. Mountjoy*, 3 B. Mon. (Ky.) 300.

14. *Certiorari*. — *Steele v. Madison County*, 83 Ala. 304; *Hall v. Pettit*, 88 Mich. 158; *Keller's*

j. OPENING WAY. — Actual opening of a private way is provided for or is essential under the statutes in several states.¹

Who Must Open Way. — The duty of opening a statutory private way devolves upon the person who made application therefor.²

k. DAMAGES. — The party for whose benefit a private way is established must pay to the owner of the land over which such way passes all damages resulting to the land from the establishment of the way.³

III. ESTABLISHMENT OF WAY — In General. — A private way may be established in an action brought by the wayowner on the ground of an interruption or obstruction of the right of passage to which he is entitled, or by means of a plea of justification in an action of trespass.⁴

Burden of Proof. — The burden of proving a way is necessarily upon the person who seeks to establish it.⁵ Thus, where the way claimed is by grant, the party claiming it must produce the grant⁶ unless secondary proof is admissible according to the ordinary rules of evidence in the event of the loss or destruction of the grant.⁷

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Private Road, 154 Pa. St. 547; Hamilton St., 148 Pa. St. 640; Sadsbury Tp. Roads, 147 Pa. St. 471; Duff's Private Road, 66 Pa. St. 459; Weaver's Road, 45 Pa. St. 405; Kirk's Appeal, 28 Pa. St. 185; New Hanover Road, 18 Pa. St. 220; Matter of Dennison Tp. Private Road, 13 Pa. Super. Ct. 227; Roche's Private Road, 10 Pa. Super. Ct. 87; *In re Rearick's Private Road*, 7 Pa. Super. Ct. 548; Miller's Road, 9 S. & R. (Pa.) 35; Schuylkill Falls Road, 2 Binn. (Pa.) 250.

Certiorari Not Remedy Where Application Is Dismissed. — *Steele v. Madison County*, 83 Ala. 304.

1. Opening Way Essential. — *Harvey v. Crane*, 85 Mich. 316.

Expense of Opening. — *Schehr v. Detroit*, 45 Mich. 626.

What Constitutes Opening. — Where by the terms of a report of viewers it appeared that damages were to be paid before the way was opened, a use of the way for three years was held to be a sufficient opening thereof to render the awarded compensation payable. *Fernald v. Palmer*, 83 Me. 244.

The Cost of Opening a Way Regarded as a Highway does not rest on the public, but on the individual applying for the way. *Belk v. Hamilton*, 130 Mo. 292. *Compare Douglas County v. Clark*, 15 Oregon 3.

Damages Must Be Paid to the landowner before the way is opened. *York Water Co.'s Road*, 24 Pa. St. 397.

Time of Opening. — By statute in *Connecticut* (now Gen. Stat. 1888, § 2699) it is provided that no private way laid out by the selectmen through the inclosure of any person who shall declare himself aggrieved thereby shall be opened or occupied until the expiration of twelve months after the laying out. *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

2. Duty of Opening. — *Keeling's Road*, 59 Pa. St. 358. See also *Civ. Code Ala.* (1896), § 2496.

3. Who Must Pay Damages. — *Littlejohn v. Cox*, 15 La. Ann. 67; *Adams v. Harrison*, 4 La. Ann. 165; *Miller v. Thompson*, 3 La. Ann. 567; *Fernald v. Palmer*, 83 Me. 244; *Craig v. Orange County*, 10 Wend. (N. Y.) 585; *Keeling's Road*, 59 Pa. St. 358; *York Water Co.'s Road*, 24 Pa. St. 397; *Private Road Case*, 1 Ashm. (Pa.) 417.

Set-off of Benefits Against Damages. — *Robinson v. Robinson*, 1 Duv. (Ky.) 163.

Claim for Damages May Be Assigned. — *Fernald v. Palmer*, 83 Me. 244.

Payment of Damages Is Not in Georgia a Prerequisite to the appointment of commissioners and the laying out of the road. *Green v. Reeves*, 80 Ga. 805.

The Order Should Not Be Made Before Damages Are Paid or at any rate tendered and brought into court. *Clowes's Private Road*, 31 Pa. St. 12.

Acceptance of Damages Estops a person from objecting to the invalidity of the proceedings because of the disqualification of a juror. *Chatterton v. Parrott*, 46 Mich. 432.

The Receipt of Compensation Works No Estoppel where it is taken under a mistake. *Stewart v. Hartman*, 46 Ind. 332.

No Review of Assessment by Supervisors. — *Craig v. Orange County*, 10 Wend. (N. Y.) 585.

Expenses of Location Not to Be Borne by State. — No portion of the expense of locating a private way is chargeable to the state or county, but the expenses must be paid by the person for whose benefit the way is located. *Doniphan County v. Albright*, 8 Kan. App. 238.

4. Actions for Obstruction. — See *infra*, this title, *Rights, Duties, and Liabilities of Parties — Obstruction of Way*.

5. Burden of Proof of Way. — *Oswald v. Wolf*, 129 Ill. 200; *Bigelow Carpet Co. v. Clinton*, 108 Mass. 70; *Smith v. Porter*, 10 Gray (Mass.) 66. See also *Powers v. Foucher*, 12 Mart. (La.) 35, holding that in an action brought to enforce a right of way, a defense of forfeiture by nonuser need not be proved by the defendant, but the plaintiff must establish user; otherwise proof of a negative would be required.

6. Claimant by Grant Must Produce Grant. — *Lanier v. Booth*, 50 Miss. 410; *Osborne v. Butcher*, 26 N. J. L. 308; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

7. Secondary Proof Admissible. — *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

Age of Grant Immaterial. — A grant of yesterday is of equal validity with one of a century past. *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

Where Substituted Way Is Claimed. — Where the way is alleged to have been acquired by substitution for another way previously reserved or granted, the claimant must show an agreement of substitution or a continuous user of the way for a sufficient time to warrant the presumption of the grant.¹

The Proof Necessary to Establish an Easement by Prescription is the subject of consideration elsewhere. As a general rule it is essential to prove use and occupation or enjoyment of the way, the use of the same way without change or variation, and the existence of a right thereto adverse to the right of some other person.²

IV. RIGHTS, DUTIES, AND LIABILITIES OF PARTIES — 1. In General — a. WAY BY GRANT OR RESERVATION. — Where the way was acquired by grant or reservation, the extent of the easement must be determined by the true construction of the grant or reservation by which it was created, aided by any circumstances surrounding the estate and the parties which have a legitimate tendency to show the intention of the parties.³

User of Way under Grant Not Material. — The grant is conclusive of the right even if the way was never enjoyed. *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

Proof of Agreement for Right of Way Sufficient. — *Shannon v. Timm*, 22 Colo. 167; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235; *Allen v. Vandervort*, (Pa. 1887) 11 Atl. Rep. 316.

1. Proof of Substituted Way in General. — *Arnold v. Cornman*, 50 Pa. St. 361.

A Rambling User, sometimes along one line and sometimes along another, is not adequate evidence either of an agreement of substitution or of an original grant. *Arnold v. Cornman*, 50 Pa. St. 361.

2. Proof of Right by Prescription. — *Alban v. Brounsall*, Yelv. 163; *Campbell v. Wilson*, 3 East 294; *Osborne v. Butcher*, 26 N. J. L. 308; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741. And see generally the title **PRESCRIPTION**, vol. 22, p. 1180.

Way by Prescription Must Always Be the Same, Way by Necessity May Vary. — *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

3. Way by Grant or Reservation — England. — *Reilly v. Booth*, 44 Ch. D. 12; *Cousens v. Rose*, L. R. 12 Eq. 366; *Henning v. Burnet*, 8 Exch. 187; *Finch v. Great Western R. Co.*, 5 Ex. D. 254; *Brunton v. Hall*, 1 Gale & D. 207, 1 Q. B. 793, 41 E. C. L. 779, 6 Jur. 340; *Jackson v. Stacey*, *Holt N. P.* 455, 17 Rev. Rep. 663; *Bidder v. North Staffordshire R. Co.*, 4 Q. B. D. 412; *Cannon v. Villars*, 8 Ch. D. 415; *United Land Co. v. Great Eastern R. Co.*, L. R. 10 Ch. 586, 44 L. J. Ch. 685; *Clifford v. Hoare*, L. R. 9 C. P. 362; *Watts v. Kelson*, L. R. 6 Ch. 166; *Hawkins v. Carbines*, 3 H. & N. 914, 27 L. J. Exch. 44; *Sketchley v. Berger*, 69 L. T. N. S. 754; *Somerset v. Great Western R. Co.*, 46 L. T. N. S. 883; *Roe v. Siddons*, 22 Q. B. D. 224; *Allan v. Gomme*, 3 Per. & Dav. 581, 11 Ad. & El. 759, 39 E. C. L. 215; *Cooke v. Ingram*, 3 Reports 607, 68 L. T. N. S. 671; *Senhouse v. Christian*, 1 T. R. 560, 1 Rev. Rep. 300; *Knox v. Sansom*, 25 W. R. 864.

California. — *Smith v. Worn*, 93 Cal. 206.

Iowa. — *Houpes v. Alderson*, 22 Iowa 167.

Kentucky. — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

Maine. — *Rotch v. Livingston*, 91 Me. 461; *Chandler v. Goodridge*, 23 Me. 78.

Maryland. — *Baker v. Frick*, 45 Md. 340, 24 Am. Rep. 506; *Bump v. Sanner*, 37 Md. 621.

Massachusetts. — *Perry v. Snow*, 165 Mass. 23; *Rowell v. Daggett*, 143 Mass. 483; *Phipps v. Johnson*, 99 Mass. 26; *Mendell v. Delano*, 7 Met. (Mass.) 176; *Clap v. M'Neil*, 4 Mass. 589; *Simonds v. Wellington*, 10 Cush. (Mass.) 313; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153; *Choate v. Burnham*, 7 Pick. (Mass.) 274; *Comstock v. Van Deusen*, 5 Pick. (Mass.) 163; *Stearns v. Mullen*, 4 Gray (Mass.) 151; *Appleton v. Fullerton*, 1 Gray (Mass.) 186; *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100.

Michigan. — *Harvey v. Crane*, 85 Mich. 316.

Minnesota. — *Lidgerding v. Zigno*, 77 Minn. 421, 77 Am. St. Rep. 677; *Shoemaker v. Cedar Rapids, etc., R. Co.*, 45 Minn. 366.

New Hampshire. — *Garland v. Furber*, 47 N. H. 302; *Bean v. Coleman*, 44 N. H. 541.

New Jersey. — *Camp v. Whitman*, 51 N. J. Eq. 467.

New York. — *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275; *Immaculate Conception Church v. Sheffer*, 88 Hun (N. Y.) 335; *Tyler v. Cooper*, 47 Hun (N. Y.) 94; *Farrington v. Bundy*, 5 Hun (N. Y.) 617; *Smith v. Sponsable*, (Supm. Ct. App. Div.) 66 N. Y. Supp. 177; *Peabody v. Chandler*, 42 N. Y. App. Div. 384; *Greenwood Lake, etc., R. Co. v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 8 N. Y. Supp. 26; *Gillespie v. Weinberg*, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 302; *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427; *York v. Briggs*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124; *Rexford v. Marquis*, 7 Lans. (N. Y.) 249; *Fort v. Brown*, 46 Barb. (N. Y.) 366.

Pennsylvania. — *Greenmount Cemetery Co.'s Appeal*, (Pa. 1886) 4 Atl. Rep. 528; *Bascom v. Cannon*, 158 Pa. St. 225; *Stevenson v. Stewart*, 7 Phila. (Pa.) 293; *Smith v. Union Switch, etc., Co.*, 31 Pittsb. Leg. J. N. S. (Pa.) 21; *Carty v. Shields*, 5 W. N. C. (Pa.) 241; *Kirkham v. Sharp*, 1 Whart. (Pa.) 328, 29 Am. Dec. 57.

Rhode Island. — *Steere v. Tiffany*, 13 R. I. 568.

South Carolina. — *Capers v. M'Kee*, 1 Strobb. L. (S. Car.) 164.

Tennessee. — *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

And see the titles **INTERPRETATION**, etc., vol. 17, p. 2; **PAROL EVIDENCE**, vol. 21, p. 1108.

Rights of Owner by Reservation. — The owner of a way by reservation has no greater rights under it than he would have if the way were acquired by grant.¹

b. WAY BY PRESCRIPTION OR ADVERSE USE. — When a way has been acquired by prescription, the wayowner's rights are determined in general by the prior use of the way, and are commensurate therewith.²

2. Owner of Way — *a. EXTENT OF EASEMENT* — (1) *In General.* — The wayowner is not by reason of his ownership entitled to the possession or the right to possession of the tenement subject to the way,³ but is merely entitled to the reasonable use and enjoyment of the servient soil for the purpose of passage over its surface⁴ and to all rights that are properly incident to the free enjoyment and exercise of the right of passage.⁵ He is not ordinarily entitled to a passage beneath the surface nor above it at any elevation that he may elect.⁶

User by Servants of Wayowner. — A right of way does not necessarily extend to the servants of the wayowner; the way may be either by grant or prescription to the wayowner, to the owner of land and his tenants, servants being expressly excluded.⁷

Members of Wayowner's Family. — The members of the family of a wayowner residing with such owner have, in the absence of anything appearing to the contrary, a right of using a way appurtenant to land.⁸

Third Parties. — Where the Way Is Appurtenant the wayowner may license others to use it for the purposes of coming to and going from the dominant tenement, provided he does not thereby increase the burden upon the servient tenement.⁹

User of Statutory Way. — The statutes expressly or impliedly confine the use

1. Rights of Owner by Reservation. — *Koelle v. Knecht*, 99 Ill. 396; *S. K. Edwards Hall Co. v. Dresser*, 168 Mass. 136; *Huson v. Young*, 4 Lans. (N. Y.) 63; *Metzger v. Holwick*, 6 Ohio Cir. Dec. 794.

Reservation of Way Construed Against Wayowner. — *Wildor v. Wheeldon*, 56 Vt. 344. See also *Meredith v. Frank*, 56 Ohio St. 479, and the title EASEMENTS, vol. 10, p. 421, note 1.

2. Ways by Prescription or Adverse Use. — *United Land Co. v. Great Eastern R. Co.*, L. R. 10 Ch. 586, 44 L. J. Ch. 685; *Ballard v. Dyson*, 1 Taunt. 279; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Harvey v. Crane*, 85 Mich. 316; *Shivers v. Shivers*, 32 N. J. Eq. 578, affirmed 35 N. J. Eq. 562; *Capers v. M'Kee*, 1 Strobb. L. (S. Car.) 164; *Dyer v. Walker*, 99 Wis. 404.

Where a right of way has been exercised for all purposes connected with the use of a farm for residential or agricultural purposes, the occupiers of the farm are not entitled to a right of way to cart materials for building. *Wimbledon, etc., Conservators v. Dixon*, 1 Ch. D. 362; *London v. Riggs*, 13 Ch. D. 798. Compare *Ames v. Shaw*, 82 Me. 379.

3. Extent of Easement — In General — *Wayowner Not Entitled to Soil of Way.* — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; *Morgan v. Boyes*, 65 Me. 124; *Lcw v. Streeter*, 66 N. H. 36; *Graves v. Amoskeag Mfg. Co.*, 44 N. H. 462.

4. Wayowner Entitled to Passage Only. — *Clifford v. Hoare*, L. R. 9 C. P. 362; *Rowell v. Doggett*, 143 Mass. 483; *Wells v. Tolman*, 156 N. Y. 636; *Gillespie v. Weinberg*, 148 N. Y. 238; *Brill v. Brill*, 108 N. Y. 511; *Kohler v. Smith*, 3 Pa. Super. Ct. 176; *Brown v. Berry*, 6 Coldw. (Tenn.) 98; *Home v. Richards*, 4 Call. (Va.) 441, 2 Am. Dec. 574.

5. Wayowner Entitled to Rights Incidental to Passage — *England.* — *Wimbledon, etc., Conservators v. Dixon*, 1 Ch. D. 362; *Cannon v. Villars*, 8 Ch. D. 415, 47 L. J. Ch. 597, 38 L. T. N. S. 939, 26 W. R. 751; *Watts v. Kelson*, L. R. 6 Ch. 166, 40 L. J. Ch. 126, 24 L. T. N. S. 209, 19 W. R. 833; *Somerset v. Great Western R. Co.*, 46 L. T. N. S. 883; *Staple v. Heydon*, 6 Mod. 1.

California. — *Currier v. Howes*, 103 Cal. 431. *Kentucky.* — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

Massachusetts. — *Parks v. Bishop*, 120 Mass. 340, 21 Am. Rep. 519; *Sargent v. Hubbard*, 102 Mass. 380; *Pratt v. Sanger*, 4 Gray (Mass.) 84; *Appleton v. Fullerton*, 1 Gray (Mass.) 186.

Michigan. — *Harvey v. Crane*, 85 Mich. 316; *McConnell v. Rathbun*, 46 Mich. 303.

New York. — *Wells v. Tolman*, 156 N. Y. 636; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Brill v. Brill*, 108 N. Y. 511; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275; *York v. Briggs*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124.

Pennsylvania. — *Stevenson v. Stewart*, 7 Phila. (Pa.) 293; *Roberts v. Wilcock*, 8 W. & S. (Pa.) 464.

Vermont. — *Walker v. Pierce*, 38 Vt. 94.

6. No Rights under or above Surface. — *Sutton v. Groll*, 42 N. J. Eq. 213.

7. User by Servants. — *Bartlett v. Prescott*, 41 N. H. 403. Compare *Robinson v. Crescent City Mill, etc., Co.*, 93 Cal. 316.

8. Members of Wayowner's Family. — *Griffith v. Rigg*, (Ky. 1896) 37 S. W. Rep. 58; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

9. User by Third Parties. — *Ackroyd v. Smith*, 10 C. B. 164, 70 E. C. L. 164; *Bartlett v. Prescott*, 41 N. H. 493; *Methodist Protestant Church v. Laws*, 4 Ohio Cir. Dec. 562, 7 Ohio

of the way when established to the owner or occupier of the land for the benefit of which the way is to be established and to those claiming under him.¹

Common Owners of Way. — Where more than one person is entitled to a way, it is the duty of all the parties interested so to arrange the use thereof as best to facilitate its use by others interested therein.²

(2) *Limitations upon Use* — (a) **Where Use Is Defined.** — The wayowner may use the way only for the purposes of the land to which the way is appurtenant and in the manner specified in the grant or reservation, or according to customary use, where the way was acquired by prescription. Should he go beyond such use he becomes a trespasser and is liable accordingly.³

Enlargement of Right by Implication. — Where the wayowner's rights are expressly defined he cannot extend them by implication.⁴

Cir. Ct. 211; Gunson v. Healy, 100 Pa. St. 42; Mahler v. Brumder, 92 Wis. 477.

1. Use of Statutory Way Limited to Owner or Occupier. — Lyon v. Hamor, 73 Me. 56; Hall v. Lincoln County, 62 Me. 325; Ayres v. Richards, 38 Mich. 217; Green v. Belitz, 34 Mich. 512; Ward v. Warner, 8 Mich. 521; Lambert v. Hoke, 14 Johns. (N. Y.) 383.

A Statutory Way Acquired by a Tenant inures on the expiration of his term to the lessor. Dempsey v. Kipp, 61 N. Y. 462.

2. Use by Common Owners. — Thorpe v. Brumfitt, L. R. 8 Ch. 650; Shoemith v. Byerley, 28 L. T. N. S. 553; Bump v. Sanner, 37 Md. 621; Kelley v. Saltmarsh, 146 Mass. 585; Killion v. Kelley, 120 Mass. 47.

3. Limitations upon Use — Where Defined — England. — Colchester v. Roberts, 4 M. & W. 769; Cowling v. Higginson, 4 M. & W. 245; Jackson v. Stacey, Holt N. P. 455; Senhouse v. Christian, 1 T. R. 560; Gayford v. Moffatt, L. R. 4 Ch. 133; London v. Riggs, 13 Ch. D. 798; Allan v. Gomme, 11 Ad. & El. 759, 39 E. C. L. 215; Henning v. Burnet, 8 Exch. 187; Howell v. King, 1 Mod. 190; Lawton v. Ward, 1 Ld. Raym. 75; Ballard v. Dyson, 1 Taunt. 279; Cousens v. Rose, L. R. 12 Eq. 366; Williams v. James, L. R. 2 C. P. 577. See also Denne v. Light, 8 De G. M. & G. 774, 26 L. J. Ch. 459.

Connecticut. — Ferriss v. Knowles, 41 Conn. 308.

Iowa. — Brossart v. Corlett, 27 Iowa 288.

Maine. — Kaler v. Beaman, 49 Me. 207; Chandler v. Goodridge, 23 Me. 78.

Maryland. — Redemptorists v. Wenig, 79 Md. 348; Frank v. Benesch, 74 Md. 58, 28 Am. St. Rep. 237; Albert v. Thomas, 73 Md. 181.

Massachusetts. — Morse v. Benson, 151 Mass. 440; Leach v. Hastings, 147 Mass. 515; Greene v. Canny, 137 Mass. 64; Davenport v. Lamson, 21 Pick. (Mass.) 72; Smith v. Porter, 10 Gray (Mass.) 66; Stearns v. Mullen, 4 Gray (Mass.) 151; Appleton v. Fullerton, 1 Gray (Mass.) 186; Mendell v. Delano, 7 Met. (Mass.) 176; Atkins v. Bordman, 2 Met. (Mass.) 457, 37 Am. Dec. 100.

New Hampshire. — Batchelder v. State Capital Bank, 66 N. H. 386; Warden v. Balch, 59 N. H. 468; Abbott v. Butler, 59 N. H. 317; French v. Marstin, 24 N. H. 440, 32 N. H. 316.

New Jersey. — Dunn v. English, 23 N. J. L. 126; Haskell v. Wright, 23 N. J. Eq. 389.

New York. — Bakeman v. Talbot, 31 N. Y.

366, 88 Am. Dec. 279; Tyler v. Cooper, 47 Hun (N. Y.) 94; Rexford v. Marquis, 7 Lans. (N. Y.) 249; Badeau v. Mead, 14 Barb. (N. Y.) 328.

Pennsylvania. — Webber v. Vogel, 159 Pa. St. 235; Greenmount Cemetery Co.'s Appeals, (Pa. 1886) 4 Atl. Rep. 528; Shroder v. Brenne-man, 23 Pa. St. 348; McMakin v. Magee, 13 Phila. (Pa.) 105, 36 Leg. Int. (Pa.) 124; Walker v. Gerhard, 9 Phila. (Pa.) 116, 30 Leg. Int. (Pa.) 108; Stevenson v. Stewart, 7 Phila. (Pa.) 293; Lewis v. Carstairs, 6 Whart. (Pa.) 207; Kirkham v. Sharp, 1 Whart. (Pa.) 323, 29 Am. Dec. 57; Carty v. Shields, 5 W. N. C. (Pa.) 247; Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617; Private Road Case, 1 Ashm. (Pa.) 417.

Tennessee. — Newsom v. Newsom, (Tenn. Ch. 1900) 56 S. W. Rep. 29; Brown v. Berry, 6 Coldw. (Tenn.) 98.

West Virginia. — Shaver v. Edgell, 48 W. Va. 502; Henrie v. Johnson, 28 W. Va. 190; Springer v. McIntire, 9 W. Va. 196.

Wisconsin. — Reise v. Enos, 76 Wis. 636.

Where Character of Dominant Tenement Is Changed. — Where the condition and character of the tenement to which a way is appurtenant are substantially altered, the right of way cannot be used for new purposes required by the altered condition of the property, if a greater burden is thereby imposed on the servient estate. Wimbledon, etc., Conservators v. Dixon, 1 Ch. D. 362; Atwater v. Bodfish, 11 Gray (Mass.) 150; Parks v. Bishop, 120 Mass. 340, 21 Am. Rep. 519.

Where There Is Not a Right of Passage at all times, but only a right at intervals and for certain purposes, the wayowner is entitled to use the way only at such times and for such purposes. Mansfield v. Shepard, 134 Mass. 520; Phipps v. Johnson, 99 Mass. 26. See also Wells v. Tolman, 156 N. Y. 636.

4. Enlargement of Rights by Implication Improper. — Senhouse v. Christian, 1 T. R. 560; Newmarch v. Brandling, 3 Swanst. 99; Hoosier Stone Co. v. Malott, 130 Ind. 21; Batchelder v. State Capital Bank, 66 N. H. 386; Webber v. Vogel, 159 Pa. St. 235; Bascom v. Cannon, 158 Pa. St. 225; Capers v. M'Kee, 1 Strobb. L. (S. Car.) 164. See also Warden v. Balch, 59 N. H. 468.

Illustrations. — A grant of a way for the ordinary purposes of a house does not entitle the grantee to pass with his horses through it or use it as a common footway to the stable.

Liberal Construction of Right. — While, however, the terms cannot be enlarged beyond their natural meaning, they will not be so narrowed as to prevent the beneficial use by the grantee of what is granted in the manner and for the purposes fairly indicated by the grant.¹

(b) **Where Use Is Not Defined.** — Where the wayowner's rights are not defined, the way must be considered as adapted to the convenient use and enjoyment of the land to which it is appurtenant, for any useful and proper purpose for which such land may be used.²

In Determining the Purposes for Which a Way May Be Used it is proper to take into consideration the condition of the way as it was when the right of passage was first acquired,³ the customary use made of the way,⁴ and the nature and relative location of the respective tenements to each other.⁵

Kirkham v. Sharp, 1 Whart. (Pa.) 328, 29 Am. Dec. 57. See also *Fort v. Brown*, 46 Barb. (N. Y.) 366. So a right of way on foot and for horses, oxen, cattle, and sheep, is not a right of way for the transportation of manure. *Brunton v. Hall*, 1 Gale & D. 207, 1 Q. B. 792, 41 E. C. L. 779. Again, a right of passage for a railroad track for a special purpose does not authorize the construction of an ordinary commercial railroad. *Shoemaker v. Cedar Rapids, etc., R. Co.*, 45 Minn. 366. See also *Bidder v. North Staffordshire R. Co.*, 4 Q. B. D. 412.

1. Construction Not Unfairly Narrowed. — *Cannon v. Villars*, 8 Ch. D. 415, 47 L. J. Ch. 597; *Senhouse v. Christian*, 1 T. R. 560; *Finch v. Great Western R. Co.*, 5 Ex. D. 254; *Brown v. Meady*, 10 Me. 391, 25 Am. Dec. 248; *Choate v. Burnham*, 7 Pick. (Mass.) 274; *Appleton v. Fullerton*, 1 Gray (Mass.) 186; *Abbott v. Butler*, 59 N. H. 317; *York v. Briggs*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124; *Roberts v. Wilcock*, 8 W. & S. (Pa.) 464; *Walker v. Pierce*, 38 Vt. 94. See also *Watts v. Kelson*, L. R. 6 Ch. 166, 40 L. J. Ch. 126.

2. Where Use Is Not Defined — *England*. — *Reilly v. Booth*, 62 L. T. N. S. 378, 44 Ch. D. 12, 38 W. R. 484; *Cousens v. Rose*, L. R. 12 Eq. 366, 24 L. T. N. S. 820, 19 W. R. 792; *Cannon v. Villars*, 8 Ch. D. 415, 47 L. J. Ch. 597, 38 L. T. N. S. 939; *Hawkins v. Carbines*, 3 H. & N. 914, 27 L. J. Exch. 44; *Somerset v. Great Western R. Co.*, 46 L. T. N. S. 883; *Watts v. Kelson*, L. R. 6 Ch. 166, 40 L. J. Ch. 126; *Senhouse v. Christian*, 1 T. R. 560.

Maine. — *Smith v. Ladd*, 41 Me. 314.

Massachusetts. — *Rowell v. Doggett*, 143 Mass. 483; *Simonds v. Wellington*, 10 Cush. (Mass.) 313; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153.

New Hampshire. — *Abbott v. Butler*, 59 N. H. 317.

New York. — *Gillespie v. Weinberg*, 148 N. Y. 238; *Arnold v. Fee*, 148 N. Y. 214; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275; *York v. Briggs*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124; *Tyler v. Cooper*, 47 Hun (N. Y.) 94; *Farrington v. Bundy*, 5 Hun (N. Y.) 617.

Tennessee. — *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619; *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

Illustration — *Right of Passage over Railway Prima Facie General*. — *United Land Co. v. Great Eastern R. Co.*, L. R. 17 Eq. 158.

Use for Agricultural Purposes. — *Brill v. Brill*, 108 N. Y. 511.

Use for Purposes of Any Suitable House Presumed Contemplated. — *Reilly v. Booth*, 44 Ch.

D. 12; *Sloan v. Holliday*, 30 L. T. N. S. 757; *Rowell v. Doggett*, 143 Mass. 483; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153; *Gillespie v. Weinberg*, 148 N. Y. 238; *Arnold v. Fee*, 148 N. Y. 214, 87 Hun (N. Y.) 502.

3. Condition of Way at Acquisition to Be Considered — *England*. — *Cousens v. Rose*, L. R. 12 Eq. 366, 24 L. T. N. S. 820, 19 W. R. 792; *Hawkins v. Carbines*, 3 H. & N. 914, 27 L. J. Exch. 44; *Watts v. Kelson*, L. R. 6 Ch. 166, 40 L. J. Ch. 126; *Allan v. Gomme*, 3 Per. & Dav. 581, 11 Ad. & El. 759, 39 E. C. L. 215; *Cannon v. Villars*, 8 Ch. D. 415.

Massachusetts. — *Perry v. Snow*, 165 Mass. 23; *Rowell v. Doggett*, 143 Mass. 483; *Dickinson v. Whiting*, 141 Mass. 414; *Fox v. Union Sugar Refinery*, 109 Mass. 292; *Sargent v. Hubbard*, 102 Mass. 380; *Stetson v. Dow*, 16 Gray (Mass.) 372; *Holt v. Sargent*, 15 Gray (Mass.) 97; *Salisbury v. Andrews*, 19 Pick. (Mass.) 250; *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153.

New Hampshire. — *Whittier v. Winkley*, 62 N. H. 338; *Abbott v. Butler*, 59 N. H. 317.

New York. — *Brill v. Brill*, 108 N. Y. 511; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275.

Pennsylvania. — *Stevenson v. Stewart*, 7 Phila. (Pa.) 293.

Tennessee. — *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

4. Customary Use to Be Considered. — *Cousens v. Rose*, L. R. 12 Eq. 366, 24 L. T. N. S. 820; *Hawkins v. Carbines*, 3 H. & N. 914, 27 L. J. Exch. 44; *Hamilton v. Dennison*, 56 Conn. 359; *Perry v. Snow*, 165 Mass. 23; *Rowell v. Doggett*, 143 Mass. 483; *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100; *Gillespie v. Weinberg*, 148 N. Y. 238; *Brill v. Brill*, 108 N. Y. 511; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275; *Tyler v. Cooper*, 47 Hun (N. Y.) 94; *Smith v. Sponsable*, (Supm. Ct. App. Div.) 66 N. Y. Supp. 177; *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

5. Relative Position of Tenements to Be Considered — *England*. — *Allan v. Gomme*, 3 Per. & Dav. 581, 11 Ad. & El. 759, 39 E. C. L. 215; *Watts v. Kelson*, L. R. 6 Ch. 166, 40 L. J. Ch. 126; *Knox v. Sansom*, 25 W. R. 864; *Cannon v. Villars*, 8 Ch. D. 415.

Connecticut. — *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279.

Maine. — *Smith v. Ladd*, 41 Me. 314.

Massachusetts. — *Rowell v. Doggett*, 143 Mass. 483; *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100.

(c) **Width of Way.** — Where the Way Is Described as of a Definite Width, without any restriction, the wayowner may use the entire specified width, and is not confined to a path of a necessary or even convenient width.¹

Where the Width Is Not Expressly Defined it must be ascertained by presumption and implication in accordance with the general rule as to the construction of grants which do not define the circumstances of the way in general,² the wayowner in such case being entitled to a way of a convenient width for the purposes for which the easement was intended.³

Statutory Ways. — The width of a statutory private way may be provided for by the statute authorizing its establishment.⁴

b. GATES AND FENCES — Duty of Wayowner to Replace Gates. — Where a gate or bar is lawfully erected, the wayowner is liable in trespass for unlawfully removing it, the great preponderance of convenience to the owner of the servient tenement over the slight inconvenience to the wayowner seeming to make such rule reasonable.⁵

The Wayowner May Not Fence in the way and thereby exclude the owner of the servient tenement from such uses as he may make of his land not inconsistent with the easement.⁶

c. DUTY TO OPEN WAY. — The owner of the servient estate is not compelled to open the way; such duty devolves upon the wayowner.⁷

Manner of Opening and Preparing Way. — For this purpose the wayowner may do

New York. — Gillespie v. Weinberg, 148 N. Y. 238; Brill v. Brill, 108 N. Y. 511; Bakeman v. Talbot, 31 N. Y. 371, 88 Am. Dec. 275.

Pennsylvania. — Stevenson v. Stewart, 7 Phila. (Pa.) 293.

Tennessee. — Brown v. Berry, 6 Coldw. (Tenn.) 98.

1. Right to Use Whole of Specified Width. — Brownell v. Dyer, 5 Mason (U. S.) 227; Rotch v. Livingston, 91 Me. 461; State v. Clements, 32 Me. 279; Frank v. Benesch, 74 Md. 58, 28 Am. St. Rep. 237; Gerrish v. Shattuck, 128 Mass. 571; Nash v. New England Mut. L. Ins. Co., 127 Mass. 91; Tucker v. Howard, 122 Mass. 529; Welch v. Wilcox, 101 Mass. 162, 100 Am. Dec. 113; Salisbury v. Andrews, 19 Pick. (Mass.) 250; Smith v. Union Switch, etc., Co., 31 Pittsb. Leg. J. N. S. (Pa.) 21; Brown v. Berry, 6 Coldw. (Tenn.) 98; Morton v. Thompson, 69 Vt. 432; Germain dit Belisle v. Pigeon, 16 Quebec Super. Ct. 235.

Effect of Practical Location as to Width. — Where at the time of the grant a way of a particular width is practically located, and has been so used for some time, the effect is as if the width had been fixed by the deed. George v. Cox, 114 Mass. 382.

The Existence of Buildings or Permanent Structures inclosing the way will control a description of the width by feet. Stevenson v. Stewart, 7 Phila. (Pa.) 293. See generally the title BOUNDARIES, vol. 4, p. 765.

2. Ascertainment of Width Where Not Defined. — Stevenson v. Stewart, 7 Phila. (Pa.) 293; Brown v. Berry, 6 Coldw. (Tenn.) 98.

3. Wayowner Entitled to Convenient Width. — Hutton v. Hamboro, 2 F. & F. 218; Frank v. Benesch, 74 Md. 58, 28 Am. St. Rep. 237; Salisbury v. Andrews, 19 Pick. (Mass.) 250; Atkins v. Bordman, 2 Met. (Mass.) 457, 37 Am. Dec. 100; Grafton v. Moir, 130 N. Y. 465, 27 Am. St. Rep. 533; York v. Briggs, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124; Farrington v. Bundy, 5 Hun (N. Y.) 617; Stevenson v. Stewart, 7 Phila. (Pa.) 293.

How Width May Be Proved. — The deed of a common grantor is admissible in evidence to show what is the width of a passageway between adjoining estates. Brown v. Stone, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

What Is Suitable Width Question of Fact. — George v. Cox, 114 Mass. 382; York v. Briggs, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 124.

Private Stairway Must Be of Reasonable Width. — Farrington v. Bundy, 5 Hun (N. Y.) 617.

4. Width of Way Provided for by Statute. — Aaron v. Gunnels, 68 Ga. 528. And see the statutes of the different jurisdictions, *e. g.*, Civ. Code Ala. (1896), § 2496; Comp. Laws Mich. (1897), § 4147.

5. Duty to Replace Gates or Fences Lawfully Erected. — Green v. Goff, 153 Ill. 534; Boyd v. Bloom, 152 Ind. 152; Phillips v. Dressler, 122 Ind. 414, 17 Am. St. Rep. 375; Houpes v. Alderson, 22 Iowa 161; Ames v. Shaw, 82 Me. 379; Bean v. Coleman, 44 N. H. 539; Whaley v. Jarrett, 69 Wis. 613, 2 Am. St. Rep. 764. See also *infra*, this section, *Owner of Land Subject to Way — Gates, Bars, and Fences.*

6. Wayowner May Not Fence to Landowner's Detriment. — Sizer v. Quinlan, 82 Wis. 390, 33 Am. St. Rep. 55. See also Dyer v. Walker, 99 Wis. 404; Wille v. Bartz, 88 Wis. 424. But see Harvey v. Crane, 85 Mich. 316, in which case the way was a statutory one, and it was held that the wayowner might employ reasonable methods to protect himself from the danger attending the driving of stock along the way when the fields of the owner of the servient tenement were not inclosed, on the ground that to withhold such a right and at the same time hold him responsible for any damage that his stock might do to the property of the owner of the servient tenement would destroy the value of the way.

7. Duty to Open Way. — McCusker v. Spier, 72 Conn. 628; Hennessey v. Old Colony, etc., R. Co., 101 Mass. 540. See also Loring v. Otis, 7 Gray (Mass.) 563.

upon the servient land any work which is necessary, fit, and proper to enable him to use and enjoy his right in a manner beneficial and advantageous to himself, provided he does not thereby make any material change in the state and condition of the soil or disturb or interfere with the estate or privileges of other persons therein.¹

Stones or Gravel in the soil of the way may be used for the purpose of constructing the way, but must not be removed therefrom by the wayowner.²

d. REPAIRS — In General. — The owner of a tenement subject to a right of passage is not bound to keep the way in repair or to be at any expense to maintain it in a passable condition³ unless he has agreed so to do.⁴

The Right of Repair Is Incident to the Easement. — Accordingly, whether the way was acquired by grant or otherwise, the wayowner has the right to make such repairs to the way as are necessary for its reasonable use,⁵ provided that thereby no material change in the state and condition of the soil is effected,⁶ and that the estates or privileges of other persons therein are not disturbed.⁷

Duty of Wayowner to Repair. — Some authorities hold that it is the duty of the wayowner to repair,⁸ and for a breach of this duty he is liable to the landowner.⁹

Statutory Ways. — In some cases it is provided that a statutory private way must be kept in repair by the person on whose application it is established.¹⁰

1. Manner of Opening and Preparing Way. — *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303. See also *Lyman v. Arnold*, 5 Mason (U. S.) 195.

Right to Pave. — *Newcomen v. Coulson*, 5 Ch. D. 133; *Appleton v. Fullerton*, 1 Gray (Mass.) 186.

Right to Lay Flagstones in Front of Dwelling Abutting on Private Way. — *Gerrard v. Cooke*, 2 B. & P. N. R. 109.

2. Use of Substance of Way. — *Phillips v. Bowers*, 7 Gray (Mass.) 21; *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427.

3. Repairs — Landowner Not Bound to Repair. — *Nugent v. Wann*, 1 McCrary (U. S.) 439; *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Walker v. Pierce*, 38 Vt. 98.

As to Landowner's Liability to Strangers, see *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85; *Nugent v. Wann*, 1 McCrary (U. S.) 439.

4. Landowner Bound to Repair under Express Contract or Prescription. — *Taylor v. Whitehead*, 2 Dougl. 745; *Pomfret v. Ricroft*, 1 Saund. 323, note; *Eames v. Worcester*, etc., R. Co., 105 Mass. 193. See also *Rider v. Smith*, 3 T. R. 766.

No Implied Contract to Repair. — *Walker v. Pierce*, 38 Vt. 94.

Parol Proof of Agreement to Repair Admissible. — *Cole v. Hadley*, 162 Mass. 579.

5. Right of Wayowner to Repair — Maryland. — *Redemptorists v. Wenig*, 79 Md. 348.

Massachusetts. — *Cole v. Hadley*, 162 Mass. 579; *Kelley v. Saltmarsh*, 146 Mass. 585; *Carleton v. Franconia Iron*, etc., Co., 99 Mass. 217; *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

Michigan. — *Harvey v. Crane*, 85 Mich. 316. *Missouri.* — *Eisenberg v. Missouri Pac. R. Co.*, 33 Mo. App. 85; *Sarcoxi v. Wild*, 64 Mo. App. 403.

New York. — *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *McMillan v. Cronin*, 75 N. Y. 474, 57 How. Pr. (N. Y.) 53; *Wynkoop v. Burger*, 12 Johns. (N. Y.) 222.

One of Several Common Owners May Repair. — *Killion v. Kelley*, 120 Mass. 47.

Right to Ditch to Turn Water from Way. — *McMillen v. Cronin*, (Ct. App.) 57 How. Pr. (N. Y.) 53. But see *Capers v. M'Kee*, 1 Strobh. L. (S. Car.) 164.

Right to Erect Railings. — The wayowner may, if it be necessary to the safety and convenience of a passway, erect a railing on the passway, provided the rights of the owner of the soil are not interfered with thereby. *Chandler v. Goodridge*, 23 Me. 78.

6. No Material Change in Condition of Land Authorized. — *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

The Repairs Must Be Consistent with the Right of the owner of the subject tenement. *Wells v. Tolman*, 156 N. Y. 636.

Grading to Detriment of Landowner Not Permissible. — *Redemptorists v. Wenig*, 79 Md. 348.

7. Rights of Common Owners Must Not Be Affected. — *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303; *Killion v. Kelley*, 120 Mass. 47; *Kelley v. Saltmarsh*, 146 Mass. 585.

Changes in Grade Making It Less Convenient Unauthorized. — *Redemptorists v. Wenig*, 79 Md. 348; *Shapine v. Shaw*, 150 Mass. 262; *Kelley v. Saltmarsh*, 146 Mass. 585; *Killion v. Kelley*, 120 Mass. 47. Compare *White v. Eagle*, etc., Hotel Co., 68 N. H. 38.

8. Duty of Wayowner to Repair. — *Rider v. Smith*, 3 T. R. 766; *Ingram v. Morecraft*, 33 Beav. 49; *Harvey v. Crane*, 85 Mich. 316; *Walker v. Pierce*, 38 Vt. 98.

Wayowner Need Not Repair for Landowner's Benefit. — *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800.

9. Liability for Nonrepair. — *Rider v. Smith*, 3 T. R. 766.

10. Who Must Repair. — *Civ. Code Ala.* (1896), § 2496; *Aaron v. Gunnels*, 68 Ga. 528; *Keeling's Road*, 59 Pa. St. 358.

Wayowner Need Not Repair for Others' Benefit. — Repairs to a statutory private way need not be made for the benefit of persons who have acquired a prescriptive right to it. *Puryear v. Clements*, 53 Ga. 232.

Private Road over Bridge. — Where the private

3. Owner of Land Subject to Way — a. IN GENERAL. — All the rights, benefits, and privileges of ownership consistent with and subject to the reasonable and proper enjoyment of the way belong to the owner of the servient tenement,¹ and the wayowner cannot make valid objection to his exercise of such rights.²

A Joint Use of the land subject to the way by both parties in the sense that a use by the wayowner should at any time give way to a use by the landowner is contrary to the idea of a way and is not recognized.³

Right of Passage. — In the case of an ordinary way, the owner of the land subject thereto has a right to pass to and fro over it in common with the wayowner unless such a common use of the way impairs or infringes upon the rights of the wayowner.⁴ The landowner, however, may have expressly contracted away such right of passage to the wayowner,⁵ or may have vested the right of passage in others by alienating the land subject to the way.⁶

Duty to Persons Rightfully Using Way. — The owner of the soil over which a way runs is liable for any accident to the persons entitled to use the way occurring through the negligence of the owner of the land or of his agents.⁷

b. LOCATION OF PRIVATE WAYS — (1) Ways by Necessity — Right to Locate. — The person whose tenement is subject to a way by necessity has the right to designate a course therefor. If he does not exercise this right the way may be located by the owner of the land to which the way is appurtenant,⁸

road is to be established over a private bridge the court may make such order respecting the maintenance and repair of the bridge as is fitting. *Clowes's Private Road*, 31 Pa. St. 12.

In England Inclosure Commissioners may direct any person or persons with the exception of a township to repair a private road. *Rex v. Wright*, 3 B. & Ad. 681, 23 E. C. L. 159.

1. Rights of Ownership of Land Subject to Way — In General — Alabama. — *Long v. Gill*, 80 Ala. 408.

Illinois. — *Green v. Goff*, 153 Ill. 534.

Indiana. — *Ross v. Thompson*, 78 Ind. 90.

Kentucky. — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

Maine. — *Chandler v. Goodridge*, 23 Me. 78.

Maryland. — *Redemptorists v. Wenig*, 79 Md. 348; *Frank v. Benesch*, 74 Md. 58, 28 Am. St. Rep. 237.

Massachusetts. — *Burnham v. Nevins*, 144 Mass. 92, 59 Am. Rep. 61; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Phipps v. Johnson*, 99 Mass. 26; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen (Mass.) 159.

Michigan. — *Harvey v. Crane*, 85 Mich. 316.

New Hampshire. — *Low v. Streeter*, 66 N. H. 36; *Garland v. Furber*, 47 N. H. 301; *Bean v. Coleman*, 44 N. H. 539; *Richardson v. Palmer*, 38 N. H. 212.

New Jersey. — *Sutton v. Groll*, 42 N. J. Eq. 213.

New York. — *Wells v. Tolman*, 156 N. Y. 636; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Brill v. Brill*, 108 N. Y. 511; *Matthews v. Delaware, etc., Canal Co.*, 20 Hun (N. Y.) 427.

North Carolina. — *Ingraham v. Hough*, 1 Jones L. (46 N. Car.) 39.

Pennsylvania. — *Greenmount Cemetery Co.'s Appeals*, (Pa. 1886) 4 Atl. Rep. 528; *Cooper v. Smith*, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658; *Stevenson v. Stewart*, 7 Phila. (Pa.) 293; *Patterson v. Philadelphia, etc., R. Co.*, 8 Pa. Co. Ct. 186; *Kohler v. Smith*, 3 Pa. Super. Ct. 176.

Tennessee. — *East Tennessee, etc., R. Co. v. Telford*, 89 Tenn. 293; *Brown v. Berry*, 6 Coldw. (Tenn.) 98.

Wisconsin. — *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 55.

2. Wayowner Must Recognize Rights of Landowner. — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

3. Joint Use. — *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800.

4. Right of Passage. — *Morgan v. Boyes*, 65 Me. 124; *Campbell v. Kuhlmann*, 39 Mo. App. 628; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Matthews v. Delaware, etc., Canal Co.*, 20 Hun (N. Y.) 427; *Greenmount Cemetery Co.'s Appeals*, (Pa. 1886) 4 Atl. Rep. 528.

5. Landowner May Yield Right of Passage. — *Peterson v. Machado*, (Cal. 1896) 43 Pac. Rep. 611; *Campbell v. Kuhlmann*, 39 Mo. App. 628.

6. Landowner May Transfer Right of Passage. — *Riley v. Stein*, 50 Kan. 591; *Franklin Ins. Co. v. Cousens*, 127 Mass. 258; *Campbell v. Kuhlmann*, 39 Mo. App. 628; *Kirkham v. Sharp*, 1 Whart. (Pa.) 323, 29 Am. Dec. 57.

By an Alienation of the Soil of a way in fee the alienor deprives himself of the power to grant to others any right of passage thereon. *McNeal v. Rebman*, 168 Pa. St. 109.

7. Duty to Persons Rightfully Using Way. — *Corby v. Hill*, 4 C. B. N. S. 556, 93 E. C. L. 556; *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

8. Right to Locate — England. — *Bolton v. Bolton*, 11 Ch. D. 968; *Deacon v. South-Eastern R. Co.*, 61 L. T. N. S. 377.

California. — *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188; *Kripp v. Curtis*, 71 Cal. 62.

Indiana. — *Ritchey v. Welsh*, 149 Ind. 214; *Ellis v. Bassett*, 128 Ind. 118, 25 Am. St. Rep. 421.

Kentucky. — *McCormack v. Crow*, (Ky. 1891) 15 S. W. Rep. 181.

and his selection will be supported unless he is chargeable with palpable abuse of the right to locate.¹

Manner of Location. — The owner of the tenement to which a way by necessity is appurtenant cannot claim a way over all parts of the servient tenement² unless the way is still undefined;³ he is generally entitled only to a single⁴ convenient way.⁵

The Route Is to Be Determined Not by the Sole Interest of Either the Wayowner or the Landowner, but by the reasonable convenience of both.⁶

(2) **Expressly Granted or Reserved Ways — Who May Locate.** — Where a way is expressly granted, but its precise location is not fixed by the instrument of conveyance, it is competent for the parties to define the location by subsequent agreement or by acts, conduct, declarations, and acquiescence, indicating a practical location, accompanied by user from the date of the creation of such right of way.⁷

Louisiana. — *Patout v. Lewis*, 51 La. Ann. 210.

Maine. — *Rumill v. Robbins*, 77 Me. 193.

Maryland. — *Oliver v. Hook*, 47 Md. 301.

Massachusetts. — *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Russell v. Jackson*, 2 Pick. (Mass.) 574.

Michigan. — *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

New Jersey. — *Hieser v. Martin*, 9 N. J. L. J. 277.

New York. — *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Fritz v. Tompkins*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 514; *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139.

South Carolina. — *Capers v. Wilson*, 3 McCord L. (S. Car.) 170.

Way Must Be Located Within Reasonable Time by Owner of Servient Tenement. — *Rucker v. Liddell*, 5 La. Ann. 577.

1. *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653.

2. **Manner of Location.** — *Hutton v. Hamboro*, 2 F. & F. 218; *Brice v. Randall*, 7 Gill & J. (Md.) 349; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415; *Gardner v. Webster*, 64 N. H. 520; *Peabody v. Chandler*, 42 N. Y. App. Div. 384.

3. *Oliver v. Hook*, 47 Md. 301; *Farnum v. Platt*, 8 Pick. (Mass.) 339, 19 Am. Dec. 330.

4. **Wayowner Entitled Only to Single Way.** — *Com. Dig.*, tit. *Chimin*, D 4; *Bolton v. Bolton*, 11 Ch. D. 968, 48 L. J. Ch. 467; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *McDonald v. Lindall*, 3 Rawle (Pa.) 492.

Two or More Ways of Necessity May Arise, as where a tract is divided by an impassable mountain. See *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

A Grant of All Mining Privileges on and through the surface does not entitle the grantee to both an overland and an underground way for the removal of the minerals. He is entitled only to the overland way as one of necessity, although an underground way might be more profitable and convenient. *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619.

5. **Entitled to Convenient Way Only.** — *Allen v. Kincaid*, 11 Me. 155; *Brice v. Randall*, 7 Gill & J. (Md.) 349; *Schmidt v. Quinn*, 136

Mass. 575; *Jeter v. Mann*, 2 Hill L. (S. Car.) 641.

6. **Determination of Route for Convenience of Both Parties — By Act of Parties.** — *Hutton v. Hamboro*, 2 F. & F. 218; *Ritchey v. Welsh*, 149 Ind. 214; *Rumill v. Robbins*, 77 Me. 193; *Oliver v. Hook*, 47 Md. 301; *Brice v. Randall*, 7 Gill & J. (Md.) 349; *Jones v. Percival*, 5 Pick. (Mass.) 485, 16 Am. Dec. 415; *Gardner v. Webster*, 64 N. H. 520; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; *Holmes v. Seely*, 19 Wend. (N. Y.) 507; *Peabody v. Chandler*, 42 N. Y. App. Div. 384; *McKell v. Collins Colliery Co.*, 46 W. Va. 625.

An arbitrary location by the wayowner without regarding the interest and convenience of the landowner is improper. *Russell v. Jackson*, 2 Pick. (Mass.) 574; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

Proof of the most convenient way of access is admissible where a way by necessity is claimed. *San Joaquin Valley Bank v. Dodge*, 125 Cal. 77. See also *Chase v. Perry*, 132 Mass. 582; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

The wayowner may change an inconvenient location. *International, etc., R. Co. v. Bost*, 2 Tex. App. Civ. Cas., § 383.

Location in Judicial Proceeding. — *Pleas v. Thomas*, 75 Miss. 495; *Pearne v. Coal Creek Min., etc., Co.*, 90 Tenn. 619.

7. **Expressly Granted or Reserved Ways — Who May Locate.** — *Wharton v. Hannon*, 101 Ala. 554; *Rucker v. Liddell*, 5 La. Ann. 577; *Bangs v. Parker*, 71 Me. 458; *Smith v. Wiggins*, 52 N. H. 112; *Crocker v. Crocker*, 5 Hun (N. Y.) 587; *March-Brownback Stove Co. v. Evans*, 9 Pa. Super. Ct. 597; *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864.

Indefinite Location. — The reservation of a right to pass and repass on foot over granted premises to repair a building when necessary is not a definite location. *Phipps v. Johnson*, 99 Mass. 26.

Convenience of Both Parties Must Be Consulted. — *Stephens v. Gordon*, 22 Can. Sup. Ct. 61; *Pratt v. Sanger*, 4 Gray (Mass.) 84.

Failure to Locate and use a way to which a person is entitled by grant does not cause any loss of the way as originally granted. *Quigley v. Baker*, 169 Mass. 303.

Evidence of Location — Admissibility — Subsequent Agreement to Locate Admissible. — *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864.

Where Way Open and in Use. — Where, at the time when a deed is given and accepted, a way is open, visible, and in use, to the knowledge of both parties to the deed, and such use is continued afterwards, there is a strong presumption that such way was the one that the parties had in mind,¹ although such presumption is not necessarily conclusive.²

Acquiescence in Use of Route. — The acquiescence of the owner of the servient tenement in the continued use of a particular route by the wayowner has the same effect as a full description of the way in the instrument of conveyance.³

Where There Are Two Roads, either of which will answer the description contained in a deed, that road must be adopted which a reasonable construction of the instrument requires, having due regard to the rights and interests of each party. Thus, where one way is almost impracticable, the other must necessarily be considered as the one contemplated.⁴

(3) **Change of Location.** — The owner of a way and the owner of the land over which it runs may alter the location of a definitely located and established way,⁵ but the course of such a way cannot be altered by either the landowner or the wayowner, without the consent of the other.⁶ The fact

Parol Evidence of Prior Agreement as to Location Not Admissible. — *Osborn v. Wise*, 7 C. & P. 761, 32 E. C. L. 723; *Crocker v. Crocker*, 5 Hun (N. Y.) 587.

Parol Agreement for Location Admissible, where there is no location in the deed. *Garraty v. Duffy*, 7 R. I. 476; *Kinney v. Hooker*, 65 Vt. 333, 36 Am. St. Rep. 864. And see the title PAROL EVIDENCE, vol. 21, p. 1094.

Fences or Walls Evidence of Location. — *Roberts v. Stephens*, 40 Ill. App. 138; *Dickinson v. Whiting*, 141 Mass. 414; *Colburn v. Marsh*, 68 Hun (N. Y.) 269; *Stockwell v. Fitzgerald*, 70 Vt. 468.

Use of a Way by the Public may be evidence as to the location of a private way. *McFerren v. Mont Alto Iron Co.*, 76 Pa. St. 180.

A Reference to a Map or Plat in a Deed may fix or help to fix, the location of a way. *Louisville, etc., R. Co. v. Koelle*, 104 Ill. 455; *Potter v. Iselin*, 31 Hun (N. Y.) 134; *Smyles v. Hastings*, 22 N. Y. 217.

Insufficient Evidence of Location. — *Turner v. Williams*, 76 Mo. 617.

1. Presumption Where Way Is in Use. — *Tabbutt v. Grant*, 94 Me. 371; *Bangs v. Parker*, 71 Me. 458; *Winthrop v. Fairbanks*, 41 Me. 307; *Cole v. Hadley*, 162 Mass. 579; *Gerrish v. Shattuck*, 128 Mass. 571; *Smith v. Wiggin*, 52 N. H. 112; *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; *Smith v. Sponsable*, (Supm. Ct. App. Div.) 66 N. Y. Supp. 177; *Peabody v. Chandler*, (Supm. Ct. Tr. T.) 17 Misc. (N. Y.) 655; *Stockwell v. Fitzgerald*, 70 Vt. 468.

2. Presumption of Location Not Conclusive. — *Gardner v. Webster*, 64 N. H. 520; *Smith v. Wiggin*, 52 N. H. 112.

On Severance of an Estate, a Reasonable Change of Ways may be made by the owner of the servient tenement. *Lyon v. Lea*, 84 Me. 254; *Fitzpatrick v. Boston, etc., R. Co.*, 84 Me. 33.

3. Acquiescence in Use of Route. — *Deacon v. South Eastern R. Co.*, 61 L. T. N. S. 377; *Green v. Goff*, 153 Ill. 534; *Bannon v. Angier*, 2 Allen (Mass.) 128; *Peabody v. Chandler*, (Supm. Ct. Tr. T.) 17 Misc. (N. Y.) 655; *Warner v. Sandusky, etc., R. Co.*, 39 Ohio St. 70.

Acquiescence of the owner of the servient tenement in the wayowner's custom of travel-

ing as he pleases and not in a specific path amounts to an agreement that he may pass and repass in this manner as long as he travels in the same general direction. *Powers v. Harlow*, 53 Mich. 507, 51 Am. Rep. 154.

Acquiescence in Way Explained by Deed. — *Smith v. Wiggin*, 52 N. H. 112.

The Permanent Closing of One of Two Ways actually used when the deed was executed and the user for a long time of the other way is a location. *Bangs v. Parker*, 71 Me. 458.

4. Where There Are Several Roads. — *McCormack v. Crow*, (Ky. 1891) 15 S. W. Rep. 181.

Declarations of the Owner of the Servient tenement are admissible to identify which of two ways was intended by the deed. *Osborn v. Wise*, 7 C. & P. 761, 32 E. C. L. 723; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127.

Land Crossed by Several Paths — No Definite Location. — *Colt v. Redfield*, 59 Conn. 427.

A Question Whether a Way Has Been Located by the parties at a particular place is one of fact. *Karmuller v. Krotz*, 18 Iowa 352.

5. Change of Location — In General. — *Rumill v. Robbins*, 77 Me. 193; *Smith v. Lee*, 14 Gray (Mass.) 473; *Hamilton v. White*, 4 Barb. (N. Y.) 60; *Lawton v. Tison*, 12 Rich. L. (S. Car.) 88.

6. Consent of Both Parties to Change Essential — *England.* — *Pearson v. Spencer*, 1 B. & S. 571, 101 E. C. L. 571, 7 Jur. N. S. 1195.

Alabama. — *Wharton v. Hannon*, 101 Ala. 554.

Connecticut. — *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122; *Colt v. Redfield*, 59 Conn. 427; *Ferriss v. Knowles*, 41 Conn. 308.

Illinois. — *Green v. Goff*, 153 Ill. 534; *Roberts v. Stephens*, 40 Ill. App. 138; *Keating v. Hayden*, 30 Ill. App. 433.

Indiana. — *Ritchey v. Welsh*, 149 Ind. 214.

Iowa. — *Karmuller v. Krotz*, 18 Iowa 352.

Kentucky. — *Faulkner v. Duff*, (Ky. 1892) 20 S. W. Rep. 227.

Maine. — *Rumill v. Robbins*, 77 Me. 193; *Gore v. Fitch*, 54 Me. 41.

Massachusetts. — *Smith v. Lee*, 14 Gray (Mass.) 473; *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100. *Compare Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.

that the owner of the servient tenement provides a new road will not authorize him to close an established way without consent of the wayowner.¹

An Agreement to Change the Location of a Way Need Not Be in Writing, but may be inferred from the words or conduct of the parties.²

Rights in New Way. — The substitution of a new way by consent of both owners entitles the owner of the land to which the way is appurtenant to such rights in the new way as he had in the old, but to no more.³

(4) **Right to Go Extra Viam.** — The general rule that a traveler on a public way may pass over the adjoining land so far as may be necessary to avoid an impassable place, taking care to do no unnecessary damage,⁴ is not applicable to a private way that has become impassable. Thus, the person entitled to the way is not entitled by reason of the impassability thereof to deviate therefrom on to adjoining land of the owner of the servient tenement,⁵ unless such impassability is created by the owner of the land subject to the way,⁶ or unless the way is one by necessity.⁷ Some authorities, however, hold that there is no distinction in this respect between a way by necessity and a way acquired by prescription or by express grant or reservation, because a way by necessity is in reality nothing but a way by grant or reservation,⁸ the reasonable repair of which, as a general rule, is a duty devolving upon the party enjoying the benefit of the way.⁹

Michigan. — Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154.

New Jersey. — Manning v. Port Reading R. Co., 54 N. J. Eq. 46.

New York. — Wynkoop v. Burger, 12 Johns. (N. Y.) 222; Hines v. Hamburger, 14 N. Y. App. Div. 577.

Rhode Island. — Garraty v. Duffy, 7 R. I. 476; Frazier v. Berry, 4 R. I. 440.

Vermont. — Kinney v. Hooker, 65 Vt. 333, 36 Am. St. Rep. 864.

Wisconsin. — Fritsche v. Fritsche, 77 Wis. 266.

An Agreement for Substitution of a Way Runs with the Land and is binding upon subsequent alienees of the right of way. Greenwalt v. Horner, 6 S. & R. (Pa.) 71.

Privilege of Closing Old Way Valuable Consideration for New Way. — Butt v. Napier, 14 Bush (Ky.) 39.

1. **Provision for New Road Immaterial.** — Keating v. Hayden, 30 Ill. App. 433; Ritchey v. Welsh, 149 Ind. 214; Frazier v. Berry, 4 R. I. 440; Fritsche v. Fritsche, 77 Wis. 266. And see Wharton v. Hannon, 101 Ala. 554.

2. **Agreement for Change Need Not Be in Writing.** — Rumill v. Robbins, 77 Me. 193; Smith v. Lee, 14 Gray (Mass.) 473; Smith v. Barnes, 101 Mass. 275; Lawton v. Tison, 12 Rich. L. (S. Car.) 88. But see Nichols v. Peck, 70 Conn. 439, 66 Am. St. Rep. 122.

Acquiescence of Wayowner in Change of Location. — Wynkoop v. Burger, 12 Johns. (N. Y.) 222.

Acquiescence in Change No Waiver of Convenient Way. — Stockwell v. Fitzgerald, 70 Vt. 468.

Statements of Intention to Change in Future Inadmissible. — Wharton v. Hannon, 101 Ala. 554.

3. **Rights in New Way.** — Bangs v. Parker, 71 Me. 458; Atwater v. Bodfish, 11 Gray (Mass.) 150. See also Smith v. Barnes, 101 Mass. 275.

Way Substituted for Way in Fee Presumed to Be in Fee. — Beinlein v. Johns, 102 Ky. 570.

Obstruction of New Mode of Access. — A mode of access substituted by reason of impassability may not be obstructed by the grantor or by one holding under him so long as the original obstruction exists. Selby v. Nettlefold, L. R. 9 Ch. 111.

And the wayowner in such case may render the new way passable, as by filling a ditch from which a bridge has been removed. Hamilton v. White, 5 N. Y. 9, affirming 4 Barb. (N. Y.) 60.

4. See the title HIGHWAYS, vol. 15, p. 506.

5. **No Right to Deviate.** — Bullard v. Harrison, 4 M. & S. 387; Taylor v. Whitehead, 2 Dougl. 749; Bakeman v. Talbot, 31 N. Y. 371, 88 Am. Dec. 275; Holmes v. Seely, 19 Wend. (N. Y.) 507; Boyce v. Brown, 7 Barb. (N. Y.) 80; Williams v. Safford, 7 Barb. (N. Y.) 309.

The Roman Law was that a wayowner might, when the way was out of repair, go at will over any part of the land. 2 Black. Com. 36.

6. **Impassability Caused by Landowner.** — Horne v. Widlake, Yelv. 141; Talbot v. Thorn, 91 Ky. 417; Kent v. Judkins, 53 Me. 160, 87 Am. Dec. 544; Farnum v. Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330; Leonard v. Leonard, 2 Allen (Mass.) 543; Haley v. Colcord, 59 N. H. 7, 47 Am. Rep. 176; Hamilton v. White, 5 N. Y. 9. But compare Williams v. Safford, 7 Barb. (N. Y.) 309, not recognizing this exception.

Wayowner Must Not Do Unnecessary Damage. — Kent v. Judkins, 53 Me. 160, 87 Am. Dec. 544; Leonard v. Leonard, 2 Allen (Mass.) 543; Farnum v. Platt, 8 Pick. (Mass.) 339, 19 Am. Dec. 330.

Right of Deviation Protected by Injunction. — Selby v. Nettlefold, L. R. 9 Ch. 111.

7. **Exception to Rule Where Way Is by Necessity.** — Bass v. Edwards, 126 Mass. 445; Boyce v. Brown, 7 Barb. (N. Y.) 80; Johnson v. Borson, 77 Wis. 593, 20 Am. St. Rep. 146; Jarstadt v. Smith, 51 Wis. 96.

8. **No Distinction Between Way of Necessity and Other Ways.** — Williams v. Safford, 7 Barb. (N. Y.) 309. Compare Taylor v. Whitehead, 2 Dougl. 745.

9. **Duty of Wayowner to Repair.** — Holmes v. Seely, 19 Wend. (N. Y.) 507; Newkirk v. Sab-

c. GATES, BARS, AND FENCES — (1) *Gates and Bars* — In General. — The right of a person whose land is subject to a way to maintain gates across the way is dependent on the circumstances, for where a way is created by grant or reservation it is competent for the parties at that time to regulate the facilities for passage as well as the right of passage.¹

Where There Is a General Grant of a Private Way, express or implied, or by necessity, the rule is that the owner of the soil may maintain a gate or bar at the places where the way intersects the public road,² unless the nature of the use to which the way is to be applied indicates that the way is to be open and unobstructed.³ But the gate or bar must be of such a character that it does not unreasonably obstruct the use of the way.⁴

A Deed in General Terms not providing that the owner of the land over which the way passes may erect gates or bars does not necessarily imply either a right or a denial of the right.⁵

Where Existing Way Is Not Open. — Where there is a grant of an existing way which at the time is subject to gates or bars, and such gates or bars are suffered by the grantee to remain, the way may, in the absence of any showing to the contrary, be considered as having been taken subject to such incumbrances.⁶

Where Existing Way Is Unobstructed. — Where the grant is of a way as then laid

ler, 9 Barb. (N. Y.) 652. And see *supra*, this section, *Owner of Way — Repairs*.

1. *Gates and Bars* — In General. — *Cowling v. Higginson*, 4 M. & W. 245; *Amondson v. Severson*, 37 Iowa 602; *Short v. Devine*, 146 Mass. 119; *Hemphill v. Boston*, 8 Cush. (Mass.) 195, 54 Am. Dec. 749; *Sach v. Cordes*, 5 Ohio Cir. Dec. 67; *Knobloch v. Hollinger*, 3 Ohio Dec. 74.

2. *Rule Where Grant Is General* — *Illinois*. — *Green v. Goff*, 153 Ill. 534.

Indiana. — *Boyd v. Bloom*, 152 Ind. 152; *Frazier v. Myers*, 132 Ind. 71; *Phillips v. Dressler*, 122 Ind. 414, 17 Am. St. Rep. 375.

Iowa. — *Amondson v. Severson*, 37 Iowa 602; *Houpes v. Alderson*, 22 Iowa 160.

Kentucky. — *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409.

Louisiana. — *Patout v. Lewis*, 51 La. Ann. 210.

Maine. — *Ames v. Shaw*, 82 Me. 379.

Maryland. — *Frank v. Benesch*, 74 Md. 58, 28 Am. St. Rep. 237; *Baker v. Frick*, 45 Md. 337, 24 Am. Rep. 506.

Massachusetts. — *Short v. Devine*, 146 Mass. 119.

New Hampshire. — *Garland v. Furber*, 47 N. H. 301; *Bean v. Coleman*, 44 N. H. 539.

New York. — *Brill v. Brill*, 108 N. Y. 511; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275; *Huson v. Young*, 4 Lans. (N. Y.) 64.

Pennsylvania. — *Hartman v. Fick*, 167 Pa. St. 18, 46 Am. St. Rep. 659; *Connery v. Brooke*, 73 Pa. St. 80; *Kohler v. Smith*, 3 Pa. Super. Ct. 176.

Wisconsin. — *Dyer v. Walker*, 99 Wis. 404; *Wille v. Bartz*, 88 Wis. 424; *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 55; *Johnson v. Borson*, 77 Wis. 593, 20 Am. St. Rep. 146; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764.

3. *Rule Where Use Requires Open Way*. — *Amondson v. Severson*, 37 Iowa 602; *Houpes v. Alderson*, 22 Iowa 160; *Maxwell v. McAtee*, 9 B. Mon. (Ky.) 20, 48 Am. Dec. 409; *Garland v. Furber*, 47 N. H. 301; *Bakeman v. Talbot*,

31 N. Y. 366, 88 Am. Dec. 275; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764.

Where the Way Is Acquired by Prescription, if no gates are erected during the period necessary for perfecting title, none can be erected afterward. *Green v. Goff*, 153 Ill. 534; *Fankboner v. Corder*, 127 Ind. 164; *Ames v. Shaw*, 82 Me. 379; *Shivers v. Shivers*, 32 N. J. Eq. 578. But see *Hartman v. Fick*, 167 Pa. St. 18, 46 Am. St. Rep. 658.

A gate may be placed across a way granted for agricultural purposes. *Green v. Goff*, 153 Ill. 534; *Ames v. Shaw*, 82 Me. 379.

4. *Gate Must Cause No Unreasonable Obstruction*. — *Brill v. Brill*, 108 N. Y. 511; *Knobloch v. Hollinger*, 3 Ohio Dec. 74; *Hartman v. Fick*, 167 Pa. St. 18, 46 Am. St. Rep. 658; *Dyer v. Walker*, 99 Wis. 404; *Wille v. Bartz*, 88 Wis. 424; *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 55; *Johnson v. Borson*, 77 Wis. 593, 20 Am. St. Rep. 146; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764.

Agreement for Special Kind of Gate Must Be Complied With. — *Sach v. Cordes*, 5 Ohio Cir. Dec. 67.

Number of Gates. — The owner of a servient estate is not entitled to maintain an unreasonable number of gates. *Boyd v. Bloom*, 152 Ind. 152; *Phillips v. Dressler*, 122 Ind. 414, 17 Am. St. Rep. 375; *Newsom v. Newsom*, (Tenn. Ch. 1900) 56 S. W. Rep. 29.

Right to Gates Unreasonably Obstructing Way Not Implied. — *Jewell v. Clement*, 69 N. H. 133.

5. *No Implication of Right or Negation of Right*. — *Devore v. Ellis*, 62 Iowa 505; *O'Brien v. Goodrich*, 177 Mass. 32; *Jewell v. Clement*, 69 N. H. 133; *Garland v. Furber*, 47 N. H. 301; *Bean v. Coleman*, 44 N. H. 539; *Connery v. Brooke*, 73 Pa. St. 80.

6. *Where Existing Way Is Not Open*. — *Garland v. Furber*, 47 N. H. 301; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Connery v. Brooke*, 73 Pa. St. 80.

Where the Wayowner Has Surrendered His Right to an Open Way, the owner of the servient tenement may close the ends by gates. *Methodist*

out, and it is unobstructed by gates or bars when granted, neither the owner of the servient tenement nor the wayowner has afterwards a right to erect either gates or bars.¹

(2) *Fences*. — The owner of the soil may, in general, fence the way or leave it unfenced at his pleasure.²

d. BUILDINGS AND ERECTIONS — *Right to Construct*. — In the absence of any restriction by grant or otherwise, the owner of land subject to a way may construct a building or erection over it provided such building or erection does not prevent the wayowner from enjoying, in a reasonable manner, his right of passage for those purposes presumably in contemplation at the creation of the way.³

Where Building Is Obstruction. — Where, however, the terms of an instrument creating a way and the surrounding circumstances show that the purpose was that the way should be kept open and unobstructed, not only for passage, but for light, air, and prospect, any building or encroachment on the way that interferes with such light, air, and prospect constitutes an illegal obstruction.⁴

e. CULTIVATION OF LAND. — Whether the owner of the soil over which a way runs may cultivate such land depends upon the question whether the cultivation interferes with the right of way.⁵

4. Wrongful Use of Way. — The owner of land subject to a way has a right to protect his estate as owner of the soil. Accordingly, he may prevent by injunction a use of the way for purposes not authorized,⁶ or, in the event of an improper use of his land, may maintain an action to recover the possession of the land⁷ or to recover damages in trespass or case.⁸

Protestant Church v. Laws, 4 Ohio Cir. Dec. 562, 7 Ohio Cir. Ct. 211.

1. Existing Way Not Obstructed. — *Williams v. Clark*, 140 Mass. 238; *Welch v. Wilcox*, 101 Mass. 162, 100 Am. Dec. 113; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Newsom v. Newsom*, (Tenn. Ch. 1900) 56 S. W. Rep. 29.

Agreement for Unobstructed Way — *Grantee No Right to Erect Bars*. — *Mineral Springs Mfg. Co. v. McCarthy*, 67 Conn. 279.

Right to Unobstructed Way Waived by Permitting Gates. — *Frazier v. Myers*, 132 Ind. 71.

2. Right to Fence. — *Brill v. Brill*, 108 N. Y. 511; *Sizer v. Quinlan*, 82 Wis. 390, 33 Am. St. Rep. 55. *Compare Amondson v. Severson*, 37 Iowa 602.

Statutory Right of Landowner to Fence. — *Dwyer v. Olivari*, (Tex. 1891) 16 S. W. Rep. 800.

In the Absence of a Fence, the horses or cattle of the landowner must not obstruct the way, and the wayowner must exercise due and reasonable care to prevent his cattle or other animals from trespassing. *Brill v. Brill*, 108 N. Y. 511.

3. Right to Erect Buildings in General — *Massachusetts*. — *Baker v. Willard*, 171 Mass. 220; *Gerrish v. Shattuck*, 132 Mass. 235; *Brooks v. Reynolds*, 106 Mass. 31; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Russell v. Jackson*, 2 Pick. (Mass.) 574.

New Jersey. — *Sutton v. Groll*, 42 N. J. Eq. 213.

Pennsylvania. — *Stevenson v. Stewart*, 7 Phila. (Pa.) 293; *Kennedy v. Burgin*, 1 Phila. (Pa.) 441, 10 Leg. Int. (Pa.) 114.

Erection of Porte-cochère Projecting into Private Carriage Way. — *Clifford v. Hoare*, L. R. 9 C. P. 362.

Erection of Window Projecting on Way, but Not Interfering with Passage. — *Burnham v. Nevins*, 144 Mass. 88, 59 Am. Rep. 61.

Bridge over Way Sufficiently High Not to Obstruct Passage. — *Patterson v. Philadelphia, etc., R. Co.*, 8 Pa. Co. Ct. 186. See also *Atkins v. Bordman*, 2 Met. (Mass.) 457, 37 Am. Dec. 100; *Grafton v. Moir*, 130 N. Y. 465, 27 Am. St. Rep. 533; *Hollins v. Demorest*, 129 N. Y. 676, 42 N. Y. St. Rep. 398, in which cases arches over the way were held to be legal when at a sufficient height above the way to permit a use thereof for the purposes intended by the grant.

4. Where Building Is Obstruction. — *Atty.-Gen. v. Williams*, 140 Mass. 329, 54 Am. Rep. 468; *Salisbury v. Andrews*, 128 Mass. 336; *Brooks v. Reynolds*, 106 Mass. 31; *Schwörer v. Boylston Market Assoc.*, 99 Mass. 285; *Dexter v. Beard*, 130 N. Y. 549, *affirming* 53 Hun (N. Y.) 638.

5. Cultivation of Land. — *Pope v. Devereux*, 5 Gray (Mass.) 409; *Wells v. Tolman*, 156 N. Y. 636; *Bakeman v. Talbot*, 31 N. Y. 371, 88 Am. Dec. 275; *Moffitt v. Lytle*, 165 Pa. St. 173.

6. Wrongful Use of Way — *Injunction*. — *Wimbleton, etc., Conservators v. Dixon*, 1 Ch. D. 362; *Hoosier Stone Co. v. Malott*, 130 Ind. 24; *Greene v. Canny*, 137 Mass. 64.

7. Recovery of Possession. — *Senhouse v. Christian*, 1 T. R. 560; *Howell v. King*, 1 Mod. 190; *Kaler v. Beaman*, 49 Me. 207; *Chase v. Perry*, 132 Mass. 582; *Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302; *Davenport v. Lamson*, 21 Pick. (Mass.) 72; *Comstock v. Van Deusen*, 5 Pick. (Mass.) 163; *Smith v. Porter*, 10 Gray (Mass.) 66; *Morgan v. Moore*, 3 Gray (Mass.) 319; *Appleton v. Fullerton*, 1 Gray (Mass.) 186.

Right to Maintain Ejectment. — See the title EJECTMENT, vol. 10, p. 473 *et seq.*, and see *Cooper v. Smith*, 9 S. & R. (Pa.) 26, 11 Am. Dec. 658.

8. Recovery of Damages. — *Walker v. Gerhard*, 9 Phila. (Pa.) 116, 30 Leg. Int. (Pa.) 108; *Ste-*

What Constitutes Misuser. — What amounts to a misuser of a way is a question of fact dependent upon the terms of the grant or reservation, customary user, and total situation.¹

5. Obstruction of Way — *a.* **WHAT CONSTITUTES OBSTRUCTION.** — It is impossible to lay down any general rule as to what constitutes an interference with or obstruction to a private way with respect to the reasonable or proper use thereof. Each case must be determined upon its own merits.

Question of Fact. — In almost all cases the question what amounts to an interference with the reasonable use of the way or to an obstruction of such use is one of fact.²

Determination of Question. — In determining the question whether any particular act amounts to an obstruction, its necessity or convenience to the landowner and its inconvenience to the wayowner, together with all other surrounding circumstances affecting either party, must be considered.³

b. **REMEDIES** — (1) *Abatement by Wayowner.* — An obstruction may, with-

venson v. Stewart, 7 Phila. (Pa.) 293; *Lewis v. Carstairs*, 6 Whart. (Pa.) 193; *Kirkham v. Sharp*, 1 Whart. (Pa.) 323, 29 Am. Dec. 57; *Shroder v. Brenneman*, 23 Pa. St. 348; *Coleman's Appeal*, 62 Pa. St. 275.

A Mortgagor of Land Subject to a Way cannot maintain trespass against a stranger for using the land as a way where a mortgagee is in possession thereof for the purpose of foreclosure. *Sparhawk v. Bagg*, 16 Gray (Mass.) 583.

1. What Constitutes Misuser **Question of Fact.** — *Williams v. James*, L. R. 2 C. P. 577, 36 L. J. C. Pl. 256; *Hawkins v. Carbines*, 3 H. & N. 914, 27 L. J. Exch. 44; *Cowling v. Higginson*, 4 M. & W. 245; *Short v. Devine*, 146 Mass. 119; *Rowell v. Doggett*, 143 Mass. 483; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153; *Appleton v. Fullerton*, 1 Gray (Mass.) 186; *Herman v. Roberts*, 119 N. Y. 37, 16 Am. St. Rep. 800; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275.

2. What Amounts to Obstruction **Question of Fact** — *England.* — *Hutton v. Hamboro*, 2 F. & F. 218; *Austin v. Scottish Widows' Fund Mut. L. Assur. Soc.*, 8 L. R. Ir. 385.

California. — *Smith v. Worn*, 93 Cal. 206.

Indiana. — *Boyd v. Bloom*, 152 Ind. 152.

Maryland. — *Frank v. Benesch*, 74 Md. 58, 28 Am. St. Rep. 237; *Baker v. Frick*, 45 Md. 343, 24 Am. Rep. 506.

Massachusetts. — *Perry v. Snow*, 165 Mass. 23; *Gaw v. Hughes*, 111 Mass. 296; *Sargent v. Hubbard*, 102 Mass. 380; *Meehan v. Barry*, 97 Mass. 447; *Richardson v. Pond*, 15 Gray (Mass.) 387; *Johnson v. Kinnicutt*, 2 Cush. (Mass.) 153.

Michigan. — *Beecher v. People*, 38 Mich. 289, 31 Am. Rep. 316.

New Hampshire. — *Jewell v. Clement*, 69 N. H. 133.

New York. — *Brill v. Brill*, 108 N. Y. 511; *Bakeman v. Talbot*, 31 N. Y. 366, 88 Am. Dec. 275; *Huson v. Young*, 4 Lans. (N. Y.) 63.

Pennsylvania. — *Bellas v. Pardoe*, (Pa. 1888) 15 Atl. Rep. 665; *Ermentrout v. Stitzel*, 170 Pa. St. 540; *Moffitt v. Lytle*, 165 Pa. St. 173; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Connery v. Brooke*, 73 Pa. St. 80.

Vermont. — *Walker v. Pierce*, 38 Vt. 94.

Wisconsin. — *Wille v. Bartz*, 88 Wis. 424;

Johnson v. Borson, 77 Wis. 593, 20 Am. St. Rep. 146; *Whaley v. Jarrett*, 69 Wis. 613, 2 Am. St. Rep. 764.

Illustrations. — The following have been held not necessarily obstructions:

Stones Piled on Way. — *Peck v. Loyd*, 38 Conn. 566; *Kohler v. Smith*, 3 Pa. Super. Ct. 176.

Excavation in Way. — *Rivera v. Finn*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 22.

An excavation causing the way to fall in and to become utterly impassable is necessarily an obstruction although made under land adjoining the way. *Foley v. Wyeth*, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

Swinging Gates and Movable Bars. — *Ames v. Shaw*, 82 Me. 379; *Knobloch v. Hollinger*, 6 Ohio Cir. Dec. 424; *Kohler v. Smith*, 3 Pa. Super. Ct. 176.

Cultivation. — *Wells v. Tolman*, 156 N. Y. 636, reversing 88 Hun (N. Y.) 438.

Buildings. — *Atkins v. Bordman*, 2 Met. (Mass.) 475, 37 Am. Dec. 100.

3. Determination of Question. — *Boyd v. Bloom*, 152 Ind. 152; *Jewell v. Clement*, 69 N. H. 133; *Joyce v. O'Neal*, 64 N. H. 91; *Gardner v. Webster*, 64 N. H. 520; *Huson v. Young*, 4 Lans. (N. Y.) 63; *Moffitt v. Lytle*, 165 Pa. St. 173; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Connery v. Brooke*, 73 Pa. St. 80; *Johnson v. Borson*, 77 Wis. 593, 20 Am. St. Rep. 146.

The Suitableness for the Defendant's Purposes of a building situated on the land subject to the way has been held not to enter into the rightfulness of the obstruction caused thereby; the question is the defendant's right to erect it. *Blanchard v. Moulton*, 63 Me. 434.

Upon the Question Whether the Defendant's Obstruction Was Rightful, evidence of obstructions by other persons at other places is inadmissible. *Randall v. Chase*, 133 Mass. 210. See also *Golden v. Coonan*, 107 Iowa 209, holding it immaterial that the defendant had no right of way over third persons' lands to reach his own.

The Fact that a Gate Across the Way Has Been Left Open, whereby the defendant's cattle have strayed and trespassed, does not justify him in obstructing the way, in the absence of evidence that the gate was left open by the plaintiff. *Golden v. Coonan*, 107 Iowa 209.

out legal proceedings, be removed by the wayowner, provided that in so doing no breach of the peace be committed,¹ and the land may be adapted to its reasonable use as a way so as to do no unnecessary injury to adjoining property.²

(2) *Summary Removal*. — In *Georgia* the county commissioners and ordinaries may summarily remove obstructions from private ways acquired by seven years' prescriptive right or a longer possession or user. Such a way, however, must not exceed fifteen feet in width, and must have been kept open and in repair by the person requesting the removal.³

(3) *Action for Damages*. — An action at law in the nature of trespass on the case is the proper and ordinary remedy available to recover for damages caused by an interruption, disturbance, or obstruction of a private way,⁴ in

1. *Abatement by Wayowner — England*. — Sprigg v. Neal, 3 Lev. 92.

Illinois. — Keating v. Hayden, 30 Ill. App. 433.

Kentucky. — Hansford v. Berry, 95 Ky. 56.

Louisiana. — Patout v. Lewis, 51 La. Ann. 210.

Maine. — Morgan v. Boyes, 65 Me. 124.

Massachusetts. — Hayes v. De Vito, 141 Mass. 233; Dickinson v. Whiting, 141 Mass. 414; Goss v. Calhane, 113 Mass. 423.

New York. — McMillan v. Cronin, 75 N. Y. 474, 57 How. Pr. (N. Y.) 53; Williams v. Safford, 7 Barb. (N. Y.) 309.

Pennsylvania. — Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Brooke v. Connery, 7 Phila. (Pa.) 193.

Wisconsin. — Joyce v. Conlin, 72 Wis. 607; Chloupak v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858.

This May Be Done on the Theory that the obstruction of a way appurtenant to an estate is a private nuisance. 3 Black. Com. 218; Salter v. Taylor, 55 Ga. 310; Hart v. Taylor, 61 Ga. 156. See also Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441. But *aliter* of a way in gross. 2 Fitz Herbert N. B. 183, *citing* Year Book, 11 Hen. IV. 26a; 4 Edw. III., Nuisance 8. See generally as to the abatement of private nuisances, the title ABATEMENT OF NUISANCES, vol. 1, p. 63. Or the removal may be made on the ground that the grant of a private way confers the right to remove all obstructions to its enjoyment. McMillan v. Cronin, 75 N. Y. 474.

Failure to Obtain a Mandatory Injunction Does Not Bar the Right of abatement. Lane v. Capsey, (1891) 3 Ch. 411.

Removal of Fence Justified. — Moffitt v. Lytle, 165 Pa. St. 173.

Limb of Tree Projecting over Passway May Be Removed. — Sargent v. Hubbard, 102 Mass. 380.

An Inhabited House may be pulled down after notice and request to remove it. Lane v. Capsey, (1891) 3 Ch. 411.

2. Freeman v. Sayre 48 N. J. L. 37.

3. Buchanan v. Parks, 111 Ga. 873; Clark v. Haymans, 110 Ga. 326; Collier v. Farr, 81 Ga. 749; Woolbright v. Cureton, 76 Ga. 107; Nott v. Tinley, 69 Ga. 766; Brown v. Marshall, 63 Ga. 657; Leathers v. Furr, 62 Ga. 421.

The fifteen feet from which it is desired to remove the obstruction must be the same fifteen feet originally appropriated. Buchanan v. Parks, 111 Ga. 873; Clark v. Haymans, 110 Ga. 326; Peters v. Little, 95 Ga. 151; Collier v. Farr, 81 Ga. 749.

4. *Action for Damages — California*. — Hardin v. Sin Claire, 115 Cal. 460.

Kentucky. — Lexington City Nat. Bank v. Guynn, 6 Bush (Ky.) 486.

Maine. — Tabbutt v. Grant, 94 Me. 371; Lyon v. Lea, 84 Me. 254; Tibbetts v. Penley, 83 Me. 118; Stillwell v. Foster, 80 Me. 333; Blanchard v. Moulton, 63 Me. 434; Gore v. Fitch, 54 Me. 41; Tuttle v. Walker, 46 Me. 280; Winthrop v. Fairbanks, 41 Me. 307; Ballard v. Butler, 30 Me. 94.

Maryland. — Browne v. M. E. Church, 37 Md. 108; McTavish v. Carroll, 7 Md. 352, 61 Am. Dec. 353; Wright v. Freeman, 5 Har. & J. (Md.) 467; Hays v. Richardson, 1 Gill & J. (Md.) 366.

Massachusetts. — Humphreys v. Old Colony R. Co., 160 Mass. 323; White v. New York, etc., R. Co., 156 Mass. 181; Ballard v. Demmon, 156 Mass. 449; Shapine v. Shaw, 150 Mass. 262; Short v. Devine, 146 Mass. 119; Deerfield v. Connecticut River R. Co., 144 Mass. 325; Franklin Ins. Co. v. Cousens, 127 Mass. 258; O'Brien v. Schayer, 124 Mass. 211; Gaw v. Hughes, 111 Mass. 296; Fox v. Union Sugar Refinery, 109 Mass. 292; Cushing v. Adams, 18 Pick. (Mass.) 110; Simonds v. Wellington, 10 Cush. (Mass.) 313; Bowen v. Conner 6 Cush. (Mass.) 132; Kilburn v. Adams, 7 Met. (Mass.) 33, 39 Am. Dec. 754.

Michigan. — Bagley v. People, 43 Mich. 355, 38 Am. Rep. 192; People v. Jackson, 7 Mich. 432, 74 Am. Dec. 729.

Missouri. — Turner v. Williams, 76 Mo. 617; Snyder v. Warford, 11 Mo. 513, 49 Am. Dec. 94; Autenrieth v. St. Louis, etc., R. Co., 36 Mo. App. 254.

New Hampshire. — Low v. Streeter, 66 N. H. 36; Batchelder v. State Capital Bank, 66 N. H. 386; De Rochemont v. Boston, etc., R. Co., 64 N. H. 500; Smith v. Cushman, 59 N. H. 27; Carleton v. Cate, 56 N. H. 130; Smith v. Wiggin, 52 N. H. 112; Smith v. Wiggin, 48 N. H. 105; French v. Hayes, 43 N. H. 30, 80 Am. Dec. 127; Lamphier v. Worcester, etc., R. Co., 33 N. H. 495; Kimball v. Cochecho R. Co., 27 N. H. 448, 59 Am. Dec. 387.

New Jersey. — Street v. Griffiths, 50 N. J. L. 656; Hart v. Leonard, 42 N. J. Eq. 416; Osborne v. Butcher, 26 N. J. L. 308; Shivers v. Shivers, 32 N. J. Eq. 578, *affirmed* 35 N. J. Eq. 562.

New York. — Lambert v. Hoke, 14 Johns. (N. Y.) 383; Williams v. Safford, 7 Barb. (N. Y.) 309.

Pennsylvania. — Ellis v. American Academy

the absence of a statute providing another method of obtaining compensation.¹ The fact that the way was acquired under statute is not an objection to this form of remedy.² Neither trespass *vi et armis*³ nor ejectment⁴ will lie, however, for an interruption or disturbance of the way, because the way-owner has no estate or interest in the soil, but only the right of passing over it.

(4) *Injunction*. — An obstruction to a private way forms one of the classes of cases in which the equitable remedy by injunction may be sought, the principles upon which the relief is granted being similar to those which control in other cases.⁵

of Music, 120 Pa. St. 608, 6 Am. St. Rep. 739; Demuth v. Amweg, 90 Pa. St. 181; Connery v. Brooke, 73 Pa. St. 80; Cannon v. Boyd, 73 Pa. St. 179; McKee v. Perchment, 69 Pa. St. 342; Hall v. McCaughey, 51 Pa. St. 43; Arnold v. Cornman, 50 Pa. St. 361; Phillips v. Phillips, 48 Pa. St. 178, 86 Am. Dec. 577; Webster v. Ross, 42 Pa. St. 418; Steffy v. Carpenter, 37 Pa. St. 41; Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Okeson v. Patterson, 29 Pa. St. 22; Wissler v. Hershey, 23 Pa. St. 333; Shroder v. Brenneman, 23 Pa. St. 348; Reimer v. Stuber, 20 Pa. St. 458, 59 Am. Dec. 744; Ebner v. Stichter, 19 Pa. St. 19; Esling v. Williams, 10 Pa. St. 126; Williams v. Esling, 4 Pa. St. 486, 45 Am. Dec. 710; Prowattain v. Philadelphia, 17 Phila. (Pa.) 158, 42 Leg. Int. (Pa.) 170; Jones v. Park, 10 Phila. (Pa.) 165, 31 Leg. Int. (Pa.) 372; Church v. Vonneida, 6 Phila. (Pa.) 557, 25 Leg. Int. (Pa.) 149; Greenwalt v. Horner, 6 S. & R. (Pa.) 71; Watson v. Bioren, 1 S. & R. (Pa.) 227, 7 Am. Dec. 617; Van Meter v. Hankinson, 6 Whart. (Pa.) 307; Kirkham v. Sharp, 1 Whart. (Pa.) 328, 29 Am. Dec. 57.

South Carolina. — State v. Harden, 11 S. Car. 368; Capers v. Wilson, 3 McCord L. (S. Car.) 170; Barnwell v. Magrath, 1 McMull. L. (S. Car.) 174, 36 Am. Dec. 254.

1. Ross v. Georgia, etc., R. Co., 33 S. Car. 477.

2. Wright v. Freeman, 5 Har. & J. (Md.) 467; Lambert v. Hoke, 14 Johns. (N. Y.) 383.

3. *Trespass Will Not Lie*. — Morgan v. Boyes, 65 Me. 124; Wright v. Freeman, 5 Har. & J. (Md.) 467; O'Brien v. Flynn, 158 Mass. 198; Low v. Streeter, 66 N. H. 36; Chloupek v. Perotka, 89 Wis. 551, 46 Am. St. Rep. 858.

In *Connecticut* and *Maine* it has been held that an action analogous to trespass may be brought for obstruction, notwithstanding that a right of way is an incorporeal right of which there can be no physical possession. Hamilton v. Dennison, 56 Conn. 359; Chandler v. Goodridge, 23 Me. 78.

4. *Ejectment Not the Remedy*. — Taylor v. Gladwin, 40 Mich. 232; Smith v. Wiggin, 48 N. H. 105.

5. *Injunction — In General — England*. — Wells v. London, etc., R. Co., 5 Ch. D. 126, 37 L. T. N. S. 302; Newmarch v. Brandling, 3 Swanst. 99.

Canada. — Germain dit Belisle v. Pigeon, 16 Quebec Super. Ct. 235.

Alabama. — Coleman v. Butt, (Ala. 1901) 30 So. Rep. 364; Wharton v. Hannon, 101 Ala. 554; McBryde v. Sayre, 86 Ala. 458; Lide v. Hadley, 36 Ala. 627, 76 Am. Dec. 338.

California. — Peterson v. Machado, (Cal. 1896) 43 Pac. Rep. 611; Stallard v. Cushing, 76 Cal. 472.

Illinois. — Lowery v. Pekin, 186 Ill. 398; McCann v. Day, 57 Ill. 101; Roberts v. Stephens, 40 Ill. App. 138.

Iowa. — Swan v. Burlington, etc., R. Co., 72 Iowa 650; Devore v. Ellis, 62 Iowa 505.

Kentucky. — Calvert v. Weddle, (Ky. 1898) 44 S. W. Rep. 648; Henry v. Louisville, (Ky. 1897) 42 S. W. Rep. 94; Gridith v. Rigg, (Ky. 1896) 37 S. W. Rep. 58; Prewitt v. Graves, (Ky. 1896) 35 S. W. Rep. 263; May v. Blackburn, (Ky. 1894) 25 S. W. Rep. 112; Conyers v. Scott, 94 Ky. 123; O'Daniel v. O'Daniel, 88 Ky. 185; Combs v. Stewart, 10 B. Mon. (Ky.) 463; Hall v. McLeod, 2 Met. (Ky.) 98, 74 Am. Dec. 400.

Maine. — Mussey v. Union Wharf, 41 Me. 34.

Massachusetts. — Prescott v. Prescott, 175 Mass. 64; Googins v. Boston, etc., R. Co., 155 Mass. 505; Burnham v. Nevins, 144 Mass. 88, 59 Am. Rep. 61; Gerrish v. Shattuck, 128 Mass. 571, 132 Mass. 235; Nash v. New England Mut. L. Ins. Co., 127 Mass. 91; Cadigan v. Brown, 120 Mass. 493; Washburn v. Miller, 117 Mass. 376.

Michigan. — McConnell v. Rathbun, 46 Mich. 303; Smith v. Lock, 18 Mich. 56.

Mississippi. — Lanier v. Booth, 50 Miss. 410.

Missouri. — Campbell v. Kuhlmann, 39 Mo. App. 628.

New Hampshire. — White v. Eagle, etc., Hotel Co., 68 N. H. 38; Cox v. Leviston, 63 N. H. 283; Webber v. Gage, 39 N. H. 182.

New Jersey. — Hart v. Leonard, (N. H. 1885) 2 Atl. Rep. 36, 42 N. J. Eq. 416; Gawtry v. Leland, 40 N. J. Eq. 323; French v. Smith, 40 N. J. Eq. 361.

New York. — Ketchum v. Edwards, 153 N. Y. 534; Haight v. Littlefield, 147 N. Y. 338; Longendyck v. Anderson, (Supm. Ct.) 59 How. Pr. (N. Y.) 1; Wheeler v. Gilsey, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139; Parsons v. Garner, 5 Hun (N. Y.) 112; Protestant Reformed Dutch Church v. Bogardus, 5 Hun (N. Y.) 304; Ranscht v. Wright, 9 N. Y. App. Div. 108; Peabody v. Chandler, (Supm. Ct. Tr. T.) 17 Misc. (N. Y.) 655; Valentine v. Schreiber, 3 N. Y. App. Div. 235.

Ohio. — Shields v. Titus, 46 Ohio St. 528.

Pennsylvania. — Haas v. Bergen, 167 Pa. St. 408; Wilkinson v. Suplee, 166 Pa. St. 315; Kraut's Appeal, 71 Pa. St. 64; Rhea v. Forsyth, 37 Pa. St. 503, 78 Am. Dec. 441; Hunter v. Wilcox, 23 Pa. Co. Ct. 191; Weidner v. Dauth, 21 Pa. Co. Ct. 440; Kennedy v. Burgin, 1 Phila. (Pa.) 441, 10 Leg. Int. (Pa.) 114.

Rhode Island. — Chapin v. Brown, 15 R. I. 579.

Vermont. — Stockwell v. Fitzgerald, 70 Vt. 468.

Right Extinguished or Waived. — Where it appears that a right of passage which previously existed has been extinguished, or that the right has been waived, no injunction is warranted.¹

Establishment of Complainant's Right at Law. — To warrant the granting of an injunction to prevent an interference with or obstruction to a private way, the right of passage must, in accordance with general principles, either have been established at law or the facts upon which it depends must be clear and undisputed.²

Mandatory Injunction. — The right to an injunction is not generally affected by the fact that the obstruction is actually in existence at the time when relief is sought, and a mandatory injunction compelling the removal of the obstruction will be issued in cases where it is the obvious intention of the landowner permanently to prevent the use of the way.³

An Injunction Is Not Available where a full and complete remedy for an obstruction by an action at law is provided by statute.⁴

West Virginia. — *Rogerson v. Shepherd*, 33 W. Va. 307.

And see generally the titles INJUNCTIONS, vol. 16, p. 352 *et seq.*; NUISANCES, vol. 21, p. 703.

Under a grant for a private right of passage to be enjoyed in the same manner and as fully as if the road were public, the wayowner is entitled to an injunction restraining the maintenance of a ditch placed along the soil of the private way when such ditch would amount to a nuisance on a public road. *Nicol v. Beaumont*, 53 L. J. Ch. 853.

Where the right is clear and not doubtful, it is not necessary for the wayowner to prove special damage. *Hacke's Appeal*, 101 Pa. St. 245.

An Injunction Has Been Granted Where the Way Was Necessary and the Only Means of Access. — *Ford v. Harris*, 95 Ga. 97; *Jay v. Michael*, 92 Md. 198; *Shibley v. Caples*, 17 Md. 183; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468; *Lathrop v. Elsner*, 93 Mich. 599; *Lakeman v. Hannibal*, etc., R. Co., 36 Mo. App. 363; *Morton v. Thompson*, 69 Vt. 432.

Or Where It Was Highly Convenient and Beneficial. — *Smith v. Young*, 160 Ill. 163; *Newell v. Sass*, 142 Ill. 104; *McTavish v. Carroll*, 17 Md. 1; *Shibley v. Caples*, 17 Md. 179; *Roman v. Strauss*, 10 Md. 89.

Or Where Obstruction Was Continuous and Injury Irreparable. — *Kittle v. Pfeiffer*, 22 Cal. 484; *Russell v. Napier*, 80 Ga. 77; *Deer v. Doherty*, 26 Pittsb. Leg. J. N. S. (Pa.) 104.

So when the obstruction is absolute, *Trump v. McDonnell*, 120 Ala. 200; *Rivera v. Finn*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 22; *Bentley v. Root*, 19 R. I. 205; or the injury is permanent and irreparable, *Jay v. Michael*, 92 Md. 198; *Schaidt v. Blaul*, 66 Md. 141; *Shibley v. Caples*, 17 Md. 183; *Amelung v. Seekamp*, 9 Gill & J. (Md.) 468.

A single threatened act of obstruction is not sufficient if there are other ways of access. *Young v. Spangler*, 1 Ohio Cir. Dec. 636.

The erection of poles and wires for the supply of electric lights is an obstruction which may be enjoined, as the injury is continuing. *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 69 Am. St. Rep. 286.

1. Extinguishment of Right. — *Durkee v. Jones*, 27 Colo. 159; *Capron v. Greenway* 74 Md. 289.

Waiver of Right. — *Ewert v. Burtis*, (N. J. 1888) 12 Atl. Rep. 893.

Laches on the part of the wayowner may affect his right to an injunction restraining an obstruction. *Wintle v. Bristol*, etc., R. Co., 6 L. T. N. S. 20.

2. Establishment of Right at Law — *England.* — *Harris v. Jenkins*, 22 Ch. D. 481; *Collins v. Slade*, 23 W. R. 199.

California. — *Kittle v. Pfeiffer*, 22 Cal. 484.

Georgia. — *Ford v. Harris*, 95 Ga. 97; *Russell v. Napier*, 80 Ga. 77; *Kirkpatrick v. Brown*, 59 Ga. 450.

Illinois. — *Yeager v. Manning*, 183 Ill. 275; *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 69 Am. St. Rep. 286; *Smith v. Young*, 160 Ill. 163; *Newell v. Sass*, 142 Ill. 104; *Oswald v. Wolf*, 129 Ill. 200.

Kentucky. — *Brizzalero v. Senour*, 82 Ky. 353.

Maryland. — *Shibley v. Caples*, 17 Md. 179; *Pue v. Pue*, 4 Md. Ch. 386.

Michigan. — *Lathrop v. Elsner*, 93 Mich. 599; *Fox v. Pierce*, 50 Mich. 505.

Ohio. — *Young v. Spangler*, 1 Ohio Cir. Dec. 636.

Pennsylvania. — *Manbeck v. Jones*, 190 Pa. St. 171; *Hacke's Appeal*, 101 Pa. St. 245; *Deer v. Doherty*, 26 Pittsb. Leg. J. N. S. (Pa.) 104.

Vermont. — *Morton v. Thompson*, 69 Vt. 432.

Denial of Preliminary Injunction Where Right Is Disputed. — *Ewert v. Burtis*, (N. J. 1888) 12 Atl. Rep. 893.

3. *Boland v. St. John's Schools*, 163 Mass. 229; *Starkie v. Richmond*, 155 Mass. 188; *Lakeman v. Hannibal*, etc., R. Co., 35 Mo. App. 363; *Shivers v. Shivers*, 32 N. J. Eq. 578, affirmed 35 N. J. Eq. 562.

Removal of Buildings Ordered. — *Lane v. Capsey*, (1891) 3 Ch. 411; *Gormley v. Clark*, 134 U. S. 338; *Kana v. Bolton*, 36 N. J. Eq. 21. But see *Lexington City Nat. Bank v. Guynn*, 6 Bush (Ky.) 486.

Wayowner Cannot Be Compelled to Sell in Lieu of Injunction. — *Krehl v. Burrell*, 7 Ch. D. 551; *Tucker v. Howard*, 128 Mass. 361.

4. *Davis v. Weymouth*, 80 Me. 307. And see generally the title INJUNCTIONS, vol. 16, p. 354.

(5) *Action to Quiet Title.* — In some jurisdictions the title to a way actually enjoyed by a landowner may be quieted by means of an action to quiet title.¹

(6) *Criminal Prosecution.* — The obstruction of a private way is not a wrong of a public nature that can at common law be punished as a criminal offense.²

c. WHO MAY SUE. — The Owner of the tenement to which the way attaches is entitled to maintain an action for an obstruction or disturbance of the way.³

Lessees have a right to sue for an obstruction of a way attached to a tenement used and occupied by them as tenants.⁴

Lessors. — The fact that the land to which the way attaches is in the occupation of a tenant is not an objection to the lessor's right to sue for an obstruction to the way.⁵

One of Several Entitled to Use a Way has a right to take proceedings for an obstruction of the way, independently of the others.⁶

d. WHO MAY BE SUED. — Any person who creates or assists in creating and maintaining an obstruction is liable to be sued therefor.⁷

e. ACCRUAL OF RIGHT OF ACTION. — Whenever the use of a way is obstructed or interrupted, a right of action accrues although no actual damage results from such interruption, and it is not necessary for the wayowner to demand the removal of the obstruction before suit.⁸

f. ESSENTIALS TO RECOVERY. — In order to recover damages for the obstruction of a private way the plaintiff must prove not only the obstruction, but his right to use the way without obstruction, and to prove this right he must establish a way acquired by one of the methods heretofore referred to.⁹

1. Action to Quiet Title. — *Roush v. Roush*, 154 Ind. 562; *Bowditch v. Gardner*, 113 Mass. 315.

2. Not Criminal Offense. — *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 192; *Tillman v. People*, 12 Mich. 401; *People v. Jackson*, 7 Mich. 432, 71 Am. Dec. 729; *State v. Harden*, 11 S. Car. 368; *State v. Randall*, 1 Strobb. L. (S. Car.) 110, 47 Am. Dec. 548.

Penalty — Maryland Statute. — In *Wright v. Freeman*, 5 Har. & J. (Md.) 467, it was held that the penalty for obstructing a way, inflicted by Stat. Md. 1785, c. 49, could not be recovered by the wayowner, as it was not given as a compensation to the party aggrieved, the disturbance for which the penalty was inflicted being styled an offense against the state.

3. Owner. — *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *Morgan v. Moore*, 3 Gray (Mass.) 319; *Hardy v. Alabama, etc.*, R. Co., 73 Miss. 719.

One in Possession, Successor in Title of Original Purchaser. — *Ford v. Harris*, 95 Ga. 97.

Reversioner Where Estate Permanently Injured. — *Hopwood v. Schofield*, 2 M. & Rob. 34; *Bell v. Midland R. Co.*, 10 C. B. N. S. 287, 100 E. C. L. 287; *Kidgell v. Moore*, 9 C. B. 364; *Sparhawk v. Bagg*, 16 Gray (Mass.) 583.

4. Lessees. — *Carleton v. Cate*, 56 N. H. 130; *Avery v. New York Cent., etc.*, R. Co., 106 N. Y. 142.

A Tenant at Will may sue. *Hamilton v. Dennison*, 56 Conn. 359; *Foley v. Wyeth*, 2 Allen (Mass.) 131, 79 Am. Dec. 771.

5. Lessors. — *Cushing v. Adams*, 18 Pick. (Mass.) 110; *Okeson v. Patterson*, 29 Pa. St. 22; *Deer v. Doherty*, 26 Pittsb. Leg. J. N. S. (Pa.) 104.

6. Right of Cotenants to Sue for Injuries to Common Property in General. — *Swift v. Coker*,

83 Ga. 789, 20 Am. St. Rep. 347; *Yeager v. Manning*, 183 Ill. 275; *Carpenter v. Capital Electric Co.*, 178 Ill. 29, 69 Am. St. Rep. 286; *McKenzie v. Elliott*, 134 Ill. 156; *Clay v. Cline*, 9 Ohio Cir. Dec. 871.

7. Any Person Who Assists in Obstructing May Be Sued. — *Hardin v. Sin Claire*, 115 Cal. 460.

Knowledge of and Consent to Obstruction Sufficient. — *Dennis v. Sipperly*, 17 Hun (N. Y.) 69.

8. When Action Accrues. — *Miller v. Richards*, 139 Ind. 263; *Collins v. St. Peters*, 65 Vt. 618.

Notice of Intention to Use Way. — The owner of land over which there is merely a right of passage at certain times is entitled to reasonable notice of an intention to use the way before any liability for an obstruction on his part can arise. *Mansfield v. Shepard*, 134 Mass. 520.

9. Proof of Right of Way Essential. — *Tibbetts v. Penley*, 83 Me. 118; *Smith v. Cushman*, 59 N. H. 27; *Osborne v. Butcher*, 26 N. J. L. 308; *Lawton v. Rivers*, 2 McCord L. (S. Car.) 445, 13 Am. Dec. 741.

As to Methods of Acquisition, see *supra*, this title, *Acquisition*.

Location and Extent of Way to Be Shown. — *Harris v. Jenkins*, 22 Ch. D. 481; *Fox v. Pierce*, 50 Mich. 505; *Shields v. Titus*, 46 Ohio St. 528. See also *Smith v. Lee*, 14 Gray (Mass.) 473.

Recitals of Deed Evidence of Location. — *Randall v. Chase*, 133 Mass. 210.

Line of County Road Evidence of Location. — *Randall v. Chase*, 133 Mass. 210.

Width of Passageway — Proof by Deeds to Predecessor. — *Brown v. Stone*, 10 Gray (Mass.) 61, 69 Am. Dec. 303.

Evidence of Duration of User Admissible. — *Hamilton v. Dennison*, 56 Conn. 359; *Roush v. Roush*, 154 Ind. 562.

g. **DAMAGES.** — The general rules relating to the recovery of damages for torts to real property are applicable to actions for the obstruction or disturbance of a private way.¹ Thus, proof that the wayowner has suffered actual or special damage is not necessary,² but nominal damages are always recoverable.³ There may, however, be under certain circumstances a recovery of punitive or exemplary damages.⁴ As a general rule, there can be a recovery only of such damages as were suffered up to the institution of the action.⁵

Entire Damages Recoverable. — A person causing an entire obstruction of a way is responsible for the whole damage caused thereby, notwithstanding there are partial obstructions created by others.⁶

Matter in Mitigation of Damages may be shown. Thus, the defendant may show that the way obstructed is not a strict necessity.⁷

V. EXTINGUISHMENT OF WAY — 1. **In General** — *a.* **BY RELEASE OR ABANDONMENT** — (1) *In General.* — A way owned by more than one person cannot be released or abandoned by one of such owners to the detriment of the other or others,⁸ although one owner may abandon his own right.⁹

(2) *Release.* — A way may be extinguished by a release under seal,¹⁰ but as it is an interest in land within the statute of frauds a deed is essential.¹¹

But an Executed Parol Agreement may amount to an abandonment and extinguish the way.¹²

1. Damages in General. — See the titles **DAMAGES**, vol. 8, pp. 640, 684; **NUISANCES**, vol. 21, p. 725 *et seq.*

Damages Exclusively Question for Jury. — *Bump v. Sanner*, 37 Md. 621.

Measure of Damage — Difference in Value of Land Before and After Obstruction. — *Autenrieth v. St. Louis, etc., R. Co.*, 36 Mo. App. 254.

Diminution in Value of the Use of Land while a way is obstructed is an element of damage to be considered. *Bannon v. Romiser*, (Ky. 1896) 35 S. W. Rep. 280.

Cost of Repairs to Way. — *Hill v. Hagaman*, 84 Ind. 287.

Damages Not Limited to Cost of Removing Obstruction. — *McTavish v. Carroll*, 13 Md. 429.

The Injury Caused through Wrongful Use by Trespassers, including an increase in the cost of repairs, is the ordinary measure of damages in an action for the partial obstruction of a way. *Johnson v. Arnold*, 91 Ga. 659.

2. Proof of Actual or Special Damage Not Necessary. — *Tuttle v. Walker*, 46 Me. 280; *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Williams v. Esling*, 4 Pa. St. 486, 45 Am. Dec. 710; *Kirkham v. Sharp*, 1 Whart. (Pa.) 333, 29 Am. Dec. 57; *Collins v. St. Peters*, 65 Vt. 618. And see the title **NUISANCES**, vol. 21, p. 712.

3. Nominal Damages for Obstruction Always Recoverable. — *Fetter v. Schmidt*, 5 Lanc. L. Rev. 9.

Nominal Damages Must Be Found by Jury. — *Fisher v. Farley*, 23 Pa. St. 501.

Nominal Damages Only Recoverable Where No Substantial Injury. — *Fitzpatrick v. Boston, etc., R. Co.*, 84 Me. 33; *McDonnell v. Cambridge R. Co.*, 151 Mass. 159.

4. Punitive Damages Recoverable for Continuance of Obstruction Pendente Lite. — *Ellis v. American Academy of Music*, 120 Pa. St. 608, 6 Am. St. Rep. 739; *Williams v. Esling*, 4 Pa. St. 486, 45 Am. Dec. 710.

Exemplary Damages Recoverable for Wilful Obstruction. — *Bennett v. Biddle*, 150 Pa. St. 420; *Burnham v. Jenness*, 54 Vt. 272.

No Recovery for Damage Subsequent to Removal of Obstruction. — *McTavish v. Carroll*, 17 Md. 1. **Right to Recover Indirect Damages.** — *Adams v. Barry*, 10 Gray (Mass.) 361.

5. Damages Recoverable Only to Institution of Action. — *Cole v. Sprowl*, 35 Me. 161, 56 Am. Dec. 696; *Freeman v. Sayre*, 48 N. J. L. 37; *Brewster v. Sussex R. Co.*, 40 N. J. L. 57.

Compensation for loss after the action is brought must be recovered in another action. *Brewster v. Sussex R. Co.*, 40 N. J. L. 57. But see *Autenrieth v. St. Louis, etc., R. Co.*, 36 Mo. App. 254.

6. Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296.

7. Way Not Strictly Necessary. — *Demuth v. Amweg*, 90 Pa. St. 181.

8. Co-owners. — *Robert v. Thompson*, (Supm. Ct. Spec. T.) 16 Misc. (N. Y.) 638; *McKee v. Perchment*, 69 Pa. St. 342.

9. Steere v. Tiffany, 13 R. I. 568. See also *Crain v. Fox*, 16 Barb. (N. Y.) 184; *Corning v. Gould*, 16 Wend. (N. Y.) 531.

10. Release of Way. — *Wright v. Freeman*, 5 Har. & J. (Md.) 467; *Richards v. Attleborough Branch R. Co.*, 153 Mass. 120.

Release of Statutory Way. — *Wright v. Freeman*, 5 Har. & J. (Md.) 467.

11. Deed Essential. — *Pope v. Devereux*, 5 Gray (Mass.) 409. See generally the titles **DEEDS**, vol. 9, p. 100; **EASEMENTS**, vol. 10, p. 432; **RELEASE**.

Parol Agreement No Release of Way. — *Pue v. Pue*, 4 Md. Ch. 386; *Addison v. Hack*, 2 Gill (Md.) 222, 41 Am. Dec. 421; *Dyer v. Sanford*, 9 Met. (Mass.) 395, 43 Am. Dec. 399; *Riehle v. Heulings*, 38 N. J. Eq. 20; *Longendyck v. Anderson*, (Supm. Ct.) 59 How. Pr. (N. Y.) 1; *Potter v. Iselin*, 31 Hun (N. Y.) 134.

12. See infra, this section, *Abandonment by Acts in Pais*; and the titles **EASEMENTS**, vol. 10, p. 432; **LICENSE (REAL PROPERTY)**, vol. 12, p. 1145.

A parol agreement to extinguish a way is, when partially performed, valid and operative as an equitable estoppel to extinguish the

(3) *Abandonment by Acts in Pais.* — A party entitled to a private way may abandon and extinguish his right by acts *in pais*, without deed or other writing.¹

Acts Relied On to Show Abandonment Must Be Unequivocal Acts of the owner of the dominant tenement indicating a clear intention to abandon.² Mere nonuser of a private way is not sufficient proof of an abandonment.³ Thus, the fact that a route just as convenient as an old route has been regularly used as a substitute by the wayowner is not, standing by itself, proof of abandonment.⁴

Nonuser Accompanied by Acts Showing Intention to Abandon. — Nonuser, however, accompanied by acts on the part of the owner of either the dominant or the servient tenement which manifest an intention to abandon, and which destroy the object for which the way was created or the means of its enjoyment, will effect an abandonment.⁵

right of passage. *Pope v. O'Hara*, 48 N. Y. 446.

1. Abandonment by Acts in Pais. — *Duval v. Becker*, 81 Md. 537; *Vogler v. Geiss*, 51 Md. 408; Boston, etc., R. Corp. v. Doherty, 154 Mass. 314; *Scott v. Moore*, 98 Va. 668. See the titles EASEMENTS, vol. 10, p. 434; LICENSE (REAL PROPERTY), vol. 18, p. 1145.

Executed Oral Agreement to Abandon. — *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3; *Warshauer v. Randall*, 109 Mass. 586; *King v. Murphy*, 140 Mass. 254; *Pope v. Devereux*, 5 Gray (Mass.) 409. And see references in the last paragraph.

Question of Abandonment One of Fact. — *James v. Stevenson*, (1893) A. C. 162; *Tibbetts v. Penley*, 83 Me. 118; *Browne v. M. E. Church*, 37 Md. 108; *Pope v. Devereux*, 5 Gray (Mass.) 409; *Welsh v. Taylor*, 134 N. Y. 450. See the title EASEMENTS, vol. 10, p. 436.

2. Acts Relied on for Abandonment Must Be Clear. — *Smith v. Worn*, 93 Cal. 206; *Duval v. Becker*, 81 Md. 537; *Vogler v. Geiss*, 51 Md. 408; *Dill v. Board of Education*, 47 N. J. Eq. 421; *Ermentrout v. Stitzel*, 170 Pa. St. 540. See also the title EASEMENTS, vol. 10, p. 435.

Slight Alteration of Way Not Proof of Abandonment. — *Faulkner v. Duff*, (Ky. 1892) 20 S. W. Rep. 227; *Hart v. Leonard*, (N. J. 1885) 2 Atl. Rep. 36.

3. Nonuser — England. — *Reg. v. Chorley*, 12 Q. B. 515, 64 E. C. L. 515.

California. — *Currier v. Howes*, 103 Cal. 431.

Georgia. — *Ford v. Harris*, 95 Ga. 97.

Illinois. — *Kuecken v. Voltz*, 110 Ill. 264.

Kansas. — *Edgerton v. McMullan*, 55 Kan. 90.

Kentucky. — *Johnson v. Clark*, (Ky. 1900) 57 S. W. Rep. 474.

Maine. — *Tabbutt v. Grant*, 94 Me. 371; *Pratt v. Sweetser*, 68 Me. 344; *Farrar v. Cooper*, 34 Me. 394.

Maryland. — *Duval v. Becker*, 81 Md. 537; *Vogler v. Geiss*, 51 Md. 408.

Massachusetts. — *King v. Murphy*, 140 Mass. 254; *Barnes v. Lloyd*, 112 Mass. 224; *Hayford v. Spokesfield*, 100 Mass. 491; *Bannon v. Angier*, 2 Allen (Mass.) 128; *White v. Crawford*, 10 Mass. 183.

Michigan. — *Lathrop v. Elsner*, 93 Mich. 599.

Missouri. — *Roanoke Invest. Co. v. Kansas City, etc., R. Co.*, 108 Mo. 50.

New Jersey. — *Manning v. Port Reading R. Co.*, 54 N. J. Eq. 46; *Dill v. Board of Education*, 47 N. J. Eq. 421; *Riehle v. Heulings*, 38 N. J. Eq. 20.

New York. — *Hennessy v. Murdock*, 137 N. Y. 317; *Welsh v. Taylor*, 134 N. Y. 450, *reversing* (Supm. Ct. Gen. T.) 27 N. Y. St. Rep. 301, which *overruled* on reargument 50 Hun (N. Y.) 137; *Wiggins v. McCleary*, 49 N. Y. 346; *Pope v. O'Hara*, 48 N. Y. 446; *Smyles v. Hastings*, 22 N. Y. 217, *affirming* 24 Barb. (N. Y.) 44; *Valentine v. Schreiber*, 3 N. Y. App. Div. 235; *Longendyck v. Anderson*, (Supm. Ct.) 59 How. Pr. (N. Y.) 1; *Tyler v. Cooper*, 47 Hun (N. Y.) 94; *Brady v. Brady*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 411; *Marshall v. Wenninger*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 527.

Ohio. — *O'Ferrall v. Chase*, 7 Ohio Dec. (Reprint) 242, 2 Cinc. L. Bul. 4.

Pennsylvania. — *Bombaugh v. Miller*, 82 Pa. St. 203; *Hall v. McCaughey*, 51 Pa. St. 43; *Yeakle v. Nace*, 2 Whart. (Pa.) 123.

See also the title EASEMENTS, vol. 10, p. 436.

The Nonuser of a Way Acquired by Adverse User should be for a time equal to that required to acquire the way. *Browne v. M. E. Church*, 37 Md. 108; *Jones v. Van Bochove*, 103 Mich. 98; *Miller v. Garlock*, 8 Barb. (N. Y.) 153. See also *Thompson v. Meyers*, 34 La. Ann. 615.

4. Substitution of Way. — *Ward v. Ward*, 7 Exch. 838; *Lovell v. Smith*, 3 C. B. N. S. 120, 91 E. C. L. 120; *Nichols v. Peck*, 70 Conn. 439, 66 Am. St. Rep. 122; *Johnson v. Clark*, (Ky. 1900) 57 S. W. Rep. 474; *Jamaica Pond Aqueduct Corp. v. Chandler*, 121 Mass. 3; *Crounse v. Wemple*, 29 N. Y. 540.

The change of location of a way with the consent of the assignee of the original grantee under an agreement that the original grantee's rights should not be affected is not an abandonment of the right of way. *Kent Furniture Mfg. Co. v. Long*, 111 Mich. 383.

5. Cesser Coupled with Other Acts Sufficient. — *Vogler v. Geiss*, 51 Md. 408; *Jones v. Van Bochove*, 103 Mich. 98; *Roanoke Invest. Co. v. Kansas City, etc., R. Co.*, 108 Mo. 50; *Suydam v. Dunt*, 84 Hun (N. Y.) 506; *Welsh v. Taylor*, 134 N. Y. 450, *Crain v. Fox*, 16 Barb. (N. Y.) 184; *Scott v. Moore*, 98 Va. 668. See also the title EASEMENTS, vol. 10, p. 437.

An Agreement to Substitute a New Path for an Old One may be shown by conduct as well as by words. *Tabbutt v. Grant*, 94 Me. 371. See also *Pope v. Devereux*, 5 Gray (Mass.) 409.

Length of Nonuser Only One Material Element. — *Louisville, etc., R. Co. v. Covington*, 2 Bush (Ky.) 526; *Pope v. Devereux*, 5 Gray (Mass.) 409.

Adverse User as Proof of Abandonment. — *Currier v. Howes*, 103 Cal. 431; *Bannon v. Angier*,

User of the Way for Purposes Not Contemplated has been considered to be sufficient proof of abandonment.¹

Obstructions. — The existence of permanent obstructions erected by the wayowner² or acquiesced in by him³ is strong evidence of an intention to abandon, although the placing of a temporary obstruction by the wayowner or an acquiescence therein by him is not so considered.⁴

b. BY UNITY OF SEIZIN OR MERGER. — Where the ownership of the land subject to a private way and of the land to which such way is appurtenant become united in the same person, an extinguishment of the way is effected, because the essential ingredient of a way, viz., a right of passage over another's land, disappears.⁵

c. DEDICATION. — A private way being a property right in the wayowner of which he cannot be deprived, regardless of the question whether he would be injured by the taking, the owner of the servient tenement cannot by dedication of the way deprive the wayowner of his rights, for when the public authorities have taken possession and control of the way it might be put to uses which would injure him, or it might be repaired and improved in a manner which would result in his injury. The way, of course, may be made public by dedication, but in that case the wayowner must have released his rights or must have been deprived of them by process of law.⁶

d. EMINENT DOMAIN. — The exercise of the right of eminent domain extinguishes a right of way to which the land taken is subject.⁷

² Allen (Mass.) 128; Jennison v. Walker, 11 Gray (Mass.) 423; Arnold v. Stevens, 24 Pick. (Mass.) 111, 35 Am. Dec. 305; Street v. Griffiths, 50 N. J. L. 556; Yeakle v. Nace, 2 Whart. (Pa.) 123; Galveston v. Williams, 69 Tex. 449. See also Warshauer v. Randall, 109 Mass. 586.

¹ **User of Way for Purposes Not Contemplated.** — Louisville, etc., R. Co. v. Covington, 2 Bush (Ky.) 526; Crain v. Fox, 16 Barb. (N. Y.) 184.

² **Permanent Obstructions.** — Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296.

³ Stein v. Dahm, 96 Ala. 481; Ballard v. Butler, 30 Me. 94; Browne v. M. E. Church, 37 Md. 108; Pope v. Devereux, 5 Gray (Mass.) 409; Barnwell v. Magrath, 1 McMull. L. (S. Car.) 174, 36 Am. Dec. 254; Capers v. Wilson, 3 McCord L. (S. Car.) 174.

⁴ **Temporary Obstructions.** — Cooke v. Ingram, 3 Reports 607, 68 L. T. N. S. 671; Hayford v. Spokesfield, 100 Mass. 491.

The temporary character of obstructions may be shown by declarations of former proprietors. McKee v. Parchment, 69 Pa. St. 342.

Proof of a license given to put up a temporary obstruction does not sustain a defense of abandonment in an action to recover damages for the obstruction of a way. Peck v. Loyd, 38 Conn. 566.

Obstruction on Other Portions of Way No Evidence. — Peck v. Loyd, 38 Conn. 566.

Obstruction in Other Place by Plaintiff. — Ricker v. Barry, 34 Me. 116.

⁵ **Merger — England.** — Whalley v. Thompson, 1 B. & P. 371, 4 Rev. Rep. 826.

Kentucky. — Robb v. Hannah, (Ky. 1890) 14 S. W. Rep. 360; Strohmair v. Leahy, (Ky. 1888) 9 S. W. Rep. 238.

Maine. — Warren v. Blake, 54 Me. 276, 89 Am. Dec. 748.

Maryland. — Duval v. Becker, 81 Md. 537; Capron v. Greenway, 74 Md. 289.

Massachusetts. — Atwater v. Bodfish, 11 Gray (Mass.) 150.

New Jersey. — Fetters v. Humphreys, 18 N. J. Eq. 260.

New York. — Mattes v. Frankel, 157 N. Y. 603, 68 Am. St. Rep. 804; Wheeler v. Gilsey, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139; Fritz v. Tompkins, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 514; Mott v. Mott, 8 Hun (N. Y.) 474.

Pennsylvania. — Kieffer v. Imhoff, 26 Pa. St. 438.

South Carolina. — Payne v. Williams, 2 Spears L. (S. Car.) 15.

Tennessee. — Brown v. Berry, 6 Coldw. (Tenn.) 98.

Texas. — Howell v. Estes, 71 Tex. 690; International, etc., R. Co. v. Bost, 2 Tex. App. Civ. Cas., § 383.

Vermont. — Plimpton v. Converse, 42 Vt. 712.

See also the titles EASEMENTS, vol. 10, p. 433; MERGER vol. 20, p. 590.

Ownership in Two Estates Must Be Equal in Duration, Quality, and Other Circumstances of Right. — Reed v. West, 16 Gray (Mass.) 283; Crocker v. Cotting, 170 Mass. 68, 64 Am. St. Rep. 278.

Fee Necessary. — Ritger v. Parker, 8 Cush. (Mass.) 145, 54 Am. Dec. 744, extensively quoted from under the title EASEMENTS, vol. 10, p. 433, note 3. See also Tuttle v. Kilroa, 177 Mass. 146.

Thus the way does not merge where a life estate in the dominant is united with the fee in the servient tenement, but it is merely suspended. Pearce v. McClenaghan, 5 Rich. L. (S. Car.) 178, 55 Am. Dec. 710. See also Bull's Petition, 15 R. I. 534.

⁶ **Private Way Not Extinguished by Dedication to Public.** — Duncan v. Louch, 6 Q. B. 904, 51 E. C. L. 904; Reg. v. Chorley, 12 Q. B. 515, 64 E. C. L. 515. And see the title DEDICATION, vol. 9, p. 31.

⁷ **Googins v. Boston, etc., R. Co.,** 155 Mass. 505, in which case the land was taken for railroad purposes. See also the title EMINENT DOMAIN, vol. 10, p. 1088.

e. BY CESSATION OF ESTATE OR USE. — A way created in or appurtenant to a particular estate or for a special purpose ceases when the estate is determined or when the purpose is no longer possible.¹

f. BY INCREASE OF BURDEN. — A way cannot be destroyed by increase of burden; for that doctrine is restricted to commons.²

2. Ways by Necessity. — A way by necessity, in whatever manner it may have originated, is not extinguishable while its use is requisite,³ but ceases with the necessity which created it,⁴ and is suspended by a temporary cessation of the necessity.⁵

3. Statutory Private Ways. — A statutory private way may either be expressly discontinued or regarded as discontinued because not opened or because, when it is finally located, the land is not entered upon and taken into possession for the purpose of a way within such time as the statutes require.⁶

Reasons for Change or Vacation. — The uselessness, inconvenience, or burdensome character of a statutory private road is a necessary basis for a proceeding to change or vacate it.⁷

Express Discontinuance — Who May Discontinue. — An express discontinuance of a private way may be effected by persons appointed for that purpose or by the court.⁸

Proceedings. — The statutes may provide for a proceeding by petition and for the appointment of viewers to report upon the desirability of the proposed change.⁹

Petition. — The requirements of a petition for the vacation or alteration of

Private Merged in Public Way Laid Out under Eminent Domain. — *Ross v. Thompson*, 78 Ind. 90; *Murphy v. Bates*, 21 R. I. 89.

1. See the title EASEMENTS, vol. 10, p. 438.

Determination of Estate. — *Jay v. Michael*, 92 Md. 198; *Newhoff v. Mayo*, 48 N. J. Eq. 619, 27 Am. St. Rep. 455.

Expiration of Time for Which Granted. — *Batchelder v. State Capital Bank*, 66 N. H. 386, stated under title EASEMENTS, vol. 10, p. 439, note 3. See also *Griffith v. Rigg*, (Ky. 1896) 37 S. W. Rep. 58; *Webster v. Ross*, 42 Pa. St. 418.

Aliter when the estate whose duration marks the period for which the way is to last is merely suspended by bankruptcy. *Colie v. Jamison*, 4 Hun (N. Y.) 284.

Cessation of Purpose. — *Hancock v. Wentworth*, 5 Met. (Mass.) 446.

2. *Kneisel v. Krug*, 8 Ohio Dec. (Reprint) 581, 9 Cinc. L. Bul. 38.

3. Lasts While Necessity Remains. — *Blum v. Weston*, 102 Cal. 362, 41 Am. St. Rep. 188; *Smyles v. Hastings*, 22 N. Y. 217. And see the title EASEMENTS, vol. 10, p. 439.

4. Ceases with Necessity — England. — *Holmes v. Goring*, 9 Moo. 166, 2 Bing. 76, 9 E. C. L. 324. *Alabama.* — *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338.

California. — *Carey v. Rae*, 58 Cal. 159.

Connecticut. — *Smith v. Tarbox*, 31 Conn. 585; *Seeley v. Bishop*, 19 Conn. 128; *Pierce v. Selleck*, 18 Conn. 321; *Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61.

Kentucky. — *Benedict v. Johnson*, (Ky. 1897) 42 S. W. Rep. 335.

Maine. — *Rumill v. Robbins*, 77 Me. 193.

Maryland. — *Oliver v. Hook*, 47 Md. 301.

Massachusetts. — *Grammar School v. Jeffrey's Neck Pasture*, 174 Mass. 572; *Rowell v. Doggett*, 143 Mass. 483; *Viall v. Carpenter*, 14 Gray (Mass.) 126.

Missouri. — *Vossen v. Dautel*, 116 Mo. 379.

New Hampshire. — *Abbott v. Stewartstown*, 47 N. H. 228; *Pingree v. McDuffie*, 56 N. H. 306.

New York. — *Palmer v. Palmer*, 150 N. Y. 139, 55 Am. St. Rep. 653; *Wheeler v. Gilsey*, (C. Pl. Spec. T.) 35 How. Pr. (N. Y.) 139; *New York L. Ins., etc., Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353; *Hines v. Hamburger*, 14 N. Y. App. Div. 577; *Simmons v. Sines*, 4 Abb. App. Dec. (N. Y.) 246; *Holmes v. Seely*, 19 Wend. (N. Y.) 507.

Texas. — *Alley v. Carleton*, 29 Tex. 74, 94 Am. Dec. 260.

The Discontinuance of a Highway to which a way by necessity leads is an extinguishment of the way. *Morse v. Benson*, 151 Mass. 440; *Herschberger v. Kachel*, 1 Woodw. (Pa.) 488.

A Way by Prescription or Express Grant does not cease because the right of passage is no longer essential. *Lide v. Hadley*, 36 Ala. 627, 76 Am. Dec. 338; *New York L. Ins., etc., Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 362. And see *Central Trust Co. v. Hennen*, (C. C. A.) 90 Fed. Rep. 593.

5. Suspension of Necessity. — *Pierce v. Selleck*, 18 Conn. 321; *Whitehouse v. Cummings*, 83 Me. 91, 23 Am. St. Rep. 756; *Jay v. Michael*, 92 Md. 198; *McTavish v. Carroll*, 7 Md. 352, 61 Am. Dec. 353.

6. Statutory Ways. — *Tibbetts v. Penley*, 83 Me. 118.

7. Reason for Change or Vacation. — *Stuber's Road*, 28 Pa. St. 199.

8. Maine — Officials' Powers Limited to Statutory Ways. — *Tibbetts v. Penley*, 83 Me. 118.

Pennsylvania — *Court's Power Extends to Ways by Prescription, but Not to Ways by Express Grant.* — *Stuber's Road*, 28 Pa. St. 199; *Krier's Private Road*, 73 Pa. St. 109.

9. Krier's Private Road, 73 Pa. St. 109.

a private way are in general similar to those of a petition to change or vacate a highway.¹

PRIVILEGE. (See also the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; LIBEL AND SLANDER, vol. 18, p. 851; LICENSE (REAL PROPERTY), vol. 18, p. 1127; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770; PRIVILEGED COMMUNICATIONS, *post*; TAXATION. And see FRANCHISES, vol. 14, p. 4.) — A privilege is an exemption from such burdens as others are subjected to;² a right peculiar to the person on whom it is conferred, not to be exercised by another or others.³ "The word 'privilege' may be defined as a right peculiar to an individual or body."⁴

1. See the title HIGHWAYS, vol. 15, p. 399.

2. **Privilege — Exemption from Burdens.** — *State v. Betts*, 24 N. J. L. 557. See also *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 278; *Wiley v. Parmer*, 14 Ala. 632; *Van Valkenburg v. Brown*, 43 Cal. 49; *Douglass v. Stephens*, 1 Del. Ch. 476.

"A *privilege* means the exemption of a person or class of persons from the operation of any law." *Com. v. Henderson*, 172 Pa. St. 138.

"The word *privilege* * * * means, generally, a right or immunity granted to a person, either against or beyond the course of the common or general law." *Dike v. State*, 38 Minn. 367. See also *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 278; *Tennessee v. Whitworth*, 117 U. S. 146.

Business Which Requires License. — See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 773.

3. **Peculiar Right.** — *Guthrie Daily Leader v. Cameron*, 3 Okla. 689; *Lonas v. State*, 3 Heisk. (Tenn.) 306; *Brenham v. Brenham Water Co.*, 67 Tex. 542.

Something Outside of Common Rights. — *Harrison v. Willis*, 7 Heisk. (Tenn.) 44. See also *Pullman Southern Car Co. v. Nolan*, 22 Fed. Rep. 279.

4. *Ripley v. Knight*, 123 Mass. 519.

Tennessee Tax Statute. — Where, by the Constitution of Tennessee, the legislature was entitled to tax *privileges*, a *privilege* was defined to be whatever the legislature might choose to declare to be a *privilege*. *Kurth v. State*, 86 Tenn. 136; *Columbia v. Guest*, 3 Head (Tenn.) 414; *Jenkins v. Ewin*, 8 Heisk. (Tenn.) 456; *Nashville, etc., Turnpike Co. v. White*, 92 Tenn. 370.

Privilege and Right Distinguished. — In *St. Louis Gas-Light Co. v. St. Louis Gas, etc., Co.*, 16 Mo. App. 65, it was said: "The word *privilege*, though nearly allied with right, has yet its distinctive signification. A right is 'that which justly belongs to any one.' * * * The word [*privilege*] implies that some other individuals or bodies — perhaps all others — are denied participation in the right, advantage, or benefit."

Right and Privilege Used Synonymously. — *Smith v. Cornell University*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 225.

Privilege in the Sense of Option. — See *Illges v. Dexter*, 77 Ga. 38; *Webster v. Sturges*, 7 Ill. App. 563. And see the title OPTIONS, vol. 21, p. 924.

Appurtenances and Privileges. — A water right appurtenant to a mill passes by the word "appurtenances," and a vendor is not bound

to insert the word *privileges* in a deed for the purpose of conveying such right, though it may be contained in the contract between the vendor and vendee. *Pickering v. Stapler*, 5 S. & R. (Pa.) 107. And see APPURTENANCE — APPURTENANT, vol. 2, p. 527.

Privilege Distinguished from Lease. — By letter a *privilege* of building a logging way over certain premises was conferred. No rent was reserved, and no consideration was paid for the right, which was called a *privilege*, and no exclusive possession of any part of the premises was conferred. It was held that there was no lease. *Nowlin Lumber Co. v. Wilson*, 119 Mich. 406.

Privilege — Power — Franchise. — In *International Trust Co. v. American L. & T. Co.*, 62 Minn. 503, it was said: "A *privilege*, as distinguished from a mere power, is a right peculiar to the person or class of persons on whom it is conferred, and not possessed by others. As applied to a corporation, it is ordinarily used as synonymous with 'franchise,' and means a special *privilege* conferred by the state which does not belong to citizens generally of common right, and which cannot be enjoyed or exercised without legislative authority. Corporations usually possess many powers which are not franchises or *privileges* in that sense." And see FRANCHISE, vol. 14, p. 4; POWER, vol. 22, p. 1083.

In the Civil Law, a privilege is a right which the nature of the debt gives to a creditor, and which entitles him to be paid in preference to others, even those who have mortgages, from the proceeds of the thing affected with the lien. *Lenel's Succession*, 34 La. Ann. 870; *Labouisse v. Orleans Cotton Rope, etc., Co.*, 43 La. Ann. 245; *Carroll v. Bancker*, 43 La. Ann. 1078.

In *The Dolphin, 1 Flipp. (U. S.) 586*, the court said: "If not analogous in all respects to our 'lien,' it authorizes the like preference in payment to claims within its scope from the proceeds in court."

Privileges and Immunities. (See also the titles CIVIL RIGHTS, vol. 6, pp. 69, 73; CONSTITUTIONAL LAW, vol. 6, pp. 958, 966. And see IMMUNITY, vol. 15, p. 1028.) — The phrase "*privileges and immunities*," as used in the Constitution of the United States, has received construction in a large number of cases. Thus, in *Coger v. North Western Union Packet Co.*, 37 Iowa 155, it was said: "The term *privileges* is comprehensive, and includes all rights pertaining to the person as a citizen of the United States."

And on the construction of this phrase, see further the following cases:

United States. — Ducat v. Chicago, 10 Wall,

(U. S.) 410; *Minor v. Happersett*, 21 Wall. (U. S.) 162; *In re Watson*, 15 Fed. Rep. 511; U. S. v. Cruikshank, 92 U. S. 542; U. S. v. Reese, 92 U. S. 214; *Hall v. De Cuir*, 95 U. S. 485; *Strauder v. West Virginia*, 100 U. S. 303; *Meriwether v. Garrett*, 102 U. S. 472; *Dennick v. Central R. Co.*, 103 U. S. 11; *Kirtland v. Hotchkiss*, 100 U. S. 496; *Ex p. Virginia*, 100 U. S. 366; *Spies v. Illinois*, 123 U. S. 150; *O'Neil v. Vermont*, 144 U. S. 323.

Arkansas. — *Dabbs v. State*, 39 Ark. 357.

Kansas. — *Head v. Daniels*, 38 Kan. 1; *Buffington v. Grosvenor*, 46 Kan. 736.

Kentucky. — *Com. v. Milton*, 12 B. Mon. (Ky.) 212, 54 Am. Dec. 522.

Illinois. — *People v. Loeffler*, 175 Ill. 585.

Maine. — *State v. Montgomery*, 94 Me. 192.

Maryland. — *Kevser v. Rice*, 47 Md. 210.

Michigan. — *Cofrode v. Gartner*, 79 Mich. 332.

New Hampshire. — *Bliss's Petition*, 63 N. H. 135; *State v. Lancaster*, 63 N. H. 267; *State v. Wiggin*, 64 N. H. 508.

New Jersey. — *Tatem v. Wright*, 23 N. J. L. 429.

Pennsylvania. — *Sayre v. Phillips*, 148 Pa. St. 482; *In re Rodgers*, 194 Pa. St. 161.

Utah. — *Steed v. Harvey*, 18 Utah 367.

Virginia. — *McCready v. Com.*, 27 Gratt. (Va.) 985.

Wisconsin. — *Eingartner v. Illinois Steel Co.*, 94 Wis. 70.

Same — Elective Franchise. — In *Van Valkenburg v. Brown*, 43 Cal. 43, it was held that an elective franchise was not one of the immunities or *privileges* intended in the first section of the Fourteenth Amendment of the Federal Constitution.

Same — Privileges and Immunities Synonymous. — *Wiley v. Parmer*, 14 Ala. 632; *Van Valkenburg v. Brown*, 43 Cal. 43; *Douglass v. Stephens*, 1 Del. Ch. 476; *Campbell v. Morris*, 3 Har. & M. (Md.) 535.

Collateral Inheritance Tax. — A statute granted to M. all the rights, powers, and *privileges* of a son of B. It was held that by the grant of all the *privileges* of a son, exemption from a collateral inheritance tax was included. *Com. v. Henderson*, 172 Pa. St. 135. See also the title SUCCESSION TAXES.

Exemption from Removal Except for Cause. — A state charter authorized the commissioner of police and excise to appoint boiler inspectors, who should "possess the same powers and *privileges* as members of the police force." It was held that a person appointed under this provision might not be removed except for cause and after notice and a hearing, as provided for by the charter in cases of members of the force. *People v. Hayden*, 133 N. Y. 198. See also the title PUBLIC OFFICERS, *post*.

Exemption from Taxation. — The word *privilege* includes in its ordinary definition an exemption or immunity from taxation. *Louisville, etc., R. Co. v. Gaines*, 3 Fed. Rep. 278, 2 Flipp (U. S.) 621; *Humphrey v. Pegues*, 16 Wall (U. S.) 244; *Railroad Cos. v. Gaines*, 97 U. S. 697; *State v. Betts*, 24 N. J. L. 555.

Right to Hold Property. — See *Campbell v. Morris*, 3 Har. & M. (Md.) 535.

Fee. — In *Dillingham v. Roberts*, 75 Me. 469, where a description in a deed of a parcel of land bounded the premises upon the one side

by the shore of the sea at high-water mark, and then added the words: "including all the *privilege* of the shore to low-water mark," it was held that the fee in the land between high-water and low-water marks passed to the grantee.

Mental Power. — "The exercise of mental power cannot be a *privilege*, as it is not derived from any particular law granting special prerogatives contrary to common right." *Lawyers' Tax Cases*, 8 Heisk. (Tenn.) 649, *per* Turney, J.

Nisi Prius Judge. — For the construction of a statute which provided that certain nisi prius judges might interchange with each other, hold court for each other, and perform each other's duties with like *privileges* as the judges of certain other courts, see *Pike v. Chicago*, 155 Ill. 656.

Documents — Inspection Privilege — Rule of Court. — See *Ehrmann v. Ehrmann*, (1896) 2 Ch. 826.

Privilege of Occupying Land — Easement. — *Cross v. Pike*, 59 Vt. 324.

Convenient Privilege of Passing, in Sense of Convenient Way or Road. — *Simpson v. Norton*, 45 Me. 281.

Privilege of Reshipping. — In *Broadwell v. Butler*, 6 McLean (U. S.) 296, it was held that the words "*privilege* of reshipping," in a bill of lading, were intended for the benefit of the carrier, but did not limit his responsibility. See also *Little v. Semple*, 8 Mo. 99, 40 Am. Dec. 123; *Carr v. Steamboat Michigan*, 27 Mo. 197.

"Privilege of the Shores." — In *Ripley v. Knight*, 123 Mass. 515, it was held that a town's "*privilege* of the shores" included the right to take sand and gravel to repair its highways.

Special or Exclusive Privileges. (See also the title STATUTES.) — The Constitution of *Minnesota* prohibits the legislature from enacting any private law granting any special or exclusive *privilege*, etc. *Dike v. State*, 38 Minn. 366, in which case the passage of an act providing for the adjustment and determination of two alleged claims was held not to be a violation of the prohibition. See also *Elk Point v. Vaughn*, 1 Dak. 118; *Ex p. Douglass*, 1 Utah 111.

Same — Monopolies. — The term "*exclusive privilege*" in the prohibition in the Constitution of *New York* against granting to private corporations "any exclusive *privilege*" was intended to describe grants in the nature of monopolies, of such inherent or statutory character as to make impossible the coexistence of the same right in another. *Exempt Firemen's Benev. Fund v. Roome*, 93 N. Y. 328. And see the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

Same — Remedies. — In *Lippman v. People*, 175 Ill. 106, in construing a constitutional provision prohibiting the passage of any special law granting any special or exclusive *privilege*, the court said: "While, perhaps, no precise and comprehensive definition of the word *privilege*, as used in constitutions, has been attempted, the right to employ remedies for the collection of debts, the recovery of property, and the enforcement of rights has always been included in the term as used in the Federal Constitution."

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CROSS-REFERENCES.

As to Privileged Communications in the law of libel and slander, see the title LIBEL AND SLANDER, vol. 18, p. 851.

For other matters related to this subject, see the following titles in this work: ATTORNEY AND CLIENT, vol. 3, p. 278; EVIDENCE, vol. 11, p. 484; PHYSICIANS AND SURGEONS, vol. 22, p. 778; WITNESSES.

I. DEFINITION. — In the law of evidence the term “privileged communications” is used to designate that class of evidence which, while relevant to the matters in dispute, is rejected by the courts or made inadmissible by statute upon the ground of public policy, because greater mischiefs would probably result from requiring or permitting its admission than from any refusal to receive it.¹

1. **Definition.** — See Best's Principles of Ev., §§ 49, 578; 1 Greenleaf on Ev. (14th ed.), § 236. See also *Vogel v. Gruaz*, 110 U. S. 311; *Totten v. U. S.*, 92 U. S. 105; *Oliver v. Pate*, 43 Ind. 132.

II. POLITICAL MATTERS — STATE SECRETS — 1. Rule Stated. — It is well established as a general rule that for reasons of state and policy matters which concern the general conduct of the affairs of the state or nation, or involve state secrets, should not be disclosed in evidence.¹

2. By Whom Question of Privilege Determined. — It has been considered that the executive or the heads of departments are the exclusive judges of the propriety of refusing to testify as to a particular matter or to produce certain documents.²

3. Possession of Documents. — A public officer may, however, be compelled to disclose whether certain documents have been in his possession or office.³

1. Political Matters — State Secrets — England.

— *Beatson v. Skene*, 5 H. & N. 838; *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, *affirmed* L. R. 7 H. L. 744; *Home v. Bentinck*, 2 Brod. & B. 130, 6 E. C. L. 68, 8 Price 225; *Rex v. Watson*, 2 Stark. 148, 3 E. C. L. 354; *Cooke v. Maxwell*, 2 Stark. 183, 3 E. C. L. 368; *Anderson v. Hamilton*, 2 Brod. & B. 156 note, 6 E. C. L. 79 note, 8 Price 244, 4 Moo. 593. See also *Wyatt v. Gore*, Holt N. P. 299, 3 E. C. L. 124; *Kain v. Farrer*, 37 L. T. N. S. 469; *H. M. S. Bellerophon*, 31 L. T. N. S. 756, 44 L. J. Adm. 5, 23 W. R. 248; *Hennessy v. Wright*, 21 Q. B. D. 509, 57 L. J. Q. B. 530, 59 L. T. N. S. 323, 53 J. P. 52; *Wright v. Mills*, 62 L. T. N. S. 558; *Smith v. East India Co.*, 1 Phil. 50, 11 L. J. Ch. 71; *Wadeer v. East India Co.*, 8 De G. M. & G. 182, 2 Jur. N. S. 407, 25 L. J. Ch. 345, 4 W. R. 421.

Canada. — *Gugy v. Maguire*, 13 L. C. Rep. 33.

United States. — *Marbury v. Madison*, 1 Cranch (U. S.) 137; *U. S. v. Six Lots Ground*, 1 Woods (U. S.) 234.

Delaware. — *State v. Brown*, 2 Marv. (Del.) 380.

Minnesota. — See *Cole v. Andrews*, 74 Minn. 93.

New Jersey. — *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111.

Pennsylvania. — *Gray v. Pentland*, 2 S. & R. (Pa.) 23. See *Yoter v. Sanno*, 6 Watts (Pa.) 164.

The discovery of documents which are protected from disclosure upon grounds of public policy cannot be compelled, either by bill in equity or by interrogatories at law. *Smith v. East India Co.*, 1 Phil. 50; *M'Elveney v. Connellan*, 17 Ir. C. L. 55; *Wilson v. Webber*, 2 Gray (Mass.) 558.

Where the rule excludes a document its contents cannot be proved by parol. *Gray v. Pentland*, 2 S. & R. (Pa.) 23. See also *Yoter v. Sanno*, 6 Watts (Pa.) 164.

Cases Distinguished. — In *White v. Nicholls*, 3 How. (U. S.) 266, and *Howard v. Thompson*, 21 Wend. (N. Y.) 319, 34 Am. Dec. 238, the original letters to the President and the secretary of the treasury, which were relied on as containing libelous matter, were produced by the plaintiff, who must have obtained them by permission of the government, so that no question of compelling a disclosure arose; and in the latter case the court said that if the letters had not been surrendered by the secretary of the treasury, he could not have been compelled to produce them, and secondary evidence of their contents could not have been admitted.

The Case of Aaron Burr. — "The ruling of Chief Justice Marshall upon the trial of Aaron

Burr * * * was merely that a subpoena *duces tecum* might be issued to the President of the United States for a letter addressed to him by a military officer who was to be a witness against the defendant; leaving the question of the production of the letter, if containing any matter which in the judgment of the President could not be disclosed without injury to the public, to be considered on the return of the subpoena. 1 Burr's Trial, 177-189. And he never had occasion to decide that question. See 2 Burr's Trial 533-539." *Worthington v. Scribner*, 109 Mass. 487.

Proceedings in Parliament. — See *Plunkett v. Cobbett*, 5 Esp. 136; *Chubb v. Salomons*, 3 C. & K. 75.

Papers of Internal Revenue Department Privileged. — *In re Comingore*, 96 Fed. Rep. 552, *affirmed* *Boske v. Comingore*, 177 U. S. 459, *overruling* *In re Hirsch*, 74 Fed. Rep. 928; *In re Huttman*, 70 Fed. Rep. 701; *In re Weeks*, 82 Fed. Rep. 729.

Information Acquired by a Tax Collector or Letter Carrier in the performance of his duties has been held not to be excluded by the application of the rule stated in the text. *Lee v. Birrell*, 3 Campb. 337; *Smith v. Smith*, 2 Penn. (Del.) 365.

Books of Bank of England Not Privileged from Production. — *Heslop v. Bank of England*, 6 Sim. 192.

2. Privilege a Question for Executive or Heads of Departments. — *Beatson v. Skene*, 5 H. & N. 838; *Gugy v. Maguire*, 13 L. C. Rep. 33; *Thompson v. German Valley R. Co.*, 22 N. J. Eq. 111; *Gray v. Pentland*, 2 S. & R. (Pa.) 23; *Hartranft's Appeal*, 85 Pa. St. 433, 27 Am. Rep. 667.

Document Sent by Subordinate. — In *Beatson v. Skene*, 5 H. & N. 838, the court said: "If, indeed, the head of the department does not attend personally to say that the production will be injurious, but sends the document to be produced or not as the judge may think proper, or, as was the case in *Dickson v. Wilton*, 1 F. & F. 419, before Lord Campbell, where a subordinate was sent with the document with instructions to object but nothing more, the case may be different." But compare *Dawkins v. Rokeby*, L. R. 8 Q. B. 255, *affirmed* L. R. 7 H. L. 744.

Where Copy Has Been Transmitted to Party. — A provincial secretary is not deprived of the right to refuse to produce a state document, because of the fact that a copy of the same has been officially transmitted to a party in the cause by the assistant secretary. *Gugy v. Maguire*, 13 L. C. Rep. 33.

3. Possession of Documents. — *Marbury v. Madison*, 1 Cranch (U. S.) 137.

III. JUDICIAL MATTERS — 1. Proceedings of Grand Jury. — The admission or exclusion of evidence as to what transpired in a grand jury room has already been discussed in this work.¹

2. Proceedings of Petit Jury. — All questions as to the admissibility of evidence concerning the proceedings of a petit jury will be discussed in another portion of this work, to which reference is made.²

3. Testimony of Judges. — It has been held that public policy authorizes a judge of a court to excuse himself from testifying as to what witnesses have testified on trials before him,³ but it furnishes no ground of exception where he has not insisted upon his right to be excused and his testimony has been admitted;⁴ and it has also been held that where the pleadings are so general and the record as given in evidence is such that it is impossible to determine by them alone the real matters tried and determined in the action, the justice before whom the action was tried may give parol evidence as to what was actually in controversy between the parties before him, and the grounds upon which his judgment was rendered, with a view to ascertaining the real issues and how they were determined.⁵ Similarly the justice who issued a process or warrant is a competent witness to prove on what papers the process issued, though he should not be asked about his reasons or his judgment in the matter.⁶

4. Testimony of Arbitrators. — As regards the effect of an award no questions can properly be put to an arbitrator or umpire for the purpose of proving the reasons or grounds for his decision, how it was arrived at, or what items it included, or what was the meaning which he intended at the time to be given to it.⁷ But the umpire or arbitrator is a competent witness, like any other person, in a legal proceeding to enforce his award, to prove matters material to the issues,⁸ and questions may properly be put to him for the purpose of proving the proceedings before him so as to arrive at what was the subject-matter of adjudication when the proceedings closed and he was about to make his award.⁹ An arbitrator is not a competent witness to prove his own misconduct¹⁰ or that of his co-arbitrators,¹¹ or to impeach his own award,¹²

1. See the title *JURY AND JURY TRIAL*, vol. 17, p. 1294 *et seq.*

2. See the title *VERDICT*.

3. *Judges.* — *Welcome v. Batchelder*, 23 Me. 85.

4. *Welcome v. Batchelder*, 23 Me. 85. See *Grimm v. Hamel*, 2 Hilt. (N. Y.) 434.

English Cases. — In *Reg. v. Gazard*, 8 C. & P. 595, 34 E. C. L. 542, it was held that on an indictment for perjury alleged to have been committed at the quarter sessions, the chairman of the quarter sessions ought not to be called upon to give evidence as to what the defendant swore at the quarter sessions. But in *Reg. v. Harvey*, 8 Cox C. C. 99, Byles, J., said that the judges of the superior courts ought not, of course, to be called upon to produce their notes. If he were to be subpoenaed for such a purpose he should certainly refuse to appear. But the same objection was not applicable to the judges of the inferior courts. He saw no reason why they should not be called, and especially where, as in this case, the judge was willing to appear.

5. *Supples v. Cannon*, 44 Conn. 424; *Taylor v. Larkin*, 12 Mo. 103, 49 Am. Dec. 119; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *Agan v. Hey*, 30 Hun (N. Y.) 591.

6. *Matter of Heyward*, 1 Sandf. (N. Y.) 701.

7. **Rule as to Arbitrators.** — *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, L. R. 5 Exch. 221, L. R. 3 Exch. 306; *Ellis*

v. Saltau, 4 C. & P. 327 note, 19 E. C. L. 406 note; *Anonymous*, 3 Atk. 644; *Habershon v. Troby*, 3 Esp. 38; *Ponsford v. Swaine*, 1 Johns. & H. 433. See also *Johnson v. Durant*, 4 C. & P. 327, 19 E. C. L. 406.

Where Discussions Between Arbitrators Took Place in Public, evidence thereof can be given by the other parties present, though the arbitrators are protected from testifying. *Ponsford v. Swaine*, 1 Johns. & H. 433.

8. **Arbitrators Competent as Witnesses.** — *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, L. R. 5 Exch. 221, L. R. 3 Exch. 306; *Cole v. Blunt*, 2 Bosw. (N. Y.) 116; *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

9. *Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, L. R. 5 Exch. 221, L. R. 3 Exch. 306; *Martin v. Thornton*, 4 Esp. 180; *Ponsford v. Swaine*, 1 Johns. & H. 433; *Briggs v. Smith*, 20 Barb. (N. Y.) 409; *New York v. Butler*, 1 Barb. (N. Y.) 325.

10. **Not Competent to Prove Misconduct.** — *Claycomb v. Butler*, 36 Ill. 100; *Tucker v. Page*, 69 Ill. 179.

This Rule Applies Also to a Merchant Appraiser appointed under United States Revised Statute to value certain imports. *Oelberman v. Merritt*, 19 Fed. Rep. 408.

11. *Tucker v. Page*, 69 Ill. 179.

12. **Not Competent to Impeach Award.** — *Stone v. Atwood*, 28 Ill. 30; *Pullian v. Pensoneau*,

though he may be called to sustain it,¹ or to testify as to the time when and the circumstances under which he made his award.²

5. Sources of Information in Criminal Prosecutions. — In criminal prosecutions the courts will not allow persons to reveal the names of those from whom they received the information on which the prosecution is based. This rule seems to have been originally announced in reference to cases in which the government was directly concerned, such as frauds on the revenue, counterfeiting, or high treason, but it has been extended so that it can safely be said to apply at the present time to all criminal prosecutions.³ It has been held that the rule extends so as to protect a witness from answering a question as to whether he himself gave the information.⁴

IV. PROFESSIONAL COMMUNICATIONS — 1. To Attorneys — a. GENERAL RULE — (1) *Rule Stated.* — As a general rule, every communication which the client makes to his legal adviser⁵ for the purpose of professional advice or aid upon the subject of his rights or liabilities is to be deemed confidential, and the disclosure thereof by the attorney is forbidden both by the common law and by express statutory provisions in all jurisdictions.⁶ It will readily be seen,

33 Ill. 375; *Ellison v. Weathers*, 78 Mo. 115; *New York v. Butler*, 1 Barb. (N. Y.) 325; *Doke v. James*, 4 N. Y. 568; *Campbell v. Western*, 3 Paige (N. Y.) 124. See also *Cole v. Blunt*, 2 Bosw. (N. Y.) 116.

There Is an Exception to This Rule in cases of fraud or mistake in the award. *In re Dare Valley R. Co.*, L. R. 6 Eq. 429, 37 L. J. Ch. 719; *Pulliam v. Pensoneau*, 33 Ill. 375; *Spruck v. Crook*, 19 Ill. 415; *Newland v. Newland*, 2 Johns. (N. Y.) 62. See also *Efner v. Shaw*, 2 Wend. (N. Y.) 567.

Where the Arbitrator's Powers Have Been Terminated by the appointment of an umpire by whom the award was made, the rule does not apply to the original arbitrator. *New York v. Butler*, 1 Barb. (N. Y.) 325.

1. Competent to Sustain Award. — *Stone v. Atwood*, 28 Ill. 30; *Ellison v. Weathers*, 78 Mo. 115.

2. Woodbury v. Northy, 3 Me. 85, 14 Am. Dec. 214.

3. Name of Informer Cannot Be Disclosed — England. — *Rex v. Akers*, 6 Esp. 125, note; *Home v. Bentinck*, 2 Brod. & B. 130, 6 E. C. L. 63, 8 Price 225. See also *Robinson v. May*, 2 Smith 3.

Canada. — *Marks v. Beyfus*, 25 Q. B. D. 494. *United States.* — *Vogel v. Gruaz*, 110 U. S.

311; *U. S. v. Moses*, 4 Wash. (U. S.) 726.

Delaware. — *State v. Brown*, 2 Marv. (Del.) 380.

Indiana. — *Oliver v. Pate*, 43 Ind. 132.

Maine. — *State v. Soper*, 16 Me. 298, 33 Am.

Dec. 665.

Massachusetts. — *Worthington v. Scribner*,

109 Mass. 487, 12 Am. Rep. 736.

Cases Explained. — In *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736, the court said: "The ruling of Chief Justice Cockburn, upon an indictment for administering poison, in *Reg. v. Richardson*, 3 F. & F. 693, compelling a policeman to answer on cross-examination from whom he had received the information in consequence of which he found the poison in a place used by the defendant must be maintained, if at all, upon the ground that the witness had already been examined by the government as to part of the conversation between him and the informer, and might therefore, for the protection of the defendant

against any unjust inference which might be drawn from the result of such examination, be required to state the whole of that conversation. * * * In *Blake v. Pilfold*, 1 M. & Rob. 198, in which Mr. Justice Taunton admitted in evidence, to support an action for libel, a letter to the chief secretary of the postmaster general from a private individual, complaining of the misconduct of a guard, the objection was made by the defendant's counsel, 'on the ground that it was a privileged communication made to a public officer, and that such public officer ought not to be allowed to produce it;' the post office department had evidently suffered the letter to pass into the plaintiff's hands, for the report states that the handwriting was proved before the objection was made; and the whole attention of the judge seems to have been directed to the question whether the letter could be deemed a privileged communication upon which no action would lie. This last question was the only one touched by the other authorities cited for the plaintiff. *Fairman v. Ives*, 5 B. & Ald. 642, 7 E. C. L. 220; *Dawkins v. Paulet*, L. R. 5 Q. B. 94; *O'Donaghue v. McGovern*, 23 Wend. (N. Y.) 26; 2 Kent Com. (6th ed.) 22."

4. Witness Need Not Answer Whether He Gave Information. — *Atty.-Gen. v. Briant*, 15 M. & W. 169, 15 L. J. Exch. 265; *Worthington v. Scribner*, 109 Mass. 487, 12 Am. Rep. 736.

Cases Opposed to the Rule. — The only cases opposed to the rule stated in the text are *Rex v. Blackman*, 1 Esp. 95, and *Reg. v. Candy*, cited in *Atty.-Gen. v. Briant*, 15 M. & W. 175, which were rulings *ad nisi prius* of very little weight.

5. In this section the term "attorney" is used as a generic one, as understood in the United States. And as the privilege in England extends alike to barristers, counselors, advocates, attorneys, solicitors, and proctors (see *Slade v. Tucker*, 14 Ch. D. 824, 49 L. J. Ch. 644, 43 L. T. N. S. 49, 28 W. R. 807; *Wilson v. Rastall*, 4 T. R. 759), no attempt is made to discriminate between them, but the term "attorney" has been adopted as covering all classes.

6. Communications to Attorney Privileged — England. — *Turquand v. Knight*, 2 M. & W.

however, that the mere placing of a seal on the attorney's lips would not afford any adequate protection, if the client could be placed upon the witness

98, 2 Gale 192; Branford v. Branford, 4 P. D. 72, 48 L. J. P. 40, 40 L. T. N. S. 659, 27 W. R. 691; Parry v. Watkins, 9 L. J. Ch. 63; Rochefoucauld v. Boustead, 74 L. T. N. S. 783, 65 L. J. Ch. 794; Gibbon v. Strathmore, 11 L. J. Ch. 366; Minet v. Morgan, L. R. 8 Ch. 361; Desborough v. Rawlins, 3 Myl. & C. 515; Richards v. Jackson, 18 Ves. Jr. 474; Morgan v. Shaw, 4 Madd. 57; Pearse v. Pearse, 1 De G. & Sm. 12, 16 L. J. Ch. 153, 11 Jur. 52; Walker v. Wildman, 6 Madd. 47; Dwyer v. Collins, 7 Exch. 639, 16 Jur. 569, 21 L. J. Exch. 225; Cleave v. Jones, 7 Exch. 421, 21 L. J. Exch. 105; Rex v. Dixon, 3 Burr. 1687; Holmes v. Baddeley, 1 Phil. 476; Woolley v. North London R. Co., L. R. 4 C. P. 602; Skinner v. Great Northern R. Co., L. R. 9 Exch. 298; Fenner v. London, etc., R. Co., L. R. 7 Q. B. 767; Chant v. Brown, 9 Hare 790; Greenough v. Gaskell, 1 Myl. & K. 101; Carmael v. Powis, 1 Phil. 692; Doe v. Watkins, 3 Bing. N. Cas. 421, 32 E. C. L. 187, 4 Scott 155; Bolton v. Liverpool, 3 Sim. 467, 1 Myl. & K. 88; Woods v. Woods, 4 Hare 83; Vent v. Pacey, 4 Russ. 193; Hughes v. Biddulph, 4 Russ. 190, 28 Rev. Rep. 46; Clagett v. Phillips, 2 Y. & C. Ch. 82; Turton v. Barber, L. R. 17 Eq. 329, 22 W. R. 438; Sandford v. Remington, 2 Ves. Jr. 189, 2 Rev. Rep. 195; Wilson v. Rastall, 4 T. R. 753, 2 Rev. Rep. 515; Gainsford v. Grammar, 2 Campb. 9; Stratford v. Hogan, 2 Ball & B. 164; Cromack v. Heathcote, 2 Brod. & B. 4, 6 E. C. L. 12, 4 Moo. 357; Cholmondeley v. Clinton, 19 Ves. Jr. 261; Doe v. Harris, 5 C. & P. 592, 24 E. C. L. 468; Reg. v. Griffin, 6 Cox C. C. 219; Anonymous, Skin. 404; Knight v. Waterford, 2 Y. & C. Exch. 22; Combe v. London, 4 Y. & C. Exch. 139; Bushnell v. Bushnell, 2 Jur. 774; Birch v. Barker, 5 Jur. 430; Bustros v. White, 1 Q. B. D. 423, 45 L. J. Q. B. D. 642, 34 L. T. N. S. 835, 24 W. R. 721; Chartered Bank v. Rich, A. B. & S. 73, 116 E. C. L. 73, 32 L. J. Q. B. D. 300, 8 L. T. N. S. 454, 11 W. R. 830; Lodge v. Prichard, 4 De G. & Sm. 587, 15 Jur. 1147; Thompson v. Falk, 1 Drew. 21; Mornington v. Mornington, 2 Johns. & H. 697. See also English v. Tottie, 1 Q. B. D. 141, 45 L. J. Q. B. D. 138, 33 L. T. N. S. 724, 24 W. R. 393.

Canada. — Lawton v. Chance, 9 N. Bruns. 411; *Ex p.* Abbott, 7 Montreal Leg. N. 318.

United States. — Vogel v. Gruaz, 110 U. S. 311; Chirac v. Reinicker, 11 Wheat. (U. S.) 280; Rhoades v. Selin, 4 Wash. (U. S.) 715; Andrews v. Solomon, Pet. (C. C.) 356; Murray v. Dowling, 1 Cranch (C. C.) 151; Montgomery v. Perkins, 94 Fed. Rep. 23; Mutual Ben. L. Ins. Co. v. Robinson, 19 U. S. App. 266; Liggett v. Glenn, 4 U. S. App. 438.

Alabama. — Eldridge v. State, 126 Ala. 63; White v. State, 86 Ala. 69; Mobile, etc., R. Co. v. Yeates, 67 Ala. 164; Rowland v. Plummer, 50 Ala. 182; Parish v. Gates, 29 Ala. 254; Crawford v. McKissack, 1 Port. (Ala.) 433.

Arkansas. — Andrews v. Simms, 33 Ark. 771; Milan v. State, 24 Ark. 346; Bobo v. Pryson, 21 Ark. 387, 76 Am. Dec. 407.

California. — Verdelli v. Gray's Harbor Commercial Co., 115 Cal. 517; Murphy v.

Waterhouse, 113 Cal. 467, 54 Am. St. Rep. 365; Sharon v. Sharon, 79 Cal. 633; People v. Atkinson, 40 Cal. 284; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114; Landsberger v. Gorham, 5 Cal. 450.

Colorado. — Denver Tramway Co. v. Owens, 20 Colo. 107.

Connecticut. — Goddard v. Gardner, 28 Conn. 172.

Dakota. — O'Neil v. Murry, 6 Dak. 107.

Georgia. — Southern R. Co. v. White, 108 Ga. 201; Philman v. Marshall, 103 Ga. 82; O'Brien v. Spalding, 102 Ga. 490, 66 Am. St. Rep. 202; Peek v. Boone, 90 Ga. 767; Doe v. Roe, 37 Ga. 289; Causey v. Wiley, 27 Ga. 444; Martin v. Anderson, 21 Ga. 301; Collins v. Johnson, 16 Ga. 458; Riley v. Johnston, 13 Ga. 260. But see Hammond v. Myrick, 14 Ga. 77, in which the court held that an objection to the admissibility of the evidence of an attorney because he was forbidden to testify by the Act of 1850 was not sustainable because the suit was instituted before that act was passed and the act was prospective in its operation.

Idaho. — Perry v. State, (Idaho 1894) 38 Pac. Rep. 655.

Illinois. — Hollenback v. Todd, 119 Ill. 543; Chillicothe Ferry, etc., Co. v. Jameson, 48 Ill. 281; Goltra v. Wolcott, 14 Ill. 89; Granger v. Warrington, 8 Ill. 299; Swaim v. Humphreys, 42 Ill. App. 370; Thayer v. McEwen, 4 Ill. App. 416.

Indiana. — McDonald v. McDonald, 142 Ind. 55; Oliver v. Pate, 43 Ind. 132; Bigler v. Reyher, 43 Ind. 112; Bowers v. Briggs, 20 Ind. 130; Borum v. Fouts, 15 Ind. 50; Nave v. Baird, 12 Ind. 318; Reed v. Smith, 2 Ind. 160; Jenkinson v. State, 5 Blackf. (Ind.) 465; Thomas v. Griffin, 1 Ind. App. 457.

Iowa. — Winters v. Winters, 102 Iowa 53, 63 Am. St. Rep. 428; Raymond v. Burlington, etc., R. Co., 65 Iowa 152; Sample v. Frost, 10 Iowa 266.

Kansas. — Tays v. Carr, 37 Kan. 141.

Kentucky. — Carter v. West, 93 Ky. 211.

Louisiana. — Morris v. Cain, 39 La. Ann. 712; Holmes v. Barbin, 15 La. Ann. 553; Shaghnessy v. Fogg, 15 La. Ann. 330; State v. Hazleton, 15 La. Ann. 72.

Maine. — Snow v. Gould, 74 Me. 540, 43 Am. Rep. 604; Sargent v. Hampden, 38 Me. 581; McLellan v. Longfellow, 32 Me. 494, 54 Am. Dec. 599; Aiken v. Kilburne, 27 Me. 252.

Maryland. — Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620; Hodges v. Mullikin, 1 Bland (Md.) 503; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277; Chew v. Farmers Bank, 2 Md. Ch. 231, *affirmed* 9 Gill (Md.) 361.

Massachusetts. — Doherty v. O'Callaghan, 157 Mass. 90, 34 Am. St. Rep. 258; Higbee v. Dresser, 103 Mass. 523; Woburn v. Henshaw, 101 Mass. 193, 3 Am. Rep. 333; Hutton v. Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; Day v. Moore, 13 Gray (Mass.) 522; Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400. See also Com. v. Goddard, 14 Gray (Mass.) 402.

Michigan. — Lorimer v. Lorimer, 124 Mich. 631, 7 Detroit Leg. N. 367.

Minnesota. — Struckmeyer v. Lamb, 75 Minn. 366.

stand and forced to testify as to such communications; and hence it is also a general and almost universally accepted rule that a client cannot be compelled to disclose communications which his attorney cannot be permitted to disclose.¹

Mississippi. — Jones v. State, 65 Miss. 179; Lengsfeld v. Richardson, 52 Miss. 443; Randel v. Yates, 48 Miss. 685; Parkhurst v. McGraw, 24 Miss. 134.

Missouri. — Tyler v. Hall, 106 Mo. 313, 27 Am. St. Rep. 337; State v. Dawson, 90 Mo. 149; Gray v. Fox, 43 Mo. 579, 97 Am. Dec. 416; Hull v. Lyon, 27 Mo. 570; Johnson v. Sullivan, 23 Mo. 474; Henry v. Buddecke, 81 Mo. App. 360; Ingerham v. Weatherman, 79 Mo. App. 480, 2 Mo. App. Rep. 448; Weinstein v. Reid, 25 Mo. App. 41.

Montana. — Smith v. Caldwell, 22 Mont. 331.

Nebraska. — Sloan v. Wherry, 51 Neb. 703; Basye v. State, 45 Neb. 261; Brady v. State, 39 Neb. 529; Nelson v. Becker, 32 Neb. 99; Spaulding v. State, 61 Neb. 289.

Nevada. — Mitchell v. Bromberger, 2 Nev. 345, 90 Am. Dec. 550.

New Hampshire. — Sleeper v. Abbott, 60 N. H. 162; Brown v. Payson, 6 N. H. 443.

New York. — People v. Buchanan, 145 N. Y. 1; Loder v. Whelpley, 111 N. Y. 239; Matter of Coleman, 111 N. Y. 220; Bacon v. Frisbie, 80 N. Y. 394, 36 Am. Rep. 627, 15 Hun (N. Y.) 26; Bedell v. Chase, 34 N. Y. 386; Williams v. Fitch, 18 N. Y. 546; Sibley v. Waffle, 16 N. Y. 180; Rogers v. Lyon, 64 Barb. (N. Y.) 373; Graham v. People, 63 Barb. (N. Y.) 468; People v. Sheriff, 29 Barb. (N. Y.) 622; Rochester City Bank v. Suydam, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; Utica Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; March v. Ludlum, 3 Sandf. Ch. (N. Y.) 35; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Stuyvesant v. Peckham, 3 Edw. (N. Y.) 579; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; Yordan v. Hess, 13 Johns. (N. Y.) 492; Brandt v. Klein, 17 Johns. (N. Y.) 335; Britton v. Lorenz, 45 N. Y. 51, *affirming* 3 Daly (N. Y.) 23; Renoux v. Geney, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 782; Barry v. Coville, 53 Hun (N. Y.) 620, *affirmed* 129 N. Y. 302; *In re Whitlock*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 204, 51 Hun (N. Y.) 351; Eastman v. Kelly, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 866; Brennan v. Hall, (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 434, *affirmed* 131 N. Y. 160; Carnes v. Platt, 36 N. Y. Super. Ct. 361, 15 Abb. Pr. N. S. (N. Y.) 337; Pearsall v. Elmer, 5 Redf. (N. Y.) 181; Matter of Merriam, 27 N. Y. App. Div. 112; Wilson v. Troup, 7 Johns. Ch. (N. Y.) 25; Mitchell's Case, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249; Brown v. Rome, etc., R. Co., 45 Hun (N. Y.) 439; McIntyre v. Costello, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 397.

North Carolina. — Hughes v. Boone, 102 N. Car. 137.

Ohio. — Benedict v. State, 44 Ohio St. 679; King v. Barrett, 11 Ohio St. 261; Rogers v. Dare, Wright (Ohio) 136.

Pennsylvania. — Kaut v. Kessler, 114 Pa. St. 603; Daniel v. Daniel, 39 Pa. St. 191; Miller v. Weeks, 22 Pa. St. 89; Heaton v. Findlay, 12 Pa. St. 304; Beeson v. Beeson, 9 Pa. St. 279; Levers v. Van Buskirk, 4 Pa. St. 309; Beltzhoover v. Blackstock, 3 Watts (Pa.)

20, 27 Am. Dec. 330; Heister v. Davis, 3 Yeates (Pa.) 4; Matthews's Estate, 1 Phila. (Pa.) 292, 9 Leg. Int. (Pa.) 11.

South Carolina. — Lombard v. Hendrix, 54 S. Car. 476.

South Dakota. — Austin, etc., Mfg. Co. v. Heiser, 6 S. Dak. 429.

Tennessee. — Johnson v. Patterson, 13 Lea (Tenn.) 626; Scales v. Kelley, 2 Lea (Tenn.) 706; McMannus v. State, 2 Head (Tenn.) 213; Lang v. Ingalls Zinc Co., (Tenn. Ch. 1898) 49 S. W. Rep. 288; Henry v. Nubert, (Tenn. Ch. 1895) 35 S. W. Rep. 444.

Texas. — Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 662; Hernandez v. State, 18 Tex. App. 134, 51 Am. Rep. 295; Sutton v. State, 16 Tex. App. 490; Warner Elevator Mfg. Co. v. Houston, (Tex. Civ. App. 1894) 28 S. W. Rep. 405; McIntosh v. Moore, 22 Tex. Civ. App. 22.

Vermont. — Childs v. Merrill, 66 Vt. 302; Arbuckle v. Templeton, 65 Vt. 205; Maxham v. Place, 46 Vt. 434; Hemenway v. Smith, 28 Vt. 701; Wetherbee v. Ezekiel, 25 Vt. 47.

Virginia. — Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513; Chahoon v. Com., 21 Gratt. (Va.) 822.

Washington. — Hartness v. Brown, 21 Wash. 655.

Wisconsin. — Koeber v. Somers, 108 Wis. 497; Bruley v. Garvin, 105 Wis. 625; McMaster v. Scriven, 85 Wis. 162, 39 Am. St. Rep. 828; Aultman v. Ritter, 81 Wis. 395; Selden v. State, 74 Wis. 271, 17 Am. St. Rep. 144; Orton v. McCord, 33 Wis. 205; Dud'ey v. Beck, 3 Wis. 274.

Statutes Allowing Parties to Testify Have Not Changed the Rule. — Pulford's Appeal, 48 Conn. 247; Lawton v. Chance, 9 N. Bruns. 411.

Cases Stated for Opinion of Counsel Are Privileged. — Walsingham v. Goodricke, 3 Hare 122; Nias v. Northern, etc., R. Co., 3 Myl. & C. 355, 7 L. J. Ch. 170, 2 Jur. 295, *affirming* 2 Keen 76.

Plaintiff Suing in Forma Pauperis. — The rule providing that where application is made for leave to sue *in forma pauperis* the case laid before counsel and his opinion thereon shall be produced is intended only to enable the court to see whether there is a fair *prima facie* ground for the action, and not to allow the opposite party to see the case and opinion and thus to obtain for such opposite party a right of seeing what under other circumstances he would have no right to see. Sloane v. Britain Steamship Co., (1897) 1 Q. B. 185, 66 L. J. Q. B. D. 72, 75 L. T. N. S. 542, 45 W. R. 203.

When Error Not Prejudicial. — There is no prejudicial error in the fact that an attorney made a statement to the court of alleged privileged communications when such statement was made in the absence of the jury and was not heard by the jury. McDonald v. McDonald, 142 Ind. 55.

1. Client Cannot Be Compelled to Disclose Communications to Attorney — *England*. — Wentworth v. Lloyd, 10 H. L. Cas. 589, 33 L. J. Ch. 688, 10 Jur. N. S. 961, 10 L. T. N. S. 767; Lyell

(2) *Reason of Rule.* — Communications to attorneys and counsel are not protected from disclosure in court merely for the reason that they are made confidentially. The principle of the rule is that so numerous and complex are the laws by which the rights and duties of citizens are governed, and so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country and maintaining them most safely in courts, without publishing those facts which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence by requiring that on such facts the mouth of the attorney shall be forever sealed.¹

(3) *Enjoining Secrecy Unnecessary.* — The rule is not restricted to such matters as may have been communicated in special confidence. The relation itself is of a confidential character, and every fact derived through the medium of it partakes of its nature.² Hence it is not necessary, in order for a client to be entitled to claim the privilege, that he should at the time of making the communication enjoin secrecy upon the attorney or even be aware of the existence of any privilege.³

(4) *Communication Need Not Be in Reply to Inquiry.* — So far as the question of privilege is concerned it is immaterial whether the communication was made by the client spontaneously or in reply to an inquiry from the attorney.⁴

(5) *Rule Extends to Statements of Attorney.* — The rule is not confined to statements by the client to the attorney, but applies with equal force to statements made and advice given by the attorney to his client.⁵

v. Kennedy, 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. N. S. 277, 32 W. R. 497; *Pearse v. Pearse*, 1 De G. & Sm. 12, 16 L. J. Ch. 153, 11 Jur. 52.

Canada. — *Dederick v. Ashdown*, 4 Manitoba 174.

Alabama. — *Birmingham R., etc., Co. v. Wildman*, 119 Ala. 547.

Arkansas. — *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 407.

California. — *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517.

Idaho. — *Perry v. State*, (Idaho 1894) 38 Pac. Rep. 655.

Indiana. — *Bigler v. Reyher*, 43 Ind. 112.

Kansas. — *State v. White*, 19 Kan. 445, 27 Am. Rep. 137.

Mississippi. — *Jones v. State*, 65 Miss. 179.

Nebraska. — *Basye v. State*, 45 Neb. 261.

New York. — *Carnes v. Platt*, 36 N. Y. Super. Ct. 361, 15 Abb. Pr. N. S. (N. Y.) 337.

Texas. — *Herring v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 301.

Vermont. — *Hemenway v. Smith*, 28 Vt. 701.

1. *Reason of Rule.* — *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734. See also the following cases:

England. — *Craig v. Anglesea*, 17 How. St. Tr. 1139.

United States. — *Hunt v. Blackburn*, 128 U. S. 464; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457.

New York. — *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385; *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; *McClure v. Goodenough*, (N. Y. Super. Ct. Spec. T.) 19 Civ. Pro. (N. Y.) 191.

Vermont. — *Dixon v. Parmelee*, 2 Vt. 185.

And see the cases cited in the two preceding notes.

Rule Based on Public Policy — *United States.* — *Stein v. Bowman*, 13 Pet. (U. S.) 209.

California. — *Lissak v. Crocker Estate Co.*, 119 Cal. 442.

Connecticut. — *State v. Barrows*, 52 Conn. 323.

Mississippi. — *Crisler v. Garland*, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 49.

Missouri. — *Deuser v. Walkup*, 43 Mo. App. 625; *Hamil v. England*, 50 Mo. App. 338.

New York. — *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Kitz v. Buckmaster*, 45 N. Y. App. Div. 283.

South Carolina. — *State v. James*, 34 S. Car. 49, 579.

Vermont. — *Coon v. Swan*, 30 Vt. 6.

West Virginia. — *State v. Douglass*, 20 W. Va. 770.

And see the preceding note.

2. *Crawford v. McKissack*, 1 Port. (Ala.) 433.

3. *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

4. *Communication Need Not Be in Reply to Inquiry.* — *Southwark, etc., Water Co. v. Quick*, 3 Q. B. D. 315, 47 L. J. Q. B. D. 258, 26 W. R. 341, affirming 38 L. T. N. S. 28; *Lockhard v. Brodie*, 1 Tenn. Ch. 384; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513. See also *In re Holloway*, 12 P. D. 167, 56 L. J. P. 81, 57 L. T. N. S. 515, 35 W. R. 751.

5. *Statements and Advice of Attorney Privileged* — *England.* — *Combe v. London*, 4 Y. & C. Exch. 139; *Woods v. Woods*, 4 Hare 83; *Richards v. Jackson*, 18 Ves. Jr. 472; *Lyell v. Ken-*

(6) *Attorney of Public Officer or Municipality.* — A sheriff is entitled to the same privilege in his communications with his attorney as other persons,¹ and the privilege also extends to the advice given by a corporation counsel to the various municipal boards.²

(7) *Communications Between Attorneys for Same Party.* — Conversations and consultations between the solicitor and the counsel for a party touching the subject-matter of the litigation are privileged.³

(8) *Communication by Agent of Client.* — It has been held that the rule of privilege extends to a communication by an agent to the attorney of his principal.⁴ But in such case there is no privilege as between the agent and the attorney, and the latter may testify as to such communication with the consent of the client.⁵

(9) *Communications of Third Person to Whom Client Has Referred Attorney.* — The privilege under the *New York* statute embraces only communications between the client and his attorney, and does not extend to communications to the attorney from a third person to whom the attorney has been referred by the client for information with regard to his, the client's, affairs.⁶

(10) *Evidence Obtained by Attorney.* — In *England* the evidence obtained from third persons by the solicitor, or by his direction or at his instance, even if obtained by the client, is protected from discovery or production at the instance of the opposite party, if obtained after litigation has been commenced or threatened, or with a view to the defense or prosecution of such litigation, but the privilege does not extend to information obtained by the solicitor from third persons as to a matter concerning which there is no dispute or litigation.⁷

(11) *Documents Prepared for Submission to Attorney.* — It has been held in *England* that a document prepared by a party for the *bona fide* purpose of being laid before his solicitor for the purpose of taking his advice in relation to an intended action is privileged from inspection by the opposite party, whether or not it was ultimately laid before the solicitor.⁸ But in a *Texas* case the court held that a statement prepared by the defendant in a prosecution for homicide, relating to matters alleged as the motive, which he intended to give to his counsel the next day, but which was found upon his person when arrested for the homicide, could not be regarded as a privileged communication so as to prevent its introduction in evidence on the trial.⁹

nedy, 9 App. Cas. 81, 53 L. J. Ch. 449, 50 L. T. N. S. 277, 32 W. R. 497; *Churton v. Frewen*, 2 Drew. & Sm. 394, 12 L. T. N. S. 105, 13 W. R. 490.

Canada. — *Ex p. Abbott*, 7 Montreal Leg. N. 318.

United States. — *Liggett v. Glenn*, 4 U. S. App. 438.

Indiana. — *Jenkinson v. State*, 5 Blackf. (Ind.) 465.

Michigan. — *People v. Hillhouse*, 80 Mich. 580. See also *Riley v. Conner*, 79 Mich. 497; *Erickson v. Milwaukee, etc., R. Co.*, 93 Mich. 414.

New York. — *Matter of Whitlock*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 204, 51 Hun (N. Y.) 351.

South Dakota. — *Austin, etc., Mfg. Co. v. Heiser*, 6 S. Dak. 429.

In several English cases the court has considered the legal advice or opinion of the solicitor privileged from production, although the cases submitted for his opinion by the client were not so. *Bluck v. Galsworthy*, 2 Giff. 453, 7 Jur. N. S. 91, 3 L. T. N. S. 399; *Walsingham v. Goodricke*, 3 Hare 122; *Preston v. Carr*, 1 Y. & J. 175. As the rule upon

which the court in these cases held the communications of the client not privileged, viz., that they did not relate to a pending suit, is now obsolete, the cases are of little value at the present time.

1. *Paxton v. Steckel*, 2 Pa. St. 93.

2. *People v. Gillon*, (Supm. Ct.) 18 Civ. Pro. (N. Y.) 109.

3. *Montgomery v. Perkins*, 94 Fed. Rep. 23. See also *Goodall v. Little*, 1 Sim. N. S. 155, 20 L. J. Ch. 132, 15 Jur. 309; *Mostyn v. West Mostyn Coal, etc., Co.*, 34 L. T. N. S. 531.

4. *Communication by Agent of Client.* — *Wheeler v. LeMarchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728.

5. *Bingham v. Walk*, 128 Ind. 164.

6. *In re Mellen*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 515, 63 Hun (N. Y.) 632, *affirmed* 138 N. Y. 615.

7. *Wheeler v. LeMarchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728.

8. *Documents Prepared for Attorney.* — *Southwark, etc., Water Co. v. Quick*, 3 Q. B. D. 315, 47 L. J. Q. B. D. 258, 26 W. R. 341, *affirming* 38 L. T. N. S. 28.

9. *Renfro v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 1013.

(12) *Copies of or Extracts from Public Records.* — Although *prima facie* privilege cannot be claimed for copies of or extracts from public records or documents which are *publici juris*, a collection of such copies or extracts will be privileged from production where it has been made or obtained by the professional advisers of a party for his defense to the action and is the result of the professional knowledge, research, and skill of those advisers.¹

(13) *Rule Does Not Render Attorney Incompetent as Witness.* — The fact that a witness is one of the attorneys in the case is no ground whatever for refusing to testify, unless the question asked tends directly to elicit some disclosure of a privileged communication between attorney and client.²

(14) *No Presumption Arises from Claim of Privilege.* — The fact that a client claims privilege with respect to communications between himself and his attorney does not give rise to any presumption of fact against him.³

b. RELATION OF ATTORNEY AND CLIENT MUST EXIST — (1) *Rule Stated.* — In order that a communication to an attorney may be privileged it is absolutely essential that the relation of attorney and client should have existed between him and the person making the communication,⁴ with reference to

1. Lyell v. Kennedy, 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. N. S. 730.

2. *Attorney a Competent Witness.* — Wisden v. Wisden, 6 Hare 549; *Ex p. Hodgson*, 2 Glyn & J. 21; Rundle v. Foster, 3 Tenn. Ch. 658. See *infra*, this section, *u. Limitations of Rule*.

3. Wentworth v. Lloyd, 10 H. L. Cas. 589, 33 L. J. Ch. 688, 10 Jur. N. S. 961, 10 L. T. N. S. 767.

4. *Relation of Attorney and Client Must Exist* — *England.* — Chant v. Brown, 9 Hare 799, 16 Jur. 606; Gillard v. Bates, 6 M. & W. 547; Rex v. Brewer, 6 C. & P. 363, 25 E. C. L. 438; Marston v. Downes, 6 C. & P. 381, 25 E. C. L. 448, 4 N. & M. 861, 1 Ad. & El. 31, 28 E. C. L. 24; Craig v. Anglesea, 17 How. St. Tr. 1221; Bramwell v. Lucas, 4 Dowl. & R. 367; Doe v. Jauncey, 8 C. & P. 99, 34 E. C. L. 310; Ford v. Tennant, 32 Beav. 162, 9 Jur. N. S. 292, 32 L. J. Ch. 465, 11 W. R. 324, 7 L. T. N. S. 732; Reg. v. Farley, 2 C. & K. 313, 61 E. C. L. 313, 1 Den. C. C. 197; Wilson v. Rastall, 4 T. R. 753; Cuts v. Pickering, 1 Vent. 197; Hill v. Elliott, 5 C. & P. 436, 24 E. C. L. 399; Turquand v. Knight, 2 M. & W. 100. See also Shore v. Bedford, 5 M. & G. 271, 44 E. C. L. 149.

Canada. — Hamelyn v. Whyte, 6 Ont. Pr. 143.

United States. — Montgomery v. Perkins, 94 Fed. Rep. 23; Randolph v. Quidnick Co., 23 Fed. Rep. 278.

Alabama. — Williams v. McKissack, 117 Ala. 441; Cotton v. State, 87 Ala. 75; Crawford v. McKissack, 1 Port. (Ala.) 433.

California. — Ferguson v. McBean, 91 Cal. 63; Sharon v. Sharon, 79 Cal. 633; George v. Silva, 68 Cal. 272; Carroll v. Sprague, 59 Cal. 655.

Colorado. — Denver Tramway Co. v. Owens, 20 Colo. 107.

Connecticut. — Pulford's Appeal, 48 Conn. 247.

Georgia. — Philman v. Marshall, 103 Ga. 82; O'Brien v. Spalding, 102 Ga. 490, 66 Am. St. Rep. 22; Rodgers v. Moore, 88 Ga. 88; Brown v. Matthews, 79 Ga. 1; McLean v. Clark, 47 Ga. 24; Sharman v. Morton, 31 Ga. 34; Smithwick v. Evans, 24 Ga. 461; Chappell v. Smith, 17 Ga. 68; Riley v. Johnston, 13 Ga. 260.

Illinois. — Tyler v. Tyler, 126 Ill. 525, 9 Am. St. Rep. 642; Griffin v. Griffin, 125 Ill. 430; Rockford v. Falver, 27 Ill. App. 604; Goltra v. Wolcott, 14 Ill. 89; Granger v. Warrington, 8 Ill. 299.

Indiana. — McDonald v. McDonald, 142 Ind. 55; Bingham v. Walk, 128 Ind. 164; Borum v. Fouts, 15 Ind. 50. See also Miller v. Palmer, 25 Ind. App. 357.

Iowa. — Sample v. Frost, 10 Iowa 266.

Kansas. — Robinson v. Blood, (Kan. App. 1900) 62 Pac. Rep. 677.

Louisiana. — Williams v. Benton, 12 La. Ann. 91.

Maryland. — Fulton v. Maccracken, 18 Md. 528, 81 Am. Dec. 620.

Massachusetts. — Hoar v. Tilden, 178 Mass. 157; Lynde v. McGregor, 13 Allen (Mass.) 172; Hoy v. Morris, 13 Gray (Mass.) 519, 74 Am. Dec. 650.

Michigan. — Ewers v. White, 114 Mich. 266; House v. House, 61 Mich. 69, 1 Am. St. Rep. 570.

Mississippi. — Parkhurst v. McGraw, 24 Miss. 134. See also Perkins v. Guy, 55 Miss. 153, 30 Am. Rep. 510.

Missouri. — Wilson v. Godlove, 34 Mo. 337; West v. Freeman, 69 Mo. App. 682; Meysenberg v. Engelke, 18 Mo. App. 346.

Nebraska. — Farley v. Peebles, 50 Neb. 723; Home F. Ins. Co. v. Berg, 46 Neb. 600; Basye v. State, 45 Neb. 261; Romberg v. Hughes, 18 Neb. 579.

New Hampshire. — Brown v. Payson, 6 N. H. 443.

New York. — Rosseau v. Bleau, 131 N. Y. 177, 27 Am. St. Rep. 578; Brennan v. Hall, 131 N. Y. 160, *affirming* (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 434; Kitz v. Buckmaster, 45 N. Y. App. Div. 283; Renihan v. Dennin, 103 N. Y. 573, 57 Am. Rep. 770; Bogert v. Bogert, 2 Edw. (N. Y.) 399; Clark v. Richards, 3 E. D. Smith (N. Y.) 89; Martin v. Platt, 51 Hun (N. Y.) 429; Mowell v. Van Buren, 77 Hun (N. Y.) 569; Haulenbeek v. McGibbon, 60 Hun (N. Y.) 26; Althouse v. Wells, 40 Hun (N. Y.) 336; Baker v. Arnold, 1 Cai. (N. Y.) 258; Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699. See also Wilson v. Troup, 7 Johns. Ch. (N. Y.) 25.

the matter to which the communication relates,¹ or at least that the person making the communication should have had good reason to suppose that it existed.²

Public Prosecutor. — The confidential relation of attorney and client has been held to exist between a public prosecutor and one who communicates facts to him in order to institute a prosecution,³ but this has been denied.⁴ And certainly there is no such relation between a prosecuting attorney and a witness before the grand jury.⁵

Pension Attorney. — Statements made to an attorney acting in his professional capacity to obtain a pension for the person making the communications are privileged.⁶

Communications Between Married Woman and Attorney of Husband. — It has been held that it is not competent for an attorney to detail as a witness in an action brought by a married woman in reference to her separate estate a conversa-

Oregon. — *State v. Gleason*, 19 *Oregon* 159.

Pennsylvania. — *Lyon v. Lyon*, 197 *Pa. St.* 212; *Turner's Estate*, 167 *Pa. St.* 609; *Seip's Estate*, 163 *Pa. St.* 423, 35 *W. N. C. (Pa.)* 401; *Beeson v. Beeson*, 9 *Pa. St.* 279.

South Carolina. — *Branden v. Gowing*, 7 *Rich. L. (S. Car.)* 459.

Tennessee. — *McMannus v. State*, 2 *Head (Tenn.)* 213; *Henry v. Nubert*, (*Tenn. Ch.* 1895) 35 *S. W. Rep.* 444.

Texas. — *Simmons Hardware Co. v. Kaufman*, 77 *Tex.* 131; *Harris v. Daugherty*, 74 *Tex.* 1, 15 *Am. St. Rep.* 812; *Flack v. Neill*, 26 *Tex.* 273; *Rahm v. State*, 30 *Tex. App.* 310, 23 *Am. St. Rep.* 911.

Vermont. — *Childs v. Merrill*, 66 *Vt.* 302; *Strong v. Dodds*, 47 *Vt.* 348; *Earle v. Grout*, 46 *Vt.* 113; *Coon v. Swan*, 30 *Vt.* 6. See also *Allen v. Harrison*, 30 *Vt.* 219, 73 *Am. Dec.* 302.

Virginia. — *Hall v. Rixey*, 84 *Va.* 790; *Parker v. Carter*, 4 *Munf. (Va.)* 273, 6 *Am. Dec.* 513.

Wisconsin. — *Plano Mfg. Co. v. Frawley*, 68 *Wis.* 577; *Tucker v. Finch*, 66 *Wis.* 17; *Brayton v. Chase*, 3 *Wis.* 456.

No Particular Form of Application or Engagement Necessary. — *Andrews v. Simms*, 33 *Ark.* 771; *Goltra v. Wolcott*, 14 *Ill.* 89; *Beeson v. Beeson*, 9 *Pa. St.* 279; *Lockhard v. Brodie*, 1 *Tenn. Ch.* 384.

Evidence of Relationship. — See *Burnham v. Roberts*, 70 *Ill.* 19.

Denial of Relationship by Client. — See *State v. Calhoun*, 50 *Kan.* 523, 34 *Am. St. Rep.* 141.

Separate Counsel of Persons Jointly Indicted. — See *Chahoon v. Com.*, 21 *Gratt. (Va.)* 822.

Circumstances Not Creating Relation. — See *Cummings v. Irvin*, (*Tenn. Ch.* 1900) 59 *S. W. Rep.* 153.

Communications Between Attorney and Witness Not Privileged. — *Lalancé, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 *Fed. Rep.* 563.

1. Communication Must Relate to Subject-matter of Employment. — *England.* — *Gillard v. Bates*, 8 *Dowl.* 774, 6 *M. & W.* 547; *Fountain v. Young*, 6 *Esp.* 113; *Wilson v. Rastall*, 4 *T. R.* 753. See also *Cobden v. Kendrick*, 4 *T. R.* 431; *Turquand v. Knight*, 2 *M. & W.* 98.

California. — *Carroll v. Sprague*, 59 *Cal.* 655; *Hager v. Shindler*, 29 *Cal.* 47; *Satterlee v. Bliss*, 36 *Cal.* 489.

Iowa. — *State v. Mewherter*, 46 *Iowa* 88.

Maine. — *Snow v. Gould*, 74 *Me.* 540, 43 *Am. Rep.* 604.

Missouri. — *Wilson v. Godlove*, 34 *Mo.* 337; *Aultman v. Daggs*, 50 *Mo. App.* 280.

Montana. — *Smith v. Caldwell*, 22 *Mont.* 331. See also *Davis v. Morgan*, 19 *Mont.* 141.

New Hampshire. — *Brown v. Payson*, 6 *N. H.* 443.

New York. — *Marsh v. Howe*, 36 *Barb. (N. Y.)* 649; *Stanfield v. Knickerbocker Trust Co.*, 1 *N. Y. App. Div.* 592; *Mowell v. Van Buren*, 77 *Hun (N. Y.)* 569; *Brandt v. Klein*, 17 *Johns. (N. Y.)* 335; *Riggs v. Denniston*, 3 *Johns. Cas. (N. Y.)* 203, 2 *Am. Dec.* 145. See also *Mandeville v. Guernsey*, 38 *Barb. (N. Y.)* 225.

Wisconsin. — *Plano Mfg. Co. v. Frawley*, 68 *Wis.* 577.

But compare *McIntosh v. Moore*, 22 *Tex. Civ. App.* 22.

The Attorney Need Not Have Been Retained Generally in the matter upon which the client was seeking advice; but he must have been counsel upon the subject upon which the conference was had, and the communication must have been made to him as such. *Earle v. Grout*, 46 *Vt.* 113.

2. Belief that Relation Exists Sufficient. — *Carroll v. Sprague*, 59 *Cal.* 655; *Alderman v. People*, 4 *Mich.* 414, 69 *Am. Dec.* 321; *Coon v. Swan*, 30 *Vt.* 6.

3. Public Prosecutor. — *Vogel v. Gruaz*, 110 *U. S.* 311; *Oliver v. Pate*, 43 *Ind.* 132. See also *Meysenberg v. Engelke*, 18 *Mo. App.* 346.

4. Granger v. Warrington, 8 *Ill.* 299; *Cole v. Andrews*, 74 *Minn.* 93.

In *Iowa* communications from a prosecuting witness to the county attorney have been held privileged, not on the ground that the relation of attorney and client exists, but because it was considered that such communications came within section 3643 of the Iowa code (Code 1897, § 4608) which provides that "no practicing attorney, counselor, * * * shall be allowed in giving testimony to disclose any confidential communication properly intrusted to him in his professional capacity and necessary and proper to enable him to discharge the functions of his office according to the usual course of practice." *State v. Houseworth*, 91 *Iowa* 740. See also *State v. Swafford*, 98 *Iowa* 362.

5. State v. Van Buskirk, 59 *Ind.* 384.

6. Pension Attorney. — *Mutual L. Ins. Co. v. Selby*, 72 *Fed. Rep.* 980, 44 *U. S. App.* 282.

tion which he had with her as an attorney of her husband in relation to personal property which had been purchased with money derived from the sale of her separate real estate, to recover which the action was brought, as the attorney must be regarded as the attorney of both the husband and the wife.¹

(2) *Person Consulted Must Actually Be an Attorney.* — In order for a communication to be privileged, the person to whom it is made must actually be an attorney.² It is not enough that the person making the communication believed him to be an attorney, if he is not so in fact.³

Solicitor Who Has Ceased to Practice. — It has been held in *England* that a communication made to a solicitor who had ceased to practice as such was privileged where the person making the communication was a client of the firm of which the solicitor had been a member, and in the name of which his name was still retained, and the client communicated with him as a solicitor and did not know that he had ceased to practice.⁴

Solicitor of Patents. — The rule of privilege does not extend to communications made to a solicitor of patents who is not an attorney at law.⁵

(3) *Attorney Must Be Consulted and Acting in Professional Capacity.* — The mere fact that the person to whom the communication was made was an attorney will not render it privileged, for there are many cases in which an attorney is employed in transacting business not properly professional, but which might have been transacted by another agent. It must further appear that the attorney was consulted and acting as such and in his professional capacity, and not merely as a friend or agent of the person making the communication, or in some capacity not connected with his professional duties.⁶

1. *Scranton v. Stewart*, 52 Ind. 68. See also in this connection *Scott v. Ives*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 749.

2. *Person to Whom Communication Made Must Actually Be an Attorney — England.* — *Calley v. Richards*, 19 Beav. 401, 2 W. R. 614; *Doe v. Jauncey*, 8 C. & P. 99, 34 E. C. L. 310; *Slade v. Tucker*, 14 Ch. D. 824, 49 L. J. Ch. 644, 43 L. T. N. S. 49, 28 W. R. 807.

Alabama. — *Hawes v. State*, 88 Ala. 37.

Colorado. — *Machette v. Wanless*, 2 Colo. 169.

Illinois. — *McLaughlin v. Gilmore*, 1 Ill. App. 563.

Iowa. — *Sample v. Frost*, 10 Iowa 266.

Pennsylvania. — *Matthews's Estate*, 1 Phila. (Pa.) 292, 9 Leg. Int. (Pa.) 11.

Vermont. — *Holman v. Kimball*, 22 Vt. 555.

Wisconsin. — *Brayton v. Chase*, 3 Wis. 456.

Contra under New Hampshire Statute of Feb. 17, 1791. — *Bean v. Quimby*, 5 N. H. 94.

Communications to Law Students Not Privileged. — *Sample v. Frost*, 10 Iowa 266; *Barnes v. Harris*, 7 Cush. (Mass.) 576; *Schubkagel v. Dierstein*, 131 Pa. St. 46, 25 W. N. C. (Pa.) 185; *Walker v. State*, 19 Tex. App. 176; *Holman v. Kimball*, 22 Vt. 555.

Person Engaged in Practice Before Justices of the Peace. — The statements of one accused of crime, made to a person whose regular employment is practicing law before justices of the peace, and whose aid and counsel are sought as such attorney or counselor, are privileged communications, and it is error to allow such adviser to testify to the statements so made, although he has not been admitted to practice in the courts of record of the state. *Benedict v. State*, 44 Ohio St. 679.

Who Within Tennessee Statute. — See *Scales v. Kelley*, 2 Lea (Tenn.) 706.

Scotch Solicitor and Law Agent Practicing in London. — See *Lawrence v. Campbell*, 4 Drew. 485, 28 L. J. Ch. 780, 5 Jur. N. S. 1071, 7 W. R. 336.

3. *Fountain v. Young*, 6 Esp. 113; *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

4. *Calley v. Richards*, 19 Beav. 401, 2 W. R. 614.

5. *Solicitor of Patents.* — *Brungger v. Smith*, 49 Fed. Rep. 124. See also *Moseley v. Victoria Rubber Co.*, 55 L. T. N. S. 482.

6. *Attorney Must Be Consulted and Acting as Such — England.* — *Greenlaw v. King*, 1 Beav. 137, 8 L. J. Ch. 92; *Maden v. Veevers*, 7 Beav. 489; *Bramwell v. Lucas*, 4 Dowl. & R. 367; *Walker v. Wildman*, 6 Madd. 47, 22 Rev. Rep. 234; *Marsh v. Keith*, 1 Drew. & Sm. 342, 30 L. J. Ch. 127, 6 Jur. N. S. 1182, 3 L. T. N. S. 498, 9 W. R. 115; *In re Hawley*, 1 W. R. 128; *Wilson v. Rastall*, 4 T. R. 753, 2 Rev. Rep. 515; *Smith v. Daniell*, L. R. 18 Eq. 649, 44 L. J. Ch. 189, 30 L. T. N. S. 752, 22 W. R. 856; *Wheeler v. LeMarchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728. See also *Perry v. Smith*, 9 M. & W. 681, C. & M. 554, 41 E. C. L. 301.

Canada. — *Rudd v. Frank*, 17 Ont. 758; *Hamelyn v. Whyte*, 6 Ont. Pr. 143.

Alabama. — *State v. Marshall*, 8 Ala. 302.

California. — *Sharon v. Sharon*, 79 Cal. 633; *Hager v. Shindler*, 29 Cal. 63.

Colorado. — *Caldwell v. Davis*, 10 Colo. 481, 3 Am. St. Rep. 599.

District of Columbia. — *Oliver v. Cameron*, *MacArthur & M. (D. C.)* 237; *Patten v. Glover*, 1 App. Cas. (D. C.) 466.

Georgia. — *Collins v. Johnson*, 16 Ga. 458.

Illinois. — *Goltra v. Wolcott*, 14 Ill. 89; *Granger v. Warrington*, 8 Ill. 299.

Attorney Employed as Scrivener. — Accordingly it is usually held that the rule of privilege does not apply in the case of a person acting as a mere scrivener, although he is a member of the legal profession. Consequently an attorney who is requested to prepare a deed or mortgage, no legal advice being required, may testify as to what comes to his knowledge in connection with such transaction, and when the terms of a contract have been agreed upon between the parties, and an attorney is afterwards employed as a scrivener merely to reduce the contract to writing, and no inquiry is made of him as to its legal effect, communications made to him while thus engaged will not be regarded as privileged.¹ But the fact that an attorney does, in the course of his employment as such, draw up certain deeds, mortgages, contracts, or the like, does not take away the privilege, where this is done merely as incidental to the main purpose of his employment, which is to obtain his professional advice and assistance in reference to the matters in hand.²

Indiana. — *Borum v. Fouts*, 15 Ind. 50.
Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415.

Michigan. — *Dikeman v. Arnold*, 78 Mich. 455; *Cady v. Walker*, 62 Mich. 157, 4 Am. St. Rep. 834; *House v. House*, 61 Mich. 69, 1 Am. St. Rep. 570; *Lange v. Perley*, 47 Mich. 352; *Alderman v. People*, 4 Mich. 414.

Missouri. — *West v. Freeman*, 69 Mo. App. 682; *Kling v. Kansas City*, 27 Mo. App. 231.

Montana. — *Smith v. Caldwell*, 22 Mont. 331.
Nebraska. — *Romberg v. Hughes*, 18 Neb. 579.

New York. — *Wadd v. Hazleton*, 62 Hun (N. Y.) 602, reversed on other grounds 137 N. Y. 215, 33 Am. St. Rep. 707; *Sheldon v. Sheldon*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 477, 58 Hun (N. Y.) 601, reversed on other grounds 133 N. Y. 1; *Matter of McCarthy*, 55 Hun (N. Y.) 7; *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117; *Hoffman v. Smith*, 1 Cal. (N. Y.) 157; *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; *People v. Hess*, 8 N. Y. App. Div. 143; *Avery v. Mattice*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 166; *Kitz v. Buckmaster*, 45 N. Y. App. Div. 283.

Pennsylvania. — *Beeson v. Beeson*, 9 Pa. St. 279; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

South Carolina. — *Branden v. Gowing*, 7 Rich. L. (S. Car.) 459.

Texas. — *Stallings v. Hullum*, 79 Tex. 421; *Flack v. Neill*, 26 Tex. 273; *Walker v. State*, 19 Tex. App. 176.

Wisconsin. — *Koeber v. Somers*, 108 Wis. 497; *Brayton v. Chase*, 3 Wis. 456. See also *Dudley v. Beck*, 3 Wis. 274.

1. Attorney Employed as a Mere Scrivener — *Colorado.* — *Caldwell v. Davis*, 10 Colo. 481, 3 Am. St. Rep. 599; *Machette v. Wanless*, 2 Colo. 169.

Connecticut. — *Todd v. Munson*, 53 Conn. 579.

Dakota. — *O'Neil v. Murry*, 6 Dak. 107.

Illinois. — *Smith v. Long*, 106 Ill. 485; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371.

Indiana. — *Hanlon v. Doherty*, 109 Ind. 37; *Borum v. Fouts*, 15 Ind. 50; *Thomas v. Griffin*, 1 Ind. App. 457.

Iowa. — *Wyland v. Griffith*, 96 Iowa 24.

Kansas. — *Sparks v. Sparks*, 51 Kan. 195.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415. See also

Hoy v. Morris, 13 Gray (Mass.) 519, 74 Am. Dec. 650.

Michigan. — *Dikeman v. Arnold*, 78 Mich. 455.

Minnesota. — *Hanson v. Bean*, 51 Minn. 546, 38 Am. St. Rep. 516.

Mississippi. — *Randel v. Yates*, 48 Miss. 685.

Montana. — *Smith v. Caldwell*, 22 Mont. 331.

New York. — *Van Alstyne v. Smith*, 82 Hun (N. Y.) 382; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557; *Hebbard v. Haughian*, 70 N. Y. 54; *Sommer v. Oppenheim*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 605.

Pennsylvania. — *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696.

Texas. — *Stallings v. Hullum*, 79 Tex. 421.

Vermont. — *Childs v. Merrill*, 66 Vt. 302.

Wisconsin. — See *Dunn v. Amos*, 14 Wis. 106.

The Fact that the Attorney Has Been the Legal Adviser of the party objecting to his evidence, and that he was paid by such party for his services in the writing of the papers, will not be allowed to affect the nature of the act done, it being otherwise clear that he was acting as a scrivener only. *Thomas v. Griffin*, 1 Ind. App. 457.

A Mere Conveyancer Is Not Within the Privilege. — *Matthews's Estate*, 1 Phila. (Pa.) 292, 9 Leg. Int. (Pa.) 11, 5 Pa. L. J. Rep. 149; *Stallings v. Hullum*, 79 Tex. 421.

2. Papers Drawn in Connection with Professional Employment — *England.* — *Doe v. Seaton*, 2 Ad. & El. 171, 29 E. C. L. 62; *Mynn v. Joliffe*, 1 M. & Rob. 326; *Carpmael v. Powis*, 1 Phil. 687, 15 L. J. Ch. 275; *Sandford v. Remington*, 2 Ves. Jr. 189, 2 Rev. Rep. 195. See also *Doe v. Harris*, 5 C. & P. 592, 24 E. C. L. 468; *Harvey v. Clayton*, 2 Swanst. 221, note.

United States. — *Linthicum v. Remington*, 5 Cranch (C. C.) 546.

Alabama. — *Blunt v. Strong*, 60 Ala. 572.

Connecticut. — *Brown v. Butler*, 71 Conn. 576.

Kentucky. — *Carter v. West*, 93 Ky. 211.

Mississippi. — *Crisler v. Garland*, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 49.

Missouri. — *Gray v. Fox*, 43 Mo. 570, 97 Am. Dec. 416.

New York. — *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

Attorney Acting as Notary. — The same rule and modification apply in the case of an attorney who has performed services as a notary public.¹

(4) *Communication Must Be on Account of Relation.* — The communication must also be made solely on account of the relation of attorney and client, and for the purpose of obtaining professional assistance or advice, or of enabling the attorney correctly to understand the matter in relation to which he is employed so that he may manage the cause with greater skill.² Hence, it has been held that a communication made by a client to his attorney to obtain information as to a matter of fact, and not for the purpose of asking his legal advice, is not privileged.³

(5) *Payment of Retainer or Fee.* — As a general rule, it is considered that it is not necessary, in order to create the relation of attorney and client so as to render any communications between them privileged, that a regular retainer should be paid to the attorney,⁴ or that he should receive any fees,⁵ or make,

Texas. — See *Stallings v. Hullum*, 79 Tex. 421.

Virginia. — *Parker v. Carter*, 4 Munf. (Va.) 273 6 Am. Dec. 513.

Abstract of Title Privileged. — *Doe v. Watkins*, 3 Bing. N. Cas. 421, 32 E. C. L. 187, 4 Scott 155, 3 Hodges 25, 1 Jur. 42; *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

1. **Attorney Acting as Notary.** — *Lukin v. Halderston*, 24 Ind. App. 645; *Mutual L. Ins. Co. v. Corey*, 54 Hun (N. Y.) 493, reversed on other grounds 135 N. Y. 326, 31 Am. St. Rep. 835; *Getzlaff v. Seliger*, 43 Wis. 207.

2. **Communication Must Be on Account of Relation** — *England.* — *Cobden v. Kendrick*, 4 T. R. 432; *Turquand v. Knight*, 2 M. & W. 98. See also *Gillard v. Bates*, 6 M. & W. 547, 8 Dowl. 774.

United States. — *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

Alabama. — *Brazier v. Fortune*, 10 Ala. 516; *State v. Marshall*, 8 Ala. 302; *Crawford v. McKissack*, 1 Port. (Ala.) 433.

California. — *Sharon v. Sharon*, 79 Cal. 633; *George v. Silva*, 68 Cal. 272; *Satterlee v. Bliss*, 36 Cal. 489; *Hager v. Shindler*, 29 Cal. 61.

Georgia. — *Philman v. Marshall*, 103 Ga. 82; *Skellie v. James*, 81 Ga. 419; *Brown v. Matthews*, 79 Ga. 1; *McDougald v. Lane*, 18 Ga. 444; *Chappell v. Smith*, 17 Ga. 68; *Collins v. Johnson*, 16 Ga. 458.

Illinois. — *DeWolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Goltra v. Wolcott*, 14 Ill. 90; *Granger v. Warrington*, 8 Ill. 309.

Indiana. — *Borum v. Fouts*, 15 Ind. 52; *Lloyd v. Davis*, 2 Ind. App. 170.

Iowa. — *Pierson v. Steortz*, Morr. (Iowa) 136; *Sample v. Frost*, 10 Iowa 266.

Maine. — *Wade v. Ridley*, 87 Me. 368.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415.

Michigan. — *Lorimer v. Lorimer*, 124 Mich. 631, 7 Detroit Leg. N. 367.

Nebraska. — *Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266.

New Hampshire. — *Brown v. Payson*, 6 N. H. 443.

New York. — *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Mowell v. Van Buren*, 77 Hun (N. Y.) 569; *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; *Peopel v. Hess* 8 N. Y. App. Div. 143; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89.

See also *Riggs v. Denniston*, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145.

Pennsylvania. — *Heaton v. Findlay*, 12 Pa. St. 304; *Moore v. Bray*, 10 Pa. St. 524; *Livers v. Van Buskirk*, 4 Pa. St. 309; *Matthews's Estate*, 1 Phila. (Pa.) 292, 9 Leg. Int. (Pa.) 11; *Weaver's Estate*, 9 Pa. Co. Ct. 516.

Texas. — *Flack v. Neill*, 26 Tex. 273; *Stallings v. Hullum*, 79 Tex. 421; *Henderson v. Terry*, 62 Tex. 281.

Vermont. — *Earle v. Grout*, 46 Vt. 113.

Not Necessary that Client Should Technically Ask or Receive Advice. — *Liggett v. Glenn*, 4 U. S. App. 438, reversing 47 Fed. Rep. 472; *National Bank v. Delano*, 177 Mass. 362.

3. *Bramwell v. Lucas*, 4 Dowl. & R. 367, 2 B. & C. 745, 9 E. C. L. 233; *Turner's Appeal*, 72 Conn. 305; *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

4. **Retainer Not Necessary.** — *Denver Tramway Co. v. Owens*, 20 Colo. 107; *Goltra v. Wolcott*, 14 Ill. 89; *King v. Barrett*, 11 Ohio St. 261; *Beeson v. Beeson*, 9 Pa. St. 279; *McMannus v. State*, 2 Head (Tenn.) 213; *Lockhard v. Brodie*, 1 Tenn. Ch. 384; *Bruley v. Garvin*, 105 Wis. 625. See also *Orton v. McCord*, 33 Wis. 205. But see *contra*, *DeWolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742.

5. **Payment of Fees Not Necessary** — *United States.* — *Alexander v. U. S.*, 138 U. S. 353.

Arkansas. — *Andrews v. Simms*, 33 Ark. 771.

Illinois. — *Goltra v. Wolcott*, 14 Ill. 89.

Indiana. — *Oliver v. Pate*, 43 Ind. 132; *Bowers v. Briggs*, 20 Ind. 139; *Reed v. Smith*, 2 Ind. 160.

Maine. — *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

Maryland. — See *Hunter v. Van Bomhorst*, 1 Md. 504.

Missouri. — *Cross v. Riggins*, 50 Mo. 336.

Montana. — *Smith v. Caldwell*, 22 Mont. 331; *Davis v. Morgan*, 19 Mont. 141.

New York. — *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, 15 Hun (N. Y.) 26; *Pfeffer v. Kling*, 58 N. Y. App. Div. 179; *Kitz v. Buckmaster*, 45 N. Y. App. Div. 283; *Mowell v. Van Buren*, 77 Hun (N. Y.) 569.

Ohio. — *King v. Barrett*, 11 Ohio St. 261.

Pennsylvania. — *Beeson v. Beeson*, 9 Pa. St. 279.

Tennessee. — *Lockhard v. Brodie*, 1 Tenn.

or even expect to make, any charge for his services or opinion.¹

(6) *Communications Before Employment* — (a) *In General*. — It follows from the general rule which has been stated that communications made to an attorney before his employment as such are not privileged when made, and are not rendered so by the subsequent creation of the relation of attorney and client.²

(b) *Communications with View to Employment*. — There is, however, this exception, that the privilege does extend to communications made to an attorney in good faith with a view to employing him in the matter to which the communications relate or during the course of negotiations for his employment, even although the attorney declines the case, or the prospective client after hearing the attorney's advice does not further employ him.³ But there can be no privilege as to communications made after the attorney has refused to act in the matter.⁴

(7) *Communications After Relation Has Ceased*. — Communications voluntarily made to an attorney by his former client after the confidential relation has terminated may be proved by the testimony of the attorney,⁵ although they

Ch. 384; *McMannus v. State*, 2 Head (Tenn.) 213.

Wisconsin. — *Bruley v. Garvin*, 105 Wis. 625.

But see *contra*, *Brown v. Matthews*, 79 Ga. 1; *De Wolf v. Strader*, 26 Ill. 225, 79 Am. Dec. 371; *In re Monroe*, 2 Connolly (N. Y.) 395; *Dunn v. Amos*, 14 Wis. 106.

Fee Paid by Person Other than Client. — *Brown v. Grove*, (C. C. A.) 80 Fed. Rep. 564.

1. *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35.

2. *Cobden v. Kendrick*, 4 T. R. 432; *Jennings v. Sturdevant*, 140 Ind. 641; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Harris v. Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812.

3. *Communications with a View to Employment* — *England*. — *Cromack v. Heathcote*, 2 Brod. & B. 4, 6 E. C. L. 12, 4 Moo. 357.

Alabama. — *State v. Tally*, 102 Ala. 25; *Hawes v. State*, 88 Ala. 37.

Colorado. — *Denver Tramway Co. v. Owens*, 20 Colo. 107.

Georgia. — *Peek v. Boone*, 90 Ga. 767; *Skellie v. James*, 81 Ga. 479; *Brown v. Matthews*, 79 Ga. 1; *Young v. State*, 65 Ga. 525.

Illinois. — *Thorp v. Goeway*, 85 Ill. 611.

Maine. — *Wade v. Ridley*, 87 Me. 368; *Sargent v. Hampden*, 38 Me. 581.

Mississippi. — *Crisler v. Garland*, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 49.

Missouri. — In *Cross v. Riggins*, 50 Mo. 335, the court adopted the rule stated in the text. This case was said, however, in *West v. Freeman*, 69 Mo. App. 682, to have been overruled by *State v. Hedgepeth*, 125 Mo. 14, but an examination of the latter two cases will show that they are clearly distinguishable and do not necessarily conflict with the rule stated in the text.

Nebraska. — *Farley v. Peebles*, 50 Neb. 723; *Nelson v. Becker*, 32 Neb. 99.

New Hampshire. — *Bean v. Quimby*, 5 N. H. 94.

New York. — *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *Ney v. Troy*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 679.

Washington. — *Hartness v. Brown*, 21 Wash. 655.

Wisconsin. — *Bruley v. Garvin*, 105 Wis. 625; *Orton v. McCord*, 33 Wis. 205.

Contra. — *Theisen v. Dayton*, 82 Iowa 74.

And see also *Heaton v. Findlay*, 12 Pa. St. 304, in which it was held that facts stated to an attorney, to show that the cause in which he is sought to be retained does not conflict with the interests of a client for whom he is already employed, are not confidential communications.

Proposal to Employ Attorney of Adverse Party. — Where one party to a controversy makes to the attorney of the other party certain statements and propositions to be communicated to his client, at the same time proposing that if the latter consents to the proposition the attorney shall be employed in the matter by both parties, and the proposition is declined, the statements so made to the attorney are not privileged. *McLean v. Clark*, 47 Ga. 24.

Communications Made by a Third Person with a view to employing the witness as an attorney for the party are not privileged as confidential, unless it be shown that such communications were authorized to be made by the party for whom such person assumed to act. *Sharon v. Sharon*, 79 Cal. 633.

4. *Communications After Refusal of Employment Not Privileged*. — *Farley v. Peebles*, 50 Neb. 723; *Haulenbeek v. McGibbon*, 60 Hun (N. Y.) 26; *People v. Hess*, 8 N. Y. App. Div. 143; *Setzar v. Wilson*, 4 Ired. L. (26 N. Car.) 501; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577. See also *Ewers v. White*, 114 Mich. 266.

5. *Communications After Relation Has Ceased* — *England*. — *Cobden v. Kendrick*, 4 T. R. 432.

California. — *Hager v. Shindler*, 29 Cal. 47.

Georgia. — *Philman v. Marshall*, 103 Ga. 82.

Illinois. — *Chillicothe Ferry, etc., Co. v. Jameson*, 48 Ill. 281.

Indiana. — *Doan v. Dow*, 8 Ind. App. 324.

Louisiana. — *Williams v. Benton*, 12 La. Ann. 91.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Nebraska. — *Brady v. State*, 39 Neb. 529.

New York. — *Wadd v. Hazleton*, 62 Hun (N. Y.) 602, reversed on other grounds 137 N. Y. 215, 33 Am. St. Rep. 707; *Yordan v. Hess*, 13 Johns. (N. Y.) 492. See also *Mandeville v. Guernsey*, 38 Barb. (N. Y.) 225.

Pennsylvania. — *Turner's Estate*, 167 Pa. St. 609.

are the same in substance as communications made while the relation existed.¹ If, however, a repetition of the information should appear to have been drawn out by an artifice for the sake of being used as evidence, it ought not to be received.²

(8) *Communications to Attorney of Adverse Party.* — As a general rule, communications made by one party to the attorney of the adverse party are not privileged,³ but where the attorney for the plaintiffs in an action is applied to by the defendants for advice as to their rights *inter sese*, the communications made to him under such circumstances are privileged.⁴

c. COMMUNICATIONS NEED NOT RELATE TO LITIGATION BEGUN OR CONTEMPLATED. — While there was at one time some doubt upon the subject, and a good many of the earlier cases refused to recognize the privilege unless the communication related to some actual legal proceedings begun or at least in contemplation at the time,⁵ it is now fully established that it is not essential to the protection of professional communications that any judicial proceeding should be actually begun or even contemplated, but it is sufficient that the communication be made to the attorney as the professional adviser of the person making it.⁶

1. *Brady v. State*, 39 Neb. 529; *Yordan v. Hess*, 13 Johns. (N. Y.) 492.

2. *Yordan v. Hess*, 13 Johns. (N. Y.) 492.

3. *Communications to Attorney of Adverse Party.* — *Ford v. Tennant*, 32 Beav. 162, 9 Jur. N. S. 292, 32 L. J. Ch. 465, 11 W. R. 324, 7 L. T. N. S. 732; *Carey v. Carey*, 108 N. Car. 267; *Hughes v. Boone*, 102 N. Car. 137. See also *Hill v. Elliott*, 5 C. & P. 436, 24 E. C. L. 399; *Marston v. Downes*, 1 Ad. & El. 31, 28 E. C. L. 24; *McLean v. Clark*, 47 Ga. 24; and *supra*, this subdivision, (6) (b) *Communications with View to Employment*.

Communications Between Solicitors of Adverse Parties Not Privileged. — *Gore v. Harris*, 15 Jur. 1168.

4. *Bowers v. Briggs*, 20 Ind. 139.

5. *Communication Must Relate to Litigation Begun or Contemplated* — *England.* — *Flight v. Robinson*, 8 Beav. 22, 13 L. J. Ch. 425, 8 Jur. 888; *Williams v. Mudie*, 1 C. & P. 158, 11 E. C. L. 354, R. & M. 34, 21 E. C. L. 375; *Wadsworth v. Hamshaw*, 4 Moo. 358, 2 Brod. & B. 6 note, 6 E. C. L. 13 note; *Broad v. Pitt*, 3 C. & P. 518, 14 E. C. L. 423; *Page v. Ward*, 20 L. T. N. S. 518, 17 W. R. 435; *Hampson v. Hampson*, 26 L. J. Ch. 612. See also *Paddon v. Winch*, L. R. 9 Eq. 666, 39 L. J. Ch. 627, 22 L. T. N. S. 403.

Canada. — *MacDonald v. Putman*, 11 Grant Ch. (U. C.) 258.

New York. — *Peck v. Williams*, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 68. See also *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385.

Vermont. — See *Thompson v. Kilborne*, 28 Vt. 750, 67 Am. Dec. 742.

Separate Litigation Respecting Same Property. — It has been held, however, that a case for the opinion of counsel and his opinion thereon prepared with reference to a separate litigation but respecting the same property as in the suit in which it was desired to have it produced were privileged. *Jenkyns v. Bushby*, L. R. 2 Eq. 547, 35 L. J. Ch. 820, 12 Jur. N. S. 558, 15 L. T. N. S. 310.

Communications Relating to a Dispute and made with a view to probable litigation are privileged, though made before litigation is

commenced. *Flight v. Robinson*, 8 Beav. 22, 13 L. J. Ch. 425, 8 Jur. 888; *Bushnell v. Bushnell*, 2 Jur. 774; *Nias v. Northern, etc.*, R. Co., 3 Myl. & C. 355, 7 L. J. Ch. 170, 2 Jur. 295, *affirming* 2 Keen 76; *Hughes v. Biddulph*, 4 Russ. 190, 28 Rev. Rep. 46; *Garland v. Scott*, 3 Sim. 396; *Clark v. Clark*, 1 M. & Rob. 3; *Vent v. Pacey*, 4 Russ. 193; *Bolton v. Liverpool*, 1 Myl. & K. 88, *affirming* 3 Sim. 467; *Clagett v. Phillips*, 2 Y. & C. Ch. 82; *Holmes v. Baddeley*, 1 Phil. 476, 9 Jur. 289, *reversing* 6 Beav. 521; *March v. Ludlum*, 3 Sandf. Ch. (N. Y.) 35; *Collins v. London General Omnibus Co.*, 63 L. J. Q. B. D. 428, 5 Reports 355, 68 L. T. N. S. 831, 57 J. P. 687; *Reed v. Smith*, 2 Ind. 160; *Strong v. Dodds*, 47 Vt. 348.

6. *Need Not Relate to Litigation Begun or Contemplated* — *England.* — *Carpmael v. Powis*, 9 Beav. 16, 1 Phil. 687, 15 L. J. Ch. 275; *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59; *Jones v. Pugh*, 1 Phil. 96; *Walsingham v. Goodricke*, 3 Hare 122; *Woods v. Woods*, 4 Hare 83, 9 Jur. 102, 615; *Calley v. Richards*, 19 Beav. 401, 2 W. R. 614; *Walker v. Wildman*, 6 Madd. 47, 22 Rev. Rep. 234; *Lowden v. Blakey*, 23 Q. B. D. 332, 58 L. J. Q. B. D. 617, 61 L. T. N. S. 251, 38 W. R. 64, 54 J. P. 54; *Robson v. Kemp*, 4 Esp. 235, 5 Esp. 52; *Manser v. Dix*, 1 Kay & J. 451, 1 Jur. N. S. 466, 3 Eq. Rep. 650, 24 L. J. Ch. 497, 3 W. R. 313; *Wilson v. Northampton, etc.*, R. Co., L. R. 14 Eq. 477, 27 L. T. N. S. 507, 20 W. R. 938; *Greenough v. Gaskell*, 1 Myl. & K. 98; *Macfarlan v. Rolt*, L. R. 14 Eq. 580, 41 L. J. Ch. 649, 27 L. T. N. S. 305, 20 W. R. 945; *Turton v. Barber*, L. R. 17 Eq. 329, 43 L. J. Ch. 468, 22 W. R. 438; *Wheeler v. Le-Marchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728; *Minet v. Morgan*, L. R. 8 Ch. 361, 42 L. J. Ch. 627, 28 L. T. N. S. 573, 21 W. R. 467; *Doe v. Harris*, 5 C. & P. 592, 24 E. C. L. 468; *Cromack v. Heathcote*, 2 Brod. & B. 4, 6 E. C. L. 12, 4 Moo. 357; *Mynn v. Joliffe*, 1 M. & Rob. 326; *Herring v. Cloberry*, 1 Phil. 91; *Clagett v. Phillips*, 2 Y. & C. Ch. 82, 7 Jur. 31; *Pearse v. Pearse*, 1 De G. & Sm. 12, 16 L. J. Ch. 153, 11 Jur. 52. See also *Bramwell v. Lucas*, 4 Dowl. & R. 367,

d. ATTORNEY ACTING FOR SEVERAL CLIENTS. — An attorney employed by two or more persons to give professional advice or assistance in a matter in which they are mutually interested can, on litigation subsequently arising between such persons or their representatives, be examined as a witness, at the instance of either, as to communications made when he was acting as attorney for all. But he cannot disclose such communication in a controversy between his clients, or either of them, and third persons.¹

e. COMMUNICATIONS TO OR THROUGH ATTORNEY'S REPRESENTATIVES, ETC. — The rule of privilege is not strictly confined to communications to the

2 B. & C. 745, 9 E. C. L. 233; *Parkhurst v. Lowten*, 2 Swanst. 216.

Canada. — *Hamelyn v. Whyte*, 6 Ont. Pr. 143, refusing to follow *MacDonald v. Putman*, 11 Grant Ch. (U. C.) 258. See also *Hoffman v. Crerar*, 17 Ont. Pr. 404.

United States. — *Alexander v. U. S.*, 138 U. S. 353; *Linthicum v. Remington*, 5 Cranch (C. C.) 546; *Liggett v. Glenn*, 4 U. S. App. 438.

Alabama. — *Parish v. Gates*, 29 Ala. 254.

Arkansas. — *Bobo v. Bryson*, 21 Ark. 387, 76 Am. Dec. 407.

California. — *Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365.

Connecticut. — *Brown v. Butler*, 71 Conn. 576.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Indiana. — *Bigler v. Reyher*, 43 Ind. 112; *Oliver v. Pate*, 43 Ind. 132; *Bowers v. Briggs*, 20 Ind. 139; *Borum v. Fouts*, 15 Ind. 50.

Kentucky. — *Carter v. West*, 93 Ky. 211.

Maine. — *Gower v. Emery*, 18 Me. 79.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Mississippi. — *Jones v. State*, 65 Miss. 179; *Crisler v. Garland*, 11 Smed. & M. (Miss.) 136, 49 Am. Dec. 49.

Missouri. — *Sweet v. Owens*, 109 Mo. 1; *Gray v. Fox*, 43 Mo. 570, 97 Am. Dec. 416; *Kling v. Kansas City*, 27 Mo. App. 231.

Montana. — *Davis v. Morgan*, 19 Mont. 141.

New York. — *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627, 15 Hun (N. Y.) 26; *Britton v. Lorenz*, 45 N. Y. 51, *affirming* 3 Daly (N. Y.) 23; *Willimas v. Fitch*, 18 N. Y. 546; *Mowell v. Van Buren*, 77 Hun (N. Y.) 569; *Graham v. People*, 63 Barb. (N. Y.) 468; *Clark v. Richards*, 3 E. D. Smith (N. Y.) 89; *Carnes v. Platt*, 36 N. Y. Super. Ct. 361, 15 Abb. Pr. N. S. (N. Y.) 337; *Pearsall v. Elmer*, 5 Redf. (N. Y.) 181; *Kitz v. Buckmaster*, 45 N. Y. App. Div. 283; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189. See also *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254.

Nevada. — *Gruber v. Baker*, 20 Nev. 453.

Pennsylvania. — *Moore v. Bray*, 10 Pa. St. 519; *Beeson v. Beeson*, 9 Pa. St. 279; *Beltz-hoover v. Blackstock*, 3 Watts (Pa.) 20, 27 Am. Dec. 330; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65; *Bennett's Estate*, 13 Phila. (Pa.) 331, 37 Leg. Int. (Pa.) 105.

Tennessee. — *Lockhard v. Brodie*, 1 Tenn. Ch. 384; *McMannus v. State*, 2 Head (Tenn.) 213.

Texas. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

Vermont. — *Durkee v. Leland*, 4 Vt. 612.

Virginia. — *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

Wisconsin. — *Dudley v. Beck*, 3 Wis. 274. See also *Orton v. McCord*, 33 Wis. 205.

1. *Attorney Acting for Several Clients.* — *England.* — *Warde v. Warde*, 3 Macn. & G. 365, 21 L. J. Ch. 90, 15 Jur. 759, *reversing* 1 Sim. N. S. 18; *Tugwell v. Hooper*, 10 Beav. 348, 16 L. J. Ch. 171; *Robson v. Kemp*, 4 Esp. 233; *Baugh v. Cradocke*, 1 M. & Rob. 182; *Cleve v. Powel*, 1 M. & Rob. 228.

Alabama. — *Parish v. Gates*, 29 Ala. 254.

California. — *Murphy v. Waterhouse*, 113 Cal. 467, 54 Am. St. Rep. 365; *Matter of Bauer*, 79 Cal. 304.

Illinois. — *Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642; *Griffin v. Griffin*, 125 Ill. 430; *Lynn v. Lyerle*, 113 Ill. 128.

Indiana. — *Hanlon v. Doherty*, 109 Ind. 37.

Kansas. — *Sparks v. Sparks*, 51 Kan. 195.

Kentucky. — *Rice v. Rice*, 14 B. Mon. (Ky.) 335.

Michigan. — *Cady v. Walker*, 62 Mich. 157, 4 Am. St. Rep. 834; *House v. House*, 61 Mich. 69, 1 Am. St. Rep. 570. See also *Frank v. Morley*, 106 Mich. 635.

Missouri. — *Gray v. Fox*, 43 Mo. 570, 97 Am. Dec. 416.

Nebraska. — *Adler, etc., Clothing Co. v. Hellman*, 55 Neb. 266.

Nevada. — *Livingston v. Wagner*, 23 Nev. 53; *Haley v. Eureka County Bank*, 21 Nev. 127; *Gruber v. Baker*, 20 Nev. 453.

New Jersey. — *Gulick v. Gulick*, 39 N. J. Eq. 516, *affirming* 38 N. J. Eq. 402.

New York. — *Hurlburt v. Hurlburt*, 128 N. Y. 420, *affirming* (Supm. Ct. Gen. T.) 2 N. Y. Supp. 317; *Root v. Wright*, 84 N. Y. 72, 38 Am. Rep. 495, *reversing* 21 Hun (N. Y.) 344; *Britton v. Lorenz*, 45 N. Y. 51; *Sandiford v. Frost*, 9 N. Y. App. Div. 55; *Hard v. Ashley*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 413, 63 Hun (N. Y.) 634, *affirmed* 136 N. Y. 645; *Sherman v. Scott*, 27 Hun (N. Y.) 331.

North Carolina. — *Carey v. Carey*, 108 N. Car. 267; *Hughes v. Boone*, 102 N. Car. 137; *Michael v. Foil*, 100 N. Car. 178, 6 Am. St. Rep. 577.

Oregon. — *Minard v. Stillman*, 31 Oregon 164, 65 Am. St. Rep. 815.

Pennsylvania. — *Seip's Estate*, 163 Pa. St. 423, 35 W. N. C. (Pa.) 401; *Goodwin Gas Stove, etc., Co.'s Appeal*, 117 Pa. St. 514, 2 Am. St. Rep. 696.

Texas. — *Harris v. Daugherty*, 74 Tex. 1, 15 Am. St. Rep. 812.

But compare *In re Ubsdell*, 27 L. T. N. S. 460, 21 W. R. 70; *Hull v. Lyon*, 27 Mo. 570.

No Privilege in Action by One of Clients Against the Attorney. — *Minard v. Stillman*, 31 Oregon 164, 65 Am. St. Rep. 815.

attorney, but extends to all persons whose intervention is necessary to facilitate communication between the attorney and client,¹ such as the attorney's clerk,² or agent,³ or an interpreter between attorney and client.⁴ The privilege, however, extends only to persons who are the media of communication between the client and the attorney, and hence a stenographer and clerk of an attorney who has overheard certain statements of the client to the attorney, but who was not in any manner a medium of communication between them, may be allowed to testify to such statements.⁵

1. Media of Communication Between Attorney and Client—England. — *Bunbury v. Bunbury*, 2 Beav. 173, 9 L. J. Ch. 1; *Carpmael v. Powis*, 9 Beav. 16, 1 Phil. 687, 15 L. J. Ch. 275; *Marriott v. Anchor Reversionary Co.*, 3 Giff. 304, 8 Jur. N. S. 51, 5 L. T. N. S. 545; *Steele v. Stewart*, 1 Phil. 471, 14 L. J. Ch. 34; *Chant v. Brown*, 9 Hare 790; *Lafone v. Falkland Islands Co.*, 4 Kay & J. 34; *Mills v. Oddy*, 6 C. & P. 731, 25 E. C. L. 623; *Taylor v. Forster*, 2 C. & P. 195, 12 E. C. L. 85; *Goodall v. Little*, 1 Sim. N. S. 155; *Fenner v. London, etc., R. Co.*, L. R. 7 Q. B. 767; *Parkins v. Hawkshaw*, 2 Stark. 239, 3 E. C. L. 393; *DuBarre v. Livette*, *Peake N. P.* (ed. 1795) 77; *Bustros v. White*, 1 Q. B. D. 423; *Walsham v. Stainton*, 2 Hen. & M. 1, 9 L. T. N. S. 603; *Jenkyns v. Bushby*, L. R. 2 Eq. 547, 35 L. J. Ch. 820; *Churton v. Frewen*, 2 Drew. & Sm. 390; *Hooper v. Gumm*, 2 Johns. & H. 602.

Massachusetts. — *Hoy v. Morris*, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

New York. — *Brand v. Brand*, (Supm. Ct. Gen. T.) 39 How. Pr. (N. Y.) 193; *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; *Sibley v. Waffle*, 16 N. Y. 180.

See also *Walker v. Wildman*, 6 Madd. 47, 22 Rev. Rep. 234; *Ford v. Tennant*, 32 Beav. 162, 9 Jur. N. S. 292, 32 L. J. Ch. 465, 11 W. R. 324, 7 L. T. N. S. 732.

2. Clerk—England. — *Wheeler v. LeMarchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728; *Rex v. Upper Bodington*, 8 Dowl. & R. 726, 16 E. C. L. 348; *De Barre v. Livette*, *Peake N. P.* (ed. 1795) 77; *Wilson v. Rastall*, 4 T. R. 756; *Chant v. Brown*, 9 Hare 790; *Wheatley v. Williams*, 1 M. & W. 533; *Mills v. Oddy*, 6 C. & P. 731, 25 E. C. L. 623; *Bowman v. Norton*, 5 C. & P. 177, 24 E. C. L. 265; *Taylor v. Forster*, 2 C. & P. 195, 12 E. C. L. 85; *Walsham v. Stainton*, 2 Hem. & M. 1, 3 New Reports 241, 9 L. T. N. S. 603, 12 W. R. 119; *Marriott v. Anchor Reversionary Co.*, 3 Giff. 304, 8 Jur. N. S. 51, 5 L. T. N. S. 545.

United States. — *Andrews v. Solomon*, Pet. (C. C.) 356.

Alabama. — *Hawes v. State*, 88 Ala. 37.

California. — *Landsberger v. Gorham*, 5 Cal. 450.

Connecticut. — *Goddard v. Gardner*, 28 Conn. 172. See also *Pulford's Appeal*, 48 Conn. 247.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Iowa. — *Sample v. Frost*, 10 Iowa 266.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415.

Missouri. — *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337.

New York. — *Sibley v. Waffle*, 16 N. Y. 180. See also *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699.

Vermont. — *Holman v. Kimball*, 22 Vt. 555.

Wisconsin. — *Brayton v. Chase*, 3 Wis. 458.

Where There Is No Privilege as Regards the Attorney there is none as regards the attorney's clerk. *Cooperson v. Pollo*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 619.

3. Agent—England. — *Chartered Bank v. Rich*, 4 B. & S. 73, 116 E. C. L. 73, 32 L. J. Q. B. D. 300, 8 L. T. N. S. 454, 11 W. R. 830; *Churton v. Frewen*, 2 Drew. & Sm. 394, 12 L. T. N. S. 105, 13 W. R. 490; *Marriott v. Anchor Reversionary Co.*, 3 Giff. 304, 8 Jur. N. S. 51, 5 L. T. N. S. 545; *Russell v. Jackson*, 9 Hare 387, 21 L. J. Ch. 146, 15 Jur. 1117; *Walsham v. Stainton*, 2 Hem. & M. 1, 3 New Reports 241, 9 L. T. N. S. 603, 12 W. R. 119; *Steele v. Stewart*, 1 Phil. 471, *affirming* 13 Sim. 533, 12 L. J. Ch. 473; *Ross v. Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. 61; *Bustros v. White*, 1 Q. B. D. 423, 45 L. J. Q. B. D. 642, 34 L. T. N. S. 835, 24 W. R. 721; *Fenner v. London, etc., R. Co.*, L. R. 7 Q. B. 767, 41 L. J. Q. B. D. 313, 26 L. T. N. S. 971, 20 W. R. 830; *Slade v. Tucker*, 14 Ch. D. 824, 49 L. J. Ch. 644, 43 L. T. N. S. 49, 28 W. R. 807; *Parkins v. Hawkshaw*, 2 Stark. 239, 3 E. C. L. 393. See also *Lafone v. Falkland Islands Co.*, 4 Kay & J. 34, 27 L. J. Ch. 25, 6 W. R. 4.

Alabama. — *Hawes v. State*, 88 Ala. 37.

Connecticut. — *Goddard v. Gardner*, 28 Conn. 172. See also *Pulford's Appeal*, 48 Conn. 247.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Iowa. — *Sample v. Frost*, 10 Iowa 266.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415.

4. Interpreter—England. — *Marriott v. Anchor Reversionary Co.*, 3 Giff. 304, 8 Jur. N. S. 51, 5 L. T. N. S. 545; *Churton v. Frewen*, 2 Drew. & Sm. 390, 12 L. T. N. S. 105, 13 W. R. 490; *DuBarre v. Livette*, *Peake N. P.* (ed. 1795) 77; *Fountain v. Young*, 6 Esp. 113; *Taylor v. Forster*, 2 C. & P. 195, 12 E. C. L. 85.

United States. — *Andrews v. Solomon*, Pet. (C. C.) 356.

Connecticut. — *Goddard v. Gardner*, 28 Conn. 172.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Indiana. — *Maas v. Bloch*, 7 Ind. 202.

Iowa. — *Sample v. Frost*, 10 Iowa 266.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415.

Missouri. — *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337; *Weinstein v. Reid*, 25 Mo. App. 41.

New York. — *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699.

Virginia. — *Parker v. Carter*, 4 Munf. (Va.) 287, note, 6 Am. Dec. 513.

Wisconsin. — *Brayton v. Chase*, 3 Wis. 456.

5. Morton v. Smith, (Tex. Civ. App. 1898) 44 S. W. Rep. 683.

A Law Student in the attorney's office, not being necessarily either the agent or the clerk of the attorney, does not occupy such a position of confidence that communications to him are privileged.¹

f. CONFIDENTIAL CHARACTER OF COMMUNICATION. — In order for a communication from a client to an attorney to be within the rule excluding evidence thereof on the ground of public policy, it must be of a confidential character,² and so regarded, at least by the client, at the time,³ and must relate to a matter which is in its nature private and properly the subject of a confidential disclosure.⁴

g. CLIENT NEED NOT BE A PARTY TO SUIT IN WHICH EVIDENCE OFFERED. — The right of a client to prevent the disclosure by his attorney of communications confidentially made is not confined to cases where he is a party to the action in which the evidence is sought to be introduced, but the privilege applies in suits to which the client is not a party.⁵

h. ADMISSIONS OF ATTORNEY. — An attorney is not competent to make admissions in conversation with third persons which will be evidence against his clients as to the facts of his case, and hence such admissions of an attorney are not competent in evidence to bind his clients.⁶ But where the client refers a person to his attorney for the purpose of having him state the client's position with respect to any situation, thus conferring authority upon the attorney to speak for him and leaving the person seeking the information to rely upon the right of such attorney to speak for his client, the reason for the rule of privilege is wanting, and statements made by the attorney to the person so referred to him are not privileged.⁷ It has also been held that an attorney is

1. *Law Student.* — *Andrews v. Solomon*, Pet. (C. C.) 356; *Barnes v. Harris*, 7 Cush. (Mass.) 576, 54 Am. Dec. 734; *Holman v. Kimball*, 22 Vt. 555.

2. *Confidential Character* — *England.* — *Smith v. Daniell*, L. R. 18 Eq. 649, 44 L. J. Ch. 189, 30 L. T. N. S. 752, 22 W. R. 856; *Bunbury v. Bunbury*, 2 Beav. 173, 9 L. J. Ch. 1; *Walsh v. Trevanion*, 15 Sim. 577, 16 L. J. Ch. 330, 11 Jur. 360; *Parkhurst v. Lowten*, 2 Swanst. 194, 19 Rev. Rep. 63; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Desborough v. Rawlins*, 3 Myl. & C. 515; *Spenceley v. Schulenburg*, 7 East 357; *Gillard v. Bates*, 6 M. & W. 547. See also *Kelly v. Jackson*, 13 Ir. Eq. 129.

United States. — *Laffin v. Herrington*, 1 Black (U. S.) 326.

California. — *Hager v. Shindler*, 29 Cal. 47.

Georgia. — *Smithwick v. Evans*, 24 Ga. 461. *Indiana.* — *Harless v. Harless*, 144 Ind. 196; *Lloyd v. Davis*, 2 Ind. App. 170.

Iowa. — *Wyland v. Griffith*, 96 Iowa 24; *Caldwell v. Meltveldt*, 93 Iowa 730; *Toms v. Beebe*, 90 Iowa 612; *State v. Kidd*, 89 Iowa 54; *Williams v. Young*, 46 Iowa 140.

Louisiana. — *Shanghnessy v. Fogg*, 15 La. Ann. 330.

Maine. — *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604.

Maryland. — *Fulton v. Maccracken*, 18 Md. 528, 81 Am. Dec. 620.

Michigan. — *Cady v. Walker*, 62 Mich. 157, 4 Am. St. Rep. 834; *House v. House*, 61 Mich. 69, 1 Am. St. Rep. 570; *Lange v. Perley*, 47 Mich. 352.

Missouri. — *Standard Oil Co. v. Meyer Bros. Drug Co.*, 84 Mo. App. 76.

Montana. — *Smith v. Caldwell*, 22 Mont. 331. *New York.* — *Matter of McCarthy*, 55 Hun (N. Y.) 7. See also *Brennan v. Hall*, (Supm.

Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 434, *affirmed* 131 N. Y. 160.

Pennsylvania. — *Heaton v. Findlay*, 12 Pa. St. 304; *Levers v. Van Buskirk*, 4 Pa. St. 309.

Tennessee. — *Johnson v. Patterson*, 13 Lea (Tenn.) 626.

Texas. — *Orman v. State*, 22 Tex. App. 604, 58 Am. Rep. 662.

Vermont. — *Childs v. Merrill*, 66 Vt. 302; *Allen v. Harrison*, 30 Vt. 219, 73 Am. Dec. 302; *Coon v. Swan*, 30 Vt. 6.

Wisconsin. — *Aultman v. Ritter*, 81 Wis. 395; *Plano Mfg. Co. v. Frawley*, 68 Wis. 577.

Whether Communication Made in Confidence a Question of Fact. — *Hager v. Shindler*, 29 Cal. 47.

3. *Sharon v. Sharon*, 79 Cal. 633; *Smith v. Caldwell*, 22 Mont. 331.

4. *Denser v. Walkup*, 43 Mo. App. 625; *Schaaf v. Fries*, 77 Mo. App. 346; *Beeson v. Beeson*, 9 Pa. St. 279. See also *Home F. Ins. Co. v. Berg*, 46 Neb. 600.

5. *Client Need Not Be a Party.* — *Rex v. Withers*, 2 Campb. 578; *Chant v. Brown*, 7 Hare 79; *Hodges v. Mullikin*, 1 Bland (Md.) 503; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 627; *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

The communications of a client to his attorney are privileged though he is not nominally connected with the litigation, when his rights are controverted and his interests put in jeopardy in the name of his partner who is the party defendant to the action. *Orton v. McCord*, 33 Wis. 205.

6. *Admissions.* — *Galle v. Tode*, 74 Hun (N. Y.) 542, *affirmed* 148 N. Y. 270.

7. *Person Referred to Attorney by Client.* — *Galle v. Tode*, 74 Hun (N. Y.) 542, *affirmed* 148 N. Y. 270.

a competent witness to state what he himself had admitted before the master at a reference.¹

i. **RULE EXTENDS TO ALL KNOWLEDGE ACQUIRED BY ATTORNEY BY REASON OF RELATION.** — The reason of the rule of privilege protects a client from the disclosure not only of what he has communicated to his attorney orally or in writing, but of any information or knowledge derived or acquired by the attorney from being employed as such, or by virtue of the relation, whether from words, signs, acts, or his own observation.² But there is no privilege as to what the attorney observes with reference to his client's condition at a time when he is alleged to have been intoxicated, where it does not appear that the attorney learned or had any opportunity to learn any fact not observable by all other persons who saw the client at the time, and no fact came peculiarly within the attorney's knowledge on account of his professional relation to the client.³

j. **RULE AS TO DOCUMENTS** — (1) *Rule Stated.* — If any deed or writing is intrusted by a client to his attorney in the course of any professional employment, the attorney cannot be required nor permitted to produce the papers, nor to give parol evidence of their contents, nor to testify as to anything in regard to their state or situation, where his only knowledge in regard to them has been derived from the papers themselves while in his possession by such delivery of his client, without the consent of the client himself,⁴ and

1. **Admission at Reference.** — *Lombard v. Hendrix*, 54 S. Car. 476.

2. **Rule Protects All Knowledge Acquired by Attorney** — *England.* — *Robson v. Kemp*, 5 Esp. 52; *Wheatley v. Williams*, 1 M. & W. 533. *Georgia.* — *Freeman v. Brewster*, 93 Ga. 648. *Illinois.* — *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99, *disapproving* *Heister v. Davis*, 3 Yeates (Pa.) 4, and *explaining* *Baker v. Arnold*, 1 Cai. (N. Y.) 258.

Missouri. — *State v. Dawson*, 90 Mo. 149; *Ingerham v. Weatherman*, 79 Mo. App. 480, 2 Mo. App. Rep. 448.

New Hampshire. — *Brown v. Payson*, 6 N. H. 443.

New York. — *Charman v. Tatum*, 54 N. Y. App. Div. 61, *affirmed* 166 N. Y. 605; *McClure v. Goodenough*, (N. Y. Super. Ct. Spec. T.) 19 Civ. Pro. (N. Y.) 191.

Pennsylvania. — *Kaut v. Kessler*, 114 Pa. St. 603; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

Texas. — *Hernandez v. State*, 18 Tex. App. 134, 51 Am. Rep. 295.

West Virginia. — *State v. Douglass*, 20 W. Va. 770.

Acts of Attorney. — The privilege would also seem to include actions by the attorney taken in the interest of the client, and by his instruction, always provided that such action was in no way criminal. *McClure v. Goodenough*, (N. Y. Super. Ct. Spec. T.) 19 Civ. Pro. (N. Y.) 191. But see *contra*, *Shore v. Bedford*, 5 M. & G. 271, 44 E. C. L. 149.

3. *State v. Fitzgerald*, 68 Vt. 125.

4. **Rule as to Documents** — *England.* — *Rex v. Dixon*, 3 Burr. 1687; *Few v. Guppy*, 13 Beav. 457; *Wright v. Mayer*, 6 Ves. Jr. 280; *Wynne v. Humberston*, 27 Beav. 421; *Stratford v. Hogan*, 2 Ball & B. 164; *Brard v. Ackerman*, 5 Esp. 120; *Wheatley v. Williams*, 1 M. & W. 533, 2 Gale 140. See also *Rex v. Upper Boddington*, 8 Dowl. & R. 726, 16 F. C. L. 348.

Canada. — *Lynch v. O'Hara*, 6 U. C. C. P. 259.

United States. — *Liggett v. Glenn*, 4 U. S. App. 438.

Connecticut. — *Lynde v. Judd*, 3 Day (Conn.) 499.

Georgia. — *Philman v. Marshall*, 103 Ga. 82; *Dover v. Harrell*, 58 Ga. 572.

Illinois. — *Dietrich v. Mitchell*, 43 Ill. 40, 92 Am. Dec. 99.

Iowa. — *State v. Kidd*, 89 Iowa 54.

Louisiana. — *State v. Hazleton*, 15 La. Ann. 72.

Massachusetts. — *Anonymous*, 8 Mass. 370.

Minnesota. — *Davis v. New York*, etc., R. Co., 70 Minn. 37; *Stokoe v. St. Paul*, etc., R. Co., 40 Minn. 545.

Missouri. — *Gray v. Fox*, 43 Mo. 570, 97 Am. Dec. 416.

New Hampshire. — *Patten v. Moor*, 26 N. H. 163; *Brown v. Payson*, 6 N. H. 443.

New Jersey. — *Matthews v. Hoagland*, 48 N. J. Eq. 455.

New York. — *Kellogg v. Kellogg*, 6 Barb. (N. Y.) 116; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Jackson v. M'Vey*, 18 Johns. (N. Y.) 330; *McPherson v. Rathbone*, 7 Wend. (N. Y.) 216; *People v. Benjamin*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 419; *Brandt v. Klein*, 17 Johns. (N. Y.) 335; *Crosby v. Berger*, 4 Edw. (N. Y.) 254.

Pennsylvania. — *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65; *Com. v. Moyer*, 15 Phila. (Pa.) 397, 38 Leg. Int. (Pa.) 458.

Texas. — *Warner Elevator Mfg. Co. v. Houston*, (Tex. Civ. App. 1894) 28 S. W. Rep. 405.

Vermont. — *Childs v. Merrill*, 66 Vt. 302; *Arbuckle v. Templeton*, 65 Vt. 205; *State v. Squires*, 1 Tyler (Vt.) 147; *Durkee v. Leland*, 4 Vt. 612. See also *Hicks v. Blanchard*, 60 Vt. 673.

West Virginia. — *State v. Douglass*, 20 W. Va. 770.

Wisconsin. — *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144.

such a document will be privileged, even though it can be produced in evidence without involving the attorney in any breach of professional duty, as when it has passed from his possession without his fault.¹

(2) *Pleadings Which Have Never Been Filed.* — It has been held that pleadings which have been prepared by an attorney and sworn to by the client, but have never been filed, are privileged.²

(3) *Drafts of Pleadings.* — Certainly drafts of pleadings are privileged, for though, of course, after a pleading has been filed it becomes *publici juris*, the drafts might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time.³

(4) *Documents Prepared by Solicitor.* — Where documents are already in existence, the mere fact of their being handed to a solicitor for the purpose of the conduct of an action cannot create a privilege. But where documents are brought into existence by a solicitor or through a solicitor for the purpose of consultation with a view to his giving professional advice or to the conduct of an action, these are in the nature of professional communications and as such are privileged.⁴

(5) *Correspondence.* — The rule of privilege extends to correspondence between the attorney and the client.⁵

(6) *Contract.* — It has also been held that admissions of the client contained in a "fee contract" with his attorney are privileged.⁶

(7) *Documents Not Obtained from Client.* — The rule does not ordinarily extend to writings obtained by attorneys from other sources than their clients or from third persons, whether strangers or opponents,⁷ though it has been held that an attorney who, as the attorney or counsel of one of the parties in

Possession Must Have Been Acquired in Professional Character. — *Stagg v. Owen*, C. P. Cooper 12.

Writings, Documents, etc., of Third Persons, even though sent by a client to his attorney, are not privileged. *In re Whitlock*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 204, 51 Hun (N. Y.) 351.

If the Attorney Does Not Know the Nature and Contents of Papers in his possession, the fact that they were left with him in professional confidence would not protect them. *Mitchell's Case*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249.

Documents of Client's Testator. — *Palmer v. Wright*, 10 Beav. 234.

Court May Examine Documents to Ascertain Whether Privileged. — *Vetter v. Schreiber*, 53 J. P. 39; *Williams v. Quebrada R., etc., Co.*, (1895) 2 Ch. 751, 65 L. J. Ch. 68, 73 L. T. 397, 44 W. R. 76.

1. *Liggett v. Glenn*, 4 U. S. App. 438, *reversing* 47 Fed. Rep. 472.

2. **Pleadings Never Filed.** — *Neal v. Patten*, 47 Ga. 73; *Burnham v. Roberts*, 70 Ill. 19. See also *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604.

No Privilege After Pleading Filed. — See *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604.

3. **Drafts of Pleadings.** — *Walsham v. Stainton*, 2 Hem. & M. 1, 3 New Reports 241, 9 L. T. N. S. 603, 12 W. R. 119; *Lamb v. Orton*, 1 Drew. 414, 1 W. R. 207; *Feaver v. Williams*, 11 Jur. N. S. 902, 13 L. T. N. S. 270.

4. *Pearce v. Foster*, 15 Q. B. D. 114, 54 L. J. Q. B. D. 432, 52 L. T. N. S. 886, 33 W. R. 919, 50 J. P. 4. See also *Bullock v. Corry*, 3 Q. B. D. 356.

5. **Correspondence — England.** — *Hughes v. Gannons*, 6 Beav. 352; *Blenkinsopp v. Blen-*

kinsopp, 10 Beav. 277; *Reynell v. Sprye*, 11 Beav. 618; *Whitbread v. Gurney*, Younge 541; *Garland v. Scott*, 3 Sim. 396; *Vent v. Pacey*, 4 Russ. 193; *Eadie v. Addison*, 52 L. J. Ch. 81, 47 L. T. N. S. 543, 31 W. R. 320; *Catt v. Tourle*, 23 L. T. N. S. 485, 19 W. R. 56; *Boyd v. Petrie*, 20 L. T. N. S. 934, 17 W. R. 903; *Harvey v. Kirwan*, 7 L. J. Exch. 50; *Charlton v. Coombes*, 4 Giff. 372, 1 New Reports 547, 32 L. J. Ch. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 W. R. 504; *Bullock v. Corry*, 3 Q. B. D. 356, 47 L. J. Q. B. D. 352, 38 L. T. N. S. 102, 26 W. R. 330; *Walker v. Wildman*, 6 Madd. 47.

United States. — *Liggett v. Glenn*, 4 U. S. App. 438, *reversing* 47 Fed. Rep. 472.

Georgia. — *Philadelphia Fire Assoc. v. Fleming*, 78 Ga. 733; *Southern R. Co. v. White*, 108 Ga. 201.

New York. — *Wilson v. Troup*, 7 Johns. Ch. (N. Y.) 25.

6. **Contract.** — *Liggett v. Glenn*, 4 U. S. App. 438, *reversing* 47 Fed. Rep. 472. In this case the court said: "The contract to pay related wholly to the fee to be paid counsel, but the admissions in regard to the ownership of stock in the express company, which is the only part of the contract sought to be used in evidence in this case, certainly would not have been made unless the relation of client and counsel had existed between the parties."

7. *Davis v. New York, etc., R. Co.*, 70 Minn. 37.

Document Obtained from Public Record Office. — *Warner Elevator Mfg. Co. v. Houston*, (Tex. Civ. App. 1894) 28 S. W. Rep. 405.

Presumption as to How Attorney Procured Documents. — See *Davis v. New York, etc., R. Co.*, 70 Minn. 37.

a cause, has been intrusted with papers by a third person cannot be called upon by the opposite party to produce such papers in evidence.¹

(8) *Documents Which Client Could Be Compelled to Produce.* — A party cannot avoid the production of a document which is of such a nature that he could be compelled to produce it, merely by passing it over to his attorney; but in such case the fact that the papers are in the possession of the attorney does not give them any privilege, and he may be called upon to produce them.²

k. WHO MAY CLAIM PRIVILEGE — (1) *Client — Personal Representative.* — It is obvious that the client can object to testimony of the attorney on the ground that it involves the disclosure of privileged communications. And after the death of the client the objection may be raised by his personal representative.³

(2) *Antagonist of Client.* — The privilege is that of the client, and not of his antagonist in litigation, and hence such antagonist cannot raise the question of privilege where the client is willing to have his conversation with his attorney detailed in evidence.⁴

(3) *Attorney.* — While the attorney can raise the question as to privilege in the first instance,⁵ he cannot insist on the privilege if the client waives it⁶ or denies its existence.⁷

(4) *Third Persons.* — It has been held that a third person cannot object to testimony on the ground that it involves a disclosure of privileged communications between attorney and client.⁸ And the court has in one case gone so far as to hold that counsel professionally consulted may be required to testify, if the privilege be waived by the party who consulted him, although the interest in the subject-matter respecting which the confidential communication was made has passed to a third person, and he objects to the disclosure.⁹

(5) *Trustee as Against Cestui Que Trust.* — A trustee who consults his attorney with reference to matters in dispute or litigation between himself and the *cestui que trust* may claim privilege as against the latter.¹⁰ But it is otherwise as to communications between the trustee and an attorney whom he consults in reference to matters connected with the administration of his trust, for in such case the attorney is acting quite as much in the interest of the

1. Jackson v. Burtis, 14 Johns. (N. Y.) 391.

2. *Documents Which Client Could Be Compelled to Produce.* — *In re Cameron's Coalbrook, etc.*, R. Co., 25 Beav. 1; Bursill v. Tanner, 16 Q. B. D. 1, 55 L. J. Q. B. D. 53, 53 L. T. N. S. 445, 34 W. R. 35; Edison Electric Light Co. v. U. S. Electric Lighting Co., 44 Fed. Rep. 294; Allen v. Hartford L. Ins. Co., 72 Conn. 693; Mitchell's Case, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249; Warner Elevator Mfg. Co. v. Houston, (Tex. Civ. App. 1894) 28 S. W. Rep. 405. See also Radcliffe v. Fursman, 2 Bro. P. C. (Tomb. ed.) 514; Fenwick v. Reed, 1 Meriv. 114; Andrews v. Ohio, etc., R. Co., 14 Ind. 169; *Ex p. Maulsby*, 13 Md. 625. But compare Greenlaw v. King, 1 Beav. 137, 8 L. J. Ch. 92.

Where Client Indicted for Forgery of Document in Possession of Attorney. — Reg. v. Avery, 8 C. & P. 596, 34 E. C. L. 542. But see Rex v. Dixon, 3 Burr. 1687.

Letters from One Party to the Other. — An attorney who has possession of a letter written to a defendant by a plaintiff may be compelled to produce it in order that it may be read in evidence when it is relevant to the controversy. Harrisburg Car Mfg. Co. v. Sloan, 120 Ind. 156.

3. Brown v. Butler, 71 Conn. 576; Pearsall v. Elmer, 5 Redf. (N. Y.) 181.

In Whelpley v. Loder, 1 Dem. (N. Y.) 368, affirmed 111 N. Y. 239, the court said that the personal representative of a decedent and no one else could raise the objection that a communication by such decedent to his attorney was privileged.

4. Smith v. Crego, 54 Hun (N. Y.) 22; Smith v. Wilson, 1 Tex. Civ. App. 115.

5. See Maddox v. Maddox, 1 Ves. 61.

6. *In re Cameron's Coalbrook, etc.*, R. Co., 25 Beav. 1; People v. Gallagher, 75 Mich. 512. See also Gaskell v. Chambers, 26 Beav. 303, 28 L. J. Ch. 388. See further *infra*, this section, *o. Waiver and Loss of Privilege*.

7. *In re Mellen*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 515, 63 Hun (N. Y.) 632, affirmed 138 N. Y. 615.

8. O'Brien v. Spalding, 102 Ga. 490, 66 Am. St. Rep. 202; Dowie's Estate, 135 Pa. St. 210. See also Padelford's Estate, 7 Pa. Dist. 331, affirmed 189 Pa. St. 634, 190 Pa. St. 335. But compare State v. Barrows, 52 Conn. 323.

9. Benjamin v. Coventry, 19 Wend. (N. Y.) 353.

10. *Attorney of Trustee.* — Talbot v. Marshfield, 2 Drew. & Sm. 549, 6 New Reports 288; Brown v. Oakshott, 12 Beav. 252; Shean v. Philips, 1 F. & F. 449. See also *In re Mason*, 23 Ch. D. 609, 52 L. J. Ch. 478, 48 L. T. N. S. 631.

cestui que trust as of the trustee, and the latter cannot claim privilege as against the *cestui* with reference to such matters even in a subsequent suit between them.¹

(6) *Wife as Against Husband*. — It has been held in *England* that the correspondence of a married woman, living apart from her husband, with her solicitor in reference to a divorce, which was afterwards obtained by collusion between the husband and wife, was not privileged from production to the husband or parties claiming through him. But correspondence of the wife subsequent to the divorce, when she was acting as a *feme sole*, and not in relation to the matter of the divorce, was privileged.²

(7) *Municipal Corporation as Against Ratepayer*. — In an action by a municipal corporation against a ratepayer the defendant cannot claim that cases stated by the corporation to its attorney and his opinions thereon are not privileged from production as against him merely because he is a ratepayer and has thus contributed towards paying for those cases and opinions; though it might be otherwise if the action were with regard to some matter relating to the raising of the rates or to the expenditure thereof.³

1. BURDEN OF PROOF. — It has been held that the burden is upon the person objecting to evidence on the ground that it involves the disclosure of privileged communications to show that the case is such that the rule will apply,⁴ but it has also been asserted that there is a presumption — rebuttable, of course — that all communications between attorney and client in the course of professional employment are confidential, and hence privileged.⁵

m. QUESTION FOR COURT. — Whether or not the circumstances are such as to make the rule of privilege applicable in a particular case is a question for the court.⁶

n. LIMITATIONS OF RULE — (1) *In General*. — As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it.⁷ And hence it does not extend to facts within the personal

1. Shean *v.* Phillips, 1 F. & F. 449; Talbot *v.* Marshfield, 2 Drew. & Sm. 549, 6 New Reports 238; Devaynes *v.* Robinson, 20 Beav. 42; Wynne *v.* Humberston, 5 Jur. N. S. 5, 28 L. J. Ch. 281. See also *In re* Mason, 22 Ch. D. 609, 52 L. J. Ch. 478, 48 L. T. N. S. 631.

2. Ford *v.* De Pontes, 5 Jur. N. S. 993, 29 L. J. Ch. 883, 32 L. T. N. S. 383, 7 W. R. 299.

3. Bristol *v.* Cox, 26 Ch. D. 678, 53 L. J. Ch. 1144, 50 L. T. N. S. 719, 33 W. R. 955.

4. Burden of Proof. — Carroll *v.* Sprague, 59 Cal. 655; Sharon *v.* Sharon, 79 Cal. 633; Turner's Appeal, 72 Conn. 305; McLaughlin *v.* Gilmore, 1 Ill. App. 563; Bingham *v.* Walk, 128 Ind. 164; Smith *v.* Caldwell, 22 Mont. 331; Mowell *v.* Van Buren, 77 Hun (N. Y.) 569; Crosby *v.* Berger, 4 Edw. (N. Y.) 254; Earle *v.* Grout, 46 Vt. 113.

Accused in Criminal Cases Entitled to Benefit of Doubt. — People *v.* Atkinson, 40 Cal. 284.

5. Hager *v.* Shindler, 29 Cal. 47; Sharon *v.* Sharon, 79 Cal. 633; Moore *v.* Bray, 10 Pa. St. 519; McIntosh *v.* Moore, 22 Tex. Civ. App. 22.

6. Question for Court. — Cleave *v.* Jones, 7 Exch. 421, 21 L. J. Exch. 105; McDonald *v.* McDonald, 142 Ind. 55; Hull *v.* Lyon, 27 Mo. 570; Bacon *v.* Frisbie, 80 N. Y. 394, 36 Am. Rep. 627; Mitchell's Case, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249; Coveney *v.* Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; People *v.* Hess, 8 N. Y. App. Div. 143; Hughes *v.* Boone, 102 N. Car. 137. See also *Ex p.* Maulsby, 13 Md. 625.

The Fact that the Court Allowed the Attorney to Decide whether or not he would testify as to a certain matter is not a ground of complaint where the attorney refused to testify and the communication was such that it should have been excluded by the court. Maxham *v.* Place, 46 Vt. 434.

Finding of Trial Court Conclusive. — Childs *v.* Merrill, 66 Vt. 302.

7. Rule Limited to Cases Falling Strictly Within Its Principle — *England*. — See Glyn *v.* Caulfeild, 3 Macn. & G. 463, 15 Jur. 807.

California. — Satterlee *v.* Bliss, 36 Cal. 489.

Connecticut. — Turner's Appeal, 72 Conn. 305.

Illinois. — Goltra *v.* Wolcott, 14 Ill. 89; McLaughlin *v.* Gilmore, 1 Ill. App. 563.

Maine. — Gower *v.* Emery, 18 Me. 79.

Massachusetts. — Foster *v.* Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; Hatton *v.* Robinson, 14 Pick. (Mass.) 416, 25 Am. Dec. 415.

Pennsylvania. — Beeson *v.* Beeson, 9 Pa. St. 279; Matthews's Estate, 1 Phila. (Pa.) 292, 9 Leg. Int. (Pa.) 11.

Statute to Be "Fairly Construed." — When a party invokes the protection of the statute, it should not be unduly extended or restricted, but should be fairly construed and applied according to the plain import of its terms so as to effectuate its intent and purpose. Denver Tramway Co. *v.* Owens, 20 Colo. 107. See also Pulford's Appeal, 48 Conn. 247.

Liberal Construction. — In Kitz *v.* Buckmaster,

knowledge of the attorney, or information acquired by him in any other way than by confidential communications of his client or by virtue of his professional relation to the client.¹

(2) *Proof Otherwise than by Attorney's Testimony.* — A communication from a client to his attorney may be admitted in evidence if it can be proved otherwise than by the attorney's testimony, for it is not the communication itself that is incompetent, but the attorney is prevented from testifying concerning it.²

Communications Overheard by Others. — Thus where a conversation between a client and his attorney, which they intend to have respected as private and confidential, is overheard by a third person, such person, standing in no relation of confidence to either of the parties, may be compelled to testify to what he overheard.³

(3) *Effect of Presence of Third Persons.* — If an interview between an attorney and client takes place in the presence and hearing of a third person, such person may testify as to what took place.⁴ There are cases which take the view that the only effect of such person's presence is to let in his testimony and not to destroy the privilege so that the attorney can be permitted or the client compelled to testify.⁵ But the more reasonable view, and that which is supported by the weight of authority, is that the presence of a third person

45 N. Y. App. Div. 283, the court said: "So important to the client have the courts regarded this rule, that they have construed it liberally, and with regard to its spirit rather than its letter." See also *Wade v. Ridley*, 87 Me. 368; *Henry v. Buddecke*, 81 Mo. App. 360.

1. When Attorney Must Testify — *England.* — *Marsh v. Keith*, 1 Drew. & Sm. 342, 30 L. J. Ch. 127, 6 Jur. N. S. 1182, 3 L. T. N. S. 498, 9 W. R. 115; *Say's Case*, 10 Mod. 43; *Brown v. Foster*, 1 H. & N. 736; *Doe v. Andrews*, 2 Cowp. 845; *Spenceley v. Schulenburgh*, 7 East 357, 3 Smith 325; *Bramwell v. Lucas*, 2 B. & C. 745, 9 E. C. L. 233; *Duffin v. Smith*, *Peake N. P.* (ed. 1795) 108; *Parkhurst v. Lowten*, 2 Swanst. 201; *Sawyer v. Birchmore*, 3 Myl. & K. 572; *Dwyer v. Collins*, 7 Exch. 639, 16 Jur. 569, 21 L. J. Exch. 225.

United States. — *Rhoades v. Selin*, 4 Wash. (U. S.) 715; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280; *Columbia Bank v. French*, 1 Cranch (C. C.) 221.

Alabama. — *Kling v. Tunstall*, 124 Ala. 268; *Chapman v. Peebles*, 84 Ala. 283; *Crawford v. McKissack*, 1 Port. (Ala.) 433.

Arkansas. — *Rosewater v. Schwab Clothing Co.*, 58 Ark. 446; *Milan v. State*, 24 Ark. 346.

California. — *Tibbet v. Sue*, 125 Cal. 544; *Gallagher v. Williamson*, 23 Cal. 331, 83 Am. Dec. 114; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543.

Georgia. — *Thompson v. Wilson*, 29 Ga. 539.

Illinois. — *Chillicothe Ferry, etc., Co. v. Jameson*, 48 Ill. 281; *Funk v. Mohr*, 85 Ill. App. 97, affirmed 185 Ill. 395; *Swaim v. Humphreys*, 42 Ill. App. 370.

Indiana. — See *Miller v. Palmer*, 25 Ind. App. 357.

Kentucky. — *Wicks v. Dean*, 103 Ky. 69.

Louisiana. — *State v. Hazleton*, 15 La. Ann. 72.

Maine. — *Gower v. Emery*, 18 Me. 79.

Maryland. — *Chew v. Farmers Bank*, 2 Md. Ch. 231.

Massachusetts. — *Foster v. Hall*, 12 Pick.

(Mass.) 89, 22 Am. Dec. 400; *Com. v. Goddard*, 14 Gray (Mass.) 402.

New Hampshire. — *Patten v. Moor*, 29 N. H. 163; *Brown v. Payson*, 6 N. H. 444.

New York. — *Baker v. Arnold*, 1 Cai. (N. Y.) 258; *Bogert v. Bogert*, 2 Edw. (N. Y.) 399; *Johnson v. Davenport*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Riggs v. Dennison*, 3 Johns. Cas. (N. Y.) 198, 2 Am. Dec. 145; *Crosby v. Berger*, 11 Paige (N. Y.) 377, 42 Am. Dec. 117, affirming 4 Edw. (N. Y.) 254; *Schattman v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 392.

Ohio. — *Rogers v. Dare*, *Wright* (Ohio) 136.

Pennsylvania. — *Levers v. Van Buskirk*, 4 Pa. St. 309; *Heaton v. Findlay*, 12 Pa. St. 304; *Moore v. Bray*, 10 Pa. St. 519; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65; *Kramer v. Kister*, 187 Pa. St. 227, 42 W. N. C. (Pa.) 392; *Heister v. Davis*, 3 Yeates (Pa.) 4; *Daniel v. Daniel*, 39 Pa. St. 191.

Tennessee. — *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288.

Vermont. — See *Allen v. Harrison*, 30 Vt. 219, 73 Am. Dec. 302.

Wisconsin. — *DeWitt v. Perkins*, 22 Wis. 473.

2. Tays v. Carr, 37 Kan. 141.

3. Communications Overheard by Others. — *Pulford's Appeal*, 48 Conn. 217; *Perry v. State*, (Idaho 1894) 38 Pac. Rep. 655; *Hoy v. Morris*, 13 Gray (Mass.) 519, 74 Am. Dec. 650; *Morton v. Smith*, (Tex. Civ. App. 1898) 44 S. W. Rep. 683.

4. Third Person Present May Testify. — *Goddard v. Gardner*, 28 Conn. 172; *Jackson v. French*, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; *People v. Buchanan*, 145 N. Y. 1. See also cases cited in next note.

5. Attorney Cannot Testify. — *Blount v. Kimpton*, 155 Mass. 378, 31 Am. St. Rep. 554; *Tyler v. Hall*, 106 Mo. 313, 27 Am. St. Rep. 337; *Bassey v. State*, 45 Neb. 261; *Walker v. State*, 19 Tex. App. 176; *Hartness v. Brown*, 21 Wash. 655. See also *Goddard v. Gardner*, 28 Conn. 172.

(other than an interpreter or the like) utterly destroys the privilege, as the fact of the communications being made in his presence shows that they do not partake of that confidential character which is the basis of the rule of privilege.¹

Conversations and Transactions Between the Client and Other Persons in the presence of the attorney cannot be considered within the rule of privilege.²

(4) *Existence and Possession of Documents.* — An attorney may be required to testify as to the existence of certain documents,³ and as to whether they are in his or his client's possession, so as to lay the foundation for the introduction of secondary evidence of their contents upon a refusal to produce them.⁴ So, also, he may be asked how he obtained possession of a document,⁵ where he last saw it, or what disposition he made of it,⁶ and may even, if it is in his possession, be required to produce it for identification.⁷ The client also may be asked if he intrusted certain documents to his attorney.⁸

1. Attorney May Testify — England. — Weeks v. Argent, 16 M. & W. 817, 11 Jur. 525, 16 L. J. Exch. 209.

Alabama. — Mobile, etc., R. Co. v. Yeates, 67 Ala. 164.

California. — Ruiz v. Dow, 113 Cal. 490.

Georgia. — Stone v. Minter, 111 Ga. 45.

Illinois. — Tyler v. Tyler, 126 Ill. 525, 9 Am. St. Rep. 642; Griffin v. Griffin, 125 Ill. 430; Lynn v. Lyerle, 113 Ill. 128.

Indiana. — Colt v. McConnell, 116 Ind. 249; Oliver v. Pate, 43 Ind. 132.

Michigan. — House v. House, 61 Mich. 69, 1 Am. St. Rep. 570.

Missouri. — Deuser v. Hamilton, 52 Mo. App. 394; Deuser v. Walkup, 43 Mo. App. 625. See also Weinstein v. Reid, 25 Mo. App. 41.

New York. — *In re McCarthy*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 581, 65 Hun (N. Y.) 624; Matter of Smith, 61 Hun (N. Y.) 101; Matter of McCarthy, 55 Hun (N. Y.) 7; Sheldon v. Sheldon, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 477, 58 Hun (N. Y.) 601, reversed on other grounds 133 N. Y. 1; Rosenberg v. Rosenberg, 40 Hun (N. Y.) 91; Greer v. Greer, 58 Hun (N. Y.) 251; Smith v. Crego, 54 Hun (N. Y.) 22; Whiting v. Barney, 30 N. Y. 330, 86 Am. Dec. 385; People v. Buchanan, 145 N. Y. 1; Cooper v. Pollon, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 619; Doheny v. Lacy, 42 N. Y. App. Div. 218, affirmed 168 N. Y. 213; Britton v. Lorenz, 45 N. Y. 51, affirming 3 Daly (N. Y.) 23.

North Carolina. — Hughes v. Boone, 102 N. Car. 137.

Pennsylvania. — Hummel v. Kistner, 182 Pa. St. 216.

South Carolina. — Moffatt v. Hardin, 22 S. Car. 9.

The Mere Fact that a Communication Was Made in a Public Place does not of itself destroy the privilege, where it was intended to be confidential. Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513. In this case the court said: "It does not follow that, because there might have been many persons in the court house at the time, they were so unengaged as to have attended to this conversation."

2. Conversations and Transactions Between Client and Others in Presence of Attorney — England. — Griffith v. Davies, 5 B. & Ad. 502, 27 E. C. L. 114.

California. — Murphy v. Waterhouse, 113

Cal. 467, 54 Am. St. Rep. 365; Gallagher v. Williamson, 23 Cal. 331, 83 Am. Dec. 114.

Georgia. — Allen v. Morgan, 61 Ga. 107, Corbett v. Gilbert, 24 Ga. 454.

Indiana. — Doan v. Dow, 8 Ind. App. 324.

Nebraska. — Adler, etc., Clothing Co. v. Hellman, 55 Neb. 266.

New Jersey. — Roper v. State, 58 N. J. L. 420; Carr v. Weld, 19 N. J. Eq. 319.

New York. — Brennan v. Hall, 131 N. Y. 160, affirming (Supm. Ct. Gen. T.) 20 Civ. Pro. (N. Y.) 434; Prouty v. Eaton, 41 Barb. (N. Y.) 409; Woodruff v. Hurson, 32 Barb. (N. Y.) 557; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

Texas. — Houx v. Blum, 9 Tex. Civ. App. 588.

Wisconsin. — See Dunn v. Amos, 14 Wis. 106.

3. Existence of Documents. — Brandt v. Klein, 17 Johns. (N. Y.) 335; Jackson v. M'Kee, 8 Johns. (N. Y.) 429; Lang v. Ingalls Zinc Co., (Tenn. Ch. 1898) 49 S. W. Rep. 288. See also Durkee v. Leland, 4 Vt. 612. But compare Robson v. Kemp, 5 Esp. 52.

4. Possession of Documents — England. — Bevan v. Waters, M. & M. 235, 22 E. C. L. 301. See also Rothwell v. King, 2 Swanst. 221, note; Eicke v. Nokes, M. & M. 303, 22 E. C. L. 314.

United States. — Rhoades v. Selin, 4 Wash. (U. S.) 715.

Minnesota. — Stokoe v. St. Paul, etc., R. Co., 40 Minn. 545; Jackson v. M'Vey, 18 Johns. (N. Y.) 330; Brandt v. Klein, 17 Johns. (N. Y.) 335; People v. Sheriff, (Supm. Ct. Gen. T.) 7 Abb. Pr. (N. Y.) 96, 29 Barb. (N. Y.) 622; Mitchell's Case, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

Pennsylvania. — Jeanes v. Fridenberg, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

5. Allen v. Root, 39 Tex. 589.

6. Banner v. Jackson, 1 De G. & Sm. 472; O'Gorman v. M'Namara, Hayes Exch. 174; Jackson v. M'Kee, 8 Johns. (N. Y.) 429; Brandt v. Klein, 17 Johns. (N. Y.) 335. See also Durkee v. Leland, 4 Vt. 612. But compare Cotman v. Orton, 9 L. J. Ch. 268.

7. Phelps v. Prew, 3 El. & Bl. 430, 77 E. C. L. 430, 24 Eng. L. & Eq. 96; People v. Sheriff, (Supm. Ct. Gen. T.) 7 Abb. Pr. (N. Y.) 96, 29 Barb. (N. Y.) 622.

8. Chellis v. Chapman, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 78, affirmed 125 N. Y. 214.

(5) *Fact of Employment.* — An attorney may testify as to the fact of his employment and the existence of the relation of attorney and client,¹ and may, when it becomes necessary, be required to disclose who is his client,² and when the relationship commenced and ended.³ It has also been held that he might be required to disclose in what character his client employed him.⁴ But he is not competent to testify as to the reason for his employment or the nature of his client's cause.⁵

(6) *Attorney's Fee.* — There is no privilege as to the amount of the attorney's fee⁶ or the terms of payment thereof.⁷

(7) *Identity of Client.* — An attorney is competent to testify as to the identity of his client⁸ or that he called himself by a certain name when bringing a particular action.⁹

(8) *Handwriting of Client.* — An attorney may testify to or identify his client's handwriting or signature, even though his knowledge thereof was acquired in consequence of his professional employment.¹⁰

(9) *Address of Client.* — That an attorney may disclose or be compelled

On a trial for murder the defendant may be asked upon cross-examination if he had not prepared a statement which was put into a sealed envelope addressed to his counsel with the instruction: "To be opened if I am convicted, and to be returned unopened if I am not convicted." *People v. Durrant*, 116 Cal. 179.

1. **Fact of Employment** — *England.* — *Forshaw v. Lewis*, 10 Exch. 712, 1 Jur. N. S. 263; *Levy v. Pope*, M. & M. 410, 22 E. C. L. 343.

United States. — *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

Alabama. — *White v. State*, 86 Ala. 69; *Mobile, etc., R. Co. v. Yeates*, 67 Ala. 164.

California. — *Satterlee v. Bliss*, 36 Cal. 489.

Georgia. — *Burnside v. Terry*, 51 Ga. 186; *Doe v. Roe*, 37 Ga. 289.

Illinois. — *Leindecker v. Waldron*, 52 Ill. 283.

Kansas. — *Arkansas City Bank v. McDowell*, 7 Kan. App. 568.

Maine. — *Gower v. Emery*, 18 Me. 79.

Nebraska. — *Brigham v. McDowell*, 19 Neb. 407.

New York. — *Hampton v. Boylan*, 46 Hun (N. Y.) 151; *Caniff v. Myers*, 15 Johns. (N. Y.) 246. See also *Mulford v. Muller*, 3 Abb. App. Dec. (N. Y.) 330.

Pennsylvania. — *Beeson v. Beeson*, 9 Pa. St. 279; *Seip's Estate*, 163 Pa. St. 423, 35 W. N. C. (Pa.) 401; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

Wisconsin. — *Koeber v. Somers*, 108 Wis. 497.

Attorney Must Answer Questions Asked for Purpose of Disproving Employment. — *Alger v. Turner*, 105 Ga. 178.

2. **By Whom Employed** — *England.* — *Parkhurst v. Lowten*, 2 Swanst. 194; *Bursill v. Tanner*, 16 Q. B. D. 1, 55 L. J. Q. B. D. 53, 53 L. T. N. S. 445, 34 W. R. 35; *Ex p. Campbell*, L. R. 5 Ch. 703; *Beckwith v. Benner*, 6 C. & P. 681, 25 E. C. L. 595; *Levy v. Pope*, M. & M. 410, 22 E. C. L. 343. But compare *Jones v. Pugh*, 1 Phil. 96, 11 L. J. Ch. 323, 6 Jur. 613, reversing 12 Sim. 470.

Alabama. — *Mobile, etc., R. Co. v. Yeates*, 67 Ala. 164.

California. — *Satterlee v. Bliss*, 36 Cal. 489.

Georgia. — *Martin v. Anderson*, 21 Ga. 301.

Louisiana. — *Shanghnessy v. Fogg*, 15 La. Ann. 330.

Maine. — *Gower v. Emery*, 18 Me. 82.

New Hampshire. — *Brown v. Payson*, 6 N. H. 443.

Attorney May Testify that He Appeared Without Authority. — *Cox v. Hill*, 3 Ohio 411.

Directions to Follow Orders of Person Other than Client. — An attorney may testify that although he was employed by one person he was directed by such person to follow the orders of another. *Gower v. Emery*, 18 Me. 79.

3. **When Relationship Commenced and Ended.** — *In re Wells*, 9 Mor. Bankr. Cas. 116; *Shanghnessy v. Fogg*, 15 La. Ann. 330. But compare *Foote v. Hayne*, 1 C. & P. 545, 11 E. C. L. 466, R. & M. 165.

4. *Beckwith v. Benner*, 6 C. & P. 681, 25 E. C. L. 595; *Beeson v. Beeson*, 9 Pa. St. 279.

5. *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280; *Doe v. Roe*, 37 Ga. 289. But see *Satterlee v. Bliss*, 36 Cal. 489.

6. *Smithwick v. Evans*, 24 Ga. 461; *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703.

7. *Smithwick v. Evans*, 24 Ga. 461.

8. **Identity of Client.** — *Doe v. Andrews*, 2 Cowp. 845; *White v. State*, 86 Ala. 69; *Gower v. Emery*, 18 Me. 79; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65. But compare *Parkins v. Hawkshaw*, 2 Stark. 239, 3 E. C. L. 393.

9. *Com. v. Bacon*, 135 Mass. 521.

10. **Handwriting or Signature of Client** — *England.* — *Hurd v. Moring*, 1 C. & P. 372, 11 E. C. L. 425; *Bowles v. Stewart*, 1 Sch. & Lef. 209.

Alabama. — *White v. State*, 86 Ala. 69.

Maine. — *Gower v. Emery*, 18 Me. 79.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

New York. — *Johnson v. Davenport*, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; *Holthausen v. Pondir*, 55 N. Y. Super. Ct. 73, affirmed 120 N. Y. 622; *Thomson v. Perkins*, 39 N. Y. App. Div. 656, 57 N. Y. Supp. 810.

Pennsylvania. — *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

Tennessee. — *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288; *Johnson v. Patterson*, 13 Lea (Tenn.) 626.

to disclose the address of his client, has been both affirmed¹ and denied.² The true distinction, however, would appear to be that the attorney is not protected from making such disclosure because the address became known to him in his professional character, unless it was communicated to him by the client in professional confidence for the purpose of obtaining advice.³

(10) *Residence of Wards of Court.*—No person, whether a professional man or not, can conceal the residence of a ward of court or do anything which will prevent the court having access to its wards and putting them under proper protection. Hence, where the mother of wards of the court had absconded with them, her solicitor was required to produce the envelopes of letters which he had received from the mother in his professional capacity, the court considering that the letters might turn out to have been posted where the mother resided and the production thereof might lead to the discovery of her residence or where she was keeping the wards of court.⁴

(11) *Communications Intended to Be Transmitted to Others or Made Public.*—No privilege exists as to communications which were made to the attorney for the express purpose of being by him communicated to another or made public, for the reason that from the very nature of the communications and the purpose with which they are made the conclusion is irresistible that the client intended to authorize the attorney to communicate them, and waived his privilege to have them preserved in secrecy.⁵

(12) *Matters Disclosed on Trial.*—The rule of privilege does not include those matters which have been from necessity, and to subserve the interests of the client, publicly disclosed by direction of the client himself on the trial of the cause, but as to such matters the attorney may testify.⁶

1. *Address of Client.*—Cox v. Bochetti, 11 Jur. N. S. 88, 34 L. J. C. Pl. 125, 13 W. R. 292, 11 L. T. N. S. 629; Alden v. Goddard, 73 Me. 345; Walton v. Fairchild, (N. Y. City Ct. Spec. T.) 4 N. Y. Supp. 552.

2. Heath v. Crealock, L. R. 15 Eq. 257, 42 L. J. Ch. 455, 28 L. T. N. S. 101, 21 W. R. 380; Harris v. Holler, 7 Dowl. & L. 319, 19 L. J. Q. B. D. 62. See also Clark v. Compton, 4 New Reports 15.

3. *Ex p.* Campbell, L. R. 5 Ch. 703, 23 L. T. N. S. 289, 18 W. R. 1056. See also *Ex p.* Official Receiver, 60 L. T. N. S. 109, 37 W. R. 223, 5 Mor. Bankr. Cas. 286.

After Termination of Litigation.—The authority of the court to direct the plaintiff's attorney to disclose his client's address should be exercised during the pendency of the action and while the relation of attorney and client actually exists. After the relation of attorney and client has ceased so far as a particular action is concerned, by the termination of the action in a judgment for the defendant which has been affirmed on appeal, the attorney for the plaintiff cannot be compelled to disclose his late client's address for the mere purpose of enabling the defendant to pursue him aggressively by new proceedings founded on the judgment. Walton v. Fairchild, (N. Y. City Ct. Spec. T.) 4 N. Y. Supp. 552. See also Hooper v. Harcourt, 1 H. Bl. 534.

4. Ramsbotham v. Senior, L. R. 8 Eq. 575, 17 W. R. 1057.

5. *Communications Intended to Be Transmitted to Others or Made Public—England.*—Ripon v. Davies, 2 N. & M. 310, 28 E. C. L. 358. See also Caldbeck v. Boon, Ir. R. 7 C. L. 32.

Alabama.—White v. State, 86 Ala. 69.

California.—Ferguson v. McBean, 91 Cal. 63.

Georgia.—See McLean v. Clark, 47 Ga. 24. *Indiana.*—Bruce v. Osgood, 113 Ind. 360.

New Mexico.—Waldo v. Beckwith, 1 N. Mex. 182.

New York.—Bartlett v. Bunn, 56 Hun (N. Y.) 507; Rosseau v. Bleau, 131 N. Y. 177, 27 Am. St. Rep. 578, reversing 60 Hun (N. Y.) 259; Martin v. Platt, 51 Hun (N. Y.) 429; Collins v. Robinson, 72 Hun (N. Y.) 495. See also Mulford v. Muller, 3 Abb. App. Dec. (N. Y.) 330.

Pennsylvania.—Levers v. Van Buskirk, 4 Pa. St. 309; Heaton v. Findlay, 12 Pa. St. 304.

Texas.—Henderson v. Terry, 62 Tex. 281.

Wisconsin.—Koeber v. Somers, 108 Wis. 497.

Facts Communicated to Be Incorporated in Pleadings.—Snow v. Gould, 74 Me. 540, 43 Am. Rep. 604; San Antonio, etc., R. Co. v. Brooking, (Tex. Civ. App. 1899) 51 S. W. Rep. 537.

Contract Made by Attorney under Instructions of Client.—See Burnside v. Terry, 51 Ga. 186; Sloan v. Courtenay, 54 S. Car. 314.

Letter from Solicitor to Client.—Where the client, wishing to purchase certain property, procured his solicitor to write him a letter to show to the owner of the property calculated to induce him to sell, the letter was not privileged. Reynell v. Sprye, 10 Beav. 51, 11 Beav. 618.

6. *Matters Disclosed on Trial.*—Levers v. VanBuskirk, 4 Pa. St. 309; Kramer v. Kister, 187 Pa. St. 227, 42 W. N. C. (Pa.) 392. See also Brown v. Foster, 1 H. & N. 736, 3 Jur. N. S. 245, 26 L. J. Exch. 249.

Agreements Made Openly in Court on Trial.—Kramer v. Kister, 187 Pa. St. 227, 42 W. N. C. (Pa.) 392.

(13) *Agreements Between Parties.* — An attorney may testify as to agreements between his client and his adversary,¹ and also as to a proposition which was made to compromise the matter in dispute.²

(14) *Execution of Deeds, etc.* — There is no privilege as to the fact of the attorney having drawn a certain deed, mortgage, or other instrument for his client,³ or as to the client's having executed the same,⁴ or its delivery,⁵ especially where the attorney was one of the attesting witnesses,⁶ or took the acknowledgment thereof as a notary.⁷

(15) *Swearing to Pleadings.* — The rule of privilege does not exclude evidence of the client having sworn to certain pleadings⁸ or to an affidavit.⁹

(16) *Handling of Client's Funds or Property.* — An attorney may be required to testify as to what money he has received and paid over for his client, to whom he has paid it,¹⁰ what money or property of the client he has in his possession,¹¹ or what disposition he has made of the client's money or property.¹²

(17) *Where Attorney a Party to Transaction.* — There is no privilege where the attorney is himself a party to the transaction or agreement which he is called upon to disclose.¹³

Where Attorney and Client Engaged in Wrongful Act. — Hence, when the attorney and client both engage in committing a wrongful act, the client cannot prevent a disclosure of the transactions by the attorney, on the ground that the latter became acquainted with the facts connected with it as his legal adviser.¹⁴

(18) *Testamentary Matters.* — While in some jurisdictions the rule of privilege applies in its full force with respect to communications between a

1. **Agreements.** — *Thayer v. McEwen*, 4 Ill. App. 416; *Moffatt v. Hardin*, 22 S. Car. 9.

2. **Proposition for Compromise.** — *Turner v. Raiton*, 2 Esp. 474; *Collier v. Nokes*, 2 C. & K. 1012, 61 E. C. L. 1012; *Gainsford v. Grammar*, 2 Campb. 9; *McTavish v. Denning*, Anth. N. P. (N. Y.) 113.

An attorney may prove the terms of a compromise offered by him to the client's creditors. *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288.

3. *Barry v. Coville*, 53 Hun (N. Y.) 620, affirmed 129 N. Y. 302.

4. **Execution of Deed, etc.** — *Tristram v. Roberts*, 10 Jur. 125; *Sandford v. Remington*, 2 Ves. Jr. 189, 2 Rev. Rep. 195; *Gower v. Emery*, 18 Me. 79; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400; *Schattman v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 392; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 190, 5 Pa. L. J. 65; *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288; *Rahm v. State*, 30 Tex. App. 310, 28 Am. St. Rep. 911. See also *Rundle v. Foster*, 3 Tenn. Ch. 658.

5. **Delivery of Deed by Client.** — *Schattman v. American Credit Indemnity Co.*, 34 N. Y. App. Div. 392.

Instructions to Attorney as to Delivery. — *Ruiz v. Dow*, 113 Cal. 490.

6. *Doe v. Andrews*, 2 Cowp. 846; *White v. State*, 86 Ala. 69.

7. Where the attorney who drew up a deed also took acknowledgment thereof as a notary, he is competent to testify where the acknowledgment was taken. *Mutual L. Ins. Co. v. Corey*, 54 Hun (N. Y.) 493, reversed on other grounds 135 N. Y. 326.

8. **Swearing to Pleadings.** — *Doe v. Andrews*, 2 Cowp. 846; *Gower v. Emery*, 18 Me. 79;

Foster v. Hall, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

9. **Affidavit.** — *Ex p. Kavanagh*, 7 Montreal Leg. N. 316.

10. *Shaughnessy v. Fogg*, 15 La. Ann. 330; *Johnson v. Patterson*, 13 Lea (Tenn.) 626.

11. *Mackenzie v. Mackenzie*, 9 L. C. Jur. 87.

12. *State v. Gleason*, 19 Oregon 159.

13. **Where Attorney a Party to Transaction.** — *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 190, 5 Pa. L. J. 65; *Ethier v. Homier*, 18 L. C. Jur. 83.

14. **Where Attorney and Client Engaged in Wrongful Act.** — *Charlton v. Coombes*, 4 Giff. 372, 1 New Reports 547, 32 L. J. Ch. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 W. R. 504; *Mornington v. Mornington*, 2 Johns. & H. 697; *In re Postlethwaite*, 35 Ch. D. 722, 56 L. J. Ch. 1077, 56 L. T. N. S. 733, 36 W. R. 563; *Ex p. Official Receiver*, 5 Mor Bankr. Cas. 286, 60 L. T. N. S. 109, 37 W. R. 223; *Feaver v. Williams*, 11 Jur. N. S. 902, 13 L. T. N. S. 270; *Dudley v. Beck*, 3 Wis. 274. See also *infra*, this subdivision, *Communications in Contemplation of Crime or Fraud*.

Violation of Professional Duty. — In a case where the plaintiff's attorney had brought an action upon knowledge which he had obtained as counsel for the defendants or some of them, and had gone upon the stand and in violation of his duty as an attorney disclosed knowledge which he had acquired as such attorney for the defendants, it was held that he could not object to the question whether he was interested in the result of the action to the extent of a share of the recovery on the ground that this called for a disclosure of the relations between attorney and client. *Eastman v. Kelly*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 866.

testator and the attorney employed by him to prepare his will,¹ the more generally accepted doctrine is that the rule does not apply in the case of litigation between the heirs, legatees, devisees, or personal representatives of a testator concerning the disposition of his property, the genuineness of a propounded will, the validity of the will, and the like, but in such case the attorney of the testator is fully competent to testify to the directions he received as to the disposition of the testator's property, facts throwing light on the questions of mental capacity and undue influence, circumstances attending the execution of the testamentary paper, and the like.²

Where the Attorney Is a Witness to the Will all the cases agree that the rule of privilege does not apply.³

(19) *Communications by Administrator Respecting Estate.* — In a case where, after the death of a wife, her husband consulted with an attorney with a view to taking out letters of administration on his wife's estate, and handed to the attorney papers belonging to the wife, among which was a certain deed, it was held that the attorney might testify as to the delivery of the papers, the date of the delivery, by whom they were delivered, and in what condition they were found after the wife's death.⁴

1. Testamentary Communications Privileged — *Maryland.* — *Chew v. Farmers Bank*, 2 Md. Ch. 231, *affirmed* 9 Gill (Md.) 361.

Missouri. — *Sweet v. Owens*, 109 Mo. 1. But see *contra*, *Graham v. O'Fallon*, 4 Mo. 338.

New York. — *Butler v. Fayerweather*, (C. C. A.) 91 Fed. Rep. 458; *Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239; *In re Gagan*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 350, *affirming* (Surrogate Ct.) 20 N. Y. Supp. 426; *In re O'Neil*, (Surrogate Ct.) 7 N. Y. Supp. 197; *In re Lamb*, (Surrogate Ct.) 21 Civ. Pro. (N. Y.) 324; *Matter of Sears*, (Surrogate Ct.) 33 Misc. (N. Y.) 141; *Pearsall v. Elmer*, 5 Redf. (N. Y.) 181; *Re McCarthy*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 581, 65 Hun (N. Y.) 624, 14 N. Y. Supp. 2, 59 Hun (N. Y.) 626; *Matter of Smith*, 61 Hun (N. Y.) 101; *Mason v. Williams*, 53 Hun (N. Y.) 398. *Contra*, *Matter of Austin*, 42 Hun (N. Y.) 516, appeal dismissed 121 N. Y. 664; *Matter of Boury*, (Supm. Ct. Gen. T.) 8 N. Y. St. Rep. 809.

Pennsylvania. — *Bennett's Estate*, 13 Phila. (Pa.) 331, 37 Leg. Int. (Pa.) 105.

When the Attorney Becomes an Executor and Residuary Devisee of the client and is called upon in that capacity to account and surrender the property, the privilege ceases. *Crosby v. Berger*, 4 Edw. (N. Y.) 254.

A Mere Draughtsman of a Will, though he is an attorney, is not incompetent to testify in support of the will to the instructions received from the testator in respect to the provisions to be incorporated in the will. *Matter of Chase*, 41 Hun (N. Y.) 203.

On an Allegation of Fraud, Forgery, or Mistake, instructions received by an attorney for making the will are not privileged communications within any just and proper construction or understanding of the rule of law. *Matter of Chapman*, 27 Hun (N. Y.) 573.

Lost Will. — Where it is sought to establish a will alleged to have been lost or destroyed after the death of the testator, the attorney by whom the will was drawn may be required to testify to the facts in relation to the preparation and contents of the will in question, as a failure of justice cannot be permitted on the

pretext of a claim of privilege. *Sheridan v. Houghton*, 16 Hun (N. Y.) 628, *affirmed* 84 N. Y. 643; *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288.

2. Rule of Privilege Not Applicable — *England.* — *Russell v. Jackson*, 9 Hare 387, 15 Jur. 1117; *Jones v. Godrich*, 5 Moo. P. C. 16.

United States. — *Glover v. Patten*, 165 U. S. 394; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175. *District of Columbia.* — *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38.

Georgia. — *O'Brien v. Spalding*, 102 Ga. 490, 66 Am. St. Rep. 202.

Illinois. — *Scott v. Harris*, 113 Ill. 447.

Indiana. — *Kern v. Kern*, 154 Ind. 29, *overruling* as far as in conflict with the text, *Gurley v. Park*, 135 Ind. 440.

Iowa. — *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428.

Massachusetts. — *Doherty v. O'Callaghan*, 157 Mass. 90, 34 Am. St. Rep. 258. See also *Worthington v. Klemm*, 144 Mass. 167.

Minnesota. — *Coates v. Semper*, 82 Minn. 460; *Matter of Layman*, 40 Minn. 371.

Communications Privileged in Dispute Between Testator's Representatives and Strangers. — *Kern v. Kern*, 154 Ind. 29.

3. Where Attorney a Witness to Will — *United States.* — *Butler v. Fayerweather*, (C. C. A.) 91 Fed. Rep. 458.

California. — *Matter of Wax*, 106 Cal. 343; *Matter of Mullin*, 110 Cal. 252.

Iowa. — *Denning v. Butcher*, 91 Iowa 425.

New York. — *Matter of Coleman*, 111 N. Y. 220; *Matter of Elston*, 5 Dem. (N. Y.) 154; *In re Lamb*, (Surrogate Ct.) 21 Civ. Pro. (N. Y.) 324; *Matter of Sears*, (Surrogate Ct.) 33 Misc. (N. Y.) 141; *Matter of O'Neil*, (Surrogate Ct.) 7 N. Y. Supp. 197; *In re Gagan*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 350, *affirming* (Surrogate Ct.) 20 N. Y. Supp. 426. See also *Matter of Smith*, 61 Hun (N. Y.) 101, Code Civ. Pro. N. Y., § 836.

Wisconsin. — *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828.

See also *infra*, this subdivision, *Where Attorney Becomes Subscribing Witness.*

4. Turner v. Warren, 160 Pa. St. 336, 34 W. N. C. (Pa.) 245.

(20) *Communications in Contemplation of Crime or Fraud* — **Crime.** — There is no privilege as to communications made to an attorney by a client who contemplates the commission of a crime, for the purpose of being guided or helped in its commission or escaping the consequences thereof.¹

Fraud. — Upon the same line of reasoning the privilege is very generally considered not to extend to communications concerning a fraud which the client proposes to perpetrate and as to which he wishes advice or assistance,² though this has been denied in a few cases.³

1. Communications in Contemplation of Crime Not Privileged — *England.* — Reg. v. Cox, 14 Q. B. D. 153; Rex v. Brewer, 6 C. & P. 363, 25 E. C. L. 438; Charlton v. Coombes, 4 Giff. 372, 32 L. J. Ch. 289; Reg. v. Farley, 1 Den. C. C. 197; Reg. v. Jones, 1 Den. C. C. 166; Chartered Bank v. Rich, 4 B. & S. 73, 116 E. C. L. 73, 32 L. J. Q. B. D. 300; Blight v. Goodliffe, 18 C. B. N. S. 757, 114 E. C. L. 757; Goodman v. Holroyd, 15 C. B. N. S. 839, 109 E. C. L. 839; Gore v. Bowser, 5 De G. & Sm. 30; Mornington v. Mornington, 2 Johns. & H. 697; Russell v. Jackson, 9 Hare 387; Reg. v. Avery, 8 C. & P. 596, 34 E. C. L. 542. See also Craig v. Anglesea, 17 How. St. Tr. 1229; Reg. v. Downer, 43 L. T. N. S. 445.

United States. — See Butler v. Fayerweather, (C. C. A.) 91 Fed. Rep. 458.

Connecticut. — See State v. Barrows, 52 Conn. 323.

Iowa. — State v. Kidd, 89 Iowa 54.

Michigan. — People v. Van Alstine, 57 Mich. 69.

Missouri. — Hamil v. England, 50 Mo. App. 338; State v. McChesney, 16 Mo. App. 259.

New Jersey. — Matthews v. Hoagland, 48 N. J. Eq. 455.

New York. — Utica Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; People v. Sherriff, 29 Barb. (N. Y.) 632; People v. Blakeley, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 176. See also Peck v. Williams, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 68; Graham v. People, 63 Barb. (N. Y.) 468.

North Carolina. — Hughes v. Boone, 102 N. Car. 137.

Tennessee. — See McMannus v. State, 2 Head (Tenn.) 213.

Texas. — Orman v. State, 22 Tex. App. 604, 58 Am. Rep. 662, 24 Tex. App. 195; Everett v. State, 30 Tex. App. 682.

Utah. — People v. Mahon, 1 Utah 205.

Virginia. — Clay v. Williams, 2 Munf. (Va.) 105, 5 Am. Dec. 453.

Washington. — Hartness v. Brown, 21 Wash. 655.

West Virginia. — State v. Douglass, 20 W. Va. 770.

Wisconsin. — Dudley v. Beck, 3 Wis. 274.

Communications Must Indicate Guilty Intent. — State v. Barrows, 52 Conn. 323. See also State v. McChesney, 16 Mo. App. 259.

Threats. — An attorney may testify as to threats made by his client against a third person, for the threat reveals a contemplated violation of law. State v. Stone, 65 N. H. 124.

Proposed Act Must Be Malum in Se, Not Simply Malum Prohibitum. — Hughes v. Boone, 102 N. Car. 137. See also People v. Blakeley, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 176; Utica

Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

2. Communications in Contemplation of Fraud Not Privileged — *England.* — Reg. v. Cox, 14 Q. B. D. 153; Charlton v. Coombes, 4 Giff. 372, 1 New Reports 547, 32 L. J. Ch. 284, 9 Jur. N. S. 534, 8 L. T. N. S. 81, 11 W. R. 504; Mornington v. Mornington, 2 Johns. & H. 697; Cutts v. Pickering, 3 Ch. Rep. 66; Follett v. Jefferyes, 1 Sim. N. S. 3, 20 L. J. Ch. 65, 15 Jur. 118; Williams v. Quebrada R., etc., Co., (1895) 2 Ch. 751, 65 L. J. Ch. 68, 73 L. T. N. S. 397, 44 W. R. 76; *In re* Postlethwaite, 35 Ch. D. 722, 56 L. J. Ch. 1077, 56 L. T. N. S. 733, 36 W. R. 563. See also Greenough v. Gaskell, 1 Myl. & K. 98; Gartside v. Outram, 3 Jur. N. S. 39, 26 L. J. Ch. 113, 5 W. R. 35; Russell v. Jackson, 9 Hare 387; Kelly v. Jackson, 13 Ir. Eq. 129.

United States. — Matter of Bellis, 3 Ben. (U. S.) 386. See also Butler v. Fayerweather, (C. C. A.) 91 Fed. Rep. 458.

Missouri. — Hamil v. England, 50 Mo. App. 338; Weinstein v. Reid, 25 Mo. App. 41.

New Jersey. — Matthews v. Hoagland, 48 N. J. Eq. 455.

North Carolina. — See Hughes v. Boone, 102 N. Car. 137.

Texas. — Taylor v. Evans, (Tex. Civ. App. 1894) 29 S. W. Rep. 172.

Washington. — Hartness v. Brown, 21 Wash. 655.

A Mere Suggestion of Fraud, in general terms, does not furnish sufficient ground for setting aside so well-known and salutary a rule as that which protects and privileges the communications of counsel and client. Higbee v. Dresser, 103 Mass. 523. See also Charlton v. Coombes, 9 Jur. N. S. 534, 32 L. J. Ch. 284, 8 L. T. N. S. 81, 11 W. R. 504, 1 New Reports 547.

3. See Davis v. Morgan, 19 Mont. 141; Smith v. Caldwell, 22 Mont. 331; Peck v. Williams, (N. Y. Super. Ct. Spec. T.) 13 Abb. Pr. (N. Y.) 68; Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; Lockhard v. Brodie, 1 Tenn. Ch. 384; Dudley v. Beck, 3 Wis. 274.

Acts Done Towards the Perpetration of a Fraud, in the presence of the attorney of the perpetrator, are not privileged, though communications to the attorney beforehand as to the means, expediency, or consequences of committing the fraud may be. Coveney v. Tannahill, 1 Hill (N. Y.) 33, 37 Am. Dec. 287.

Overruled Cases. — So far as they hold that professional privilege extends to transactions for an illegal or fraudulent purpose, Cromack v. Heathcote, 2 Brod. & B. 4, 6 E. C. L. 12, Rex v. Smith, 1 Phil. & Arn. on Ev. 118, and Doe v. Harris, 5 C. & P. 592, 24 E. C. L. 468, are expressly overruled in Reg. v. Cox, 14 Q. B. D. 153. And the same case must be re-

Communications After the Crime Is Committed or the Fraud Perpetrated, with reference thereto, are within the general rule as to privilege and must not be disclosed.¹

(21) *Where Attorney Becomes Subscribing Witness.* — It has been held that there is no privilege where an attorney becomes a subscribing witness to a deed or other writing, as in such case he assumes another character than that of attorney, for the occasion, and adopts all the duties which it imposes, and hence is bound to give evidence of all that any other subscribing witness could be required to prove.²

(22) *Question Whether Certain Facts Communicated to Attorney.* — Asking a witness on cross-examination whether he had ever communicated to his attorney a fact to which he had testified, is not a violation of the rules as to privileged communications.³

(23) *Suit to Set Aside Purchase by Attorney from Client.* — It has been held that in a suit by the heir and general devisee of the client against the devisees and executors of the solicitor to set aside a purchase by him from his client on the grounds of its having been at an undervalue and the client having been in embarrassed circumstances at the time, the executor of the solicitor could not claim privilege against the real representative of the vendor for any documents as confidential communications with the vendor.⁴

(24) *Suit for Accounting Between Attorneys in Partnership.* — It has been considered in *England* that in a suit by the representatives of a deceased solicitor for the taking of a partnership account between the decedent and a solicitor with whom he was in partnership, the plaintiffs were entitled to the discovery and production in the usual way of papers material to the account, although such papers related to professional business transacted for their client.⁵

(25) *Disclosure for Protection of Attorney.* — The rule of privilege will not be enforced to the prejudice of the attorney or when it would prevent his obtaining or adequately defending his rights, as, for example, when the client charges him with mismanagement of his cause, or fraud, or other improper or unprofessional conduct.⁶

o. WAIVER AND LOSS OF PRIVILEGE — (1) *In General.* — The privilege belongs to the client and not to the attorney,⁷ and hence it makes no differ-

garded as *disapproving* *Holt v. Tyrrel*, Bull. N. P. 284a; *Anonymous*, Skin. 404, and *Hyde v. McCartney*, 2 Molloy 544.

In *Matthews v. Hoagland*, 48 N. J. Eq. 455, the court said that the recent case of *Reg. v. Cox*, 14 Q. B. D. 153, had so undermined the authorities which Chancellor Walworth felt constrained to follow in *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189, that "We are forced to the conclusion that had the decisions stood at that time as they do now he would have held as he thought principle and the character of the profession demanded;" and in this case the court further showed that *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400, so far as regards its authority for the rule that communications in contemplation of fraud are privileged, was based upon English law since overruled.

1. *Communication After Commission of Crime or Fraud.* — *Alexander v. U. S.*, 138 U. S. 353; *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 237; *Hartness v. Brown*, 21 Wash. 655.

2. *Where Attorney a Subscribing Witness* — *England.* — *Robson v. Kemp*, 5 Esp. 52; *Crawcour v. Saller*, 18 Ch. D. 30, 45 L. T. N. S. 62; *Doe v. Carr*, C. & M. 123, 41 E. C. L. 73; *Doe v. Andrews*, 2 Cowp. 845.

New York. — *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

North Carolina. — *Hughes v. Boone*, 102 N. Car. 137.

South Carolina. — *Brazel v. Fair*, 26 S. Car. 370; *Moffatt v. Hardin*, 22 S. Car. 9; *Spencer v. Bedford*, 4 Strobb. L. (S. Car.) 96; *Monaghan Bay Co. v. Dickson*, 39 S. Car. 146, 39 Am. St. Rep. 704.

Tennessee. — *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288.

3. *State v. Tall*, 43 Minn. 273.

4. *Gresley v. Mousley*, 2 Kay & J. 288, 2 Jur. N. S. 156.

5. *Brown v. Perkins*, 2 Hare 540, 8 Jur. 186.

6. *Disclosures for Protection of Attorney.* — *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Nave v. Baird*, 12 Ind. 318; *Mitchell v. Bromberger*, 2 Nev. 345, 90 Am. Dec. 550; *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; *Lang v. Ingalls Zinc Co.*, (Tenn. Ch. 1898) 49 S. W. Rep. 288; *Koeber v. Somers*, 108 Wis. 497.

7. *Privilege Belongs to Client, Not to Attorney* — *England.* — *Ramsbotham v. Senior*, L. R. 8 Eq. 575, 17 W. R. 1057; *In re Cameron's Coalbrook, etc.*, R. Co., 25 Beav. 1; *Parkhurst v. Lowten*, 2 Swanst. 194, 19 Rev. Rep. 63; *Herring v. Clobery*, 1 Phil. 91, 11 L. J. Ch. 149,

ence whatever that the attorney is willing to testify as to communications made to him.¹ The privilege cannot be removed except by the client or those who stand in his place,² and unless so removed it remains in force for all time.³ It follows that the privilege is not lost by the termination of the

6 Jur. 202; *Wilson v. Rastall*, 4 T. R. 753, 2 Rev. Rep. 515; *Jones v. Pugh*, 1 Phil. 96; *Merle v. More*, R. & M. 300, 21 E. C. L. 469; *Charlton v. Coombes*, 4 Giff. 372, 9 Jur. N. S. 534, 32 L. J. Ch. 284, 8 L. T. N. S. 81, 11 W. R. 504, 1 New Reports 547; *Beer v. Ward*, Jac. 77.

United States. — *Liggett v. Glenn*, 4 U. S. App. 438; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

Colorado. — *Denver Tramway Co. v. Owens*, 20 Colo. 107.

Illinois. — *Fossler v. Schriber*, 38 Ill. 172; *Granger v. Warrington*, 8 Ill. 299.

Kentucky. — *Carter v. West*, 93 Ky. 211.

Louisiana. — *Morris v. Cain*, 39 La. Ann. 712.

Maryland. — *Hodges v. Mullikin*, 1 Bland (Md.) 503; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Chew v. Farmers Bank*, 2 Md. Ch. 231, affirmed 9 Gill (Md.) 361.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Michigan. — *Lorimer v. Lorimer*, 124 Mich. 631, 7 Detroit Leg. N. 367; *People v. Gallagher*, 75 Mich. 512; *People v. Van Alstine*, 57 Mich. 69; *Passmore v. Passmore*, 50 Mich. 626, 45 Am. Rep. 62.

Mississippi. — *Jones v. State*, 65 Miss. 179; *Lengsheld v. Richardson*, 52 Miss. 443.

Missouri. — *Weinstein v. Reid*, 25 Mo. App. 41.

New Hampshire. — *Sleeper v. Abbott*, 60 N. H. 162.

New York. — *Baker v. Arnold*, 1 Cai. (N. Y.) 258; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Mitchell's Case*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249; *Yordan v. Hess*, 13 Johns. (N. Y.) 492.

Ohio. — *King v. Barrett*, 11 Ohio St. 261.

Pennsylvania. — *Miller v. Weeks*, 22 Pa. St. 89; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20.

Tennessee. — *McMannus v. State*, 2 Head (Tenn.) 213.

Virginia. — *Tate v. Tate*, 75 Va. 522; *Chahoon v. Com.*, 21 Gratt. (Va.) 822; *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

Washington. — *Hartness v. Brown*, 21 Wash. 655.

Wisconsin. — *Koeber v. Somers*, 108 Wis. 497; *McMaster v. Scriven*, 85 Wis. 162, 39 Am. St. Rep. 828.

1. Attorney's Willingness to Testify Immaterial — *England*. — *In re Cameron's Coalbrook*, etc., R. Co., 25 Beav. 1; *Cholmondeley v. Clinton*, 19 Ves. Jr. 261, overruling *Winchester v. Fournier*, 2 Ves. 445; *Beer v. Ward*, Jac. 77. But compare *Maddox v. Maddox*, 1 Ves. 61.

United States. — *Chirac v. Reinicker*, 11 Wheat. (U. S.) 280.

California. — *People v. Atkinson*, 40 Cal. 284.

Georgia. — The contrary has been held under the Act of 1866. See *Willis v. West*, 60 Ga. 613. But under the present statute (Code

5199) the rule stated in the text would undoubtedly apply.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Michigan. — *Lorimer v. Lorimer*, 124 Mich. 631, 7 Detroit Leg. N. 367.

New York. — *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; *Bacon v. Frisbie*, 80 N. Y. 394, 36 Am. Rep. 629; *Mitchell's Case*, (C. Pl. Gen. T.) 12 Abb. Pr. (N. Y.) 249.

North Carolina. — *Hughes v. Boone*, 102 N. Car. 137.

Pennsylvania. — *Miller v. Weeks*, 22 Pa. St. 89; *Jeanes v. Fridenberg*, 3 Pa. L. J. Rep. 199, 5 Pa. L. J. 65.

Tennessee. — *McMannus v. State*, 2 Head (Tenn.) 213.

Vermont. — See *Hicks v. Blanchard*, 60 Vt. 673.

2. Privilege Cannot Be Removed Except by Client — *England*. — *Fenner v. London*, etc., R. Co., L. R. 7 Q. B. 767, 41 L. J. Q. B. D. 313, 26 L. T. N. S. 971, 20 W. R. 830.

United States. — *Liggett v. Glenn*, 4 U. S. App. 438.

Connecticut. — *Goddard v. Gardner*, 28 Conn. 172.

Maine. — *Sargent v. Hampden*, 38 Me. 581.

Maryland. — *Fulton v. Maccracken*, 18 Md. 528, 81 Am. Dec. 620.

Massachusetts. — *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Nebraska. — *Nelson v. Becker*, 32 Neb. 99.

New York. — *Coveney v. Tannahill*, 1 Hill (N. Y.) 33, 37 Am. Dec. 287; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

North Carolina. — *Hughes v. Boone*, 102 N. Car. 137.

Washington. — *Hartness v. Brown*, 21 Wash. 655.

If the Client Is Not a Party to the suit in which it is proposed to have his attorney testify, so as to be able to communicate an express or tacit relinquishment of his privilege, the lips of his attorney must remain closed and the court cannot allow him to speak of that which the policy of the law has prohibited him from disclosing. *Hodges v. Mullikin*, 1 Bland (Md.) 503.

3. Privilege Remains until Removed by Client — *England*. — *Chant v. Brown*, 7 Hare 79.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Maryland. — *Chew v. Farmers Bank*, 2 Md. Ch. 231, affirmed 9 Gill (Md.) 361.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415. See also *Com. v. Goddard*, 14 Gray (Mass.) 402.

Nebraska. — See *Spaulding v. State*, 61 Neb. 280.

New Hampshire. — *Sleeper v. Abbott*, 60 N. H. 162.

New York. — *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Utica Bank v. Mersereau*, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189.

action or suit in reference to which it was made,¹ nor by the termination of the relation of attorney and client,² nor by the death of the client,³ nor by the attorney's subsequently becoming interested in the subject-matter to which the communications related.⁴

(2) *Who May Waive* — (a) *Client*. — As the privilege is that of the client, it follows that it is within his power to waive it whenever he sees fit to do so.⁵

Ohio. — *King v. Barrett*, 11 Ohio St. 261.

Texas. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

Virginia. — *Parker v. Carter*, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

Case Explained. — In *Snow v. Gould*, 74 Me. 540, the court said that privileged communications may lose their privileged character by the lapse of time, as that which may be private at one time may not be private at a subsequent time; adding by way of illustration that directions to an attorney to make a certain contract are a confidential communication before, but not after, the contract is made, and likewise a solicitor cannot be compelled to disclose the contents of an answer in equity before it is filed, but may be compelled to do so afterwards. But the illustrations given seem to fall within one of the well-recognized limitations to the rule of privilege. See *supra*, this subsection, *n.* (II) *Communications Intended to Be Transmitted to Others or Made Public*.

1. **Termination of Suit.** — *Du Barre v. Livette*, Peake N. P. (ed. 1795) 77; *Bullock v. Corry*, 3 Q. B. D. 356, 47 L. J. Q. B. D. 352, 38 L. T. N. S. 102, 26 W. R. 330; *Hodges v. Mullikin*, 1 Bland (Md.) 503; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *McIntosh v. Moore*, 22 Tex. Civ. App. 22. See also *Beer v. Ward*, Jac. 77.

2. **Termination of Relation** — *England*. — See *Cholmondeley v. Clinton*, 19 Ves. Jr. 261.

Colorado. — *Denver Tramway Co. v. Owens*, 20 Colo. 107.

Delaware. — *Andrews v. Thompson*, 1 Houst. (Del.) 522.

Illinois. — *Granger v. Warrington*, 8 Ill. 299.

Kentucky. — *Carter v. West*, 93 Ky. 211.

Louisiana. — *Morris v. Cain*, 39 La. Ann. 712.

Maryland. — *Hunter v. Van Bomhorst*, 1 Md. 504.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 416, 25 Am. Dec. 415; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Minnesota. — *Struckmeyer v. Lamb*, 75 Minn. 366.

Missouri. — *Sweet v. Owens*, 109 Mo. 1; *Cross v. Riggins*, 50 Mo. 335.

New York. — *Eastman v. Kelly*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 866; *Yordan v. Hess*, 13 Johns. (N. Y.) 492. See also *Walton v. Fairchild*, (N. Y. City Ct. Spec. T.) 4 N. Y. Supp. 552.

Pennsylvania. — *Bennett's Estate*, 13 Phila. (Pa.) 331, 37 Leg. Int. (Pa.) 105.

Texas. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

3. **Death of Client** — *England*. — *Charlton v. Coombes*, 4 Giff. 372, 9 Jur. N. S. 534, 32 L. J. Ch. 284, 8 L. T. N. S. 81, 11 W. R. 504, 1 New Reports 547.

Connecticut. — *Brown v. Butler*, 71 Conn. 576.

Kentucky. — *Carter v. West*, 93 Ky. 211.

Louisiana. — *Morris v. Cain*, 39 La. Ann. 712.

Pennsylvania. — *Bennett's Estate*, 13 Phila. (Pa.) 331, 37 Leg. Int. (Pa.) 105.

Texas. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

4. **Subsequent Interest of Attorney.** — *Chant v. Brown*, 7 Hare 79.

5. **Client May Waive Privilege** — *England*. — *Merle v. More*, R. & M. 390, 21 E. C. L. 469; *Baillie's Case*, 21 How. St. Tr. 341; *Blenkinsopp v. Blenkinsopp*, 2 Phil. 607, 17 L. J. Ch. 343; *Chant v. Brown*, 7 Hare 79.

United States. — *Hunt v. Blackburn*, 128 U. S. 464; *Blackburn v. Crawford*, 3 Wall. (U. S.) 175.

Alabama. — *Hawes v. State*, 88 Ala. 37; *Rowland v. Plummer*, 50 Ala. 182.

California. — See *Verdelli v. Gray's Harbor Commercial Co.*, 115 Cal. 517.

Connecticut. — *Goddard v. Gardner*, 28 Conn. 172.

District of Columbia. — *Oliver v. Cameron*, *MacArthur & M.* (D. C.) 237.

Illinois. — *Fossler v. Schriber*, 38 Ill. 172; *Granger v. Warrington*, 8 Ill. 299.

Louisiana. — See *Morris v. Cain*, 39 La. Ann. 712.

Maine. — *McLellan v. Longfellow*, 32 Me. 494, 54 Am. Dec. 599.

Maryland. — *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277.

Massachusetts. — *Hatton v. Robinson*, 14 Pick. (Mass.) 420, 25 Am. Dec. 415; *Foster v. Hall*, 12 Pick. (Mass.) 89, 22 Am. Dec. 400.

Michigan. — *People v. Gallagher*, 75 Mich. 512; *People v. Van Alstine*, 57 Mich. 69; *Passmore v. Passmore*, 50 Mich. 626, 45 Am. Rep. 62; *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667; *Hamilton v. People*, 29 Mich. 173; *Stanton v. Hart*, 27 Mich. 539.

Mississippi. — *Jones v. State*, 65 Miss. 179.

Missouri. — *Sweet v. Owens*, 109 Mo. 1; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Riddles v. Aikin*, 29 Mo. 453; *Hamil v. England*, 50 Mo. App. 338; *Weinstein v. Reid*, 25 Mo. App. 41.

New Hampshire. — *Sleeper v. Abbott*, 60 N. H. 162.

New York. — *Rosseau v. Bleau*, 131 N. Y. 177, 27 Am. St. Rep. 578; *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77; *Whiting v. Barney*, 30 N. Y. 330, 86 Am. Dec. 385; *Britton v. Lorenz*, 3 Daly (N. Y.) 23, *affirmed* 45 N. Y. 51; *Smith v. Crego*, 54 Hun (N. Y.) 22; *Benjamin v. Coventry*, 19 Wend. (N. Y.) 353.

Ohio. — *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362; *King v. Barrett*, 11 Ohio St. 261.

South Carolina. — *State v. James*, 34 S. Car. 49, 579.

Texas. — *Smith v. Wilson*, 1 Tex. Civ. App. 115; *Walker v. State*, 19 Tex. App. 176.

Virginia. — *Tate v. Tate*, 75 Va. 522; *Cha-*

Where the Privilege Belongs to Several Clients, it cannot be waived by any one of them or even a majority, contrary to the expressed will of the others, but all must concur in order to make a legal waiver.¹

(b) **Heirs at Law or Devisees.** — It has also been held that the privilege may be waived by the heirs at law² or devisees of the client.³

(c) **Personal Representatives.** — So, also, it has been held that the executor or administrator of a deceased client may exercise in favor of the client's estate the right to waive the privilege, and may call upon the attorney to disclose as a witness communications made to him by the client.⁴

(3) **How Waived** — (a) **Whether Waiver May Be Implied.** — The general rule is that a waiver of the privilege may be implied,⁵ though, of course, it must clearly appear that it is the intention of the client to waive the protection of the rule.⁶

The New York Code originally provided that an attorney should not be allowed to disclose communications to him in the course of his employment, unless such provision should be "expressly waived by the client,"⁷ but this provision was rather liberally construed,⁸ and thereafter the code was amended so that the prohibition should apply unless "expressly waived upon the trial or examination" by the client.⁹

(b) **Pleading Privileged Matter.** — In England it is held that a party does not lose the protection against producing privileged documents by referring to the same in his pleadings,¹⁰ and that even where a part of such a document is set out in an answer and the remainder referred to, the privilege is lost only as to the part set out, and not as to the remainder.¹¹

In the United States, however, the rule has been held to be that when a defendant enters upon a line of defense which involves what passed between himself and his attorney he waives his right to object to the attorney giving his own account of the matter.¹²

(c) **Introduction of Testimony.** — The client does not waive the privilege by testifying generally in the cause¹³ nor by introducing the attorney as a witness

hoon v. Com., 21 Gratt. (Va.) 822; Parker v. Carter, 4 Munf. (Va.) 273, 6 Am. Dec. 513.

Georgia Rule. — In O'Brien v. Spalding, 102 Ga. 499, 66 Am. St. Rep. 202, the court said: "By no means is a client permitted, under our statute, to waive the protection it affords. The Act of 1887 is clear upon this point." See also Lewis v. State, 91 Ga. 168.

1. **All Must Concur.** — Utica Bank v. Mersereau, 3 Barb. Ch. (N. Y.) 528, 49 Am. Dec. 189; Michael v. Foil, 100 N. Car. 178, 6 Am. St. Rep. 577; Chahoon v. Com., 21 Gratt. (Va.) 822.

2. **Heirs at Law.** — Fossler v. Schriber, 38 Ill. 172; Winters v. Winters, 102 Iowa 53, 63 Am. St. Rep. 428.

3. **Devisee.** — Winters v. Winters, 102 Iowa 53, 63 Am. St. Rep. 428.

4. **Personal Representatives.** — Winters v. Winters, 102 Iowa 53, 63 Am. St. Rep. 428; Brooks v. Holden, 175 Mass. 137.

5. **Waiver May Be Implied.** — Blackburn v. Crawford, 3 Wall. (U. S.) 175; Hodges v. Mullikin, 1 Bland (Md.) 503; Koeber v. Somers, 108 Wis. 497; McMaster v. Scriven, 85 Wis. 162, 39 Am. St. Rep. 828. See also cases cited *infra*, this subsection. But see *contra*, Sweet v. Owens, 109 Mo. 1.

6. **Waiver Must Be Distinct and Unequivocal.** — State v. James, 34 S. Car. 49, 579; Tate v. Tate, 75 Va. 522; Chahoon v. Com., 21 Gratt. (Va.) 822.

The Silence of the Client, who is in the court

when the witness objects to answering a question on the ground that a privileged communication is involved, must be understood as sanctioning the objection. Chew v. Farmers' Bank, 2 Md. Ch. 231, *affirming* 9 Gill (Md.) 361.

7. **New York.** — Butler v. Fayerweather, (C. C. A.) 91 Fed. Rep. 458; Alberti v. New York, etc., R. Co., 118 N. Y. 77.

8. **What Amounts to Express Waiver.** — In Matter of Coleman, 111 N. Y. 220, it was held that where the attorney became the attesting witness to the will at the request of the testator the prohibition was "expressly waived" within the meaning of the code, and the attorney was competent to testify as to all of the circumstances attending the execution of the instrument.

9. Butler v. Fayerweather, (C. C. A.) 91 Fed. Rep. 458; *In re Gagan*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 350, *affirming* (Surrogate Ct.) 20 N. Y. Supp. 426. See Code Civ. Pro. N. Y. 1901, § 836.

10. **English Rule.** — Roberts v. Oppenheim, 26 Ch. D. 724, 53 L. J. Ch. 1148, 50 L. T. N. S. 729, 32 W. R. 654.

11. Belsham v. Perceval, 10 Jur. 772, 15 L. J. Ch. 438.

12. **Rule in United States.** — Hunt v. Blackburn, 128 U. S. 464.

13. **Client Testifying Generally** — *Indiana.* — Bigler v. Reyher, 43 Ind. 112; Oliver v. Pate, 43 Ind. 132.

Massachusetts. — Montgomery v. Pickering, Volume XXIII.

with reference to matters other than the confidential communications to him,¹ but the privilege is waived where the client introduces the confidential matter in evidence either by testifying to it himself² or by offering the attorney as a witness to prove the communications made to him.³

(d) **Turning State's Evidence.** — It has been held that where a person accused, jointly with others, of a crime, turns state's evidence, and testifies against the others, he thereby waives all privilege against the disclosure of communications between himself and his attorney touching the offense charged, and both he and the attorney may be compelled to disclose such communications, at the instance of either the prosecution or the defense.⁴ But in other jurisdictions the courts have refused to adopt this view.⁵

(4) **Partial Waiver.** — It has been held that where privilege has been claimed for a number of documents a waiver thereof in respect to some of them does not preclude the party from claiming his privilege as to the remainder.⁶

2. To Physicians — *a. IN GENERAL.* — Communications from a patient to his physician were not privileged at common law;⁷ but on considerations of public policy⁸ statutes have been enacted in most jurisdictions forbidding the disclosure in evidence, against the will of the patient, of information acquired by physicians in their professional capacity.⁹

116 Mass. 227; *McCooe v. Dighton*, etc., St. R. Co., 173 Mass. 117. But compare *Woburn v. Henshaw*, 101 Mass. 193.

Mississippi. — *Jones v. State*, 65 Miss. 179.

South Carolina. — *State v. James*, 34 S. Car. 49, 579.

Texas. — *Herring v. State*, (Tex. Crim. 1897) 42 S. W. Rep. 301.

Virginia. — *Tate v. Tate*, 75 Va. 522.

In Ohio, by statute, a party who voluntarily offers himself as a witness, generally on his own behalf, thereby waives all the protection which the law would otherwise have afforded to communications made by him to his attorney pertinent to the issue on trial. *King v. Barrett*, 11 Ohio St. 261.

Contra in Criminal Cases. — *Duttenhofer v. State*, 34 Ohio St. 91, 32 Am. Rep. 362.

1. Introducing Testimony of Attorney as to Other Matters. — *Blount v. Kimpton*, 155 Mass. 378, 31 Am. St. Rep. 554; *Montgomery v. Pickering*, 116 Mass. 227; *Tate v. Tate*, 75 Va. 522; *Forsyth v. Charlebois*, 12 L. C. Jur. 264. See also *Vaillant v. Dodemead*, 2 Atk. 524, 1 Dick. 92. But see *Crittenden v. Strother*, 2 Cranch (C. C.) 464.

2. Client Testifying as to Communications. — *Eldridge v. State*, 126 Ala. 63; *Young v. State*, 65 Ga. 525; *Oliver v. Pate*, 43 Ind. 132; *Tate v. Tate*, 75 Va. 522. See also *Louisville, etc. R. Co. v. Hill*, 115 Ala. 334. Compare *Cha-hoon v. Com.*, 21 Gratt. (Va.) 822.

Testimony Brought Out Only on Cross Examination has been held no waiver. *Tate v. Tate*, 75 Va. 522.

3. Offering Attorney as Witness to Communication. — *Fossler v. Schriber*, 38 Ill. 172; *Riddles v. Aikin*, 29 Mo. 453; *Masterton v. Boyce*, 2 Silv. Sup. (N. Y.) 205. See also *Vaillant v. Dodemead*, 2 Atk. 524, 1 Dick. 92.

4. Turning State's Evidence. — *People v. Gallagher*, 75 Mich. 512; *Hamilton v. People*, 29 Mich. 173; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321; *Jones v. State*, 65 Miss. 179.

5. Sutton v. State, 16 Tex. App. 490. See also *State v. James*, 34 S. Car. 49, 579.

6. Partial Waiver. — *Lyell v. Kennedy*, 27 Ch. D. 1, 51 L. J. Ch. 937, 50 L. T. N. S. 730.

7. Not Privileged at Common Law — England. — *Rex v. Gibbons*, 1 C. & P. 97, 11 E. C. L. 327; *Brown v. Carter*, 9 L. C. Jur. 163; *Kingston's Case*, 20 How. St. Tr. 572, 11 Harg. St. Tr. 243; *Broad v. Pitt*, 3 C. & P. 518, 14 E. C. L. 423. See also *Wheeler v. Le Marchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728.

Connecticut. — See *Goddard v. Gardner*, 28 Conn. 172.

Indiana. — *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159.

Iowa. — *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428.

Massachusetts. — See *Barnes v. Harris*, 7 Cush. (Mass.) 577, 54 Am. Dec. 734.

Michigan. — *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433.

Montana. — *Territory v. Corbett*, 3 Mont. 50. *New York.* — *People v. Stout*, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 670; *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564; *Kendall v. Grey*, 2 Hilt. (N. Y.) 300.

Texas. — See *Steagald v. State*, 22 Tex. App. 464.

Wisconsin. — *Boyle v. Northwestern Mut. Relief Assoc.*, 95 Wis. 312. See also *In re Bruendl*, 102 Wis. 45.

8. Public Policy. — *Lissak v. Crocker Estate Co.*, 119 Cal. 442; *Matter of Flint*, 100 Cal. 391; *Kling v. Kansas City*, 27 Mo. App. 231; *Davis v. Supreme Lodge, etc.*, 165 N. Y. 159, *affirming* 35 N. Y. App. Div. 354; *Butler v. Manhattan R. Co.*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 453, 30 Abb. N. Cas. (N. Y.) 78, *affirmed* 143 N. Y. 630; *Hoyt v. Hoyt*, 112 N. Y. 493; *In re Bruendl*, 102 Wis. 45.

9. Privileged by Statute — United States. — *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266; *Adreveno v. Mutual Reserve Fund L. Assoc.*, 34 Fed. Rep. 870; *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670.

b. RELATION OF PHYSICIAN AND PATIENT MUST EXIST—(1) Rule Stated. — In order for such statutes to apply it is necessary that the relation of physician and patient should exist, or at least that the circumstances should be such as to impress the patient with the belief that it does.¹

(2) Employment by Patient Not Necessary — (a) Rule Stated. — It is not, however, necessary, in order to exclude the testimony of a physician, that he

California. — *Lissak v. Crocker Estate Co.*, 119 Cal. 442; *Matter of Redfield*, 116 Cal. 637; *Freel v. Market St. Cable R. Co.*, 97 Cal. 40.

Colorado. — *Colorado Fuel, etc., Co. v. Cummings*, 8 Colo. App. 541.

Indiana. — *Bower v. Bower*, 142 Ind. 194; *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159; *Gurley v. Park*, 135 Ind. 440; *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384; *Morris v. Morris*, 119 Ind. 341; *Excelsior Mut. Aid. Assoc. v. Riddle*, 91 Ind. 84; *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Warsaw v. Fisher*, 24 Ind. App. 46; *Becknell v. Hosier*, 10 Ind. App. 5.

Iowa. — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600; *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Baxter v. Cedar Rapids*, 103 Iowa 599; *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428; *State v. Houseworth*, 91 Iowa 740; *Raymond v. Burlington, etc., R. Co.*, 65 Iowa 152.

Kansas. — *Kansas City, etc., R. Co. v. Murray*, 55 Kan. 336; *Clark v. State*, 8 Kan. App. 782.

Michigan. — *Jones v. Preferred Bankers' L. Assur. Co.*, 120 Mich. 211; *Cooley v. Foltz*, 85 Mich. 47; *Storrs v. Scougale*, 48 Mich. 387; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433.

Missouri. — *Blair v. Chicago, etc., R. Co.*, 89 Mo. 334, 383.

Montana. — *Territory v. Corbett*, 3 Mont. 50.

New York. — *Davis v. Supreme Lodge, etc.*, 165 N. Y. 159, *affirming* 35 N. Y. App. Div. 354; *Hoyt v. Hoyt*, 112 N. Y. 493; *Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239; *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661; *Westover v. Ætna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Edington v. Ætna L. Ins. Co.*, 77 N. Y. 564; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *People v. Stout*, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 670; *Matter of Hoyt*, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 162; *Kendall v. Grey*, 2 Hilt. (N. Y.) 300; *Hunn v. Hunn*, 1 Thomp. & C. (N. Y.) 499; *Grossman v. Supreme Lodge, etc.*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 821, 53 Hun (N. Y.) 637; *Renihan v. Dennin*, 38 Hun (N. Y.) 270, *affirmed* 103 N. Y. 573, 57 Am. Rep. 770; *Ferguson v. Massachusetts Mut. L. Ins. Co.*, 32 Hun (N. Y.) 306, *affirmed* 102 N. Y. 647; *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74; *Hanford v. Hanford*, 3 Edw. (N. Y.) 468; *Johnson v. Johnson*, 4 Paige (N. Y.) 460; *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; *Kelly v. Levy*, (N. Y. City Ct. Gen. T.) 8 N. Y. Supp. 849; *Enright v. Brooklyn Heights R. Co.*, 26 N. Y. App. Div. 538; *MacEvitt v. Maass*, (Supm. Ct. Tr. T.) 33 Misc. (N. Y.) 552, *affirmed* 64 N. Y. App. Div. 382; *Numrich v. Supreme Lodge, etc.*, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 552.

Pennsylvania. — *Wells v. New England Mut. L. Ins. Co.*, 187 Pa. St. 166, 42 W. N. C. (Pa.) 353.

Wisconsin. — *Shafer v. Eau Claire*, 105 Wis. 239; *McGowan v. Supreme Ct., etc.*, 104 Wis. 173; *Kenyon v. Mondovi*, 98 Wis. 50; *Boyle v. Northwestern Mut. Relief Assoc.*, 95 Wis. 312.

Rules for Construction of Statutes. — See *Post v. State*, 14 Ind. App. 452; *Kling v. Kansas City*, 27 Mo. App. 231; *Streeter v. Breckenridge*, 23 Mo. App. 244; *People v. Stout*, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 670.

Where the Deposition of a Physician Was Taken Before the Passage of Such a Statute, and, the physician having died, was offered in evidence after the passage thereof, it was held to be admissible. *Wells v. New England Mut. L. Ins. Co.*, 187 Pa. St. 166, 42 W. N. C. (Pa.) 353.

A Physician Cannot Give an Opinion based upon information which he acquired in a professional capacity and is hence prohibited from disclosing. *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552.

Patient as Well as Physician Exempt from Testifying. — *Post v. State*, 14 Ind. App. 452.

Dentists Are Not Within the Michigan Statute. — *People v. De France*, 104 Mich. 563.

Veterinary Surgeon Not Within Statute. — *Hendershot v. Western Union Tel. Co.*, 106 Iowa 529, 68 Am. St. Rep. 313.

1. Relation of Physician and Patient Must Exist — England. — See *Lee v. Hammerton*, 10 L. T. N. S. 730, 12 W. R. 975.

Kansas. — *Clark v. State*, 8 Kan. App. 782. *Missouri.* — *Weitz v. Mound City R. Co.*, 53 Mo. App. 39.

New York. — *People v. Koerner*, 154 N. Y. 355; *Fisher v. Fisher*, 129 N. Y. 654, *affirming* (Supm. Ct. Gen. T.) 9 N. Y. Supp. 4; *Matter of Lowenstine*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 323; *Henry v. New York, etc., R. Co.*, 57 Hun (N. Y.) 76; *Kendall v. Grey*, 2 Hilt. (N. Y.) 300; *Babcock v. People*, 15 Hun (N. Y.) 347; *Heath v. Broadway, etc., R. Co.*, 57 N. Y. Super. Ct. 496.

Where the Relation Is Such that No Confidence Is Reposed, there is none to be abused, and hence the physician may testify. *Scripps v. Foster*, 41 Mich. 742.

Where the Whole Testimony of a Physician Is Excluded on the ground that he cannot separate impressions received by him growing out of the relation of physician and patient and those received by observations of the patient when that relation did not exist, the fact justifying such exclusion must appear. The statement of the physician to that effect is not sufficient. *Gartside v. Connecticut Mut. L. Ins. Co.*, 8 Mo. App. 592, *affirmed* 76 Mo. 446, 43 Am. Rep. 765.

Previous Acquaintance Not Necessary Between Physician and Patient. — *Grattan v. Metropolitan L. Ins. Co.*, 24 Hun (N. Y.) 43.

should have been employed by the patient, for if this were necessary the fact that physicians are frequently called in by other physicians, or by friends or even strangers, would, to a large extent, destroy the usefulness of the statutes.¹

(b) **Physician Employed by Person Responsible for Injury to Another.** — Thus, where the person who is responsible for an accident by which another has been injured, sends a physician employed and paid by him to attend the injured person, the rule of privilege applies in full force;² but it is otherwise where the physician is sent merely to ascertain the extent of the injury, or the circumstances attending the accident, with a view to a possible claim for damages, and gives the injured person no reason to believe that he intends to treat him professionally or that he is acting otherwise than in the interest of the person by whom he is sent.³

(c) **Physician Sent to Examine Prisoner.** — Similarly the privilege does not apply where a physician is sent by the prosecuting attorney to examine into and make a report as to the mental and physical condition of a prisoner,⁴ though it is otherwise if the prisoner is led to believe that the object of the visit is to give him professional attendance of which he stands in need.⁵

(3) **Person Consulted Must Actually Be Physician.** — It has been held in *New York*, under the wording of the statute in that state, that in order for the rule of privilege to apply against the testimony of a witness it must appear that he was "duly authorized to practice physic or surgery" according to the law of the state.⁶

(4) **Physician Must Be Acting Professionally.** — That information acquired by a physician may be privileged, he must have been acting professionally when he acquired the information.⁷

1. **Employment by Patient Not Necessary.** — *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770; *Grattan v. Metropolitan L. Ins. Co.*, 24 Hun (N. Y.) 43.

Communications made to a physician sent to a woman by the public prosecutor after discovering that an abortion has been committed on her are privileged where she accepts his services as a physician and he renders them as such. *People v. Murphy*, 101 N. Y. 128, 54 Am. Rep. 661.

2. **Physician Employed by Person Responsible for Injury.** — *Freel v. Market St. Cable R. Co.*, 97 Cal. 40; *New York, etc., R. Co. v. Mushrush*, 11 Ind. App. 192; *Keist v. Chicago Great Western R. Co.*, 110 Iowa 32; *Raymond v. Burlington, etc., R. Co.*, 65 Iowa 152; *Weitz v. Mound City R. Co.*, 53 Mo. App. 39.

Hospital for Employees. — A corporation having established a hospital for its use in the care of its employees, which was supported in whole or in part by deductions from the wages of such employees, it was held that where an employee of the company, after sustaining an injury, put himself under the charge of the physician employed by the company, the relation of physician and patient existed. *Colorado Fuel, etc., Co. v. Cummings*, 8 Colo. App. 541.

3. **Where Professional Treatment Not Intended.** — *Freel v. Market St. Cable R. Co.*, 97 Cal. 40; *Weitz v. Mound City R. Co.*, 53 Mo. App. 39; *Heath v. Broadway, etc., R. Co.*, 57 N. Y. Super. Ct. 496.

4. **Physician Sent to Examine Prisoner.** — *People v. Glover*, 71 Mich. 303; *People v. Kemmler*, 119 N. Y. 580; *People v. Sliney*, 137 N. Y. 570.

5. *People v. Stout*, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 670.

6. *New York.* — *Wiel v. Cowles*, 45 Hun (N. Y.) 307.

Presumption that Physician Was Duly Licensed. — *Record v. Saratoga Springs*, 46 Hun (N. Y.) 448, affirmed 120 N. Y. 646.

The Fact that a Duly Licensed Physician Has Failed to Register does not prevent his being within the statute. *McGillicuddy v. Farmers' L. & T. Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 55.

7. **Physician Must Be Acting Professionally.** — *Bower v. Bower*, 142 Ind. 104; *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564, reversing 13 Hun (N. Y.) 543; *Staunton v. Parker*, 19 Hun (N. Y.) 55; *Matter of Freeman*, 46 Hun (N. Y.) 458; *Hunn v. Hunn*, 1 Thomp. & C. (N. Y.) 499; *Burley v. Barnhard*, (Supm. Ct. Gen. T.) 9 N. Y. St. Rep. 587; *Stowell v. American Co-operative Relief Assoc.*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 233, 1 Silv. Sup. (N. Y.) 246, 52 Hun (N. Y.) 613.

Where a Physician Paid Both Professional and Social Visits to a patient, and is unable to separate the knowledge acquired as a physician from that acquired as a friend, his testimony is inadmissible. *Matter of Darragh*, 52 Hun (N. Y.) 591.

Matters Open to General Observation Have Been Held Not Privileged. — *Linz v. Massachusetts Mut. L. Ins. Co.*, 8 Mo. App. 369; *Matter of Loewenstine*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 323. The first case was, however, disapproved in *Kling v. Kansas City*, 27 Mo. App. 231, in which case the court held that the test of whether information acquired by a physician is privileged is how it was acquired, and it matters not that it could have been acquired in a different way.

The Fact that a Physician Gave No Prescription

(5) *Who Are Patients.* — The term "patient" in a statute prohibiting physicians from disclosing information acquired in attending a patient includes persons under a disability such as infancy, lunacy, etc.¹

c. COMMUNICATIONS BETWEEN PHYSICIANS ATTENDING SAME PATIENT. — The privilege is not limited to communications with the patient, but applies in all its force to communications between physicians attending or consulting in the same case.²

d. MEDIA OF COMMUNICATION BETWEEN PHYSICIAN AND PATIENT. — Disclosures of confidential communications between physician and patient cannot be made by other persons whose intervention is strictly necessary to enable the parties to communicate with each other.³

e. WHAT MATTERS ARE PRIVILEGED — (1) *Rule Extends to All Information Acquired Professionally.* — The prohibition against a physician's divulging information acquired while attending a patient excludes his examination as to any information so acquired, whether actually obtained from statements of the patient, or of others present at the time, or gathered from his professional or surgical examination.⁴

(2) *Ailments of Patient.* — A physician will not be allowed to disclose the nature of the disease or ailment for which he treated the patient.⁵ And it has been held that the prescriptions of a physician for his patient could not be introduced in evidence or their ingredients explained.⁶

(3) *Previous State of Health.* — A physician cannot be allowed to testify as to his patient's previous state of health where his only knowledge is acquired from an inspection of and conversations with the patient as his physician.⁷

(4) *Whether Information Must Be Necessary for Treatment.* — The privilege is very generally restricted to information necessary to enable the physician to

or Advice is not conclusive. *Grattan v. Metropolitan L. Ins. Co.*, 24 Hun (N. Y.) 43.

1. *Patient.* — *Corey v. Bolton*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 138, *affirming* (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 836. See also *PATIENT*, vol. 22, p. 506.

2. *Communications Between Physicians.* — *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219; *Prader v. National Masonic Acc. Assoc.*, 95 Iowa 149.

3. *Media of Communication.* — *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159.

4. *Rule Extends to All Information Acquired Professionally* — *California.* — *Freel v. Market St. Cable R. Co.*, 97 Cal. 40; *Valensin v. Valensin*, 73 Cal. 106.

Colorado. — *Colorado Fuel, etc., Co. v. Cummings*, 8 Colo. App. 541.

Indiana. — *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159; *Williams v. Johnson*, 112 Ind. 273; *Penn. Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Excelsior Mut. Aid. Assoc. v. Riddle*, 91 Ind. 84; *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Becknell v. Hosier*, 10 Ind. App. 5; *Post v. State*, 14 Ind. App. 452.

Iowa. — *Finnegan v. Sioux City*, 112 Iowa 232; *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600; *Prader v. National Masonic Acc. Assoc.*, 95 Iowa 149.

Michigan. — *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525; *Fraser v. Jennison*, 42 Mich. 206; *Briggs v. Briggs*, 20 Mich. 34.

Missouri. — *Gartside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765, *affirming* 8 Mo. App. 592; *Kling v. Kansas City*, 27 Mo. App. 231; *Corbett v. St. Louis, etc., R. Co.*, 26

Mo. App. 621; *Linz v. Massachusetts Mut. L. Ins. Co.*, 8 Mo. App. 363.

New York. — *Nelson v. Oneida*, 156 N. Y. 219, 66 Am. St. Rep. 556, *affirming* 85 Hun (N. Y.) 616, 35 N. Y. Supp. 1113; *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372, *affirming* 28 Hun (N. Y.) 430; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617; *Redmond v. Industrial Ben. Assoc.*, 78 Hun (N. Y.) 104, *affirmed* 150 N. Y. 167; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185, *affirming* as to this point, 5 Hun (N. Y.) 1; *Barker v. Cunard Steamship Co.*, 91 Hun (N. Y.) 495, *affirmed* 157 N. Y. 693; *People v. Stout*, (Oyer & T. Ct.) 3 Park. Crim. (N. Y.) 670; *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74; *Brigham v. Gott*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 518, 51 Hun (N. Y.) 636; *Jones v. Brooklyn, etc., R. Co.*, (Brooklyn City Ct. Gen. T.) 3 N. Y. Supp. 253.

Wisconsin. — *Shafer v. Eau Claire*, 105 Wis. 239; *McGowan v. Supreme Ct., etc.*, 104 Wis. 173.

Examination Need Not Be Private. — *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617.

5. *Ailments of Patient.* — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600; *Lammiman v. Detroit Citizens' St. R. Co.*, 112 Mich. 602; *Storrs v. Scougale*, 48 Mich. 387; *Sloan v. New York Cent. R. Co.*, 45 N. Y. 125.

6. *Prescriptions.* — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600.

7. *Barker v. Cunard Steamship Co.*, 91 Hun (N. Y.) 495, *affirmed* 157 N. Y. 693.

prescribe for or treat the patient;¹ but the tendency of the courts is towards a liberal construction of this rule,² and the presumption is that the information would not have been imparted except for the purpose of aiding the physician in prescribing for the patient.³

The Word "Necessary" should not be construed to exclude information in good faith asked for or given to enable intelligent treatment, although it may appear that some of the information was not strictly essential.⁴

Similarly the Word "Prescribe" in such a statute should be given as liberal and enlarged an effect as the word itself will bear in the connection found.⁵

A More Liberal View has been announced by the Supreme Court of *Indiana*, which has practically considered all information given by the patient in response to inquiries of the physician privileged.⁶

f. WHO MAY CLAIM PRIVILEGE. — The privilege may be claimed by the patient or his personal representatives,⁷ or the beneficiary in a policy of insurance on the life of the patient.⁸

g. BURDEN OF PROOF. — The party claiming the benefit of the statutory privilege must show the facts which bring the case within the statute.⁹

h. LIMITATIONS OF RULE — (1) *Fact of Attendance*. — The fact that a doctor is the family physician of a certain person or attended him profes-

1. Information Must Be Necessary for Treatment — *Arkansas*. — *Collins v. Mack*, 31 Ark. 684.

California. — *Matter of Redfield*, 116 Cal. 637.

Kansas. — *Kansas City, etc., R. Co. v. Murray*, 55 Kan. 336; *Clark v. State*, 8 Kan. App. 782.

Michigan. — *People v. Cole*, 113 Mich. 83; *Lincoln v. Detroit*, 101 Mich. 245; *Dittrich v. Detroit*, 98 Mich. 245; *Cooley v. Folz*, 85 Mich. 47; *Campau v. North*, 39 Mich. 606, 33 Am. Rep. 433; *Briggs v. Briggs*, 20 Mich. 34.

Missouri. — *Gartside v. Connecticut Mut. L. Ins. Co.*, 76 Mo. 446, 43 Am. Rep. 765, *affirming* 8 Mo. App. 592.

Montana. — *Territory v. Corbett*, 3 Mont. 50.

New York. — *People v. Koerner*, 154 N. Y.

355; *Redmond v. Industrial Ben. Assoc.*, 78 Hun (N. Y.) 104, *affirmed* 50 N. Y. 167; *People v. Harris*, 136 N. Y. 423; *People v. Schuyler*, 106 N. Y. 298; *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Herrington v. Winn*, 60 Hun (N. Y.) 235; *Henry v. New York, etc., R. Co.*, 57 Hun (N. Y.) 76; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182; *Kendall v. Grey*, 2 Hilt. (N. Y.) 300; *Matter of Freeman*, 46 Hun (N. Y.) 458; *Brown v. Rome, etc., R. Co.*, 45 Hun (N. Y.) 439; *Matter of Boury*, (Supm. Ct. Gen. T.) 8 N. Y. St. Rep. 809; *In re McQueen*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 705, 59 Hun (N. Y.) 625; *In re O'Neil*, (Surrogate Ct.) 7 N. Y. Supp. 197; *Babcock v. People*, 15 Hun (N. Y.) 347; *Heath v. Broadway, etc., R. Co.*, 57 N. Y. Super. Ct. 496; *Matter of Halsey*, 2 Connolly (N. Y.) 220.

Wisconsin. — *In re Bruendl*, 102 Wis. 45; *Kenyon v. Mondovi*, 98 Wis. 50.

See also the title INFORMATION AND BELIEF, vol. 16, p. 322.

Distinction Between Disclosures of Patient and Knowledge Otherwise Acquired. — In *Michigan* all disclosures by the patient to his physician respecting his ailments are privileged, whether they are necessary or not; so are facts necessary for the treatment of the disease obtained

from any source; but unnecessary facts from other sources are not privileged. *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525.

Physical Defects or Degrading Marks on Person Are Privileged. — *Kling v. Kansas City*, 27 Mo. App. 231.

2. Liberal Construction. — *In re Bruendl*, 102 Wis. 45. See also *De Jong v. Erie R. Co.*, 43 N. Y. App. Div. 427; *Matter of Darragh*, 52 Hun (N. Y.) 591.

3. Presumption. — *Feeney v. Long Island R. Co.*, 116 N. Y. 375; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185; *Sloan v. New York Cent. R. Co.*, 45 N. Y. 125. See also *Brigham v. Gott*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 518, 51 Hun (N. Y.) 636.

4. Meaning of "Necessary." — *In re Bruendl*, 102 Wis. 45.

What Information Is Necessary. — See *Norton v. Moberly*, 18 Mo. App. 457; *Kling v. Kansas City*, 27 Mo. App. 231; *Dilleber v. Home L. Ins. Co.*, 69 N. Y. 256, 25 Am. Rep. 182.

Wisconsin — Purpose to Cure or Alleviate Must Exist. — *In re Bruendl*, 102 Wis. 45 (stated under PRESCRIBE, vol. 22, p. 1179).

5. In re Bruendl, 102 Wis. 45. See last note *supra*.

6. Pennsylvania Co. v. Marion, 123 Ind. 415, 18 Am. St. Rep. 330.

7. Personal Representatives. — *Heuston v. Simpson*, 115 Ind. 62, 7 Am. St. Rep. 409; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185.

8. The Assignee of a Beneficiary in a life insurance policy is entitled to the privilege. *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525. See also *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185, *reversing* 5 Hun (N. Y.) 1; *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74.

9. Burden of Proof. — *Bowles v. Kansas City*, 51 Mo. App. 416; *People v. Koerner*, 154 N. Y. 355; *People v. Schuyler*, 106 N. Y. 298, *affirming* 43 Hun (N. Y.) 88; *Edington v. Aetna L. Ins. Co.*, 77 N. Y. 564; *Herrington v. Winn*, 60 Hun (N. Y.) 235; *Stowell v. American Co-operative Relief Assoc.*, (Supm. Ct. Gen. T.) 5

sionally, and the dates and number of his visits are not, as a general rule, within the prohibition of the statute, and the physician may be permitted to testify thereto.¹ But it has been held that where in an action on an insurance policy the defense was a breach of warranty or false representations on the part of the insured in his application consisting in statements that he was in good health, whereas, as a matter of fact, he was suffering from a disease of the throat and tongue, it was error to allow certain physicians to testify that they were specialists in such diseases and had been called upon by the insured for professional treatment, as this violated the spirit of the statute.²

(2) *Testamentary Matters.* — It has been held that in disputes between parties all of whom claim under a decedent as heirs at law, devisees, legatees, or personal representatives, either party may call the attending physician of the decedent as a witness, and the rule of privilege does not apply.³

In New York the rule as established by statute is that upon a trial or examination the physician of a deceased patient may disclose any information acquired in attending the deceased as to his mental or physical condition, except confidential communications and such facts as would tend to disgrace his memory, when the provisions of the statute have been waived on the trial, or when the validity of his will is in question, by the executor named in the will or his surviving spouse, or any of his heirs, next of kin, or other party in interest.⁴

(3) *Communications for Unlawful Purpose.* — The privilege does not apply to communications for an unlawful purpose.⁵ But in the absence of any showing to the contrary the presumption must be indulged that the communication was made for a lawful purpose and is therefore privileged.⁶

(4) *Inquisition in Lunacy.* — It has been held in New York that the statutory provision prohibiting a physician from disclosing information acquired while attending a physician in a professional capacity does not apply in an inquisition as to the lunacy of the patient.⁷

(5) *Effect of Presence of Third Persons.* — The fact that a third person was present at the time a physician learned certain matters concerning his patient does not render the physician competent to testify thereto,⁸ though the third person may testify.⁹

N. Y. Supp. 233, 1 Silv. Sup. (N. Y.) 246, 52 Hun (N. Y.) 613; *Henry v. New York, etc., R. Co.*, 57 Hun (N. Y.) 76; *Heath v. Broadway, etc., R. Co.*, 57 N. Y. Super. Ct. 496.

1. **Fact of Attendance** — *Iowa.* — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600.

Michigan. — *Dittrich v. Detroit*, 98 Mich. 245; *Cooley v. Foltz*, 85 Mich. 47; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525; *Brown v. Metropolitan L. Ins. Co.*, 65 Mich. 306, 8 Am. St. Rep. 894.

New York. — *Numrich v. Supreme Lodge, etc.*, (N. Y. City Ct. Tr. T.) 3 N. Y. Supp. 552. See also *Patten v. United L., etc., Ins. Assoc.*, 133 N. Y. 450, reversing 16 N. Y. Supp. 376, 61 Hun (N. Y.) 627; *Feeney v. Long Island R. Co.*, 116 N. Y. 375.

2. *McCormick v. United L., etc., Ins. Assoc.*, 79 Hun (N. Y.) 340.

3. **Testamentary Causes.** — *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552.

Contra. — *Matter of Redfield*, 116 Cal. 637; *Matter of Flint*, 100 Cal. 391.

No Privilege Where Physician an Attesting Witness to Will. — *Matter of Mullin*, 110 Cal. 252.

Blackening the Memory of the Dead might well be prevented by the court in its discretion, should it ever be necessary. *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428.

4. **New York Rule.** — Code Civ. Pro. N. Y., 1901, § 836. See the following cases: *Matter of Coleman*, 111 N. Y. 220; *Loder v. Whelpley*, 111 N. Y. 239, affirming 1 Dem. (N. Y.) 368; *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, affirming 38 Hun (N. Y.) 270; *Mason v. Williams*, 53 Hun (N. Y.) 398; *Matter of Freeman*, 46 Hun (N. Y.) 458; *Allen v. Public Administrator*, 1 Bradf. (N. Y.) 221; *Van Orman v. Van Orman*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 931, 58 Hun (N. Y.) 606; *In re Connor*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 855, 5 Silv. Sup. (N. Y.) 261, 55 Hun (N. Y.) 606, affirmed 124 N. Y. 663; *In re O'Neil*, (Surrogate Ct.) 7 N. Y. Supp. 197; *Matter of Murphy*, 85 Hun (N. Y.) 575.

5. **Communications for Unlawful Purpose.** — *State v. Smith*, 99 Iowa 26, 61 Am. St. Rep. 219. See also *Hewitt v. Prime*, 21 Wend. (N. Y.) 79.

6. *Guptill v. Verback*, 58 Iowa 98.

7. *In re Benson*, (Monroe County Ct.) 16 N. Y. Supp. 111. See also the *Wisconsin* case of *In re Bruendl*, 102 Wis. 45.

8. **Third Person Present.** — *Cahen v. Continental L. Ins. Co.*, 41 N. Y. Super. Ct. 296, reversed on other grounds 69 N. Y. 300. See also *Post v. State*, 14 Ind. App. 452.

9. *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159; *Masons' Union L. Ins. Assoc.*

Partner of Physician Consulted. — Where two physicians are partners, one who is present at a consultation between the other and a patient cannot testify as to what took place during such consultation.¹

(6) *Rule in Criminal Proceedings.* — Statutes extending privilege to physicians are applicable in criminal proceedings as well as civil,² unless the matter as to which it is sought to introduce the testimony of the physician would throw light upon the guilt or innocence of the prisoner, in which case the privilege does not apply.³

(7) *Autopsy.* — A physician may be examined as to an autopsy of the body of a person who was not his patient in life.⁴

(8) *Proofs of Death.* — It has been held that statements or affidavits of the attending physician of a deceased person furnished to an insurance company with the proofs of death are not privileged.⁵ But it has also been held that the certificate of an attending physician filed with a city board of health as to the cause of the death of certain relatives of the person insured was not admissible in an action upon a policy of life insurance, although the defense was a breach of warranty that such relatives of the insured had not died of consumption.⁶

(9) *Hypothetical Questions.* — A physician who has attended a patient may give an opinion as a witness upon a hypothetical state of facts expressed in a question which excludes all knowledge of the condition of the patient derived while in professional attendance.⁷

(10) *Disclosures for Protection of Physician.* — Where the patient sues the physician for malpractice the rule of privilege does not apply as to matters connected with the treatment of the injury or disease or the operation in reference to which the malpractice is alleged, but all these matters may be fully disclosed.⁸ The mere interposition by the patient of a general denial in an action brought against him by the physician for payment of his services does not, however, prevent the application of the rule of privilege.⁹

i. WAIVER AND LOSS — (1) *In General* — The privilege with reference to information acquired by a physician in the performance of his professional duties, like the privilege with reference to communications to an attorney, remains in force until removed by the client or his representatives.¹⁰ It does

v. Brockman, 26 Ind. App. 182; *Wells v. New England Mut. L. Ins. Co.*, 187 Pa. St. 166, 42 W. N. C. (Pa.) 353.

1. *Partner of Physician.* — *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384; *Raymond v. Burlington, etc.*, R. Co., 65 Iowa 152.

2. *In Criminal Proceedings.* — *People v. Murphy*, 101 N. Y. 126, 54 Am. Rep. 661; *People v. Brower*, 53 Hun (N. Y.) 217. Both of these cases distinguished *Pierson v. People*, 79 N. Y. 427, 35 Am. Rep. 524, *infra*, next note.

3. *Testimony Tending to Prove Guilt or Innocence.* — *People v. Lane*, 101 Cal. 513; *People v. West*, 106 Cal. 89; *Hauk v. State*, 148 Ind. 238; *People v. Harris*, 136 N. Y. 423; *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, *affirming* 18 Hun (N. Y.) 239; *People v. Benham*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 466, 14 N. Y. Crim. 434.

Examination as to Sanity at Defendant's Instance. — *Nesbit v. People*, 19 Colo. 441.

4. *Autopsy.* — *Harrison v. Sutter St. R. Co.*, 116 Cal. 156.

5. *Proofs of Death.* — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525. See also *Propp v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 266; *Buffalo Loan, etc., Co. v. Knights Templar, etc., Assoc.*, 126

N. Y. 450, 22 Am. St. Rep. 839, *affirming* 56 Hun (N. Y.) 303. *Contra*, *Dreier v. Continental L. Ins. Co.*, 24 Fed. Rep. 670.

See generally the title LIFE INSURANCE, vol. 19, p. 110.

6. *Davis v. Supreme Lodge, etc.*, 165 N. Y. 159, *affirming* 35 N. Y. App. Div. 354. See also the title LIFE INSURANCE, vol. 19, p. 111.

7. *Hypothetical Questions.* — *Valensin v. Valensin*, 73 Cal. 106; *People v. Schuyler*, 106 N. Y. 208, *affirming* 43 Hun (N. Y.) 88; *Meyer v. Standard L., etc., Ins. Co.*, 8 N. Y. App. Div. 74.

8. *Suit for Malpractice.* — *Becknell v. Hosier*, 10 Ind. App. 5; *Warsaw v. Fisher*, 24 Ind. App. 46; *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752; *Van Allen v. Gordon*, 83 Hun (N. Y.) 379.

9. *General Denial in Action for Services.* — *Van Allen v. Gordon*, 83 Hun (N. Y.) 379; *McGillcuddy v. Farmers' L. & T. Co.*, (Supm. Ct. Tr. T.) 26 Misc. (N. Y.) 55. But compare *Kendall v. Grey*, 2 Hilt. (N. Y.) 300.

10. *Privilege Continues until Waived by Patient.* — *Storrs v. Scougale*, 48 Mich. 387; *Cahen v. Continental L. Ins. Co.*, 41 N. Y. Super. Ct. 296, *reversed* on other grounds 69 N. Y. 300; *Butler v. Manhattan R. Co.*, (N. Y. Super. Ct.

not cease upon the termination of the relation by the death of either the patient¹ or the physician.²

(2) *Who May Waive* — (a) *The Patient*. — As the privilege is that of the patient and not of the physician,³ it follows that the patient may waive it whenever he sees fit to do so.⁴ And this right to waive the statutory privilege is not dependent upon any statute expressly allowing the waiver.⁵

(b) *Attorney of Patient*. — The privilege may be waived by the attorney of the patient on the trial.⁶

(c) *Natural Guardians of Patient*. — It has been held that where the patient is an infant and, not being *sui juris*, cannot himself waive the statutory privilege, it may be waived by his parents.⁷ It does not seem necessary that the waiver should affirmatively appear to be of benefit to the infant.⁸

(d) *Personal Representatives of Patient*. — After the death of the patient the privilege may, as a general rule, be waived by his personal representatives.⁹

Gen. T.) 3 Misc. (N. Y.) 453, 30 Abb. N. Cas. (N. Y.) 78, *affirmed* 143 N. Y. 630.

Under the California Statute the privilege becomes absolute at the patient's death. *Harrison v. Sutter St. R. Co.*, 116 Cal. 156. See also *Matter of Flint*, 100 Cal. 391.

1. *Death of Patient*. — Penn Mut. L. Ins. Co. v. Wiler, 100 Ind. 92, 50 Am. Rep. 769; *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Edington v. Mutual L. Ins. Co.*, 67 N. Y. 185, *affirming* as to this point 5 Hun (N. Y.) 1; *Cahen v. Continental L. Ins. Co.*, 41 N. Y. Super. Ct. 296, *reversed* on other grounds 69 N. Y. 300; *Grattan v. Metropolitan L. Ins. Co.*, 80 N. Y. 281, 36 Am. Rep. 617.

2. *Death of Physician*. — *Lowenthal v. Leonard*, 20 N. Y. App. Div. 330.

3. *Privilege Belongs to Patient* — *Indiana*. — *Springer v. Byram*, 137 Ind. 15, 45 Am. St. Rep. 159.

Michigan. — *Lincoln v. Detroit*, 101 Mich. 245; *Storrs v. Scougale*, 48 Mich. 387; *Fraser v. Jennison*, 42 Mich. 206.

New York. — *Johnson v. Johnson*, 14 Wend. (N. Y.) 637; *Record v. Saratoga Springs*, 46 Hun (N. Y.) 448, *affirmed* 120 N. Y. 646; *Cahen v. Continental L. Ins. Co.*, 41 N. Y. Super. Ct. 296, *reversed* on other grounds 69 N. Y. 300; *Kelly v. Levy*, (N. Y. City Ct. Gen. T.) 8 N. Y. Supp. 849.

Wisconsin. — *In re Bruendl*, 102 Wis. 45.

The Court Can Compel a Physician to Answer a question as to the cause of a disease for which he treated the patient, where the patient has waived the privilege. *Zimmer v. Third Ave. R. Co.*, 36 N. Y. App. Div. 265.

4. *Patient May Waive Privilege* — *United States*. — *Adreveno v. Mutual Reserve Fund L. Assoc.*, 34 Fed. Rep. 870.

California. — *Lissak v. Crocker Estate Co.*, 119 Cal. 442.

Indiana. — *Morris v. Morris*, 119 Ind. 341; *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769; *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295; *Post v. State*, 14 Ind. App. 452; *Becknell v. Hosier*, 10 Ind. App. 5.

Iowa. — *Nelson v. Nederland L. Ins. Co.*, 110 Iowa 600; *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428; *Denning v. Butcher*, 91 Iowa 425.

Michigan. — *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525; *Storrs v. Scougale*,

48 Mich. 387; *Fraser v. Jennison*, 42 Mich. 206; *Grand Rapids, etc., R. Co. v. Martin*, 41 Mich. 667.

Missouri. — *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752; *Davenport v. Hannibal*, 108 Mo. 471; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Blair v. Chicago, etc., R. Co.*, 89 Mo. 334, 383; *Squires v. Chillicothe*, 89 Mo. 226; *Carrington v. St. Louis*, 89 Mo. 208, 58 Am. Rep. 108; *Groll v. Tower*, 85 Mo. 249, 55 Am. Rep. 358, *affirming* 12 Mo. App. 585, *overruling* *Harriman v. Stowe*, 57 Mo. 93; *Kling v. Kansas City*, 27 Mo. App. 231; *Corbett v. St. Louis, etc., R. Co.*, 26 Mo. App. 621.

Montana. — *Territory v. Corbett*, 3 Mont. 50.

New York. — *Morris v. New York, etc., R. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675; *Hoyt v. Hoyt*, 112 N. Y. 493; *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 60, 52 Am. Rep. 1; *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74; *Cahen v. Continental L. Ins. Co.*, 41 N. Y. Super. Ct. 296, *reversed* on other grounds 69 N. Y. 300.

Wisconsin. — *In re Bruendl*, 102 Wis. 45.

An Entry upon the Record by the patient's counsel of the waiver would be sufficient if the patient be alive, and in case of his inability to attend the trial a written stipulation signed by him and entered upon the record would remove the prohibition. *Dougherty v. Metropolitan L. Ins. Co.*, 87 Hun (N. Y.) 15.

5. *Corey v. Bolton*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 138, *affirming* (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 836. See also *Boyle v. Northwestern Mut. Relief Assoc.*, 95 Wis. 312; *Kenyon v. Mondovi*, 98 Wis. 50.

6. *Attorney of Patient*. — *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77.

7. *Waiver by Parents*. — *State v. Depoister*, 21 Nev. 107; *Corey v. Bolton*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 138, *affirming* (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 836. Compare the title GUARDIAN AND WARD, vol. 15, pp. 71, 72.

8. *Corey v. Bolton*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 138, *affirming* (N. Y. City Ct. Gen. T.) 30 Misc. (N. Y.) 836.

9. *Personal Representatives May Waive Privilege* — *Indiana*. — *Morris v. Morris*, 119 Ind. 341.

Iowa. — *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Denning v. Butcher*, 91 Iowa 425.

(e) **Beneficiary in Insurance Policy.** — The beneficiary in a policy of life insurance may, in an action thereon, waive the privilege attaching to communications between the insured and his physician.¹

(f) **Proponents of Will.** — The proponents of a will may, it has been held, waive the privilege as to evidence of the testator's physician.²

(g) **New York Rule Where Validity of Will in Question.** — The *New York* rule, in controversies about a will, is fixed by statute and has been already stated.³

(3) **How Waived** — (a) **Whether Waiver May Be Implied.** — A waiver of the benefit of the rule excluding the testimony of a physician may be implied,⁴ unless, as is the case in *New York*, it is required by statute to be express.⁵

(b) **Provision in Insurance Policy or Application.** — An applicant for insurance may waive the privilege by a stipulation to that effect in his application.⁶ There is nothing against public policy in such waiver,⁷ and it will be binding upon all who claim under the contract of insurance.⁸

The Present *New York* Statute, which requires the privilege to be "expressly waived upon the trial or examination," precludes a waiver in such manner.⁹

(c) **Introduction of Testimony.** — A patient waives the privilege where he testifies as to privileged matters¹⁰ or calls the physician to testify thereto.¹¹ But there is no waiver involved in his going on the stand and testifying generally or offering the physician as a general witness.¹² The privilege as against the testimony of one physician with reference to information acquired by him which is within the privilege is not waived by calling another physician to testify as to other and totally distinct privileged matters.¹³

Michigan. — *Fraser v. Jennison*, 42 Mich. 206.
New York. — *Holcomb v. Harris*, 166 N. Y. 257; *Dougherty v. Metropolitan L. Ins. Co.*, 87 Hun (N. Y.) 15; *Staunton v. Parker*, 19 Hun (N. Y.) 55.

1. *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

2. *Fraser v. Jennison*, 42 Mich. 206.

3. See *supra*, this section, *Limitations of Rule — Testamentary Matters*.

4. **Waiver May Be Implied.** — *State v. Depoister*, 21 Nev. 107. See also cases cited *infra*, this subsection.

Circumstances Not Amounting to Waiver. — See *Phillips v. U. S. Benevolent Soc.*, 120 Mich. 142.

5. **Requirement of Express Waiver.** — *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77; *Renihan v. Dennin*, 103 N. Y. 573, 57 Am. Rep. 770, *affirming* 38 Hun (N. Y.) 270; *Dougherty v. Metropolitan L. Ins. Co.*, 87 Hun (N. Y.) 15; *Grattan v. National L. Ins. Co.*, 15 Hun (N. Y.) 74; *Treanor v. Manhattan R. Co.*, (C. Pl. Gen. T.) 28 Abb. N. Cas. (N. Y.) 47, 21 Civ. Pro. (N. Y.) 364. See also *Record v. Saratoga Springs*, 46 Hun (N. Y.) 448, *affirmed* 120 N. Y. 646.

6. *Adreveno v. Mutual Reserve Fund L. Assoc.*, 34 Fed. Rep. 870.

Stating the Name and Residence of the Family Physician of the applicant, in an application for insurance, in answer to an interrogatory, does not amount to a waiver of the statute. *Masonic Mut. Ben. Assoc. v. Beck*, 77 Ind. 203, 40 Am. Rep. 295. See also *Edington v. Mutual L. Ins. Co.*, 5 Hun (N. Y.) 1.

7. *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, *affirming* 78 Hun (N. Y.) 222.

8. *Adreveno v. Mutual Reserve Fund L. Assoc.*, 34 Fed. Rep. 870. See also *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, *affirming* 78 Hun (N. Y.) 222.

9. **New York Rule.** — *Holden v. Metropolitan*

L. Ins. Co., 165 N. Y. 13, *reversing* 11 N. Y. App. Div. 426. See also *Foley v. Royal Arcanum*, 151 N. Y. 196, 56 Am. St. Rep. 621, *affirming* 78 Hun (N. Y.) 222; *Davis v. Supreme Lodge, etc.*, 35 N. Y. App. Div. 354, *affirmed* 165 N. Y. 159.

In view of the above decisions the cases of *Dougherty v. Metropolitan L. Ins. Co.*, 87 Hun (N. Y.) 15, and *Proppe v. Metropolitan L. Ins. Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 266, holding otherwise, cannot be considered as having any binding authority.

10. **Testimony as to Privileged Matters.** — *Lane v. Boicourt*, 128 Ind. 420, 25 Am. St. Rep. 442; *State v. Depoister*, 21 Nev. 107; *Rauh v. Deutscher Verein*, 29 N. Y. App. Div. 483; *Treanor v. Manhattan R. Co.*, (C. Pl. Gen. T.) 28 Abb. N. Cas. (N. Y.) 47, 21 Civ. Pro. (N. Y.) 364; *Marx v. Manhattan R. Co.*, 56 Hun (N. Y.) 575. But compare *Morris v. New York, etc., R. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675.

The Wife of the Plaintiff Appearing as a Witness for the plaintiff does not of itself amount to a waiver. *Cramer v. Hurt*, 154 Mo. 112, 77 Am. St. Rep. 752.

11. **Calling Physician as Witness.** — *Lissak v. Crocker Estate Co.*, 119 Cal. 442; *Valensin v. Valensin*, 73 Cal. 106; *Thompson v. Ish*, 99 Mo. 160, 17 Am. St. Rep. 552; *Lawson v. Morning Journal Assoc.*, 32 N. Y. App. Div. 71; *Holcomb v. Harris*, 166 N. Y. 257, *reversing* 42 N. Y. App. Div. 363; *Morris v. New York, etc., R. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675. See also *Alberti v. New York, etc., R. Co.*, 118 N. Y. 77.

12. **General Testimony of Patient.** — *McConnell v. Osage*, 80 Iowa 293; *Butler v. Manhattan R. Co.*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 453, 30 Abb. N. Cas. (N. Y.) 78, *affirmed* 143 N. Y. 630.

13. **Testimony of Other Physicians** — *Indiana.* — *Penn Mut. L. Ins. Co. v. Wiler*, 100 Ind. 92, 50 Am. Rep. 769.

(d) **Failure to Object Seasonably to Testimony.** — It is too late, after the testimony of a physician has been received without objection, to raise the question of competency by a motion to strike out.¹

(4) **Effect of Waiver at One Trial on Subsequent Trial.** — It has been held that the fact that a party on one trial of a case waived his privilege does not preclude him from claiming the privilege on a subsequent trial,² but the contrary view has also been asserted.³

3. To Spiritual Advisers — *a.* **IN GENERAL.** — Though the cases are by no means uniform, the more generally accepted view is that confidential communications in the nature of confessions made to a priest or clergyman are not privileged at common law.⁴ But such communications are now made privileged by statute in many jurisdictions.⁵

b. **REPLIES OF SPIRITUAL ADVISER.** — It has been held that such a statute also excludes the replies of the spiritual adviser.⁶

c. **CONFIDENTIAL NATURE OF STATEMENTS.** — Such a statute does not preclude a minister of the gospel from testifying as to statements to him which were not of a confidential nature and were not made for the purpose of obtaining his advice or assistance.⁷

d. **CHURCH DISCIPLINE.** — The privilege with regard to clergymen usually extends only to confessions made to them in the course of discipline enjoined by the church.⁸

Iowa. — *Baxter v. Cedar Rapids*, 103 Iowa 599.

Michigan. — *Dotton v. Albion*, 57 Mich. 575.

Missouri. — *Mellor v. Missouri Pac. R. Co.*, 105 Mo. 455.

New York. — *Barker v. Cunard Steamship Co.*, 91 Hun (N. Y.) 495, *affirmed* 157 N. Y. 693; *Record v. Saratoga Springs*, 46 Hun (N. Y.) 448, *affirmed* 120 N. Y. 646; *Hope v. Troy, etc.*, R. Co., 40 Hun (N. Y.) 441, *affirmed* 110 N. Y. 643; *Hennessy v. Kelley*, 55 N. Y. App. Div. 449, *reversing* (County Ct.) 30 Misc. (N. Y.) 703. See also *Tracey v. Metropolitan St. R. Co.*, 49 N. Y. App. Div. 197, *affirmed* 168 N. Y. 653.

Two Physicians at Same Examination or Consultation. — See *Morris v. New York, etc., R. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675, *reversing* 73 Hun (N. Y.) 560.

Testimony of Physician Employed by Other Party. — The plaintiff in an action for damages for personal injuries does not waive his privilege as to his own physician because the defendant has examined its own doctor sent to the plaintiff to look after its interests and incidentally to attend to the plaintiff's wounds. *Jones v. Brooklyn, etc., R. Co.*, (Brooklyn City Ct. Gen. T.) 3 N. Y. Supp. 253.

1. Failure to Object in Time. — *Lissak v. Crocker Estate Co.*, 119 Cal. 442; *Lincoln v. Detroit*, 101 Mich. 245; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525; *Hoyt v. Hoyt*, 112 N. Y. 493.

2. Claiming Privilege. — *Grattan v. Metropolitan L. Ins. Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Briesenmeister v. Supreme Lodge, etc.*, 81 Mich. 525.

3. McKinney v. Grand St., etc., R. Co., 104 N. Y. 352, *approved* in *Morris v. New York, etc., R. Co.*, 148 N. Y. 88, 51 Am. St. Rep. 675.

4. Not Privileged at Common Law. — *Normanshaw v. Normanshaw*, 69 L. T. N. S. 468; *Butler v. Moore, MacNally* 253; *Anonymous, Skin*, 404; *Rex v. Gilham*, 1 Moody 186, Car. Crim. L. 51; *Wheeler v. Le Marchant*, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728.

In *Reg. v. Hay*, 2 F. & F. 4, a priest was asked from whom he received a watch which was identified as stolen property, and objected to answering on the ground that he received it in connection with the confessional, but Kill, J., ruled that he must answer the question, saying that the priest was merely asked to answer a question as to something done out of the confession.

Contrary Opinion. — In *Reg. v. Griffin*, 6 Cox C. C. 219, Alderson, B., thought such communications privileged, but said: "I do not lay this down as an absolute rule; but I think such evidence ought not to be given." To the same effect are *Du Barre v. Livette*, Peake N. P. (ed. 1795) 77; *Broad v. Pitt*, 3 C. & P. 518, 14 E. C. L. 423.

Confessions Voluntarily Made to Members of the Same Church may be given in evidence on the trial of the party for the crime or misdemeanor so confessed. *Com. v. Drake*, 15 Mass. 161.

5. Statutory Privilege — *United States*. — *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266.

Indiana. — *Knight v. Lee*, 80 Ind. 201; *Gillooley v. State*, 58 Ind. 182; *Dehler v. State*, 22 Ind. App. 383.

Iowa. — *Winters v. Winters*, 102 Iowa 53, 63 Am. St. Rep. 428; *State v. Brown*, 95 Iowa 381; *State v. Houseworth*, 91 Iowa 740; *Raymond v. Burlington, etc., R. Co.*, 65 Iowa 152.

New York. — *Westover v. Aetna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1; *Dougherty v. Metropolitan L. Ins. Co.*, 87 Hun (N. Y.) 15; *Rochester City Bank v. Suydam*, (Supm. Ct. Spec. T.) 5 How. Pr. (N. Y.) 254; *Kelly v. Levy*, (N. Y. City Ct. Gen. T.) 8 N. Y. Supp. 849.

Canada. — *Gill v. Bouchard*, 5 Quebec Q. B. 138.

6. Gill v. Bouchard, 5 Quebec Q. B. 138.

7. State v. Brown, 95 Iowa 381.

8. Church Discipline. — *Knight v. Lee*, 80 Ind. 201; *Gillooley v. State*, 58 Ind. 182; *People v. Gates*, 13 Wend. (N. Y.) 311. See also *Dehler v. State*, 22 Ind. App. 383.

e. **WAIVER AND LOSS.** — The privilege, like other statutory privileges of this character, may be waived by the person confessing, but remains forever unless it is removed by him.¹

4. Experts in Patent Cases. — While there is little, if any, express authority dealing with the question to what extent, if at all, communications passing between counsel and client on the one side and the so-called "expert" on the other are privileged, the conditions of patent litigation are such that a similar public policy would seem to require an extension of the doctrine of privilege to meet such a case. But when the expert ceases to act as counsel, and allows himself to be made a witness, the privilege will be lost, at least to the extent to which he testifies.²

V. COMMUNICATIONS BETWEEN HUSBAND AND WIFE — 1. General Rule —
a. **RULE STATED.** — The preservation of the sacredness and confidence of the matrimonial relation being a matter of public policy,³ the disclosure by either the husband or the wife of confidential communications between them during the existence of that relation is prohibited both under the common law and by express statutory provisions.⁴

1. See *Westover v. Ætna L. Ins. Co.*, 99 N. Y. 56, 52 Am. Rep. 1.

2. **Experts in Patent Cases.** — *Lalance, etc., Mfg. Co. v. Haberman Mfg. Co.*, 87 Fed. Rep. 563.

3. **Public Policy.** — *Hilbert v. Com.*, (Ky. 1899) 51 S. W. Rep. 817; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276; *Spradling v. Conway*, 51 Mo. 51; *Buck v. Ashbrook*, 51 Mo. 539; *Seitz v. Seitz*, 170 Pa. St. 71; *Robinson v. Robinson*, 22 R. I. 121; *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539; *Washington v. Bedford*, 10 Lea (Tenn.) 243. And see generally cases in the following note.

4. **Communications Between Husband and Wife Privileged — England.** — *O'Connor v. Marjoribanks*, 4 M. & G. 435, 43 E. C. L. 228, 5 Scott N. R. 394.

United States. — *Hopkins v. Grimshaw*, 165 U. S. 342; *Bassett v. U. S.*, 137 U. S. 496; *Stickney v. Stickney*, 131 U. S. 227; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *In re Jefferson*, 96 Fed. Rep. 826.

Alabama. — *Swoope v. State*, 115 Ala. 40; *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40.

Arkansas. — *Inman v. State*, 65 Ark. 508; *Nolen v. Harden*, 43 Ark. 307, 51 Am. Rep. 563.

California. — *People v. Warner*, 117 Cal. 637; *Emmons v. Barton*, 109 Cal. 662. See also *People v. Durrant*, 116 Cal. 179.

District of Columbia. — *McCartney v. Fletcher*, 10 App. Cas. (D. C.) 572; *Chase v. U. S.*, 7 App. Cas. (D. C.) 149; *Brooks v. Francis*, 3 MacArthur (D. C.) 109.

Florida. — *Henderson v. Chaires*, 25 Fla. 26.

Georgia. — *Toole v. Toole*, 107 Ga. 472; *Wilkinson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63; *Stanford v. Murphy*, 63 Ga. 410; *McIntyre v. Meldrim*, 40 Ga. 490; *Jackson v. Jackson*, 40 Ga. 150.

Illinois. — *Geer v. Goudy*, 174 Ill. 514; *Joiner v. Duncan*, 174 Ill. 252; *Goelz v. Goelz*, 157 Ill. 33; *Mueller v. Rebhan*, 94 Ill. 142; *Pyle v. Oustati*, 92 Ill. 209; *Reeves v. Herr*, 59 Ill. 81; *Munford v. Miller*, 7 Ill. App. 62.

Indiana. — *Beyerline v. State*, 147 Ind. 125; *Hutchason v. State*, 67 Ind. 449; *Brown v. Norton*, 67 Ind. 424; *Dye v. Davis*, 65 Ind. 474; *Mercer v. Patterson*, 41 Ind. 440; *Palmer v.*

Henderson, 20 Ind. 297; *Woolley v. Turner*, 13 Ind. 253; *Jack v. Russey*, 8 Ind. 180.

Iowa. — *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Head v. Thompson*, 77 Iowa 263. See also *State v. Rainsbarger*, 71 Iowa 746.

Kansas. — *Chicago, etc., R. Co. v. Ellis*, 52 Kan. 41; *French v. Wade*, 35 Kan. 391; *Dresher v. Corson*, 23 Kan. 313; *Jaquith v. Davidson*, 21 Kan. 341; *Van Zandt v. Shuyler*, 2 Kan. App. 118.

Kentucky. — *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224; *Churchill v. Hohn*, (Ky. 1898) 45 S. W. Rep. 498.

Massachusetts. — *Fuller v. Fuller*, 177 Mass. 184; *Hyde v. Gannett*, 175 Mass. 177; *Jones v. New York L. Ins. Co.*, 168 Mass. 245; *Com. v. Cleary*, 152 Mass. 491; *Drew v. Tarbell*, 117 Mass. 90; *Raynes v. Bennett*, 114 Mass. 424; *Bliss v. Franklin*, 13 Allen (Mass.) 244. See also *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697.

Michigan. — *McKenzie v. Lautenschlager*, 113 Mich. 171; *Carter v. Hill*, 81 Mich. 275; *Derham v. Derham*, 125 Mich. 109, 7 Detroit Leg. N. 430.

Minnesota. — *Beckett v. Northwestern Masonic Aid Assoc.*, 67 Minn. 298; *Newstrom v. St. Paul, etc., R. Co.*, 61 Minn. 78.

Missouri. — *State v. Ulrich*, 110 Mo. 350; *Moore v. Wingate*, 53 Mo. 398. See also *State v. Burlingame*, 146 Mo. 207.

Nebraska. — *Buckingham v. Roar*, 45 Neb. 244.

New Hampshire. — *Noyes v. Marston*, 70 N. H. 7; *Chase v. Pitman*, 69 N. H. 423.

New York. — *Warner v. Press Pub. Co.*, 132 N. Y. 181, affirming 5 Daly (N. Y.) 545; *Schaffner v. Reuter*, 37 Barb. (N. Y.) 44.

North Carolina. — *State v. Brittain*, 117 N. Car. 783.

Ohio. — *McCague v. Miller*, 36 Ohio St. 595; *Haberty v. State*, 4 Ohio Cir. Dec. 462, 8 Ohio Cir. Ct. 262.

Pennsylvania. — *Brock v. Brock*, 116 Pa. St. 109.

South Carolina. — *State v. Turner*, 36 S. Car. 534.

Tennessee. — *Phoenix, etc., Ins. Co. v. Shoemaker*, 95 Tenn. 72; *Brewer v. Ferguson*, 11

b. EFFECT OF STATUTES MAKING HUSBAND AND WIFE COMPETENT WITNESSES. — This rule has not been in any way affected by the statutes which have been enacted, making the husband and wife competent witnesses for or against each other,¹ or permitting parties in interest to testify.²

c. RULE DOES NOT AFFECT COMPETENCY AS WITNESSES. — Statutes creating this privilege do not affect the competency of husband and wife as witnesses for each other, but they may testify as to any matter whatever of which they have knowledge, except as to admissions and conversations during the existence of the marriage relation.³

d. NECESSITY FOR VALID MARRIAGE. — In order for communications between persons living together as husband and wife to be privileged, there must be a valid marriage between them. There is no privilege where one of such persons has been previously married to a third person who is still living and not divorced.⁴

e. COMMUNICATIONS MUST HAVE BEEN WHILE MARRIAGE RELATION EXISTED. — After the marriage relation has ceased the husband and wife are competent witnesses for or against each other as to facts which did not come to them while that relation existed.⁵

f. INJUNCTION OF SECRECY NOT NECESSARY. — It is not necessary that there should be any injunction of secrecy on the part of the spouse who makes the communication.⁶

g. DOCUMENTS AND LETTERS. — As a general rule, letters passing between husband and wife are protected,⁷ as are also documents intrusted by one spouse to the custody of the other.⁸

Humph. (Tenn.) 565; Orr *v.* Cox, 3 Lea (Tenn.) 617; Patton *v.* Wilson, 2 Lea (Tenn.) 101; Young *v.* Hurst, (Tenn. Ch. 1898) 48 S. W. Rep. 355.

Texas. — Mitchell *v.* Mitchell, 80 Tex. 101; Williams *v.* State, 40 Tex. Crim. 565.

Utah. — U. S. *v.* Bassett, 5 Utah 131.

Vermont. — *Re* Buckman, 64 Vt. 313, 33 Am. St. Rep. 930; Edgell *v.* Bennett, 7 Vt. 534.

West Virginia. — White *v.* Perry, 14 W. Va. 66.

Wisconsin. — Selden *v.* State, 74 Wis. 271, 17 Am. St. Rep. 144.

1. Statutes Making Husband and Wife Competent Witnesses — Florida. — Mercer *v.* State, 40 Fla. 216, 74 Am. St. Rep. 135.

Georgia. — Goodrum *v.* State, 60 Ga. 509; McIntyre *v.* Meldrim, 40 Ga. 490; Jackson *v.* Jackson, 40 Ga. 150.

Massachusetts. — Hyde *v.* Gannett, 175 Mass. 177; Bliss *v.* Franklin, 13 Allen (Mass.) 244.

Missouri. — State *v.* Kodat, 158 Mo. 125; Buck *v.* Ashbrook, 51 Mo. 539; Moore *v.* Moore, 51 Mo. 118; Herndon *v.* Triple Alliance, 45 Mo. App. 426; Spradling *v.* Conway, 51 Mo. 51.

New Hampshire. — Noyes *v.* Marston, 70 N. H. 7; Chase *v.* Pitman, 69 N. H. 423.

New York. — People *v.* Wood 126 N. Y. 249.

Ohio. — Haberty *v.* State, 4 Ohio Cir. Dec. 462, 8 Ohio Cir. Ct. 262.

Pennsylvania. — Taylor's Estate, 17 Pa. Co. Ct. 166, 4 Pa. Dist. 691.

Tennessee. — Orr *v.* Cox, 3 Lea (Tenn.) 617; Patton *v.* Wilson, 2 Lea (Tenn.) 101.

2. Statutes Permitting Parties to Testify. — Hopkins *v.* Grimshaw, 165 U. S. 342. See also Lucas *v.* Brooks, 18 Wall. (U. S.) 436; Bassett *v.* U. S., 137 U. S. 406.

3. Competency as Witnesses Not Affected. — Otis *v.* Spencer, 102 Ill. 622, 40 Am. Rep. 617;

Mueller *v.* Rebhan, 94 Ill. 142; Munford *v.* Miller, 7 Ill. App. 62; Williams *v.* Riley, 88 Ind. 290; Palmer *v.* Henderson, 20 Ind. 297; Young *v.* Hurst, (Tenn. Ch. 1898) 48 S. W. Rep. 355. See also State *v.* Rainsbarger, 71 Iowa 746; Schaffner *v.* Reuter, 37 Barb. (N. Y.) 44; Stober *v.* McCarter, 4 Ohio St. 513.

4. Valid Marriage. — Wells *v.* Fletcher, 5 C. & P. 12, 24 E. C. L. 198; Cole *v.* Cole, 153 Ill. 585.

5. Communication Must Have Been During Existence of Relation. — Inman *v.* State, 65 Ark. 508; Stillwell *v.* Patton, 108 Mo. 352.

A divorced wife may testify as to a confession of her former husband made to her after the divorce had been procured. White *v.* State, 40 Tex. Crim. 366.

6. Injunction of Secrecy Not Necessary. — Robin *v.* King, 2 Leigh (Va.) 140.

7. Letters — Georgia. — Wilkerson *v.* State, 91 Ga. 729, 44 Am. St. Rep. 63.

Kentucky. — Scott *v.* Com., 94 Ky. 511, 44 Am. St. Rep. 371.

Michigan. — Derham *v.* Derham, 125 Mich. 109, 7 Detroit Leg. N. 430.

Missouri. — State *v.* Ulrich, 110 Mo. 350; Hall *v.* Hall, 77 Mo. App. 600.

Ohio. — Hanley *v.* State, 5 Ohio Cir. Dec. 488, 12 Ohio Cir. Ct. 584.

Texas. — Mitchell *v.* Mitchell, 80 Tex. 101.

Wisconsin. — Lancot *v.* State, 98 Wis. 136, 67 Am. St. Rep. 800; Selden *v.* State, 74 Wis. 271, 17 Am. St. Rep. 144.

Massachusetts Statute. — Under Pub. Stat. Mass., c. 169, § 18, clause 1, letters passing between husband and wife are admissible in evidence. Com. *v.* Caponi, 155 Mass. 534.

8. Documents Intrusted to Spouse's Keeping. — Stanford *v.* Murphy, 63 Ga. 410; Toole *v.* Toole, 107 Ga. 472.

A Paper Addressed "To All Whom It May

h. RULE INCLUDES ALL KNOWLEDGE ACQUIRED BY VIRTUE OF RELATION. — The rule excluding the testimony of husband or wife as to confidential communications between them during the marriage relation is not confined to mere spoken or written communications, but extends to all information which is acquired by either spouse during the marriage and by reason of its existence.¹

i. CONFIDENTIAL NATURE. — The more generally accepted rule is that only such matters as are confidential in their nature are excluded,² but in a few states evidence of all communications between husband and wife is excluded, even those which are not confidential.³

j. APPLICATION OF RULE IN CRIMINAL PROCEEDINGS. — The application of the rule under consideration is not confined to civil cases, but applies as well where the husband or wife is on trial under a charge of crime committed against a third person,⁴ but in some states the rule does not apply in the case of a prosecution of one spouse for a crime by which the other is injured.⁵ And it has also been held that on the trial of an indictment for forgery the

Concern," written by a wife and containing a statement as to the cause of her separation from her husband, is admissible in evidence where there is nothing to show that it was intended as a private communication between husband and wife other than the fact that it was found among the husband's papers after his death. *Hovt v. Davis*, 21 Mo. App. 235.

1. All Information Acquired by Virtue of Relation Excluded — *Florida*. — *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135.

Georgia. — *Goodrum v. State*, 60 Ga. 509; *Stanford v. Murphy*, 63 Ga. 410.

Illinois. — *Pyle v. Oustatt*, 92 Ill. 209; *Reeves v. Herr*, 59 Ill. 81.

Indiana. — *Perry v. Randall*, 83 Ind. 143.

Missouri. — *Holman v. Bachus*, 73 Mo. 49; *Herndon v. Triple Alliance*, 45 Mo. App. 426; *Waddle v. McWilliams*, 21 Mo. App. 208.

Ohio. — *McCague v. Miller*, 36 Ohio St. 595.

Tennessee. — *Kimbrough v. Mitchell*, 1 Head (Tenn.) 539; *State v. McAuley*, 4 Heisk. (Tenn.) 424; *Brewer v. Ferguson*, 11 Humph. (Tenn.) 565; *Washington v. Bedford*, 10 Lea (Tenn.) 243; *Orr v. Cox*, 3 Lea (Tenn.) 617; *Patton v. Wilson*, 2 Lea (Tenn.) 101.

The Silence of a Spouse on a particular subject is within the protection of the rule. *Goodrum v. State*, 60 Ga. 509.

The Acts of a Husband done in the presence of his wife during the marriage and in response to her questions or suggestions are confidential communications to her by her husband within the meaning of the statute. *Perry v. Randall*, 83 Ind. 143.

2. Only Confidential Communications Excluded — *England*. — See *Aveson v. Kinnaird*, 6 East 194; *Beveridge v. Minter*, 1 C. & P. 364, 11 E. C. L. 421.

Alabama. — See *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40.

Arkansas. — *Nolen v. Harden*, 43 Ark. 307, 51 Am. Rep. 563.

Connecticut. — *Spitz's Appeal*, 56 Conn. 184, 7 Am. St. Rep. 303.

Indiana. — *Beyerline v. State*, 147 Ind. 125; *Polson v. State*, 137 Ind. 519; *Stanley v. Stanley*, 112 Ind. 143. See also *Sage v. State*, 127 Ind. 15.

Indian Territory. — See *German American Ins. Co. v. Paul*, 2 Indian Ter. 625.

Iowa. — *Giddings v. Iowa Sav. Bank*, 104 Iowa 676. See also *Hanks v. Von Garder*, 59 Iowa 179.

Kentucky. — *McGuire v. Maloney*, 1 B. Mon. (Ky.) 224.

Michigan. — *Hagerman v. Wigent*, 108 Mich. 192.

Missouri. — *Darrier v. Darrier*, 58 Mo. 222. But see *Missouri* cases in next note.

New York. — *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384; *People v. Lewis*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 881, 62 Hun (N. Y.) 622, affirmed 136 N. Y. 633.

Ohio. — *Stoher v. McCarter*, 4 Ohio St. 513.

Pennsylvania. — *Seitz v. Seitz*, 170 Pa. St. 71; *Robb's Appeal*, 98 Pa. St. 501.

Wisconsin. — *Crook v. Henry*, 25 Wis. 569.

3. All Communications Privileged — *California*. — *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223; *Low's Estate*, Myr. Prob. (Cal.) 143.

Massachusetts. — *Com. v. Hayes*, 145 Mass. 289; *Dexter v. Booth*, 2 Allen (Mass.) 559.

Minnesota. — *Newstrom v. St. Paul, etc., R. Co.*, 61 Minn. 78; *Leppla v. Minnesota Tribune Co.*, 35 Minn. 310.

Rhode Island. — *Campbell v. Chace*, 12 R. I. 333.

Tennessee. — *Brewer v. Ferguson*, 11 Humph. (Tenn.) 565.

Vituperative Epithets. — In *Missouri* the courts have refused to allow husband or wife to testify as to vituperative epithets addressed by one to the other. *King v. King*, 42 Mo. App. 454; *Ayers v. Ayers*, 28 Mo. App. 97; *Miller v. Miller*, 14 Mo. App. 418; *Vogel v. Vogel*, 13 Mo. App. 588.

But in *Massachusetts* the statute has been held not to apply to mere abusive language addressed by one party to the other when they are not in conversation. *French v. French*, 14 Gray (Mass.) 186.

4. Criminal Proceedings. — *People v. Warner*, 117 Cal. 637; *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223. See also *Williams v. State*, 40 Tex. Crim. 565. And see generally the criminal cases *passim* in this section.

5. Crime Against Spouse. — *People v. Warner*, 117 Cal. 637; *Jordan v. State*, 142 Ind. 422; *Pettit v. State*, 135 Ind. 393; *Doolittle v. State*, 93 Ind. 272.

wife of the defendant may testify that he made her sign the name on the forged instrument.¹

k. CIVIL ACTIONS BETWEEN SPOUSES. — While in some states the rule of privilege is held to be applicable in all its force in the case of a civil action between the spouses,² in others it has been relaxed so as to make the rule not applicable in such cases,³ especially in suits for divorce.⁴

2. Limitations of Rule — *a. EFFECT OF PRESENCE OF THIRD PERSONS.* — Conversations between husband and wife or admissions made by one to the other in the presence of third persons are not privileged,⁵ and such communications may be testified to by either the husband or wife⁶ or by the others who were present.⁷ So, also, communications between one spouse and a third person in the presence of the other spouse are not privileged.⁸

Conversation in Presence of Children. — Where a conversation between husband and wife has been had in the presence of no other person except their family of young children, who are not shown to have taken any part in or paid any attention to the conversation, it must be deemed a private conversation between husband and wife and is privileged.⁹

b. CONVERSATIONS OVERHEARD BY OTHERS. — A confidential conversation between a husband and wife may be given in evidence by a person who overheard the same, even though he was an eavesdropper or had concealed himself for the purpose of listening.¹⁰

1. *Beyerline v. State*, 147 Ind. 125.

2. Rule Applies in Civil Action Between Spouses.

— *French v. French*, 14 Gray (Mass.) 186; *Moore v. Moore*, 51 Mo. 118; *Hall v. Hall*, 77 Mo. App. 600; *Schierstein v. Schierstein*, 68 Mo. App. 205; *King v. King*, 42 Mo. App. 454; *Ayers v. Ayers*, 28 Mo. App. 97; *Miller v. Miller*, 14 Mo. App. 418, 13 Mo. App. 591; *Vogel v. Vogel*, 13 Mo. App. 588. See also the title *DIVORCE*, vol. 9, p. 850.

3. Rule Not Applicable in Civil Action Between Spouses. — *People v. Warner*, 117 Cal. 637; *Goelz v. Goelz*, 157 Ill. 33; *Mueller v. Rebhan*, 94 Ill. 142; *Hunt v. Eaton*, 55 Mich. 362. See also *Joiner v. Duncan*, 174 Ill. 252.

4. Suit for Divorce. — *Smith v. Smith*, 77 Ind. 80.

Under the Statutes of Rhode Island a husband cannot disclose any communication made to him by his wife during their marriage except in trials for divorce. *Robinson v. Robinson*, 22 R. I. 121, citing *Gen. Laws R. I. 1896, c. 244, § 37*.

This exception as to trials for divorce seems not to have existed under prior statutes. See *Briggs v. Briggs*, (R. I. 1893) 26 Atl. Rep. 193.

5. Presence of Others. — *Schierstein v. Schierstein*, 68 Mo. App. 205; *Allison v. Barrow*, 3 Coldw. (Tenn.) 414, 91 Am. Dec. 291.

Conversation in Presence of Person Incapable of Understanding. — The reason for this exception fails when the conversation is had in the presence of an infant or other person totally incapable of comprehending it, and hence in such case the conversation is privileged. *Schierstein v. Schierstein*, 68 Mo. App. 205.

Confession to Third Person Induced by Husband's Threats Privileged. — *State v. Brittain*, 117 N. Car. 783.

6. Husband or Wife May Testify — *Indiana.* — *Reynolds v. State*, 147 Ind. 3.

Massachusetts. — *Fay v. Guynon*, 131 Mass. 31; *French v. French*, 14 Gray (Mass.) 186.

Missouri. — *Long v. Martin*, 152 Mo. 668, 71

Mo. App. 569; *Schierstein v. Schierstein*, 68 Mo. App. 205.

New York. — *People v. Lewis*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 881, 62 Hun (N. Y.) 622, affirmed 136 N. Y. 633.

Ohio. — *McCague v. Miller*, 36 Ohio St. 595. *Tennessee.* — *Phoenix, etc., Ins. Co. v. Shoemaker*, 95 Tenn. 72.

Vermont. — *Re Buckman*, 64 Vt. 313, 33 Am. St. Rep. 930.

Contra. — *Campbell v. Chace*, 12 R. I. 333.

Fact of Third Person's Presence. — A husband or wife who is called to testify as to such a communication or act is also competent to testify as to the known presence, hearing, or knowledge of a third person. *McCague v. Miller*, 36 Ohio St. 595.

The Fact that the Third Person Is Dead at the time of the trial does not preclude the husband or wife from testifying as to communications in his presence or hearing. *Sessions v. Trevitt*, 39 Ohio St. 259.

7. Third Person Present May Testify. — *State v. Gray*, 55 Kan. 135. See also *Hopkins v. Grimshaw*, 165 U. S. 342.

8. Communications in Presence of Spouse. — *Floyd v. Miller*, 61 Ind. 224; *Mercer v. Patterson*, 41 Ind. 440; *Mainard v. Reider*, 2 Ind. App. 115; *Phoenix, etc., Ins. Co. v. Shoemaker*, 95 Tenn. 72.

Contra under *Missouri Statute.* — *Moore v. Wingate*, 53 Mo. 398; *Holman v. Bachus*, 73 Mo. 49. See also *Waddle v. McWilliams*, 21 Mo. App. 298; *Hoffman v. Parry*, 23 Mo. App. 20.

9. Presence of Children. — *Jacobs v. Hesler*, 113 Mass. 157; *Hopkins v. Grimshaw*, 165 U. S. 342.

Privilege Exists as to Conversation in Presence of Fourteen-year-old Daughter. — *Lyon v. Prouty*, 154 Mass. 488. In this case the court said further: "Nothing in this case shows * * * that the conversation was confidential."

10. Conversations Overheard by Others. — *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89;

c. DECLARATIONS TO THIRD PERSONS. — Statutes prohibiting husband and wife from testifying as to communications with each other relate to testimony by the husband or wife, and not to the testimony of third persons as to declarations made by either spouse against the other.¹

d. LETTERS IN HANDS OF THIRD PERSONS. — Notwithstanding the rule that letters between husband and wife are privileged, it has been repeatedly held that where such a letter has come into the hands of a third person it may be produced in evidence,² but there are, on the other hand, a number of cases in which this has been denied.³

e. FACTS WITHIN PERSONAL KNOWLEDGE. — A husband or wife may, of course, testify to any and all matters of fact within his or her personal knowledge, and not communicated to him or her by his or her spouse during the existence of the marriage relation, or ascertained by reason of that relation.⁴

f. FACT OF MARRIAGE. — It has been held that where the husband and wife have been made competent witnesses for or against each other by statute, either may testify as to the fact of marriage, though the statute prohibits the disclosure of confidential communications.⁵

g. PERSONAL INJURIES. — It has been asserted that a wife may testify to any injury to her person either before or after marriage, and while the relation exists.⁶

h. SANITY OF SPOUSE. — Where insanity is set up as a defense in a trial for murder, the wife of the defendant may be asked if she ever saw anything to indicate that he was of unsound mind.⁷

i. RULE IN CASES OF FRAUD. — Where the husband has been made the instrument of a third person to perpetrate a fraud upon the wife and obtain a deed of trust or other incumbrance upon her real estate, both the husband and the wife are competent to testify in relation to conversations between themselves concerning the transaction for the purpose of showing fraud, and the third person cannot object that the case falls within the rule respecting confidential communications between husband and wife.⁸

j. BUSINESS NEGOTIATIONS. — Negotiations between a husband and wife prior to and resulting in the conveyance of land from the husband to the wife are not in any sense privileged.⁹

k. WHERE HUSBAND ACTING AS AGENT FOR WIFE. — It has been held that the rule of privilege does not apply to communications between husband

Wilkerson v. State, 91 Ga. 729, 44 Am. St. Rep. 63; *Chatham State Bank v. Hutchinson*, 62 Kan. 9; *Com. v. Griffin*, 110 Mass. 181; *Mahner v. Linck*, 70 Mo. App. 380; *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, *affirming* 70 Hun (N. Y.) 111; *State v. Center*, 35 Vt. 378.

1. *State v. Bertoch*, (Iowa 1899) 79 N. W. Rep. 378.

2. *Letters in Hands of Third Persons* — *United States*. — *Lloyd v. Pennie*, 50 Fed. Rep. 4 (decided under *California* statute).

Connecticut. — *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89.

Kansas. — *State v. Buffington*, 20 Kan. 599, 27 Am. Rep. 193.

Missouri. — See *State v. Ulrich*, 110 Mo. 350.

New York. — *People v. Hayes*, 140 N. Y. 484, 37 Am. St. Rep. 572, *affirming* 70 Hun (N. Y.) 111.

Ohio. — *Hanley v. State*, 5 Ohio Cir. Dec. 488, 12 Ohio Cir. Ct. 584. See also *Lowther v. State*, 2 Ohio Cir. Dec. 685, 4 Ohio Cir. Ct. 522.

Vermont. — *State v. Mathers*, 64 Vt. 101, 33 Am. St. Rep. 921.

3. *United States*. — *Bowman v. Patrick*, 32 Fed. Rep. 368.

Florida. — *Mercer v. State*, 40 Fla. 216, 74 Am. St. Rep. 135.

Georgia. — *Wilkerson v. State*, 91 Ga. 729, 44 Am. St. Rep. 63.

Kentucky. — *Scott v. Com.*, 94 Ky. 511, 42 Am. St. Rep. 371.

Missouri. — *Mahner v. Linck*, 70 Mo. App. 380.

Wisconsin. — *Selden v. State*, 74 Wis. 271, 17 Am. St. Rep. 144.

4. *Facts Within Personal Knowledge*. — *Floyd v. Miller*, 61 Ind. 224; *Cannon v. Moore*, 17 Mo. App. 92; *White v. Perry*, 14 W. Va. 66; *Brown v. Johnson*, 101 Wis. 661; *Bigelow v. Sickles*, 75 Wis. 427. See also *Carpenter v. Dame*, 10 Ind. 125.

5. *Chase v. U. S.*, 7 App. Cas. (D. C.) 149. See the title WITNESSES.

6. *Inman v. State*, 65 Ark. 508.

7. *U. S. v. Guiteau*, 1 Mackey (D. C.) 498, 47 Am. Rep. 247.

8. *Fraud*. — *Henry v. Sneed*, 99 Mo. 409, 17 Am. St. Rep. 580; *Moeckel v. Heim*, 134 Mo. 576.

9. *Beitman v. Hopkins*, 109 Ind. 177.

and wife in regard to a business matter in which he is acting as her agent,¹ but there are also cases which consider the rule applicable under such circumstances.²

7. DYING DECLARATIONS. — The statute prohibiting husband and wife from testifying as to communications with each other does not apply where, on the trial of a person charged with killing the husband, it is sought to prove by the wife the dying declarations of the husband made to her.³

m. VOLUNTARY DISCLOSURES. — It has been held that a statute providing that no husband or wife "shall be compellable to disclose" confidential communications from the other spouse prohibited a compulsive disclosure only and not a voluntary disclosure.⁴

3. Waiver and Loss of Privilege — **a. WHETHER PRIVILEGE MAY BE WAIVED.** — Under the common law, and under some of the statutes, the privilege is absolute, and no waiver is effectual to remove the seal from the lips of either spouse,⁵ but in a great many jurisdictions the rule is now established that the privilege may be waived.⁶

b. WHO MAY WAIVE. — In some jurisdictions it is held that the privilege may be waived by the spouse who made the communication which it is sought to disclose,⁷ while in others the concurrence of both spouses is deemed necessary for a waiver.⁸

c. HOW WAIVED. — The privilege is waived by going on the stand and testifying as to the privileged communication,⁹ or calling the spouse to testify thereto,¹⁰ but it is not waived by testifying generally in the cause.¹¹ And it has been held that the privilege is waived by a failure seasonably to object to the introduction in evidence of the prohibited matter.¹²

d. PRIVILEGE NOT LOST BY TERMINATION OF RELATION. — The privilege is not lost by the termination of the marriage relation, whether by death or divorce.¹³

1. Agency. — *Schmied v. Frank*, 86 Ind. 250. See also *State v. Burlingame*, 146 Mo. 207.

2. Kelley v. Andrews, 102 Iowa 119; *Com. v. Hayes*, 145 Mass. 289.

3. Dying Declarations. — *Hilbert v. Com.*, (Ky. 1899) 51 S. W. Rep. 817.

4. Voluntary Disclosures. — *Southwick v. Southwick*, 2 Sweeney (N. Y.) 234, 9 Abb. Pr. N. S. (N. Y.) 109, *affirmed* 49 N. Y. 510.

5. Prohibition Absolute. — *O'Connor v. Marjoribanks*, 4 M. & G. 435, 43 E. C. L. 228, 5 Scott N. R. 394; *Stein v. Bowman*, 13 Pet. (U. S.) 209; *Hopkins v. Grimshaw*, 165 U. S. 342; *Stanford v. Murphy*, 63 Ga. 410; *Robinson v. Robinson*, 22 R. I. 121. See also *Bevins v. Cline*, 21 Ind. 37; *Hubbell v. Grant*, 39 Mich. 641; *Campbell v. Chace*, 12 R. I. 333.

6 See cases cited *infra*, this subsection.

7. Privilege May Be Waived by Spouse Making Communication. — *Stickney v. Stickney*, 131 U. S. 227 (decided under statute relating to *District of Columbia*). See also *Brown v. Norton*, 67 Ind. 424; *Hutchason v. State*, 67 Ind. 449; *State v. Turner*, 36 S. Car. 534.

8. Concurrence of Both Spouses Necessary. — *McKenzie v. Lautenschlager*, 113 Mich. 171, *citing* 3 How. Ann. Stat. Mich., § 7546; *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276; *Hubbell v. Grant*, 39 Mich. 641; *People v. Wood*, 126 N. Y. 249. See also *Low's Estate*, Myr. Prob. (Cal.) 143; *Newstrom v. St. Paul*, etc., R. Co., 61 Minn. 78; *Warner v. Press Pub. Co.*, 132 N. Y. 181, *affirming* 15 Daly (N. Y.) 545.

Personal Representative. — Under the *Michigan* statute the personal representative of a de-

ceased spouse has no right to waive the privilege. *Maynard v. Vinton*, 59 Mich. 139, 60 Am. Rep. 276.

9. What Is a Waiver. — *State v. Turner*, 36 S. Car. 534.

10. See *Columbia*, etc., R. Co. *v. Hawthorne*, 3 Wash. Ter. 353.

11. See *People v. Mullings*, 83 Cal. 138, 17 Am. St. Rep. 223.

12. Failure to Object. — *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384. See also *Chatham State Bank v. Hutchinson*, 62 Kan. 9; *Hubbell v. Grant*, 39 Mich. 641.

Silence of Attorney. — In the absence of one party her solicitor's silence could not supply the place of her actual consent to the testimony of the other. *Hubbell v. Grant*, 39 Mich. 641.

Testimony at Former Trial. — While statements made by husband or wife as to communications between them in the hearing of others are admissible under some circumstances, they are not admissible when made in giving testimony at a former trial. *Kelley v. Andrews*, 102 Iowa 119.

13. Privilege Not Lost by Termination of Relation — *England*. — *Doker v. Hasler*, R. & M. 198, 21 E. C. L. 416; *O'Connor v. Marjoribanks*, 4 M. & G. 435, 43 E. C. L. 228, 5 Scott N. R. 394; *Monroe v. Twistleton*, *cited in* *Peake on Evidence*, appendix lxxxvii.

United States — *Hopkins v. Grimshaw*, 165 U. S. 342; *Lucas v. Brooks*, 18 Wall. (U. S.) 436; *Stein v. Bowman*, 13 Pet. (U. S.) 209. See also *Bowman v. Patrick*, 32 Fed. Rep. 368.

Alabama. — *Owen v. State*, 78 Ala. 425, 56 Am. Rep. 40.

VI. ORDINARY COMMUNICATIONS IN CONFIDENCE.—The mere fact that certain information was imparted to a witness in confidence or under a promise of secrecy does not preclude his testifying thereto.¹ Hence there is no privilege as to a communication to a newspaper reporter,² or between cotenants, or guardian and ward,³ or codefendants merely as such,⁴ or a communication between assignees and the commissioner of the insolvent debtor's court,⁵ or from a member of the Masonic order to a fellow Mason.⁶

VII. BUSINESS COMMUNICATIONS—1. **General Rule.**—As a general rule, communications between principal and agent, or master and servant, or other communications made in the ordinary course of business are not in any way

Arkansas.—Inman v. State, 65 Ark. 508. See also Nolen v. Harden, 43 Ark. 307, 51 Am. Rep. 563.

California.—Low's Estate, Myr. Prob. (Cal.) 143.

Delaware.—Farmers' Bank v. Cole, 5 Harr. (Del.) 418.

District of Columbia.—McCartney v. Fletcher, 10 App. Cas. (D. C.) 572; Brooks v. Francis, 3 MacArthur (D. C.) 109; U. S. v. Guiteau, 1 Mackey (D. C.) 498, 47 Am. Rep. 247.

Florida.—Henderson v. Chaires, 25 Fla. 26; Mercer v. State, 40 Fla. 216, 74 Am. St. Rep. 135.

Georgia.—Lingo v. State, 29 Ga. 470.

Illinois.—Geer v. Goudy, 174 Ill. 514; Goelz v. Goelz, 157 Ill. 33.

Indiana.—Stanley v. Montgomery, 102 Ind. 102; Perry v. Randall, 83 Ind. 143; Dye v. Davis, 65 Ind. 474; Denbo v. Wright, 53 Ind. 226; Griffin v. Smith, 45 Ind. 366; Mercer v. Patterson, 41 Ind. 440; Woolley v. Turner, 13 Ind. 253; Jack v. Russey, 8 Ind. 180.

Iowa.—Shuman v. Supreme Lodge, etc., 110 Iowa 480.

Kansas.—French v. Wade, 35 Kan. 391; Jaquith v. Davidson, 21 Kan. 341.

Kentucky.—McGuire v. Maloney, 1 B. Mon. (Ky.) 224.

Massachusetts.—Dexter v. Booth, 2 Allen (Mass.) 559.

Michigan.—Hitchcock v. Moore, 70 Mich. 112; Maynard v. Vinton, 59 Mich. 139, 60 Am. Rep. 276; Derham v. Derham, 125 Mich. 109, 7 Detroit Leg. N. 430.

Minnesota.—Newstrom v. St. Paul, etc., R. Co., 61 Minn. 78.

Missouri.—State v. Kodat, 158 Mo. 125, Herndon v. Triple Alliance, 45 Mo. App. 426.

Nebraska.—Buckingham v. Roar, 45 Neb. 244.

New Hampshire.—Ryan v. Follansbee, 47 N. H. 100; Jackson v. Barron, 37 N. H. 494.

Ohio.—Stober v. McCarter, 4 Ohio St. 513.

Pennsylvania.—Brock v. Brock, 116 Pa. St. 109. See also Robb's Appeal, 98 Pa. St. 501; Taylor's Estate, 17 Pa. Co. Ct. 166, 4 Pa. Dist. 691.

Rhode Island.—Robinson v. Robinson, 22 R. I. 121.

Tennessee.—State v. McAuley, 4 Heisk. (Tenn.) 424; Orr v. Cox, 3 Lea (Tenn.) 617; Patton v. Wilson, 2 Lea (Tenn.) 101; Kimbrough v. Mitchell, 1 Head (Tenn.) 539; Brewer v. Ferguson, 11 Humph. (Tenn.) 565.

Vermont.—Re Buckman, 64 Vt. 313, 33 Am. St. Rep. 930; Edgell v. Bennett, 7 Vt. 534.

West Virginia.—White v. Perry, 14 W. Va. 66.

Wisconsin.—Brown v. Johnson, 101 Wis. 661.

1. Ordinary Communications in Confidence Not Privileged—*England.*—Wheeler v. Le Marchant, 17 Ch. D. 675, 50 L. J. Ch. 793, 44 L. T. N. S. 632, 45 J. P. 728; Webb v. East, 5 Ex. D. 108, 49 L. J. Exch. 250, 41 L. T. N. S. 715, 28 W. R. 336, 44 J. P. 200; Fenner v. London, etc., R. Co., L. R. 7 Q. B. 767, 41 L. J. Q. B. D. 313, 26 L. T. N. S. 971, 20 W. R. 830. See also Mahony v. National Widows' L. Assur. Fund, L. R. 6 C. P. 252, 40 L. J. C. Pl. 203, 24 L. T. N. S. 548, 19 W. R. 722; Chadwick v. Bowman, 16 Q. B. D. 561, 54 L. T. N. S. 16; Hopkinson v. Burghley, L. R. 2 Ch. 447, 36 L. J. Ch. 504, 15 W. R. 543; Kilcat v. Sharp, 48 L. T. N. S. 64; Penkethman v. White, 2 W. R. 380.

United States.—Cox v. Montague, 78 Fed. Rep. 845, 47 U. S. App. 384.

Connecticut.—Mills v. Griswold, 1 Root (Conn.) 383; Calkins v. Lee, 2 Root (Conn.) 336.

New York.—People v. Buchanan, 145 N. Y. 1; People v. Hess, 8 N. Y. App. Div. 143.

2. Newspaper Reporter.—People v. Durrant, 116 Cal. 179.

3. Tenants in Common—Guardians.—Sutton v. Sutton, (Tenn. Ch. 1900) 58 S. W. Rep. 891.

4. Communications Made by One Defendant to Another in reference to enabling them to defend the suit are not, as a general rule, privileged. Betts v. Menzies, 3 Jur. N. S. 885, 26 L. J. Ch. 528, 5 W. R. 767; Hamilton v. Nott, L. R. 16 Eq. 112, 42 L. J. Ch. 512; Whitbread v. Gurney, Younge 541. See also Goodall v. Little, 1 Sim. N. S. 155, 20 L. J. Ch. 132, 15 Jur. 309.

But it has been held otherwise with respect to a letter concerning the subject-matter of the litigation, written by one of the defendants to another with the direction to send it on to their joint solicitor. Jenkyns v. Bushby, L. R. 2 Eq. 547, 35 L. J. Ch. 820, 12 Jur. N. S. 558, 15 L. T. N. S. 310. But compare Goodall v. Little, 1 Sim. N. S. 155, 20 L. J. Ch. 132, 15 Jur. 309.

And it has also been held that where one of the defendants is a solicitor and has acted as agent for the solicitor of record to collect evidence, the letters passing between him and his codefendant are privileged. Hamilton v. Nott, L. R. 16 Eq. 112, 42 L. J. Ch. 512.

5. Assignees and Commissioners of Insolvent Court.—Flight v. Robinson, 8 Beav. 22, 13 L. J. Ch. 425, 8 Jur. 888.

6. Fellow Mason.—Owens v. Frank, 7 Wyo. 457.

privileged, but may be given in evidence.¹

2. Communications with View to Litigation. — It is held in *England* that opinions or reports of an officer of a company obtained by the company confidentially with a view to litigation are privileged from production.²

3. Statements Obtained to Be Submitted to Attorney. — It has also been held that a statement submitted by an agent to his principal at the request of the latter for the purpose of being laid before a solicitor or attorney for his advice or opinion for guidance in litigation is privileged.³

4. Communications to Agent to Enable Him to Communicate with Attorney. — Confidential communications made by a person living abroad to his agent in *England* for the purpose of enabling such agent to communicate directly with an English solicitor with reference to a pending suit to which the person making the communication was a party have been held to be privileged.⁴

5. Telegraphic Despatches. — Telegraphic despatches are not privileged communications, but their production in evidence by the telegraph company, or the operator, or custodian, may be compelled.⁵

VIII. EFFECT OF STATE STATUTES IN UNITED STATES COURTS. — Where the

1. Communications Between Principal and Agent. — *Kerr v. Gillespie*, 7 Beav. 572; *Slade v. Tucker*, 14 Ch. D. 824, 49 L. J. Ch. 644, 43 L. T. N. S. 49, 28 W. R. 807; *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. N. S. 76, 24 W. R. 624, *affirming* 24 W. R. 724; *Reid v. Langlois*, 1 Macn. & G. 627, 2 Hall & T. 59, 14 Jur. 467, 19 L. J. Ch. 337; *Van Volkenburg v. Bank of British North America*, 5 British Columbia 4; *Sontheim v. Schmidt*, (Supm. Ct. App. T.) 66 N. Y. Supp. 1034, 32 Misc. (N. Y.) 737.

The cases of *Ross v. Gibbs*, L. R. 8 Eq. 522, 39 L. J. Ch. 61, and *Pacific Mut. Ins. Co. v. Butters*, 17 L. C. Jur. 309, asserting a contrary view, cannot be now regarded as of any binding force.

Communications Between Master and Servant — *Baker v. London*, etc., R. Co., 8 B. & S. 645, 37 L. J. Q. B. D. 53, L. R. 3 Q. B. 91, 16 W. R. 126; *Falmouth v. Moss*, 11 Price 455, 25 Rev. Rep. 753; *Webb v. Smith*, 1 C. & P. 337, 11 E. C. L. 410, R. & M. 106, 21 E. C. L. 392.

Report of Officer of Company to Manager. — *Woolley v. North London R. Co.*, L. R. 4 C. P. 602, 38 L. J. C. Pl. 317, 20 L. T. N. S. 813, 17 W. R. 650, 797; *Baker v. London*, etc., R. Co., L. R. 3 Q. B. 91; *Mahony v. National Widows' L. Assur. Fund*, L. R. 6 C. P. 252, 40 L. J. C. Pl. 203, 24 L. T. N. S. 548, 19 W. R. 722; *Skinner v. Great Northern R. Co.*, L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. N. S. 233, 23 W. R. 7.

Report of Railway Conductor Concerning Accident. — *Carlton v. Western*, etc., R. Co., 81 Ga. 531.

Declarations or Admissions of One Partner to Another. — *Wills Point Bank v. Bates*, 72 Tex. 137.

A Banker is not privileged from being examined or producing his books to show the state of a customer's account. *Loyd v. Freshfield*, 2 C. & P. 325, 12 E. C. L. 149; *Emmott v. Star Newspaper Co.*, 62 L. J. Q. B. D. 77; *Hannum v. McRae*, 18 Ont. Pr. 185, *affirming* 17 Ont. Pr. 567; *Mackenzie v. Taylor*, 6 L. C. Jur. 83.

2. Communications with a View to Litigation. — *Woolley v. North London R. Co.*, L. R. 4 C. P. 602, 38 L. J. C. Pl. 317, 20 L. T. N. S.

813, 17 W. R. 650, 797; *Cossey v. London*, etc., R. Co., L. R. 5 C. P. 146, 39 L. J. C. Pl. 174, 22 L. T. N. S. 19, 18 W. R. 493, *distinguishing* *Baker v. London*, etc., R. Co., L. R. 3 Q. B. 91; *Skinner v. Great Northern R. Co.*, L. R. 9 Exch. 298, 43 L. J. Exch. 150, 32 L. T. N. S. 233, 23 W. R. 7; *Friend v. London*, etc., R. Co., 2 Ex. D. 437, 46 L. J. Exch. 606, 36 L. T. N. S. 729, 25 W. R. 735. See also *The Palermo*, 9 P. D. 6, 53 L. J. P. 6, 49 L. T. N. S. 551, 32 W. R. 403, 5 Asp. M. Cas. 165; *Knapp v. City of London Ins. Co.*, 29 L. C. Jur. 233, 8 Montreal Leg. N. 89.

In *M'Corquodale v. Bell*, 1 C. P. D. 471, 45 L. J. C. Pl. 329, 35 L. T. N. S. 261, 24 W. R. 399, the court carried the principle still further and held that communications sent to a plaintiff's solicitor in response to inquiries about an anticipated litigation were privileged, although the writer of the letters was in no way connected with the plaintiffs.

3. Statements Obtained to Be Submitted to Attorney. — *Anderson v. Bank of British Columbia*, 2 Ch. D. 644, 45 L. J. Ch. 449, 35 L. T. N. S. 76, 24 W. R. 624, *affirming* 24 W. R. 724; *Reid v. Langlois*, 1 Macn. & G. 627, 2 Hall & T. 59, 14 Jur. 467, 19 L. J. Ch. 337; *Davenport Co. v. Pennsylvania R. Co.*, 166 Pa. St. 480. See also *Chartered Bank v. Rich*, 4 B. & S. 73, 116 E. C. L. 73, 32 L. J. Q. B. D. 300, 8 L. T. N. S. 454, 11 W. R. 830.

4. Hooper v. Gumm, 2 Johns. & H. 602, 6 L. T. N. S. 891, 10 W. R. 644.

5. Telegraphic Despatches. — *England.* — *Waddell's Case*, 8 Jur. N. S. (pt. 2) 181.

Canada. — *Re Dwight*, 15 Ont. 148.

United States. — *In re Storrer*, 63 Fed. Rep. 564. See also *U. S. v. Hunter*, 15 Fed. Rep. 712; *U. S. v. Babcock*, 3 Dill. (U. S.) 566.

Iowa. — *Woods v. Miller*, 55 Iowa 163, 39 Am. Rep. 170.

Maine. — *State v. Litchfield*, 58 Me. 267.

Missouri. — *Ex p. Brown*, 72 Mo. 83, 37 Am. Rep. 426.

New York. — *People v. Webb*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 855.

Pennsylvania. — *Henisler v. Freedman*, 2 Pars. Eq. Cas. (Pa.) 274.

West Virginia. — *Merchants' Nat. Bank v. Wheeling First Nat. Bank*, 7 W. Va. 544.

question of privilege is raised in a federal court, the decision must be governed by the statutes on that subject of the state in which the federal court sits.¹

PRIVILEGE OF RENEWAL. — See **RENEWAL**, and see the titles **LANDLORD AND TENANT**, vol. 18, p. 149; **LEASES**, vol. 18, p. 593.

PRIVY — PRIVIES — PRIVITY. (See also such titles as **ADMISSIONS**, vol. 1, p. 680; **ADVERSE POSSESSION**, vol. 1, p. 842; **CONTRACTS**, vol. 7, p. 104; **COVENANTS**, vol. 8, pp. 135, 147; **ESTOPPEL**, vol. 11, pp. 390, 394; **EXECUTORS AND ADMINISTRATORS**, vol. 11, p. 720; **JOINT TENANTS AND TENANTS IN COMMON**, vol. 17, p. 646; **NOTICE OF PENDENCY AND LIS PENDENS**, vol. 21, p. 591; **RES JUDICATA**. And see the **ENCYC. OF PL. AND PR.**, vols. 2, p. 1021; 7, p. 857; 9, p. 611.) — The term "privity" denotes mutual or successive relationship to the same rights of property; and privies are those who stand in this relationship, and are distributed into several classes according to the manner thereof. Thus, there are privies in estate, as donor and donee, lessor and lessee, and joint tenants; privies in blood, as heir and ancestor, and co-parceners; privies in representation, as executors and testator, administrators and intestate; privies in law, where the law, without privity of blood or estate, casts the land upon another as by escheat.²

1. State Statutes Govern in Federal Courts. — *Connecticut Mut. L. Ins. Co. v. Union Trust Co.*, 112 U. S. 250; *Butler v. Fayerweather*, (C. C. A.) 91 Fed. Rep. 458; *Mutual Ben. L. Ins. Co. v. Robinson*, 19 U. S. App. 266.

Overruled Cases. — The cases of *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, and *Liggett v. Glenn*, 4 U. S. App. 438, in so far as they conflict with the rule stated in the text must be considered as *overruled*. *Mutual Ben. L. Ins. Co. v. Robison*, 19 U. S. App. 266.

2. Privy — Privity Defined. — *Greenleaf on Evidence*, (14th ed.) § 189. The above definition and classification have been recognized in many cases. See the following:

United States. — *Bailey v. Sundberg*, 1 U. S. App. 108; *Stacy v. Thrasher*, 6 How. (U. S.) 59; *Bate Refrigerating Co. v. Gillett*, 30 Fed. Rep. 687; *Bank of Commerce v. Louisville*, 88 Fed. Rep. 406.

Georgia. — *Johnston v. Duncan*, 67 Ga. 70; *Morris v. Murphey*, 95 Ga. 307; *Latine v. Clements*, 3 Ga. 430.

Kansas. — *Challiss v. Atchison*, 45 Kan. 22. *Minnesota.* — *Newman v. Home Ins. Co.*, 20 Minn. 422.

Mississippi. — *Lipscomb v. Postell*, 38 Miss. 477.

Missouri. — *Crispen v. Hannavan*, 50 Mo. 418; *State v. St. Louis*, 145 Mo. 567.

New York. — *Coan v. Osgood*, 15 Barb. (N. Y.) 588; *O'Donnell v. McIntyre*, 118 N. Y. 162; *Mygatt v. Coe*, 124 N. Y. 219; *Stamp v. Franklin*, 144 N. Y. 611; *Bennett v. Couchman*, 48 Barb. (N. Y.) 81. And see *Gourand v. Gourand*, 3 Redf. (N. Y.) 267.

Pennsylvania. — *Giltinan v. Strong*, 64 Pa. St. 246.

Tennessee. — *Aiken v. Suttle*, 4 Lea (Tenn.) 128.

Utah. — *Allen v. Fitzgerald*, 23 Utah 597.

A *privity* is said to be one who has an interest in an action or thing. *Pickett v. Ford*, 4 How. (Miss.) 249.

One Who Buys Land Subject to the Lien of a Judgment cannot impeach the judgment or

avoid the lien on any ground which would not have availed the defendant to prevent the rendition of the judgment. *Stoutimore v. Clark*, 70 Mo. 471.

Purchaser at Tax Sale. — One who acquires real estate pursuant to a tax sale is not in *privity* with the former owner. *O'Donnell v. McIntyre*, 118 N. Y. 162.

The Privity of the Surety with His Principal is in the contract alone and not in the action. *Giltinan v. Strong*, 64 Pa. St. 246. See also *McConnell v. Poor*, 113 Iowa 133.

There is no *privity* existing between a guardian, executor, or administrator, and the surety on his official bond. *Lipscomb v. Postell*, 38 Miss. 477.

Successive Executors, Etc. — In *Hummel v. Central City First Nat. Bank*, 2 Colo. App. 581, the court said: "It would require a great stretch of the doctrine and the definition of the authorities on this subject to hold that successive executors and successive administrators and representatives of other sorts were *privies* in legal contemplation. Yet it was held by a very learned court in *Stacy v. Thrasher*, 6 How. (U. S.) 44, that the administrator *de bonis non* did so sustain that legal relation to his predecessor in the same trust, as to be bound, probably, by any judgments rendered against that predecessor. It was put in that case, however, on the principle and reason of an 'official succession or *privity*.' The rule cannot be extended beyond the doctrine of that case."

Suit by Infant — Suit by Mother — Evidence. — "Manifestly no such mutual or successive relationship exists between the infant claiming damages for his pain and suffering, and his mother claiming damages for the loss of his services; the causes of action are distinct, and neither claimant could, under any circumstances, succeed to the other's cause of action. There is a case in 53 Ind. 143 (*Indianapolis, etc., R. Co. v. Stout*) where this distinction seems to be overlooked." *Metropolitan St. R. Co. v. Gumby* (C. C. A.), 99 Fed. Rep. 192. Here it was accordingly held that the testi-

In Point of Time. — A privy must come after him to whom he is privy, and can never precede.¹

As to the Estate. — A privy in estate is a successor to the same estate, not to a different estate in the same property.²

Res Judicata. — Privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon him with whom they are in privity.³

Time of Acquisition of Interest. — But within the rule that judgments are binding upon privies, as well as upon parties, only those are privies who acquire their interest in the subject matter of the suit, subsequent to the suit.⁴

Private. — The term "privy" is also used in the sense of private, as privy seal, privy verdict, etc.⁵

Knowledge — Secret Transaction. — It also means, sometimes, "admitted to the participation of knowledge with another of a secret transaction."⁶

PRIZE. — I. A prize is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter.⁷ II. A purse, prize, or premium is properly something taken on the high sea from a common enemy against whom war is declared.⁸ III. In

mony of the infant in the former action was inadmissible in the second action. See also *Murphy v. New York Cent., etc., R. Co.*, 31 Hun (N. Y.) 358.

The Recital of One Deed in Another binds the parties and those who claim under them; technically speaking, it operates as an estoppel and binds parties and *privies*; *privies* in blood, *privies* in estate, and *privies* in law. *Carver v. Jackson*, 4 Pet. (U. S.) 83. See also the title *ESTOPPEL*, vol. II, p. 385.

Privies in Estate and Privies by Contract Distinguished. — See *Breckenridge v. Ormsby*, 1 J. J. Marsh (Ky.) 250.

Limitation of Liability of Ship Owners — United States Statutes — "Without the Privy or Knowledge," etc. — See the titles *SHIPS and SHIPPING*; *CONTRACTS of AFFREIGHTMENT and CHARTER PARTIES*, vol. 7, p. 156. In *Quinlan v. Pew*, 5 U. S. App. 416, the court, after giving various definitions of the term *privy*, in the ordinary sense, continues: "We therefore conclude that the word *privy*, as found in this statute, includes at least as much as the word 'knowledge;' but we, of course, do not overlook the fact that there is in law imputed knowledge, and therefore there may be imputed *privy*. Each of these arises where the owners give an order for the doing of a particular thing in a particular way, and assume that it is done, or do not inquire whether or not it is afterwards accomplished. Under such circumstances the word *privy* is even more pertinent than 'knowledge,' because, while the conduct of the owners would in law impute knowledge, they would also actively partake. Each is also imputed to those who refuse to see, or who are guilty of perverseness, or of such crass negligence as amounts to it."

Same — English Statutes. — In *The Republic*, 20 U. S. App. 561, the court said: "The statute was principally taken from the English statutes of 26 and 53 Geo. III. These statutes, instead of the words '*privy* or knowledge,' used the words '*privity* and knowledge,' or 'fault or *privity*,' to express the exception. In the later English statutes (the Merchants' Shipping Acts of 1854 and 1862), the phrase-

ology was varied so that the exemption was limited to losses occurring without the 'actual fault or *privity*' of the shipowner. There is no reason to suppose that the diverse phraseology of these acts was employed for the purpose of expressing different rules of exemption, as there were no decisions of the English courts which indicated that the terms were not synonymous." See also *Lord v. Goodall, etc., Steamship Co.*, 4 Sawy. (U. S.) 300.

1. 2 T. Coke 506, cited in *Crutchfield v. Hudson*, 23 Ala. 400.

2. Pool v. Morris, 29 Ga. 374, 74 Am. Dec. 66.

3. *Crispen v. Hannavan*, 50 Mo. 418. And see the title *RES JUDICATA*.

4. *Carroll v. Goldschmidt*, (C. C. A.) 83 Fed. Rep. 509; *Ingersoll v. Jewett*, 16 Blatchf. (U. S.) 378. And see the title *RES JUDICATA*.

5. A **Privy Verdict** is one "given out of court, before one of the judges thereof; and it is called *privy*, being to be kept secret from the parties until it is affirmed in court." Jacob's L. Dict., tit. Verdict, quoted in *Com. v. Heller*, 5 Phila. (Pa.) 124, 19 Leg. Int. (Pa.) 133. See also *Willard v. Shaffer*, 6 Phila. (Pa.) 520, 25 Leg. Int. (Pa.) 52; and the title *VERDICT*.

Privily means privately or secretly. So stated with reference to a certificate of examination of a married woman. *Coombs v. Thomas*, 57 Tex. 322. And see the title *ACKNOWLEDGMENTS*, vol. I, p. 483.

6. Webster's Dict. In *Edgell v. Lowell*, 4 Vt. 405, which was a case of a transfer alleged to be fraudulent as to creditors, the court said: "This is nearly the sense in which the word is used in the statute: it means a knowledge of a secret fraudulent transaction, in which he who has the knowledge was a party."

Deviation from Plans — Position of Privies — Tub-closets Within Term Privies in 21 and 22 Vict., c. 98, § 34. — *Burton v. Acton*, 51 J. P. 566.

7. **Prize.** — *Harris v. White*, 81 N. Y. 539. And see the titles *GAMBLING CONTRACTS*, vol. 14, p. 614; *GAMING*, vol. 14, p. 671; *LOTTERIES*, vol. 19, p. 588. See also *Long v. State*, 74 Md. 570; *Sullivan v. State*, 67 Miss. 346.

8. **International Law.** — *Beak v. Tyrrell*,

marine insurance, a prize is a capture, any taking or seizing, even unlawfully, by force.¹

Carth. 32. See also the title INTERNATIONAL LAW, vol. 16, p. 1121.

In *Seventy-eight Bales Cotton*, 1 Lowell (U. S.) 14, it is said: "But, it is said, in order that goods should be condemned, they must be captured from the enemy, and here was no capture. Sir William Scott is quoted as saying in *The Two Friends*, 1 C. Rob. 283: 'I know of no other definition of prize goods than that they are goods taken on the high seas, *jure belli*, out of the hands of the enemy.' It is sought to be inferred from this remark of an eminent judge, that there must have been a hostile possession at the time of the taking, which possession has been changed by the captors. But it is evident that no such meaning was intended, because in the great majority of all the condemnations pronounced by that learned judge, the property came from neutral or friendly possession. Nor can it be maintained that the application of force, actual or constructive, is necessary. In many cases that have passed into judgment the goods were driven within the jurisdiction by stress of weather, or of a hostile pursuit which had ceased, or had been detained by an embargo; and the taking has often been only by the marshal, on his warrant, after due proceedings had in the prize court itself."

See also *Groning v. Union Ins. Co.*, 1 Nott & M. (S. Car.) 539.

Recapture. — The Schooner *Adeline*, 9 Cranch (U. S.) 284.

In Case of Joint Capture by the Army and Navy, it has been held that under a United States statute there is no right to prize money. The court said: "No provision is found in any of these statutes touching joint captures by the army and navy. They are wholly silent as to the military arm of the service. It results from this state of things, according to the principles we have laid down, that such captures enure exclusively to the benefit of the United States. In the English law they are

held not to be within the prize acts, and are provided for by statutes passed specially for that purpose. In *Genoa and Its Dependencies*, 2 Dods. 446, Lord Stowell, speaking of the word prize, says: 'It evidently means maritime capture effected by maritime force only, — ships and cargoes taken by ships. * * *

What was taken by a conjunct expedition was formerly erroneously considered as vested in a certain proportion of it, in the capturing ships under the prize acts; but in a great and important case lately decided, *Hoogskarpel*, Lords of Appeal, 1785, it was determined that the whole was entirely out of the effect of those prize acts, and in so deciding, determined by direct and included consequence, that the words 'prizes taken by any of her majesty's ships or vessels of war,' cannot apply to any other cases than those in which the captures are made by ships only.' In *Booty in The Peninsula*, 1 Hag. 47, the same great authority, referring to 'a conjunct expedition,' held this language: 'It may be difficult, and perhaps perilous, to define it negatively and exclusively. It is more easy and safe to define it affirmatively, that that is a conjunct expedition which is directed by competent authority, combining together the actions of two different species of force, for the attainment of some common specific purpose.' The opinion of the court below proceeded upon the ground that the present case is one of this character. Whether it was or was not is the question presented for our determination. The application of Lord Stowell's test leaves no room for doubt as to its proper solution." *The Siren*, 13 Wall. (U. S.) 395.

Booty and Prize Distinguished. — See *Booty*, vol. 4, p. 718.

1. And. L. Dict., citing *Dole v. New England Mut. Marine Ins. Co.*, 6 Allen (Mass.) 373. See also the title MARINE INSURANCE, vol. 19, p. 946.

PRIZE-FIGHTS.

BY BASIL JONES.

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CROSS-REFERENCES.

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I. DEFINITION. — The term "prize-fight" has no technical legal meaning, but is used in its common signification,¹ to indicate a fight in a public place² for a prize or reward.³

II. NATURE AND ELEMENTS OF OFFENSE — 1. **Nature of Offense** — a. **AT COMMON LAW.** — While prize-fighting did not constitute a specific offense at common law, it was illegal, and the participants therein were guilty of a breach of the peace⁴ and were punishable for an affray,⁵ assault and battery, or riot, according to the circumstances.⁶

1. **Term Used in Its Common Signification.** — *People v. Taylor*, 96 Mich. 576; *Seville v. State*, 49 Ohio St. 117; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246; *In re Athletic Clubs*, 5 Ohio Dec. 696. See also *Sullivan v. State*, 67 Miss. 346.

2. **Publicity.** — See *infra*, this title, *Elements of Offense — Publicity*.

3. **Necessity of Reward.** — See *infra*, this title, *Elements of Offense — Prize or Reward*.

Further Definitions. — See *State v. Purtell*, 56 Kan. 479; *La. Acts* 1890, No. 25, p. 19; *Tex. Gen. Laws* 1891, c. 50, p. 54.

4. **Offense at Common Law.** — *Rex v. Perkins*, 4 C. & P. 537, 19 E. C. L. 515; *Rex v. Billingham*, 2 C. & P. 234, 12 E. C. L. 105; *Reg. v. Brown*, C. & M. 314, 41 E. C. L. 175; *Reg. v. Coney*, 8 Q. B. D. 534, 15 Cox C. C. 46. See also *Sullivan v. State*, 67 Miss. 346; 1 East P. C., c. 5, § 42.

5. **Affray.** — See *Sullivan v. State*, 67 Miss. 346. See also the title *AFFRAY*, vol. 1, p. 915.

6. **Assault or Riot.** — *Reg. v. Coney*, 8 Q. B. D. 534, 15 Cox C. C. 46; *Rex v. Billingham*, 2 C. & P. 234, 12 E. C. L. 105; *Rex v. Perkins*, 4 C. & P. 537, 19 E. C. L. 515.

b. UNDER STATUTES. — In the majority if not all of the states, statutes have been enacted prohibiting prize-fighting and defining the offense.¹

2. Elements of Offense — *a.* NECESSITY OF PREVIOUS AGREEMENT. — It has been stated that to render a contest a prize-fight there must have been a previous agreement between the contestants that it should continue until one of them obtained the victory. The agreement need not have been entered into at any specific length of time before the contest, nor is it necessary that it should have been in writing. Where it is entered into by the seconds or other parties it is not binding on the principals unless it is shown that they knew of the terms before the contest was held.²

b. INTENT TO INJURE. — There must be an intent on the part of the contestants to do violence to and inflict some degree of bodily harm on each other.³ It is not necessary, however, that there should have been anger or mutual ill-will on the part of the principals.⁴ Nor is it necessary that they shall have agreed that the contest shall be continued until one of them is overcome or that it shall be fought "to a finish."⁵

c. PUBLICITY. — To constitute the offense of prize-fighting, it is essential that the fight should have been held in a public place or in a place to which the public or some part of it was admitted as spectators.⁶ The *Ohio* statute has been construed, however, to prohibit not only public prize-fighting but also all contests of that description, whether public or private.⁷

d. PRIZE OR REWARD. — To constitute a fight a prize-fight there must have been expectation of a prize or reward to be gained by the contest.⁸

Method in Which Prize Obtained Immaterial. — The prize may be money or other thing of value, and whether it takes the form of a wager between the contestants, or is contributed by others, or is the proceeds of the gate receipts, is immaterial.⁹

Unlawful Assembly. — *Reg. v. Orton*, 14 Cox C. C. 226.

1. Under Statutes. — *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407; *State v. Purtell*, 56 Kan. 479; *State v. Olympic Club*, 46 La. Ann. 935; *Com. v. Welsh*, 7 Gray (Mass.) 324; *People v. Taylor*, 96 Mich. 576; *Sullivan v. State*, 67 Miss. 346; *People v. Floss*, (Buffalo Super. Ct. Gen. T.) 7 N. Y. Supp. 504; *People v. Johnson*, (Supm. Ct. Crim. T.) 22 Misc. (N. Y.) 150; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246. See also the statutes of the several states.

Agreement to Engage in Prize-fight a Conspiracy to Commit Crime. — *Seville v. State*, 49 Ohio St. 117.

Prize-fighting a Felony under Texas Statute. — *Sullivan v. State*, 32 Tex. Crim. 50.

Prize-fight a Nuisance. — *State v. Hobart*, 11 Ohio Dec. 166; *Columbian Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407.

Leaving State to Engage in Fight. — Under Mass. Gen. Stat., c. 160, § 17 (Pub. Stat. c. 202, § 17), it is made an offense punishable by fine or imprisonment for an inhabitant or resident of the state to leave the state and engage in a fight with another person without the limits of the state, where these acts are done in pursuance of a previous engagement made within the state. *Com. v. Barrett*, 108 Mass. 302.

Statute Inoperative. — How. Stat. Mich., § 9306 (Comp. Laws, § 11732), in so far as it seeks to punish those who are parties to or engage in any other fight in the nature of a prize-fight, is inoperative, the elements constituting such a fight not being defined and there being no means by which the legislative

intent can be ascertained. *People v. Taylor*, 96 Mich. 576.

2. Agreement. — *State v. Moore*, 5 Ohio Dec. 689.

3. Intent to Injure. — *State v. Purtell*, 56 Kan. 479; *State v. Olympic Club*, 47 La. Ann. 1095; *People v. Taylor*, 96 Mich. 576. See also *Reg. v. Coney*, 8 Q. B. D. 534.

4. Anger Not Essential. — *Reg. v. Coney*, 8 Q. B. D. 534; *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328.

5. *State v. Moore*, 5 Ohio Dec. 689; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246.

6. Publicity Essential. — *Sullivan v. State*, 67 Miss. 346, citing the definition of "prize-fighter" in Webster's Dict. and Worcester's Dict., and of "prize-fighting" in Webster's Dict. See also "prize-fighting," Century Dict.; *Reg. v. Young*, 10 Cox C. C. 371.

7. Ohio Statute. — *Seville v. State*, 49 Ohio St. 117, citing "prize-fighting," Century Dict.; *In re Athletic Clubs*, 5 Ohio Dec. 696; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246.

8. Prize Essential. — *State v. Purtell*, 56 Kan. 479; *State v. Olympic Club*, 47 La. Ann. 1095; *People v. Taylor*, 96 Mich. 576; *Sullivan v. State*, 67 Miss. 346; *State v. Moore*, 5 Ohio Dec. 689, 4 Ohio N. P. 81; *In re Athletic Clubs*, 5 Ohio Dec. 696; *State v. Hobart*, 11 Ohio Dec. 166, 8 Ohio N. P. 246.

Under the Massachusetts Statute of 1849, c. 149, a prize or reward is not essential to constitute a fight a prize-fight. *Com. v. Welsh*, 7 Gray (Mass.) 324.

9. What Constitutes the Prize Immaterial. — *State v. Moore*, 5 Ohio Dec. 689, 4 Ohio N. P. 81; *People v. Taylor*, 96 Mich. 576.

Indirect Reward. — Where the reward received is only an indirect one, as an increase of salary on account of the notoriety secured by engaging in the fight, the contest is not a prize-fight.¹

Division of Prize Immaterial. — It is not necessary that the prize should be gained by one contestant from the other, nor does the fact that a prize was awarded to the defeated as well as to the successful combatant necessarily prevent a conviction.²

Actual Award of Prize Not Essential. — It is sufficient that there was an agreement to contest for a prize, and it is not essential that the prize should have been actually awarded.³

e. METHOD IN WHICH FIGHT CONDUCTED IMMATERIAL. — No account is taken, in determining whether a contest is a prize-fight, as to whether it was fought with gloves or with bare fists,⁴ though the jury may take into consideration this fact, and, where gloves were used, may consider the kind, size, weight, and other characteristics of such gloves, in connection with the other evidence in the case.⁵

Nor Are the Technical Rules under which the contest was held material in determining whether or not it was a prize-fight.⁶

A Limitation upon the Number of Rounds to be fought does not render the contest any the less a prize-fight.⁷

3. Consent No Defense. — That the fight was had by consent or agreement between the principals does not prevent it from being illegal.⁸

III. AIDERS AND ABETTORS — 1. In General. — All persons aiding and abetting in a prize-fight are liable as principals.⁹

2. Liability of Spectators. — Under the earlier decisions it was held that persons who attended a prize-fight and were spectators thereat were guilty as principals.¹⁰ This did not, however, include those casually passing by and not remaining to witness the contest.¹¹ In a more recent decision it has been held that while the presence of a person at a fight, when unexplained, is some evidence for the consideration of the jury, mere voluntary presence does not as a matter of law necessarily render persons so present guilty, but that there must be some active step, either by word or deed, to instigate the principals, to render a spectator liable.¹²

IV. SPARRING OR BOXING MATCHES — 1. At Common Law. — A sparring or boxing match which was merely intended as an exhibition of skill was not

1. Indirect Reward. — *People v. Floss*, (Buffalo Super. Ct. Gen. T.) 7 N. Y. Supp. 504.

2. Division of Prize. — *State v. Purtell*, 56 Kan. 479.

3. Actual Award Not Essential. — *State v. Moore*, 5 Ohio Dec. 689, 4 Ohio N. P. 81.

4. Use of Gloves. — *Reg. v. Orton*, 14 Cox C. C. 226; *State v. Moore*, 5 Ohio Dec. 689; *State v. Olympic Club*, 47 La. Ann. 1095; *State v. Hobart*, 11 Ohio Dec. 166; *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801.

5. State v. Purtell, 56 Kan. 479; *State v. Moore*, 5 Ohio Dec. 689.

Examination of Gloves by Jury. — See *State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 801.

6. Rules Immaterial. — *Seville v. State*, 49 Ohio St. 117; *In re Athletic Clubs*, 5 Ohio Dec. 696.

Marquis of Queensberry Rules. — See *State v. Olympic Club*, 46 La. Ann. 935.

7. Limited Number of Rounds. — *State v. Hobart*, 11 Ohio Dec. 166.

8. Consent. — *Reg. v. Coney*, 8 Q. B. D. 534, 15 Cox C. C. 46; *Rex v. Billingham*, 2 C. & P. 234, 12 E. C. L. 105; *Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328; *State v. Burn-*

ham, 56 Vt. 445, 48 Am. Rep. 801. See *infra*, this title, *Remedies in Civil Actions — Damages*.

9. Aiding and Abetting. — *Reg. v. Coney*, 8 Q. B. D. 534; *Rex v. Perkins*, 4 C. & P. 537; 19 E. C. L. 515; *Rex v. Billingham*, 2 C. & P. 234, 12 E. C. L. 105.

Stakeholder Not Liable as Accessory Before the Fact Where Death Results. — *Reg. v. Taylor*, L. R. 2 C. C. 147, 12 Moak 636.

10. Spectators Liable. — *Rex v. Perkins*, 4 C. & P. 537, 19 E. C. L. 515; *Rex v. Billingham*, 2 C. & P. 234, 12 E. C. L. 105; *Reg. v. Orton*, 14 Cox C. C. 226. See also *Rex v. Hargrave*, 5 C. & P. 170, 24 E. C. L. 260.

Spectators Not Liable Where Killing Unconnected with Original Purpose. — *Rex v. Murphy*, 6 C. & P. 103, 25 E. C. L. 301.

11. Casual Spectators. — *Rex v. Murphy*, 6 C. & P. 103, 25 E. C. L. 301; *Reg. v. Coney*, 8 Q. B. D. 534.

12. Spectators Not Liable. — *Reg. v. Coney*, 8 Q. B. D. 534.

Persons Present at and Sanctioning a Prize-fight Are Not Such Accomplices as that it is necessary that their evidence should be confirmed. *Rex v. Hargrave*, 5 C. & P. 170, 24 E. C. L. 260.

illegal at common law, but when the principals met intending to fight till one was overcome by injury or exhaustion,¹ or where the contest was so long continued as to render it probable that injury would result,² it was an offense.

2. Under Statutes. — In some jurisdictions authority is granted by statute to athletic clubs to conduct sparring or boxing matches.³ The exhibitions so authorized must be strictly of that nature, and must not be held for a prize or reward⁴ or have any of the features of a prize-fight.⁵

V. REMEDIES IN CIVIL ACTIONS — 1. Injunction. — Although a prize-fight is a crime, it has been held that when the fight and its attendant circumstances will constitute a nuisance and cause an irreparable injury for which there is no remedy at law, an injunction will be granted to prevent it from being held.⁶ Such relief has also been granted where the holding of such a fight would be a misuse and abuse of the charter of the corporation conducting it.⁷

2. Damages. — An action by one of the contestants to recover damages for injuries received by reason of the fight is not barred by the fact that it was held by consent or agreement between them, as such agreement to break the peace is void, and the maxim *volenti non fit injuria* has no application.⁸ But the agreement may be shown in mitigation of damages.⁹

VI. EVIDENCE — 1. Declarations. — Declarations of either of the principals with reference to the prize-fight or in furtherance thereof, while engaged in its prosecution, are competent evidence against the other, though the agreement to fight was made through representatives of the principals, and the latter were unknown to each other.¹⁰

2. Prize-fight a Question of Fact. — The question whether or not a particular contest was a prize-fight is for the determination of the jury upon the evidence and under proper instructions from the court.¹¹

3. Expert Evidence. — Expert evidence as to whether or not a contest was a prize-fight is not admissible,¹² nor are the rules adopted by associations of persons for the management of such encounters.¹³

PRIZE LOGS. — See note 14.

PROBABILITY. — See note 15.

1. Sparring Matches. — Reg. v. Orton, 14 Cox C. C. 226. See also Reg. v. Coney, 8 Q. B. D. 534. 15 Cox C. C. 46; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

2. Reg. v. Young, 10 Cox C. C. 371.

3. Exhibitions in Athletic Clubs. — State v. Olympic Club, 46 La. Ann. 935; Seville v. State, 49 Ohio St. 117. See generally the statutes of the several states.

Licensing Power of Mayor. — People v. Wurster, 14 N. Y. App. Div. 556.

4. Contest Must Be Bona Fide. — State v. Moore, 5 Ohio Dec. 689, 4 Ohio N. P. 81; State v. Hobart, 11 Ohio Dec. 166, 8 Ohio N. P. 246.

5. State v. Olympic Club, 47 La. Ann. 1095. And see People v. Johnson, (Supm. Ct. Crim. T.) 22 Misc. (N. Y.) 150.

Exclusive Occupation of Building by Club Not Required. — People v. Johnson, (Supm. Ct. Crim. T.) 22 Misc. (N. Y.) 150.

6. Enjoining Fight. — State v. Hobart, 11 Ohio Dec. 166. See also Opinion of Chancellor Martin, 35 Am. L. Reg. N. S. 100.

7. Columbian Athletic Club v. State, 143 Ind. 98, 52 Am. St. Rep. 407.

8. Recovery Not Barred by Agreement to Fight. — Boulter v. Clark, Bull. N. P. 16; Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Stout v. Wren, 1 Hawks (8 N. Car.) 420, 9 Am. Dec. 653; Bell v. Hanslev, 3 Jones L. (48 N. Car.) 131; Barholt v. Wright, 45 Ohio St. 181. See

also Logan v. Austin, 1 Stew. (Ala.) 476; and see *supra*, this title, *Nature and Elements of Offense — Consent No Defense*.

9. Mitigation. — Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Barholt v. Wright, 45 Ohio St. 181. See also Logan v. Austin, 1 Stew. (Ala.) 476.

10. Declarations. — Seville v. State, 49 Ohio St. 117.

11. Question of Fact. — Reg. v. Orton, 14 Cox C. C. 226; State v. Purtell, 56 Kan. 479; State v. Olympic Club, 46 La. Ann. 935; State v. Moore, 5 Ohio Dec. 689; Seville v. State, 49 Ohio St. 117; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

12. Expert Evidence. — State v. Olympic Club, 46 La. Ann. 961; Seville v. State, 49 Ohio St. 117.

13. Rules Inadmissible. — Seville v. State, 49 Ohio St. 117.

14. Prize Logs. — See Kennebec Log Driving Co. v. Burrill, 18 Me. 314.

15. Probability. — A committee of viewers found that a tract of land would, "in all probability," continue to be held and used for railroad freight purposes. It was held that a mere *probability* was not sufficient to affect the case under consideration, and that if a degree of *probability* which amounted to a practical certainty was intended, the facts on which the conclusion was based should have

PROBABLE. — “Probable” has been defined as having more evidence for than against.¹

PROBABLE CAUSE. (See also the titles MALICIOUS PROSECUTION, vol. 19, p. 655; SEARCHES AND SEIZURES.) — See note 2.

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been found, so that the court might see on what it rested. New York, etc., R. Co. v. New Britain, 49 Conn. 40.

Instructions. — In *People v. O'Brien*, 130 Cal. 1, it was said: “*Probability* is mere ‘likelihood’ or ‘appearance’ — *i. e.*, resemblance — of truth’ (Webster’s Dictionary); and in ordinary language the term implies doubt (Century Dictionary). To instruct the jury that they may ‘act on *probabilities*’ means simply that they may act on less than convincing evidence, or without that ‘moral certainty’ required by the law.” See also *Howard v. State*, 108 Ala. 571; and the title REASONABLE DOUBT.

Probability Distinguished from Proof. — “It seems to us that there is a difference between *probability* and proof. The object of both words is to express a particular effect of evidence, but ‘proof’ is the stronger expression. * * * Demonstration produces certain knowledge, proof produces belief, and *probability*, opinion.” McGowen, J., in *Brown v. Atlanta*, etc., R. Co., 19 S. Car. 59, 13 Am. & Eng. R. Cas. 487.

1. **Probable.** — *Bain v. State*, 74 Ala. 38; *Williams v. State*, 98 Ala. 22; *Howard v. State*, 108 Ala. 571; *State v. Jones*, 64 Iowa 356; *Bailey v. Centerville*, 108 Iowa 27.

Probable means most consonant with reason; having the appearance of reality and truth. *Gardner v. Gardner*, (Pa. 1896) 35 Atl. Rep. 560.

Probable Consequence. — In *Chicago*, etc., R. Co. v. *Elliott*, 12 U. S. App. 387, it was said: “A *probable* consequence is one that is more likely to follow its supposed cause than it is to fail to follow it.”

Probable Expectation. (See also the titles

ASSIGNMENTS, vol. 2, p. 1026; CATCHING BARGAIN, vol. 5, p. 764; and see EXPECTANCY, vol. 12, p. 392.) — In *Allen v. Flood*, (1898) A. C. 16, Hawkins, J., said that what Lord Ellenborough, in *Pitt v. Donovan*, 1 M. & S. 639, termed a “*probable* expectation” (as distinguished from a vested legal interest) is “an essential element in promoting the success and contributing to the value of every occupation by which the means of living are obtained. The daily laborer whose tested character for steadiness, honesty, and industry has induced his master, as a matter of course, through a long series of years, week by week to renew or continue his employment finds in this the foundation for his ‘reasonable and *probable* expectation’ that he may rely on continual employment in the future. These ‘*probable* expectations’ are equally applicable to all trades, great and small. * * * It is analogous to the good will of a business sold to a new firm.”

Probable Grounds for Suspicion. — See *State v. Grant*, 76 Mo. 246.

2. **Probable Cause — Information and Belief.** — In *State v. Boulter*, 5 Wyo. 244, it was said: “Another consideration that should not be overlooked is that the information is verified by the prosecuting attorney on information and belief. And there is no finding or showing of *probable cause* to believe the defendant guilty of the degree of offense charged. The information verified on information and belief does not of itself constitute ‘*probable cause* supported by affidavit.’ See Const. Wyo., art. 1, § 4; U. S. v. *Bollman*, 1 Cranch (C. C.) 373, 24 Fed. Cas. No. 14,622; *State v. Gleason*, 32 Kan. 245.”

PROBATE AND LETTERS OF ADMINISTRATION.

BY CHARLES PORTERFIELD.

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For matters of *PROCEDURE*, see the title *PROBATE AND CONTEST OF WILLS*, 16 ENCYC. PL. AND PR. 991, and the references there given.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 720; *FOREIGN EXECUTORS AND ADMINISTRATORS*, vol. 13, p. 915; *JOINT EXECUTORS AND ADMINISTRATORS*, vol. 17, p. 616; *JURISDICTION*, vol. 17, p. 1039; *LEGACIES AND DEVISES*, vol. 18, p. 704; *PRIVATE INTERNATIONAL LAW*, vol. 22, p. 1314; *TESTAMENTARY CAPACITY*; *UNDUE INFLUENCE*; *WILLS*.

I. DEFINITIONS — 1. Probate. — The probate of a will is the proof before the proper court or officer that the instrument offered to be proved or recorded is the last will and testament of the deceased person whose testamentary act it is alleged to be.¹ This includes not only the evidence, jurisdictional and otherwise, presented to the court, but also the judicial determination by the court on that evidence that the instrument is what it purports to be.²

2. Letters of Administration and Letters Testamentary. — Letters of Administration are defined as an instrument in writing granted by the judge or officer having jurisdiction and power to grant such letters, thereby authorizing the person or persons to whom they are granted to administer the personal estate of the intestate.³

Letters Testamentary are defined as an instrument in writing granted by the

1. *Probate Defined.* — *Reno v. McCully*, 65 Iowa 629; *Warford v. Colvin*, 14 Md. 532; *Pettit v. Black*, 13 Neb. 142, 8 Neb. 52; *Kirk v. Bowling*, 20 Neb. 262; *Rees v. Stille*, 38 Pa. St. 138.

2. *Probate Includes Both Evidence and Determination Thereon.* — *Vanderpoel v. VanValkenburgh*, 6 N. Y. 190; *Matter of Drayton*, 4 McCord L. (S. Car.) 46. Thus, in *Chase v. Stockett*, 72 Md. 235, the executors of a will presented to the probate court an unattested paper signed by the testatrix after the execution of the will, and prayed that it might be filed and recorded with the affidavits thereto

attached, showing its genuineness, "to have such effect as it may." Thereupon the court ordered "that the foregoing papers be filed by the register of wills and by him recorded in accordance with the prayer of the petitioners." It was held that this did not operate as a probate of the paper as a part of the will.

3. *Letters of Administration Defined.* — *Bouvier's Law Dict., Letters of Administration.* As to the jurisdiction to grant letters of administration, the persons entitled thereto, and the several kinds thereof, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 759 *et seq.*

judge or proper officer having jurisdiction of the probate of wills, after the probate of the will, to an executor, authorizing him to act as such.¹

II. NATURE AND INCIDENTS OF PROBATE PROCEEDING — Not an Action. — A proceeding for the probate of a will is not an "action" in the sense in which that word is generally used,² and therefore it does not abate by the death of a party.³ Thus, no persons are parties to the proceeding until, by some affirmative act, they engage in the litigation; but the mere fact that persons interested in the estate have been served with notice of the application for probate is not sufficient to constitute them parties.⁴ In some respects, however, under statutes regulating the subject, it is in the nature of an ordinary action.⁵

Proceeding in Rem. — The proceeding is one *in rem*, the purpose of which is to ascertain the status of the estate of the decedent and the condition in which he died, that is, whether he died testate or intestate.⁶ This rule is not affected by the transfer of the cause, under the statute, to a court of law for the trial of the issue. The proceeding is still one *in rem* operating directly on the will.⁷

Nonsuit or Withdrawal of Application. — It has been held that the proponent of a will cannot suffer a nonsuit or withdraw the paper propounded as the decedent's will, because the proceeding in the court being *in rem*, the court must give its judgment on the *res*, which is the paper itself, without regard to particular persons.⁸ On the other hand, some authorities hold that where there is a contest, the proceeding is in the nature of one *inter partes*, and in some respects like ordinary suits, one of the incidents of which is the right to take a nonsuit or dismiss the proceeding.⁹ But any person may withdraw at will from a probate proceeding to which he is a party, even in those juris-

1. **Letters Testamentary Defined.** — Bouvier's Law Dict., *Letters Testamentary*. For a full discussion as to who may be an executor, see the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 744 *et seq.*

2. **Probate Proceeding Not an Action.** — Sisters of Visitation *v.* Glass, 45 Iowa 154; Allison *v.* Smith, 16 Mich. 405; Frazier *v.* Wayne Circuit Judge, 39 Mich. 198; Stevens *v.* Hope, 52 Mich. 65; Enloe *v.* Sherrill, 6 Ired. L. (28 N. Car.) 212. And see ACTION, vol. I, pp. 579, 581.

3. **Not Subject to Abatement by Death of Party.** — Van Alen *v.* Hewins, 5 Hun (N. Y.) 44.

4. **When Persons Interested Become Parties.** — Deslonde *v.* Darrington, 29 Ala. 92; Blakey *v.* Blakey, 33 Ala. 611; Clemens *v.* Patterson, 38 Ala. 721; Leslie *v.* Sims, 39 Ala. 161; Nelson *v.* Boynton, 54 Ala. 368; Kumpe *v.* Coons, 63 Ala. 448; Sawyer *v.* Dozier, 5 Ired. L. (27 N. Car.) 97; Love *v.* Johnston, 12 Ired. L. (34 N. Car.) 355.

The Mere Employment of Counsel by heirs at law after notices have been served on them is not sufficient to constitute them parties to the proceeding. Allen *v.* Prater, 35 Ala. 169.

5. **Assimilated to Action by Statute.** — Deslonde *v.* Darrington, 29 Ala. 92.

6. **Proceeding in Rem — Alabama.** — Deslonde *v.* Darrington, 29 Ala. 92; Hall *v.* Hall, 47 Ala. 290; Brock *v.* Frank, 51 Ala. 85; Wood *v.* Mathews, 53 Ala. 1; Kumpe *v.* Coons, 63 Ala. 448; Goodman *v.* Winter, 64 Ala. 410, 38 Am. Rep. 13; Martin *v.* King, 72 Ala. 354.

California. — Matter of Carpenter, 127 Cal. 582.

Illinois. — Matter of Storey, 20 Ill. App. 183, affirmed 120 Ill. 244.

Maryland. — Worthington *v.* Gittings, 56 Md. 542; Johns *v.* Hodges, 62 Md. 525.

Michigan. — Allison *v.* Smith, 16 Mich. 405; Frazier *v.* Wayne Circuit Judge, 39 Mich. 198; Stevens *v.* Hope, 52 Mich. 65.

Missouri. — Benoist *v.* Murrin, 48 Mo. 48.

New York. — Vanderpoel *v.* VanValkenburgh, 6 N. Y. 190.

North Carolina. — St. John's Lodge No. 1 *v.* Callender, 4 Ired. L. (26 N. Car.) 335; Sawyer *v.* Dozier, 5 Ired. L. (27 N. Car.) 97; Enloe *v.* Sherrill, 6 Ired. L. (28 N. Car.) 212; Benjamin *v.* Teel, 11 Ired. L. (33 N. Car.) 49; Love *v.* Johnston, 12 Ired. L. (34 N. Car.) 355; Matter of Young, 123 N. Car. 358.

Failure to Give Statutory Notice. — As probate proceedings are *in rem*, the failure to give the statutory ten days' notice to the widow and next of kin does not vitiate the proceeding, but it is only an irregularity. Hall *v.* Hall, 47 Ala. 290.

7. **Effect of Sending Issues to Court of Law.** — Benoist *v.* Murrin, 48 Mo. 48.

8. **Proponent May Not Take Nonsuit or Withdraw Paper.** — Matter of Lasak, 57 Hun (N. Y.) 417, affirmed 131 N. Y. 624; St. John's Lodge No. 1 *v.* Callender, 4 Ired. L. (26 N. Car.) 335; Hutson *v.* Sawyer, 104 N. Car. 1; Matter of Young, 123 N. Car. 358; Collins *v.* Collins, 125 N. Car. 98. But see Heermans *v.* Hill, 2 Hun (N. Y.) 409.

9. **Proponent Permitted to Take Nonsuit or Withdraw Paper.** — Crow *v.* Blakey, 31 Ala. 728, distinguishing Roberts *v.* Trawick, 13 Ala. 68, in which it was held that the proponent of a will could not take a nonsuit for the purpose of a review by the supreme court under the Alabama statute of Feb. 4, 1846. See also *In re Leonard*, (N. J. 1900) 47 Atl. Rep. 222, holding that the proponent of a will may withdraw the application for probate before citations have been issued.

dictions where the right of the proponent to take a nonsuit or dismiss the proceeding is denied. Such withdrawal, however, can affect the rights of no one except the person who seeks to withdraw. The paper propounded remains in the possession of the court and the proceeding for its probate is still pending.¹

Arbitration and Compromise. — It results as a consequence of the nature of a proceeding for the probate of a will as one *in rem* that the parties cannot submit the controversy to arbitration,² nor can a contestant compromise anything beyond his own personal interest in the contest.³

Proceeding Not Divisible. — A proceeding for the probate of a will is not a separable controversy. It must be single and complete in one hearing, whether it is in the probate court or in the appellate court;⁴ and on the same principle such a proceeding is not severable for the purpose of removal to a federal court.⁵

Probate a Judicial Act. — The courts of probate, as ordinarily constituted, exercise a judicial and not a ministerial power in respect to the probate of wills.⁶ Even in those jurisdictions where the clerk of the court in vacation is authorized to admit wills to probate subject to confirmation by the court, it is still a judicial power, since the action of the clerk is of no effect unless afterwards confirmed by the court.⁷

III. JURISDICTION — 1. Probate Jurisdiction Generally — a. BY WHAT COURTS EXERCISED — (1) In England. — Formerly the ecclesiastical courts were practically the only courts in England in which wills of personalty could be established or disputed. The exception to this was in the case of certain courts baron, which by immemorial usage had exercised jurisdiction in the probate of wills.⁸ By a statute passed in the year 1857, the Court of Probate was created, and all probate jurisdiction formerly exercised by other courts was transferred to it.⁹ Afterwards (in 1873) the Supreme Court of Judicature Act united and consolidated together as one Supreme Court of Judicature all existing courts of which the Court of Probate was one.¹⁰

(2) *In United States* — (a) **State Courts and Officers.** — In the United States, probate jurisdiction is vested by statute in local courts, of which there is generally one for each county. The courts are variously designated as courts of probate, surrogates' courts, orphans' court, etc., and in some states this jurisdiction is conferred on the county court, or some other local court having common-law powers.¹¹

1. **Right of Party to Withdraw.** — *Sawyer v. Dozier*, 5 Ired. L. (27 N. Car.) 97; *Eichert's Estate*, 155 Pa. St. 59.

2. **Parties Cannot Submit Controversy to Arbitration.** — *Matter of Carpenter*, 127 Cal. 582.

3. **Compromise by Contestant.** — *Seip's Estate*, 163 Pa. St. 423, 43 Am. St. Rep. 803.

4. **Probate Not a Divisible Proceeding.** — *Frazier v. Wayne Circuit Judge*, 39 Mich. 198.

5. **Removal to Federal Court.** — *Fraser v. Jenkinson*, 106 U. S. 191.

6. **Probate a Judicial Act — Illinois.** — *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879. *Kentucky.* — *Payne's Will*, 4 T. B. Mon. (Ky.) 424.

Mississippi. — *Fotherree v. Lawrence*, 30 Miss. 416.

Missouri. — *Stowe v. Stowe*, 140 Mo. 594; *Jourden v. Meier*, 31 Mo. 40.

New Jersey. — *Quidort v. Pergeaux*, 18 N. J. Eq. 472; *Ryno v. Ryno*, 27 N. J. Eq. 522.

North Carolina. — *McClure v. Spivey*, 123 N. Car. 678.

Ohio. — *Bailey v. Bailey*, 8 Ohio 239.

Pennsylvania. — *Holliday v. Ward*, 19 Pa. St. 485, 57 Am. Dec. 671; *Lovett v. Mathews*,

24 Pa. St. 330; *Barker v. McFerran*, 26 Pa. St. 211; *Shoenberger's Estate*, 139 Pa. St. 132.

See also *Fouvergne v. Municipality No. 2*, 18 How. (U. S.) 470, holding that a decision of the alcalde of New Orleans in 1792, declaring a will valid, is the judicial act of a court of competent jurisdiction.

Under the *Illinois* statute of 1837 it was held that probate was a ministerial and not a judicial act. *Ferguson v. Hunter*, 7 Ill. 657. See also *Ayres v. Clinefelter*, 20 Ill. 465; *Wardwell v. McDowell*, 31 Ill. 364. But this statute was never regarded with favor and was repealed in 1849. See *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879.

7. **Probate by Clerk of Court in Vacation.** — *Snuffer v. Howerton*, 124 Mo. 637. As to the jurisdiction of the clerk of the court in vacation, see *infra*, this title, *Jurisdiction*.

8. **Former Probate Jurisdiction in England.** — 1 Williams on Executors (7th Am. ed.) 337.

9. **Court of Probate Act.** — 20 & 21 Vict., c. 77.

10. **Supreme Court of Judicature Act.** — 36 & 37 Vict., c. 66.

11. **Probate Jurisdiction in the United States.** — See the statutes of the several states. See also

Officers Authorized to Admit Wills to Probate. — In some states the statutes provide that the clerk of the court of probate or other designated officer may admit wills to probate during the vacation of the courts,¹ or when the judge thereof cannot act for any other reason,² but the action of such clerk or officer must be confirmed by the court.³

(b) **Federal Courts.** — It is a well-settled principle that the federal courts have no original probate jurisdiction,⁴ though they may entertain a suit between citizens of different states for the construction of a will,⁵ to set aside a will which has been admitted to probate.⁶ Logically, therefore, an original proceeding in a probate court for the probate of a will, or an appeal therefrom, would seem not to be removable to a federal court, and it has been held so in several cases,⁷ but the decisions on this question are conflicting.⁸

b. JURISDICTIONAL FACTS — (1) *Death of Testator.* — Before any court can take jurisdiction of an application for the probate of a will, it is essential that the paper propounded as a will should have become effective as such by the death of the testator. Therefore an order or decree admitting a paper to probate is absolutely void, if it afterwards appears that the testator was not, in fact, dead.⁹

Ante-mortem Probate Authorized by Statute. — By a comparatively recent statute in one of the states, it was provided that a testator might procure the probate of his will during his lifetime,¹⁰ but this statute was soon held to be inoperative as not within any recognized judicial power.¹¹

(2) *Residence Within Jurisdiction of Court.* — Where the testator was an inhabitant of the state at the time of his death, the probate court of the county in which he then had his residence has exclusive original jurisdiction

the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 759.

As to the legislation in *Arkansas* on the subject of courts of probate, see *Hogane v. Hogane*, 57 Ark. 508.

In *Pennsylvania* the probate jurisdiction is vested in a judicial officer in each county styled the Register of Wills. *Morris v. Vanderen*, 1 Dall. (Pa.) 66; *Logan v. Watt*, 5 S. & R. (Pa.) 213; *Guthrie v. Kerr*, 85 Pa. St. 303; *Hoopes's Estate*, 12 Pa. Co. Ct. 331, 2 Pa. Dist. 509; *Brightly's Purdon Dig.* (12th ed.), p. 1847, § 5.

1. Probate by Clerk of Court in Vacation. — *Petty v. Ducker*, 51 Ark. 281; *Fuentes v. McDonald*, 85 Tex. 132. See also the various local statutes.

2. Disqualification of Probate Judge. — *Hooks v. Barnett*, 38 Ala. 607.

Probate Judge Not Disqualified by Being Subscribing Witness. — *Patten v. Tallman*, 27 Me. 17.

Relationship by Marriage Not a Disqualification. — *Marston, Petitioners*, 79 Me. 25.

Legacy to Probate Judge — Preliminary Orders Held Valid. — *McFarlane v. Clark*, 39 Mich. 44, 33 Am. Rep. 346.

For a Full Discussion as to matters which disqualify a judge to act, see the title JUDGE, vol. 17, p. 732 et seq.

3. Confirmation of Probate Granted in Vacation. — *Petty v. Ducker*, 51 Ark. 281. Unless there is a confirmation, appropriately evidenced by an order to that effect, the will is not probated. *Smith v. Estes*, 72 Mo. 310; *Snuffer v. Howerston*, 124 Mo. 637; *Rothwell v. Jamison*, 147 Mo. 601. See also the various local statutes.

4. Federal Courts Have No Probate Jurisdiction. — *Fouvergne v. Municipality No. 2*, 18 How.

(U. S.) 470; *Gaines v. Fuentes*, 92 U. S. 10; *Ellis v. Davis*, 109 U. S. 485; *McDonnell v. Jordan*, 178 U. S. 229; *Cilley v. Patten*, 62 Fed. Rep. 498; *Hargroves v. Redd*, 43 Ga. 142; *Burnside's Succession*, 34 La. Ann. 730.

5. Suits for Construction of Wills. — *Wood v. Paine*, 66 Fed. Rep. 807.

6. Suits to Set Aside Probated Wills. — *Richardson v. Green*, (C. C. A.) 61 Fed. Rep. 423; *Oakley v. Taylor*, 64 Fed. Rep. 245; *Kirby v. Chicago, etc., R. Co.*, 106 Fed. Rep. 551; *Williams v. Crabb*, (C. C. A.) 117 Fed. Rep. 193. Compare *Reed v. Reed*, 31 Fed. Rep. 49.

7. Probate Proceeding Not Removable to Federal Court. — *In re Cilley*, 58 Fed. Rep. 977; *In re Aspinwall*, 83 Fed. Rep. 851; *Hargroves v. Redd*, 43 Ga. 142.

8. For a Full Discussion as to the removability of probate proceedings, see the title REMOVAL OF CAUSES, 18 ENCYC. OF PL. AND PR. 174 et seq.

9. Jurisdictional Facts — Death of Testator — Illinois. — *Thomas v. People*, 107 Ill. 517, 47 Am. Rep. 458.

Kentucky. — *Moore v. Tanner*, 5 T. B. Mon. (Ky.) 42, 17 Am. Dec. 35.

Nebraska. — *Thompson v. Thompson*, 30 Neb. 489, 53 Neb. 490.

New York. — *Roderigas v. East River Sav. Inst.*, 76 N. Y. 316, 32 Am. Rep. 309; *Prout v. McNab*, 6 Dem. (N. Y.) 152.

Pennsylvania. — *Devlin v. Com.*, 101 Pa. St. 273, 47 Am. Rep. 710.

And see generally the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 759.

10. Ante-mortem Probate — Michigan Statute. — *Pub. Acts Mich.* 1883, No. 25.

11. Michigan Statutes Held Imperative. — *Lloyd v. Chambers*, 56 Mich. 236, 56 Am. Rep. 378.

in the matter of the probate of his will in that state,¹ and it is proper that the will should be first submitted to the forum of the domicil, but this is not absolutely necessary.² In order to give this exclusive jurisdiction, the testator must have been domiciled in the state,³ and he must have had a permanent and not a mere temporary residence in the county.⁴

Domicil of Married Woman. — The rule of the common law that a married woman cannot have a separate domicil from her husband⁵ is applicable in testamentary matters as well as in other respects, and where there has been no statutory modification of the rule, a married woman's will must be proved in the probate court of the county of her husband's residence, though, at the time of her death, she was living apart from her husband and in another jurisdiction.⁶ But modern legislation removing the disabilities of married women, and modifying the ancient doctrine of the unity of husband and wife, has done much to change the rule under consideration, and where there has been such legislation it has been held that a married woman, living apart from her husband, may acquire a domicil on her own account so as to give the courts thereof jurisdiction of the probate of her will.⁷

Determination as to Domicil. — When a will is presented for probate, the court has jurisdiction to decide the question of the residence of the testator, and the decision in that question is generally held to be conclusive on collateral attack.⁸ The admission of the will to probate is in effect a decision on the

1. Testator's Last Place of Residence — *Alabama*. — Herbert v. Hanrick, 16 Ala. 581; Merrill v. Morrissett, 76 Ala. 433; McDonnell v. Farrow, (Ala. 1902) 31 So. Rep. 475.

California. — Matter of Harlan, 24 Cal. 182, 85 Am. Dec. 58; Matter of Wickes, 128 Cal. 270.

Colorado. — Corrigan v. Jones, 14 Colo. 311.
Delaware. — St. James Church v. Walker, 1 Del. Ch. 284.

Iowa. — Olson's Will, 63 Iowa 145.

Kentucky. — Payne's Will, 4 T. B. Mon. (Ky.) 424; Barnes v. Edward, 17 B. Mon. (Ky.) 640; Drake v. Vaughan, 6 J. J. Marsh. (Ky.) 147; Miller v. Swan, 91 Ky. 36.

Maryland. — Stanley v. Safe Deposit, etc., Co., 87 Md. 450.

Massachusetts. — Harvard College v. Gore, 5 Pick. (Mass.) 370.

Missouri. — Stewart v. Pettus, 10 Mo. 755.

New York. — Matter of Zerega, 58 Hun (N. Y.) 505; Matter of Jones, (Surrogate Ct.) 19 Misc. (N. Y.) 80; Matter of McKeon, (Surrogate Ct.) 26 Misc. (N. Y.) 464.

Ohio. — Limes v. Irwin, 16 Ohio St. 488; Converse v. Starr, 23 Ohio St. 491.

See also the statutes of the several states prescribing the venue in the matter of the probate of wills.

Domicil at Time of Death and Not at Time of Making Will Governs. — Olson's Will, 63 Iowa 145; Nat v. Coons, 10 Mo. 543; Stewart v. Pettus, 10 Mo. 755; Tarbell v. Walton, 71 Vt. 406.

2. Probate at Domicil in First Instance Not Absolutely Necessary. — Hyman v. Gaskins, 5 Ired. L. (27 N. Car.) 267. See also *infra*, this section, *Situs of Assets*.

If a will is proved in the first instance out of the domicil, the original will must still be presented in order to obtain a domiciliary probate. An authenticated copy of the probate in another state is not sufficient. Bate v. Incisa, 59 Miss. 513; Stark v. Parker, 56 N. H. 481; Wallace v. Wallace, 3 N. J. Eq. 616;

Alexander's Will, Tuck. (N. Y.) 114. But see McDonald's Estate, 130 Pa. St. 480.

3. Domicil in State Requisite to Exclusive Jurisdiction in County of Residence. — Merrill v. Morrissett, 76 Ala. 433. As to the subject of domicil generally, see the title DOMICIL, vol. 10, p. 6.

4. Temporary Residence Not Sufficient. — Harvard College v. Gore, 5 Pick. (Mass.) 370; Matter of Brant, (Surrogate Ct.) 30 Misc. (N. Y.) 14.

5. See the title DOMICIL, vol. 10, p. 32.

6. Jurisdiction of Married Woman's Will — Common Law Rule. — Matter of Wickes, 128 Cal. 270. See also Dolphin v. Robins, 7 H. L. Cas. 390.

In France, naturalization is purely personal, and therefore an English woman who marries a naturalized citizen of France does not thereby acquire her husband's domicil, but retains her domicil of origin for the purpose of the probate of her will. In Goods of Brown-Sequard, 6 Reports 565.

7. Statutory Rule as to Woman Living Apart from Husband. — Matter of Florence, 54 Hun (N. Y.) 328, 119 N. Y. 661. And see generally the title DOMICIL, vol. 10, p. 32 *et seq.*; HUSBAND AND WIFE, vol. 15, p. 785.

8. Decision as to Domicil Conclusive on Collateral Attack. — See generally *infra*, this title, *Operation and Effect of Decree or Order — Matters Adjudicated by Probate*.

In this respect there is a distinction between the probate of a decedent's will in the wrong county and the probate of a will of a person who is not, in fact, dead. If the testator is dead, jurisdiction exists in some court to admit the will to probate, and the court to which the will is presented must decide whether it or some other court has jurisdiction. If, on the other hand, the testator is not dead, there is no jurisdiction in any court to take proof of the will, and therefore the act of the court in assuming jurisdiction in such a case is absolutely void. See *supra*, this section, *Death of*

question of domicil.¹

Proof of Domicil. — The evidence by which the domicil of a person may be proved has been treated elsewhere in this work.² According to the principles there stated, a recital in a will of the testator's domicil is evidence that such was his domicil at the time of his death, but it is not conclusive.³ And so, too, the payment of taxes on personal property is evidence of domicil at the place of payment.⁴

Burden of Proof. — The burden of proving the domicil of the testator is on the proponent.⁵

(3) *Situs of Assets.* — In case a testator leaves property in a state other than that in which he had his residence, it is generally necessary to prove the will and to obtain the letter testamentary in the state where such property is situated.⁶ The jurisdictional fact is the existence of assets within the state.⁷ Under such circumstances, the probate court of the county in which the property is situated has jurisdiction in the premises,⁸ and even the original probate may be had in that county⁹ though, as a general rule, a will should be proved in this first instance at the testator's domicil.¹⁰

Wills of Real Estate. — If real estate is disposed of by a foreign will, probate in the proper court of the *locus rei sitæ* is always necessary.¹¹

2. Nature and Extent of Probate Jurisdiction — In General. — The jurisdiction of the courts of probate is original, peculiar, and exclusive,¹² and though

Testator. But see *Hyman v. Gaskins*, 5 Ired. L. (27 N. Car.) 267.

Under the *Kentucky* statute it is held that the probate of a will may be collaterally attacked on the ground that the testator was not, at the time of his death, a resident of the county in which the probate was made. The statute in question provides that the probate of a will shall be conclusive except as to the jurisdiction of the court. *Miller v. Swan*, 91 Ky. 36.

1. Admission of Will to Probate a Decision as to Domicil. — *Corrigan v. Jones*, 14 Colo. 311; *Stanley v. Safe Deposit, etc., Co.*, 87 Md. 450. And see *infra*, this title, *Operation and Effect of Decree or Order*.

2. See the title *DOMICIL*, vol. 10, p. 20 et seq.

3. Recitals in Will. — *Corrigan v. Jones*, 14 Colo. 311. See also *Matter of Cleveland*, (Surrogate Ct.) 28 Misc. (N. Y.) 369; *Matter of Brant*, (Surrogate Ct.) 30 Misc. (N. Y.) 14.

4. Payment of Taxes. — *Harvard College v. Gore*, 5 Pick. (Mass.) 370.

5. Burden of Proof. — *Matter of Gould*, 131 N. Y. 630.

6. See generally the title *FOREIGN EXECUTORS AND ADMINISTRATORS*, vol. 13, p. 915.

7. Assets Necessary to Give Jurisdiction of Non-resident's Will. — *Fletcher v. Sanders*, 7 Dana (Ky.) 347; *In re Southard*, 48 Minn. 37; *Wilson v. Cox*, 49 Miss. 538.

Assets Brought into Jurisdiction After Death. — *Matter of Hopper*, 5 Dem. (N. Y.) 242. See also the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 763, 764.

8. Probate in County Where Property Is Situated. — *Jaques v. Horton*, 76 Ala. 238; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 52; *Fletcher v. Sanders*, 7 Dana (Ky.) 347; *Wells v. Wells*, 35 Miss. 638; *Matter of Gordon*, 50 N. J. Eq. 397; *Gilman v. Gilman*, 1 Redf. (N. Y.) 354; *Hyman v. Gaskins*, 5 Ired. L. (27 N. Car.) 267; *Matter of Blymeyer*, Ohio Prob. 14.

Situs of Assets. — A judgment exists locally in the county where it was entered. *Thomas*

v. Tanner, 6 T. B. Mon. (Ky.) 58. As to the situs of assets, see the title *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 764 et seq.

Disposal of Property as Affecting Right to Probate. — It has been held in *Mississippi* that only such foreign wills as dispose of property in that state are always allowed to be probated there. *Wilson v. Cox*, 49 Miss. 538.

9. Situs of Assets as Ground of Original Jurisdiction. — *Varner v. Bevil*, 17 Ala. 286; *Jaques v. Horton*, 76 Ala. 238; *Still v. Woodville*, 38 Miss. 646; *Matter of Coursen*, 4 N. J. Eq. 408; *Matter of Lawrence*, 7 N. J. Eq. 215; *Matter of Gordon*, 50 N. J. Eq. 397; 52 N. J. Eq. 317; *Matter of Clayson*, 26 Wash. 253. See also *Pepper's Estate*, 148 Pa. St. 5, reversing 9 Pa. Co. Ct. 507, 27 W. N. C. (Pa.) 513; *Brown's Estate*, 13 Pa. Co. Ct. 289, 2 Pa. Dist. 730.

10. See *supra*, this section, *Residence Within Jurisdiction of Court*.

11. Local Probate of Will of Land. — *Cabanne v. Skinner*, 56 Mo. 357; *Van Syckel v. Beam*, 110 Mo. 589; *Nelson v. Potter*, 50 N. J. L. 324; *Flannery's Will*, 24 Pa. St. 502; *Thomason's Estate*, 13 Phila. (Pa.) 376, 37 Leg. Int. (Pa.) 290; *Walton v. Hall*, 66 Vt. 455. As to the rules governing the probate of wills of real estate, see *infra*, this title, *What Papers Require Probate — Distinction Between Real and Personal Estate*.

12. Exclusive Original Jurisdiction — England. — *Douglas v. Cooper*, 3 Myl. & K. 378.

Alabama. — *McGrew v. McGrew*, 1 Stew. & P. (Ala.) 30; *Apperson v. Cottrell*, 3 Port. (Ala.) 61; *McElroy v. McElroy*, 5 Ala. 81; *Herbert v. Hanrick*, 16 Ala. 581; *Sowell v. Sowell*, 41 Ala. 359.

Arkansas. — *Hynds v. Imboden*, 5 Ark. 385.

Colorado. — *Mitchell v. Hughes*, 3 Colo. App. 43; *Clough v. Clough*, 10 Colo. App. 433.

Connecticut. — *Fortune v. Buck*, 23 Conn. 1.

Georgia. — *Sperber v. Balster*, 66 Ga. 317.

Illinois. — *Wild v. Sweeney*, 84 Ill. 213; *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879.

limited or restricted to a particular subject-matter, yet such courts are not, strictly speaking, of an inferior or limited jurisdiction, but, within their province, are courts of general jurisdiction.¹

Wills of Real Estate. — The jurisdiction of the probate courts as constituted in the *United States* is not limited to wills which dispose of personal property, but it extends also to wills of real estate.²

Construction of Will. — The general rule is that courts of probate are not courts of construction, therefore they are not authorized to determine the validity and effect of the provisions of a will, but only whether the paper offered for probate was duly executed and published by the testator as his last will and testament, and whether he had mental capacity and legal power to make a will,³ though it is sometimes provided by statute that the validity of a bequest may be put in issue in the probate court and may be determined by that court.⁴

IV. NECESSITY OF PROBATE OR LETTERS OF ADMINISTRATION. — The Probate of a will is the judicial determination of its character and validity as such,⁵ and until it has been duly admitted to probate in the proper court it is wholly ineffectual as an instrument of title,⁶ unless it is admissible in evidence as an

Kentucky. — *Payne's Will*, 4 T. B. Mon. (Ky.) 427; *Hunt v. Hamilton*, 9 Dana (Ky.) 91; *Campbell v. West*, 3 B. Mon. (Ky.) 243; *Barnes v. Edward*, 17 B. Mon. (Ky.) 640; *Abbott v. Traylor*, 11 Bush (Ky.) 335.

Missouri. — *Banks v. Banks*, 65 Mo. 432; *Stowe v. Stowe*, 140 Mo. 594.

New Mexico. — *Bent v. Thompson*, 5 N. Mex. 408.

New York. — *Booth v. Kitchen*, 7 Hun (N. Y.) 255; *Anderson v. Anderson*, 112 N. Y. 104.

Oregon. — *Willamette Falls Canal, etc., Co. v. Gordon*, 6 Oregon 175; *Jones v. Dove*, 6 Oregon 188; *Hubbard v. Hubbard*, 7 Oregon 42.

Pennsylvania. — *Guthrie v. Kerr*, 85 Pa. St. 303.

Tennessee. — *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70, 94 Am. Dec. 184.

If a Court of Equity Has Jurisdiction in Any Case, it can be only one in which probate is, for some reason, not attainable in the court of ordinary. *Slade v. Street*, 27 Ga. 17.

A court of equity has no jurisdiction to enjoin the custodian of an alleged will from offering it for probate or to decree the cancellation of an alleged will on which no action has ever been taken by the court of ordinary. *Israel v. Wolf*, 100 Ga. 339.

Probate Not Compellable by Mandamus. — *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879.

1. Probate Courts Are Courts of General Jurisdiction. — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Matter of Coursen*, 4 N. J. Eq. 408. See also *infra*, this title, *Operation and Effect of Decree or Order*.

2. Probate Jurisdiction in United States Not Limited to Wills of Personality. — *Gaines v. Chew*, 2 How. (U. S.) 619; *Hall v. Hall*, 47 Ala. 290; *Brock v. Frank*, 51 Ala. 85; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Beyer v. Le Fevre*, 17 App. Cas. (D. C.) 238; *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 181.

3. Probate Courts Not Courts of Construction — *England.* — *Barnes v. Vincent*, 5 Moo. P. C. 201.

Alabama. — *Hall v. Hall*, 38 Ala. 131.

District of Columbia. — *St. John's Parish v. Bostwick*, 8 App. Cas. (D. C.) 452.

Georgia. — *Wetter v. Habersham*, 60 Ga. 194.

Michigan. — *Brown v. Just*, 118 Mich. 678.

Ohio. — *In re Oskamp*, 5 Ohio Dec. 584, 7 Ohio N. P. 665.

South Carolina. — *Jolliffe v. Fanning*, 10 Rich. L. (S. Car.) 186.

4. Statutory Authority of Probate Court to Determine Validity. — *Matter of Lampson*, (Surrogate Ct.) 22 Misc. (N. Y.) 198. Compare the statutes in other jurisdictions.

5. See *supra*, this title, *Definition*.

6. Necessity of Probate in General — *England.* — *Rex v. Netherseal*, 4 T. R. 258; *Stone v. Forsyth*, 2 Doug. 707.

United States. — *Armstrong v. Lear*, 12 Wheat. (U. S.) 175; *Baldwin v. Wylie*, 2 Hayw. & H. (D. C.) 126, 30 Fed. Cas. No. 18,228.

Alabama. — *Moore v. Lewis*, 21 Ala. 580; *Kinnebrew v. Kinnebrew*, 35 Ala. 628; *Hawkins v. Dumas*, 41 Ala. 391; *Jordan v. Thompson*, 67 Ala. 469; *Inge v. Johnston*, 110 Ala. 650.

Arkansas. — *Crow v. Powers*, 19 Ark. 424; *James v. Williams*, 31 Ark. 175. But see *Arrington v. McLemore*, 33 Ark. 759.

Georgia. — *Hester v. Young*, 2 Ga. 31; *Rogers v. Rogers*, 78 Ga. 688.

Illinois. — *Harris v. Douglas*, 64 Ill. 466.

Kansas. — *Meyers v. Smith*, 50 Kan. 6.

Maine. — *Cousens v. Advent Church*, 93 Me. 292.

Massachusetts. — *Dublin v. Chadbourn*, 16 Mass. 442.

Mississippi. — *Fotherree v. Lawrence*, 30 Miss. 416; *Rothschild v. Hatch*, 54 Miss. 554.

Nebraska. — *Pettit v. Black*, 13 Neb. 150; *Thompson v. Thompson*, 30 Neb. 489.

New Hampshire. — *Strong v. Perkins*, 3 N. H. 517.

New York. — *Harison v. Caswell*, 32 N. Y. App. Div. 134.

Ohio. — *Swazy v. Blackman*, 8 Ohio 5.

Oregon. — *Willamette Falls Canal, etc., Co. v. Gordon*, 6 Oregon 175; *Jones v. Dove*, 6 Oregon 188.

Texas. — *Paschal v. Acklin*, 27 Tex. 173;

ancient document.¹ An unprobated will is, however, capable of conveying an interest in the property devised, so as to be the foundation of an equity in and a claim to the property.²

Probate After Commencement of Action. — A will is admissible in evidence in an action by a devisee under it, though probate was not had until the action had been commenced.³

When Probate May Be Dispensed With. — The probate of a will may be dispensed with where the persons interested in the estate under the will, being under no disability, divide the estate, pursuant to an agreement among themselves,⁴ or where the testator, before his death, conveyed to the devisees all the property which he had devised to them,⁵ or where the will makes no other disposition of the testator's property than had there been no will.⁶

Testator Cannot Waive Probate. — The testator cannot waive probate, because it is only by the probate that the character of the will as such is established.⁷

Probate Not a Matter of Discretion. — The court has no discretion but to admit to probate a will which appears to answer fully all the requirements of the statute.⁸

Necessity of Letters of Administration. — The necessity of letters of administration in case the decedent died intestate or left no executor competent and willing to act has been treated elsewhere in this work.⁹

V. WHAT PAPERS REQUIRE PROBATE — 1. Testamentary Papers in General. — Every instrument of a Testamentary Character must, as a general rule, be admitted to probate in the proper court before it becomes effectual to support any rights under it.¹⁰ There was, at one time, a distinction in this respect between wills relating wholly to real estate and wills relating either in whole or in part to personalty, but the distinction is now obsolete.¹¹ In determining therefore whether probate is necessary in any case, it must be first determined whether the particular instrument possesses the testamentary character, that is, whether it is a will. This question will be considered in another part of this work.¹² But it may be stated here that, as a general rule, a paper which

Tynan v. Paschal, 27 Tex. 286; *Brundige v. Rutherford*, 57 Tex. 26; *Ochoa v. Miller*, 59 Tex. 460; *Moursund v. Priess*, 84 Tex. 554; *Naugher v. Patterson*, 9 Tex. Civ. App. 168.

Vermont. — *Tucker v. Starks*, Brayt. (Vt.) 99.

See also the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 744, note 7.

In *California* an unprobated will executed under the *Mexican* government is not a nullity because the *Mexican* law did not require probate. The due execution of such a will may be proved to sustain title to property thereunder. *Adams v. De Cook*, McAll. (U. S.) 253, 1 Fed. Cas. No. 51; *Adams v. Norris*, 23 How. (U. S.) 353; *Castro v. Castro*, 6 Cal. 158.

1. **Ancient Documents.** — *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; *Giddings v. Smith*, 15 Vt. 344. And see generally the title ANCIENT DOCUMENTS, vol. 2, p. 322.

The rule admitting a will in evidence without proof, as an ancient instrument, embraces no instrument which is not valid on its face and which does not contain every essential requirement of the law. *Meegan v. Boyle*, 19 How. (U. S.) 130.

2. **Unprobated Will as Foundation of Equity in and Claim to Property.** — *Olleman v. Kelgore*, 52 Iowa 38; *Pettit v. Black*, 13 Neb. 142.

3. **Probate After Commencement of Action.** — *Otto v. Doty*, 61 Iowa 23.

4. **Division of Estate by Beneficiaries Without Probate of Will.** — Such division invests the parties with complete equitable titles to the

property allotted to them. *Carter v. Owens*, 41 Ala. 217; *Lloyd's Estate*, 24 Pa. Co. Ct. 567, 10 Pa. Dist. 207; *Stringfellow v. Early*, 15 Tex. Civ. App. 597. See also *Walton v. Ambler*, 29 Neb. 626; *Fox v. Fee*, 24 N. Y. App. Div. 314.

5. **Conveyance to Devisees.** — *Letts v. Letts*, 73 Mich. 138.

6. **Will Making Same Disposition as Law Would Have Made.** — *Campbell v. Webster*, 31 Miss. 345. See also the title WILLS.

7. **Testator Cannot Waive Probate.** — *Harris v. Douglas*, 64 Ill. 466.

8. **Probate Not Discretionary.** — *Doran v. Mullen*, 78 Ill. 342.

A parol agreement between the testator and another with respect to the title to the property purporting to be devised will not authorize the surrogate to refuse probate. *Heath v. Heath*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 521.

9. **Necessity of Letters of Administration.** — See the title EXECUTORS AND ADMINISTRATORS, vol. II, pp. 741 *et seq.*, 798 *et seq.*

10. See *infra*, this title, *Necessity of Probate or Letters of Administration*.

11. See *infra*, this section, *Distinction Between Real and Personal Estate*.

12. **What Constitutes a Will.** — See generally the title WILLS.

Letter of Attorney Held Entitled to Probate as a Will. — *Pritchett's Estate*, 9 Pa. Co. Ct. 600, 28 W. N. C. (Pa.) 167.

neither disposes of any property nor appoints an executor has no testamentary character so as to enable the court to grant probate of it.¹

Will Containing Invalid Provisions. — If a will has been properly executed by a competent testator, duly attested as required by law, and there has been no fraud or undue influence in its procurement, it is entitled to probate in its entirety though some of its provisions are invalid, obscure, or not capable of execution.² It has also been held that a duly executed will must be admitted to probate, even though it contains no provision which can be executed or which is valid under the law.³

In the Case of Successive Wills, only the one last executed may be admitted to probate, if the earlier will or wills have been revoked by the last one.⁴

A Will Made in the Execution of a Power must be proved in the same manner as an ordinary will.⁵

Property Transferred by Testator in Lifetime. — The fact that the testator had transferred all his property during his lifetime does not take away the right to prove his will, and it is immaterial whether the will was made before or after the transfer. In either case, the devisee or legatee may have the will proved to enable him to contest the transfer; and if a devisee is also the grantee, he may have the will proved to enable him to claim under it; in case the deed should be held to be invalid.⁶

Will of Deceased Sovereign. — In *England* it seems that no court has jurisdiction to grant probate of the will of a deceased sovereign.⁷

2. Distinction Between Real and Personal Estate — *a. RULE IN ENGLAND.* — Before the passage of the Court of Probate Act in 1857, the ecclesiastical court could not grant probate of a will unless it operated on personal estate, and therefore a will which affected real estate only and no personalty was not subject to probate.⁸ But in the case of a mixed will, that is, one affecting both realty and personalty, probate was required,⁹ though it had no effect so far as the realty was concerned.¹⁰

Effect of Court of Probate Act. — The Court of Probate Act, which created a court of probate and transferred to it all matters of probate jurisdiction, did not have the effect of requiring the probate of a will of real estate only,¹¹ though it provided that in a proceeding for probate in solemn form of a will which did not affect personal estate alone, the heir at law, devisees, and other persons having or claiming an interest in the real estate devised, should be

1. Paper neither Disposing of Property nor Appointing Executor. — *Straubensee v. Monck*, 8 Jur. N. S. 1159, 3 Sw. & Tr. 6; *Lucas v. Brooks*, 18 Wall. (U. S.) 436. Thus, an instrument which appoints no executor and merely excludes one of the testator's sons from participation in the estate, without making any other disposition of the property, has been held not entitled to probate. *Coffman v. Coffman*, 85 Va. 459, 17 Am. St. Rep. 69.

2. Partial Invalidity of Will. — *Pool v. Pool*, 35 Ala. 12; *Hawley v. Brown*, 1 Root (Conn.) 494; *Lusk v. Lewis*, 32 Miss. 297; *Cameron v. Watson*, 40 Miss. 191; *McClary v. Stull*, 44 Neb. 175; *George v. George*, 47 N. H. 27; *In re John*, 30 Oregon 494; *Werkheiser v. Werkheiser*, 6 W. & S. (Pa.) 184; *Hauberger v. Root*, 6 W. & S. (Pa.) 431; *Matter of Baxter*, 1 Brews. (Pa.) 451; *Hegarty's Appeal*, 75 Pa. St. 503.

3. Will Without Any Valid Provision. — *Cox v. Cox*, 101 Mo. 169. But see *contra*, *Ralston's Estate*, 1 Chest. Co. Rep. (Pa.) 482.

4. Successive Wills. — See *infra*, this section, *Will Contained in Several Papers*.

5. Will Made in Execution of Power. — *Turner v. Hughes*, 4 Hag. 30; *Goldsworthy v. Crossley*, 4 Hare 140; *Tatnall v. Hankey*, 2 Moo. P.

C. 342; *Newburyport Bank v. Stone*, 13 Pick. (Mass.) 420; *Heath v. Withington*, 6 Cush. (Mass.) 497; *Van Wert v. Benedict*, 1 Bradf. (N. Y.) 114.

6. Property Transferred by Testator in Lifetime. — *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538; *Young v. Crowder*, 2 Sneed (Tenn.) 156.

7. Will of Deceased Sovereign. — In *Goods of King George the Third*, 1 Add. Ecc. 255; In *Goods of King George III*, 8 Jur. N. S. 1134, 3 Sw. & Tr. 199; *Ryves v. Wellington*, 9 Beav. 579.

8. Wills of Realty Only Not Entitled to Probate. — *Habergham v. Vincent*, 2 Ves. Jr. 230; *Partridge's Case*, 2 Salk. 552; In *Goods of Drummond*, 2 Sw. & Tr. 8.

Appointment of Executor. — As to the effect of the appointment of an executor by a will dealing with real estate only, see *infra*, this section, *Paper Appointing Executor*.

9. Probate of Mixed Will. — *Partridge's Case*, 2 Salk. 553.

10. See *infra*, this title, *Operation and Effect of Decree or Order*.

11. Probate of Will of Realty Only Not Required by Court of Probate Act. — In *Goods of Bootle*, L. R. 3 P. & D. 177.

cited, and that the decree of the court in the premises should be conclusive as to the validity or invalidity of the will, as the case might be.¹

Doctrine of Equitable Conversion. — The question has been raised, whether a will which effects an equitable conversion of realty into personalty is to be regarded, in respect to the property so converted, as a will of personal estate. This question was first presented while the Court of Probate Act was in force, and the court of probate refused to recognize the doctrine of equitable conversion as giving the jurisdiction over a will limited to real property. The ruling was seemingly based on the ground that such court, having only the jurisdiction formerly exercised by the ecclesiastical, manorial, and peculiar courts, was not the proper tribunal to determine whether or not there was an equitable conversion.² The question arose again after the court of probate and other courts had been consolidated into one by the Judicature Act, and it was held by the probate division that there is no difference in the law to be administered in that division and in the other divisions of the high court of justice, but that each is to ascertain what the law is, whether legal or equitable principles are involved. In consequence of this changed condition, it was held by the probate division that a will which converted real estate into personalty would be treated as a will of personalty and that it should therefore be admitted to probate as such.³

Present Rule in England. — The rule respecting the probate of wills of realty, as stated above, has been radically changed by recent legislation in England. By the Conveyancing Act of 1881 it is provided that real estate vested on any trust, or by way of mortgage, in any person solely, shall, on his death, devolve on and become vested in his personal representative,⁴ and the Land Transfer Act of 1897 contains the same provision in regard to real estate to which a decedent was entitled in fee simple for his own benefit;⁵ and in order that their estates may vest in the executor, the will by which the executor is appointed must be admitted to probate.⁶

6. RULE IN UNITED STATES. — The distinction between wills of real estate and wills of personalty in regard to the necessity of probate is now practically obsolete in the United States, and under the existing probate laws of the several states, all wills must now be proved in the probate court, regardless of the property affected.⁷

3. Paper Appointing Executor. — The authorities hold that the bare nomination of an executor without appointing anything to be done by him or giving any legacy is sufficient to make the instrument a will, and that as a will it must be proved,⁸ even though the executor renounces the executorship.⁹

1. Probate of Will Affecting Both Real and Personal Estate. — 20 & 21 Vict., c. 77, § 61 *et seq.* And see *Barracrough v. Greenhough*, L. R. 2 Q. B. 612.

2. Doctrine of Equitable Conversion Not Recognized by Court of Probate. — In *Goods of Barden*, L. R. 1 P. & D. 325.

3. Doctrine of Equitable Conversion Recognized by Probate Division. — In *Goods of Gunn*, 9 P. D. 242.

4. Conveyancing Act. — 44 & 45 Vict., c. 41, § 30.

5. Land Transfer Act. — 60 & 61 Vict., c. 65, § 1.

6. 2 Steph. Com. (13th ed.), p. 193.

7. Probate of Wills of Realty in United States — United States. — *Wilkinson v. Leland*, 2 Pet. (U. S.) 627; *Gaines v. Chew*, 2 How. (U. S.) 619; *Moore v. Greene*, 2 Curt. (U. S.) 202, 17 Fed. Cas. No. 9,763; *Tompkins v. Tompkins*, 1 Story (U. S.) 547; *McClaskey v. Barr*, 54 Fed. Rep. 781, *affirming* 47 Fed. Rep. 169; *Adams v. De Cook*, McAll. (U. S.) 253.

Arkansas. — See *Campbell v. Garven*, 5 Ark. 485.

Indiana. — *Rogers v. Stevens*, 8 Ind. 464.

Massachusetts. — *Shumway v. Holbrook*, 1 Pick. (Mass.) 114, 11 Am. Dec. 153.

Missouri. — *Keith v. Keith*, 97 Mo. 223; *Snuffer v. Howerton*, 124 Mo. 637.

Nebraska. — *Pettit v. Black*, 13 Neb. 142.

Ohio. — *Anderson v. Evans*, 2 Ohio Dec. (Reprint) 502, 3 West. L. Month. 371; *Woodbridge v. Banning*, 14 Ohio St. 328.

As to the early rule in *Virginia*, see *Bagwell v. Elliott*, 2 Rand. (Va.) 190.

8. Paper Merely Appointing Executor. — *Beard v. Beard*, 3 Atk. 72; In *Goods of Lancaster*, 1 Sw. & Tr. 464; In *Goods of Leese*, 2 Sw. & Tr. 442; *Brownrigg v. Pike*, 7 P. D. 61; *Miller v. Miller*, 32 La. Ann. 437; *Morey v. Sohler*, 63 N. H. 507, 56 Am. Rep. 538; *In re John*, 30 Oregon 494.

9. Renunciation by Executor. — In *Goods of Jordan*, L. R. 1 P. & D. 555, in which it was held that the testamentary character of an in-

Will Limited to Real Estate. — It has already been seen that formerly a will limited to real estate was not within the jurisdiction of the probate court.¹ In case such a will also contained the appointment of an executor, there was a question as to whether it was still to be regarded as a will of real estate only, and therefore not entitled to probate, or whether the appointment of the executor was sufficient to bring it within the probate jurisdiction. Under such circumstances it would seem, on principle, that the instrument would have been entitled to probate, if the testator left any personalty, because the title to such personalty would vest in the executor;² and some authorities lay down the rule without qualification that a will which appoints an executor is entitled to probate though it deals only with real estate.³

4. Paper Appointing Guardian. — It has been held in *England* that a paper which does not purport to dispose of any property and contains no appointment of an executor, but merely appoints a guardian of a minor, is not entitled to probate,⁴ but in the *United States* it seems that probate of such a will is necessary.⁵

5. Will Contained in Several Papers. — It is not essential that a will should consist of a single paper, and in practice it often occurs that a testator leaves several papers constituting his will.⁶ When this condition exists, all the papers constituting the will must be included in the probate, regardless of their form, provided they are duly executed. Thus, in many cases, separate papers, each in testamentary form, have been admitted as a will.⁷ So, too, a paper not executed as a will may, by a proper reference in a duly attested

instrument nominating an executor could not be affected by anything occurring after the decedent's death, and therefore renunciation by the executor could not have the effect of making the decedent intestate.

1. Wills Limited to Real Estate. — See *supra*, this section, *Distinction Between Real and Personal Estate*.

2. Appointment of Executor by Will Dealing with Real Estate Only. — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 986 *et seq.*

In *Goods of Cubbon*, 11 P. D. 169, was an application for the probate of a will dealing with realty, but it appeared that the testator left a small amount of personal property. The court granted the probate on the ground that there was some personal estate and limited the grant to such personalty.

3. 1 Wms. Exr. (7th Am. ed.), p. 469. See also In *Goods of Hornbuckle*, 15 P. D. 149.

Compare In *Goods of Barden*, L. R. 1 P. & D. 325; *O'Dwyer v. Geare*, 5 Jur. N. S. 1366, 1 Sw. & Tr. 465.

4. Paper Appointing Guardian — Probate Not Necessary in England. — In *Goods of Morton*, 3 Sw. & Tr. 422. See also the title GUARDIAN AND WARD, vol. 15, p. 29, note 7.

5. Probate Required in the United States. — See the title GUARDIAN AND WARD, vol. 15, p. 29, note 8.

6. Will Contained in Several Papers. — See the title WILLS.

7. Probate of Several Papers, Each in Testamentary Form. — In *Goods of Petchell*, L. R. 3 P. & D. 153, 43 L. J. P. 22, 22 W. R. 353, 30 L. T. N. S. 74; In *Goods of Graham*, 3 Sw. & Tr. 69, 32 L. J. P. 113, 8 L. T. N. S. 610, 11 W. R. 638; In *Goods of Nickalls*, 4 Sw. & Tr. 40, 34 L. J. P. 103, 13 W. R. 1047; In *Goods of Lewis*, 19 W. R. 1038, 25 L. T. N. S. 510; In *Goods of Griffith*, L. R. 2 P. & D. 457, 26 L. T. N. S. 780, 20 W. R. 495; In *Goods of Hastings*,

20 W. R. 616, 26 L. T. N. S. 715; In *Goods of Rotton*, 35 L. T. N. S. 518; *Robinson v. Clarke*, 2 P. D. 269, 47 L. J. P. 17, 39 L. T. N. S. 43; *O'Leary v. Douglass*, 1 L. R. Ir. 45; *Leslie v. Leslie*, Ir. R. 6 Eq. 332; In *Goods of Bland*, 9 L. R. Ir. 53; In *Goods of O'Connor*, 13 L. R. Ir. 406; In *Goods of Bonner*, 21 L. R. Ir. 339; *Matter of Dietz*, 41 N. J. Eq. 284.

Instruments Executed Simultaneously. — Mere repugnancy in the provisions of two instruments executed and attested at the same time by a testator is not a ground for refusing to admit them to probate. *Matter of Forman*, 54 Barb. (N. Y.) 274, *affirming* *Tuck*. (N. Y.) 205.

Foreign Will Included in Probate of Domestic Will. — In *Goods of Harris*, L. R. 2 P. & D. 83, 18 W. R. 901, 22 L. T. N. S. 630; In *Goods of Lockhart*, 1 Reports 481, 69 L. T. N. S. 21, 57 J. P. 313; In *Goods of Howden*, 43 L. J. P. 26, 22 W. R. 711, 30 L. T. N. S. 768; In *Goods of Murray*, (1896) P. 65, 44 W. R. 414; In *Goods of Bolton*, 12 P. D. 202, 36 W. R. 287; In *Goods of Mercer*, L. R. 2 P. & D. 91, 23 L. T. N. S. 195, 18 W. R. 1040 (in which a copy of the foreign will was included in the probate of the domestic will).

But if the two wills are entirely independent of each other, the foreign will should not be included in the probate of the domestic will. In *Goods of Tamplin*, (1894) P. 39, 6 Reports 533, 42 W. R. 287. See also In *Goods of Smart*, 9 P. R. 64, 53 L. J. P. 57, 32 W. R. 724, 48 J. P. 456; In *Goods of Cole*, 20 L. T. N. S. 758; In *Goods of Callaway*, 15 P. D. 147; In *Goods of Seaman*, (1891) P. 253, 64 L. T. N. S. 805; In *Goods of Fraser*, (1891) P. 285, 60 L. J. P. 93, 64 L. T. N. S. 808; In *Goods of De la Rue*, 15 P. D. 185. *Compare* In *Goods of Crawford*, 15 P. D. 212.

Revoked Will Not Included in Probate. — A will which is revoked by a later will is not to be included in the probate of the later will,

will, be made a part thereof, in which case both papers must be included in the probate,¹ though it has been held that it is not necessary to include such extraneous paper in the probate.² And several papers, none of which were in testamentary form, have been admitted to probate as a will.³

The Principle here involved is that the several papers taken together constitute the will of the decedent and that the probate should contain the whole and not a part only of the decedent's will.⁴

VI. WHO MAY PROPOUND WILL FOR PROBATE — 1. Rule in England. — The rule laid down by the English authorities is that only he who is named as the executor may prove the will.⁵ If he renounces the executorship, which he may do as matter of right,⁶ or if he dies before the testator, or if the will either fails to name an executor at all or names a person who is incompetent to act, the application is not for probate, but for letters of administration with the will annexed,⁷ but in such case the will must still be proved, as though probate of it were taken by an executor.⁸

2. Rule in United States. — While the executor named in a will is always the proper person to propound it for probate,⁹ and he is, in some jurisdictions, subject to penalties if he neglects to act,¹⁰ it is generally provided by the probate laws of the several states that any devisee or legatee named in a will, or any person interested in the estate of the testator, may have the will proved before the proper probate court.¹¹ Under such statutes, if a person other than the executor propounds the will for probate, he must show that

whether the revocation is express or results from inconsistency of the two instruments. In *Goods of Stephens*, 18 W. R. 528, 22 L. T. N. S. 727; In *Goods of Palmer*, 58 L. J. P. 44; *Pepper v. Pepper*, Ir. R. 5 Eq. 85; *Shiel v. O'Brien*, Ir. R. 7 Eq. 64; In *Goods of Macfarlane*, 13 L. R. Ir. 264; *McAra v. McCay*, 23 L. R. Ir. 138. And the fact that the revoked will had been made pursuant to a contract between the testator and the beneficiary will not entitle it to probate. The only remedy of the beneficiaries under the first will is in equity, the surrogate's court having no jurisdiction to deal with any matter of contract. *In re Gloucester*, (Surrogate Ct.) 11 N. Y. Supp. 809.

1. Probate of Papers Referred to in Will. — *Singleton v. Tomlinson*, 3 App. Cas. 404, 38 L. T. N. S. 653, 26 W. R. 722.

Sufficiency of Identification. — In *Goods of Norris*, 14 W. R. 348; *Matter of Shillaber*, 74 Cal. 144, 5 Am. St. Rep. 433; *Newton v. Seaman's Friend Soc.*, 130 Mass. 91, 39 Am. Rep. 433; *Butler's Estate*, 37 Pa. L. J. 122.

2. Including Extraneous Paper in Probate Held Not Essential. — *Tuttle v. Berryman*, 94 Ky. 553; *Hall v. Hill*, 6 La. Ann. 745; *Matter of Tonnele*, 5 N. Y. Leg. Obs. 254.

3. Probate of Papers Not in Testamentary Form. — In *Goods of Morgan*, L. R. 1 P. & D. 214, 35 L. J. P. 98, 14 W. R. 1022, 14 L. T. N. S. 804; In *Goods of Webb*, 10 Jur. N. S. 709, 3 Sw. & Tr. 482, 33 L. J. P. 182, 11 L. T. N. S. 277.

4. Probate Must Cover Entire Will. — In *Goods of Crawford*, 15 P. D. 212, 63 L. T. N. S. 232, 54 J. P. 504.

The proposition that the probate must contain the whole and not a part only of the will does not mean that all or none of several consistent testamentary papers must be admitted to probate. It means merely that so much of such papers as may be found by the court to compose the will shall be probated. See *infra*, this title, *Partial or Limited Probate*.

5. Executor Alone May Prove Will in England. — *Wankford v. Wankford*, 1 Salk. 308.

Proof by Executor According to the Tenor. — In *Goods of Leven*, 15 P. D. 22. See also the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 745.

6. Renunciation by Executor. — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 754.

7. Letters of Administration with Will Annexed. — See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 789.

8. 1 Wms. Exrs. (7th Am. ed.), p. 553.

9. Duty of Executor to Propound Will. — *Smith v. Harrison*, 2 Heisk. (Tenn.) 230.

10. Executor Subject to Penalties for Failure to Prove Will. — *Barber v. Eno*, 2 Root (Conn.) 150; *Moore v. Smith*, 5 Me. 490; *Matter of Storey*, 120 Ill. 244. And see the various local statutes in the *United States*.

11. Who May Prove Will in United States — Parties in Interest — Alabama. — *McGrew v. McGrew*, 1 Stew. & P. (Ala.) 30.

Georgia. — *Finch v. Finch*, 14 Ga. 362.

Illinois. — *Matter of Storey*, 120 Ill. 244.

Indiana. — *Stone v. Huxford*, 8 Blackf. (Ind.) 452.

Kentucky. — *Wells's Will*, 5 Litt. (Ky.) 273; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 153, 16 Am. Dec. 150.

Maine. — *Keniston v. Adams*, 80 Me. 290.

Massachusetts. — *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

New York. — *Foster v. Foster*, 7 Paige (N. Y.) 48; *Russell v. Hartt*, 9 N. Y. Wkly. Dig. 54, affirming 87 N. Y. 19.

North Carolina. — *Enloe v. Sherrill*, 6 Ired. L. (28 N. Car.) 213; *Redmond v. Collins*, 4 Dev. L. (15 N. Car.) 430, 27 Am. Dec. 208.

Tennessee. — *Ford v. Ford*, 7 Humph. (Tenn.) 92.

Texas. — *Ryan v. Texas*, etc., R. Co., 64 Tex. 239; *Elwell v. Universalist Gen. Convention*, 76 Tex. 514.

he has an interest in the matter, and of this the fact that he is named as a legatee in the will is sufficient evidence.¹

Custodian of Will. — It is sometimes provided by statute that a will shall be propounded by the person who has been intrusted with its custody, though it may be presented by any person interested under it who may acquire possession.²

A Creditor of the testator or of a legatee is interested in the estate, and as such may prove the will.³

VII. TIME FOR PROBATE — 1. **During Lifetime of Testator.** — While the testator is living, the probate court may not proceed to the probate of the will, because it is subject to revocation or alteration by the testator as long as he lives; and it has even been held that a statute providing for the probate of a will during the life of the testator is ineffectual.⁴ But provision may properly be made for one or more safe and convenient depositories, under the direction and control of the court of probate, for all such wills of living persons as shall be deposited therein for safe custody.⁵

2. **After Death of Testator** — a. **HOW SOON AFTER DEATH WILL MAY BE PROVED.** — There is no requirement that any particular period after a testator's death shall elapse before the will may be proved,⁶ in the absence of a statute or rule of practice on the subject.⁷

b. **DELAY IN PROOF OF WILL** — (1) *Rule at Common Law.* — At common law, the right to prove a will is not barred by the lapse of any time, however great,⁸ though the failure of the executor to make a timely application may operate as an implied renunciation of the executorship so as to authorize a

Virginia. — *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335.

Refusal or Neglect of Executor. — *Keniston v. Adams*, 80 Me. 290.

Necessity of Citing Executor. — In *Finch v. Finch*, 14 Ga. 362, it was held that a legatee could not propound a will for probate until the executors named therein had been cited to prove the will and take on themselves the execution thereof, or else to refuse the same, or some good cause were shown why this was omitted.

Who Are Parties in Interest — *Assignee of Share of Devise.* — *Matter of Engle*, 124 Cal. 292.

The Agent or Attorney of an interested person may propound the will. *Evansville Ice, etc., Co. v. Winsor*, 148 Ind. 682.

Slaves Emancipated by a Will were held to have the right to propound it for probate. *Ford v. Ford*, 7 Humph. (Tenn.) 92; *Mercer v. Kelso*, 4 Gratt (Va.) 106.

Unincorporated Association as Legatee. — Some of the members of an unincorporated association, to which a legacy has been bequeathed, may, on behalf of all, proceed to establish the will. This results from the principle that, though the proceeding is technically one at law, yet it is to a certain extent of an equitable nature. *Lilly v. Tobbein*, 103 Mo. 477, 23 Am. St. Rep. 887, affirming (Mo. 1890) 13 S. W. Rep. 1060.

1. **Proof of Interest.** — *Finch v. Finch*, 14 Ga. 362; *Enloe v. Sherrill*, 6 Ired. L. (28 N. Car.) 212. Compare *Bliss v. Macomb* Probate Judge, (Mich. 1901) 88 N. W. Rep. 390, 8 Detroit Leg. N. 997.

2. **Custodian as Proper Proponent.** — *Matter of Storey*, 120 Ill. 244; *Bent v. Thompson*, 5 N. Mex. 408. Compare the statutes in other jurisdictions.

3. **Creditor of Testator or of Legatee May Prove Will.** — *Stebbins v. Lathrop*, 4 Pick. (Mass.) 33.

4. See *supra*, this title, *Jurisdiction* — *Jurisdictional Facts* — *Death of Testator*.

5. **Custody of Wills of Living Persons.** — 20 & 21 Vict., c. 77, § 91; Rev. Laws Mass., c. 135, § 10. And see the statutes in other jurisdictions.

6. **How Soon After Death Will May Be Proved.** — Since the death of the testator is the fact which brings the matter within the jurisdiction of the proper court, there would seem to be no reason why the court should not proceed as soon as the fact occurs. See the title **EXECUTORS AND ADMINISTRATORS**, vol. II, pp. 783, 784.

7. In *England* it is provided by the general rules and orders for the registrars of the principal registry that "no probate * * * shall issue until the lapse of seven days from the death of the deceased unless under the direction of the judge or by order of two of the registrars." Rule 43, P. R. 1862.

By statute in *New Jersey* no will shall be proved until ten days from the death of the testator. *Matter of Evans*, 29 N. J. Eq. 571. Compare the statutes in other jurisdictions.

8. **Time of Probate Not Limited at Common Law.** — *Vance v. Crawford*, 4 Ga. 446; *Rebhan v. Mueller*, 114 Ill. 343, 55 Am. Rep. 869; *Wells's Will*, 5 Litt. (Ky.) 274; *Shumway v. Holbrook*, 1 Pick. (Mass.) 114, 11 Am. Dec. 153; *Haddock v. Boston, etc., R. Co.*, 146 Mass. 155, 4 Am. St. Rep. 295 (in which the will was admitted to probate sixty-three years after the testator's death); *Fatherree v. Lawrence*, 33 Miss. 585; *Transue v. Brown*, 31 Pa. St. 92; *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70, 94 Am. Dec. 184.

See also the title **LIMITATION OF ACTIONS**, vol. 19, p. 283.

grant of administration with the will annexed.¹ Therefore, though a paper has been admitted to probate as the last will of the decedent, or administration has been granted on the supposition that the decedent was intestate, a later will discovered at any time thereafter may, nevertheless, be proved.²

(2) *Statutory Provisions* — (a) *In General*. — The time for presenting a will for probate is now the subject of statutory regulation in many jurisdictions. A common instance of this is to be found in the statutes which require the executor or other person having custody of a will to deliver it to the court of probate within a limited time after the testator's death, and impose a penalty or forfeit of the executorship or other rights under the will in case of noncompliance with the statutory requirements. These, however, are not statutes of limitation.³ It is also sometimes provided that the courts to which the application is made shall receive the proof of the will without delay, that is, without unreasonable delay.⁴

(b) *Statutes of Limitation*. — In some states there is an absolute limitation of the time within which an application may be made for the probate of a will in any case, with a saving clause, however, in favor of persons under disabilities, or where the existence of the will has been concealed.⁵ In other states it is only an application for the probate of a later will or codicil discovered after the probate of a will of earlier date that is subject to limitation, and this is effected by a provision that a will which has been admitted to probate shall

1. See the title EXECUTORS AND ADMINISTRATORS, vol. II, p. 756.

2. *Later Will Discovered After Probate of Earlier Will* — *England*. — *Wilkinson v. Robinson*, 14 Jur. 72.

United States. — *Gaines v. Hennen*, 24 How. (U. S.) 553.

California. — *Adsit's Estate*, Myr. Prob. (Cal.) 266.

Maryland. — *Clagett v. Hawkins*, 11 Md. 381.

Massachusetts. — *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Clark v. Wright*, 3 Pick. (Mass.) 67.

New York. — *Campbell v. Logan*, 2 Bradf. (N. Y.) 90.

Rhode Island. — *Bowen v. Johnson*, 5 R. I. 119, 73 Am. Dec. 49.

Virginia. — *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335; *Norvell v. Lesueur*, 33 Gratt. (Va.) 222.

Probate of Will After Grant of Administration. — *Miller v. Coulter*, 156 Ind. 290; *Cousens v. Advent Church*, 93 Me. 292. See also the title EXECUTORS AND ADMINISTRATORS, vol. II, pp. 819, 826.

3. *Statutes to Prevent Delay in Application for Probate*. — See, for example, Gen. Stat. Conn. 1888, § 547, which provides that all executors having knowledge of their appointment shall, within thirty days next after the death of the testator, exhibit the will for probate to the proper court or present it and declare their refusal to accept the executorship; and that every executor neglecting to do this shall forfeit seventeen dollars for each month from the expiration of the said thirty days until he shall exhibit said will to said court.

Forfeiture of Legacy or Devise. — The *Michigan* statute provides that if a legatee, having knowledge of the will, fails to secure its probate within a reasonable time after he knows of the testator's death, he will thereby bar himself from making claim thereunder; and fourteen years has been held an unreasonable

time under this statute. *Foote v. Foote*, 61 Mich. 181.

Under the *New York* statute a devise does not affect the title of a *bona fide* purchaser from the testator's heirs, unless the will is admitted to probate or is duly established in an action brought for that purpose, within four years after the testator's death. *Fox v. Fee*, 167 N. Y. 44, affirming 33 N. Y. App. Div. 627.

And see generally the statutes of the various states on this subject.

Not a Statute of Limitation. — The *Ohio* statute providing that an estate devised shall not pass to the devisee but shall descend to the heirs of the testator, if the devisee fails to have the will probated within three years, merely forfeits an interest under the will, but does not preclude its probate at any subsequent time. The instrument still remains the will of the decedent, but the devisee loses his interest in it. *Matter of Blymeyer*, Ohio Prob. 14. See also *Carpenter v. Denoon*, 29 Ohio St. 379, holding that this statute refers only to the original probate and not to the admission of record of an authenticated copy of a probated will.

4. *Statutes to Secure Prompt Action by the Probate Court*. — *People v. Knickerbocker*, 114 Ill. 539, 55 Am. Rep. 879; *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327.

5. *Statutes Limiting Applications for Probate* — *Kentucky*. — *Allen v. Froman*, 96 Ky. 313; *Reid v. Bengel*, (Ky. 1902) 66 S. W. Rep. 997.

Maine. — *Deake*, Appellant, 50 Me. 50.

New Mexico. — *Bent v. Thompson*, 5 N. Mex. 408.

Tennessee. — *Townsend v. Bonner*, 1 Shannon Tenn. Cas. 197.

Texas. — *Ochoa v. Miller*, 59 Tex. 460; *Ryan v. Texas*, etc., R. Co., 64 Tex. 239; *Elwell v. Universalist Gen. Convention*, 76 Tex. 514.

And see generally the statutes of the several states, and the title LIMITATION OF ACTIONS, vol. 19, p. 283.

not be contested after the expiration of a specified time.¹

VIII. PROOF OF WILL — 1. Death of Testator. — In a proceeding for the probate of a will, the first fact to be proved is the death of the testator, and this is essential to the jurisdiction of the court.² This is ordinarily so notorious a fact that no difficulty attends the proof of it. In some cases, however, direct evidence is not obtainable, and resort must then be had to circumstantial evidence or to the presumption which arises from certain facts,³ but it must still be proved as a fact, and it is not sufficient to show that the testator is reputed to be dead.⁴

2. Due Execution of Will — a. RULE STATED. — The proponent in a probate proceeding must prove that the paper offered as a will was duly executed by the testator with all the formalities required by law, that is, it must be shown that the testator signed the will or acknowledged the signature as his in the presence of the prescribed number of witnesses and declared the instrument to be his will,⁵ that the witnesses subscribed their names as such in the presence of the testator and at his request,⁶ and that the testator knew the contents of the instrument.⁷

b. EVIDENCE — (1) Proof by Attesting Witnesses — (a) General Rule. — Proof that the will was executed in accordance with the requirements of law must

1. Will or Codicil Discovered After Probate of Another Instrument. — *Watson v. Turner*, 89 Ala. 220; *Couchman v. Couchman*, 104 Ky. 680; *Thruston v. Prather*, (Ky. 1898) 47 S. W. Rep. 871. See *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335. Compare the statutes in other states.

2. Proof of Death. — See *supra*, this title, *Jurisdiction — Jurisdictional Facts — Death of Testator*.

3. Circumstantial Evidence and Presumption of Death. — See generally the titles EXECUTORS AND ADMINISTRATORS, vol. II, pp. 759, 760; PRESUMPTIONS, vol. 22, p. 1244 *et seq.*

Circumstantial Evidence of Death in Hotel Fire. — *Matter of Morgan*, (Surrogate Ct.) 30 Misc. (N. Y.) 578.

4. Death Not Proved by Repute. — *Prout v. McNab*, 6 Dem. (N. Y.) 152.

5. Proof of Execution in General. — *Davis v. Rogers*, 1 Houst. (Del.) 44; *Dickie v. Carter*, 42 Ill. 376; *In re Goldthorp*, (Iowa 1902) 88 N. W. Rep. 944; *McFadin v. Catron*, 120 Mo. 252; *Delafield v. Parish*, 25 N. Y. 9; *In re Sarauw*, (Surrogate Ct.) 2 N. Y. Supp. 629; *Welch v. Welch*, 9 Rich. L. (S. Car.) 133; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *Hopf v. State*, 72 Tex. 281.

Signing or Acknowledgment by Testator. — *Dickie v. Carter*, 42 Ill. 376; *Brownfield v. Brownfield*, 43 Ill. 147; *Critz v. Pierce*, 106 Ill. 167.

A witness may testify that "the testator either signed the will in his presence or acknowledged his signature to him — he could not remember which." *Brownfield v. Brownfield*, 43 Ill. 147.

Sufficiency of Evidence to Show Acknowledgment by Testator. — *In re Robinson*, 190 Ill. 95.

The burden of proving that the testator declared the instrument to be his will is on the proponent, unless the attestation clause recites such facts. *Swain v. Edmunds*, 53 N. J. Eq. 142.

Signature by Making Mark. — *Matter of Porter*, (Surrogate Ct.) 1 Misc. (N. Y.) 262. See also MARK, vol. 19, p. 1137.

6. Attestation of Will. — *Perea v. Barela*, 6 N. Mex. 239; *Roberts v. Welch*, 46 Vt. 164. See *Matter of Stockwell*, (Surrogate Ct.) 17 Misc. (N. Y.) 108. And see generally the title WILLS.

7. Knowledge of Contents. — *Brown v. Fisher*, 63 L. T. N. S. 405; *Davis v. Rogers*, 1 Houst. (Del.) 44; *Potts v. House*, 6 Ga. 324, 50 Am. Dec. 329; *McCommon v. McCommon*, 151 Ill. 428; *Gerrish v. Nason*, 22 Me. 438, 39 Am. Dec. 589; *Lake v. Ranney*, 33 Barb. (N. Y.) 49.

Knowledge of Contents a Question for Jury. — *Wilbur v. Wilbur*, 138 Ill. 446.

One Witness Sufficient to Prove Knowledge of Contents. — *Cox v. Cox*, 4 Sneed (Tenn.) 85.

Declarations of Testator to Prove Knowledge of Contents. — *McCommon v. McCommon*, 151 Ill. 428; *Patton v. Allison*, 7 Humph. (Tenn.) 327; *Maxwell v. Hill*, 89 Tenn. 584.

Knowledge of Contents Presumed Where Will Is Properly Executed and Testator Was Competent. — *Browning v. Budd*, 6 Moo. P. C. 430; *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265; *Sheer v. Sheer*, 159 Ill. 591; *Sechrest v. Edwards*, 4 Met. (Ky.) 163; *Pettes v. Bingham*, 10 N. H. 514; *Wallace v. Wallace*, 23 N. H. 149; *Day v. Day*, 3 N. J. Eq. 549; *Matter of Henry*, (Surrogate Ct.) 18 Misc. (N. Y.) 149; *Downey v. Murphey*, 1 Dev. & B. L. (18 N. Car.) 82; *Hemphill v. Hemphill*, 2 Dev. L. (13 N. Car.) 291, 21 Am. Dec. 331; *Boehm v. Kress*, 179 Pa. St. 386; *Maxwell v. Hill*, 89 Tenn. 584; *Kelly v. Settegast*, 68 Tex. 13.

The presumption that the testator knew the contents of a will which was properly executed, may be rebutted by the circumstances, as that the testator was of unsound mind, unable to read, or subject to undue influence, or that the beneficiary prepared the will, or its execution. *McCommon v. McCommon*, 151 Ill. 428. See also *Harding v. Harding*, 18 Pa. St. 340; *Patton v. Allison*, 7 Humph. (Tenn.) 327; *Wisener v. Maupin*, 2 Baxt. (Tenn.) 366; *Key v. Holloway*, 7 Baxl. (Tenn.) 583; *Bartee v. Thompson*, 8 Baxt. (Tenn.) 511; *Maxwell v. Hill*, 89 Tenn. 584.

be made by the testimony of the attesting witnesses, if they are living and within the jurisdiction of the court.¹

(b) **Number of Witnesses.** — The authorities are not agreed as to whether a will may be proved by one only of the attesting witnesses or whether all must be called. In some states it is held that the statutes requiring the attestation of wills by two or more witnesses according to certain prescribed formalities do not imply that all of such witnesses shall be called to testify on the probate of the will, but that the fact of a due attestation may be proved, on common-law principles, by one credible witness,² though in a contested case the contestant may insist that all the attesting witnesses who are within reach of the process of the court shall be examined.³ It has been held, however, that even though the statute does not require the testimony of all the attesting witnesses, yet on appeal from an order admitting the will to probate, the failure of the proponent to produce a witness who was within the jurisdiction and could reasonably have been produced, is a suspicious circumstance.⁴ In other states the courts, following the rule which obtained in the ecclesiastical courts of *England*, hold that the full number of witnesses required by law to attest a will (generally two) must be produced, if they are living and within the jurisdiction of the court.⁵ But if the probate is uncontested, it seems

1. Proof by Attesting Witnesses. — *Bowman v. Hodgson*, L. R. 1 P. & D. 362; *Givin v. Green*, 10 Phila. (Pa.) 99, 30 Leg. Int. (Pa.) 424, 5 Leg. Gaz. (Pa.) 406.

2. Proof by One Attesting Witness — *Connecticut*. — Field's Appeal, 36 Conn. 277.

Georgia. — *Walker v. Hunter*, 17 Ga. 364.

Kentucky. — *Hall v. Sims*, 2 J. J. Marsh. (Ky.) 509; *Falker's Will*, 2 T. B. Mon. (Ky.) 83, 15 Am. Dec. 126; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 501; *Lindsay v. McCormack*, 2 A. K. Marsh. (Ky.) 229, 12 Am. Dec. 387.

Maryland. — *Collins v. Elliott*, 1 Har. & J. (Md.) 1; *Deakins v. Hollis*, 7 Gill & J. (Md.) 311.

New Jersey. — *Whitenack v. Stryker*, 2 N. J. Eq. 8; *Bailey v. Stile*, 2 N. J. Eq. 220; *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401; *Jackson v. Vandyke*, 1 N. J. L. 32; *Den v. Mitton*, 12 N. J. L. 70; *Den v. Matlack*, 17 N. J. L. 86.

Texas. — *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529.

3. Right of Contestant to Require Examination of All the Attesting Witnesses. — Field's Appeal, 36 Conn. 277, in which it was held that this right was waived by not insisting on it before the testimony was closed. See also *Ragland v. Green*, 14 Smed. & M. (Miss.) 194.

4. Presumption from Failure to Produce Witnesses. — *Abbott v. Abbott*, 41 Mich. 540.

5. Proof by All the Attesting Witnesses Required — *Alabama*. — *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239; *Bowling v. Bowling*, 8 Ala. 538.

Arkansas. — *Janes v. Williams*, 31 Ark. 175.

Delaware. — *Rash v. Purnel*, 2 Harr. (Del.) 448.

Massachusetts. — *Sears v. Dillingham*, 12 Mass. 358; *Chase v. Lincoln*, 3 Mass. 236.

Michigan. — See *Abbott v. Abbott*, 41 Mich. 540, in which it was said that the statute does not require all the subscribing witnesses to be sworn on a contest of a will, though it possibly implies that they should be sworn in the probate court.

Mississippi. — *Evans v. Evans*, 10 Smed. & M. (Miss.) 402; *Martin v. Perkins*, 56 Miss. 204.

New Hampshire. — *Whitman v. Morey*, 63 N. H. 448.

New York. — *Jackson v. Vickory*, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522. The *New York* statute now provides that two at least of the attesting witnesses must be produced on the probate of a will in the surrogate's court. *In re Graham*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 122; *In re Stewart*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 219, 59 Hun (N. Y.) 618. But in an action in the supreme court to establish a will, the will may be proved by the testimony of one witness, according to the common-law rule of evidence which obtains in that court. *Upton v. Bernstein*, 76 Hun (N. Y.) 516.

North Carolina. — *Armstrong v. Baker*, 9 Ired. L. (31 N. Car.) 109; *Cowles v. Reavis*, 109 N. Car. 417.

Ohio. — *Mosier v. Harmon*, 29 Ohio St. 223.

Pennsylvania. — *Hock v. Hock*, 6 S. & R. (Pa.) 47; *Carson's Appeal*, 59 Pa. St. 493; *Derr v. Greenawalt*, 76 Pa. St. 239; *Evan's Will*, 1 Pa. Lack. Jur. 13.

Tennessee. — *Moore v. Steele*, 10 Humph. (Tenn.) 562; *Johnson v. Fry*, 1 Coldw. (Tenn.) 101. See *Franklin v. Franklin*, 90 Tenn. 44.

Vermont. — *Thornton v. Thornton*, 39 Vt. 122.

Virginia. — *Redford v. Peggy*, 6 Rand. (Va.) 316; *Johnson v. Dunn*, 6 Gratt. (Va.) 625. See also *Pollock v. Glassell*, 2 Gratt. (Va.) 439.

In *Illinois* it is provided by statute that two witnesses must testify as to the testator's signature or acknowledgment in order that the will may be admitted to probate. *Canatsey v. Canatsey*, 130 Ill. 397; *Matter of Ingalls*, 148 Ill. 287. See also *Doran v. Mullen*, 78 Ill. 342; *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151; *Fry v. Morrison*, 159 Ill. 244. Compare the statutes in other states.

Each Witness Must Separately Depose to All the Facts necessary to be shown, and where the evidence of one or both of the witnesses is circumstantial, each must make out proof complete in itself. Circumstantial proof cannot be made by two or more witnesses alternating with each other as to the different parts of the

that one witness is considered sufficient,¹ and in some jurisdictions the statutes expressly provide that in such cases the proof may be made by one attesting witness.²

Establishment of Will in Equity. — In a suit to establish a will, the rule of the court of equity in *England* is to require the production of all the attesting witnesses who are living and within the jurisdiction of the court.³

Death or Absence of Witnesses. — The rule that a will must be proved by all the attesting witnesses is of necessity dispensed with when the production of all of them is impossible by reason of death or absence. In such cases the execution of the will may be proved by a single witness, if one only can be produced, and proof of due attestation by the requisite number may be made by proving the handwriting of the other or others,⁴ unless the witness was incompetent at the time of the attestation.⁵ And if all the attesting witnesses

aggregate of circumstances which are to make the necessary sum of proof. *Hock v. Hock*, 6 S. & R. (Pa.) 47; *Derr v. Greenawalt*, 76 Pa. St. 239.

1. **One Witness in Uncontested Cases.** — *Bowling v. Bowling*, 8 Ala. 538.

2. **Statutes Authorizing Proof by Single Witness in Uncontested Cases.** — *Jones v. Roberts*, 96 Wis. 427. Thus, the *Massachusetts* statute provides that "if it appears to the probate court, by the consent in writing of the heirs or by other satisfactory evidence that no person interested in the estate of the deceased intends to object to the probate of an instrument purporting to be the will of said deceased person, the court may grant probate thereof upon the testimony of one only of the subscribing witnesses." Rev. Laws Mass. (1902), c. 136, § 2. See also the statutes of *California*, *Michigan*, and *Nevada*. Compare the statutes of the other states on the subject.

There was an early statute in *Iowa* to the same effect. See *Barney v. Chittenden*, 2 Greene (Iowa) 176.

3. **Suit in Equity to Establish Will.** — *Ogle v. Cook*, 1 Ves. 177; *Grayson v. Atkinson*, 2 Ves. 454; *McKenire v. Fraser*, 9 Ves. Jr. 5; *Bootle v. Blundell*, 19 Ves. Jr. 494, Coop. t. Eld. 136, 15 Rev. Rep. 93; *McGregor v. Topham*, 3 H. L. Cas. 132, *affirming* 3 Hare 488; *Binfield v. Lambert*, 1 Dick. 337; *Hare v. Hare*, 5 Beav. 629, 12 L. J. Ch. 344, 7 Jur. 337; *Carrington v. Payne*, 5 Ves. Jr. 405, 5 Rev. Rep. 87.

4. **Proof of Handwriting of Dead or Absent Witnesses.** — *England*. — *Bennett v. Taylor*, 9 Ves. Jr. 381; *Banks v. Farquharson*, 1 Dick. 167; *Bishop v. Burton*, 2 Comyns 614; *James v. Parnell*, T. & R. 417.

United States. — *Adams v. Norris*, 23 How. (U. S.) 353.

Alabama. — *Snider v. Burks*, 84 Ala. 53; *Barnewall v. Murrell*, 108 Ala. 366.

Illinois. — *Robinson v. Brewster*, 140 Ill. 649, 33 Am. St. Rep. 265; *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, *affirming* 53 Ill. App. 133. See *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395; *Slingloff v. Bruner*, 174 Ill. 561.

Iowa. — *Scott v. Hawk*, 107 Iowa 723, 70 Am. St. Rep. 228.

Kentucky. — *Turner v. Turner*, 1 Litt. (Ky.) 101.

Maryland. — *Collins v. Nicols*, 1 Har. & J. (Md.) 399.

Maine. — *McKeen v. Frost*, 46 Me. 239.

Massachusetts. — *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Chase v. Lincoln*, 3 Mass. 236; *Ela v. Edwards*, 16 Gray (Mass.) 91.

New York. — *Matter of Dockstader*, 6 Dem. (N. Y.) 106; *Matter of Wilson*, 76 Hun (N. Y.) 1; *In re Hyland*, (Surrogate Ct.) 27 N. Y. Supp. 961; *Cheaney v. Arnold*, 18 Barb. (N. Y.) 438; *Jackson v. LeGrange*, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; *Jackson v. Vickory*, 1 Wend. (N. Y.) 406, 19 Am. Dec. 522.

North Carolina. — *Bethell v. Moore*, 2 Dev. & B. L. (19 N. Car.) 311; *In re Thomas*, 111 N. Car. 409.

Pennsylvania. — *Hays v. Harden*, 6 Pa. St. 409; *Engles v. Bruington*, 4 Yeates (Pa.) 345, 2 Am. Dec. 411.

Tennessee. — *Crockett v. Crockett*, Meigs (Tenn.) 95; *Maxwell v. Hill*, 89 Tenn. 584.

Vermont. — *Dean v. Dean*, 27 Vt. 746.

Virginia. — *Lambert v. Cooper*, 29 Gratt. (Va.) 61. See also *Cheatham v. Hatcher*, 30 Gratt. (Va.) 56, 32 Am. Rep. 650.

Mere Temporary Absence Not Ground for Proving Handwriting. — *Stow v. Stow*, 1 Redf. (N. Y.) 305.

Depositions of Absent Witnesses. — If provision is made by statute for taking the depositions of witnesses out of the state, this does not prevent proof of the handwriting of an absent attesting witness to a will. It may be and often is impossible to compel a witness in another state to testify in a deposition. *McKeen v. Frost*, 46 Me. 239. See also *Matter of Clark*, 75 Hun (N. Y.) 471; *Denny v. Pinney*, 60 Vt. 524.

The *New York* statute provides, on this subject, a will may be established on proof of the handwriting of the testator and of the attesting witnesses, if an attesting witness "is absent from the state * * * and his testimony cannot, with due diligence, be obtained by a commission." *Matter of Dates*, 58 Hun (N. Y.) 608, 12 N. Y. Supp. 205.

Even if the proponent had taken the deposition of an absent witness and such deposition is on file, it is still sufficient under the *Iowa* statute to prove his handwriting. *Matter of Allison*, 104 Iowa 130.

The Declarations of a Deceased Witness to a will are not evidence of his signature. *Collins v. Nichols*, 1 Har. & J. (Md.) 399.

5. **Witness Incompetent at Time of Attestation.** — *Harding v. Harding*, 18 Pa. St. 340. See *Curtiss v. Strong*, 4 Day (Conn.) 51, 4 Am.

are dead, the will may be established by proof of their handwriting and the handwriting of the testator, and also of such other circumstances as would be sufficient to prove the will on the trial of an action.¹

Failure of Witness to Remember Circumstances. — The due execution of a will may be proved by the testimony of one of the attesting witnesses, not only when the other or others are dead or absent, but also when he or they have forgotten the transaction.²

(2) *Proof by Extrinsic Evidence* — (a) **In General.** — Though the law regards the testimony of the attesting witnesses as the best evidence, yet it is not the only evidence by which a will may be established, because the probate of a will executed in accordance with all the requirements of the law is not dependent on either the lives of the witnesses or their recollection of the facts, or even on their veracity,³ and under such circumstances any evidence which is relevant and tends to prove the legal execution of the instrument is admissible.⁴ Accordingly, the fact of legal attestation and the other facts may be proved without the testimony of attesting witnesses, in case they are dead or absent⁵ or have no recollection of the matter.⁶

Dec. 179. As to who may be attesting witnesses in general, see the title *WILLS*.

If a Witness Was Competent at the Time of Attestation, but afterwards became incompetent, the attestation is nevertheless good on proof of the handwriting of the witness. *In re Sullivan*, 114 Mich. 189. Thus, where the executor was an attesting witness, and was rejected on the ground of interest, proof was made of his handwriting. *Loomis v. Kellogg*, 17 Pa. St. 60.

1. Death of All the Attesting Witnesses. — *Collins v. Elliott*, 1 Har. & J. (Md.) 1; *Matter of Laudy*, 78 Hun (N. Y.) 479, 148 N. Y. 403; *Transue v. Brown*, 31 Pa. St. 92.

The Handwriting of All must be proved. *Hopkins v. Albertson*, 2 Bay (S. Car.) 484, 1 Brev. (S. Car.) 240. But this proof may be made by one witness. *Hopkins v. DeGraffenreid*, 2 Bay. (S. Car.) 187. Compare *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619, holding that the handwriting must be proved by two witnesses.

2. Failure of Witness to Remember Circumstances. — *Craig v. Craig*, 156 Mo. 358.

3. Testimony of Attesting Witnesses Not the Only Evidence to Prove Will — *Arkansas*. — *Rogers v. Diamond*, 13 Ark. 474.

Georgia. — *Gillis v. Gillis*, 96 Ga. 1, 51 Am. St. Rep. 121.

Michigan. — *Abbott v. Abbott*, 41 Mich. 540.

Missouri. — *Morton v. Heidorn*, 135 Mo. 608.

New York. — *Lewis v. Lewis*, 11 N. Y. 220; *Weir v. Fitzgerald*, 2 Bradf. (N. Y.) 42; *Mowry v. Silber*, 2 Bradf. (N. Y.) 133; *Lawrence v. Norton*, 45 Barb. (N. Y.) 448.

Pennsylvania. — *Hight v. Wilson*, 1 Dall. (Pa.) 94; *Carson's Appeal*, 59 Pa. St. 493; *Smith's Estate*, 34 Pa. L. J. 228, 2 Pa. Co. Ct. 626; *Miller v. Carothers*, 6 S. & R. (Pa.) 215.

Tennessee. — *Jones v. Arterburn*, 11 Humph. (Tenn.) 97.

Texas. — *Key v. Holloway*, 7 Baxt. (Tenn.) 579; *Elwell v. Universalist General Convention*, 76 Tex. 515; *Stephenson v. Stephenson*, 6 Tex. Civ. App. 529.

Virginia. — *Glasscock v. Smither*, 1 Call. (Va.) 479.

The *New York* statute provides that a will may be established by proof of the testator's

handwriting and the handwriting of the attesting witnesses and by such circumstances as would be sufficient to establish a will in an action. *Matter of Townley*, 1 Connolly (N. Y.) 400. As to when this degree of proof is wanting, see *In re Phelps*, (Surrogate Ct.) 16 Civ. Pro. (N. Y.) 424; *Worden v. Van Gieson*, 6 Dem. (N. Y.) 237.

4. General Rule as to Admissibility. — *Sutton v. Sutton*, 5 Harr. (Del.) 459; *Dew v. Reid*, 52 Ohio St. 519.

Evidence Held Irrelevant. — *Snider v. Burks*, 84 Ala. 53; *Robinson v. Stuart*, 73 Tex. 267.

Evidence as to the number and circumstances of next of kin is irrelevant where only the validity of the execution of the alleged will is in question. *Seguine v. Seguine*, 2 Barb. (N. Y.) 385.

Character in Evidence. — The character of the proponent is not admissible on the question of the genuineness of the instrument. *Outlaw v. Hurdle*, 1 Jones L. (46 N. Car.) 150. But the good character of a deceased subscribing witness is admissible to sustain the will. *Black v. Ellis*, 3 Hill L. (S. Car.) 68.

5. Inability to Produce Attesting Witnesses. — *Rogers v. Diamond*, 13 Ark. 474; *Patten v. Tallman*, 27 Me. 17. It is not necessary to show by the attesting witnesses that, at the time they signed, they knew that they were witnessing the testator's will. This fact, though necessary, may be shown by other witnesses or it may be inferred from the circumstances. *In re Clafin*, 73 Vt. 129. See also *supra*, this division of this section, *Evidence* — *Number of Witnesses*, paragraph *Death or Absence of Witnesses*.

6. Inability of Witness to Remember Transaction. — *Irvin v. Deschamps*, 11 W. N. C. (Pa.) 365; *Winpenn's Appeal*, 8 W. N. C. (Pa.) 415; *Pearson v. Wightman*, 1 Mill. (S. Car.) 336; *Sampson v. White*, 1 McCord. L. (S. Car.) 74; *Hopf v. State*, 72 Tex. 281.

Discretion of Probate Court. — It has been held that it is discretionary with the court to permit the proponent to introduce extrinsic evidence when the attesting witnesses have failed to make out a *prima facie* case in favor of the will. *In re Ludlow*, 6 Ohio Dec. 106, 4 Ohio N. P. 99.

Contradicting Attesting Witnesses. — A will may be admitted to probate even in opposition to the testimony of the attesting witness, and therefore if they all testify that the will was not duly executed the proponent may go into other evidence to prove its due execution.¹ So, too, if the testimony of the attesting witnesses is conflicting as to the legal execution of the will, it may be supported and established by other evidence.² In all such cases, however, the evidence in favor of the will must be clear and full to substantiate it.³

(b) **Declarations and Admissions** — *aa.* OF TESTATOR. — The declarations of a testator made at the time of the execution of a will are admissible in evidence as a part of the *res gestæ*, according to the general principles governing evidence of that character.⁴ But no subsequent statements are admissible to show the absence of any element requisite to a valid execution of a will, or that the instrument was not, in fact, the act of the testator,⁵ because they are neither a part of the *res gestæ*⁶ nor can they be considered as made in derogation of the title of the testator or otherwise against his interest.⁷ While the weight of authority is as indicated above, there are some cases which hold that such declarations are admissible,⁸ at least to corroborate other testimony to the same effect.⁹

1. **Contradicting Attesting Witnesses** — *Alabama*. — Barnewall v. Murrell, 108 Ala. 366.

Arkansas. — Rogers v. Diamond, 13 Ark. 474.

Kentucky. — Howard's Will, 5 T. B. Mon. (Ky.) 199, 17 Am. Dec. 60.

Maryland. — Higgins v. Carlton, 28 Md. 115, 92 Am. Dec. 666.

New Hampshire. — Perkins v. Perkins, 39 N. H. 163.

New York. — Matter of Cottrell, 95 N. Y. 329; Matter of Wilcox, 59 Hun (N. Y.) 627, 14 N. Y. Supp. 109; Matter of Van Houten, (Surrogate Ct.) 15 Misc. (N. Y.) 196; Peebles v. Case, 2 Bradf. (N. Y.) 226.

Ohio. — *In re* Stacey, 6 Ohio Dec. 499.

Tennessee. — Rose v. Allen, 1 Coldw. (Tenn.) 24.

Texas. — Hopf v. State, 72 Tex. 281.

Vermont. — Thornton v. Thornton, 39 Vt. 122; Adams v. Field, 21 Vt. 256.

Virginia. — Spencer v. Moore, 4 Call. (Va.) 423.

The Rule that a Party May Not Impeach His Own Witness does not apply to the attesting witnesses of a will. Thornton v. Thornton, 39 Vt. 122.

2. **Conflict in Testimony of Subscribing Witnesses.** — Jenkins's Will, 43 Wis. 610.

3. **Degree of Proof to Contradict Attesting Witnesses.** — Rose v. Allen, 1 Coldw. (Tenn.) 24.

4. **Declarations of Testator as Part of Res Gestæ.** — Smith v. Fenner, 1 Gall. (U. S.) 170; Bonds v. Gray, Ga. Dec. (pt. ii.) 137; Chaney v. Home, etc., Missionary Soc., 28 Ill. App. 621; Marston v. Marston, 17 N. H. 503, 43 Am. Dec. 611. And see generally the titles ADMISSIONS, vol. 1, p. 670; DECLARATIONS (IN EVIDENCE), vol. 9, p. 5.

5. **Declarations Not Admissible to Disprove Due Execution** — *England*. — Provis v. Reed, 5 Bing. 435, 15 E. C. L. 490.

United States. — Smith v. Fenner, 1 Gall. (U. S.) 170; Stevens v. Vancleve, 4 Wash. (U. S.) 262.

Arkansas. — Leslie v. McMurtry, 60 Ark. 301.

Connecticut. — Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100.

Georgia. — Mealing v. Pace, 14 Ga. 596.

Illinois. — Dickie v. Carter, 42 Ill. 376; Bevelot v. Lestrade, 153 Ill. 625.

Maryland. — Collins v. Elliott, 1 Har. & J. (Md.) 1.

Missouri. — Gibson v. Gibson, 24 Mo. 227; Walton v. Kendrick, 122 Mo. 504; Wells v. Wells, 144 Mo. 198.

New Jersey. — Boylan v. Meeker, 28 N. J. L. 274; Matter of Gordon, 50 N. J. Eq. 397. But see Boylan v. Meeker, 15 N. J. Eq. 310 (overruled in effect by the two cases cited next above). Compare Den v. Vancleve, 5 N. J. L. 680.

New York. — Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Jackson v. Kniffen, 2 Johns. (N. Y.) 31. Compare Matter of Oliver, (Surrogate Ct.) 13 Misc. (N. Y.) 466.

Pennsylvania. — Moritz v. Brough, 16 S. & R. (Pa.) 493.

Texas. — Johnson v. Brown, 51 Tex. 65; Kennedy v. Upshaw, 64 Tex. 411.

Vermont. — Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298.

6. See generally the titles DECLARATIONS (IN EVIDENCE), vol. 9, p. 670; RES GESTÆ.

7. **Declarations of Testator Not Against Interest.** — Boylan v. Meeker, 28 N. J. L. 274.

8. **Declarations Held Admissible.** — Davis v. Rogers, 1 Houst. (Del.) 74; Throckmorton v. Holt, 12 App. Cas. (D. C.) 552; Reel v. Reel, 1 Hawks (8 N. Car.) 248, 9 Am. Dec. 632 (in which case the admissibility of the declarations was put on the ground that the testator was interested to declare the truth, and that in so doing he could interfere with the rights of no one); Howell v. Barden, 3 Dev. L. (14 N. Car.) 442; Kirby v. Kirby, Busb. L. (44 N. Car.) 454. See also Ethridge v. Bennett, 9 Houst. (Del.) 295; Beades v. Alexander, 9 Baxt. (Tenn.) 606; Maxwell v. Hill, 89 Tenn. 584.

In Scott v. Hawk, 105 Iowa 467, it was held that where the attesting witnesses were dead it was competent to show that the testator, on examination of the instrument and the signatures thereto, declared it his will, and that such statement was convincing evidence that he had executed the instrument as his will.

9. **Corroboration.** — Lane v. Hill, 68 N. H. 275, 73 Am. St. Rep. 591.

bb. OF THIRD PERSONS. — It is obvious that the declarations of a devisee, legatee, or other person interested in the probate of a will, are not admissible in evidence to prove the due execution of the will.¹ Neither are the declarations of the contestant admissible against the will,² or to dispense with proof of its due execution.³ Whether the declarations and admissions of a devisee or legatee are admissible to impeach the will is a question as to which there is a difference of opinion. The weight of authority seems to be against their admissibility,⁴ at least in a case where there are other devisees or legatees who are not parties to the probate proceeding, or who, being parties, do not consent to the reception of such evidence.⁵ It has been held, however, that the admissions of a legatee or devisee may be received in evidence like any other admissions against interest, even though there are other legatees and devisees, but as to such others it is merely a circumstance to be considered.⁶

Declarations of Executor or Administrator. — A will is not to be impeached or established by proof of the declarations of the executor,⁷ or administrator.⁸

Declarations of Attesting Witness. — The declarations of a deceased attesting witness are not admissible to prove his signature,⁹ though it has been held that after probate of the will such declarations may be received in derogation of the affidavit of the witness filed in the court of probate.¹⁰

(3) *Presumption of Regularity.* — When a will appears to have been duly executed and the attestation is established by proof of the handwriting of the witnesses or otherwise, but their testimony is not obtainable, or they do not remember the transaction, it will be presumed, in the absence of other evidence, that the will was executed in compliance with all the requirements of law.¹¹ Thus, it may be shown that the scrivener who drew the will and

1. **Declarations of Devisee, etc., Not Admissible to Prove Will.** — See generally the title DECLARATIONS (IN EVIDENCE), vol. 9, p. 5.

2. **Declarations of Contestant.** — *Stocksdale v. Cullison*, 35 Md. 322.

3. **Admission by Contestant.** — *Hylton v. Hylton*, 1 Gratt. (Va.) 161.

4. **Declarations of Legatee, etc., Not Admissible to Impeach Will.** — *Roberts v. Trawick*, 13 Ala. 68. Even though the declarations might estop him from claiming an interest under the will, they are not available to impeach the will. *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150.

5. **Absence or Nonconsent of Other Legatees.** — *Blakey v. Blakey*, 33 Ala. 611; *Dotts v. Fetzer*, 9 Pa. St. 88.

6. **Admissions of Legatee, etc., Held Admissible.** — *Beall v. Cunningham*, 1 B. Mon. (Ky.) 399; *Rogers v. Rogers*, 2 B. Mon. (Ky.) 324. See also *McCraine v. Clarke*, 2 Murph. (6 N. Car.) 317.

7. **Declarations of Executor.** — *Roberts v. Trawick*, 13 Ala. 68; *Bunyard v. McElroy*, 21 Ala. 311.

8. *Wittick v. Traun*, 31 Ala. 203.

9. **Declarations of Deceased Attesting Witness.** — *Collins v. Nicols*, 1 Har. & J. (Md.) 399.

10. **Declarations to Impeach Witness.** — *Abram v. Wilkins*, 17 Ark. 292.

11. **Presumption of Regularity** — *England*. — In *Goods of Thomas*, 5 Jur. N. S. 104, 1 Sw. & Tr. 255; *Trott v. Skidmore*, 6 Jur. N. S. 760, 2 Sw. & Tr. 12; *Hitch v. Wells*, 10 Beav. 84; *Croft v. Pawlet*, 2 Stra. 1109; *Hands v. James*, 2 Comyns 531.

Alabama. — *Woodruff v. Hundley*, 127 Ala. 640.

California. — *Estate of Twombly*, 120 Cal.

350. See *Matter of Tyler*, 121 Cal. 405, (Cal. 1897) 50 Pac. Rep. 927.

Georgia. — *Deupree v. Deupree*, 45 Ga. 415.

Illinois. — *Gould v. Chicago Theological Seminary*, 189 Ill. 282; *Huggins v. Drury*, 192 Ill. 528; *Thompson v. Bennett*, 194 Ill. 57.

Maryland. — *Welty v. Welty*, 8 Md. 15.

Massachusetts. — *Eliot v. Eliot*, 10 Allen (Mass.) 357; *Nickerson v. Buck*, 12 Cush. (Mass.) 332; *Ela v. Edwards*, 16 Gray (Mass.) 91.

Michigan. — *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460; *In re Sullivan*, 114 Mich. 189. *Mississippi.* — *Fatherree v. Lawrence*, 33 Miss. 585.

New Jersey. — *Miller v. Van Dyk*, (N. J. 1887) 9 Atl. Rep. 372.

New York. — *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Price v. Brown*, 1 Bradf. (N. Y.) 291; *Moore v. Griswold*, 1 Redf. (N. Y.) 388; *Jauncey v. Thorne*, 2 Barb. Ch. (N. Y.) 59, 45 Am. Dec. 424; *Matter of De Haas*, 19 N. Y. App. Div. 266; *Matter of Schweigert*, (Surrogate Ct.) 17 Misc. (N. Y.) 186.

Pennsylvania. — *Greenough v. Greenough*, 11 Pa. St. 489, 51 Am. Dec. 567; *Barr v. Grayhill*, 13 Pa. St. 396; *Vernon v. Kirk*, 30 Pa. St. 218; *McKee v. White*, 50 Pa. St. 354; *Kirk v. Carr*, 54 Pa. St. 285; *Leckey v. Cunningham*, 56 Pa. St. 370; *Mealey's Estate*, 2 Phila. (Pa.) 161, 33 Leg. Int. (Pa.) 444, 3 W. N. C. (Pa.) 370.

South Carolina. — *Verdier v. Verdier*, 8 Rich. L. (S. Car.) 135; *Gable v. Rauch*, 50 S. Car. 95.

Tennessee. — *Beadles v. Alexander*, 9 Baxt. (Tenn.) 604.

Virginia. — *Clarke v. Dunnivant*, 10 Leigh (Va.) 14; *Young v. Barner*, 27 Gratt. (Va.) 96.

Wisconsin. — *Allen v. Griffin*, 69 Wis. 529; *O'Hagan's Will*, 73 Wis. 78, 9 Am. St. Rep. 763.

superintended its execution was experienced in drawing wills and familiar with the law thereof, since it may be inferred from the fact that the testator signed the will or acknowledged his signature in the presence of the attesting witnesses.¹ And on the same principle an attesting witness who does not remember the particulars of the transaction may testify as to his usual practice or course of business in such cases.²

Presumption of Fact. — This presumption is not one of law, but is a presumption of fact,³ and therefore, in contested cases, the regularity of the proceedings is open for general testimony.⁴

Effect of Attestation Clause. — A formal attestation clause is presumptive evidence of the facts which it states,⁵ and may be overcome only by clear and satisfactory proof to the contrary.⁶

(4) **Burden of Proof.** — The burden of proving due execution of the will is on the proponent,⁷ and for this purpose a preponderance of the evidence is all that is required,⁸ even a slight preponderance being ordinarily

1. **Presumption from Scrivener's Knowledge and Experience.** — *Gable v. Rauch*, 50 S. Car. 95.

2. **Habit or Course of Business.** — *Barnes v. Barnes*, 66 Me. 286; *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460. See *Barbour v. Moore*, 10 App. Cas. (D. C.) 30.

3. **Presumption of Fact.** — *Woodruff v. Hundley*, 127 Ala. 640.

4. **Evidence to Rebut Presumption.** — *Abbott v. Abbott*, 41 Mich. 540.

Evidence Held Not Sufficient to Rebut Presumption of Regularity. — *Cook v. White*, 167 N. Y. 588, affirming 43 N. Y. App. Div. 388.

5. **Presumption as to Facts Stated in Attestation Clause — England.** — *Reeves v. Lindsay, Jr.* R. 3 Eq. 509.

New Jersey. — *McCurdy v. Neall*, 42 N. J. Eq. 333.

New York. — *Jackson v. Jackson*, 39 N. Y. 153; *Rugg v. Rugg*, 83 N. Y. 594; *Matter of Pepon*, 91 N. Y. 255; *Butler v. Benson*, 1 Barb. (N. Y.) 526; *Everitt v. Everitt*, 41 Barb. (N. Y.) 385; *Matter of Brissell*, 16 N. Y. App. Div. 137; *Matter of Carey*, 24 N. Y. App. Div. 531, affirming (Surrogate Ct.) 14 Misc. (N. Y.) 486; *Matter of Johnson*, (Surrogate Ct.) 7 Misc. (N. Y.) 220; *Matter of Sears*, (Surrogate Ct.) 33 Misc. (N. Y.) 141.

Oregon. — *Skinner v. Lewis*, (Oregon 1902) 67 Pac. Rep. 951.

Vermont. — *In re Claflin*, 73 Vt. 129.

Wisconsin. — *Meurer's Will*, 44 Wis. 392.

6. **Contradicting Attestation Clause.** — *In re Lewis*, 51 Wis. 101; *O'Hagan's Will*, 73 Wis. 78, 9 Am. St. Rep. 763.

7. **Burden of Proof — Alabama.** — *Barnewall v. Murrell*, 108 Ala. 366.

Connecticut. — *Livingston's Appeal*, 63 Conn. 68.

Georgia. — *Evans v. Arnold*, 52 Ga. 169.

Illinois. — *Rigg v. Wilton*, 13 Ill. 15, 54 Am. Dec. 419; *Potter v. Potter*, 41 Ill. 80; *Tate v. Tate*, 89 Ill. 42; *Moyer v. Cox*, 153 Ill. 220; *Campbell v. Campbell*, 138 Ill. 612; *Purdy v. Hall*, 134 Ill. 298; *Graybeal v. Gardner*, 146 Ill. 337; *Taylor v. Smith*, 153 Ill. 220; *Bevelot v. Lestrade*, 153 Ill. 625; *Smith v. Henline*, 174 Ill. 184; *Slingloff v. Bruner*, 174 Ill. 561.

Indiana. — *Morell v. Morell*, 157 Ind. 179.

Kentucky. — *Rogers v. Thomas*, 1 B. Mon. (Ky.) 394; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 268; *Barlow v. Waters*, (Ky. 1894) 28 S.

W. Rep. 785; *Muller v. Muller*, (Ky. 1900) 56 S. W. Rep. 802.

Maine. — *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Barnes v. Barnes*, 66 Me. 286.

Maryland. — *Cramer v. Crumbaugh*, 3 Md. 491.

Massachusetts. — *Baldwin v. Parker*, 99 Mass. 79, 96 Am. Dec. 697; *Davis v. Davis*, 123 Mass. 590.

Missouri. — *Norton v. Paxton*, 110 Mo. 456; *Carl v. Gabel*, 120 Mo. 283; *Sehr v. Lindemann*, 153 Mo. 276; *Elliott v. Welby*, 13 Mo. App. 19.

Nebraska. — *Seebrock v. Fedawa*, 30 Neb. 424; *Murry v. Hennessey*, 48 Neb. 608.

New Hampshire. — *Patten v. Cilley*, 67 N. H. 520.

New York. — *Matter of Kellum*, 52 N. Y. 517; *Mairs v. Freeman*, 3 Redf. (N. Y.) 181; *Matter of Hitchler*, (Surrogate Ct.) 25 Misc. (N. Y.) 365.

Ohio. — *Mears v. Mears*, 15 Ohio St. 90.

Oregon. — *Luper v. Werts*, 19 Oregon 122.

Pennsylvania. — *Simcox's Estate*, 11 Pa. Co. Ct. 545.

Tennessee. — *Bartee v. Thompson*, 8 Baxt. (Tenn.) 511.

Texas. — *Kennedy v. Upshaw*, 66 Tex. 442; *In re Nieman*, (Tex. 1890) 14 S. W. Rep. 25.

Vermont. — *Williams v. Robinson*, 42 Vt. 658, 1 Am. Rep. 359; *Roberts v. Welch*, 46 Vt. 164.

West Virginia. — *McMechen v. McMechen*, 17 W. Va. 683, 41 Am. Rep. 682.

Evidence Held Sufficient to Establish Will. — *Hobart v. Hobart*, 154 Ill. 610, 45 Am. St. Rep. 151, affirming 53 Ill. App. 133; *Fry v. Morrison*, 159 Ill. 244; *Montgomery v. Perkins*, 2 Met. (Ky.) 450, 74 Am. Dec. 419; *In re Sullivan*, 114 Mich. 189; *Seebrock v. Fedawa*, 30 Neb. 424, 33 Neb. 413, 29 Am. St. Rep. 488; *McClary v. Stull*, 44 Neb. 175.

Evidence Held Not Sufficient to Establish Will. — *Clark v. Ellis*, (Ky. 1894) 28 S. W. Rep. 148; *Risse v. Gasch*, 43 Neb. 287; *Burwell v. Corbin*, 1 Rand. (Va.) 131, 10 Am. Dec. 494.

8. **Preponderance of Evidence.** — *Morell v. Morell*, 157 Ind. 179; *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473; *Dean v. Dean*, 27 Vt. 746; *Thornton v. Thornton*, 39 Vt. 122.

Evidence Must Be Reasonably Sufficient to Establish Fact. — *Snider v. Burks*, 84 Ala. 53.

sufficient.¹ The burden of proof may, however, be increased by circumstances, as that the attesting witnesses are near relatives of the proponent, who is also a beneficiary under the will.²

3. **Testamentary Capacity.** — In a proceeding for the probate of a will, some direct evidence must be given that the testator was of sound and disposing mind.³

IX. OPERATION AND EFFECT OF DECREE OR ORDER — 1. **Admission to Probate** — *a. CONCLUSIVENESS OF PROBATE* — (1) *Collateral Attack.* — The admission of a will to probate, in a case where the court had jurisdiction, is a sentence or decree of a judicial officer,⁴ and therefore, like any other judgment of a court of competent jurisdiction, it cannot be collaterally impeached for any error or irregularity, but is conclusive until reversed or set aside according to law.⁵ This is the rule when the probate is in common form as

Proof Beyond Doubt Not Required. — *Brown v. Walker*, (Miss. 1892) 11 So. Rep. 724.

Evidence Held Sufficient. — *Montgomery v. Perkins*, 2 Met. (Ky.) 448, 74 Am. Dec. 419; *Cheever v. North*, 106 Mich. 390, 58 Am. St. Rep. 499; *Orser v. Orser*, 24 N. Y. 51; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Jackson v. Thompson*, 6 Cow. (N. Y.) 178; *Jackson v. Betts*, 6 Cow. (N. Y.) 377; *Jackson v. Le Grange*, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Crispell v. Dubois*, 4 Barb. (N. Y.) 393; *Auburn Theological Seminary v. Calhoun*, 38 Barb. (N. Y.) 148; *In re Buckley*, (Surrogate Ct.) 2 N. Y. Supp. 24; *Dunn's Estate*, 14 Pa. Co. Ct. 584, 3 Pa. Dist. 248, 34 W. N. C. (Pa.) 166.

1. **Slight Preponderance Held Sufficient.** — *McBee v. Bowman*, 89 Tenn. 132.

2. **Burden of Proof Increased by Circumstances.** — *Donnelly v. Broughton*, (1891) A. C. 435.

3. **Proof of Testamentary Capacity.** — *Wallis v. Hodgeson*, 2 Atk. 56; *Harris v. Ingledew*, 3 P. Wms. 93; *Bice v. Hall*, 120 Ill. 597; *Martin v. Perkins*, 56 Miss. 204; *Delafield v. Parish*, 25 N. Y. 9.

For a full discussion of this subject, see the title **TESTAMENTARY CAPACITY**.

4. See *supra*, this title, *Nature and Incidents of Probate Proceeding*, paragraph *Probate a Judicial Act*.

5. **Probate Conclusive Against Collateral Attack** — *United States*. — *Gaines v. New Orleans*, 6 Wall. (U. S.) 642; *Foulke v. Zimmerman*, 14 Wall. (U. S.) 113; *Simmons v. Saul*, 138 U. S. 439.

Alabama. — *Darrington v. Borland*, 3 Port. (Ala.) 19; *Hilliard v. Binford*, 10 Ala. 977; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Dickey v. Vann*, 81 Ala. 425; *Leatherwood v. Sullivan*, 81 Ala. 458; *Nicrosi v. Giuly*, 85 Ala. 365; *Sullivan v. Rabb*, 86 Ala. 433.

Arkansas. — *Janes v. Williams*, 31 Ark. 175; *Ludlow v. Flournoy*, 34 Ark. 451; *Nathan v. Lehman*, 39 Ark. 256; *Trimble v. James*, 40 Ark. 393; *St. Joseph's Convent v. Garner*, 66 Ark. 623.

California. — *Rogers v. King*, 22 Cal. 71; *Castro v. Richardson*, 18 Cal. 478; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Dennis v. Winter*, 63 Cal. 16; *Goldtree v. McAlister*, 86 Cal. 93.

Connecticut. — *Fortune v. Buck*, 23 Conn. 1. *Delaware.* — *Pennel v. Weyant*, 2 Harr. (Del.) 501; *Smith v. Redden*, 5 Harr. (Del.) 321;

Melvin v. Halloway, 2 Houst. (Del.) 527; *St. James' Church v. Walker*, 1 Del. Ch. 284.

Georgia. — *Langston v. Marks*, 68 Ga. 435; *Weathers v. McFarland*, 97 Ga. 266.

Illinois. — *Hobson v. Ewan*, 62 Ill. 146; *Grand Tower Min., etc., Co. v. Gill*, 111 Ill. 541; *Matter of Storey*, 120 Ill. 244.

Indiana. — *Winslow v. Donnelly*, 119 Ind. 565.

Iowa. — *Stanley v. Morse*, 26 Iowa 454; *Latham v. Latham*, 30 Iowa 294; *Gregg v. Myatt*, 78 Iowa 703.

Kansas. — *Calloway v. Cooley*, 50 Kan. 743.

Kentucky. — *Chasteen v. Ford*, 5 Litt. (Ky.) 268; *Wells's Will*, 5 Litt. (Ky.) 274; *Jacob v. Pulliam*, 3 J. J. Marsh. (Ky.) 200; *King v. Bullock*, 9 Dana (Ky.) 41; *Singleton v. Singleton*, 8 B. Mon. (Ky.) 348; *Tibbatts v. Berry*, 10 B. Mon. (Ky.) 474; *Henry v. Nunn*, 11 B. Mon. (Ky.) 241; *Stevenson v. Huddleson*, 13 B. Mon. (Ky.) 311; *Sanders v. Sanders*, 17 B. Mon. (Ky.) 13; *Mitchell v. Holder*, 8 Bush (Ky.) 364; *Thompson v. Beadles*, 14 Bush (Ky.) 47.

Louisiana. — *Nichols v. Grice*, 6 La. Ann. 446; *Hollingshead v. Sturges*, 16 La. Ann. 334; *Pfarr v. Belmont*, 39 La. Ann. 294; *Harris's Succession*, 39 La. Ann. 443, 4 Am. St. Rep. 269; *Schaffer's Succession*, 50 La. Ann. 601.

Maine. — *Piper v. Moulton*, 72 Me. 155.

Maryland. — *Warford v. Colvin*, 14 Md. 532; *McDaniel v. McDaniel*, 86 Md. 623; *Stanley v. Safe Deposit, etc., Co.*, 87 Md. 450.

Massachusetts. — *Brown v. Wood*, 17 Mass. 72.

Michigan. — *Allison v. Smith*, 16 Mich. 405; *Needham v. Gillett*, 39 Mich. 574; *Johnson v. Johnson*, 70 Mich. 65.

Mississippi. — *Herrington v. Herrington*, 1 Walk. (Miss.) 322; *Scott v. Calvit*, 3 How. (Miss.) 158; *Tucker v. Whitehead*, 58 Miss. 762.

Missouri. — *Jourden v. Meier*, 31 Mo. 40; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Banks v. Banks*, 65 Mo. 432; *Stowe v. Stowe*, 140 Mo. 594; *Cooper v. Duncan*, 20 Mo. App. 355.

Nebraska. — *Kirk v. Bowling*, 20 Neb. 260; *Roberts v. Flanagan*, 21 Neb. 503.

New Hampshire. — *Wilson v. Edmonds*, 24 N. H. 517; *Hall v. Woodman*, 49 N. H. 295; *Spofford v. Smith*, 59 N. H. 366.

New Jersey. — *Vreeland v. Ryno*, 26 N. J. Eq. 161; *Ryno v. Ryno*, 27 N. J. Eq. 522; *Quidort v. Pergeaux*, 18 N. J. Eq. 472.

New Mexico. — *Bent v. Thompson*, 5 N. Mex. 408.

well as when it is in solemn form.¹

(2) *Direct Attack*. — The statutes regulating the practice in probate matters generally provide for an appeal from a decree or order admitting a will to probate,² and in some jurisdictions a suit, usually in chancery, to contest a will may be brought within a certain time after its admission to probate, if there was no contest in the probate court.³ If no contest is instituted within the time specified, the probate becomes absolutely conclusive, and cannot afterwards be questioned in any proceeding,⁴ even though a later will is discovered.⁵

b. DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY. — At Common Law, probate operated to establish the will so far only as it related to personal property, and was wholly without effect as to any real estate that might have been devised by the will, because the probate jurisdiction of the ecclesiastical courts did not extend to wills of real estate.⁶ Since the creation of the court of probate in *England* and its subsequent incorporation into the higher court of justice, wills of real and personal estate are alike subject to probate.⁷

In the United States, by virtue of the statutes regulating the subject, there is generally no distinction as regards the effect of probate between wills of personality and wills of real estate,⁸ except so far as the will disposes of realty in a state other than that in which the probate was had, the reason of which

New York. — *Wetmore v. Parker*, 52 N. Y. 450, *affirming* 7 Lans. (N. Y.) 121; *Caulfield v. Sullivan*, 85 N. Y. 153, *affirming* 21 Hun (N. Y.) 227; *Harrison v. Clark*, 87 N. Y. 576; *Campbell v. Logan*, 2 Bradf. (N. Y.) 90; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153; *Clark v. Fisher*, 1 Paige (N. Y.) 171, 19 Am. Dec. 402; *Pritchard v. Hicks*, 1 Paige (N. Y.) 270; *Colton* 6 Ross, 2 Paige (N. Y.) 396; *Bogardus v. Clark*, 4 Paige (N. Y.) 623, *affirming* 1 Edw. (N. Y.) 266; *Muir v. Leake*, etc., *Orphan House*, 3 Barb. Ch. (N. Y.) 477.

North Carolina. — *Stanly v. Kean*, Tayl. (1 N. Car.) 93; *Ralston v. Telfair*, 1 Dev. & B. L. (18 N. Car.) 482; *Ward v. Hearne*, Busb. L. (44 N. Car.) 184; *Loudon v. Wilmington*, etc., R. Co., 88 N. Car. 584; *Hampton v. Hardin*, 88 N. Car. 592; *Jenkins v. Jenkins*, 96 N. Car. 254.

Ohio. — *Bailey v. Bailey*, 8 Ohio 239; *Holman v. Riddle*, 8 Ohio St. 384; *Brown v. Burdick*, 25 Ohio St. 265; *Mears v. Mears*, 15 Ohio St. 90; *Ousley v. Witheron*, 7 Ohio Cir. Dec. 448, 13 Ohio Cir. Ct. 298.

Oregon. — *Hubbard v. Hubbard*, 7 Oregon 42.

Pennsylvania. — *Thompson v. Thompson*, 9 Pa. St. 234; *Lovett v. Mathews*, 24 Pa. St. 330; *Whittaker's Estate*, 14 Phila. (Pa.) 275, 38 Leg. Int. (Pa.) 140; *Mackin's Estate*, 14 Phila. (Pa.) 328, 38 Leg. Int. (Pa.) 458; *Sheetz's Estate*, 7 Pa. Dist. 336.

Tennessee. — *Hodges v. Bauchman*, 8 Verg. (Tenn.) 188; *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70, 94 Am. Dec. 184.

Texas. — *Paschal v. Acklin*, 27 Tex. 173; *Acklin v. Paschal*, 48 Tex. 147; *Steele v. Renn*, 50 Tex. 467, 32 Am. Rep. 605; *Martin v. Robinson*, 67 Tex. 368; *Whitman v. Haywood*, 77 Tex. 557.

Vermont. — *Townsend v. Downer*, 32 Vt. 183; *Clark v. Clark*, 54 Vt. 489.

Virginia. — *Lemon v. Reynolds*, 5 Munf. (Va.) 552; *Connolly v. Connolly*, 32 Gratt. (Va.) 657.

Wisconsin. — *O'Dell v. Rogers*, 44 Wis. 136; *Dicke v. Wagner*, 95 Wis. 260.

See also the title JURISDICTION, vol. 17, p. 1053.

1. *Probate in Common Form Not Subject to Collateral Attack.* — *Petty v. Ducker*, 51 Ark. 281; *London v. Wilmington*, etc., R. Co., 88 N. Car. 584.

In *Georgia* the probate of a will in common form unattacked for seven years is conclusive on all parties in interest, except minor heirs at law. *Anderson v. Green*, 46 Ga. 362; *Peters v. West*, 70 Ga. 343; *Brinkley v. Sanford*, 99 Ga. 130.

2. *Appeal from Probate Court.* — See *infra*, this title, *Revocation of Probate* — *By Appeal from Probate Court*.

3. *Suit to Contest Will.* — See *infra*, this title, *Revocation of Probate* — *By Suit in Equity or Action at Law*.

4. *Failure to Contest Within Time Limited.* — *Hall v. Hall*, 47 Ala. 290; *Brock v. Frank*, 51 Ala. 85; *Matter of Gwin*, 77 Cal. 313; *Sanders v. Sanders*, 14 Smed. & M. (Miss.) 81; *Folmar's Appeal*, 68 Pa. St. 482; *Re Depuy*, 28 Pittsb. Leg. J. N. S. (Pa.) 404; *Nalle v. Fenwick*, 4 Rand. (Va.) 585; *Vaughan v. Green*, 1 Leigh (Va.) 287.

5. *Discovery of Later Will.* — See *supra*, this title, *Time for Probate* — *After Death of Testator* — *Statutory Provisions*.

6. *Effect of Probate at Common Law Stated.* — *Tompkins v. Tompkins*, 1 Story U. S.) 547.

7. See *supra*, this title, *Jurisdiction* — *By What Courts Exercised* — *In England*.

8. *General Rule in United States — Probate Establishes Will of Realty* — *United States*. — *Adams v. De Cook*, McAll. (U. S.) 253, 1 Fed. Cas. No. 51.

Connecticut. — *Bush v. Sheldon*, 1 Day (Conn.) 170; *Judson v. Lake*, 3 Day (Conn.) 318; *Brown v. Lanman*, 1 Conn. 467.

Kentucky. — *Stevenson v. Huddleson*, 13 B. Mon. (Ky.) 299; *Davies v. Leete*, (Ky. 1901) 64

is that the validity of a devise must be determined by the *lex loci rei sitæ*.¹ But in some jurisdictions the rule of the common law is still in force and the probate of a will is inoperative as to real estate disposed of by it,² or, at most, is only presumptive evidence of the validity of the will.³

c. MATTERS ADJUDICATED BY PROBATE. — The admission of a will to probate operates as an adjudication that it was duly executed and attested as a will,⁴ and was not forged,⁵ or procured by fraud;⁶ that the testator had sufficient mental capacity to make a will,⁷ was of testamentary age,⁸ and had authority to dispose of property by will;⁹ that the attesting witnesses were

S. W. Rep. 441, 23 Ky. L. Rep. 899; Wells's Will, 5 Litt. (Ky.) 273.

Massachusetts. — *Dublin v. Chadbourne*, 16 Mass. 433; *Laughton v. Atkins*, 1 Pick. (Mass.) 535.

South Carolina. — *Rumph v. Hiott*, 35 S. Car. 444. Formerly the common-law rule prevailed in *South Carolina*. *Tygart v. Peebles*, 9 Rich. Eq. (S. Car.) 46.

Virginia. — *Norvell v. Lessueur*, 33 Gratt. (Va.) 222.

1. Probate Not Effective as to Devise of Land in Another State. — *Robertson v. Pickrell*, 109 U. S. 608; *McCormick v. Sullivant*, 10 Wheat. (U. S.) 192; *Darby v. Mayer*, 10 Wheat. (U. S.) 465; *Pennel v. Weyant*, 2 Harr. (Del.) 501.

2. Common-law Rule in Force in Some Jurisdictions. — *Arkansas*. — *Janes v. Williams*, 31 Ark. 175.

District of Columbia. — *Webb v. Janney*, 9 App. Cas. (D. C.) 41; *Perry v. Sweeny*, 11 App. Cas. (D. C.) 404; *Robertson v. Pickrell*, 109 U. S. 608; *Campbell v. Porter*, 162 U. S. 478.

Florida. — *Belton v. Summer*, 31 Fla. 139.

Maryland. — *Warford v. Colvin*, 14 Md. 532; *Darby v. Mayer*, 10 Wheat. (U. S.) 465.

New York. — *Anderson v. Anderson*, 112 N. Y. 104; *Matter of Merriam*, 136 N. Y. 58; *Corley v. McElmeel*, 149 N. Y. 229; *Bailey v. Hilton*, 14 Hun (N. Y.) 3, *affirming* 2 Redf. (N. Y.) 212; *Upton v. Bernstein*, 76 Hun (N. Y.) 516; *Bowen v. Sweeney*, 89 Hun (N. Y.) 359, 25 Civ. Pro. (N. Y.) 128; *Jackson v. Le Grange*, 19 Johns. (N. Y.) 386. As to the conclusive effect of a verdict in an action to determine the validity of a will, see *Matter of Ruppenner*, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 158, 15 Misc. (N. Y.) 654.

Pennsylvania. — *Smith v. Bonsall*, 5 Rawle (Pa.) 80; *Rowland v. Evans*, 6 Pa. St. 435; *Kenyon v. Stewart*, 44 Pa. St. 179; *Cochran v. Young*, 104 Pa. St. 333; *Broe v. Boyle*, 108 Pa. St. 76.

3. Probate as Presumptive Evidence of Validity of Devise. — *Corley v. McElmeel*, 87 Hun (N. Y.) 23, *affirmed* 149 N. Y. 228.

4. Execution and Attestation. — *Alabama*. — *Matthews v. McDade*, 72 Ala. 377.

District of Columbia. — *Barbour v. Moore*, 4 App. Cas. (D. C.) 535.

Iowa. — *Lorieux v. Keller*, 5 Iowa 196, 68 Am. Dec. 696.

Kentucky. — *Miller v. Swan*, 91 Ky. 36.

Maine. — *Patten v. Tallman*, 27 Me. 17.

Maryland. — *Buchanan v. Turner*, 26 Md. 1.

Massachusetts. — *Sumner v. Crane*, 155 Mass. 483.

Michigan. — *Allison v. Smith*, 16 Mich. 405.

New Hampshire. — *Poplin v. Hawke*, 8 N. H. 124.

New York. — *Matter of Gilman*, 38 Barb. (N. Y.) 364; *Van Rensselaer v. Morris*, 1 Paige (N. Y.) 13; *Muir v. Leake*, etc., Orphan House, 3 Barb. Ch. (N. Y.) 477; *Bogardus v. Clarke*, 1 Edw. (N. Y.) 266.

North Carolina. — *Morgan v. Bass*, 3 Ired. L. (25 N. Car.) 243.

South Carolina. — *Prater v. Whittle*, 16 S. Car. 46; *Burkett v. Whittemore*, 36 S. Car. 428; *Marshall v. Marshall*, 42 S. Car. 436.

Wisconsin. — *Jones v. Roberts*, 84 Wis. 465.

Testamentary Character of Instrument Established by Probate. — *England*. — *Russell v. Dickson*, 1 Con. & Law. 284.

United States. — *Tompkins v. Tompkins*, 1 Story (U. S.) 547.

Alabama. — *Darrington v. Borland*, 3 Port. (Ala.) 11; *Hardy v. Hardy*, 26 Ala. 524; *Deslonde v. Darrington*, 29 Ala. 92; *Hall v. Hall*, 47 Ala. 296; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Matthews v. McDade*, 72 Ala. 377.

New York. — *Van Rensselaer v. Morris*, 1 Paige (N. Y.) 13; *Colton v. Ross*, 2 Paige (N. Y.) 396, 22 Am. Dec. 648; *Bogardus v. Clark*, 4 Paige (N. Y.) 623; *Morrell v. Dickey*, 1 Johns. Ch. (N. Y.) 153.

Pennsylvania. — *Huff's Estate*, 15 S. & R. (Pa.) 42.

Virginia. — *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

But see *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164, holding that probate does not establish the testamentary character of the instrument.

5. *Tucker v. Whitehead*, 58 Miss. 765.

6. *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398.

7. Mental Capacity. — *Parker v. Parker*, 11 Cush. (Mass.) 519; *Dublin v. Chadbourne*, 16 Mass. 433; *Greenwood v. Murray*, 26 Minn. 259; *Poplin v. Hawke*, 8 N. H. 124; *Varner v. Johnston*, 112 N. Car. 570; *Vermont Baptist State Convention v. Ladd*, 59 Vt. 5.

8. Testamentary Age. — *Bent's Appeal*, 35 Conn. 525; *Ex p. Williams*, 1 Lea (Tenn.) 529. The probate of the will of a person over eighteen years of age but under twenty-one, disposing only of personality, but directing that land should not be sold for the payment of the legacies, is conclusive of the factum and validity of the will as one of personality only. *Banks v. Sherrod*, 52 Ala. 267.

9. Testamentary Power in General. — *Brock v. Frank*, 51 Ala. 85; *Parker v. Parker*, 11 Cush. (Mass.) 519; *Crippen v. Dexter*, 13 Gray (Mass.) 332; *Strong v. Perkins*, 3 N. H. 517; *Ballow v. Hudson*, 13 Gratt. (Va.) 682.

Thus, while at common law a married woman had no power to dispose of her person-

competent and credible,¹ and that the evidence on which the probate was granted was sufficient to sustain the decree.² The probate of a will also involves an adjudication that the testator was a resident of the county in which the proceeding was had,³ and that the will was not revoked by marriage.⁴

Situs of Principal Part of Estate. — Under the *Pennsylvania* statute, providing that a will must be proved in the county where the principal part of the estate is found, the probate constitutes an adjudication of this fact.⁵

Force and Effect of Will. — Since courts of probate are not courts of construction,⁶ the validity and effect of the provisions of a will are not determined by its admission to probate, but are open to litigation in other proceedings.⁷

Want of Jurisdiction. — If the court was without jurisdiction in the premises, the decree of probate is not merely erroneous, but is absolutely void, and this objection may be made in any proceeding in which the probate may be relied on. Thus, the probate may be attacked collaterally on the ground that the testator was still alive,⁸ or that the will was not attested by the requisite number of witnesses,⁹ or that the record of the proceeding shows a want of compliance with the statutory requirements which are made essential to the jurisdiction of the court in the particular case, such as the publication of notice.¹⁰ In *Georgia* a probate in solemn form, being conclusive only on the parties notified and the legatees who are represented in the executor, is subject to collateral attack at the instance of an heir who had no notice of the proceeding;¹¹ and

ality by will unless by her husband's consent or by virtue of a marriage settlement, the probate of the will of a married woman operated as an adjudication that she had such authority. *Picquet v. Swan*, 4 Mason (U. S.) 443; *Cassels v. Vernon*, 5 Mason (U. S.) 332; *Judson v. Lake*, 3 Day (Conn.) 318; *Osgood v. Breed*, 12 Mass. 525; *Parker v. Parker*, 11 Cush. (Mass.) 519; *Bryant v. Allen*, 6 N. H. 116; *Cutter v. Butler*, 25 N. H. 343, 57 Am. Dec. 330; *Robinson v. Allen*, 11 Gratt. (Va.) 785. But see *Gregory v. Oates*, 92 Ky. 532.

But the operation of such a will is restricted to such estate as the testatrix was authorized by law to dispose of by will. *Mitchell v. Holder*, 8 Bush (Ky.) 365.

1. Competency and Credibility of Witnesses. — *Fortune v. Buck*, 23 Conn. 1.

2. Sufficiency of Evidence. — *Newman v. Virginia*, etc., Steel, etc., Co., (C. C. A.) 80 Fed. Rep. 228; *Jourden v. Meier*, 31 Mo. 40; *Roberts v. Flanagan*, 21 Neb. 503; *McClure v. Spivey*, 123 N. Car. 678.

3. Residence of Testator — *California*. — *Irwin v. Scriber*, 18 Cal. 507.

Connecticut. — *Willett's Appeal*, 50 Conn. 340.

Georgia. — *Tant v. Wigfall*, 65 Ga. 412.

Indiana. — *Cunningham v. Tuley*, 154 Ind. 270.

Maryland. — *Shultz v. Houck*, 29 Md. 24.

New York. — *Bolton v. Schriever*, 135 N. Y. 65, affirming 58 N. Y. Super. Ct. 520, 19 Civ. Pro. N. Y. 398, 26 Abb. N. Cas. (N. Y.) 230; *Plant v. Harrison*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 649; *Bumstead v. Read*, 31 Barb. (N. Y.) 661.

Wisconsin. — *Slinger's Will*, 72 Wis. 22.

4. Revocation by Marriage. — *Bowen v. Allen*, 113 Ill. 53, 55 Am. Rep. 398; *Broe v. Boyle*, 108 Pa. St. 76.

5. Situs of Principal Part of Estate. — *Shoenberger's Estate*, 139 Pa. St. 132.

6. Probate Court Not a Court of Construction. — See *supra*, this title, *Jurisdiction* — *Nature and Extent of Probate Jurisdiction*.

7. Validity and Effect of Will Not Adjudicated — *United States*. — *McArthur v. Scott*, 113 U. S. 340; *Ware v. Wisner*, 50 Fed. Rep. 310, 4 McCrary (U. S.) 66.

California. — *Murphy's Estate*, 104 Cal. 554.

Connecticut. — *Bent's Appeal*, 35 Conn. 523.

Iowa. — *Fallon v. Chidester*, 46 Iowa 588, 26 Am. Rep. 164.

Louisiana. — *Skipwith's Succession*, 15 La. Ann. 209.

Massachusetts. — *Sumner v. Crane*, 155 Mass. 483.

Minnesota. — *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339.

Mississippi. — *Lusk v. Lewis*, 32 Miss. 297.

Missouri. — *Cox v. Cox*, 101 Mo. 168, *criticising and doubting* *Kenrick v. Cole*, 61 Mo. 572; *Lilly v. Tobbein*, 103 Mo. 477, 23 Am. St. Rep. 887.

New York. — *Waters v. Cullen*, 2 Bradf. (N. Y.) 354; *McLaughlin's Will*, Tuck. (N. Y.) 79.

Pennsylvania. — *Broe v. Boyle*, 108 Pa. St. 76.

South Carolina. — *Prater v. Whittle*, 16 S. Car. 46; *Burkett v. Whittemore*, 36 S. Car. 428.

Wisconsin. — *Jones v. Roberts*, 84 Wis. 465.

8. Probate Granted in Lifetime of Testator. — See *supra*, this title, *Jurisdiction* — *Death of Testator*. But the grant of probate is *prima facie* evidence of the death of the testator. *Hendrix v. Boggs*, 15 Neb. 469. See also the title *PRESUMPTIONS*, vol. 22, p. 1250.

9. Insufficient Attestation. — *Hooks v. Stamper*, 18 Ga. 471; *Cureton v. Taylor*, 89 Ga. 490; *Gay v. Sanders*, 101 Ga. 601. But see *infra*, this title, *Holographic Wills*.

Disqualification of Witness. — The probate of a will is not subject to collateral attack because one of the attesting witnesses was not credible, if such fact did not appear on the face of the will. *Chicago Title, etc., Co. v. Brown*, 183 Ill. 42.

10. Record Showing Noncompliance with Statute. — *In re Charlebois*, 6 Mont. 373.

11. Probate in Solemn Form Without Notice. — *Medlock v. Merritt*, 102 Ga. 212.

in *New York*, when probate is contested, notice must be given to all persons who would take any interest in any property under the will.¹

d. EFFECT OF PROBATE AS TO VESTING OF RIGHTS. — The title and rights of the executor and devisees are created by the will and not by the probate,² which is merely evidence of such title and rights,³ and in this respect the probate relates back to the death of the testator.⁴ But the probate is the only evidence, as a general rule, by which rights under the will may be established.⁵

2. Refusal of Probate. — Ordinarily, a will which has been refused probate on the merits cannot be again propounded for probate as long as the sentence of rejection remains in force,⁶ because that would be a collateral attack on the former proceeding.⁷ But persons who had no notice of the proceeding, and who would have been entitled to apply for probate in the first instance, may propound the will, notwithstanding its rejection.⁸

Void Sentence. — If the sentence of the probate court is void, it is, of course, subject to collateral attack, and therefore the will may again be offered for probate.⁹

Rejection Not on Merits. — If probate was refused, not on the merits, but merely because of the insufficiency of some matter of form or procedure, there is no adjudication that the instrument is not entitled to probate, and therefore it may be again propounded.¹⁰

Fraud or Collusion. — Another instance in which the refusal of probate does not bar a second application is where the decision was fraudulently and collusively obtained.¹¹

X. REVOCATION OF PROBATE — 1. By Application to Probate Court —
a. POWER OF PROBATE COURT. — There is no question as to the power of a court of probate, in a proper case, to revoke the probate of a will. It was exercised by the ecclesiastical courts in *England*,¹² and it is generally recog-

1. *Cook v. White*, 43 N. Y. App. Div. 388.

2. **No Title or Rights Created by Probate.** — *Johnes v. Jackson*, 67 Conn. 89; *Bolton v. Jacks*, 6 Robt. (N. Y.) 166; *Pollock v. Hooley*, 67 Hun (N. Y.) 370; *Naylor v. Brown*, (County Ct.) 32 Misc. (N. Y.) 298. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 985.

3. **Probate Mere Evidence of Rights under Will.** — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Shepherd v. Carriel*, 19 Ill. 313. See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 744.

4. **Probate Relates Back to Death.** — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Allison v. Smith*, 16 Mich. 405; *Sutphen v. Ellis*, 35 Mich. 446; *Richards v. Pierce*, 44 Mich. 444; *Barnard v. Bateman*, 76 Mo. 414.

5. See *supra*, this title, *Necessity of Probate or Letters of Administration*.

6. **Probate Refused on Merits.** — *Wells's Will*, 5 Litt. (Ky.) 273; *Negro John v. Morton*, 8 Gill & J. (Md.) 391; *Matter of Mousseau*, 30 Minn. 202; *Hill v. Burger*, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 264; *Ward v. Vickers*, 2 Hayw. (3 N. Car.) 164; *Redmond v. Collins*, 4 Dev. L. (15 N. Car.) 430, 27 Am. Dec. 208; *Missionary Soc. v. Ely*, 56 Ohio St. 405; *Patterson's Estate*, 30 Pittsb. Leg. J. N. S. (Pa.) 72; *Schultz v. Schultz*, 10 Gratt. (Va.) 358, 60 Am. Dec. 335; *Ballow v. Hudson*, 13 Gratt. (Va.) 672; *Norvell v. Lessueur*, 33 Gratt. (Va.) 222.

Propounding After Revocation of Sentence Refusing Probate. — *Edwards v. Edwards*, 3 Ired. L. (25 N. Car.) 82.

7. **Collateral Attack.** — *Matter of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

Discovery of Codicil After Refusal of Probate. — Where a codicil to a will is discovered after refusal to admit the will to probate, the will and codicil together may be presented for probate. In such case the second application is not a collateral attack on the first proceeding, because the questions involved are not the same. *Barney v. Hayes*, 11 Mont. 99.

8. **Persons Without Notice of Former Proceeding.** — *Martin v. Perkins*, 56 Miss. 204; *Harvey v. Smith*, 1 Dev. & B. L. (18 N. Car.) 186.

Effect of Statutory Right of Appeal. — The fact that the party aggrieved by the order refusing probate is given the right to appeal therefrom does not affect his right to propound the will for probate. The remedy by appeal, unless made conclusive by the terms of the statute, is merely cumulative. *Feuchter v. Keyl*, 48 Ohio St. 357; *In re Stacey*, 6 Ohio Dec. 142, 4 Ohio N. P. 143.

9. **Void Sentence.** — *Gay v. Minot*, 3 Cush. (Mass.) 352.

10. **Rejection Not on Merits.** — *Levy v. Levy*, 28 Md. 25; *Lilly v. Tobbein*, 103 Mo. 486, 23 Am. St. Rep. 887; *Whitfield v. Hurst*, 9 Ired. L. (31 N. Car.) 176.

11. **Fraud and Collusion.** — *St. John's Parish v. Bostwick*, 8 App. Cas. (D. C.) 452; *Redmond v. Collins*, 4 Dev. L. (15 N. Car.) 430, 27 Am. Dec. 208; *Wills v. Spraggins*, 3 Gratt. (Va.) 548. See also *Brookie v. Portwood*, 84 Ky. 250.

12. **Power of Ecclesiastical Courts to Revoke Probate.** — *Ridgway v. Abington*, 3 Sw. & Tr. 3; *In Goods of Napier*, 1 Phill. Ecc. 83; *Noell v.*

nized as inherent in the probate courts in the *United States*,¹ though in some of the states it is expressly conferred by statute.²

Exclusive Power of Probate Court. — The power of the probate court to revoke the probate of a will is exclusive in the absence of a statute conferring it on other courts.³

Construction of Will. — The probate court has no power to construe the will in a proceeding to revoke the probate thereof.⁴

b. GROUNDS OF REVOCATION. — Probate may be revoked on the ground that the court acted without jurisdiction,⁵ that the probate was procured by fraud or was the result of mistake,⁶ that some statutory requirement, such as the giving of notice, was not complied with,⁷ or that a later will superseding the will proved has been discovered.⁸ Probate may also be revoked on the ground of newly discovered evidence.⁹

Consent of Parties. — The probate of a will may be revoked on the consent of the parties in interest.¹⁰

Statutory Provisions. — In some states the statutes enumerate in terms more or less comprehensive the grounds on which probate may be revoked.¹¹

c. TIME OF APPLICATION. — It is held that a void order of probate may, in the absence of any statute on the subject, be revoked at any time,¹² but

Wells, 1 Lev. 235, 1 Sid. 359; *Allen v. Dundas*, 3 T. R. 125.

1. Power of Probate Courts in United States. — *Hill v. Hill*, 6 Ala. 166; *Kirby v. Kirby*, 40 Ala. 492; *Roy v. Segrist*, 19 Ala. 810; *Sowell v. Sowell*, 40 Ala. 243. Compare *Kirby v. Kirby*, 40 Ala. 492; *Price v. Moore*, 21 Md. 366; *Worthington v. Gittings*, 56 Md. 542; *Larson v. How*, 71 Minn. 250; *Ryno v. Ryno*, 27 N. J. Eq. 522, reversing *Vreeland v. Ryno*, 26 N. J. Eq. 161; *Straub's Case*, 49 N. J. Eq. 264, affirmed *Scharer v. Schmidt*, 50 N. J. Eq. 795; *Dobke v. McClaran*, 41 Barb. (N. Y.) 491; *Hanau's Estate*, 12 Pa. Co. Ct. 386; *Franks v. Chapman*, 61 Tex. 576; *Hotchkiss v. Ladd*, 62 Vt. 209.

In *South Carolina* an ordinary may revoke the probate of a will allowed by his predecessor. *Brown v. Gibson*, 1 Nott & M. (S. Car.) 326. But it is otherwise in *New Mexico*. *Bent v. Thompson*, 138 U. S. 114, affirming 5 N. Mex. 408.

In *Michigan* the court of probate has no power to revoke the probate of a will, because that court derives its jurisdiction exclusively from the statute, and the statute does not confer any such authority. *Grady v. Hughes*, 64 Mich. 545; *Wright v. Wright*, 79 Mich. 527.

A Register of Wills in Pennsylvania cannot revoke an order of probate made by him. Such power is vested in the Orphans' Court. *Beatty's Estate*, 193 Pa. St. 304.

2. Power of Revocation Conferred by Statute. — *Bacigalupo v. Superior Ct.*, 108 Cal. 92; *Tudor v. James*, 53 Ga. 302; *Rockwell v. Holden*, 22 R. I. 244.

3. Exclusive Power of Probate Court. — *Langdon v. Blackburn*, 109 Cal. 19; *Tudor v. James*, 53 Ga. 302; *Paxton v. Patterson*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 389.

4. Construction of Will. — *Matter of De Haas*, (Surrogate Ct.) 24 Misc. (N. Y.) 420.

5. Want of Jurisdiction. — *Matter of Warfield*, 22 Cal. 51, 83 Am. Dec. 49.

6. Fraud or Mistake. — *Hambleton v. Yocum*, 108 Pa. St. 304; *Dugan v. Northcutt*, 7 App. Cas. (D. C.) 367; *Shultz v. Houck*, 29 Md. 24; *Worthington v. Gittings*, 56 Md. 542; *Vance*

v. Upson, 64 Tex. 266; *Goodell v. Pike*, 40 Vt. 325; *Matter of Fisher*, 15 Wis. 511. But see *Archer v. Meadows*, 33 Wis. 166.

7. Failure to Give Notice of Proceedings. — *Kirby v. Kirby*, 40 Ala. 495; *Matter of Lawrence*, 7 N. J. Eq. 215; *Matter of Odell*, (Surrogate Ct.) 1 Misc. (N. Y.) 390.

8. Discovery of Later Will. — *Executors' Case*, *Hetley* 77; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Campbell v. Logan*, 2 Bradf. (N. Y.) 90; *Matter of Hamilton*, 2 Connolly (N. Y.) 268; *Vance v. Upson*, 64 Tex. 266. But in *Michigan* the probate court, on probating a later will, has no authority to revoke an earlier probate. *Besancon v. Brownson*, 39 Mich. 388.

9. Newly Discovered Evidence. — *McNorton v. Robeson*, 9 Ired. L. (31 N. Car.) 256.

10. Revocation by Consent. — *Louisville, etc., R. Co. v. Sanders*, (Ky 1898) 44 S. W. Rep. 644.

Consent of Contingent Remaindermen Required. — *Hanau's Estate*, 12 Pa. Co. Ct. 386, 2 Pa. Dist. 127.

11. Statutory Enumeration of Grounds of Revocation — Thus, the *New York* statute provides that probate may be revoked for fraud, newly discovered evidence, "or other sufficient cause." *Matter of Hamilton*, 2 Connolly (N. Y.) 268; *Matter of Miller*, (Surrogate Ct.) 28 Misc. (N. Y.) 373; *Matter of Tilden*, 56 N. Y. App. Div. 277. And see generally the statutes of the several states.

What Constitutes "Sufficient Cause." — *Matter of Donlon*, 66 Hun (N. Y.) 199 (failure to appoint representatives for a party who is *non compos mentis*); *Matter of Richardson*, 81 Hun (N. Y.) 425 (infancy of one of the next of kin); In *Matter of Odell*, (Surrogate Ct.) 1 Misc. (N. Y.) 390 (failure to cite one of the next of kin of the testator).

What Is Not "Sufficient Cause." — *In re Gillies*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 909 (insufficient provision for widow and children).

12. Time of Application in General. — *Hooks v. Stamper*, 18 Ga. 471; *Clagett v. Hawkins*, 11 Md. 381.

the matter is now generally regulated by statute, which requires the application to be made within a certain time after the probate or after the discovery of the facts on which the application is made.¹

d. WHO MAY OBTAIN REVOCATION. — Probate may be revoked only at the instance of a person interested in the estate,² or the personal representatives, heirs, devisees, or legatees of such person.³

2. By Appeal from Probate Court. — A decree or order admitting a will to probate, if erroneous, may be reversed and vacated on appeal. This is a purely statutory remedy, but it is provided for by the probate laws of nearly all the states.⁴

3. By Suit in Equity or Action at Law — *a. SUIT IN EQUITY.* — A court of equity has no jurisdiction, unless it is conferred by statute, to entertain a bill to set aside the probate of a will even on the ground of fraud, mistake, or forgery. This is an exception to the general rule that under such circumstances equity has concurrent jurisdiction with the other courts, and though no sufficient reason therefor can be assigned the rule is well established.⁵ It

Probate in Common Form in South Carolina may be revoked at any time within thirty years. *Brown v. Gibson*, 1 Nott & M. (S. Car.) 326.

Revocation on the Ground of Fraud must be sought within a reasonable time after the discovery of the facts showing the fraud. *Worthington v. Gittings*, 56 Md. 542.

Power of Court at Subsequent Term. — In *Dickenson v. Stewart*, 1 Murph. (5 N. Car.) 99, it was held that the probate of a will might be revoked at a term subsequent to that at which it was granted.

But the law in *Kentucky* is that such power does not exist at a subsequent term. *Taylor v. Tibbatts*, 13 B. Mon. (Ky.) 177. Unless the parties in interest consent. *Louisville, etc., R. Co. v. Sanders*, (Ky. 1898) 44 S. W. Rep. 644.

1. Time Limited by Statute. — *Clements v. McGinn*, (Cal. 1893) 33 Pac. Rep. 920; *Justus's Succession*, 45 La. Ann. 190; *Snow v. Hamilton*, 90 Hun (N. Y.) 157; *Matter of Soule*, 46 Hun (N. Y.) 661; *In re Liddington*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 646; *Matter of Rupaner*, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 158, 15 Misc. (N. Y.) 654, 9 N. Y. App. Div. 422; *Craig v. Beatty*, 11 S. Car. 379; *Franks v. Chapman*, 61 Tex. 576. And see the various local statutes on the subject.

2. Who May Obtain Revocation. — *Matter of Peaslee*, 73 Hun (N. Y.) 113; *Matter of Bradley*, 70 Hun (N. Y.) 104; *Matter of Rupaner*, (Surrogate Ct.) 25 Civ. Pro. (N. Y.) 158, 15 Misc. (N. Y.) 654; *Wynne v. Spiers*, 7 Humph. (Tenn.) 407.

Next of Kin of Testator. — *Matter of Bradley*, 70 Hun (N. Y.) 104.

Estoppel to Ask Revocation — Acceptance of Legacy. — *Matter of Soule*, 1 Connolly (N. Y.) 18, 22 Abb. N. Cas. (N. Y.) 236.

Estoppel by Failure to Appear in Probate Court. — *Brown v. Harris*, 9 Baxt. (Tenn.) 387.

3. Representatives of Party Entitled. — *Lovett v. Chisolm*, 30 Ala. 88. See *Matter of Milliken*, (Surrogate Ct.) 32 Misc. (N. Y.) 317.

4. Appeal from Probate Court. — *Matthews v. McDade*, 72 Ala. 377; *Buckingham's Appeal*, 57 Conn. 544; *Havelick v. Havelick*, 18 Iowa 414; *Lawrie v. Lawrie*, 39 Kan. 480; *Preston v. Fidelity Trust, etc., Co.*, 94 Ky. 295; *Meyer*

v. Henderson, 88 Md. 585; *Northampton v. Smith*, 11 Met. (Mass.) 390; *Cheever v. Judge*, 45 Mich. 6; *Wright v. Wright*, 79 Mich. 527; *Matter of Alexander*, 27 N. J. Eq. 463; *Sicknoth's Estate*, 7 Nev. 223; *Newhouse v. Gale*, 1 Redf. (N. Y.) 217; *Rollwagen v. Rollwagen*, 3 Hun (N. Y.) 121; *Scribner v. Williams*, 1 Paige (N. Y.) 550; *Dennison v. Talmage*, 29 Ohio St. 433; *Missionary Soc. v. Ely*, 56 Ohio St. 405; *Rockwell v. Holden*, 22 R. I. 244; *Howe v. Pratt*, 11 Vt. 255. And see the statutes of the several states.

In *Missouri* the remedy by appeal does not exist. An action to contest the probate must be brought. *Kenrick v. Cole*, 46 Mo. 85.

5. General Rule as to Equity Jurisdiction — England. — *Webb v. Claverden*, 2 Atk. 424; *Kerrich v. Bransby*, 7 Bro. P. C. (Toml. ed.) 437; *Jones v. Jones*, 3 Meriv. 161; *Pemberton v. Pemberton*, 13 Ves. Jr. 297; *Jones v. Gregory*, 2 DeG. J. & S. 83, 33 L. J. Ch. 679; *Allen v. Macpherson*, 1 Phil. 133, 1 H. L. Cas. 191. In *Boyse v. Rossborough*, Kay 71, 2 Eq. R. 675, 3 DeG. M. & G. 817, 18 Jur. 205, it was said that previously to the statute of frauds the court of chancery frequently took itself to determine the validity of wills by inquiry before some of the masters of the court, a practice which has ceased since the case of *Kerrich v. Bransby*, 7 Bro. P. C. (Toml. ed.) 437. See also *Bonser v. Bradshaw*, 5 Jur. N. S. 86. In *Middleton v. Sherburne*, 4 Y. & C. Exch. 359, it was held that a bill in equity will lie to set aside a will made under the influence of superstitious terrors.

United States. — *Broderick's Will*, 21 Wall. (U. S.) 503; *Tarver v. Tarver*, 9 Pet. (U. S.) 174; *Gaines v. Chew*, 2 How. (U. S.) 619; *Gould v. Gould*, 3 Story (U. S.) 537.

Arkansas. — *Ewell v. Tidwell*, 20 Ark. 136.

California. — *Langdon v. Blackburn*, 109 Cal. 19; *State v. McGlynn*, 20 Cal. 235, 81 Am. Dec. 118.

Georgia. — *Tudor v. James*, 53 Ga. 302; *Harris v. Tisereau*, 52 Ga. 153, 21 Am. Rep. 242. *Compare Slade v. Street*, 27 Ga. 17.

Illinois. — *Luther v. Luther*, 122 Ill. 558.

Kentucky. — *Walters v. Ratliff*, 5 Bush (Ky.) 577; *Abbott v. Traylor*, 11 Bush (Ky.) 335; *Hughey v. Sidwell*, 18 B. Mon. (Ky.) 259.

Missouri. — *Lyne v. Guardian*, 1 Mo. 470, 13

has been said, however, that there is not an absolute want of jurisdiction in equity, but that such courts may interfere when there is not an adequate remedy at law.¹

Statutory Jurisdiction in Equity. — In some states it is provided by statute that a suit in equity to contest a will may be brought² within a specified time after the probate thereof,³ but with a saving clause in favor of persons who are absent or under disability.⁴ The provision as to the time within which the suit may be brought is held to be not a mere matter of limitation, but a restriction on the power of the court, and therefore it cannot be waived.⁵

b. ACTION AT LAW. — In several states there are statutes which provide that an action at law or in the nature of an action at law may be brought to contest a will which has been admitted to probate,⁶ but in such actions equitable principles are applied by the court.⁷

XI. PARTIAL OR LIMITED PROBATE — 1. Power to Grant Partial or Limited Probate. — It is very clear that an instrument may possess all the requisites of a valid will as to some of its provisions, while other portions of it may not be the testamentary act of the testator, or may for some reason be ineffectual as to a part of the property. Therefore, since it is the province of the court in

Am. Dec. 509; *Swain v. Gilbert*, 3 Mo. 347. See also *Trotters v. Winchester*, 1 Mo. 413.

New York. — *Booth v. Kitchen*, 7 Hun (N. Y.) 255; *Colton v. Ross*, 2 Paige (N. Y.) 396, 22 Am. Dec. 648.

North Carolina. — *Blue v. Patterson*, 1 Dev. & B. Eq. (21 N. Car.) 457.

South Carolina. — *M'Dowall v. Peyton*, 2 Desaus. (S. Car.) 313; *Palmer v. Mikell*, 2 Desaus. (S. Car.) 342.

Tennessee. — *Burrow v. Ragland*, 6 Humph. (Tenn.) 481. Compare *Ford v. Ford*, 2 Coldw. (Tenn.) 74.

1. Inadequate Remedy at Law. — *De Bussierre v. Holladay*, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 111.

2. Equity Jurisdiction Given by Statute — *Alabama.* — *Johnston v. Glasscock*, 2 Ala. 218; *Kennedy v. Kennedy*, 2 Ala. 571; *Johnston v. Hainesworth*, 6 Ala. 443; *Hill v. Barge*, 12 Ala. 687; *Hardy v. Hardy*, 26 Ala. 524; *Hunt v. Acre*, 28 Ala. 580; *Woodcock v. McDonald*, 30 Ala. 411; *Copeland v. Copeland*, 32 Ala. 512; *McCartney v. Bone*, 33 Ala. 601; *Kumpe v. Coons*, 63 Ala. 448; *Lyons v. Campbell*, 88 Ala. 462; *Watson v. Turner*, 89 Ala. 220; *Mathews v. Forniss*, 91 Ala. 157; *Knox v. Paull*, 95 Ala. 505; *Garrett v. Heflin*, 98 Ala. 615, 39 Am. St. Rep. 89; *McCutchen v. Loggins*, 109 Ala. 457.

Arkansas. — In this state the statute provides for an appeal from the probate court to the circuit court and thence to the supreme court, and makes the final decision thereon a bar to any other proceeding to call the probate of the will in question, except that it may be impeached in chancery on any ground that would give the court of chancery jurisdiction over any other judgment at law. *Sand. & H. Dig. Ark.*, § 7421; *Ludlow v. Flournoy*, 34 Ark. 451.

Illinois. — *Shaw v. Moderwell*, 104 Ill. 64; *Moyer v. Swygart*, 125 Ill. 262; *Wheeler v. Wheeler*, 134 Ill. 522; *Sinnet v. Bowman*, 151 Ill. 146; *Jele v. Lemberger*, 163 Ill. 338; *Spaulding v. White*, 173 Ill. 127; *Peacock v. Churchill*, 38 Ill. App. 634; *Storrs v. St. Luke's Hospital*, 75 Ill. App. 152.

Kentucky. — *Payne's Will*, 4 T. B. Mon. (Ky.) 429; *Rogers v. Thomas*, 1 B. Mon. (Ky.) 393; *Singleton v. Singleton*, 8 B. Mon. (Ky.) 348; *Moran v. Masterson*, 11 B. Mon. (Ky.) 18; *Abbott v. Traylor*, 11 Bush (Ky.) 335; *Hughey v. Sidwell*, 18 B. Mon. (Ky.) 261.

Nebraska. — *Williams v. Miles*, (Neb. 1902) 89 N. W. Rep. 451.

Ohio. — *Bailey v. Bailey*, 8 Ohio 239. For the present statute see *Bates's Anno. Stat. Ohio*, §§ 5933-5936.

West Virginia. — *Coffman v. Hedrick*, 32 W. Va. 119.

3. See the statutes of the several states.

4. Persons Absent from State. — *Wheeler v. Wheeler*, 35 Ill. App. 123, affirmed 134 Ill. 522. Compare the statutes in other states.

An Infant not a party is not barred under the *Kentucky* statute until one year after attaining full age. *Cleveland v. Lyne*, 5 Bush (Ky.) 387.

5. Effect of Provisions as to Time. — *Luther v. Luther*, 122 Ill. 558; *Sinnet v. Bowman*, 151 Ill. 146.

6. Action at Law — *Arkansas.* — The *Arkansas* statute formerly provided for an action to contest a will after probate. *Mitchell v. Rogers*, 40 Ark. 91. But this statute has since been repealed. *Dowell v. Tucker*, 46 Ark. 438.

Iowa. — *Leighton v. Orr*, 44 Iowa 679; *Lynch v. Miller*, 54 Iowa 516.

Missouri. — *Lyne v. Guardian*, 1 Mo. 410, 13 Am. Dec. 509; *Swain v. Gilbert*, 3 Mo. 347; *Matter of Duty*, 27 Mo. 43; *Harris v. Hays*, 53 Mo. 90; *Lamb v. Helm*, 56 Mo. 420; *Young v. Ridenbaugh*, 67 Mo. 574; *Bridwell v. Swank*, 84 Mo. 455; *Norton v. Paxton*, 110 Mo. 456.

New York. — *Thomas v. Thomas*, 9 N. Y. App. Div. 487; *Matter of De Haas*, (Surrogate Ct.) 24 Misc. (N. Y.) 420; *Long v. Rodgers*, 79 Hun (N. Y.) 441, 24 Civ. Pro. (N. Y.) 63; *Matter of Austin*, 35 N. Y. App. Div. 278.

Texas. — *Lewis v. Ames*, 44 Tex. 321. See also *Parker v. Parker*, 10 Tex. 83.

And see the statutes of the several states.

7. Application of Equitable Principles. — *Gay v. Gillilan*, 92 Mo. 250, 1 Am. St. Rep. 712; *Lilly v. Tobbein*, 103 Mo. 489, 23 Am. St. Rep. 887; *Garland v. Smith*, 127 Mo. 583.

a probate proceeding to determine whether or not the instrument propounded is the will of the alleged testator, it is obvious on principle and well settled by authority that the court may find that a part only of the instrument is the testator's will, or that it is operative as to a part only of the property which it assumes to dispose of, and may admit it to probate as to such part and reject the balance, or may limit the probate as to such property as the will is effectual to pass.¹

Nature and Extent of Power. — It has been held that this power is of a purely negative character, that is, the court may refuse probate to a part of the will, but cannot insert anything in the will.² Neither has the court the right to exclude any part of the will from probate on any ground which involves the construction of the will or the ascertainment of the testamentary intent.³ Thus, in the case of a will sufficiently comprehensive in terms to dispose of the testator's entire estate, the court cannot limit the probate to a particular part of such estate, though the testator may have believed that such part was all that he had the right to dispose of.⁴

2. Grounds for Exercise of Power. — According to the rule stated above, the court, in admitting a will to probate, may reject any provision which was procured by undue influence,⁵ or was inserted by fraud or mistake, or without the testator's instructions and without his knowledge,⁶ or which was a forgery.⁷

Will Not Effectual as to Part of Testator's Property. — A will may be sufficient as to some but not all of the property which it assumes to pass. This condition occurs in the case of a will which is void as to devises of realty, but good as to legacies of personalty. In such case probate will be limited to the property as to which the will is sufficient.⁸

Want of Testamentary Power. — Where a testator had the power to dispose, by will, of only part of his property, or only such part as is of a particular kind or character, but the will in terms undertakes to dispose of all the testator's property, it may be admitted to probate, limited, however, to such property as the testator had the power to dispose of.⁹

1. Power to Grant Partial or Limited Probate. — Allen v. M'Pherson, 1 H. L. Cas. 208; Lake v. Warner, 34 Conn. 483, *overruling* Starr v. Starr, 2 Root (Conn.) 303; Morris v. Stokes, 21 Ga. 552; Deane v. Littlefield, 1 Pick. (Mass.) 239; Loughton v. Atkins, 1 Pick. (Mass.) 535; Holman v. Perry, 4 Met. (Mass.) 492; Heath v. Withington, 6 Cush. (Mass.) 497. See also Shaw v. Camp, 163 Ill. 144, *affirming* 61 Ill. App. 68; Prather v. McClelland, 75 Tex. 574.

2. Nature and Extent of Power. — Creely v. Ostrander, 3 Bradf. (N. Y.) 107. See also Holder v. Howell, 8 Ves. Jr. 97.

But see Boardman v. Stanley, 1 R. 6 Eq. 590; In Goods of Morony, L. R. 1 Ir. 483. In the two cases last cited certain words were inserted in the probate as obviously required by the context of the will.

And In Goods of Huddleston, 63 L. T. N. S. 255, a clerical error in the engrossment of the will by substituting one word for another was corrected on probate.

3. In Goods of Durlacher, 75 L. T. N. S. 664; Ramsey v. Welby, 63 Md. 584.

4. Matter of Graber, 1 Connoly (N. Y.) 366.

5. Undue Influence. — Morris v. Stokes, 21 Ga. 552; Ogden v. Greenleaf, 143 Mass. 349; *In re* Welsh, 1 Redf. (N. Y.) 238; Baker's Will, 2 Redf. (N. Y.) 179.

6. Fraud or Mistake. — Harter v. Harter, L. R. 3 P. & D. 11; Morrell v. Morrell, 7 P. D. 68; In Goods of Snowden, 75 L. T. N. S. 279; Fawcett v. Jones, 3 Phill. Ecc. 434; Barton v.

Robbins, 3 Phill. Ecc. 455, note; Deakins v. Hollis, 7 Gill & J. (Md.) 311; Cox v. Cox, 101 Mo. 168; Lilly v. Tobbein, 103 Mo. 477, 23 Am. St. Rep. 887; Hill v. Burger, (Supm. Ct. Spec. T.) 10 How. Pr. (N. Y.) 264; Burger v. Hill, 1 Bradf. (N. Y.) 360.

Unauthorized Provisions Not Known to Testator. — In Goods of Oswald, L. R. 3 P. & D. 162; In Goods of Duane, 2 Sw. & Tr. 590, 8 Jur. N. S. 752; In Goods of Wray, 1 R. 10 Eq. 266. See also Rhodes v. Rhodes, 7 App. Cas. 192.

7. Forgery. — Plume v. Beale, 1 P. Wms. 388.

8. Will Ineffectual as to Part of Property. — Lake v. Warner, 34 Conn. 483, *overruling* Starr v. Starr, 2 Root (Conn.) 303; Fatheree v. Lawrence, 33 Miss. 585.

9. Lack of Testamentary Power as to Part of Property. — Holman v. Perry, 4 Met. (Mass.) 492.

Married Women. — In Heath v. Withington, 6 Cush. (Mass.) 497, it was held that the probate of a will of a married woman, who had a power of appointment as to a part of her property, would be limited according to her power. See also Temple v. Walker, 3 Phill. Ecc. 400.

Infants. — Thus, where an infant who had both real and personal estate, and was of sufficient age to bequeath personalty, makes a will giving all his "property of every description whatsoever," it was admitted to probate as a will of personal property only. Deane v. Littlefield, 1 Pick. (Mass.) 239.

Want of Mental Capacity.—If a testator was incompetent at the time of the execution of one part of his will, but was competent when the other part was executed, probate of the part executed while the testator was incompetent will be refused.¹

Defamatory Matter in Will.—Where a will contains defamatory statements not connected with the disposing provisions, such statements may be expunged in the probate proceeding,² or at least omitted from the record or probate copy.³ There is no doubt as to the power of the court in this respect, but the power, it is said, is one that should be exercised with great moderation and only in cases of a definite character.⁴

XII. FOREIGN WILLS—1. **Necessity of Probate**—*a. WILLS OF PERSONALTY.*—When a testator leaves personalty in one or more states or countries other than that of which he was a resident at the time of his death, it is the usual practice to prove the will and obtain letters testamentary or letters of administration with the will annexed in each state or country where such assets may be found. This practice, however, is not regarded as necessary in every case,⁵ unless made so by statute.⁶

Probate as Affecting Right to Sue.—The rule that an executor or administrator cannot maintain any action or suit beyond the territorial limits of the state or country in which he was appointed, except under the authority of local statutes, has been considered elsewhere in this work.⁷

b. WILLS OF REAL ESTATE.—Since the validity of a will of real estate is governed by the *lex loci rei sitæ*, such a will must be admitted to probate or recorded in the state where the realty is situated,⁸ unless the necessity of

1. **Incapacity of Testator.**—Billingshurst v. Vickers, 1 Phill. Ecc. 187; Wood v. Wood, 1 Phill. Ecc. 357.

2. **Expunging Defamatory Statements in Will.**—Marsh v. Marsh, 6 Jur. N. S. 380, 1 Sw. & Tr. 528. See Curtis v. Curtis, 3 Add. Ecc. 33.

In Matter of T—B—, (Surrogate Ct.) 27 Abb. N. Cas. (N. Y.) 425, the clause objected to was as follows: "Item—Whereas one of my sons * * * is deceased and there is a child in existence which is claimed to be his and which is named * * * now it is my will that no portion of my estate, real or personal, shall go to or belong to him, his heirs or representatives." It was held that the clause should be expunged.

3. **Omission from Record or Probate Copy.**—In Goods of Warraby, 1 Rob. Ecc. 423.

4. **Caution in Exercise of Power.**—In Goods of Honywood, L. R. 2 P. & D. 251, the matter objected to was as follows: "Lastly, it is my most sacred wish that the brief 'Honywood v. Honywood,' 1859, should be kept in the family, and handed down to all ages as a witness of the terrible iniquity which has robbed me of my birthright and blotted out the Essex branch of Honywood forever, and by which F. E. H. did most deliberately and designedly defraud me and my heirs of our patrimony and inheritance forever. I hereby record my most solemn conviction that my poor brother, the late W. P. Honywood, was perfectly unconscious and innocent of what was done, and that he was simply an instrument in the hands of his wicked and remorseless wife." The court was of the opinion that the matter objected to, though offensive, was not calculated to injure, and the motion was therefore denied.

5. **For a Full Discussion** of this matter see the title FOREIGN EXECUTORS AND ADMINISTRATORS,

vol. 13, p. 921 *et seq.* See also Hurst v. Melinger, 73 Tex. 189.

6. **Probate of Foreign Will Required by Statute.**—Walton v. Hall, 66 Vt. 455; Matter of Clayton, 26 Wash. 253. See also the various local statutes in the *United States*.

7. See the title FOREIGN EXECUTORS AND ADMINISTRATORS, vol. 13, p. 945 *et seq.* See also the following cases:

England.—Lee's Case, Palmer 163.

United States.—Armstrong v. Lear, 12 Wheat. (U. S.) 169; Picquet v. Swan, 4 Mason (U. S.) 443, 19 Fed. Cas. No. 11,133.

Alabama.—Ward v. Oates, 43 Ala. 515.

Indiana.—Thieband v. Sebastian, 10 Ind. 454.

Kentucky.—Helm v. Rookesby, 1 Met. (Ky.) 49.

Louisiana.—Dixon v. D'Armond, 23 La. Ann. 200.

Massachusetts.—Campbell v. Sheldon, 13 Pick. (Mass.) 22; Campbell v. Wallace, 10 Gray (Mass.) 162.

Michigan.—Pope v. Cutler, 34 Mich. 150; Dickinson v. Seaver, 44 Mich. 624.

Mississippi.—Wells v. Wells, 35 Miss. 638.

Missouri.—Cabanne v. Skinker, 56 Mo. 357.

North Carolina.—Drake v. Merrill, 2 Jones L. (47 N. Car.) 368.

Vermont.—Ives v. Allyn, 12 Vt. 589; Townsend v. Downer, 32 Vt. 183.

Virginia.—Ex p. Povall, 3 Leigh (Va.) 816.

As to Assets Brought into the State After the Testator's Death, see Johnson v. Sevier, 4 J. J. Marsh. (Ky.) 141.

8. **Wills of Realty—Local Probate or Record Necessary**—*United States.*—Robertson v. Pickrell, 109 U. S. 608; De Roux v. Girard, 105 Fed. Rep. 798.

Delaware.—Pennel v. Weyant, 2 Harr. (Del.) 501.

a local probate is dispensed with by statute.¹

2. Mode of Probate of Foreign Wills.—*a. ORIGINAL PROOF.*—It has already been stated that probate of a will may be granted in any state in which the testator left assets, though his domicil, at the time of his death, was in another state and probate had not been granted by the court of the domicil.²

b. PROOF OF FOREIGN PROBATE.—In most of the *United States* it is provided by statute that when a will of a nonresident has been admitted to probate in the state of which the testator was a resident at the time of his death, it may be admitted to probate on the production of the will or a copy thereof, with the foreign probate duly certified,³ and in *England* the practice

Indiana.—Thieband *v. Sebastian*, 10 Ind. 454.

Kentucky.—Sneed *v. Ewing*, 5 J. J. Marsh. (Ky.) 465, 22 Am. Dec. 41.

Mississippi.—Crusoe *v. Butler*, 36 Miss. 150.

Missouri.—Keith *v. Keith*, 97 Mo. 223; Emmons *v. Gordon*, 140 Mo. 490, 62 Am. St. Rep. 734.

New Hampshire.—Barstow *v. Sprague*, 40 N. H. 27.

New York.—Young *v. Brush*, 28 N. Y. 667, 18 Abb. Pr. (N. Y.) 171, *reversing* 38 Barb. (N. Y.) 294, 24 How. Pr. (N. Y.) 70.

North Carolina.—Drake *v. Merrill*, 2 Jones L. (47 N. Car.) 368; Ward *v. Hearne*, 3 Jones L. (18 N. Car.) 326.

Ohio.—Barr *v. Chapman*, 11 Ohio Dec. (Reprint) 862, 30 Cinc. L. Bul. 264.

Pennsylvania.—Pepper's Estate, 9 Pa. Co. Ct. 507.

Texas.—Slayton *v. Singleton*, 72 Tex. 209.

Vermont.—Ives *v. Allyn*, 12 Vt. 589.

West Virginia.—Thrasher *v. Ballard*, 33 W. Va. 285, 25 Am. St. Rep. 894.

In *Maryland* original probate must be had where the will devises realty in that state. Budd *v. Brooke*, 3 Gill (Md.) 198.

1. Local Probate Dispensed With by Statute.—In *Indiana* a will made and recorded in any other state, according to the laws of such state, is valid to pass lands and other property in *Indiana*, and a copy duly certified from such record is made evidence. Doe *v. Woody*, 4 McLean (U. S.) 75, 18 Fed. Cas. No. 10,398.

So also in some other jurisdictions. See Apperson *v. Bolton*, 29 Ark. 418; Currell *v. Villars*, 72 Fed. Rep. 330, reciting the *Tennessee* statute; Bleidorn *v. Pilot Mountain Coal, etc.*, Co., 89 Tenn. 166, 204. Compare the statutes in other states.

2. See *supra*, this title, *Jurisdiction*—*Jurisdictional Facts*—*Situs of Assets*.

The refusal to admit to probate an exemplified copy of a foreign will on the ground that the case is not within the statute will not bar an application for probate of the original will, though the order refusing probate of the copy adjudged that the paper was not testator's will. Matter of Diez, 50 N. Y. 88.

3. Probate of Foreign Will—Certified Copy of Foreign Probate—United States.—Kerr *v. Moon*, 9 Wheat. (U. S.) 565.

Alabama.—Puryear *v. Beard*, 14 Ala. 121; Broughton *v. Bradley*, 34 Ala. 694, 73 Am. Dec. 474; Ward *v. Oates*, 43 Ala. 515; Brock *v. Frank*, 51 Ala. 85; Goodman *v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; Leatherwood *v. Sullivan*, 81 Ala. 458; Sullivan *v. Rabb*, 86 Ala.

433; Dickey *v. Vann*, 81 Ala. 425; Keith *v. Proctor*, 114 Ala. 676.

California.—Goldtree *v. McAlister*, 86 Cal. 93.

Colorado.—Corrigan *v. Jones*, 14 Colo. 311.

Georgia.—Settle *v. Alison*, 8 Ga. 201, 52 Am. Dec. 393.

Illinois.—Shephard *v. Carriel*, 19 Ill. 313; Harrison *v. Weatherby*, 180 Ill. 418.

Iowa.—Stanley *v. Morse*, 26 Iowa 454; Vance *v. Anderson*, 39 Iowa 426; Matter of Capper, 85 Iowa 82.

Kansas.—Gemmell *v. Wilson*, 40 Kan. 764; Calloway *v. Cooley*, 50 Kan. 743.

Kentucky.—Hood *v. Mathers*, 2 A. K. Marsh. (Ky.) 554; Bowman *v. Bartlet*, 3 A. K. Marsh. (Ky.) 89; M'Intire *v. Funk*, Litt. Sel. Cas. (Ky.) 428; Helm *v. Rookesby*, 1 Met. (Ky.) 49;

Kaye *v. Tydings*, 3 Met. (Ky.) 527; Dupoyster *v. Gagani*, 84 Ky. 403; Whalen *v. Nisbet*, 95 Ky. 464; Newcomb *v. Newcomb*, (Ky. 1900) 57 S. W. Rep. 2.

Louisiana.—Gaines's Succession, 45 La. Ann. 1237.

Maine.—Hovey *v. Deane*, 13 Me. 31.

Massachusetts.—Dublin *v. Chadbourn*, 16 Mass. 433; Parker *v. Parker*, 11 Cush. (Mass.) 519; Crippen *v. Dexter*, 13 Gray (Mass.) 330; Shannon *v. Shannon*, 111 Mass. 331.

Michigan.—Pope *v. Cutler*, 34 Mich. 150; Wilt *v. Cutler*, 38 Mich. 189; Clow *v. Plummer*, 85 Mich. 550.

Minnesota.—Lyon *v. Gleason*, 40 Minn. 434; Putnam *v. Pitnev*, 45 Minn. 242.

Mississippi.—Ratcliff *v. Ratcliff*, 12 Smed. & M. (Miss.) 134; Sturdivant *v. Neill*, 27 Miss. 157; Morris *v. Morris*, 27 Miss. 847.

Missouri.—Applegate *v. Smith*, 31 Mo. 166.

Nebraska.—Fremont, etc., R. Co. *v. Setright*, 34 Neb. 253.

New Hampshire.—Kennard *v. Kennard*, 63 N. H. 303.

New Jersey.—Nelson *v. Potter*, 50 N. J. L. 324.

New York.—Isham *v. Gibbons*, 1 Bradf. (N. Y.) 69.

Ohio.—Barr *v. Closterman*, 1 Ohio Cir. Dec. 546, 2 Ohio Cir. Ct. 387.

Oregon.—*In re Clayson*, 24 Oregon 542.

Pennsylvania.—McDonald's Estate, 130 Pa. St. 480.

Tennessee.—Martin *v. Stovall*, 103 Tenn. 1.

Texas.—Houze *v. Houze*, 16 Tex. 598; Green *v. Benton*, 3 Tex. Civ. App. 92; Dew *v. Dew*, 23 Tex. Civ. App. 676.

Vermont.—Ives *v. Allyn*, 12 Vt. 589.

Wisconsin.—Wells, etc., Co. *v. Walsh*, 88 Wis. 534.

is the same.¹ In some states the statutes declare it sufficient to produce the record of the foreign probate authenticated according to the act of Congress regulating the authentication of records, without obtaining a local decree of probate.²

In Respect to Personal Property, the foreign probate is exclusive as to the due execution of the will and the testamentary capacity of the testator, so that there can be no contest of the validity of the will on the application for ancillary probate.³ The foreign probate also creates a presumption that the jurisdiction of the court was founded on sufficient evidence of the last domicile of the testator,⁴ and this presumption is conclusive as to all persons who were parties to the proceeding.⁵

Real Estate. — In some states, where realty therein has been disposed of by the will of a nonresident owner, the same effect is given to probate at the testator's domicile as in the case of a will of personalty, that is, the probate is conclusive as to the validity of the will to pass the title to the land devised.⁶ In the absence, however, of a statute to that effect, it is generally held that foreign probate of a will of lands does not establish the validity of the will, but that the will must appear to have been executed in accordance with the *lex loci rei sitæ*.⁷ Ordinarily the record of the foreign probate should show that the will was duly executed in accordance with the law of the situs;⁸ but

Copy of Foreign Probate Must Be Produced. — *Mower v. Verplanke*, 101 Mich. 209.

Sufficiency of Authentication. — If the foreign probate is authenticated as prescribed by the act of Congress regulating the authentication of records, it is sufficient, without proof of the statute which gives the foreign court jurisdiction. *Puryear v. Beard*, 14 Ala. 121. See also *Tittman v. Thornton*, 107 Mo. 500; *Harris v. Anderson*, 9 Humph. (Tenn.) 779; *Gornio v. Bonney*, 7 Leigh (Va.) 234.

Defective Authentication — Renewal of Application. — *Matter of Dubreuil*, 8 Phila. (Pa.) 596.

Statute Applicable to Probate in Foreign Country as Well as Other States. — *Gaven v. Allen*, 100 Mo. 293.

1. Probate of Foreign Wills in England. — *Pullan v. Rawlins*, 4 Beav. 142; *Bayley v. Bayley*, 4 Beav. 143, note; *Rand v. MacMahon*, 12 Sim. 553, 6 Jur. 450; *In re Cliff*, (1892) 2 Ch. 229; *In Goods of Lemme*, (1892) P. 89; *In Goods of Brown*, 80 L. T. N. S. 360; *In Goods of Gubboy*, 80 L. T. N. S. 808.

2. *Long v. Patton*, 154 U. S. 573 (citing the *Illinois* statute); *Crolly v. Clark*, 20 Fla. 849; *Doe v. Roe*, 31 Ga. 593; *Thomas v. Morrisett*, 76 Ga. 384; *Hyman v. Gaskins*, 5 Ired. L. (27 N. Car.) 267; *Lancaster v. McBryde*, 5 Ired. L. (27 N. Car.) 421; *Smith v. Smith*; Harp. Eq. (S. Car.) 160; *Sally v. Gunter*, 13 Rich. L. (S. Car.) 72. And see generally the titles FOREIGN JUDGMENTS, vol. 13, p. 1038 *et seq.*; RECORD.

3. Foreign Probate Conclusive as to Validity of Will of Personalty. — *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13; *Brock v. Frank*, 51 Ala. 85; *Newcomb v. Newcomb*, (Ky. 1900) 57 S. W. Rep. 2.

4. Presumption as to Jurisdiction of Foreign Court. — *Corrigan v. Jones*, 14 Colo. 311; *Townsend v. Downer*, 32 Vt. 183.

5. Presumption Conclusive as to Parties. — *Willett's Appeal*, 50 Conn. 330.

6. Foreign Probate Made Conclusive as to Validity of Will of Land. — *Colorado*. — *Corrigan v. Jones*, 14 Colo. 311.

Connecticut. — *Irwin's Appeal*, 33 Conn. 128.

Maine. — *Lyon v. Ogden*, 85 Me. 374.

Michigan. — *Wilt v. Cutler*, 38 Mich. 189.

Minnesota. — *Babcock v. Collins*, 60 Minn. 73.

Wisconsin. — *Hayes v. Lienlokken*, 48 Wis. 509.

7. Foreign Probate Not Generally Conclusive as to Will of Land — United States. — *M'Cormick v. Sullivan*, 10 Wheat. (U. S.) 192.

Alabama. — *Varner v. Bevil*, 17 Ala. 286; *Goodman v. Winter*, 64 Ala. 410, 38 Am. Rep. 13.

Delaware. — *Pennel v. Weyant*, 2 Harr. (Del.) 501; *St. James' Church v. Walker*, 1 Del. Ch. 284.

Illinois. — *Richards v. Miller*, 62 Ill. 417. See *Gardner v. Ladue*, 47 Ill. 211, 95 Am. Dec. 487.

Kentucky. — *Sneed v. Ewing*, 5 J. J. Marsh. (Ky.) 460, 22 Am. Dec. 41; *Williams v. Jones*, 14 Bush (Ky.) 418.

Maryland. — *Budd v. Brooke*, 3 Gill (Md.) 198.

Mississippi. — *Crusoe v. Butler*, 36 Miss. 150. *New Hampshire*. — *Barstow v. Sprague*, 40 N. H. 27.

New Jersey. — *Nelson v. Potter*, 50 N. J. L. 324; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802.

New York. — *Davison's Will*, Tuck. (N. Y.) 479.

North Carolina. — *Hyman v. Gaskins*, 5 Ired. L. (27 N. Car.) 267.

Oregon. — *In re Clayson*, 24 Oregon 542. See *Wells v. Neff*, 14 Oregon 66.

Tennessee. — *Smith v. Neilson*, 13 Lea (Tenn.) 461.

Texas. — *Holman v. Hopkins*, 27 Tex. 38.

8. Foreign Probate Should Show Due Execution of Will. — *Doe v. Pickett*, 51 Ala. 584; *Lynch v. Miller*, 54 Iowa 516; *Hood v. Mathers*, 2 A. K. Marsh. (Ky.) 554; *Barnes v. Brashear*, 2 B. Mon. (Ky.) 382; *Cornelison v. Browning*, 10 B. Mon. (Ky.) 428; *Lindley v. O'Reilly*, 50 N. J. L. 636, 7 Am. St. Rep. 802; *Shearer's Estate*, (Surrogate Ct.) 1 Civ. Pro. (N. Y.) 455; *Lock-*

defects of evidence in this regard may be supplied on the ancillary probate of the authenticated copy of the will,¹ and if the will itself shows compliance with the local statute, it is immaterial that the fact is not recited in the record of the foreign probate.²

XIII. LOST, SUPPRESSED, OR DESTROYED WILLS — 1. General Principles —

a. EFFECT OF LOSS OR DESTRUCTION. — A will which has been destroyed without the knowledge or consent of the testator, or which has been lost, does not on that account cease to be the testator's will, but its contents may be proven by secondary evidence, as in the case of other lost instruments, with the same effect as if the writing had been produced.³ This follows from the principle that a will duly executed according to law remains in force so long as it is not revoked, and becomes operative at the death of the testator.⁴

Subsequent Discovery of Lost Will. — The probate of a lost will granted on proof of its contents will not bar the probate of the original will, if it is afterwards discovered. The form of probate in such case should be that it is established until a more authentic copy can be brought in.⁵

b. MATTERS REQUIRED TO BE PROVED. — In order that an alleged lost or destroyed will may be proved in the probate court or otherwise established as the decedent's will, it must be shown that the decedent had made a valid will according to law, that such will has not been revoked, and that it has been lost or destroyed; and when these preliminary facts are shown, the contents of the will must be proved.⁶

c. NECESSITY OF PROVING ENTIRE WILL. — Some authorities hold that a will cannot be admitted to probate on proof of a part only of its contents, but that the entire will must be proved as made,⁷ in which respect they seem to partially adopt the early rule of the ecclesiastical courts;⁸ but other authorities adopt the more reasonable rule that in case a part only of the contents of a will can be proved, probate may be granted as to such part.⁹

d. TIME OF LOSS OR DESTRUCTION — (1) *Before Testator's Death.* — In the absence of any statutory provision on the subject, a will lost or destroyed

wood *v.* Lockwood, 51 Hun (N. Y.) 337; Moody *v.* Johnson, 112 N. Car. 708.

1. Defects of Evidence Supplied on Ancillary Probate. — Doe *v.* Pickett, 51 Ala. 584. Compare Meigs *v.* Hoagland, 68 N. Y. App. Div. 182.

2. Due Execution Apparent on Face of Will. — Dickey *v.* Vann, 81 Ala. 425.

3. General Principles as to Proof of Lost Wills. — Gaines *v.* Hennen, 24 How. (U. S.) 553; Southworth *v.* Adams, 11 Biss. (U. S.) 256, 22 Fed. Cas. No. 13,194; Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130; Graham *v.* O'Fallon, 4 Mo. 338. And see generally the titles LOST PAPERS AND RECORDS, vol. 19, p. 552; SECONDARY EVIDENCE.

4. Will Not Revoked by Casual Loss, etc. — Happy's Will, 4 Bibb (Ky.) 553; Payne's Will, 4 T. B. Mon. (Ky.) 422; Steele *v.* Price, 5 B. Mon. (Ky.) 59; Baker *v.* Dobyns, 4 Dana (Ky.) 221.

As to What Constitutes Revocation of a will, see generally the title WILLS.

5. Discovery of Lost Will After Probate. — McBeth *v.* McBeth, 11 Ala. 506; Agnew's Appeal, 37 Pa. St. 467, 2 Pittsb. Leg. J. (Pa.) 143.

6. What Facts Must Be Proved. — Harris *v.* Knight, 15 P. D. 170; Butler *v.* Butler, 5 Harr. (Del.) 178; Moseley *v.* Evans, 72 Ga. 203; Grant *v.* Grant, 1 Sandf. Ch. (N. Y.) 235; Tynan *v.* Paschal, 27 Tex. 286, 84 Am. Dec. 619; Dower *v.* Seeds, 28 W. Va. 113, 57 Am. Rep. 646.

7. Rule that Entire Contents of Will Must Be Proved. — Todd *v.* Rennick, 13 Colo. 546; Butler *v.* Butler, 5 Harr. (Del.) 178; Rhodes *v.* Vinson, 9 Gill (Md.) 169; Davis *v.* Sigourney, 8 Met. (Mass.) 487; McNally *v.* Brown, 5 Redf. (N. Y.) 372; Matter of Ruser, 6 Dem. (N. Y.) 31.

8. Rule of Ecclesiastical Courts. — In Tucker *v.* Phipps, 3 Atk. 360, it was said that the ecclesiastical courts imposed the almost insuperable difficulty of proving the will in its very words.

9. Rule Allowing Probate as Far as Contents Are Proved. — Sugden *v.* St. Leonards, 1 P. D. 154; Skeggs *v.* Horton, 82 Ala. 352; Burge *v.* Hamilton, 72 Ga. 569; Jones *v.* Casler, 139 Ind. 382, 47 Am. St. Rep. 274; Steele *v.* Price, 5 B. Mon. (Ky.) 72; Jackson *v.* Jackson, 4 Mo. 210; Dickey *v.* Malechi, 6 Mo. 177, 34 Am. Dec. 130.

In Vining *v.* Hall, 40 Miss. 83, this question was raised, but was not decided.

In *Massachusetts* the rule is laid down that any substantial provision of a lost will, which is complete in itself and independent of the other provisions, may, when proved, be admitted to probate, though other provisions cannot be proved, if the validity and operation of the part which is proved are not affected by those parts which cannot be proved. Tarbell *v.* Forbes, 177 Mass. 238, explaining Davis *v.* Sigourney, 8 Met. (Mass.) 487; Durfee *v.* Durfee, 8 Met. (Mass.) 490, note.

before the death of the testator is as much entitled to probate as one which was in existence at the time of the testator's death, and was afterwards destroyed or lost.¹

(2) *After Testator's Death.* — In some states, however, the statutes authorize the probate or establishment of such a will only in case it is proved to have been in existence at the time of the testator's death² or was fraudulently destroyed in his lifetime;³ and the reason assigned for legislation of this sort is that the court would be much more likely to be imposed on when the loss or destruction occurred in the lifetime of the testator than it would in a case where the loss or destruction was after the testator's death.⁴

2. Jurisdiction — *a. IN ENGLAND* — (1) *Wills of Personalty.* — It seems always to have been the rule in England that in case of the loss, destruction, or suppression of a will of personalty the ecclesiastical courts had jurisdiction to grant probate on sufficient proof of the due execution of the will, its loss, etc., and its contents.⁵ The proponent, however, was required to prove the contents of the will in the very words thereof, and also to prove the whole will, though the other parts of it did not belong to or regard his legacy. This was generally a matter of almost insuperable difficulty, and therefore a legatee, instead of citing the executor in the ecclesiastical court, was permitted to sue in equity for his legacy on the ground of spoliation or suppression.⁶ And now, since the Judicature Act, consolidating certain courts, the usual practice is to apply to the probate division for the probate of a will which has been lost, destroyed, or suppressed.⁷

(2) *Wills of Real Estate.* — In case of the loss or destruction of a will of real estate, the only remedy of a devisee was to establish the will by a suit in equity,⁸ because the ecclesiastical courts had no jurisdiction to grant probate of a will of realty; but since the change of the law in this particular⁹ it would seem that the probate division, in which is now vested the jurisdiction formerly exercised by the ecclesiastical courts, may grant probate of a lost or destroyed will of real estate.

b. IN UNITED STATES. — There is a conflict of authority in the United States as to whether a court of probate has jurisdiction, independently of statute, to admit a lost or destroyed will to probate. In some states it is held that no such power exists, and that the only remedy in such cases is in chancery.¹⁰ On the other hand, there are cases which hold that probate courts

1. Time of Loss or Destruction Held Immaterial. — *Todd v. Rennick*, 13 Colo. 546; *Steele v. Price*, 5 B. Mon. (Ky.) 58; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130.

2. Proof of Existence of Will at Testator's Death. — *Newell v. Homer*, 120 Mass. 277; *Matter of Sinclair*, 5 Ohio St. 290. See also the cases cited in the next following note. Compare the statutes in other states.

Recitals of Record. — But the omission of the record to state that the destruction of the original will was after the death of the testator does not render an order admitting such will to probate void. *Converse v. Starr*, 23 Ohio St. 491.

3. Fraudulent Destruction After Testator's Death. — *Kidder's Estate*, 57 Cal. 282; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *In re Soule*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 934, 61 Hun (N. Y.) 624; *Perry v. Perry*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 133, 66 Hun (N. Y.) 629; *Matter of Reiffeld*, (Surrogate Ct.) 36 Misc. (N. Y.) 472; *Matter of Harris*, 10 Wash. 555. Compare the statutes in other states.

Proof of Actual Destruction. — It must be shown that there was actual destruction of the will to bring it within this rule. *Matter of De*

Groot (Surrogate Ct.) 18 Civ. Pro. (N. Y.) 102. See also *Timon v. Claffy*, 45 Barb. (N. Y.) 438.

A Will Accidentally Destroyed in the testator's lifetime cannot be admitted to probate under the *New York* statute. *Matter of Reiffeld*, (Surrogate Ct.) 36 Misc. (N. Y.) 472.

4. Reason of Statutory Rule. — *Matter of Sinclair*, 5 Ohio St. 290.

5. Jurisdiction of Ecclesiastical Courts in England — Wills of Personalty. — *Foster v. Foster*, 1 Add. Ecc. 462; *Davis v. Davis*, 2 Add. Ecc. 223; *Trevelyan v. Trevelyan*, 1 Phill. Ecc. 149; *Swin. Wills*, pt. 6, § 14, pl. 4.

6. Jurisdiction in Equity. — *Tucker v. Phipps*, 3 Atk. 360.

7. Harris v. Knight, 15 P. D. 170.

8. Wills of Real Estate — Equity Jurisdiction. — *Hayne v. Hayne*, 1 Dick. 18, *sub nom.* *Haines v. Haines*, 2 Vern. 441.

9. See supra, this title, *What Papers Require Probate — Distinction Between Real and Personal Estate.*

10. Probate Courts Held Without Jurisdiction over Lost Wills. — *Buchanan v. Matlock*, 8 Humph. (Tenn.) 390, 47 Am. Dec. 622; *Townsend v. Townsend*, 4 Coldw. (Tenn.) 70. See also *Hall v. Allen*, 31 Wis. 691.

have inherent power to admit to probate wills which have been lost or destroyed.¹ But, however this may be from a technical point of view, the probate courts in the United States are generally invested by statute with jurisdiction to admit to probate wills which have been lost or destroyed,² and in some states this jurisdiction is exclusive,³ while in others it is concurrent with the equity jurisdiction in the premises.⁴

3. Who May Procure or Oppose Probate or Establishment. — The probate of a lost or destroyed will may be procured by any person who is interested therein,⁵ as in any other case of probate.⁶ And so, too, persons interested in the intestacy of the decedent may oppose the probate.⁷

4. Evidence — *a. PROOF OF EXECUTION* — (1) *Fact of Execution.* — The first step in a proceeding for the probate or establishment of an alleged lost or destroyed will is to prove that the decedent had, in fact, made a will. This fact cannot be proved merely by evidence of declarations of the decedent that he had made a will.⁸ There must be evidence that a will had been seen by a witness,⁹ or the existence must be admitted by the party claiming in

In *Arkansas* it is held that the court of probate has no jurisdiction in case of lost or destroyed wills, the statute conferring such jurisdiction on the courts of equity, and it is held that such jurisdiction is exclusive. *Waggener v. Lyles*, 29 Ark. 47.

In *New York* also it was held in an early case that the surrogate court had no jurisdiction to set up a lost will in the absence of statutory authority. *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281. But it is now provided by statute in that state that a lost or destroyed will may be admitted to probate in any case where the judgment establishing it could be rendered by the supreme court. See the next following note but one, *Statutory Jurisdiction in United States*.

1. Inherent Jurisdiction of Probate Courts over Lost Wills. — *Payne's Will*, 4 T. B. Mon. (Ky.) 427; *Happy's Will*, 4 Bibb (Ky.) 553; *Waters v. Stickney*, 12 Allen (Mass.) 1, 90 Am. Dec. 122; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619; *Dower v. Seeds*, 28 W. Va. 113, 57 Am. Rep. 646.

2. Statutory Jurisdiction in United States — *Alabama.* — *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239; *McBeth v. McBeth*, 11 Ala. 596.

California. — *McDaniel v. Pattison*, 98 Cal. 86.

Georgia. — *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

Maine. — *Rich v. Gilkey*, 73 Me. 595.

Massachusetts. — *Clark v. Wright*, 3 Pick. (Mass.) 67.

Missouri. — *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130.

New York. — *Matter of Reiffeld*, (Surrogate Ct.) 36 Misc. (N. Y.) 472.

North Carolina. — *McCormick v. Jernigan*, 110 N. Car. 406.

Ohio. — *In re Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20.

Pennsylvania. — *Foster's Appeal*, 87 Pa. St. 67, 30 Am. Rep. 340, 13 Phila. (Pa.) 567, 34 Leg. Int. (Pa.) 222.

3. Exclusive Jurisdiction of Probate Court. — *McDaniel v. Pattison*, 98 Cal. 86; *Morningstar v. Selby*, 15 Ohio 345.

In *Alabama* it has been held that the statute giving the orphans' court full jurisdiction of all testamentary matters denies this cognizance

to any other tribunal, even to chancery, except in peculiar cases requiring the exercise of its extraordinary powers; such, for instance, as involve matters of trust and require an account to be taken, or where for other purposes a discovery, on oath, from a party in interest is essential to the merits of the controversy. *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239.

In *Kentucky*, also, chancery jurisdiction seems to be limited to cases where there is an alleged spoliation or suppression, or where a discovery is indispensable, or some peculiar circumstances which would be defeated by a proceeding in the court of probate and which would be obviated by the chancellor. *Hunt v. Hamilton*, 9 Dana (Ky.) 91; *Campbell v. West*, 3 B. Mon. (Ky.) 243; *Barnes v. Edward*, 17 B. Mon. (Ky.) 640.

4. Concurrent Jurisdictions. — *Matter of Reiffeld*, (Surrogate Ct.) 36 Misc. (N. Y.) 472; *McCormick v. Jernigan*, 110 N. Car. 406.

In *New York* the court of chancery formerly had jurisdiction to establish lost or destroyed wills. *Bowen v. Idley*, 6 Paige (N. Y.) 46. And this power is now conferred on the supreme court. *Donlon v. Kimball*, 61 N. Y. App. Div. 31; *Schultz v. Schultz*, 35 N. Y. 653, 91 Am. Dec. 88; *Hook v. Pratt*, 8 Hun (N. Y.) 102; *Voorhees v. Voorhees*, 39 N. Y. 463, 100 Am. Dec. 458, *affirming* 50 Barb. (N. Y.) 119; *Jackson v. Betts*, 9 Cow. (N. Y.) 208.

5. Who May Procure Probate of Lost Will. — *Donlon v. Kimball*, 61 N. Y. App. Div. 31; *Chittenden's Will*, Tuck. (N. Y.) 135; *Taylor v. Bennett*, 1 Ohio Cir. Dec. 57, 1 Ohio Cir. Ct. 95.

6. As to the persons entitled to procure the probate of wills generally, see *supra*, this title, *Who May Propound Will for Probate*.

7. Who May Oppose Probate. — *Clark's Succession*, 11 La. Ann. 124.

8. Declarations of Decedent Not Competent Evidence of Making a Will. — *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667; *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

9. Evidence that Witness Has Seen Will. — *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667. Thus, there is sufficient evidence that the decedent had made a will where a witness testifies that he saw decedent sign a paper which he declared to be his will, and

opposition to it.¹ Declarations by the decedent that he had made no will, however, are admissible to refute the claim that a will had been made.²

(2) *Formality of Execution.* — In a proceeding for the probate or establishment of a lost or destroyed will, compliance with all the formalities of execution required by law must be shown just as if the writing itself were produced before the court. This proof should be made by direct evidence, that is, by the testimony of the subscribing witnesses, where their testimony is procurable.³ If the subscribing witnesses are dead, or for any other reason their testimony is not procurable, resort may be had to secondary evidence.⁴

The Declarations of the Testator are held to be not sufficient of themselves to prove the due execution of the will,⁵ and the reason assigned for this is that the exercise of the extraordinary power being conditioned on the observance of formalities prescribed by statute, one cannot, by his own mere assertion, establish that he has fulfilled the required conditions.⁶

b. PROOF OF LOSS OR DESTRUCTION. — (1) *In General.* — The loss or destruction of a will may, in general, be proved by any evidence which establishes that fact,⁷ but the evidence must be positive and sufficient to overcome both the presumption of revocation by the testator and the presumption of innocence on the part of a third person charged with destroying the will.⁸

Motive. — Where it is claimed that a will was destroyed, not by the testator, but by a third person, it is competent to show a motive therefor on the part of such person, and an earlier will containing a more liberal provision for him than the will alleged to have been destroyed is admissible to show the motive.⁹

(2) *Destruction by Testator.* — Since the power of a testator to revoke his will depends on his mental capacity to form an intent at the time of the alleged revoking act,¹⁰ the destruction of a will by the testator while of an unsound mind is not a revocation of the will, and therefore it may be admitted to probate as in any other case of destruction.¹¹ So, too, the

that the witness and another person signed such instrument as attesting witnesses. *Matter of Harris*, 10 Wash. 555.

1. *Admission of Existence of Will.* — *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667.

2. *Declarations Against Will.* — *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184.

3. *Formality of Execution in General.* — *Scott v. Maddox*, 113 Ga. 795; *In re Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20; *McKenna v. McMichael*, 189 Pa. St. 440.

Even where a copy of a lost will made from memory was admitted to probate by the register of wills, and recorded, it was held that a certified copy of such a paper, not showing that the will was properly attested or the other requirements of the statute complied with, is not admissible in evidence to show a devise of land. *Hale v. Monroe*, 28 Md. 98.

Proof by Direct Evidence. — *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

4. *Death or Absence of Subscribing Witnesses* — *Secondary Evidence.* — *In re Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20. But where the subscribing witnesses to a lost will are dead, the testimony of one witness to the handwriting of one of the subscribing witnesses is not sufficient to authorize a probate of the will; and the insufficiency of such testimony cannot be supplied by proof of declarations made by the supposed testator, after the execution of the instrument, to the effect that he had a will in existence of import similar to that offered for probate. *Tynan v. Paschal*, 27 Tex. 296, 84 Am. Dec. 619.

5. *Due Execution Not Provable by Declaration of Testator.* — *Lane v. Hill*, 68 N. H. 282, 73 Am. St. Rep. 591.

6. *Reason of Rule.* — *Sugden v. St. Leonards*, 1 P. D. 154.

7. *Evidence of Loss or Destruction in General.* — *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Mosely v. Carr*, 70 Ga. 333; *Scott v. Maddox*, 113 Ga. 795.

8. *Sufficiency of Evidence.* — *Matter of Kennedy*, (Surrogate Ct.) 30 Misc. (N. Y.) 1, affirmed 53 N. Y. App. Div. 105, 167 N. Y. 163.

In *Matter of Cosgrove*, (Surrogate Ct.) 31 Misc. (N. Y.) 422, it was shown that the testator made his will in due form of law and gave it to the executor for safe keeping. A few days before his death the testator referred to the fact that his will was in the hands of the executor, and declared himself satisfied with its provisions. The executor, after the testator's death, was unable to find the will. It was held that these facts were sufficient to show that the will was in existence at the death of the testator or was fraudulently destroyed in the testator's lifetime.

9. *Motive for Destruction of Will.* — *Barker v. Bell*, 49 Ala. 284.

10. See generally the title WILLS.

11. *Destruction by Testator While Insane.* — *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239.

In a suit to set up a will which had been destroyed by the testator, it is not sufficient to show that the will may have been in existence after the testator's mind had become so im-

destruction of the will by the testator may be the result of mistake or misapprehension, in which case there is not a revocation of the will destroyed. Thus, if the testator destroys a duly executed will in pursuance of an attempt to substitute a more formal or legible copy, and such copy lacks any of the formalities prescribed by law, the destroyed will may be admitted to probate.¹

(3) *Proof of Search.* — Unless there is conclusive proof of the destruction of a will alleged to have been lost or destroyed, the party seeking to set it up must prove that diligent search and inquiry have been made without success in those places where the will would most probably have been found if in existence,² and whether the proof of search is sufficient in any case to authorize the admission of parol evidence of the contents of the will is for the court to determine.³ But where the theory of the case is that the will was destroyed, proof of a search is unnecessary, because search is not consistent with that theory.⁴

(4) *Presumption of Revocation* — (a) *Rule Stated.* — Where it is proved that a deceased person had made a will which was last seen in his possession, and the will cannot be found after his death, the presumption, in the absence of other evidence, is that he destroyed the will with the intention of revoking it,⁵ and the strength of this presumption depends on the character of the testator's custody.⁶

If Possession Is Not Traced to the Testator, no presumption of revocation arises from the fact that the will cannot be found.⁷

paired that he could not revoke it, but it must appear that it was in existence after that time. *Shacklett v. Roller*, 97 Va. 639.

1. *Attempt to Substitute a More Formal Copy.* — *Matter of Johnson*, 134 Cal. 662; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363.

2. *Proof of Search.* — *Gaines v. Hennen*, 24 How. (U. S.) 553; *Eure v. Pittman*, 3 Hawks. (10 N. Car.) 364.

3. *Sufficiency of Evidence of Search* — *Province of Court.* — *Eure v. Pittman*, 3 Hawks (10 N. Car.) 364.

As to what constitutes a sufficient search, see *McConnell v. Wildes*, 153 Mass. 487.

4. *Search Not Necessary Where Will Was Destroyed.* — *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274.

5. *Presumption of Revocation* — *Possession Traced to Testator* — *England.* — *Colvin v. Fraser*, 2 Hag. Ecc. 266; *Loxley v. Jackson*, 3 Phill. Ecc. 126; *Welch v. Phillips*, 1 Moo. P. C. 299; *Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 876; *Eckersley v. Platt*, L. R. 1 P. & D. 281; *Allan v. Morrison*, (1900) A. C. 604, 69 L. J. C. Pl. 141.

United States. — *Southworth v. Adams*, 11 Biss. (U. S.) 256, 22 Fed. Cas. No. 13,194.

Alabama. — *McBeth v. McBeth*, 11 Ala. 596; *Weeks v. McBeth*, 14 Ala. 474.

Delaware. — *Dawson v. Smith*, 3 Houst. (Del.) 335.

Georgia. — *Scott v. Maddox*, 113 Ga. 795.

Illinois. — *Boyle v. Boyle*, 158 Ill. 228.

Kentucky. — *Minor v. Guthrie*, (Ky. 1887) 4 S. W. Rep. 179; *Mercer v. Mercer*, 87 Ky. 21. *Massachusetts.* — *Davis v. Sigourney*, 8 Met. (Mass.) 487; *Clark v. Wright*, 3 Pick. (Mass.) 67; *Newell v. Homer*, 120 Mass. 280.

New Jersey. — *In re Willitt*, (N. J. 1900) 46 Atl. Rep. 519.

New York. — *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Idle v. Bowen*, 11 Wend. (N. Y.) 227; *Knapp v. Knapp*, 10 N. Y. 276; *Schultz v.*

Schultz, 35 N. Y. 653, 91 Am. Dec. 88; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405; *Matter of Kennedy*, 53 N. Y. App. Div. 105, affirmed 167 N. Y. 163; *Hard v. Ashley*, 88 Hun (N. Y.) 103; *Hatch v. Sigman*, 1 Dem. (N. Y.) 519; *Bulkley v. Redmond*, 2 Bradf. (N. Y.) 281; *Holland v. Ferris*, 2 Bradf. (N. Y.) 334. *North Carolina.* — *Scoggins v. Turner*, 98 N. Car. 135.

Ohio. — *Behrens v. Behrens*, 47 Ohio St. 323; *Matter of Wiswell*, Ohio Prob. 19; *Matter of Blymeyer*, Ohio Prob. 14.

Pennsylvania. — *Clark v. Morton*, 5 Rawle (Pa.) 242, 28 Am. Dec. 667; *Jones v. Murphy*, 8 W. & S. (Pa.) 275; *Foster's Appeal*, 87 Pa. St. 67; *Gardner v. Gardner*, 177 Pa. St. 218.

South Carolina. — *Legare v. Ashe*, 1 Bay (S. Car.) 464.

South Dakota. — *In re Bell*, 13 S. Dak. 475.

Tennessee. — *Brown v. Brown*, 10 Yerg. (Tenn.) 84.

Texas. — *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

Vermont. — *Minkler v. Minkler*, 14 Vt. 125.

Virginia. — *Appling v. Eades*, 1 Gratt. (Va.) 286.

Washington. — *Matter of Harris*, 10 Wash. 555.

The Presumption Stands in Place of Positive Proof, and the court will not weigh the probability of the decedent's wishes or otherwise speculate as to the motives which may or may not have influenced him in the direction of intestacy. *Hard v. Ashley*, 88 Hun (N. Y.) 103; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405.

6. *Strength of Presumption.* — *Sugden v. St. Leonards*, 1 P. D. 154.

7. *Possession Not Traced to Testator.* — *Snider v. Burks*, 84 Ala. 53; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591; *Hildreth v. Schilling*, 10 N. J. Eq. 197; *Hamersley v. Lockman*, 2 Dem. (N. Y.) 524; *Schultz v. Schultz*,

(b) **Nature of Presumption.** — The cases generally hold that this presumption is one of law,¹ though it has been declared to be merely a presumption of fact.² But whether it is a presumption of law or a presumption of fact has been said to be immaterial, because in either case it must be rebutted by proof.³

(c) **Rebutting Presumption** — *aa. EVIDENCE IN REBUTTAL GENERALLY.* — In order to rebut the presumption of revocation arising from the fact that the will cannot be found, it may be shown that the will was destroyed by accident or mistake or while the testator was insane,⁴ or proof may be made of circumstances inconsistent with the theory that the testator destroyed it with the intention of revoking it,⁵ but the proof must be clear and satisfactory.⁶

Opportunity on Part of Third Persons. — The presumption of revocation is not rebutted by proof that persons interested to establish intestacy had an opportunity to destroy the will.⁷

Possession by Testator Shortly Before Death. — Neither is the presumption rebutted by proof that the will was in existence a short time before the testator's death.⁸

bb. BURDEN OF PROOF. — The burden of rebutting the presumption of revocation which arises from the fact that a will last seen in the possession of the testator cannot be found after his death, is on the person seeking to establish such will.⁹

cc. DECLARATIONS IN EVIDENCE — (*aa. Declarations of Testator.* — The rule of the *English* decisions and of some of the decisions of the *United States* is that the declarations of the testator are admissible to prove that he had not revoked a will which was proved to have been at one time in existence, but which could not be found after the testator's death,¹⁰ and also to show that an

35 N. Y. 653, 91 Am. Dec. 88; *Matter of Marsh*, 45 Hun (N. Y.) 107. See *In re Steinke*, 95 Wis. 121.

1. **Presumption of Law.** — *Sugden v. St. Leonards*, 1 P. D. 154; *Betts v. Jackson*, 6 Wend. (N. Y.) 173. And see generally the cases cited *supra*, this division of this section, *Presumption of Revocation — Rule Stated*.

2. **Presumption of Fact.** — *Legare v. Ashe*, 1 Bay (S. Car.) 464; *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 192.

3. **Immaterial Whether Presumption Is One of Law or of Fact.** — *Brown v. Brown*, 8 El. & Bl. 887, 92 E. C. L. 887; *Matter of Johnson*, 40 Conn. 588.

4. **Evidence in Rebuttal Generally.** — *Weeks v. McBeth*, 14 Ala. 474; *Scoggins v. Turner*, 98 N. Car. 135.

Will Destroyed by Testator While Insane. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

5. **Circumstantial Evidence to Rebut Presumption.** — *Southworth v. Adams*, 11 Biss. (U. S.) 256, 22 Fed. Cas. No. 13,194; *Steele v. Price*, 5 B. Mon. (Ky.) 68; *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 465.

6. **Clear and Satisfactory Proof Required.** — *Eckersley v. Platt*, L. R. 1 P. & D. 281.

There Must Be a Moral Conviction that the will was not destroyed by the testator *animo revocandi*. *Allan v. Morrison*, (1900) A. C. 604, 69 L. J. C. Pl. 141.

7. **Opportunity of Third Persons to Destroy Will.** — *Collyer v. Collyer*, 110 N. Y. 481, 6 Am. St. Rep. 405; *Stewart's Estate*, 149 Pa. St. 111; *Buchle's Estate*, 3 Pa. Dist. 16. Compare *Smith v. Spencer*, 1 Y. & C. Ch. 75, 5 Jur. 1056.

8. **Possession by Testator Shortly Before Death.** — *Matter of Kennedy*, (Surrogate Ct.) 30 Misc. (N. Y.) 1, affirmed 53 N. Y. App. Div. 105, 167 N. Y. 163.

9. **Burden of Proof — England.** — *Welch v. Phillips*, 1 Moo. P. C. 299; *Colvin v. Fraser*, 2 Hag. Ecc. 266; *Lillie v. Lillie*, 3 Hag. Ecc. 184; *Wargent v. Hollins*, 4 Hag. Ecc. 245.

Alabama. — *Jaques v. Horton*, 76 Ala. 238.

Louisiana. — *Fuentes v. Gaines*, 25 La. Ann. 85.

New York. — *Kahn v. Hoes*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 63; *Perry v. Perry*, (Supm. Ct. Gen. T.) 49 N. Y. St. Rep. 291.

Pennsylvania. — *Gardner's Estate*, 164 Pa. St. 420.

Texas. — *McIntosh v. Moore*, 22 Tex. Civ. App. 22.

And see the cases cited *supra*, this division of this section, *Presumption of Revocation — Rule Stated*.

10. **Declarations of Testator to Disprove Revocation — England.** — *Sugden v. St. Leonards*, 1 P. D. 154; *Keen v. Keen*, L. R. 3 P. & D. 105, 42 L. J. P. 61, 29 L. T. N. S. 247; *Whiteley v. King*, 17 C. B. N. S. 756, 112 E. C. L. 756, 10 Jur. N. S. 1,079, 11 L. T. N. S. 342, 13 W. R. 83; *Finch v. Finch*, L. R. 1 P. & D. 371, 16 L. T. N. S. 268.

United States. — *Southworth v. Adams*, 11 Biss. (U. S.) 257, 22 Fed. Cas. No. 13,194.

Alabama. — *Weeks v. McBeth*, 14 Ala. 474.

Connecticut. — *Matter of Johnson*, 40 Conn. 587.

Georgia. — *Patterson v. Hickey*, 32 Ga. 156.

Illinois. — *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395; *Boyle v. Boyle*, 158 Ill. 228.

Indiana. — *McDonald v. McDonald*, 142 Ind. 55.

Kentucky. — *Steele v. Price*, 5 B. Mon. (Ky.) 58.

Mississippi. — *Tucker v. Whitehead*, 59 Miss. 594.

Ohio. — *Behrens v. Behrens*, 47 Ohio St. 323;

earlier will had been revoked by a later will which could not be found.¹ In *New York*, however, the rule is that the declarations of a testator, unaccompanied by any act on his part, are not admissible to prove the continued existence of a lost or destroyed will.²

(bb) *Declarations of Third Persons.* — The declaration of a third person that he destroyed the will or procured its destruction, without the knowledge or consent of the testator, are admissible so far as they constitute a part of the transaction, are illustrative of its character, and are contemporaneous with it,³ provided the declarant is a party to the proceeding.⁴

c. PROOF OF CONTENTS — (1) *Admissibility of Evidence* — (a) *In General* — **Degrees of Secondary Evidence.** — Where a will has been lost or destroyed, its contents may be proved by secondary evidence, as in the case of any other lost document. This is unquestioned. But whether there are degrees of secondary evidence by which the contents of the will may be proved, so as to require the production of the best obtainable evidence of this character, is a matter concerning which there is a conflict of authority.⁵

Derivation of Testator's Property. — Evidence as to the source from which the testator derived his property is not admissible to show an improbability that he would have disposed of it as claimed by the proponents of the lost will. If the property was his, he could dispose of it as he pleased.⁶

Stipulation of Counsel. — The contents of a lost will cannot be established by a stipulation of counsel, because proof thereof by competent evidence is required.⁷

Will Read at Testator's Funeral. — The fact that a paper purporting to be the will of a decedent was publicly read at the decedent's funeral in the presence of the heirs at law, and that possession was taken by the devisee according to the will so read, is competent evidence of its contents.⁸

(b) *Copy of Will.* — If the original draft or other copy of a lost or destroyed will is in existence and is properly identified, it is admissible in evidence to prove the contents of the paper which has been lost or destroyed.⁹

Matter of Wiswell, Ohio Prob. 19; *Matter of Blymeyer*, Ohio Prob. 14.

Pennsylvania. — *Foster's Appeal*, 87 Pa. St. 67; *Gardner v. Gardner*, 177 Pa. St. 218.

South Carolina. — *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184; *Bauskett v. Keitt*, 22 S. Car. 187.

Texas. — *Tynan v. Paschal*, 27 Tex. 286, 84 Am. Dec. 619.

Washington. — *Matter of Harris*, 10 Wash. 555.

Wisconsin. — *In re Valentine*, 93 Wis. 45.

And see generally the title **DECLARATIONS (IN EVIDENCE)**, vol. 9, p. 5.

1. **Lost Will Revoking Earlier Will.** — *Matter of Hope*, 48 Mich. 518.

2. **Rule in New York.** — *Waterman v. Whitney*, 11 N. Y. 157, 62 Am. Dec. 71; *Eighmy v. People*, 79 N. Y. 546; *Matter of Russell*, 33 Hun (N. Y.) 271; *Matter of Kennedy*, (Surrogate Ct.) 30 Misc. (N. Y.) 1, *affirmed* 53 N. Y. App. Div. 105, 167 N. Y. 163; *Hamersley v. Lockman*, 2 Dem. (N. Y.) 524; *Matter of Ruser*, 6 Dem. (N. Y.) 31; *Betts v. Jackson*, 6 Wend. (N. Y.) 173.

But see *contra*, *Matter of Marsh*, 45 Hun (N. Y.) 107. This case, however, was afterwards *disapproved* in *Matter of Kennedy*, 53 N. Y. App. Div. 105, *affirmed* 167 N. Y. 163.

In the *Matter of Cosgrove*, (Surrogate Ct.) 31 Misc. (N. Y.) 422, the declarations of the testator were held admissible to rebut the presumption of revocation of a lost will, but in

this case it appeared that the will had been placed in the custody of an executor, and the declarations of the testator indicated that he believed it to be still in the executor's possession. There was no evidence that the will had ever been returned to the testator's possession.

3. **Declarations of Person Charged with Destruction.** — *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504; *Boyle v. Boyle*, 158 Ill. 228.

And see generally the title **DECLARATIONS (IN EVIDENCE)**, vol. 9, p. 5.

4. **If the Declarant Is Not a Party to the Proceeding**, his declaration to the effect that he destroyed the will was mere hearsay and is not admissible in favor of the proponent. *Scott v. Maddox*, 113 Ga. 795.

5. **For a Full Discussion** as to where there are degrees of secondary evidence, see the title **SECONDARY EVIDENCE**.

6. **Derivation of Testator's Property Not Relevant.** — *Tarbell v. Forbes*, 177 Mass. 238. See also *Ormsby v. Webb*, 134 U. S. 47.

7. **Stipulation of Counsel.** — *Matter of Ruser*, 6 Dem. (N. Y.) 31.

8. **Will Read at Testator's Funeral.** — *Nelson v. Whitfield*, 82 N. Car. 46.

9. **Copy of Will — England.** — In *Goods of Barber*, L. R. 1 P. & D. 267, 15 L. T. N. S. 192, 15 W. R. 231; *Finch v. Finch*, L. R. 1 P. & D. 371; *Burls v. Burls*, L. R. 1 P. & D. 472, 16 L. T. N. S. 677, 15 W. R. 1090; *Sly v. Sly*, 2 P. & D. 91, 25 W. R. 463; In *Goods of Pechell*, 6

(c) **Parol Evidence.** — The contents of a lost will may be established by parol evidence, as in the case of any other lost document. This is a definitely settled doctrine which cannot now be questioned,¹ though in a comparatively recent case some doubt was expressed as to its soundness.²

Who May Testify. — A subscribing witness or any other person who has read the will may testify as to its contents.³

Refreshing Memory of Witness. — A witness testifying to the contents of a lost or destroyed will may, in a proper case, refresh his memory by referring to memoranda,⁴ but this principle does not extend to the use of an alleged copy of the will which has not been proved to be such copy.⁵

(d) **Declarations** — *aa.* **DECLARATIONS OF TESTATOR.** — The declarations of a testator made after the execution of his will are admissible as secondary evidence of its contents. The authorities are generally agreed as to this.⁶ Such declarations, however, are admissible only to corroborate other evidence, and are not of themselves sufficient to prove the contents of the will.⁷

bb. **DECLARATIONS OF THIRD PERSONS.** — The declarations of third persons when made against their interest are admissible, according to the general principles

Jur. N. S. 406; *Podmore v. Whatton*, 10 Jur. N. S. 756, 3 Sw. & Tr. 449, 10 L. T. N. S. 754; *Martin v. Laking*, 1 Hag. Ecc. 244; *James v. James*, 3 Hag. Ecc. 184, note.

Canada. — *Hamilton v. Lightbody*, 21 U. C. C. P. 126.

Delaware. — *Dawson v. Smith*, 3 Houst. (Del.) 335; *Kearns v. Kearns*, 4 Harr. (Del.) 83.

Georgia. — *Batton v. Watson*, 13 Ga. 63, 58 Am. Dec. 504.

Indiana. — *Forbing v. Weber*, 99 Ind. 589.

Kentucky. — *Happy's Will*, 4 Bibb (Ky.) 553; *Payne's Will*, 4 T. B. Mon. (Ky.) 423; *Lane's Will*, 2 Dana (Ky.) 106.

Missouri. — *Graham v. O'Fallon*, 3 Mo. 507.

New Jersey. — *Hildreth v. Schillenger*, 10 N. J. Eq. 196.

New York. — *Jackson v. Russell*, 4 Wend. (N. Y.) 543.

Ohio. — *In re Lasance*, 7 Ohio Dec. 246, 5 Ohio N. P. 20.

Tennessee. — *McNeely v. Pearson*, (Tenn. Ch. 1896) 42 S. W. Rep. 165.

Vermont. — *Dudley v. Wardner*, 41 Vt. 59; *Minkler v. Minkler*, 14 Vt. 125.

Copy the Best Evidence. — According to the rule obtaining in some jurisdictions, that there are degrees of secondary evidence (see *supra*, this division of this section, *Proof of Contents — Admissibility of Evidence — In General*), it is held that parol evidence is not admissible to prove the contents of a lost will, where it appears that a copy was in the possession of the party, and the nonproduction of the copy is not accounted for. *Illinois Land, etc., Co. v. Bonner*, 75 Ill. 315.

1. Parol Evidence Admissible to Prove Contents of Lost Will — *England.* — *Sugden v. St. Leonards*, 1 P. D. 154; *In Goods of Leigh*, (1892) P. 82; *Brown v. Brown*, 8 El. & Bl. 876, 92 E. C. L. 876; *Foster v. Foster*, 1 Add. Ecc. 462; *Knight v. Cook*, 1 Lee Ecc. 413.

Alabama. — *Jaques v. Horton*, 76 Ala. 238; *Skeggs v. Horton*, 82 Ala. 352.

Connecticut. — *Matter of Johnson*, 40 Conn. 587.

Delaware. — *Dawson v. Smith*, 3 Houst. (Del.) 335; *Kearns v. Kearns*, 4 Harr. (Del.) 83.

Illinois. — *Anderson v. Irwin*, 101 Ill. 415.

Indiana. — *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274.

Kentucky. — *Steele v. Price*, 5 B. Mon. (Ky.) 59; *Muller v. Muller*, (Ky. 1900) 56 S. W. Rep. 802.

Massachusetts. — *McConnell v. Wildes*, 153 Mass. 487.

Missouri. — *Graham v. O'Fallon*, 3 Mo. 507; *Jackson v. Jackson*, 4 Mo. 210; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130.

New Jersey. — *Wyckoff v. Wyckoff*, 16 N. J. Eq. 401.

New York. — *Dan v. Brown*, 4 Cow. (N. Y.) 483; *Jackson v. Betts*, 6 Cow. (N. Y.) 377.

Pennsylvania. — *Havard v. Davis*, 2 Binn. (Pa.) 406; *Jones v. Murphy*, 8 W. & S. (Pa.) 300.

South Carolina. — *Reeves v. Reeves*, 2 Treadw. (S. Car.) 334.

Tennessee. — *McNeely v. Pearson*, (Tenn. Ch. 1896) 42 S. W. Rep. 165.

2. Admissibility of Parol Evidence Doubted. — *Wharram v. Wharram*, 10 Jur. N. S. 499, 3 Sw. & Tr. 301, in which case Sir J. P. Wilde thought that the provision of the Wills Act, that no will should be valid "unless in writing," precluded the admissibility of parol evidence to prove the contents of a lost will. This case, however, is *overruled*, in effect at least, by the later cases cited in the next preceding note.

3. Who May Testify to Contents of Will. — *Graham v. O'Fallon*, 3 Mo. 507; *Durant v. Ashmore*, 2 Rich. L. (S. Car.) 184.

4. See generally the title **EXAMINATION OF WITNESSES**, 8 ENCYC. OF PL. AND PR. 135 *et seq.*

5. Refreshing Memory with Copy of Will. — *Jaques v. Horton*, 76 Ala. 238.

6. Declarations of Testator Held Admissible. — *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 305; *Schnee v. Schnee*, 61 Kan. 643; *Muller v. Muller* (Ky. 1900) 56 S. W. Rep. 802; *Matter of Lambie*, 97 Mich. 49; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591.

7. See *infra*, this division of this section, *Weight and Sufficiency of Evidence — Declarations of Testator*. The declarations of the testator are not equivalent to one witness under the statutory rule requiring the contents of a lost or destroyed will to be proved by two witnesses. *Matter of Harris*, 10 Wash. 555.

relating to such declarations, as evidence of the contents of the will,¹ especially where there is evidence of suppression or spoliation by the declarant.²

(2) *Weight and Sufficiency of Evidence* — (a) *In General*. — The rule as to the degree of the proof of the contents of a lost or destroyed will has been stated by the courts in various forms, mostly of equivalent import, as that the evidence must be "clear, full, and satisfactory," "clear and convincing," and the like.³ Some cases state the rule in yet stronger terms,⁴ and it has even been said that when the proof is by parol evidence only, it ought to be such as to satisfy one beyond all reasonable doubt;⁵ but this seems to prescribe too strict a measure of proof, and it has been so held.⁶

The *Exact Language* of the will need not be proved in any case. It is sufficient if the witnesses testify to the substance of the will, so that it can be incorporated in the decree if probate is granted.⁷

(b) *Number of Witnesses — Proof by One Witness*. — It is clear, on principle, that there is no reason for a greater quantum of proof on the probate of a lost will than is required to establish the contents of any other lost instrument, though greater caution should probably be observed in the case of a lost will. Therefore, unless a greater quantum of proof is prescribed by statute, the contents of a lost will may be established by the testimony of a single witness,⁸ and this rule is not affected by the fact that the statute of wills requires two or more subscribing witnesses to a will to render it valid.⁹

1. *Declarations of Third Persons*. — *Sugden v. St. Leonards*, 1 P. D. 154, 34 L. J. N. S. 372, 17 Moak. 453; *Hayball v. Shephard*, 25 U. C. Q. B. 536; *Brown v. Morrow*, 43 U. C. Q. B. 436; *Matter of Ruser*, 6 Dem. (N. Y.) 31; *Nelson v. Whitfield*, 82 N. Car. 46.

And see generally the title *ADMISSIONS*, vol. 1, p. 670; *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 5.

2. *Matter of Lambie*, 97 Mich. 49.

3. *Degree of Proof in General* — *United States*. — *Southworth v. Adams*, 11 Biss. (U. S.) 256. *Alabama*. — *Skeggs v. Horton*, 82 Ala. 352. *Connecticut*. — *Matter of Johnson*, 40 Conn. 588.

Georgia. — *Kitchens v. Kitchens*, 39 Ga. 168, 99 Am. Dec. 453; *Mosely v. Carr*, 70 Ga. 333. *Kentucky*. — *Chisholm v. Ben*, 7 B. Mon. (Ky.) 415.

New Jersey. — *Coddington v. Jenner*, 60 N. J. Eq. 447, *affirming* 57 N. J. Eq. 528.

New York. — *Matter of Purdy*, 46 N. Y. App. Div. 33, *affirming* (Surrogate Ct.) 25 Misc. (N. Y.) 458.

North Carolina. — *Eure v. Pittman*, 3 Hawks (10 N. Car.) 364.

Pennsylvania. — *Jones v. Murphy*, 8 W. & S. (Pa.) 275; *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667.

Tennessee. — *Morris v. Swaney*, 7 Heisk. (Tenn.) 591; *Buchanan v. Matlock*, 8 Humph. (Tenn.) 390, 47 Am. Dec. 622.

Vermont. — *Dudley v. Wardner*, 41 Vt. 59.

Virginia. — *Hylton v. Hylton*, 1 Gratt. (Va.) 161; *Apperson v. Dowdy*, 82 Va. 776.

Proof of Contents Held Sufficient. — *Coddington v. Jenner*, 60 N. J. Eq. 447, *affirming* 57 N. J. Eq. 528; *Fetes v. Volmer*, 58 Hun (N. Y.) 1; *Matter of De Groot*, (Surrogate Ct.) 18 Civ. Pro. (N. Y.) 102.

Proof of Contents Held Not Sufficient. — *Keesy v. Dimon*, 91 Hun (N. Y.) 642, 37 N. Y. Supp. 92; *Kahn v. Hoes*, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 63; *Apperson v. Dowdy*, 82 Va. 776.

The evidence is not satisfactory that the paper offered as a copy of the destroyed will was such, where the only witness on the subject did not claim that he had ever read the will and did not read the purported copy, but only said, when it was read over to him at the trial, "That is right, as near as I can recollect." *McCarn v. Rundall*, 111 Iowa 406.

4. *Miscellaneous Statements of Degree of Proof* — *Fulltest and Most Stringent Proof*. — *Wharram v. Wharram*, 10 Jur. N. S. 499, 3 Sw. & Tr. 301; *Rhodes v. Vinson*, 9 Gill (Md.) 169; *Vining v. Hall*, 40 Miss. 83.

Evidence Must Be Strong, Positive, and Free from Doubt. — *Newell v. Homer*, 120 Mass. 277; *Davis v. Sigourney*, 8 Met. (Mass.) 487; *Durfee v. Durfee*, 8 Met. (Mass.) 490, note.

5. *Proof Beyond Reasonable Doubt*. — *Woodward v. Goulstone*, 11 App. Cas. 469.

6. *Apperson v. Cottrell*, 3 Port. (Ala.) 51, 29 Am. Dec. 239; *Skeggs v. Horton*, 82 Ala. 352. See also *Rumph v. Hiott*, 35 S. Car. 444, in which it was held that whatever the quantum of proof necessary to establish a lost will for probate, as to the terms of the will lost after its probate, it is the same as the proof of other issues of fact.

7. *Proof of Exact Language Not Required*. — *Matter of Camp*, 134 Cal. 233; *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274; *Allison v. Allison*, 7 Dana (Ky.) 95; *Tarbell v. Forbes*, 177 Mass. 238; *McNally v. Brown*, 5 Redf. (N. Y.) 372.

8. *Proof of Contents by One Witness*. — *Harris v. Knight*, 15 P. D. 170; *Jaques v. Horton*, 76 Ala. 238; *Skeggs v. Horton*, 82 Ala. 352; *Matter of Johnson*, 40 Conn. 588; *Kearns v. Kearns*, 4 Harr. (Del.) 83; *Baker v. Dobyns*, 4 Dana (Ky.) 221; *Graham v. O'Fallon*, 3 Mo. 507, 4 Mo. 601; *Dickey v. Malechi*, 6 Mo. 177, 34 Am. Dec. 130; *Varnon v. Varnon*, 67 Mo. App. 534.

9. *Requirement as to Attesting Witnesses*. — *Skeggs v. Horton*, 82 Ala. 352.

Proof by Two Witnesses Required by Statute. — In some jurisdictions the statutes provide that the contents of a lost or destroyed will must be proved by the testimony of at least two witnesses.¹ This requirement is ordinarily answered if there are two witnesses to each and every part of the will,² though in some states the rule requires two witnesses, each of whom shall testify to the contents of the entire will.³

(c) **Declarations of Testator.** — The declarations of a testator, though admissible in evidence as tending to prove the contents of the will,⁴ are not of themselves sufficient to prove the contents, but are received only in corroboration of other evidence.⁵

XIV. HOLOGRAPHIC WILLS — **Character and Condition of Instrument.** — The rules governing the probate of holographic wills are necessarily based on the assumption that the testator in every case intended that the instrument should operate as his will in the form in which he left it, and the statutes in some jurisdictions contain special provisions relating to the evidence of this fact.⁶ If a paper on its face is, in legal construction, imperfect and unfinished, the presumption is against it, but evidence of intention is let in to rebut such presumption, and it may be shown either that the decedent abandoned the intention he once had of giving effect to the paper, or that he was in progress towards finishing it and was only prevented by the act of God.⁷

Proof of Testator's Handwriting. — The statutes governing holographic wills generally provide that such a will may be admitted to probate on proof that the body of the instrument is in the testator's handwriting, and also that he signed it,⁸ unless the signature of the testator is not necessary to constitute a will of this character.⁹

Number of Witnesses. — Some of the statutes require the proof of handwriting

1. **Two Witnesses Required by Statute.** — *McDaniel v. Pattison*, 98 Cal. 86; *Matter of Camp*, 134 Cal. 233; *Todd v. Rennick*, 13 Colo. 546; *Jones v. Casler*, 139 Ind. 382, 47 Am. St. Rep. 274; *Matter of Waldron*, (Surrogate Ct.) 19 Misc. (N. Y.) 333; *Matter of Purdy*, (Surrogate Ct.) 25 Misc. (N. Y.) 458; *In re Buechle's Estate*, 17 Pa. Co. Ct. 449, 5 Pa. Dist. 127; *Matter of Harris*, 10 Wash. 555. See also the statutes of the several states on the subject.

Copy of Draft Equivalent to One Witness. — Under the *New York* statute, a correct copy or draft of the will is equivalent to one witness. *Sheridan v. Houghton*, (Supm. Ct. Gen. T.) 6 Abb. N. Cas. (N. Y.) 234.

2. **Two Witnesses to Each Part of Will Held Sufficient.** — *Todd v. Rennick*, 13 Colo. 546.

3. **Each Witness Required to Testify to Entire Will.** — *Matter of Ruser*, 6 Dem. (N. Y.) 31.

4. See *supra*, this division of this section, *Admissibility of Evidence — Declarations*.

5. **Declaration of Testator Not Alone Sufficient to Prove Contents of Will.** — In *Goods of Ripley*, 4 Jur. N. S. 342, 1 Sw. & Tr. 68; *Woodward v. Goulstone*, 11 App. Cas. 469, 35 W. R. 337, 55 L. T. N. S. 790; *Chisholm v. Ben*, 7 B. Mon. (Ky.) 408; *Clark v. Turner*, 50 Neb. 290; *Matter of Russell*, 33 Hun (N. Y.) 271; *Hatch v. Sigman*, 1 Dem. (N. Y.) 519; *Clark v. Morton*, 5 Rawle (Pa.) 235, 28 Am. Dec. 667.

6. **Custody or Place of Keeping of Will.** — The *North Carolina* statute requires proof that an alleged holographic will was found among the testator's valuable papers or had been placed by the testator in someone's hands for safe-keeping. *Brown v. Eaton*, 91 N. Car. 26; *Harrison v. Burgess*, 1 Hawks (8 N. Car.) 384.

The *Tennessee* statute is to the same effect. *Crutcher v. Crutcher*, 11 Humph. (Tenn.) 377; *Tate v. Tate*, 11 Humph. (Tenn.) 465.

To be "found among his valuable papers" implies that the will must have been placed there by the testator or with his knowledge and assent, and so deposited with intent and purpose at the time that it should be his will. *Marr v. Marr*, 2 Head (Tenn.) 303; *Hooper v. McQuary*, 5 Coldw. (Tenn.) 129.

7. **Imperfect or Incomplete Instrument.** — *Forbes v. Gordon*, 3 Phill. Ecc. 614.

Incomplete Attestation. — A will of land attested by only one witness may be probated on proof that the instrument is in the handwriting of the testator and was found among his valuable papers. *Harrison v. Burgess*, 1 Hawks (8 N. Car.) 384. See also *Brown v. Beaver*, 3 Jones L. (48 N. Car.) 516, 67 Am. Dec. 255; *Matter of Soher*, 78 Cal. 477. And the fact that a holographic will contains an attestation clause, unsigned by witnesses, does not show a lack of finality, because such a will does not require attestation. *Perkins v. Jones*, 84 Va. 358, 10 Am. St. Rep. 863.

8. **Proof of Testator's Handwriting.** — *Ex p. Horner*, 27 Ark. 443; *Franklin v. Franklin*, 90 Tenn. 44. And see the statutes of the several states.

Women, though not competent in *Louisiana* to attest a will, may, nevertheless, prove it. *Eubanks's Succession*, 9 La. Ann. 148.

9. **When Proof of Signature Is Not Required.** — *Suggett v. Kitchell*, 6 Verg. (Tenn.) 429; *Reagan v. Stanley*, 11 Lea (Tenn.) 316. Compare the statutes in other jurisdictions.

to be made by a certain number of witnesses, usually two,¹ or three.² But unless the statute absolutely requires a certain number of witnesses one is sufficient, at least if there are corroborating circumstances.³

Effect of Probate. — Where an unattested will has been admitted to probate, but the record does not recite the evidence, it will be presumed that the will was proved to be in the testator's handwriting.⁴

XV. NUNCUPATIVE WILLS — In General. — Nuncupative wills are not regarded with favor, and therefore very strict proof is required by the courts of all the facts which the statute makes essential to the validity of such wills.⁵ The proponent must prove, not only the circumstances under which a nuncupative will may be made and the words spoken by the testator, but he must also prove that the testator, in some form, bade the persons present to bear witness that he was making his will, or, as the phrase is, the *rogatio testium* must be proved.⁶

Time of Proof. — The statutes generally require the testator's words to be proved in the probate court within six months from the time they were spoken, and after that time there can be no probate unless the words were reduced to writing within a specified number of days after they were spoken.⁷ The period for putting the words in writing in order that they may be proved after the lapse of six months varies somewhat. It is usually fixed at six days, though in some jurisdictions ten and even thirty days are allowed.⁸

Number of Witnesses. — Some of the statutes require proof of the testator's words by three witnesses,⁹ while other statutes make two witnesses sufficient.¹⁰ In any event, both or all of the witnesses must have been present together at the time the words were spoken by the testator, and each must testify to the entire matter. It is not sufficient that one witness should testify as to some of the testator's words and the other as to the residue.¹¹

PROBATE COURTS. — See the title **SURROGATES' AND PROBATE COURTS.**

PROCEDENDO. (See also the title **MANDATE AND PROCEEDINGS THEREON**, 13 ENCYC. OF PL. AND PR. 835.) — A writ of procedendo *ad iudicium* issues out of the court of chancery in *England*, and out of a superior court in the United States, where judges of any subordinate court delay the parties, as by not giving judgment on either side.¹² A procedendo is a writ commanding an inferior court to proceed to judgment; it gives no decision, but directs one.¹³

PROCEDURE. (See also **PROCEEDING**, *post.*) — The word "procedure" as a law term is not well understood. The term is so broad in its signification that it is seldom employed as a term of art. It includes in its meaning whatever is embraced by the three technical terms pleading, evidence, and practice. In this sense the word "practice" means those legal rules which direct the course of proceeding, to bring parties into the court, and the course of the

1. **Two Witnesses Required.** — Eubanks's Succession, 9 La. Ann. 148; Franklin v. Franklin, 90 Tenn. 44.

2. **Three Witnesses Required.** — *Ex p.* Horner, 27 Ark. 443.

3. **One Witness and Corroborating Circumstances** — **Declarations of Testator Held Admissible to Prove Handwriting.** — Morvant's Succession, 45 La. Ann. 207.

4. **Effect of Probate.** — Stevenson v. Huddleston, 13 B. Mon. (Ky.) 299.

5. **Strict Proof Required.** — Dorsey v. Sheppard, 12 Gill & J. (Md.) 192, 37 Am. Dec. 77; Woods v. Ridley, 27 Miss. 119; Rankin v. Rankin, 9 Ired. L. (31 N. Car.) 156; Perez v. Perez, 59 Tex. 322.

As to the Requirements of a nuncupative will, see generally the title **WILLS**.

6. **Rogatio Testium.** — St. James Church v.

Walker, 1 Del. Ch. 284; Broach v. Sing, 57 Miss. 115; Winn v. Bob, 3 Leigh (Va.) 140, 23 Am. Dec. 258; Owen's Appeal, 37 Wis. 68.

7. **Time of Proof in General.** — Webb v. Webb, 7 T. B. Mon. (Ky.) 626; George v. Greer, 53 Miss. 405. And see the various statutes on the subject.

8. See the statutes of the several states.

9. **Three Witnesses Required.** — Parsons v. Parsons, 2 Me. 298; Brayfield v. Brayfield 3 Har. & J. (Md.) 208.

10. **Proof by Two Witnesses.** — Webb v. Webb, 7 T. B. Mon. (Ky.) 626; Bundrick v. Haygood, 106 N. Car. 468; Werkheiser v. Werkheiser, 6 W. & S. (Pa.) 184.

11. **Each Witness Must Testify to Whole Will.** — Tally v. Butterworth, 10 Verg. (Tenn.) 501.

12. **Procedendo.** — 4 Min. Inst. 301.

13. Yates v. People, 6 Johns. (N. Y.) 463.

court after they are brought in. And evidence, as a part of procedure, signifies those rules of law whereby we determine what testimony is to be admitted and what rejected in each case, and what is the weight to be given to the testimony admitted.¹

PROCEED.—See note 2.

PROCEEDING. (See also SPECIAL PROCEEDING.)—In a general sense, the term “proceeding” includes the form and manner of conducting judicial business before a court or judicial officer; regular and orderly progress in form of law; including all possible steps in an action, from its institution to the execution of judgment. In a more particular sense, any application to a court of justice, however made, for aid in the enforcement of rights, for relief, for redress of injuries, for damages, or for any remedial object. In its general acceptation, this word means the form in which actions are to be brought and defended, the manner of intervening in suits, of conducting them, of opposing judgments, and of executing them.³ A proceeding is any step taken by a party in the progress of an action.⁴

1. **Procedure.**—Kring *v.* Missouri, 107 U. S. 231, citing 1 Bishop on Criminal Procedure, § 2.

Procedure is a generic term, and comprehends pleadings, evidence, and practice. Kansas *v.* O'Connor, 36 Mo. App. 594.

Claims Against Insolvent Estate.—A statute provided that any creditor who should have or hold any security or lien upon any part of an insolvent estate should by affidavit put a value upon such security. In *Matter of Chaffey*, 30 U. C. Q. B. 73, it was held that specifying the value and amount of a security held, and putting a value on it under oath, and the other proceedings to be taken with respect to it, were not “a matter of *procedure* merely,” and hence were not affected by legislation subsequent to the pendency of the action. See also *In re Botsford*, 22 U. C. C. P. 65.

Conflict of Laws.—As a general rule the *lex fori* controls in matters of *procedure*. In *Cochran v. Ward*, 5 Ind. App. 95, it was said: “*Procedure*, in this connection, applies to the nature of the action, as whether it shall be covenant, assumpsit, debt, etc., to the rules of pleading and evidence, the order and manner of trial, and the nature and effect of process, and perhaps to all other matters of remedy only, which are not incorporated into the contract as affecting its nature and obligatory character.” See generally the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1383.

2. **Proceed—Issue.**—See **ISSUE**, vol. 17, p. 539.

Sue.—A stipulation not to *proceed* against a party is an agreement not to sue. The court said: “To sue a man is certainly to *proceed* against him.” *Planters' Bank v. Houser*, 57 Ga. 140.

Legal Proceedings.—To *proceed*, when applied to legal proceedings, means to commence and carry on a legal process. *Hliff v. Weymouth*, 40 Ohio St. 103.

3. **Proceedings.**—*Exp. McGee*, 33 Oregon 165, quoting Black's L. Dict. and Bouv. L. Dict.; *Erwin v. U. S.*, 37 Fed. Rep. 488.

Limited Sense of Term.—Where a statute permitted appeals in all actions and *proceedings*, it was held that the term *proceedings* was not used in its ordinary sense of every step taken in the action. The court said: “We

do not believe the legislature intended that the word should be understood in any such sense. But we do believe that the court should not depart from the well-known and established principles of the common law, and permit a cause to be brought before it by piecemeal for review, unless clearly authorized so to do by legislative enactment.” *Windt v. Banniza*, 2 Wash. 154. See also *Dossett v. St. Paul, etc., Lumber Co.*, (Wash. 1902) 69 Pac. Rep. 11.

4. **Any Step Taken in Action.**—*Dodd v. Middleton*, 63 Ga. 638; *Hopewell v. State*, 22 Ind. App. 489; *Gordon v. State*, 4 Kan. 501; *Strom v. Montana Cent. R. Co.*, 81 Minn. 346; *Johnson v. Jones*, 2 Neb. 137; *Wilson v. Allen*, (Supm. Ct. Gen. T.) 3 How. Pr. (N. Y.) 369; *Williamson v. Champlin, Clarke* (N. Y.) 9; *Morewood v. Hollister*, 6 N. Y. 320; *Bulkeley v. Keteltas*, 3 Sandf. (N. Y.) 741; *Irwin v. Bellefontaine Bank*, 6 Ohio St. 87; *Stonesifer v. Kilburn*, 94 Cal. 43.

The word *proceeding* includes all steps taken by the court, or by its officers under its precepts, from the institution of the suit to the close of the final process which may issue thereon. *Cropper v. Coburn*, 2 Curt. (U. S.) 468. To the same effect see *Bruner v. Superior Ct.*, 92 Cal. 248.

Form and Power.—In *St. Joseph Mfg. Co. v. Harrington*, 53 Iowa 382, in construing a statute (now Code 1897, § 4485) providing that all *proceedings* prescribed for the Circuit Court (now District Court) shall be pursued in justices' courts, it was said: “This does not confer power; it relates to the manner of the exercise of power. The term *proceedings* does not relate to matters pertaining to the powers of the court, but to the form and manner of the exercise of power.”

“**Proceeding**” **More Comprehensive than “Judgment.”**—“The word *proceeding*, in a judicial sense, is much more comprehensive than that of ‘judgment,’ the former very frequently including the latter.” *Yeager v. Wright*, 112 Ind. 235, in which case it was held that the certificate of a justice of the peace to a transcript that it contained “a correct statement of the *proceedings*” sufficiently complied with the provision of an *Indiana* statute requiring that copies of *proceedings* before a justice of the peace be certified by him as “true and

Performance of Act. — "Proceeding" means in all cases the performance of an act, and is wholly distinct from any consideration of an abstract right. It is

complete" copies of such *proceedings* and judgments.

In *State v. Gordon*, 8 Wash. 488, it was held, where a statute required a party instituting an action or *proceeding* to pay a fee of four dollars when the cause was entered or when the first paper on his part was filed, that this had no application to the filing and entry of a transcript of a judgment of a justice of the peace in the execution docket of the county clerk.

"Proceeding" in Sense of "Action." — *Pryor v. City Offices Co.*, 10 Q. B. D. 508, *per Brett*, M. R. See also *Mars v. Oro Fino Min. Co.*, 7 S. Dak. 617. Compare *Strom v. Montana Cent. R. Co.*, 81 Minn. 346.

"A suit is certainly a *proceeding*." *Dodd v. Middleton*, 63 Ga. 638, *per Jackson*, J.

Advertisement for Sale of Land. — See *Smith v. Brown*, 20 Ont. 165.

Filing of Affidavit in Action of Replevin a Proceeding. — *Wilson v. Macklin*, 7 Neb. 50.

Filing of Appeal Bond a Proceeding. — *Irwin v. Bellefontaine Bank*, 6 Ohio St. 87. See also *Wilson v. Allen*, (Supm. Ct. Gen. T.) 3 How. Pr. (N. Y.) 369.

Arbitration — Application by Letter. — An English statute provided that if any party to a submission should commence any legal *proceedings* in any court against any other party to the submission, such other party might apply to the court to stay the *proceedings*. It was held that *proceeding*, in this connection, meant some application to the court by summons or motion, and did not include an application by letter or notice from one party to another, or by correspondence between their respective solicitors. *Ives v. Willans*, (1894) 1 Ch. 68. And see *Caughell v. Brower*, 17 Ont. Pr. 438.

In *Wells v. Lane*, 15 Wend. (N. Y.) 99, it was held that a parol submission to arbitration of a cause pending in court was not a *proceeding* in the cause.

Assignee for Benefit of Creditors. — An attorney was to have a fee of ten per cent. for collecting a note provided he had to resort to judicial *proceedings*. It was held that the attorney was not entitled to the fee on the acceptance and payment of the note by an assignee for the benefit of creditors, the assignee not having been appointed by a court and not being under the direction and control of one. The court said: "If presenting a claim to an assignee is collecting by judicial *proceeding*, presenting it to any agent or trustee would be." *Briam v. Sullivan*, (Tex. Civ. App. 1902) 66 S. W. Rep. 572.

Assignment for Benefit of Creditors. — *Kittridge v. Kinne*, 80 Mich. 204.

Attachment. — *Cropper v. Coburn*, 2 Curt. (U. S.) 468.

Undertaking for Attachment. — *Langstaff v. Miles*, 5 Mont. 554.

Embraces Proceedings Both Before and After Judgment. — *Ross v. Farewell*, 5 U. C. C. P. 29.

Bill of Exception. — In *Stonesifer v. Kilburn*, 94 Cal. 43, it was held that a settlement of a bill of exception was a *proceeding* in an action, and that an objection to the settlement of the bill and a motion to disregard it on the

ground that it was not served in time was a *proceeding*.

Capias. — *Ball v. Stanley*, 6 M. & W. 396.

Case and Proceedings Distinguished. — See *Hopewell v. State*, 22 Ind. App. 489. And see *CASE*, vol. 5, p. 748.

Presentation to County Court of Claim Against Estate of Decedent Commencement of Action or Proceeding. — *Frawley v. Cosgrove*, 83 Wis. 441.

Claim Before County Board. — In *Maloney v. Douglas County*, (Neb. 1902) 89 N. W. Rep. 248, it was said: "The phrase 'action or *proceeding*' in which the lien is given is certainly broad enough to include the prosecution of a claim before a county board."

Costs. — In *Rich v. Husson*, 1 Duer (N. Y.) 617, it was held that the term *proceedings* did not include the right to recover costs, nor the amount to be recovered.

But in *Reg. v. London*, etc., R. Co., L. R. 3 Q. B. 170, it was held that the taxation of costs was a *proceeding* within a statute which provided that from and after the passage of a certain act no action, suit, attachment, execution, or other *proceeding* against a named railroad company should be commenced or continued.

Not Applicable to County-seat Proceedings. — *Gordon v. State*, 4 Kan. 489. See also *State v. Butler County*, 31 Kan. 461.

Criminal Proceeding. — In *Hopewell v. State*, 22 Ind. App. 494, it was said that "criminal *proceeding*," within the meaning of *Burns's Stat. Ind.* 1894, § 2127, means any step taken in the progress of a criminal action, and does not include criminal conduct on the part of one against whom no charge has been legally preferred.

In *Yates v. Reg.*, 14 Q. B. D. 654, it was said, *per Brett*, M. R., that the term "criminal *proceeding*" is one much wider than "criminal prosecution." *Yates v. Reg.*, 14 Q. B. D. 648.

Proceedings of Sheriff under Execution Part of Proceedings in a Cause. — *Smith v. Union Bank*, 5 Pet. (U. S.) 518; *Ward v. Cohen*, 3 S. Car. 338. And see *infra*, this note, *Judicial Sale*.

Levy and Sale under Execution a Proceeding. — *Mills v. Provident L. & T. Co.*, (C. C. A.) 100 Fed. Rep. 344. See also *In re Perkins Beach Lead Min. Co.*, 7 Ch. D. 371.

Proceeding by Execution a Proceeding by Suit at Law. — *Vanderveer v. Conover*, 16 N. J. L. 487.

Final Process — Jail Liberties. — A *United States* statute provided that "writs of execution and other final process issued on judgments and decrees rendered in any courts of the United States and the *proceedings* thereupon, shall be the same, except their style, in each state respectively as are now used in the courts of such state," etc. It was held that the allowance of jail liberties was a part of the *proceeding* upon such writs of execution, within the meaning of the act. *U. S. v. Knight*, 3 Sumn. (U. S.) 371.

And in construing this statute in *Amis v. Smith*, 16 Pet. (U. S.) 313, the court said: "We understand the phrase 'the *proceedings*'

an act necessary to be done in order to attain a given end; it is a prescribed

thereupon' to mean the exercise of all the duties of the ministerial officers of the states prescribed by the laws of the state for the purpose of obtaining the fruits of judgments." See also *Pollard v. Cocke*, 19 Ala. 197.

Foreclosure of Mortgage. — "The statutory proceedings to foreclose a mortgage are not 'proceedings in court,' so as to authorize the court to remedy defects in them." *Dwight v. Phillips*, 48 Barb. (N. Y.) 119.

But in *Hogan v. Hoyt*, 37 N. Y. 300, it was held that a judgment of foreclosure and a report of sale were proceedings.

Drawing of Grand Jury. — A charter declared that a certain police justice should have all the authority, powers, and rights of a justice of the peace in civil and criminal proceedings. It was held that such police justice had the authority of a justice of the peace in respect to the drawing of a grand jury. *Hogan v. State*, 30 Wis. 428. See also *Bruner v. Superior Ct.*, 92 Cal. 248; *Matter of Tillery*, 43 Kan. 192.

Imprisonment. — In *Ex p. McGee*, 33 Oregon 165, it was held that an imprisonment for failure to pay a fine was a proceeding, within the meaning of a charter providing for proceedings before a municipal court.

Instructions to Jury. — In *Atchison, etc., R. Co. v. Brassfield*, 51 Kan. 174, it was said of the term proceedings: "In a judicial sense it fairly includes the instructions given to the jury."

Judgment Roll. — In *People v. Stephens*, (Supm. Ct. Spec. T.) 51 How. Pr. (N. Y.) 227, it was held, where an order was entered at special term for the defendant on demurrer, in an action to set aside a contract for fraud, and it was arranged and agreed between counsel for the respective parties that the defendants should waive the costs in the action and the plaintiffs would not appeal from the decision, and that "no further proceedings should be taken in the action, but that the same should be considered at an end and finally disposed of," that such agreement did not preclude the defendants from entering and filing a judgment roll upon the decision.

Judicial Sale. — In *American Assoc. v. Hurst*, 16 U. S. App. 325, a sale of land by a sheriff under an execution issued out of a court of equity was held to be a proceeding. See also *Neil v. Almond*, 29 Ont. 63.

Jurat. — In *Johnson v. Jones*, 2 Neb. 137, it was said: "The swearing to the petition is a proceeding; and so is attaching the jurat to the affidavit. It is clearly a proceeding by which the suitor takes steps to prosecute his action."

Jurisdictional Proceedings. — An act provided that whenever any authority should be exercised by any officer pursuant to any provision of a certain title, the proceedings might be removed into the Supreme Court by certiorari. On a certiorari pursuant to this act the Supreme Court held that only such proceedings as were jurisdictional could be thus removed. The Court of Appeals reversed this decision, holding that the term proceeding, as used in the act, meant "all the matters connected with or attending the exercise of the power

which are necessary to enable the court of review to determine its validity and correctness." *Morewood v. Hollister*, 6 N. Y. 320.

Mandamus. — In *Murphy v. Utter*, (1902) 22 U. S. Sup. Ct. Rep. 782, a petition for a writ of mandamus was held to be a "proceeding theretofore taken," within the meaning of the saving clause in Rev. Stat. Ariz. (1887), § 2934.

Mechanic's Lien. — In *Morgan v. Chapple*, 10 Kan. 224, it was held that the word proceedings applied to mechanics' liens filed.

Motion. — A statute provided that a party to the record of any civil action or proceeding might be examined upon the trial thereof, as if under cross-examination, at the instance of the adverse party. In construing this statute the court said: "We hold that it applies to the trial of any civil action involving an issue of fact; also, to the trial of any proceeding involving such an issue which the parties are entitled as a matter of right to have heard upon the oral testimony of witnesses and other evidence as in ordinary trials. A party is not entitled as matter of right to have a motion involving an issue of fact heard and tried on the oral testimony of witnesses." *Strom v. Montana Cent. R. Co.*, 81 Minn. 349.

Notice. — Under a Wisconsin statute which provided that unless proceedings should be had within one year from the entry of a certain order in court, the cause should be dismissed, etc., it was held that the notice of an attorney to the adverse party that the cause had been remitted, and that on a day named he would move the court to vacate its judgment, was such a proceeding. *Bonesteel v. Orvis*, 31 Wis. 117.

Pleadings. — A Kansas statute (now Code Civ. Pro. Kan., § 393) provides that "an action may be dismissed without prejudice to a future action, * * * by the court, for disobedience by the plaintiff of an order concerning the proceedings in the action." It was held that the word proceedings in this connection meant any proceedings in the case, including the pleadings. *Jackson County v. Hoaglin*, 5 Kan. 559.

In *School Dist. Number Forty-Nine v. Cooper*, 44 Neb. 714, it was held that the word proceedings included duly certified copies of the pleadings on which an action was tried, within a statute requiring that the plaintiff in error should file a transcript of the proceedings.

But in *Wilson v. Macklin*, 7 Neb. 50, the terms "pleading" and proceeding were distinguished.

Preliminary Examination. — A statute provided for a transfer by the justice before whom an action or proceeding was pending to another justice, "if on the return of the process, or at any time before the trial commences," a certain affidavit was made. In construing this statute the court said: "The question in the case is, do these provisions apply to an examination by a justice of the peace, under chapter 106, of a person accused of crime? Such an examination is, of course, a proceeding; and if there were nothing else but that word and the word 'action' to indicate the cases in

mode of action for carrying into effect a legal right, and, so far from involving any consideration or determination of the right, presupposes its existence.¹

PROCEEDING IN REM AND IN PERSONAM. — See REM AND PERSONAM
PROCEEDING TO SEA. — See SEA.

PROCEEDS. — The term "proceeds" is defined as the amount proceeding or accruing from some possession or transaction, especially the sum derived from the sale of goods; the useful or material results of an action or course.²

which a transfer can be demanded, the right would apply to such examination. But the words 'at any time before the trial commences' and 'proceed to hear and determine the same' show that the *proceeding* must be one in which there is to be a trial before the justice, and which on such trial he is to determine.' State v. Bergman, 37 Minn. 408.

Preparation of Case Out of Court. — A statute provided that whenever, in a criminal action or *proceeding*, any attorney defended the accused by order of court, the county in which such criminal action or *proceeding* arose should pay to such attorney a reasonable sum per day for each day actually occupied for such trial or *proceeding*. It was held that the word *proceeding* in the phrase "such trial or *proceeding*" must be taken to have been used in the same sense as when used in the preceding part of the statute, *i. e.*, as referring to something in the nature of a criminal action but distinguished therefrom, and that under the statute an attorney was not entitled to compensation for time spent in preparing the trial out of court, on the ground that such time was spent in the *proceeding*. Green Lake County v. Waupaca County, (Wis. 1902), 89 N. W. Rep. 549.

Process. — See PROCESS, *post*.

Appointment of Receiver a Proceeding. — Phelps v. Mutual Reserve Fund L. Assoc., (C. C. A.) 112 Fed. Rep. 463.

Removal from Position in Court Room. — A statute provided that every justice of the peace should keep a record of all *proceedings* before him. A justice of the peace ordered a respondent to remove from a position he had taken near the bench. It was held that the justice need not enter such an order upon the record. State v. Copp, 15 N. H. 214.

Replevin Bond. — In Meloché v. Reaume, 34 U. C. Q. B. 606, it was held that an order of a judge setting aside a writ of replevin "and all *proceedings* thereon subsequent to the issue thereof," admitting that it extended to a replevin bond, did not of itself absolutely annul the bond so that to an action on it such an order could be pleaded as a defense.

Confined to Special Proceedings. — Windt v. Banniza, 2 Wash. 153.

Filing of Stay Bond a Proceeding. — State v. Russell, 17 Neb. 203. See also O'Dea v. Washington County, 3 Neb. 118.

The Term Proceedings Has Been Held to Include Tax Proceedings. — See Bowman v. Cockrill, 6 Kan. 327; Matter of Tillery, 43 Kan. 192.

Warrant of Arrest a Proceeding. — Drumm v. Cessnum, 61 Kan. 467.

Writ of Revivor a Proceeding. — Caspar v. Keachie, 41 U. C. Q. B. 599.

Proceeding in Court. (See *supra*, this note, *Foreclosure of Mortgage*.) — A *proceeding* in court is an act done by the authority or direc-

tion of the court, express or implied. Bulkeley v. Keteltas, 3 Sandf. (N. Y.) 741.

In *Ex p.* Board of Trade, 13 Q. B. D. 492, it was held that a second meeting of creditors, under a bankruptcy provision, held to consider the confirmation of a scheme of arrangement of the debtor's affairs, accepted at the first meeting, was not a *proceeding* in court.

Proceeding Instituted. — In Hood Barrs v. Heriot, (1897) A. C. 177, it was held that an appeal by a woman from a judgment in an action in which she was a defendant was not a *proceeding* instituted.

Proceedings Supplementary. — See the title SUPPLEMENTARY PROCEEDINGS, 21 ENCYC. OF PL. AND PR. 85.

1. Performance of Act. — Neil v. Almond, 29 Ont. 69; Rich v. Husson, 1 Duer (N. Y.) 620; Fargo v. Helmer, 43 Hun (N. Y.) 19.

2. Proceeds. — Matter of Gates, (Supm. Ct. App. Div.) 31 Civ. Pro. (N. Y.) 91, 51 N. Y. App. Div. 352, *citing* Cent. Dict. and Stand. Dict. See also Tradesmen's Nat. Bank v. National Surety Co., 169 N. Y. 563.

Proceeds is "a word of great generality." Phelps v. Harris, 101 U. S. 380; Matter of Gates, (Supm. Ct. App. Div.) 31 Civ. Pro. (N. Y.) 91, 51 N. Y. App. Div. 352.

Clear Proceeds. — See CLEAR, vol. 6, p. 109; NET PROCEEDS, vol. 21, p. 530. And see Board of Education v. Henderson, 126 N. Car. 699.

Gross Proceeds. — A lease of a hotel stipulated that the lessor should pay out of the *proceeds* of the business a certain sum of rent. It was held that in determining the question whether the word *proceeds* was to be construed the same as "net profits," or as "receipts," or "gross receipts," resort must be had to the contract itself for the meaning which the parties themselves intended should be given thereto, and that in the connection in which it was used the term was equivalent to "gross receipts." Smith v. Hubert, 83 Hun (N. Y.) 508. And for *proceeds* in the sense of gross *proceeds*, see also Caperton v. Caperton, 36 W. Va. 484; Dallas County v. Club Land, etc., Co., (Tex. 1902), 66 S. W. Rep. 296. And see GROSS, vol. 14, p. 1118.

Same — Proceeds of Fines. — The Constitution of Kansas provided that the *proceeds* of fines should be applied to the support of the common schools. In construing this provision in Atchison, etc., R. Co. v. State, 22 Kan. 14, the court said: "'The *proceeds* of fines' mean, of course, the moneys collected from fines, the amounts realized from fines, and just such amounts, no more and no less. 'The *proceeds* of fines' evidently mean all the *proceeds*, not merely the clear *proceeds*; not a portion thereof, but all.'" And see CLEAR, vol. 6, p. 109.

Net Proceeds. — See NET PROCEEDS, vol. 21, p. 530.

The term is one of equivocal import. Its construction depends much upon the context and the subject-matter to which it is applied. Thus, if a testator should direct that his property be sold, and the proceeds disposed of or distributed in a certain manner, no one could doubt that the whole corpus or principal was intended.¹ But should he order that it be rented or invested, then "proceeds" would necessarily be limited to the net income, especially if the interest given was for life only.² The term does not necessarily mean money.³

PROCESS. (See also the titles DUE PROCESS OF LAW, vol. 10, p. 287; NOTICE, vol. 21, p. 580; PUBLICATION, *post*. And see ENCYC. OF PL. AND PR., titles SERVICE OF PROCESS AND PAPERS, vol. 19, p. 567; SUMMONS AND

Right to Proceeds. — An Act of Congress entitled a claimant of captured and abandoned property to recover on proof of ownership and his right to the *proceeds*. In construing this provision in *Woodruff's Case*, 7 Ct. Cl. 613, the court said: "These words, 'ownership' and 'right to the proceeds,' are not technical words, and in their ordinary meaning they include all property and rights of property which may be available for pecuniary benefit."

Advances. — The owner of property in the hands of a factor directed that a certain debt should be discharged out of its *proceeds*. It was held that the factor might advance money to pay the debt. *Hundley v. Spencer*, 1 Rob. (La.) 211.

Proceeds of Mines. — The Constitution of *Nevada* provided for the taxation of all property, real, personal, and possessory, except mines and mining claims, the *proceeds* of which alone should be taxed. It was held that this meant that the entire annual *proceeds* of the mine were subject to taxation, and not the mere *proceeds* on hand when the assessor happened to visit the mines. *State v. Kruttschnitt*, 4 Nev. 178.

Proceeds of Cargo. — See the title MARINE INSURANCE, vol. 19, p. 961; and see *Hancox v. Fishing Ins. Co.*, 3 Sumn. (U. S.) 132.

Proceeds of Note. — In *Wheeler, etc., Mfg. Co. v. Winnett*, (Neb. 1902) 91 N. W. Rep. 515, it was said: "When we speak of the *proceeds* of a sale, we mean the sum that is paid for the things sold. When we speak of the *proceeds* of a note, we ordinarily mean the amount due or collected upon it. When we send a note to an attorney for collection with instructions to collect it and remit the *proceeds*, it is usually inferred that he will retain his collection fee, and the *proceeds* in such a case may be held to be the amount remitted after deducting such fee."

Proceeds of a Sale. — In *Andrews v. Johns*, 59 Ohio St. 71, it was said: "The term *proceeds*, when used in connection with sale, as the lexicographers seem to agree (see Webster, the Standard, Rapalje, and Bouvier), means a sum of money derived from the sale of property. If money be derived from the sale, then it has yielded *proceeds*."

In *Matter of Mitchell*, 61 Hun (N. Y.) 372, it was held that the *proceeds* of a sale were ordinarily the amount thereof after deducting the expenses, including taxes.

Same — Mortgage. — A mortgage covering a homestead and other lands was foreclosed, and the entire premises were sold, the nonexempt portion being worth less than the amount

of the debt. It was held that the surplus money remaining after satisfaction of the mortgage debt should be deemed *proceeds* of the sale of the homestead. *Clancey v. Alme*, 98 Wis. 229.

Same — Bid by Mortgage Creditor. — In *Andrews v. Johns*, 59 Ohio St. 65, it was held that where land is bid in by a mortgage creditor whose mortgage is the first lien, and the bid is less than the amount of the debt so secured, the bid cannot be considered the *proceeds* of the sale within a statute providing that in judicial sales the court may order the payment of all incumbrances and liens upon any of the property sold out of the *proceeds* thereon.

Sale of Judgment. — In *Matter of Gates*, 51 N. Y. App. Div. 350, it was held that an attorney had a lien upon moneys realized by an assignee for the benefit of creditors, upon the sale of judgments recovered by such attorney for the assignors. Such moneys are *proceeds* of a judgment within the meaning of Code Civ. Pro. *New York*, § 66, which provides that an attorney's lien upon a judgment recovered by him shall attach to the *proceeds* thereof.

1. **Corpus.** — *Thomson's Appeal*, 89 Pa. St. 46. And see *Belmont v. Pouvert*, 35 N. Y. Super. Ct. 208; *Knox v. Knox*, 59 Wis. 172; *Allen v. Barnes*, 5 Utah 100. And that the term is of equivocal import, see also *Wheeler, etc., Mfg. Co. v. Winnett*, (Neb. 1902) 91 N. W. Rep. 515; *Matter of Gates*, (Supm. Ct. App. Div.) 31 Civ. Pro. (N. Y.) 91, 51 N. Y. App. Div. 352.

2. **Proceeds in Sense of Income.** — *Roberts's Appeal*, 92 Pa. St. 419; *Thomson's Appeal*, 89 Pa. St. 46; *Chubbock v. Murray*, 30 Nova Scotia 23.

In *Hunt v. Williams*, 126 Ind. 495, it was said: "A devise of the *proceeds* of real estate is not materially different from a devise of the income."

3. **Money Not Necessarily Implied.** — It was argued that a direction in a will to invest the *proceeds* of the testator's estate indicated that a sale was meant. The court said: "This does not necessarily follow. *Proceeds* are not necessarily money. This is also a word of great generality. Taking the words in their ordinary sense, a general power to dispose of land or real estate and to take in return therefor such *proceeds* as one thinks best will include the power of disposing of them in exchange for other lands. It would be a disposal of the lands parted with; and the lands received would be the *proceeds*." *Phelps v. Harris*, 101 U. S. 380.

PROCESS, vol. 20, p. 1099.)—The term "process" comprehends all mandates of a court issued to its officer commanding him to perform certain services within his official cognizance; and embraces every writ that may be necessary to institute or to carry on an action or suit and to execute the judgment of the court.¹ "Process" is so denominated because it proceeds or issues forth in order to bring the defendant into court to answer the charge preferred, and signifies the writ or judicial means by which he is brought to answer.² In its largest sense "process" is equivalent to procedure, including all the steps and proceedings in a cause, from its commencement to its conclusion.³ Thus, the

1. **Process.**—Aven *v.* Wilson, 61 Ark. 287. See also U. S. *v.* Murphy, 82 Fed. Rep. 899; Birmingham Dry Goods Co. *v.* Bledsoe, 113 Ala. 419; Gilmer *v.* Bird, 15 Fla. 410; Perry *v.* Lorillard F. Ins. Co., 6 Lans. (N. Y.) 204.

Other Definitions.—*Process* has been defined as "a writ or summons issued in the course of judicial proceedings." Comp. Laws Dak. (1887), § 4807, quoted in McLaughlin *v.* Wheeler, 2 S. Dak. 383.

Process, at common law, is "the means of compelling the defendant to appear in court." And. L. Dict., quoted in Dumars *v.* Denver, (Colo. App. 1901) 65 Pac. Rep. 588.

"*Process* is a mandatory precept issuing from a court." Brown *v.* Way, 33 Ga. 191.

In Palmer *v.* Allen, 5 Day (Conn.) 200, it was said that "*process*, in one sense, is the method to be pursued by law to compel a compliance with the original writ by giving the party notice to obey it; a warning to appear in court at the return of the original writ. On failure of obedience, further *process* is said to be had, by attachment, etc."

Section 4175 of the Political Code of California provides that *process* shall include "all writs, warrants, summons, and orders of courts of justice or judicial officers." In construing this provision together with that defining "notice," in Bruner *v.* Superior Ct., 92 Cal. 247, the court said: "It is impossible to imagine any sort of a thing ordered by any court or judge thereof, which has to be executed by an officer, that is not embraced in the above definitions; and the general statutory provision is that it [*process*] must be executed by the sheriff." See also in Minnesota, Hinkley *v.* St. Anthony Falls Water Power Co., 9 Minn. 55.

In Wisconsin it has been held that a constitutional requirement that all writs of *process* should run in the name of the state included only *process* emanating from the courts of justice of the state. Sprague *v.* Birchard, 1 Wis. 457.

Divisions.—The original division of *process* was into original, mesne, and final: original *process* being the original writ commanding the party to appear and defend; mesne *process* embracing all writs and orders of the court necessary for the carrying on of the suit; while final *process* comprehended those writs which were necessary to secure to the successful party the benefit of the suit. It is now generally understood, however, that all writs preceding execution are embraced within the term "*mesne process*," which is therefore used to describe any except final *process*. Ferguson *v.* State, 31 N. J. L. 291; Arnold *v.* Chapman, 13 R. I. 586. See also the various titles

which treat of different *process*, *e. g.*, ATTACHMENT, vol. 3, p. 181; EXECUTIONS, vol. 11, p. 604; SUBPŒNA; WRITS.

Judicial Process.—See JUDICIAL, vol. 17, p. 887.

Mesne Process.—See MESNE PROCESS, vol. 20, p. 608.

Malicious Abuse of Process.—See the title MALICIOUS ABUSE OF PROCESS, vol. 19, p. 630.

2. Davenport *v.* Bird, 34 Iowa 527.

3. **Largest Sense.**—Marvin *v.* U. S., 44 Fed. Rep. 411; U. S. *v.* Murphy, 82 Fed. Rep. 899; Wayman *v.* Southard, 10 Wheat. (U. S.) 1; McBratney *v.* Usher, 1 Dill. (U. S.) 367; Gilmer *v.* Bird, 15 Fla. 410; Gollobitsch *v.* Rainbow, 84 Iowa 570; Hanna *v.* Russell, 12 Minn. 80; Wolf *v.* McKinley, 65 Minn. 156; Perry *v.* Lorillard F. Ins. Co., 6 Lans. (N. Y.) 204.

"**Forms and Modes of Proceeding**"—"Modes of Process"—**Synonymous.**—Campbell *v.* Hadley, 1 Sprague (U. S.) 472, citing Wayman *v.* Southard, 10 Wheat. (U. S.) 1; Beers *v.* Haughton, 9 Pet. (U. S.) 329; and Lockhurst *v.* West, 7 Met. (Mass.) 232.

Affidavit.—In Blumauer-Frank Drug Co. *v.* Branstetter, (Idaho 1895) 43 Pac. Rep. 575, it was held that an affidavit and notice for the foreclosure of a chattel mortgage were *process*.

Alias Process. (See also ALIAS WRIT, vol. 2, p. 52.)—*Process* includes alias *process*. Wheeling Gas Co. *v.* Wheeling, 7 W. Va. 24.

Attachment.—In Carey *v.* German American Ins. Co., 84 Wis. 85, a writ of attachment was held to be *process*.

Bankruptcy.—Proceedings in bankruptcy have been held not to be legal *process* as that term was used in a fire-insurance policy providing against a change in the title to the property by legal *process*. Perry *v.* Lorillard F. Ins. Co., 6 Lans. (N. Y.) 204.

So a petition in bankruptcy has been held not to be *process*. *Ex p.* Walker, 6 De G. M. & G. 752; *Ex p.* Treherne, 2 De G. F. & J. 661; *Ex p.* Hills, 3 De G. & J. 476, note. And in *Re Kerr*, 1 L. R. Ir. 67, it was held that an adjudication in bankruptcy was not *process*.

Clerk.—*Process* ordinarily means *process* issued by the clerk, which constitutes part of the record. Brown *v.* Harris, 9 Baxt. (Tenn.) 388.

Color of Process.—In Barfield *v.* Turner, 101 N. Car. 357, it was held that the term "*color of process*" meant *process* sufficient in form and apparently valid.

Commitments.—An Act of Congress allowed mileage of six cents a mile to an officer serving "any *process*, warrant, attachment, or other writ, including writs of subpoena in civil or criminal cases." In construing this statute in U. S. *v.* Tanner, 147 U. S. 663, the court said: "The word *process*, as used in that

phrase "due process of law," as used in the various constitutions, means the

clause, evidently refers to *process* for bringing persons or property within the jurisdiction of the court, and not to warrants of commitment by virtue of which criminals are transported from the court to the place of commitment."

But in *Anderson v. Vanstone*, 14 Can. L. T. 469, it was held that an order by a judge of the County Court in chambers for a commitment to close custody of a party to an action in that court, for default of attendance to be re-examined as a judgment debtor, pursuant to a former order, was *process*.

Mittimus.—In *Palmer v. Allen*, 5 Day (Conn.) 199, it was held that a mittimus is *process*.

Distress.—A distress warrant is not legal *process*. *U. S. v. Myers*, 14 Int. Rev. Rec. 14, 27 Fed. Cas. No. 15,847.

So a distress for rent has been held not to be an execution or legal *process*. *Ex p. Birmingham, etc., Gas-Light Co.*, L. R. 11 Eq. 615; *Ex p. Harrison*, 13 Q. B. D. 760; *Rex v. Crisp*, 1 B. & Ald. 287.

Execution.—The term *process* includes execution. *Breitenbach v. Bush*, 44 Pa. St. 320.

All the steps taken in an execution with seizure and sale are, in the natural meaning of the word, comprehended in the term *process*. *Re Delahoyd*, 11 Ir. Ch. 407.

A Kentucky statute provided that every *process* in the action should be directed to the sheriff of the county. It was held that the term *process* included an execution. *Johnson v. Elkins*, 90 Ky. 163; *Gowdry v. Sanders*, 88 Ky. 347.

Fee-bill.—It has been held that a fee bill is *process* and must run in the name of the state. *Reddick v. Cloud*, 7 Ill. 670.

Garnishment.—Garnishment has been held not to be a suit or *process*. *Tunstall v. Worthington, Hempst.* (U. S.) 662.

But notice to a garnishee is *process* within the meaning of the statutes and constitutional provisions prescribing the manner and style in which *process* shall issue. *Middleton Paper Co. v. Rock River Paper Co.*, 19 Fed. Rep. 252; *Boyd v. Chesapeake, etc., Canal Co.*, 17 Md. 195; *Hinkley v. St. Anthony Falls Water Power Co.*, 9 Minn. 55.

In *Wile v. Cohn*, 63 Fed. Rep. 759, *affirmed* (C. C. A.) 70 Fed. Rep. 138, on the other hand, it was held that notice to a garnishee of the garnishment was not *process*. See also the title GARNISHMENT, vol. 14, p. 731.

Information.—In *Davenport v. Bird*, 34 Iowa 527, it was held that an information filed before a police magistrate, accusing an individual of the violation of a city ordinance, was not *process*.

Judicial Sales.—In *Parke v. Bryant*, (Ala. 1902) 31 So. Rep. 593, it was said: "Decrees of sale are not *process*, and moneys received by the register merely as the custodian of sale proceeds belonging in court are not moneys collected under *process*."

Mandamus.—*Process* includes mandamus. *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 24.

Memorial.—In *Ex p. Davis*, 41 Me. 38, a justice of the Supreme Court who had been removed by the governor in a manner alleged to be unconstitutional filed a memorial to the court asking for judgment of the court thereon,

and claiming the right to sit as a justice of the court. It was held, however, that the memorial so filed was no *process* known to the common law, since no party adversely interested or otherwise had been summoned or claimed to be heard, and therefore it did not bring the proceedings of the removal before the court in such a manner as to give jurisdiction thereto.

Notice. (See also *infra*, this note, *Summons*.)—In *Horton v. Kansas City, etc., R. Co.*, 26 Mo. App. 349, it was held that the notice required by statute in the case of an appeal from the judgment of a justice of the peace was not *process* in a legal sense.

In *Dorman v. Bayley*, 10 Minn. 383, it was held that none of the appeal papers in an appeal from the judgment of a justice was a "writ or other *process*" requiring a stamp under the Internal Revenue Law of 1864, schedule B.

In *Nichols v. Burlington, etc., Plank Road Co.*, 4 Greene (Iowa) 42, notice was held not to be *process*.

A mere notice, though headed with the name of a County Court, is not a *process* within 9 & 10 Vict., c. 95, § 57; *R. v. Castle*, 30 L. T. N. S. 188; but such a notice, especially if it also has the royal arms and (without authority) professes to bear the signature of the register, is a "false color or pretense" of such *process*. *Reg. v. Evans, Dears. & B.* 236, 26 L. J. M. C. 92; *R. v. Richmond*, 28 L. J. M. C. 188.

But in *Schwed v. Hartwitz*, 23 Colo. 188, it was held that the publication of the notice of a tax sale was in the nature of service of *process*.

An Iowa statute provided that the *process* of the City Court of Dubuque might be served by the marshal of that city or by any sheriff. It was held that the word *process* thus used included original notice in actions commenced in the Dubuque City Court. *Tully v. Beaubien*, 10 Iowa 187.

In *Field v. Park*, 20 Johns. (N. Y.) 141, it was held that notices on which rules were made were *process*.

And in *Wilson v. St. Louis, etc., R. Co.*, 108 Mo. 599, notice was held to be *process*.

Same — Process Must Emanate from Court.—In *Healey v. Blake Mfg. Co.*, (Mass. 1902) 62 N. E. Rep. 271, it was said: "'Lawful *process* in any action or proceeding' manifestly refers to *process* emanating from court, or by the authority of a court, and cannot be understood to refer to such acts or notices in *pair* between private parties as derive no authority from a court, but simply serve to create a right of action. *Bouv. Law Dict.*, tit. 'Process,' 'Proceeding;' *Pub. Stat.*, glossary, 'Process.'"

Same. — A Guardian's Notice of an application to sell his ward's land has been held to stand in the place and to perform the office of *process*. *Nichols v. Mitchell*, 70 Ill. 258.

Same — Depositions.—In *Atchison, etc., R. Co. v. Sage*, 49 Kan. 524, it was held that notice to take depositions was not *process*.

Same — Attorney's Lien.—In *Kansas Pac. R. Co. v. Thacher*, 17 Kan. 92, it was held that the service of notice of an attorney's lien was not a service of *process*.

due course of legal proceedings according to those rules and forms which have

Same — Garnishment. — See *supra*, this note, *Garnishment*.

Order of Sale. — In *Sauer v. Steinbauer*, 14 Wis. 70, it was held that an order of court directing the sale of the property of a judgment debtor was legal *process*.

Ordinance Authorizing Construction of Sewer. — In *Dumars v. Denver*, (Colo. App. 1901) 65 Pac. Rep. 588, upon the question whether an ordinance authorizing the construction of a sewer was *process*, Wilson, P. J., said: "It would seem, therefore, to be essential, in order to constitute *process*, that the notice be of something proposed, against which the party notified might have the opportunity to appear or to defend himself or his property. That the ordinance in question was not of such a character or nature seems to me apparent. It was not the preliminary act in the matter of providing for the construction of the sewer, but was simply one of the intermediate acts required by the charter in making provision for the improvement. It required nothing of the citizen; there was nothing in it against which he could defend, so far as the city council was concerned." Compare *Hastings v. Columbus*, 42 Ohio St. 586.

Prohibition. — *Process* includes prohibition. *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 24.

Receiver. — In *In re Pope*, 17 Q. B. D. 743, an order for the appointment of a receiver was held to be a *process* of execution within an *English* statute providing that where land had been actually delivered in execution by writ of *elegit* or other lawful authority, it should be unnecessary to register the judgment, writ, or other *process* of execution.

Recognizance. — In *U. S. v. Murphy*, 82 Fed. Rep. 893, it was held that a recognizance to answer in a criminal cause was *process*.

Recording, Indexing, Etc. — In *Louisiana process* is held to signify the judicial means or the writ which issues forth to bring the defendant into court to answer. It does not include furnishing copies of indictments, recording and indexing court papers, and the like. *Fitzpatrick v. New Orleans*, 27 La. Ann. 457.

Rule to Show Cause. — A rule to show cause has been held not to be a writ or *process* within Stat. Mass. 1782, c. 9, § 3, requiring writs and *processes* to have a *teste*, and to be under the seal of the court. *Taylor v. Henry*, 2 Pick. (Mass.) 397.

But a rule upon an incumbent to show cause why he refuses to surrender his office is *process*. *Kennard v. Louisiana*, 92 U. S. 480.

A rule *nisi* is also held to be judicial *process*. *Falvey v. Jones*, 80 Ga. 130.

Rule to Commit. — The word *process* usually signifies a writ or warrant, but it also means all the proceedings in a cause after the first step (Tomlins's Dict.), and comprehends a rule or order to commit. *People v. Nevins*, 1 Hill (N. Y.) 169.

Scire Facias. — In *Drexel v. Miller*, 49 Pa. St. 246, a *scire facias* upon a mortgage was held to be *process* within the meaning of Act Pa., April 18, 1861, staying civil *process* against any person in the service of the state or of the

United States for the term of such service and thirty days thereafter.

So a *scire facias* to hear error is *process*. *Weiskoph v. Dibble*, 18 Fla. 22. See also *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 24.

Sequestration. — A writ of sequestration is *process*. *Re Browne*, 40 Bank. L. J. 46; *Ex p. Hughes*, L. R. 12 Eq. 137.

Signature. — In *Brown v. Way*, 33 Ga. 192, it was said: "The mandate, without the authenticating signature, is no more *process* than would be the signature without the preceding mandate."

Summons. (See also *supra*, this note, *Notice*.) — The question as to whether a mere writ of summons is *process* has often arisen. It has been held in *Minnesota* that the term *process* did not include a mere summons, *process* being considered as nearly synonymous with "proceedings." *Hanna v. Russell*, 12 Minn. 80. But in *Sherman v. Gundlach*, 37 Minn. 118, summons was held to be *process*.

In *Brooks v. Nevada Nickel Syndicate*, 24 Nev. 311, it was held that a summons was not *process* within the meaning of a constitutional provision requiring the style of all *process* to run in the name of the state.

So in *Colorado*, *Florida*, *Oregon*, *South Carolina*, *Wisconsin*, and the federal courts, a summons has been held not to be *process*. *Chamberlain v. Mensing*, 47 Fed. Rep. 435; *Comet Consol. Min. Co. v. Frost*, 15 Colo. 313; *Gilmer v. Bird*, 15 Fla. 421; *Bailey v. Williams*, 6 Oregon 71; *Genobles v. West*, 23 S. Car. 154; *Porter v. Vandercook*, 11 Wis. 70. See also *Dwight v. Merritt*, 18 Blatchf. (U. S.) 305. In all these cases the summons was merely a writing directed to the defendant requiring him to appear and answer the complaint, and was signed only by the plaintiff's attorney. It was not a mandate of the court to its officer commanding him to summon, nor did it bear the signature of the clerk nor the seal of the court. And see *Whitney v. Blackburn*, 17 Oregon 564, 11 Am. St. Rep. 857.

That summons is *process*, see *Horton v. Kansas City*, etc., R. Co., 26 Mo. App. 355; *McLaughlin v. Wheeler*, 2 S. Dak. 383.

In *In re Dobson*, 8 Ir. Ch. 391, it was held that a trade debtor's summons was *process*.

Same — Summons in Unlawful Detainer Held to Be Process. — *Wheeling Gas Co. v. Wheeling*, 7 W. Va. 24.

Same — Summons from Justice's Court. — In *Hyfield v. Sims*, 90 Ga. 809, it was held that the term *process* included a summons from a justice's court, as well as *process* attached to the declaration by the clerk in a case brought in the Superior Court.

Supplemental Proceedings Held to Be Process. — *Wolf v. McKinley*, 65 Minn. 156.

Void and Irregular Process Distinguished. — See *Philips v. Biron*, 1 Stra. 509; *Bergman v. Noble*, 45 Hun (N. Y.) 136. And see *IRREGULAR — IRREGULARITY*, vol. 17, p. 482, note.

Witnesses. — In *Matter of Wellen*, 104 Mich. 318, it was held that persons detained as witnesses were held upon civil *process*, as that term was used in a *Michigan* statute providing that persons arrested on civil *process*

been established for the protection of private rights. It is not necessarily judicial process only.¹

PROCESS BUTTER. — See note 2.

PROCESS (PATENT LAW). — See the title PATENTS, vol. 22, p. 260.

PROCESS FOR FORCING WATER. — See note 3.

PROCESSIONING. — See note 4.

PROCES-VERBAL. — A "proces-verbal" is a true relation in writing, in due form of law, of what has been done and said verbally in the presence of a public officer, and what he himself does upon the occasion. It is a species of inquisition of office.⁵

PROCHEIN AMI. (See also the title NEXT FRIEND, 14 ENCYC. OF PL. AND PR. 996.) — A *prochein ami* is one admitted by the court to prosecute for the infant because otherwise he might be prejudiced by the refusal or neglect of his guardian.⁶

PROCLAMATION. — A proclamation is defined as the act of causing some state matters to be published or made generally known; a written or printed document in which are contained such matters, issued by proper authority.⁷

PRO CONFESSO. (See also the title DECREES, 5 ENCYC. OF PL. AND PR. 946.) — To take a bill *pro confesso* is to order it to stand as if its statements were confessed to be true, and a decree *pro confesso* is a decree based on such statements, assumed to be true.⁸

PROCURE. — To procure means to contrive; to bring about; to effect; to

should be kept in rooms separate and distinct from those in which prisoners were detained.

Writ. — In *Horton v. Kansas City, etc.*, R. Co., 26 Mo. App. 355, it was said that *process* is used as "a generic term for writs of the class called judicial."

In *Carey v. German American Ins. Co.*, 84 Wis. 85, it was said: "A writ is *process* and a *process* is a writ, interchangeably."

Process usually signifies a writ or warrant. *Perry v. Lorillard F. Ins. Co.*, 6 Lans. (N. Y.) 204; *People v. Nevins*, 1 Hill (N. Y.) 154.

But in *Blackamore's Case*, 8 Coke 157, it was said: "This statute doth not extend to an original writ, nor to the writ which is in the nature of an original, for the same is not included within this word *process*."

Writ of Error as Process. — See *Cleveland Ins. Co. v. Globe Ins. Co.*, 93 U. S. 366.

1. Due Process of Law. — See the title DUE PROCESS OF LAW, vol. 10, pp. 293, 294, and see *Weimer v. Bunbury*, 30 Mich. 201; *Westervelt v. Gregg*, 12 N. Y. 209.

2. Process Butter. — See *Hathaway v. McDonald*, (Wash. 1902) 68 Pac. Rep. 379. See generally the title ADULTERATION, vol. 1, p. 738.

3. Process for Forcing Water. — A grantor in a deed reserved to himself and his heirs the right to use a supply of spring water by means of a hydraulic ram, wheel, or "other *process of forcing water*." It was held that "other *process*" included a windmill. *Richardson v. Clements*, 89 Pa. St. 503, 33 Am. Rep. 784.

4. Processioning. — "*Processioning* was designed to prevent controversies concerning the boundaries of land between adjacent owners, and originally they were required, once in every ten years, to have their lands '*processioned* or gone around, and the landmarks renewed.' It is, however, now confined to cases where the owner of any particular land desires the lines around his entire tract surveyed and

marked anew. And an examination of the law of *processioning* will show that there is no provision for any other manner of tracing and marking the lines of adjacent owners, so as to make the said lines *prima facie* correct and admissible in evidence without further proof." *Watson v. Bishop*, 69 Ga. 53.

5. Proces-verbal. — *Bouv. L. Dict.* See also *Hall v. Hall*, 11 Tex. 539.

6. Prochein Ami. — *Isaacs v. Boyd*, 5 Port. (Ala.) 393; *Raming v. Metropolitan St. R. Co.*, (Mo. 1899) 50 S. W. Rep. 793. See also *Thomas v. Safe Deposit, etc., Co.*, 73 Md. 451; *Bulow v. Witte*, 3 S. Car. 322; *Mitchell v. Connolly*, 1 Bailey L. (S. Car.) 205.

7. Proclamation. — *Bouv. L. Dict.*, quoted in *Atty.-Gen. v. Ryan*, 5 Manitoba 92.

In *Lapeyre v. U. S.*, 17 Wall. (U. S.) 195, it is said: "In the English law the instrument is thus defined: Proclamation — *proclamatio* — is a notice publicly given of anything whereof the King thinks fit to advertise his subjects;" and in the same case it was held that publication in a newspaper was not necessary to make the proclamation of the President operative.

Time of Taking Effect. — See *Lapeyre v. U. S.*, 17 Wall. (U. S.) 201. And see the title STATUTES.

"A Proclamation by the President, Reserving Lands from Sale, is his official public announcement of an order to that effect. No particular form of such an announcement is necessary. It is sufficient if it has such publicity as accomplishes the end to be attained." *Wolsey v. Chapman*, 101 U. S. 770. See also the titles PRESIDENT OF UNITED STATES, vol. 22, p. 1229; STATUTES.

8. Pro Confesso. — *Thomson v. Wooster*, 114 U. S. 111. A carefully prepared history of the practice and effect of taking bills *pro confesso* is given in *Williams v. Corwin*, Hopk. (N. Y.) 471, by Hoffman, master, in a report made to Chancellor Sandford, of New York.

cause;¹ to acquire for one's self.²

PROCUREMENT. — "Procurement" is defined to be the act of procuring, obtaining, bringing about, or effecting.³

PRODUCE, PRODUCTS, ETC. — See note 4.

1. **Procure.** — Long *v. State*, 23 Neb. 45; Marcus *v. Bernstein*, 117 N. Car. 31. And in the latter case it was said that to *procure* imported article.

2. *Sisk v. Citizens' Ins. Co.*, 16 Ind. App. 565.

Bankruptcy—Procure and Suffer. — In *In re Ogles*, 93 Fed. Rep. 434, it was said: "It was decided by the Supreme Court in the case of *Wilson v. City Bank*, 17 Wall. (U. S.) 473, under the bankruptcy statute of 1867, which was more liberal to creditors and comprehensive on this subject than the bankruptcy statute of 1898, that the mere passive nonresistance by an insolvent debtor to the suit brought was not sufficient to establish the fact that he had *procured* or 'suffered' his property to be taken on legal process."

There is a clearly recognized legal distinction between *procuring* an act to be done and suffering it to be done. *Matter of Black*, 2 Ben. (U. S.) 204.

Illicit Intercourse. — *Procure*, as used in the *California* statute making it an offense to "*procure* a female to have illicit carnal connection with any man," does not cover the offense of seduction. The natural meaning of the word *procure* is that the illicit intercourse is with a person other than the one who commits the offense of *procuring*, etc. *People v. Roderigas*, 49 Cal. 11.

Procuring Cause—Real-estate Broker. (See also the title REAL-ESTATE BROKERS, *post*.) — In *Ware v. Dos Passos*, 4 N. Y. App. Div. 32, it was held that the plaintiff might devote time, labor, and money to the interests of the owner seeking to sell his property, might call attention to the property, might bring people together who might not have met otherwise, and might create impressions which under later and more favorable circumstances might assist in the consummation of a sale, and yet not be entitled to commissions, for the reason that he was not the *procuring* cause of the sale. *Compare Smith v. McGovern*, 65 N. Y. 574; *Garding v. Haskin*, 141 N. Y. 514.

Upon a written request by an owner of freehold property to a real-estate agent to *procure* a purchaser for it and to advertise it at a certain place, it was held that the agent had no authority to enter into an open contract for sale, and *semble*, that he had no authority to enter into any contract for sale. *Hamer v. Sharp*, L. R. 19 Eq. 108.

Procuring Pistol. — In *Reg. v. Mines*, 25 Ont. 577, it was held that a conviction for *procuring* a pistol with intent unlawfully to do injury to another person was not a sufficient conviction for "having on his person a pistol," and was bad as not disclosing an offense known to law. The court said: "The term used in the commitment, *procure*, does not mean, or may not mean, personal use and handling of the weapon; had it been said that 'he did *procure* and have in his hand (or upon his person),' then the offense would be well defined."

3. **Procurement.** — *Wiley v. State*, 52 Ind. 251, *quoting* Webst. Dict. And in that case it was held that in an indictment for attempting to *procure* an abortion, an averment that the *procurement* of the miscarriage was not necessary to preserve the life of the woman was equivalent to an averment that the miscarriage was not necessary to preserve her life.

4. **Produce—Butter, Eggs, Meat.** — Within the meaning of a statute which provided that every person engaged in buying and selling "*produce*, fish, meats, and fruits" should be regarded as a *produce* dealer, and that no additional license should be required from *produce* dealers for selling meat, it was held that butter and eggs were *produce*, but that one who sells meat alone is not a *produce* dealer. *District of Columbia v. Oyster*, 4 Mackey (D. C.) 285.

Wood and Timber. — In *Ladd v. Abel*, 18 Conn. 513, in construing a covenant in which A agreed to furnish B with "one-half of all the *produce*" of a farm, and further, if "one-half of the yearly rent and *produce*" should be insufficient for B's support, agreed to increase the supplies, it was held that "yearly *produce*" did not comprehend the wood and timber of the farm, but must be confined to crops annually gathered.

The Produce of Capital Employed in Trade is all that the capital produces, whether in the shape of interest or profits allowed. *Johnston v. Moore*, 4 Jur. N. S. 356, 27 L. J. Ch. 453. See also *Howe v. Dartmouth*, 7 Ves. Jr. 137.

Principal. — In a will, a bequest of the *produce* of a fund, directly, or in trust without any limitation as to continuance, will carry the principal. *Craft v. Snook*, 13 N. J. Eq. 121. See also *Peale v. White*, 7 La. Ann. 449; *Arnauld v. Delachaise*, 4 La. Ann. 109.

A Charter-party contained an agreement to ship at A "a full and complete cargo of *produce*." It was held that the term *produce* meant "any article of commerce which was usually shipped from the loading port." *Per Maule, J.*, in *Warren v. Peabody*, 8 C. B. 808, 65 E. C. L. 808.

Coke. — Coke has been held to be *produce* within the meaning of a reservation of a right of way for conveying the *produce* of mines. *Bowes v. Ravensworth*, 15 C. B. 523, 80 E. C. L. 523.

Product—Live Stock—Meat. — In *State v. Spagh*, 129 N. Car. 564, it was held that the term *products*, in an act exempting farmers from a license tax, included live stock and fresh meat.

Forest Products. — Standing, growing trees are not "forest *products*." *Fletcher v. Alcona Tp.*, 72 Mich. 18.

Spirits. — An exception to a license law permitted persons to sell wines and liquors, the *products* of their own farms. It was held that spirits manufactured from the grain received by a miller as tolls are not from the "*products* of his own farm." *State v. Kennerly*, 98 N. Car. 657.

PRODUCE BROKER. — See note 1.

PRODUCE EXCHANGE. — See the title STOCK AND PRODUCE EXCHANGE.

PRODUCER. — See note 2.

PRODUCTION. — The word "production" has reference to that which is produced or made; product; fruit of labor; as, the productions of the earth, comprehending all vegetables and fruits; the productions of intellect or genius, as poems and prose compositions; the products of art, as manufactures of every kind.³

Product of Agriculture — Flour. — Under a charter of a corporation authorizing it to deal in agricultural *products*, it was held that the corporation was not authorized to go upon the market and purchase flour. *Getty v. C. R. Barnes Milling Co.*, 40 Kan. 284.

Pork Packers. — In *Morningstar v. Cunningham*, 110 Ind. 328, 59 Am. Rep. 211, it was held that evidence was admissible to show a usage among pork packers not to keep the *product* of each customer's hogs separate, also to retain certain portions of the hogs as compensation; and also to show that the term *product* had a known peculiar meaning, and did not include those portions of the hogs so retained. See also *Stewart v. Smith*, 28 Ill. 397. And see generally the title USAGES AND CUSTOMS.

Products of Exempt Homestead. — See the title HOMESTEAD, vol. 15, p. 592.

Producing. — In *Mighell v. Dougherty*, 86 Iowa 485, it was said that *producing* means "'giving being or form to;" 'manufacturing;' 'making;' and 'procuring' means 'bringing into possession;' 'obtaining.'" *Quoting* Webst. Dict.

Produced and Published Distinguished. — In

Hanfstaengl v. American Tobacco Co., (1895) 1 Q. B. 352, in construing a copyright act, *Esher, M. R.*, said: "The word *produced* is more general than the word 'published' used in the convention, and there are works mentioned in the act which would not be touched under the word 'published,' and the more general word is therefore used."

1. **Produce Broker.** — In *U. S. v. Simons*, 1 Abb. (U. S.) 470, the term *produce broker*, as used in an internal revenue law, was held to include a person who sold *produce* in the public market, although such *produce* was raised by him upon his own farm. See generally the title FACTORS OR COMMISSION MERCHANTS, vol. 12, p. 625.

2. **Producer.** — The term *producer* may apply to one who produces manufactured articles or products of the farm. *Warren v. Buck*, 71 Vt. 44; *Beals v. Olmstead*, 24 Vt. 114.

Producer Used as Equivalent to Manufacturer. — *Hancock v. State*, 114 Ga. 439. See MANUFACTURE — MANUFACTURER — MANUFACTURING, ETC., vol. 19, p. 922.

3. **Production.** — *Webst. Dict.*, *quoted* in *Dano v. Mississippi, etc.*, R. Co., 27 Ark. 567.

Volume XXIII.

PRODUCTION OF DOCUMENTS.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, titles *DISCOVERY*, vol. 6, p. 781; *EXAMINATION OF PARTIES BEFORE TRIAL*, vol. 8, p. 57; *PENALTIES AND PENAL ACTIONS*, vol. 16, p. 292; *PROFERT AND OYER*, vol. 16, p. 1082.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *DEPOSITIONS*, vol. 9, p. 313; *DOCUMENTARY EVIDENCE*, vol. 9, p. 879; *EVIDENCE*, vol. 11, p. 541; *EXECUTION AND PROOF OF DOCUMENTS*, vol. 11, p. 583; *PRIVILEGED COMMUNICATIONS*, *ante*, p. 47; *RECORDS; SECONDARY EVIDENCE; STOCK AND STOCKHOLDERS; WITNESSES*.

I. PUBLIC DOCUMENTS — 1. In General. — Public documents have been defined as consisting of the acts of public functionaries in the executive, legislative, and judicial departments of government, including those transactions which official persons are required to enter in books or registers in the course of their public duties and which occur within the circle of their own personal knowledge and observation. They have been subdivided into judicial documents and those which are not judicial.¹ It may be stated as a general rule, applicable to all writings of a public nature, that if their contents would, in the opinion of the court, or of the chief magistrate, or of the head of the department under whose control the documents are kept, be detrimental to public interest, an inspection will not be granted.²

2. Judicial Writings. — From a very early period it has been admitted that every one has a right, upon paying the proper fees, to have the records of the public courts produced for him to inspect and copy.³ In *England*, while it is doubted whether in theory all persons without distinction have the legal right to inspect the records of inferior tribunals, these records are, in practice, open to the public without restriction.⁴ In the reign of Charles II. this right was, in consequence of frequent applications for a copy of the record on which to base actions for malicious prosecution, restricted by refusing to grant a

1. **Public Documents Defined.** — 1 Greenl. Ev. (14th ed.), §§ 251, 476; 2 Taylor Ev. (8th ed.), § 1483. See also the title *DOCUMENTARY EVIDENCE*, vol. 9, p. 880.

2. See the title *PRIVILEGED COMMUNICATIONS*, *ante*, p. 47.

3. 3 Coke, p. iv.

By 46 Edw. III. the right to the inspection of judicial records was extended to cases arising between the sovereign and the subject. 3 Coke, p. iv.

4. **Records of Inferior Courts.** — See 1 Greenl. Ev. (14th ed.), § 473; 2 Taylor Ev., § 1483; *Herbert v. Ashburner*, 1 Wils. C. Pl. 297.

copy of an indictment for felony save upon motion in open court.¹ The right to a copy of the record was never questioned, however, in cases of misdemeanor.² In the *United States* the right to have a copy of the record seems never to have been restrained.³ This right of inspection applies also to writs and other papers in a cause; and if the officer having custody of them refuses to produce them for inspection, he may be compelled, by rule of court, to do so, even where the object is to procure evidence to be used in a civil action against himself.⁴

3. Nonjudicial Writings. — The right to inspect nonjudicial public documents, among which are included acts of state,⁵ legislative acts and journals, laws of other states, official registers,⁶ and books of public officers,⁷ is limited to cases where they constitute the common evidence of transactions between public officers and private individuals, and where the inspection is necessary to establish some disputed claim.⁸ There is not the same general right of inspection of documents of this nature as there is of public judicial writings, but it is limited to those persons interested in the subject-matter.⁹ It is not necessary that the interest should be private, capable of sustaining a suit or defense on the personal behalf of the party desiring the inspection, but he has the right of inspection whenever, by reason of his relation to the common interest, he may act in such a suit as a representative of a common or public right.¹⁰ Where the purpose for which the inspection is sought is a purely private matter and not connected with the purposes for which the books are kept, no right of inspection exists.¹¹ Where an action is pending the court will at any stage of the cause award a rule for the production of the documents,¹² but where there is no action mandamus will be granted to compel the production.¹³

4. Semi-public Documents — *a. IN GENERAL.* — There are certain documents considered as public with respect to a particular class of society because they proceed from an authority which it recognizes, but with respect to the rest of the community they may be nothing more than private documents. In *England* this includes court rolls, customaries of manors, public lottery tickets, parish books, and books of corporations. In the *United States* the only documents of this nature seem to be books of private corporations.¹⁴

1. Restriction of Right. — Orders and Directions, 16 Car. II., prefixed to Sir J. Kelyng's Rep., order vii. See also *Groenvelt v. Burrell*, 1 Ld. Raym. 252; *Jordan v. Lewis*, 2 Stra. 1122.

The legality of this order was doubted in *Browne v. Cumming*, 10 B. & C. 70, 21 E. C. L. 27.

Accused Entitled to Copy of Acquittal. — *Rex v. Brangan*, 1 Leach C. C. 27. See also *Doe v. Date*, 3 Q. B. 609, 43 E. C. L. 889. Compare *Rex v. Vandercomb*, 2 Leach C. C. 711, wherein a copy of the acquittal was refused, though the court ordered the indictment to be read slowly to the prisoners.

2. Production of Copy in Case of Misdemeanor. — *Morrison v. Kelly*, 1 W. Bl. 385; *Evans v. Phillips*, 2 Selw. N. P. 1072, 1 Phil. Evidence 307; *Rex v. Midlem*, 3 Burr. 1720; *Groenvelt v. Burrell*, 1 Ld. Raym. 252.

Stone v. Crocker, 24 Pick. (Mass.) 87.

The *English* rule stated above seems to have been followed in *People v. Poyllon*, 2 Cai. (N. Y.) 202, in which case the counsel, in order to ground an action for malicious prosecution, moved for a copy of the indictment in the cause.

4. Fox v. Jones, 7 B. & C. 732, 14 E. C. L. 112. Compare *Davies v. Brown*, 9 Moo. 778, 17

E. C. L. 130; *Rex v. Chester*, 1 Chit. 477, 18 E. C. L. 139. See generally, in this connection, the title RECORD.

5. See 2 Tayl. Ev. (8th ed.), § 152 *et seq.* See also the title DOCUMENTARY EVIDENCE, vol. 9, p. 880.

6. See 1 Greenl. Ev. (14th ed.), § 484; 2 Taylor Ev. (8th ed.), § 159 *et seq.*

7. See 4 Minor's Inst. (2d ed.) 721, *et seq.*

8. *Rex v. Fraternity of Hostmen*, 2 Stra. 1223. See also *Rex v. King*, 2 T. R. 235.

9. Interest Essential to Right of Inspection. — *Crew v. Saunders*, 2 Stra. 1005; *Crew v. Blackburn* [cited in *Rex v. Purnell*, 1 Wils. C. Pl. 240]; *Dalv v. Dimock*, 55 Conn. 579.

10. *Rex v. Staffordshire*, 6 Ad. & El. 84, 33 E. C. L. 17; *Rex v. Babb*, 3 T. R. 579; *Ferry v. Williams*, 41 N. J. L. 332, 32 Am. Rep. 219.

11. *Crew v. Blackburn* [cited in *Rex v. Purnell*, 1 Wils. C. Pl. 240]; *Crew v. Saunders*, 2 Stra. 1005. See also *Ex p. Briggs*, 28 L. J. Q. B. D. 272, 1 El. & El. 881, 102 E. C. L. 881.

12. See 1 Tidd's Pr. 595; 1 Greenl. Ev. (14th ed.), § 477; *People v. Vail*, 2 Cow. (N. Y.) 623.

13. See the title MANDAMUS, vol. 19, p. 817.

14. See the title DOCUMENTARY EVIDENCE, vol. 9, p. 891. See also 1 Greenl. Ev. (14th ed.), § 474; 2 Taylor Ev. (8th ed.), § 1494 *et seq.*

b. BOOKS OF CORPORATIONS — (1) *Inspection by Stranger*. — As regards the inspection of the books of a public or private corporation by a stranger, the same rules obtain as if the books were those of an individual.¹

(2) *Inspection by Stockholders*. — The right of a stockholder to inspect the books of his corporation will be treated elsewhere in this work.²

II. PRIVATE DOCUMENTS — 1. **In General** — *a. AT COMMON LAW*. — Under the earlier practice the common law refused to compel either party to assist the other in the conduct of his case. The only recourse was a bill in equity for a discovery.³ Subsequently, however, a less stringent practice was gradually substituted, and the courts would compel either party to produce for the inspection of the adverse party a document in his possession or control material to the latter's case, and in which the parties had a joint interest,⁴ or where the document was held by the party moved against as a trustee or agent for the applicant,⁵ one party being, in this connection, deemed to hold as a trustee for the other, when it was shown that such other had an interest in the document sought.⁶ Production was not compelled, however, where the document had been interchangeably executed.⁷ In case the document sought was the instrument declared on, an inspection in the nature of *oyer* was also allowed.⁸

b. UNDER STATUTORY PROVISIONS. — The common-law right of inspection has been further enlarged by statutes authorizing the court, in its discretion,⁹ to compel a party to a pending action or other legal proceeding to allow

1. **Corporate Books**. — *Southampton v. Graves*, 8 T. R. 590; *Bolton v. Liverpool*, 1 Myl. & K. 88; *Rex v. Buckingham County*, 8 B. & C. 375, 15 E. C. L. 240; *Hodges v. Atkis*, 3 Wils. C. Pl. 398; *Bristol v. Visger*, 8 Dowl. & R. 434, 16 E. C. L. 346; *Imperial Gas Co. v. Clarke*, 7 Bing. 95, 20 E. C. L. 59. See also *Henry v. Travelers' Ins. Co.*, 35 Fed. Rep. 15.

2. See the title **STOCK AND STOCKHOLDERS**.

3. **Earlier Practice**. — Best on Evidence (Am. ed.), § 624; Anonymous, 3 Salk. 363; *Smith v. Morrow*, 7 T. B. Mon. (Ky.) 234.

4. **Joint Interest**. — *Doe v. Roe*, 1 El. & Bl. 279, 72 E. C. L. 279; *Pritchett v. Smart*, 7 C. B. 625, 62 E. C. L. 625. See also *Threlfall v. Webster*, 1 Bing. 161, 8 E. C. L. 452, and the cases cited in the following notes.

5. **Document Held in Trust**. — *Goodliff v. Fuller*, 14 M. & W. 4; *Charnock v. Lumley*, 5 Scott 438; *Price v. Harrison*, 8 C. B. N. S. 617, 98 E. C. L. 617, 6 Jur. N. S. 1345; *Reid v. Coleman*, 4 Tyrw. 274; *Browning v. Alwin*, 7 B. & C. 204, 14 E. C. L. 27; *Blakey v. Porter*, 1 Taunt. 386; *Doe v. Slight*, 1 Dowl. 163; *Doe v. Roe*, 1 M. & W. 207; *Arundel v. Holmes*, 8 Dowl. 118; *Morrow v. Saunders*, 1 Brod. & B. 318, 5 E. C. L. 94; *Ratcliffe v. Bleasby*, 3 Bing. 148, 11 E. C. L. 74; *Smith v. Winter*, 3 M. & W. 309; *Steadman v. Arden*, 15 M. & W. 587. See also *Eddy v. Bay Circuit Judge*, 114 Mich. 668; *Murphy v. Morris*, 2 Miles (Pa.) 60.

Production of Document in Hands of Agent Compelled. — *Gigner v. Bayly*, 5 Moo. 71, 16 E. C. L. 389. See also *Morrow v. Saunders*, 1 Brod. & B. 318, 5 E. C. L. 94.

6. *Price v. Harrison*, 8 C. B. N. S. 617, 98 E. C. L. 617, 6 Jur. N. S. 1345; *Bateman v. Phillips*, 4 Taunt. 157; *Powell v. Bradbury*, 4 C. B. 541, 56 E. C. L. 541; *Owen v. Nickson*, 3 El. & El. 603, 107 E. C. L. 603; *Jessel v. Millingen*, 1 Moo. & S. 606, 28 E. C. L. 272; *Kelly v. Eckford*, 5 Paige (N. Y.) 548.

Inspection of Letters Written by Applicant's Agent Allowed. — *Blogg v. Kent*, 6 Bing. 614, 19 E. C. L. 179.

Actions on Policies of Insurance. — In actions on policies of insurance a more liberal practice was followed and the production of all documents relative to the matters in issue was compelled, the ground assigned therefor being that owing to the nature of the case the assured should exercise the utmost good faith, as the underwriter was so entirely at his mercy. *Rayner v. Ritson*, 6 B. & S. 888, 118 E. C. L. 888; *China Traders Ins. Co. v. Royal Exch. Assur. Corp.*, (1898) 2 Q. B. 187; *Morrison v. City of London F. Ins. Co.*, 6 Manitoba 222; *Lawrence v. Ocean Ins. Co.*, 11 Johns. (N. Y.) 245, note *a*.

7. *Woodcock v. Worthington*, 2 V. & J. 4; *Street v. Brown*, 6 Taunt. 302, 1 E. C. L. 391. See also *Portmore v. Goring*, 4 Bing. 152, 13 E. C. L. 384. *Contra*, *Wallis v. Murray*, 4 Cow. (N. Y.) 399.

8. **Inspection of Instrument Sued On**. — *Price v. Harrison*, 8 C. B. N. S. 617, 98 E. C. L. 617, 6 Jur. N. S. 1345; *Penarth Harb. & Dock Co. v. Cardiff Water Works Co.*, 7 C. B. N. S. 816, 97 E. C. L. 816, 6 Jur. N. S. 942; *Whitbourne v. Pettifer*, 4 Moo. & S. 182, 30 E. C. L. 345; *Devenoge v. Bouverie*, 8 Bing. 1, 21 E. C. L. 199; *Woolmer v. Devereux*, 2 M. & G. 758, 40 E. C. L. 612; *Wallis v. Murray*, 4 Cow. (N. Y.) 399; *Utica Bank v. Hillard*, 6 Cow. (N. Y.) 62. See also the title **PROPERT AND OYER**, 16 ENCYC. OF PL. AND PR. 1082 *et seq.*

9. **Granting of Order Discretionary** — *United States*. — *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. Rep. 46.

Iowa. — *Schmidt v. Kiser*, 75 Iowa 457; *Sheldon v. Mickel*, 40 Iowa 19; *Allison v. Vaughan*, 40 Iowa 421.

New Jersey. — *Condict v. Wood*, 25 N. J. L. 319.

New York. — *Ashley v. Whitney*, 54 N. Y.

his opponent an inspection with the right to make copies of all documents in his possession relating to the pending cause.¹ The right of production and inspection given by the statute is generally coextensive with that given by the principles and practice of chancery in cases where relief was sought by a bill of discovery, being intended to provide a speedier and more convenient substitute for such a bill.² This power having been exercised by the courts of common law before statutes were enacted, the statutes in regard thereto are to be considered as declaratory rather than creative of the jurisdiction in this respect.³

Not Matter of Right. — This inspection is granted, as has been stated, in the discretion of the court,⁴ and is not a matter of right,⁵ but is granted in extreme cases where the refusal may defeat justice or seriously imperil the establishment of a claim or defense.⁶

2. Where Parties Have Joint Interest in Document. — The court, in behalf of a party to an action, may compel such party's adversary to produce any documents that he may have in his possession to which such party has an exclusive right or a right in common with his adversary, if it appears that such document is material to the maintenance of his contested rights.⁷

Super. Ct. 540; *Hart v. Ogdensburg, etc., R. Co.*, 69 Hun (N. Y.) 497; *White v. Munroe*, 33 Barb. (N. Y.) 650; *Stilwell v. Priest*, 85 N. Y. 649; *Clyde v. Rogers*, 94 N. Y. 541; *O'Gorman v. O'Gorman*, 92 Hun (N. Y.) 605, 36 N. Y. Supp. 401; *Morgan v. Morgan*, (C. Pl. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 291; *Brown v. Georgi*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 128; *Dalzell v. Fahys Watch Case Co.*, (N. Y. Super. Ct. Gen. T.) 5 Misc. (N. Y.) 493; *Finlay v. Chapman*, 119 N. Y. 404; *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216; *New England Iron Co. v. New York Loan, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Jackling v. Edmonds*, 3 E. D. Smith (N. Y.) 539.

Pennsylvania. — *Cowles v. Cowles*, 2 P. & W. (Pa.) 139.

Canada. — *Commercial Bank v. Great Western R. Co.*, 25 U. C. Q. B. 335.

1. Statutory Provisions — *United States.* — See Rev. Stat. U. S., § 724.

California. — *Barnstead v. Empire Min. Co.*, 5 Cal. 299.

Illinois. — *Field v. Zemansky*, 9 Ill. App. 479; *Rigdon v. Conley*, 31 Ill. App. 630; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375; *People v. Western Manufacturers Mut. Ins. Co.*, 40 Ill. App. 428; *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602.

Maryland. — *Williams v. Williams*, 1 Md. Ch. 199.

Nebraska. — *Dorchester First Nat. Bank v. Smith*, 36 Neb. 199.

New York. — *Pindar v. Seaman*, 33 Barb. (N. Y.) 140; *Case v. Banta*, 9 Bosw. (N. Y.) 595; *Powers v. Elmendorf*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 60; *Van Zandt v. Cobb*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 544.

North Carolina. — *McLeod v. Bullard*, 84 N. Car. 515.

See generally the statutes of the various states.

2. Coextensive with Discovery in Equity — *England.* — *Hunt v. Hewitt*, 7 Exch. 236.

Canada. — See *Morrison v. City of London F. Ins. Co.*, 6 Manitoba 222.

United States. — *U. S. v. Youngs*, 10 Ben. (U. S.) 264; *U. S. v. Hutton*, 10 Ben. (U. S.)

268; *Finch v. Rikeman*, 2 Blatchf. (U. S.) 301, 9 Fed. Cas. No. 4,788; *Paine v. Warren*, 33 Fed. Rep. 357; *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. Rep. 46.

District of Columbia. — *Smithson v. Stanton*, 7 D. C. 6.

Georgia. — *Howard College v. Pace*, 15 Ga. 486.

Illinois. — *People v. Western Manufacturers' Mut. Ins. Co.*, 40 Ill. App. 428.

New York. — *Opdyke v. Marble*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 266; *Woods v. De Figanieri*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257; *Townsend v. Lawrence*, 9 Wend. (N. Y.) 458; *Brevort v. Warner*, (Supm. Ct.) 8 How. Pr. (N. Y.) 321; *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 132.

Pennsylvania. — *Moelling v. Lehigh Coal, etc., Co.*, 9 Phila. (Pa.) 223, 31 Leg. Int. (Pa.) 396.

Rhode Island. — *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189.

The Rule Laid Down by Lord Mansfield was that whenever the party would be entitled to a discovery in equity he should have it at law. *Barry v. Alexander*, cited in 1 Tidd's Pr. 592. This principle has also been laid down in *New York*. *Wallis v. Murray*, 4 Cow. (N. Y.) 399.

3. Statutes Declaratory of Common Law. — *Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189; *Ely v. Mowry*, 12 R. I. 570.

4. See *supra*, this subdivision.

5. Not Matter of Right. — *Lombard v. Citizens' Bank*, 107 La. 183.

6. Equitable L. Assur. Soc. v. Clark, (Miss. 1902) 31 So. Rep. 964; *Harbison v. Von Volkenburgh*, 5 Hun (N. Y.) 454; *Dalzell v. Fahys Watch Case Co.*, (N. Y. Super. Ct. Gen. T.) 5 Misc. (N. Y.) 493.

Discretion Should Be Liberally Exercised. — *Finlay v. Chapman*, 119 N. Y. 404; *Hart v. Ogdensburg, etc., R. Co.*, 69 Hun (N. Y.) 497; *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216.

7. Joint Interest. — *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375; *Marion Nat. Bank*

3. Actions Between Principal and Agent. — As a general rule, in actions between principal and agent either party is entitled to the production and inspection of all books, papers, and documents relating to the business.¹ This is true even though one party alleges an agreement on the part of the other party not to demand an inspection.²

4. Actions Between Partners — *a.* IN GENERAL. — In the case of partnership books and papers in the hands of one of the partners or his assignees or representatives, where both parties have an equal right to the examination and inspection thereof for the purposes of the suit, it is the constant and uniform practice of the court, upon the application of either party, and in any stage of the suit, to order the production of the books and papers belonging equally to both for the inspection of the adverse party and the taking of copies thereof.³

Rights of Heirs and Devisees. — The right of inspection extends also to the heirs and devisees of a deceased partner.⁴ The application must, however, be made in good faith.⁵

b. TO WHOM APPLICABLE. — This right extends to every person having a direct interest in the business, whether his relation is that of a partner, or a principal bringing business to the firm, or an employee entitled to a share of the profits, or a coworker with a partnership in the general business, as long as he is entitled to a portion of the profits of the common venture.⁶ The partner's right of inspection is not affected by the fact that opportunity has previously been given to him to examine the books;⁷ but where it appears that the party moved against offers to allow the applicant to examine the books, and this offer has been refused on account of relations between the parties and their counsel, the court will not aid in securing a further examination.⁸

c. BOOKS IN FOREIGN STATE. — The order for inspection will be granted even though the books of which inspection is desired are in a foreign state.⁹

d. EFFECT OF DISSOLUTION OF PARTNERSHIP. — That a partnership is dissolved does not affect the right to an inspection of the partnership books, the courts recognizing the right of a former partner to have access to the books at all reasonable times.¹⁰

v. Abell, 88 Ky. 428; *Raub v. Van Horn*, 133 Pa. St. 573; *Pennsylvania County v. Philadelphia, etc.*, R. Co., 9 Pa. Co. Ct. 517; *Arrott v. Pratt*, 2 Whart. (Pa.) 566. See the cases cited *supra*, this section, *At Common Law*.

1. Principal and Agent. — *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. Rep. 46; *Petrie v. Dickerman*, 90 Mich. 265; *Manley v. Bonnel*, (N. Y. Super. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 123; *Ruberry v. Binns*, 5 Bosw. (N. Y.) 685; *Babbitt v. Crampton*, 1 Civ. Pro. (N. Y.) 169; *Brevoort v. Warner*, (Supm. Ct. Gen. T.) 8 How. Pr. (N. Y.) 321; *Inyo Consol. Min. Co. v. Pheby*, 49 N. Y. Super. Ct. 392; *Brigham v. Zaiss*, 48 N. Y. App. Div. 144; *Harding v. Field*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 918.

2. *Sydney Cheese, etc., Factory Assoc. v. Brower*, 19 Ont. Pr. 152.

3. Actions Between Partners. — *Ex p. Baker*, 118 Ala. 185; *Kelly v. Eckford*, 5 Paige (N. Y.) 548; *Stebbins v. Harmon*, 17 Hun (N. Y.) 445; *Brush v. Anderson*, 2 Ch. Sent. (N. Y.) 71; *Howlett v. Hall*, 55 N. Y. App. Div. 614; *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216; *Lord v. Spielman*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 48; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21, 31 Abb. N. Cas. (N. Y.) 181; *Zimmerman v. Dieckerhoff*, (Supm. Ct. Gen. T.) 12 N. Y. St. Rep. 613; *Copeland v. Brown*, 73 N. Y. App. Div. 423; *Saunders v.*

Duval, 19 Tex. 467. See also *Gould Roofing Co. v. Gildea*, 4 N. Y. App. Div. 107. *Compare Pickering v. Rigby*, 18 Ves. Jr. 484; *Maud v. Allies*, 4 Myl. & C. 503.

Agreement for Continuance of Partnership by Survivor Does Not Affect Executor's Right of Inspection. — *Newman v. Newman*, 20 N. Y. Wkly. Dig. 283.

4. *Ex p. Baker*, 118 Ala. 185; *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216; *Applebee v. Duke*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 890.

5. *Howlett v. Hall*, 55 N. Y. App. Div. 614; *Lord v. Spielman*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 48; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21, 31 Abb. N. Cas. (N. Y.) 181.

6. *Lord v. Spielman*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 48; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21, 31 Abb. N. Cas. (N. Y.) 181.

7. *Lord v. Spielman*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 48.

8. *Bearns v. Burras*, 86 Hun (N. Y.) 258.

9. *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216; *Holby Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42, 2 N. Y. Annot. Cas. 128.

10. *Howlett v. Hall*, 55 N. Y. App. Div. 614; *Bearns v. Burras*, 86 Hun (N. Y.) 258. See also *Livingston v. Curtis*, (Supm. Ct. Gen. T.) 54 How. Pr. (N. Y.) 370.

e. SALE OF PARTNERSHIP INTEREST. — Where the interest of a deceased partner has been sold and suit is brought by the executors,¹ heirs,² or devisees³ to set aside the transfer on the ground of fraud, an order allowing them to inspect the partnership books is properly granted, even before the fraud has been established.⁴ It has been held, however, that where a partner had, during his lifetime, sold his interest, his executors could not, in an action to set aside the conveyance as fraudulent, claim a general inspection of the books while the sale stood.⁵

5. Where Forgery Is Alleged. — Where it is claimed that the document of which inspection is sought is forged, the application for inspection will generally be granted.⁶

6. Against Whom Allowed — *a. IN GENERAL.* — It is well settled that the order of production will be granted only as against the adverse party, and that the court will not compel a third person not interested in the suit to produce a private paper of his own for inspection;⁷ but such a person may be compelled to produce in court any documents in his possession to which the applicant has an exclusive right or a right in common with another.⁸

The Real Party in Interest may be compelled to produce a document, even though he is not nominally a party.⁹

Nominal Party. — Conversely, the court has no power to compel one who is merely a nominal party to produce his documents.¹⁰

Interest of Third Persons as Affecting. — In *England* and *Canada* production will not be compelled where a third person who is not a party to the action has an interest in the documents of which production is sought,¹¹ unless the court can see that the party having the legal custody sufficiently represents the other party's interest.¹² Similarly, a joint agent of the defendant and others not parties to the cause cannot be compelled to produce documents held by him for the defendant and such third parties.¹³

1. Sale of Partnership Interest. — *Zimmerman v. Dieckerhoff*, (Supm. Ct. Gen. T.) 12 N. Y. St. Rep. 613. See also *Livingston v. Curtis*, (Supm. Ct. Gen. T.) 54 How. Pr. (N. Y.) 370.

2. Martine v. Albro, 26 Hun (N. Y.) 559.

3. Fleischmann v. Fleischmann, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216.

4. Fleischmann v. Fleischmann, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216.

5. Platt v. Platt, 61 Barb. (N. Y.) 52.

6. Forgery. — *Thomas v. Dunn*, 6 M. & G. 274, 46 E. C. L. 274; *Jones v. Lewis*, 2 Sim. & St. 242; *Davis v. Davis*, 47 Ga. 81; *Den v. Driver*, 1 N. J. L. 129; *Mierisch v. Mt. Morris Bank*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 743; *Andrews v. Townshend*, (N. Y. Super. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 76; *Holmes v. Cornell*, 7 N. Y. Wkly. Dig. 375; *Cornell v. Woolsey*, 7 N. Y. Wkly. Dig. 555; *Bamberger v. U. S. Fidelity, etc., Co.*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 512; *Jackson v. Jones*, 3 Cow. (N. Y.) 17; *McGibboney v. Mills*, 13 Ired. L. (35 N. Car.) 163. See also *Woolmer v. Devereux*, 2 M. & G. 758, 40 E. C. L. 612; *Boyd v. Petrie*, L. R. 3 Ch. 818. Compare *Frank v. Frank*, 1 Houst. (Del.) 245.

7. Production by Third Person. — *Willis v. Baddeley*, (1892) 2 Q. B. 324; *Cocke v. Nash*, 9 Bing. 723, 23 E. C. L. 439; *Henry v. Travelers' Ins. Co.*, 35 Fed. Rep. 15; *Marion Nat. Bank v. Abell*, 88 Ky. 428; *Kelly v. Morrison*, 176 Mass. 531; *Davenbagh v. McKinnie*, 5 Cow. (N. Y.) 27; *Morgan v. Morgan*, (C. Pl. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 291; *Low v. Graydon*, (Supm. Ct.) 14 Abb. Pr. (N. Y.)

443; *Morley v. Green*, 11 Paige (N. Y.) 240, 42 Am. Dec. 112.

8. Marion Nat. Bank v. Abell, 88 Ky. 428; *Dickerson v. Talbot*, 14 B. Mon. (Ky.) 49; *Woods v. Miller*, 55 Iowa 168, 39 Am. Rep. 170. See also *Simon v. Ash*, 1 Tex. Civ. App. 202, in which case it was further stated that an interest sufficient to compel production existed if the documents sought were material evidence for the party demanding them.

9. Party in Interest. — *Willis v. Baddeley*, (1892) 2 Q. B. 324; *Simon v. Ash*, 1 Tex. Civ. App. 202.

10. Nominal Party. — *Adrian v. Sanders*, (N. Y. Super. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 422.

11. Interests of Third Persons. — *Kearsley v. Phillips*, 10 Q. B. D. 465; *Reid v. Langlois*, 1 Macn. & G. 627, 19 L. J. Ch. 337; *Morrell v. Wootten*, 13 Beav. 105; *Robertson v. Shewell*, 15 Beav. 277; *Edmonds v. Foley*, 30 Beav. 282; *Few v. Guppy*, 13 Beav. 457; *Reynolds v. Godlee*, 4 Kay & J. 88; *Burbridge v. Robinson*, 2 Macn. & G. 244; *Ford v. Dolphin*, 1 Drew. 222; *Smith v. Sidney*, 6 Jur. 432; *Hadley v. McDougall*, L. R. 7 Ch. 312; *Manning v. Cubitt*, 1 Ch. Chamb. (Ont.) 177; *Bradbury v. Moffatt*, 1 Manitoba 92; *Campbell v. Dalhousie*, L. R. 1 H. L. Sc. 462. *Contra*, *Carte v. Dennis*, 4 Terr. L. R. 357.

12. Fraser v. Home Ins. Co., 6 Ont. Pr. 45. See also *Plant v. Kendrick*, L. R. 10 C. P. 692; *Richardson v. Hastings*, 7 Beav. 356; *McDonnell v. McKay*, 2 Ch. Chamb. (Ont.) 141.

13. Murray v. Walter, Cr. & Ph. 114, 3 Jur.

b. EXECUTORS AND ADMINISTRATORS. — The production of the books in the hands of an executor¹ or administrator² may also be compelled.

c. ASSIGNEE FOR BENEFIT OF CREDITORS. — In an action to set aside an assignment for the benefit of creditors as fraudulent, the assignee may be ordered, on a proper showing, to produce the books of his assignor for the inspection of the adverse party.³

d. COPLAINTIFF OR CODEFENDANT. — A plaintiff or defendant will be allowed an order of production and inspection as against a coplaintiff or codefendant where there are rights to be adjusted between them to which the inspection is material and where the right to the inspection depends upon the community of interest between the parties.⁴ But the inspection will not be allowed where it is sought in an independent matter not connected with the action in which they are joined.⁵

e. OFFICERS OF CORPORATION. — Where the corporation is not a party to the action, its officers and agents cannot be compelled to produce in their individual capacities books of the corporation over which they have not the absolute control and right of disposition at their own discretion.⁶ This is true although the corporation whose books are sought is alleged to be a sham.⁷ Even where the corporation is a party, its officers and agents cannot in that capacity be compelled to produce its books unless it is shown that the books are in their custody or control.⁸

f. RECEIVERS. — The stockholders of a corporation are entitled to an order allowing them to inspect the books of the corporation, though it is in the hands of a receiver.⁹ Nor is the fact that a receiver has been appointed sufficient ground for denying to the adverse party in a suit against the corporation an order for the production and inspection of the corporate books if the receiver has not actually taken possession of the books.¹⁰ It has also been held that in an action against the security on a note given by a company,

719; *Lopez v. Deacon*, 6 Beav. 254; *Bovill v. Cowan*, 15 W. R. 608.

Production Not Compelled of Documents Relating to Compromise between defendant and a third party. *Warrick v. Queen's College*, L. R. 4 Eq. 254.

1. Production by Executor. — *Bowen v. Pearson*, 9 Jur. N. S. 789; *Gough v. Offley*, 5 De G. & Sm. 653, 17 Jur. 61; *Travers v. Satterlee*, 67 Hun (N. Y.) 652; *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 409; *Kuhn v. Elmaker*, 1 Pa. L. J. Rep. 318, 2 Pa. L. J. 299. See also *Freeman v. Fairlie*, 3 Meriv. 24; *Farrer v. Hutchinson*, 3 Y. & C. Exch. 692; *Elsworth v. Hinton*, (Supm. Ct. Spec. T.) 23 Abb. N. Cas. (N. Y.) 374.

2. Production by Administrator. — *Matter of Stokes*, 28 Hun (N. Y.) 564; *Forsyth Com'rs v. Lemly*, 85 N. Car. 341. See also *Dent v. Dent*, 35 Beav. 126.

3. Assignee for Benefit of Creditors. — *Bundschu v. Simon*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 80; *York Haven Paper Co. v. Place*, 13 N. Y. App. Div. 227. See also *Wagner v. Mason*, 6 Ont. Pr. 187.

Production by Representative of Assignee Ordered. — *Rhodes v. Neild*, 1 Ch. Chamb. (Ont.) 131.

An Inspection under the New York General Assignment Act (Laws of 1877, c. 466, as amended by Laws of 1878, c. 318) can be had only in aid of the assignment and not to show that property has been fraudulently secreted or preferences fraudulently given. *Matter of Holbrook*, 99 N. Y. 539; *Matter of Goldsmith*, 10 Daly

(N. Y.) 112; *Matter of Everit*, 10 Daly (N. Y.) 99. See also *Matter of Bryce*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 359; *Matter of Isidor*, (C. Pl. Gen. T.) 59 How. Pr. (N. Y.) 98.

4. *Shaw v. Smith*, 18 Q. B. D. 193. See also *Kennedy v. Wakefield*, 39 L. J. Ch. 827.

5. *Rafferty v. Williams*, 34 Hun (N. Y.) 544. Compare *Evans v. Staples*, 42 N. J. Eq. 584.

6. Production by Corporate Officers. — *Morgan v. Morgan*, (C. Pl. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 291. See also *Pennéy v. Goode*, 1 Drew. 474, 17 Jur. 82; *Southern R. Co. v. North Carolina Corp. Commission*, 104 Fed. Rep. 700; *Brock v. Surpluss*, 66 N. Y. App. Div. 609; *Woods v. De Figanieri*, 1 Robt. (N. Y.) 681.

General Manager Deemed in Possession and Control of Books Where Principal Directors Are Non-resident. — *Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 726.

7. *Opdyke v. Marble*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 266.

8. *Boorman v. Atlantic, etc., R. Co.*, 78 N. Y. 599; *Morgan v. Morgan*, (C. Pl. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 291; *La Farge v. La Farge F. Ins. Co.* (N. Y. Super. Ct. Gen. T.) 14 How. Pr. (N. Y.) 26; *Utica Bank v. Hillard*, 5 Cow. (N. Y.) 153.

9. Books in Hands of Receiver. — *People v. Cataract Bank*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 14; *Fowler's Petition*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 268.

10. *Maxwell v. Manitoba, etc., R. Co.*, 11 Manitoba 149.

who was also receiver for the company, the defendant could be compelled to produce for inspection books and documents of the company which were in his absolute control.¹

g. SHERIFF. — That the books of which inspection is sought are in the hands of the sheriff under attachment levied at the instance of the applicant is no ground for refusing an order of production and inspection.²

7. Purposes for Which Allowed — *a. TO AID IN FRAMING PLEADINGS.* — To determine whether an order of production and inspection will be granted to aid the applicant in framing his pleadings, reference must be had to the statutes.³ By rules of court adopted in some jurisdictions, express provision has been made for the production of documents of which an inspection is necessary to enable a party to frame his declaration or complaint,⁴ answer,⁵ counterclaim,⁶ or reply.⁷

To Aid in Furnishing Bill of Particulars. — It is within the power of the court, in the proper exercise of its discretion, to order the production and inspection to enable a party to furnish a required bill of particulars. The order should be made only in cases of necessity and where the application has been made in good faith for a legitimate purpose.⁸

b. TO AID IN PREPARATION FOR TRIAL — (1) *In General.* — Under the statutes it is generally held that the order will be granted to enable the applicant to prepare for trial,⁹ to aid him in proving either his cause of action¹⁰

1. London, etc., *Bank v. Cooper*, 15 Q. B. D. 473.

2. *Brooke v. Foster*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 200.

3. The North Carolina Statute has been construed to allow an order of inspection in order to frame the declaration. *Justice v. National Bank*, 83 N. Car. 8. See also *Simmons v. Hoffman*, 6 Pa. Dist. 218.

4. **To Frame Complaint** — *New York.* — *Vieller v. Oppenheim*, (Supm. Ct. Gen. T.) 31 Abb. N. Cas. (N. Y.) 181; *Manley v. Bonnel*, (N. Y. Super. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 123; *Perrow v. Lindsay*, 52 Hun (N. Y.) 115; *Livingston v. Curtis*, 12 Hun (N. Y.) 121; *Ruberry v. Binns*, 5 Bosw. (N. Y.) 685; *Stilwell v. Priest*, 85 N. Y. 649; *Frothingham v. Broadway, etc., R. Co.*, (Supm. Ct. Spec. T.) 9 Civ. Pro. (N. Y.) 304; *Kastner v. Kastner*, 53 N. Y. App. Div. 293; *Mehesy v. Kahn*, 50 N. Y. Super. Ct. 209; *Rafferty v. Williams*, 50 N. Y. Super. Ct. 66; *Taylor v. American Ribbon Co.*, 38 N. Y. App. Div. 144; *Brown v. Georgi*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 128; *Churchill v. Loeser*, (Supm. Ct. Gen. T.) 35 N. Y. Supp. 310; *Hofman v. Seixas*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 3; *Dalzell v. Fahys Watch Case Co.*, 58 N. Y. Super. Ct. 136; *Birdsall v. Pixly*, 3 Wend. (N. Y.) 425; *Ward v. New York L. Ins. Co.*, 78 Hun (N. Y.) 363.

Wisconsin. — *Williams Mower, etc., Co. v. Raynor*, 38 Wis. 132.

See *Maclean v. Barber, etc., Co.*, 13 Ont. Pr. 500.

5. **Answer.** — *Wesson v. Judd*, (C. Pl. Spec. T.) 1 Abb. Pr. (N. Y.) 254; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Inyo Consol. Min., etc., Co. v. Pheby*, 49 N. Y. Super. Ct. 392; *Earle v. Beman*, 1 N. Y. App. Div. 136; *Stanton v. Delaware Mut. Ins. Co.*, 2 Sandf. (N. Y.) 662; *Kraus v. Sentinel Co.*, 62 Wis. 660.

In Missouri if an inspection is necessary to enable the applicant to answer he must obtain an extension of time and prosecute his petition

under Gen. Stat. Mo., c. 169, § 40 (Rev. Stat. Mo. 1899, § 737), for an inspection and copy of the document. *Hill v. Meyer*, 47 Mo. 585.

6. **Counterclaim.** — *Albany Brass, etc., Co. v. Hoffman*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 167; *Brevoort v. Warner*, (Supm. Ct.) 8 How. Pr. (N. Y.) 321; *Harding v. Field*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 628; *Frowein v. Lindheim*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 526.

7. **Reply.** — *Stebbins v. Harmon*, 17 Hun (N. Y.) 445. See also *Earle v. Beman*, 1 N. Y. App. Div. 136; N. Y. Supreme Court Rule 18; Wis. Circuit Court Rule 19.

8. **Bill of Particulars.** — *Cornish v. Wormser*, 53 Hun (N. Y.) 40; *Prince v. Currie*, (Supm. Ct.) 2 How. Pr. (N. Y.) 119; *Brevoort v. Warner*, (Supm. Ct.) 8 How. Pr. (N. Y.) 321; *Campbell v. Brock's Commercial Agency*, 38 N. Y. App. Div. 137. Compare *McIlhanney v. Magie*, (Supm. Ct. Spec. T.) 12 Civ. Pro. (N. Y.) 27.

9. **To Prepare for Trial.** — *Rigdon v. Conley*, 31 Ill. App. 630; *Petrie v. Dickerman*, 90 Mich. 265; *Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 230; *Babbitt v. Crampton*, (Supm. Ct. Gen. T.) 1 Civ. Pro. (N. Y.) 169; *Amsinck v. Northrop*, (C. Pl. Spec. T.) 1 Civ. Pro. (N. Y.) 180, note; *Hart v. Ogdenburg, etc., R. Co.*, 69 Hun (N. Y.) 497; *Bensinger v. Erhardt*, 60 N. Y. App. Div. 303; *Genet v. Hirschberg*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 761; *Gould v. McCarty*, 11 N. Y. 575.

10. **To Prove Cause of Action** — *United States.* — *Kirkpatrick v. Pope Mfg. Co.*, 61 Fed. Rep. 46. See *infra*, the next subdivision.

Kansas. — *State v. Allen*, 5 Kan. 214.

Michigan. — *Petrie v. Dickerman*, 90 Mich. 265.

New York. — *Stichter v. Tillinghast*, 43 Hun (N. Y.) 95; *Lefferts v. Bampton*, (C. Pl. Gen.

or his defense.¹

(2) *Under Federal Statute.*—As to whether or not the production of documents for inspection may be compelled in advance of trial under the federal statute² there is a conflict in the decisions, one line holding that there is no authority in the provisions of the statute,³ the other that the production may be compelled.⁴

8. Prerequisites to Granting of Order—*a. PENDENCY OF CAUSE.*—As a general rule the statutes provide that there must be a cause pending to entitle a person to an order for production and inspection.⁵

b. POSSESSION OR CONTROL.—Production by an adverse party can be compelled only when the document sought is shown to be in the possession or control of such party.⁶ As a general rule, where the party denies the possession and control the order will not be granted.⁷ An evasive denial is not,

T.) 24 How. Pr. (N. Y.) 257; *Babbitt v. Crampton*, (Supm. Ct. Gen. T.) 1 Civ. Pro. (N. Y.) 169; *Gould v. McCarty*, 11 N. Y. 575; *Shoe, etc., Assoc. v. Bailey*, 49 N. Y. Super. Ct. 385; *Ahlmeier v. Healy* (C. Pl. Gen. T.) 12 N. Y. St. Rep. 677; *Bensinger v. Erhardt*, 60 N. Y. App. Div. 303; *Genet v. Hirschberg*, (N. Y. City Ct. Gen. T.) 32 Misc. (N. Y.) 761; *Bundschu v. Simon*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 80; *Smith v. Seattle, etc., R. Co.*, (Supm. Ct. Gen. T.) 16 N. Y. Supp. 417; *Continental Nat. Bank v. Myerle*, 29 N. Y. App. Div. 282.

North Carolina.—*Austin v. Secrest*, 91 N. Car. 214; *Forsyth Com'rs v. Lemly*, 85 N. Car. 341.

Rhode Island.—*Arnold v. Pawtuxet Valley Water Co.*, 18 R. I. 189.

Wisconsin.—*Phelps v. Atlantic, etc., Tel. Co.*, 46 Wis. 266.

1. To Establish Defense.—*Germania F. Ins. Co. v. Newaygo Circuit Judge*, 41 Mich. 258; *Elsworth v. Hinton*, (Supm. Ct. Spec. T.) 23 Abb. N. Cas. (N. Y.) 374; *Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Stichter v. Tillinghast*, 43 Hun (N. Y.) 95; *Union Paper Collar Co. v. Metropolitan Collar Co.*, 3 Daly (N. Y.) 171; *Babbitt v. Crampton*, (Supm. Ct. Gen. T.) 1 Civ. Pro. (N. Y.) 169.

2. Production under Federal Statute.—Rev. Stat. U. S., § 724.

3. Production Before Trial Denied.—*U. S. v. National Lead Co.*, 75 Fed. Rep. 94; *Paine v. Warren*, 33 Fed. Rep. 357; *Iasigi v. Brown*, 1 Curt. (U. S.) 401, 12 Fed. Cas. No. 6,993; *Triplett v. Washington Bank*, 3 Cranch (C. C.) 646, 24 Fed. Cas. No. 14,178; *U. S. v. Hutton*, 10 Ben. (U. S.) 268. See also *Merchants' Nat. Bank v. State Nat. Bank*, 3 Cliff. (U. S.) 201, 17 Fed. Cas. No. 9,448.

Where the Papers Sought Are to Be Used "in Aid of Preparation for Trial," the statute does not apply, but the courts will follow the state practice. *Frescole v. Lancaster*, 70 Fed. Rep. 337.

Statute Applicable Solely to Actions at Law and Not to Suits in Equity.—*Ryder v. Bateman*, 93 Fed. Rep. 31; *Bischoffsheim v. Brown*, 29 Fed. Rep. 341.

4. Production Compelled.—*Central Bank v. Tayloe*, 2 Cranch (C. C.) 427, 5 Fed. Cas. No. 2,548; *Jacques v. Collins*, 2 Blatchf. (U. S.) 23, 13 Fed. Cas. No. 7,767; *Victor G. Bloede Co. v. Bancroft, etc., Co.*, 98 Fed. Rep. 175; *Lucker*

v. Phoenix Assur. Co., 67 Fed. Rep. 18; *Exchange Nat. Bank v. Washita Cattle Co.*, 61 Fed. Rep. 190; *Gregory v. Chicago, etc., R. Co.*, 10 Fed. Rep. 529. See also *U. S. v. Youngs*, 10 Ben. (U. S.) 264, 28 Fed. Cas. No. 16,783.

Permission to Take Copies.—*Exchange Nat. Bank v. Washita Cattle Co.*, 61 Fed. Rep. 190; *Lucker v. Phoenix Assur. Co.*, 67 Fed. Rep. 18.

5. Pending Cause Essential.—See *supra*, this section, *In General—Under Statutory Provisions.* See also the statutes of the several states, and see *Pepper v. Chambers*, 7 Exch. 226.

6. Possession Necessary—*United States.*—*Iasigi v. Brown*, 1 Curt. (U. S.) 401.

District of Columbia.—*Smithson v. Stanton*, 7 D. C. 6.

Alabama.—See also *National Fertilizer Co. v. Holland*, 107 Ala. 412, 54 Am. St. Rep. 101.

Florida.—*Sinclair v. Gray*, 9 Fla. 71.

Georgia.—*Georgia Iron, etc., Co. v. Etowah Iron Co.*, 104 Ga. 395; *Carlton v. Western, etc., R. Co.*, 81 Ga. 531; *Earnest v. Napier*, 15 Ga. 306; *Bryan v. Walton*, 14 Ga. 185.

Indiana.—*Whitman v. Weller*, 39 Ind. 515.

Maryland.—*Eschbach v. Lightner*, 31 Md. 528.

New York.—*Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Case v. Banta*, 9 Bosw. (N. Y.) 505; *Exchange Bank v. Monteath*, (Supm. Ct.) 4 How. Pr. (N. Y.) 280; *Brock v. Surples*, 66 N. Y. App. Div. 609, 72 N. Y. Supp. 831; *Hoyt v. American Exch. Bank*, 1 Duer (N. Y.) 652; *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 5 N. Y. App. Div. 126. See also *National Oleo Meter Co. v. Jackson*, 54 N. Y. Super. Ct. 444; *Jackling v. Edmonds*, 3 E. D. Smith (N. Y.) 539.

Pennsylvania.—*Adams v. Uhler*, 7 Pa. Co. Ct. 103; *Rose v. King*, 5 S. & R. (Pa.) 241.

Wisconsin.—*Schuetze v. Continental L. Ins. Co.*, 69 Wis. 252.

Positive Proof of Possession Not Essential.—*Wright v. Crane*, 13 S. & R. (Pa.) 447.

7. Denying Possession.—*Chaffe v. Mackenzie*, 43 La. Ann. 1062; *Ahoyke v. Wolcott*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 41; *Bradstreet v. Bailey*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 233; *Hoyt v. American Exch. Bank*, 1 Duer (N. Y.) 652; *Woods v. De Figanieri*, 1 Robt. (N. Y.) 681; *Southart v. Dwight*, 2 Sandf. (N. Y.) 672; *Holly Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42; *Watts v. Knevals*, 56 N. Y. Super.

however, sufficient ground for refusing the order,¹ nor is a mere denial of present possession of the document, without more, sufficient where it is shown to have been in the possession or control of the party.² He must satisfy the court that the paper is not in his possession nor under his control, and where a paper is last shown in his possession he must show what he has done with it, what has become of it, or that it has gotten out of his possession and control.³

c. MATERIALITY AND NECESSITY — (1) *In General*. — To entitle the applicant to an order for production and inspection it must be shown that the document sought contains material evidence,⁴ and that the production and inspection are necessary to the claim or the defense of the applicant.⁵ Where

Ct. 592; *Baggott v. Goodwin*, 17 Ohio St. 76. See also *McIlhanney v. Magie*, (Supm. Ct. Spec. T.) 13 Civ. Pro. (N. Y.) 16.

1. *Evasive Denial*. — *Hicks v. Charlick*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 129; *Holly Mfg. Co. v. Venner*, 86 Hun (N. Y.) 42; *Sibley v. New York Times Pub. Co.*, 80 Hun (N. Y.) 561; *Union Trust Co. v. Driggs*, 49 N. Y. App. Div. 406; *Press Pub. Co. v. Associated Press*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 90. See also *Hepburn v. Archer*, 20 Hun (N. Y.) 535; *Palmer v. United Press*, 67 N. Y. App. Div. 64.

Denial by Attorney of Possession Insufficient. — *Fox v. Brega*, 53 Hun (N. Y.) 629, 5 N. Y. Supp. 908.

2. *Denial of Present Possession*. — *Sibley v. New York Times Pub. Co.*, 80 Hun (N. Y.) 561; *Perrow v. Lindsay*, 52 Hun (N. Y.) 115; *Palmer v. United Press*, 67 N. Y. App. Div. 64; *McCreery v. Ghormley*, 6 N. Y. App. Div. 170; *Leonard v. Sharp*, 1 W. N. C. (Pa.) 345. See also *Steadman v. Arden*, 15 M. & W. 587.

3. *Perrow v. Lindsay*, 52 Hun (N. Y.) 115; *Press Pub. Co. v. Associated Press*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 90; *McCreery v. Ghormley*, 6 N. Y. App. Div. 170; *Moses v. Hatch*, 22 N. Y. App. Div. 21; *Adams v. Uhler*, 7 Pa. Co. Ct. 103. See also *Bates v. Terrell*, 7 Ala. 129. *Compare State v. Lucksinger*, 79 Mo. App. 289.

4. *Materiality* — *United States*. — *Caspary v. Carter*, 84 Fed. Rep. 416.

Florida. — *Sinclair v. Gray*, 9 Fla. 71.

Georgia. — *Bull v. Edward Thompson Co.*, 99 Ga. 134; *Carlton v. Western, etc., R. Co.*, 81 Ga. 531; *Earnest v. Napier*, 15 Ga. 306; *Bryan v. Walton*, 14 Ga. 185; *Berry v. Mathewes*, 7 Ga. 457.

Illinois. — *Pyncheon v. Day*, 118 Ill. 9; *Woodstock First Nat. Bank v. Mansfield*, 48 Ill. 494.

Louisiana. — *Murison v. Butler*, 18 La. Ann. 197.

Maryland. — *Cooney v. Hax*, 92 Md. 134.

Minnesota. — *Powell v. Northern Pac. R. Co.*, 46 Minn. 249.

New Jersey. — *Condict v. Wood*, 25 N. J. L. 319.

New York. — *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *New England Iron Co. v. New York Loan, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Morrison v. Sturges*, (N. Y. Super. Ct. Spec. T.) 26 How. Pr. (N. Y.) 177; *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257; *Davis v.*

Dunham, (Supm. Ct. Gen. T.) 13 How. Pr. (N. Y.) 425; *Bailey v. Williams Mfg. Co.*, (N. Y. City Ct. Spec. T.) 9 N. Y. St. Rep. 518; *Ahlmeier v. Healy*, 14 Daly (N. Y.) 288; *Jackling v. Edmonds*, 3 E. D. Smith (N. Y.) 539; *Halstead v. Halstead*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 618; *Neukirch v. Keppler*, 56 N. Y. App. Div. 225; *Emanuel v. La Compagnie, etc.*, (Supm. Ct. Spec. T.) 16 Civ. Pro. (N. Y.) 188; *Phillips v. Curtis*, 70 N. Y. App. Div. 551; *Palmer v. United Press*, 67 N. Y. App. Div. 64; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333; *Keilty v. Traynor*, 31 N. Y. App. Div. 115; *New York Bank Note Co. v. Hamilton Bank Note Engraving, etc., Co.*, 5 N. Y. App. Div. 126; *Knoch v. Funke*, 59 N. Y. Super. Ct. 240; *Frowein v. Lindheim*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 87; *Dyett v. Seymour*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 643. *Compare Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Powers v. Elmendorf*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 60.

North Carolina. — *McLeod v. Bullard*, 84 N. Car. 515; *Forsyth Com'r's v. Lemly*, 85 N. Car. 341.

Pennsylvania. — *Rauschmeyer v. Bank*, 2 L. T. N. S. (Pa.) 76; *Rose v. King*, 5 S. & R. (Pa.) 241; *Wills v. Kane*, 2 Grant Cas. (Pa.) 47.

South Carolina. — *Jenkins v. Bennett*, 40 S. Car. 393.

Canada. — *Moxley v. Canada Atlantic R. Co.*, 11 Ont. Pr. 39; *Fraser v. Home Ins. Co.*, 6 Ont. Pr. 45.

Order Denied Where Counsel Refuses to State How Papers Sought Are Material. — *Bull v. Edward Thompson Co.*, 99 Ga. 134.

5. *Must Be Necessary* — *Arkansas*. — *Hill v. Cawthon*, 15 Ark. 29.

Florida. — *Neafie v. Miller*, 37 Fla. 173.

Illinois. — *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602.

Michigan. — *Cummer v. Judge*, 38 Mich. 355.

New York. — *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Walmsley v. Nelson*, (Supm. Ct.) 3 Abb. N. Cas. (N. Y.) 127; *Phelps v. Platt*, 54 Barb. (N. Y.) 557; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Hayden v. Van Cortlandt*, 81 Hun (N. Y.) 150; *Green v. Carey*, 81 Hun (N. Y.) 496; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Campbell v. Hoge*, 2 Hun (N. Y.) 308; *New England Iron Co. v. New York Loan, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Woods v. De Figanieri*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *McAllister v. Pond*, (N. Y. Super. Ct. Spec. T.) 15 How. Pr. (N. Y.) 299; *Phillips v. Curtis*,

the applicant does not show that he has a cause of action,¹ or a defense,² the court will not grant the order.

(2) *Materiality* — (a) *In General.* — While the materiality is not required to be shown absolutely,³ facts and circumstances sufficient to warrant a presumption of materiality must be shown,⁴ mere belief on the applicant's part that the evidence will tend to prove his case being insufficient.⁵

(b) *How Shown.* — To this end the applicant must show the particular information which is required⁶ and that there are entries in the documents sought as to the matter in regard to which the inspection is denied,⁷ or give other facts sufficient to satisfy the court that material evidence is contained in the document.⁸

(3) *Necessity* — (a) *In General.* — The necessity which must be shown is not the general necessity that exists for getting relevant testimony, but is a necessity peculiar to the case of getting information in this particular manner. This kind of necessity does not exist when it is probable that the information can be had by the usual and ordinary methods.⁹

70 N. Y. App. Div. 551; *Rhoades v. Schwartz*, 52 N. Y. App. Div. 379; *Cutting v. Baltimore*, etc., R. Co., 51 N. Y. App. Div. 628, 64 N. Y. Supp. 258; *Stanton v. Friedman*, 47 N. Y. App. Div. 621, 62 N. Y. Supp. 291; *Brummer v. Cohen*, 47 N. Y. App. Div. 470; *Allen v. Fowler*, etc., Co., 45 N. Y. App. Div. 506; *Leach v. Haight*, (Supm. Ct. App. Div.) 38 N. Y. Supp. 886; *Earle v. Beman*, 1 N. Y. App. Div. 136; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21, 31 Abb. N. Cas. (N. Y.) 181; *Bien v. Hellman*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 168; *Perls v. Metropolitan L. Ins. Co.*, 16 Daly (N. Y.) 255; *Smith v. Seattle*, etc., R. Co., (Supm. Ct. Gen. T.) 16 N. Y. Supp. 417; *Watts v. Knevals*, 56 N. Y. Super. Ct. 592; *Stichler v. Tillinghast*, 43 Hun (N. Y.) 95; *Dyett v. Seymour*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 643; *Bailey v. Williams Mfg. Co.*, (N. Y. City Ct. Spec. T.) 9 N. Y. St. Rep. 518. *Contra*, *Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Powers v. Elmendorf*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 60.

North Carolina. — *Sheek v. Sain*, 127 N. Car. 266; *Justice v. National Bank*, 83 N. Car. 8.

Pennsylvania. — *Davenport v. Pennsylvania R. Co.*, 2 Pa. Dist. 784.

Canada. — *Arthur v. Runians*, 18 Ont. Pr. 205; *Graham v. Temperance*, etc., L. Assur. Co., 16 Ont. Pr. 536.

1. *Bridgman v. Scott*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 338. See also *Marrone v. New York Jockey Club*, 60 Hun (N. Y.) 577, 14 N. Y. Supp. 199.

2. *Fromme v. Lisner*, 63 Hun N. Y.) 290.

3. *Absolute Proof Not Required.* — *Ahlmeier v. Healy*, 14 Daly (N. Y.) 288.

4. *Prima Facie Proof of Materiality.* — *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257; *Union Paper Collar Co. v. Metropolitan Collar Co.*, 3 Daly (N. Y.) 171; *Phillips v. Curtis*, 70 N. Y. App. Div. 551; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333.

5. *Caspary v. Carter*, 84 Fed. Rep. 416; *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Morrison v. Sturges*, (N. Y. Super. Ct.

Spec. T.) 26 How. Pr. (N. Y.) 177; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333; *Ashley v. Whitney*, 54 N. Y. Super. Ct. 540; *Halstead v. Halstead*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 618.

6. *Particular Information Sought.* — *Berry v. Mathewes*, 7 Ga. 457; *Murison v. Butler*, 18 La. Ann. 197; *Lynch v. Henderson*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 345, note; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *New England Iron Co. v. New York Loan*, etc., Co., (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Phillips v. Curtis*, 70 N. Y. App. Div. 551; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333.

7. *Entries Sought.* — *Condict v. Wood*, 25 N. J. L. 319; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Cassard v. Hinman*, 6 Duer (N. Y.) 695; *New England Iron Co. v. New York Loan*, etc., Co., (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Husson v. Fox*, (Supm. Ct. Gen. T.) 15 Abb. Pr. (N. Y.) 464; *Phillips v. Curtis*, 70 N. Y. App. Div. 551; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333; *Keilty v. Traynor*, 31 N. Y. App. Div. 115; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Frowein v. Lindheim*, (Supm. Ct. Spec. T.) 25 Abb. N. Cas. (N. Y.) 87. See also *Caspary v. Carter*, 84 Fed. Rep. 416.

8. *Facts Showing Materiality.* — *Caspary v. Carter*, 84 Fed. Rep. 416; *Bennett v. Reef*, 16 Colo. 431; *Bull v. Edward Thompson Co.*, 99 Ga. 134; *Eschbach v. Lightner*, 31 Md. 528; *Condict v. Wood*, 25 N. J. L. 319; *Cassard v. Hinman*, 6 Duer (N. Y.) 695; *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Brooklyn L. Ins. Co. v. Pierce*, 7 Hun (N. Y.) 236; *Thompson v. Erie R. Co.*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 212; *Davis v. Dunham*, (Supm. Ct. Gen. T.) 13 How. Pr. (N. Y.) 425; *Morrison v. Sturges*, (N. Y. Super. Ct. Spec. T.) 26 How. Pr. (N. Y.) 177; *Merguelle v. Continental Bank Note Co.*, 7 Robt. (N. Y.) 77; *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257; *Dyett v. Seymour*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 643; *Ahlmeier v. Healy*, 14 Daly (N. Y.) 288; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333; *Jenkins v. Bennett*, 40 S. Car. 393.

9. *Necessity Which Must Exist.* — *New England Iron Co. v. New York Loan*, etc., Co., (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.)

(b) **How Shown.** — The same showing of the necessity of the production is required as of the materiality of the evidence sought; and facts and circumstances must be stated to show how and why the necessity exists.¹ Thus, the order will not be granted where it appears that the applicant is sufficiently informed of the facts to enable him to present his case,² or to frame his reply or answer to any pleading of his adversary without an inspection of the document,³ or where it appears that he already possesses the information contained in the document sought.⁴ Nor will an order be granted where its only purpose is to prevent the applicant from answering untruthfully.⁵ It is not sufficient that the paper may, or even probably will, furnish information to obtain evidence which may be material, but the paper itself must contain the evidence, either by itself or in connection with other proof.⁶ Nor will the production be ordered where it appears that the documents contain merely hearsay evidence which neither party could use as evidence on the trial,⁷ nor where it appears that the production sought is not indispensably necessary, but is simply a precautionary measure.⁸

To Discover Parties. — Where the purpose for which the order of discovery is sought is merely to enable the applicant to ascertain who are the proper persons to be made parties defendant, the order will not be granted.⁹

To State Amount of Damages. — The order will not be granted where the purpose for which it is sought is to enable the plaintiff to state with accuracy in his complaint the amount of damages claimed.¹⁰

(4) **Demand.** — Ordinarily the court will not grant an order for inspection in the absence of proof that the applicant has made a demand for such inspection and it has been refused,¹¹ but where the court has made an order for the

351. See also *infra*, this section, *Grounds for Denial — Where Party Has Other Means of Securing Evidence.*

1. *Arkansas.* — *Hill v. Cawthon*, 15 Ark. 29. *Illinois.* — *Meeth v. Rankin Brick Co.*, 48 Ill. App. 602.

New York. — *Cutter v. Pool*, (C. Pl.) 3 Abb. N. Cas. (N. Y.) 130; *Strong v. Strong*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 233; *Hauseman v. Sterling*, 61 Barb. (N. Y.) 347; *Hayden v. Van Cortlandt*, 84 Hun (N. Y.) 150; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Bien v. Hellman*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 168; *Moore v. McIntosh*, 18 Wend. (N. Y.) 529; *Wilkie v. Moore*, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 480; *McAllister v. Pond*, (N. Y. Super. Ct. Spec. T.) 15 How. Pr. (N. Y.) 299; *Commercial Bank v. Dunham*, (Supm. Ct.) 13 How. Pr. (N. Y.) 541; *Gelston v. Marshall*, (N. Y. Super. Ct.) 6 How. Pr. (N. Y.) 398; *Bissell v. Mutual Reserve Fund Assoc.*, (Supm. Ct. Spec. T.) 38 Misc. (N. Y.) 249; *Kaupe v. Isdell*, 3 Robt. (N. Y.) 699; *Jackling v. Edmonds*, 3 E. D. Smith (N. Y.) 539; *Bloom v. Patten*, 58 N. Y. Super. Ct. 225; *Whitworth v. Erie R. Co.*, 37 N. Y. Super. Ct. 437; *Holtz v. Schmidt*, 34 N. Y. Super. Ct. 28; *Mason v. Smith*, (Supm. Ct. Gen. T.) 18 N. Y. St. Rep. 10.

Wisconsin. — *Noonan v. Orton*, 28 Wis. 600.

2. **Illustrations.** — *Green v. Carey*, 81 Hun (N. Y.) 496; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Gaughe v. Laroche*, (N. Y. Super. Ct. Spec. T.) 14 How. Pr. (N. Y.) 451; *Cutting v. Baltimore*, etc., R. Co., 51 N. Y. App. Div. 628, 64 N. Y. Supp. 258; *Mehesy v. Kahn*, 50 N. Y. Super. Ct. 209; *Leach v. Haight*, (Supm. Ct. App. Div.) 38 N. Y. Supp. 886; *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21, 31 Abb. N.

Cas. (N. Y.) 181; *Sheek v. Sain*, 127 N. Car. 266; *Arthur v. Runians*, 18 Ont. Pr. 205.

3. *Neafie v. Miller*, 37 Fla. 173; *Mora v. McCredy*, 2 Bosw. (N. Y.) 669; *Allen v. Fowler*, etc., Co., 45 N. Y. App. Div. 506; *Earle v. Beman*, 1 N. Y. App. Div. 136; *Watts v. Knevals*, 56 N. Y. Super. Ct. 592.

4. *McAllister v. Pond*, (N. Y. Super. Ct. Spec. T.) 15 How. Pr. (N. Y.) 299.

5. *Mora v. McCredy*, 2 Bosw. (N. Y.) 669.

6. *Morrison v. Sturges*, (N. Y. Super. Ct. Spec. T.) 26 How. Pr. (N. Y.) 177; *Woods v. De Figanieri*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522.

7. *Powell v. Northern Pac. R. Co.*, 46 Minn. 249.

8. **Production Must Be Indispensably Necessary.** — *Walmsley v. Nelson*, (Supm. Ct.) 3 Abb. N. Cas. (N. Y.) 127; *Woods v. De Figanieri*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *Campbell v. Hoge*, 2 Hun (N. Y.) 308; *Bailey v. Williams Mfg. Co.*, (N. Y. City Ct. Spec. T.) 9 N. Y. St. Rep. 518.

9. **Discovery of Parties.** — *Opdyke v. Marble*, 44 Barb. (N. Y.) 64.

10. **To State Damages.** — *Miner v. Gardiner*, 4 Hun (N. Y.) 132; *Stanton v. Friedman*, 47 N. Y. App. Div. 621, 62 N. Y. Supp. 291; *Brummer v. Cohen*, 47 N. Y. App. Div. 470; *Taylor v. American Ribbon Co.*, 38 N. Y. App. Div. 144; *Emanuel v. La Compagnie*, etc., (Supm. Ct. Spec. T.) 16 Civ. Pro. (N. Y.) 188; *Perls v. Metropolitan L. Ins. Co.*, 16 Daly (N. Y.) 255. See also *Keilty v. Traynor*, 31 N. Y. App. Div. 115. Compare *Hofman v. Seixas*, (C. Pl. Gen. T.) 12 Misc. (N. Y.) 3.

11. **Demand.** — *Rex v. Wilts*, etc., Canal Nav., 3 Ad. & El. 477, 30 E. C. L. 132; *Gross v. Rock*, (Supm. Ct. Gen. T.) 14 Civ. Pro. (N. Y.) 314;

inspection, coupled with an order to show cause in the event that the inspection is refused, and the plaintiff refuses but appears upon the order to show cause, no demand and refusal are necessary.¹

(5) *Notice*. — The statutes also provide, as a general rule, that notice of the motion shall be given to the other party.²

9. Grounds for Denial — *a. FISHING EXAMINATION*. — The courts uniformly decline to grant an application for production and inspection where it is merely for the purpose of a fishing examination,³ as where it is made to discover whether or not there is evidence contained in the documents which will be useful to the applicant,⁴ or for the purpose of determining whether he has a cause of action,⁵ or a defense,⁶ or in anticipation of a defense,⁷

Jenkins v. Bennett, 40 S. Car. 393; *Wenzel v. Palmetto Brewing Co.*, 48 S. Car. 80.

1. Demand Not Necessary. — *Albany Brass, etc., Co. v. Hoffman*, (Supm. Ct. Spec. T.) 12 Misc. (N. Y.) 167; *Blumberg v. Lindeman*, 19 N. Y. App. Div. 370.

Under the New York Laws 1877, c. 466, § 21, it seems that it was not necessary to allege or prove a demand and refusal of inspection. *Matter of Bryce*, (C. Pl. Spec. T.) 56 How. Pr. (N. Y.) 359.

2. Notice. — *Catterlin v. Armstrong*, 79 Ind. 514; *Globe Acc. Ins. Co. v. Helwig*, 13 Ind. App. 539; *Pennsylvania Ins. Co. v. Philadelphia, etc., R. Co.*, 9 Pa. Co. Ct. 517; *Wenzel v. Palmetto Brewing Co.*, 48 S. Car. 80. *Compare Congdon v. Aylsworth*, 16 R. I. 281. See the statutes of the several states, and see the title DISCOVERY, 6 ENCYC. OF PL. AND PR. 797.

3. Fishing Examination — *England*. — *Rex v. Merchant Tailor's Co.*, 2 B. & Ad. 115, 22 E. C. L. 40; *Scott v. Walker*, 2 El. & Bl. 555, 75 E. C. L. 555. See also *Janson v. Solarte*, 2 Y. & C. Exch. 132.

United States. — *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, 98 Fed. Rep. 175.

Colorado. — *Bennett v. Reef*, 16 Colo. 431.

Georgia. — *Hamby Mountain Gold Mines v. Findley*, 85 Ga. 431.

Illinois. — *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375; *Rigdon v. Conley*, 31 Ill. App. 630.

Indiana. — *Whitman v. Weller*, 39 Ind. 515.

New York. — *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257; *Commercial Bank v. Dunham*, (Supm. Ct.) 13 How. Pr. (N. Y.) 541; *Brevoort v. Warner*, (Supm. Ct.) 8 How. Pr. (N. Y.) 321; *Cutter v. Pool*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 311; *Hayden v. Van Cortlandt*, 84 Hun (N. Y.) 150; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Brownell v. National Bank*, 20 Hun (N. Y.) 517; *Continental Nat. Bank v. Myerle*, 29 N. Y. App. Div. 282.

Pennsylvania. — *Com. v. Phœnix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

Rhode Island. — *Arnold v. Pawtuxet Valley Water Co.*, 13 R. I. 189.

4. To Discover Evidence. — *Triplett v. Washington Bank*, 3 Cranch (C. C.) 646, 24 Fed. Cas. No. 14,178; *Neafie v. Miller*, 37 Fla. 173; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375; *Walker v. Granite Bank*, (Supm. Ct. Gen. T.) 19 Abb. Pr. (N. Y.) 111, 44 Barb. (N. Y.) 39; *Dale v. Stokes*, 5 Redf. (N. Y.) 586; *Opdyke v. Marble*, 44 Barb. (N. Y.) 64; *Mott v. Consumers' Ice Co.*, (C. Pl.) 52 How. Pr. (N. Y.) 148; *Pegram v. Carson*, (N. Y. Super. Ct.

Gen. T.) 18 How. Pr. (N. Y.) 519; *Hoyt v. American Exch. Bank*, (N. Y. Super. Ct. Gen. T.) 8 How. Pr. (N. Y.) 89; *Davenport v. Pennsylvania R. Co.*, 2 Pa. Dist. 784; *Matter of Stokes*, 28 Hun (N. Y.) 564.

5. To Discover Cause of Action. — *Equitable L. Assur. Soc. v. Clark*, (Miss. 1902) 31 So. Rep. 964; *Phillips v. Curtis*, 70 N. Y. App. Div. 551; *Leach v. Haight*, (Supm. Ct. App. Div.) 38 N. Y. Supp. 886; *Walsh v. Press Co.*, 48 N. Y. App. Div. 333; *Woods v. De Figanieri*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *Brownell v. National Bank*, 20 Hun (N. Y.) 517; *Newhall v. Appleton*, 2 N. Y. L. Bul. 35; *Rice v. West*, 7 Pa. Dist. 764; *Pennsylvania Co. v. Philadelphia, etc., R. Co.*, 9 Pa. Co. Ct. 517.

But in an Action by a Principal Against His Agent the fact that the examination of the transactions may incidentally disclose whether or not there is a cause of action does not affect the plaintiff's right to an inspection of the books to see whether the agent has obeyed instructions. *Talbot v. Doran, etc., Co.*, 16 Daly (N. Y.) 174, 18 Civ. Pro. (N. Y.) 304.

Order Not Denied on Ground that Party May Discover New Cause of Action. — *Palmer v. United Press*, 67 N. Y. App. Div. 64.

6. To Discover Defense. — *Scott v. Walker*, 2 El. & Bl. 555, 75 E. C. L. 555; *Birmingham, etc., R. Co. v. White*, 1 Q. B. 282, 41 E. C. L. 541; *Mott v. Consumers' Ice Co.*, (C. Pl.) 52 How. Pr. (N. Y.) 148; *Herbert v. Spring*, 1 N. Y. L. Bul. 21; *Pennsylvania Co. v. Philadelphia, etc., R. Co.*, 9 Pa. Co. Ct. 517; *Rice v. West*, 7 Pa. Dist. 764. See also *Lathrop v. Brown*, (Supm. Ct.) 5 Civ. Pro. (N. Y.) 101; *Schepmoes v. Bousson*, (C. Pl. Spec. T.) 1 Abb. N. Cas. (N. Y.) 481.

7. To Anticipate Defense. — *Shadwell v. Shadwell*, 6 C. B. N. S. 679, 95 E. C. L. 679; *Cutter v. Pool*, (C. Pl. Spec. T.) 54 How. Pr. (N. Y.) 311; *McInnes v. Gardiner*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 124; *Broad St. Nat. Bank v. Sinclair*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 88; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Bloom v. Patten*, 58 N. Y. Super. Ct. 225; *James v. Cox*, (N. Y. City Ct. Gen. T.) 3 How. Pr. N. S. (N. Y.) 36; *Douglas v. Delano*, 20 N. Y. Wkly. Dig. 85; *Strong v. Strong*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 233. *Compare Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Powers v. Elmendorf*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 60.

A production will not be ordered to enable a party to ascertain whether he has one or the other of two causes of action. *Green v. Carey*,

or to gratify curiosity.¹

b. WHERE PARTY HAS OTHER MEANS OF SECURING EVIDENCE. — Where the rights of the applicant will be sufficiently protected by the production of documents in another manner, as by subpoena *duces tecum*,² or where the facts can be secured by examination of the party,³ or by other competent or available testimony,⁴ or by a discovery,⁵ or where it appears that he has means of access to the documents sought,⁶ the court will not grant the application. But where the production of the books on trial by a subpoena *duces tecum* will not avail the party, the court will not refuse to order the production.⁷

c. DOCUMENTS RELATING TO ADVERSARY'S TITLE. — The order for production and inspection will not be granted where the documents which are sought relate solely to the title of the adversary and have no bearing upon the applicant's title.⁸ The order will not be denied, however, on the ground that it contains evidence of the title of the party moved against where it also contains evidence which the applicant intends, or is entitled, to use in support of his case.⁹

d. PUBLIC DOCUMENTS. — Where the document sought is a public record open to the inspection of both parties and a copy of it may be obtained by either or both parties upon the payment of the necessary fees, the adverse party will not be compelled to produce it.¹⁰ The production of a copy of an

81 Hun (N. Y.) 496; *Ryder v. Bateman*, 93 Fed. Rep. 31.

1. **To Gratify Curiosity.** — *Victor G. Bloede Co. v. Joseph Bancroft, etc., Co.*, 98 Fed. Rep. 175; *People v. Walker*, 9 Mich. 328; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 563.

2. **Subpoena Duces Tecum.** — *Clarke v. Eastern Bldg., etc., Assoc.*, 89 Fed. Rep. 779; *Cummer v. Judge*, 38 Mich. 351; *Low v. Graydon*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 443; *Woods v. De Figaniere*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *Dalzell v. Fahys Watch Case Co.*, (N. Y. Super. Ct. Gen. T.) 5 Misc. (N. Y.) 493; *New England Iron Co. v. New York Loan, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Perls v. Metropolitan L. Ins. Co.*, 16 Daly (N. Y.) 255; *Meakings v. Cromwell*, 1 Sandf. (N. Y.) 698. *Compare* *Lefferts v. Brampton*, (C. Pl. Gen. T.) 24 How. Pr. (N. Y.) 257.

Under some statutes the applicant is entitled to production upon a proper showing, even though the documents could be secured by subpoena. *Rigdon v. Conley*, 31 Ill. App. 630; *Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 743.

3. **Examination of Party.** — *New England Iron Co. v. New York Loan, etc., Co.*, (N. Y. Super. Ct. Spec. T.) 55 How. Pr. (N. Y.) 351; *Commercial Bank v. Dunham*, (Supm. Ct.) 13 How. Pr. (N. Y.) 541; *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 132; *Dreyfus v. Bernhard*, (Supm. Ct. App. Div.) 55 N. Y. Supp. 6. See also *Clarke v. Eastern Bldg., etc., Assoc.*, 89 Fed. Rep. 779.

4. **Other Testimony.** — *Pegram v. Carson*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 340; *Gelston v. Hoyt*, 1 Johns. Ch. (N. Y.) 546; *Woods v. De Figaniere*, (N. Y. Super. Ct. Gen. T.) 25 How. Pr. (N. Y.) 522; *McAllister v. Pond*, (N. Y. Super. Ct. Spec. T.) 15 How. Pr. (N. Y.) 299; *Van Zandt v. Cobb*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 544; *Commercial Bank v. Dunham*, (Supm. Ct.) 13 How. Pr. (N. Y.) 541; *Stalker v. Gaunt*, 12 N. Y. Leg. Obs. 132. See

also *Hill v. Cawthon*, 15 Ark. 29; *Campbell v. Hoge*, 2 Hun (N. Y.) 308; *Keilty v. Traynor*, 31 N. Y. App. Div. 115.

That Person in Foreign State Holding Duplicate Original of Document Can Be Examined by Commission, Not Ground for Refusing Order. — *National Oleo Meter Co. v. Jackson*, 54 N. Y. Super. Ct. 444.

5. **Discovery.** — *Guyot v. Hilton*, 32 Fed. Rep. 743.

6. **Other Means of Access.** — *Charlick v. Flushing R. Co.*, (Supm. Ct. Spec. T.) 10 Abb. Pr. (N. Y.) 130; *Walmsley v. Nelson*, (Supm. Ct.) 3 Abb. N. Cas. (N. Y.) 127; *McAllister v. Pond*, (N. Y. Super. Ct. Spec. T.) 15 How. Pr. (N. Y.) 299; *Meakings v. Cromwell*, 1 Sandf. (N. Y.) 698.

No Production Where Ordinary Notice to Produce Will Suffice. — *M'Keon v. Lane*, 2 Hall (N. Y.) 520.

7. **Where Subpoena Not Available.** — *Lord v. Spielman*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 48.

8. **Title of Adversary.** — *Pickering v. Noyes*, 1 B. & C. 262, 8 E. C. L. 112; *Micklethwait v. Moore*, 3 Meriv. 292; *Stovel v. Coles*, 4 Ch. Chamb. (Ont.) 9; *Davis v. Davis*, 47 Ga. 81; *Thompson v. Engle*, 4 N. J. Eq. 271; *Shoe, etc., Reporter Assoc. v. Bailey*, 49 N. Y. Super. Ct. 385; *Meakings v. Cromwell*, 1 Sandf. (N. Y.) 698; *Sanger v. Seymour*, 42 Hun (N. Y.) 641; *Andrews v. Townshend*, (N. Y. Super. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 76. But see *Seligman v. Real Estate Trust Co.*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 210; *Powers v. Elmendorf*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 60.

9. *Combe v. London*, 1 Y. & C. Ch. 631; *Diamond Match Co. v. Hawkesbury Lumber Co.*, 1 Ont. L. Rep. 577; *Shoe, etc., Reporter Assoc. v. Bailey*, 49 N. Y. Super. Ct. 385.

10. **Public Documents.** — *Wood v. Morewood*, 3 Scott N. R. 197, 5 Jur. 389; *Spielman v. Flynn*, 19 Neb. 342; *Meakings v. Cromwell*, 1 Sandf. (N. Y.) 698. See also *Hammerslough v. Hackett*, 30 Kan. 64.

order of court has been compelled, however, where the adverse party held the copy and the original was not readily accessible to the applicant.¹

e. LACHES. — An unreasonable delay in making an application for the production of the documents is sufficient ground for denying the application;² but where, in spite of the delay, there is still a reasonable time in which the books may be produced,³ or where it is caused by the act of the party of whom production is sought,⁴ there is not such laches as to cause a denial of the order.

f. INCONVENIENCE. — The mere fact that producing and depositing the books for inspection will subject the party required to do so to great annoyance and inconvenience is not alone sufficient ground for refusing the order.⁵ But it has been held that where the production of the books would be attended with great inconvenience and copies of the pertinent matters will serve the purposes of the applicant, the production of such copies instead of the original will be allowed.⁶ Thus, a foreign corporation will not be compelled to produce books in use in its office in a foreign state, but will be allowed to produce sworn copies of the contents of the books relating to the subject-matter mentioned in the order.⁷ So, too, where it is evident that there is no absolute right on the part of the applicant to have an inspection, and that such an inspection would be a great hardship as to the person moved against if the applicant's case should fail, an order will not be granted unless it is absolutely necessary.⁸

g. INCRIMINATING DOCUMENTS. — The right of a person to refuse to produce documents which will incriminate him or render him liable to penalties or forfeitures will be treated elsewhere.⁹

h. PRIVILEGED COMMUNICATIONS. — The freedom from production of certain classes of documents is fully treated elsewhere in this work.¹⁰

10. Inspection. — The court will not remove the document from the possession of the party moved against and deliver it to the applicant,¹¹ nor will it order the document to be impounded in the hands of an officer of the court,¹² except where forgery is alleged, in which case it may be held for the purposes of a criminal prosecution.¹³ The inspection must be had while the document is in the hands of the party or his attorney.¹⁴ Where the place designated in the application is not proper or suitable, the court will desig-

Production of Public Document Unlawfully Detained Compelled. — *People v. Vail*, 2 Cow. (N. Y.) 623.

1. *Lovell v. Clarke*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 158.

2. *Laches.* — *Schmidt v. Kiser*, 75 Iowa 457; *Sheldon v. Mickel*, 40 Iowa 19; *Allison v. Vaughan*, 40 Iowa 421; *Moran v. Vreeland*, 29 N. Y. App. Div. 243; *Walmsley v. Nelson*, (Supm. Ct.) 3 Abb. N. Cas. (N. Y.) 127; *Hooker v. Matthews*, (Supm. Ct.) 3 How. Pr. (N. Y.) 329; *Jackson v. Ives*, 22 Wend. (N. Y.) 637.

3. **Where Reasonable Time Allowed.** — *Bensinger v. Erhardt*, 60 N. Y. App. Div. 303.

4. **Delay Not Caused by Applicant.** — *Fleischmann v. Fleischmann*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 216.

5. **Inconvenience.** — *Martine v. Albro*, 26 Hun (N. Y.) 559; *Stone v. Mansfield*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 560; *Umfreville v. Manhattan R. Co.*, 46 N. Y. App. Div. 594; *Beeber v. Parker*, 17 W. N. C. (Pa.) 399; *Thompson v. Taylor*, 9 W. N. C. (Fa.) 169; *Hamelyn v. Whyte*, 6 Ont. Pr. 143; *Ferguson v. Provincial Provident Inst.*, 15 Ont. Pr. 366.

6. **Copies.** — *Neafie v. Miller*, 37 Fla. 173; *Merchants' Bank v. Pierson*, 8 Ont. Pr. 123. See also *Comstock v. Harris*, 12 Ont. Pr. 17.

7. *Erwin v. Oregon R., etc., Co.*, 22 Hun (N. Y.) 566.

8. *Ward v. New York L. Ins. Co.*, 78 Hun (N. Y.) 363.

9. See the title **WITNESSES**. See also the title **PENALTIES AND PENAL ACTIONS**, 16 ENCYC. OF PL. AND PR. p. 292 *et seq.*

10. See the title **PRIVILEGED COMMUNICATIONS**, *ante*, p. 47 *et seq.*

11. **Inspection.** — *Thomas v. Dunn*, 6 M. & G. 274, 46 E. C. L. 274; *Rogers v. Turner*, 21 L. J. Exch. 8; *Hilyard v. Harrison Tp.*, 37 N. J. L. 173; *Fox v. Brega*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 908; *Ely v. Mowry*, 12 R. I. 570.

12. *Thomas v. Dunn*, 6 M. & G. 274, 46 E. C. L. 274; *Free Grammar School v. Maddock*, 7 Price 655; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375; *Ely v. Mowry*, 12 R. I. 570. Compare *Sidden v. Liddiard*, 1 Sim. 388; *Darling v. Darling*, 10 Ont. Pr. 1.

13. *Walker v. Corke*, 3 Y. & C. Exch. 277; *Woolmer v. Devereux*, 2 M. & G. 758, 40 E. C. L. 612.

14. *Grane v. Cooper*, 4 Myl. & C. 263; *Mertens v. Haigh*, 3 De G. J. & S. 528; *Skey v. Bennett*, 6 Jur. 981; *Johnson v. Consolidated Silver Min. Co.*, (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 413; *Fox v. Brega*, (Supm.

nate another place where the examination sought can be had.¹ Inspection must be made at reasonable times,² and cannot be made by all persons generally.³ The court will not, however, limit the number of assistants to be employed by the applicant in making the inspection, though it will protect the party producing against an abuse of the privilege granted.⁴ Where the aid of an expert is necessary to render the inspection of any service to the applicant, the court will, on due cause shown, authorize the inspection by an expert.⁵

Return of Documents After Inspection. — Where the object of the order has been accomplished the documents will be delivered to the custody of the party producing them.⁶

11. Sealing Up Books. — Where books are produced for inspection it is the uniform practice of the court to permit the person so producing them to seal up those parts which do not relate to the subject of litigation.⁷ If the applicant breaks open and examines the portion so sealed up he renders himself liable as for a contempt.⁸ If the adverse party can show any fair grounds for supposing that any part which is material has been, whether designedly or not, sealed up, the court may order such part to be opened.⁹ The affidavit of the party moved against that the parts so sealed do not relate to the matters in the litigation is sufficient ground for authorizing him to seal them up.¹⁰

12. Production for New Trial. — The court may compel the production on a new trial of a paper produced on notice and improperly removed from the custody of the clerk after the first trial,¹¹ or of a paper which had been produced voluntarily at the first trial and was afterwards removed from the papers of the case.¹² But where the producing party takes back the paper without its having come into the custody of the court, the court cannot compel him to produce it for the new trial.¹³

13. Production in Connection with Examination of Witness Before Trial. — In *New York* provision is made for the production of the books and papers of the corporation in connection with the examination of an officer of the corporation before trial.¹⁴ The object of this provision is that if a reference to the books becomes necessary during the examination, either to corroborate or contradict a witness, or to make the proof preliminary to the introduction of the books in evidence upon the trial, this proof may be made and the books may be referred to for that purpose. The order is not one for the discovery

Ct. Gen. T.) 5 N. Y. Supp. 908; *Ely v. Mowry*, 12 R. I. 570.

1. *Howlett v. Hall*, 55 N. Y. App. Div. 614.

2. *Stevens v. Blake*, 5 Kan. App. 124; *Johnson v. Consolidated Silver Min. Co.*, (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 413.

3. *Stevens v. Blake*, 5 Kan. App. 124; *Hilyard v. Harrison Tp.*, 37 N. J. L. 170.

4. *Vieller v. Oppenheim*, (Supm. Ct. Gen. T.) 31 Abb. N. Cas. (N. Y.) 181. See also *Rigdon v. Conley*, 31 Ill. App. 630.

5. *Swansea Vale R. Co. v. Budd*, L. R. 2 Eq. 274; *Matter of Isidor*, (C. Pl. Gen. T.) 59 How. Pr. (N. Y.) 98; *Livingston v. Curtis*, (Supm. Ct. Gen. T.) 54 How. Pr. (N. Y.) 370.

Impounding Documents Where Alterations Are Feared. — *Mertens v. Haigh*, 3 De G. J. & S. 528; *Beckford v. Wildman*, 16 Ves. Jr. 438.

6. Return After Inspection. — *Darling v. Darling*, 10 Ont. Pr. 1; *Small v. Attwood*, 1 Y. & C. Exch. 37; *Jones v. Thomas*, 2 Y. & C. Exch. 312.

7. Sealing Books. — *Few v. Guppy*, 13 Beav. 457; *Forshaw v. Lewis*, 10 Exch. 712, 1 Jur.

N. S. 263; *Graham v. Sutton*, (1897) 1 Ch. 761, 66 L. J. Ch. 320; *Ord v. Fawcett*, 14 Jur. 456; *Jones v. Andrews*, 58 L. T. N. S. 601; *Sheffield Canal Co. v. Sheffield, etc., R. Co.*, 1 Phil. 484, 12 L. J. Ch. 376; *Ferguson v. Provincial Provident Inst.*, 15 Ont. Pr. 366; *Robbins v. Davis*, 1 Blatchf. (U. S.) 238; *Pyncheon v. Day*, 118 Ill. 9; *Dias v. Merle*, 2 Paige (N. Y.) 494; *Elder v. Bogardus*, 1 Edm. Sel. Cas. (N. Y.) 110; *Titus v. Cortelyou*, 1 Barb. (N. Y.) 444.

8. *Dias v. Merle*, 2 Paige (N. Y.) 494; *Titus v. Cortelyou*, 1 Barb. (N. Y.) 444.

9. *Titus v. Cortelyou* 1 Barb. (N. Y.) 444.

10. *Graham v. Sutton*, (1897) 1 Ch. 761, 66 L. J. Ch. 320; *Pyncheon v. Day*, 118 Ill. 9; *Titus v. Cortelyou*, 1 Barb. (N. Y.) 444.

11. **Production for New Trial.** — *Smith v. Morrow*, 7 T. B. Mon. (Ky.) 234.

12. *Boothe v. Feist*, (Tex. 1892) 19 S. W. Rep. 398.

13. *Smith v. Morrow*, 7 T. B. Mon. (Ky.) 234.

14. Code Civ. Pro. N. Y., § 872, subdiv. 7.

Production in Connection with Taking of Deposition under Rule. — *Borton v. Streeper*, 2 Miles (Pa.) 41.

and inspection of the books, but is intended to be, and can only be, ancillary to the examination of the witness.¹ To excuse an officer for noncompliance with the order he must give affirmative proof of his inability to produce the books and show his good faith in the matter.²

14. Taking Copies. — Generally an order for production and inspection carries with it the right to take copies of the documents ordered produced.³

15. Modifying or Vacating Order. — That there may possibly be an abuse of the privilege granted is not sufficient ground for modifying the order, but relief can be sought only when the abuse actually exists.⁴ Where, however, the order may be construed as authorizing an illegal act it will be so modified as to obviate such a construction.⁵ If the order is too broad and includes documents other than those which the applicant is entitled to inspect, it will be modified so as properly to limit the inspection.⁶ The order will be vacated where it is granted without jurisdiction, or where a sufficient showing for the granting of the order was not made,⁷ or where a sufficient inspection is voluntarily offered;⁸ also where the evidence on account of which the inspection is sought is in the nature of hearsay and cannot be used.⁹ A satisfactory showing by the party moved against that the documents sought are not in his possession or under his control is sufficient ground for vacating the order.¹⁰

16. Effect of Noncompliance with Order — *a. IN GENERAL.* — In the several jurisdictions in which provision is made by statute for the production and inspection of documents, provision is also made for the effect of noncompliance therewith.¹¹ It is generally provided that in case of a failure to obey the order to produce, the court shall give judgment by default where the failure is that of the defendant, or a nonsuit if the plaintiff refuses.¹² The remedy provided by statute for the failure to comply with the order of the court is exclusive.¹³

b. ORDER OF COURT PREREQUISITE. — In some jurisdictions, before the penalty provided by statute for failure to produce can be imposed there must be an order of court, based on notice, requiring the party notified to produce the papers and a failure or refusal on his part to comply therewith.¹⁴

1. *Press Pub. Co. v. Associated Press*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 90; *Duffy v. Consolidated Gas Co.*, 59 N. Y. App. Div. 580; *Press Pub. Co. v. Star Co.*, 33 N. Y. App. Div. 242; *Rosenbaum v. Rice*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 410. See also the title EXAMINATION BEFORE TRIAL, 8 ENCYC. OF PL. AND PR. 57.

2. *Press Pub. Co. v. Associated Press*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 90.

3. *Pratt v. Pratt*, 51 L. J. Ch. 838; *Hyde v. Holmes*, 2 Molloy 372; *Coleman v. West Harlepool Harbour Co.*, 5 L. T. 467. See also *Stow v. Betts*, 7 Wend. (N. Y.) 536; *Exchange Bank v. Monteath*, (Supm. Ct.) 4 How. Pr. (N. Y.) 280.

Applicant Allowed to Photograph Documents. — *Lewis v. Londesborough*, (1893) 2 Q. B. 191; *Holmes v. Cornell*, 7 N. Y. Wkly. Dig. 375; *Cornell v. Woolsey*, 7 N. Y. Wkly. Dig. 555. *Compare Ely v. Mowry*, 12 R. I. 570.

4. **Modifying Order.** — *Veiller v. Oppenheim*, 75 Hun (N. Y.) 21.

5. *Krooks v. Wise*, (Supm. Ct. Spec. T.) 31 Abb. N. Cas. (N. Y.) 46.

6. *Allen v. Allen*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 535; *Clyde v. Rogers*, 24 Hun (N. Y.) 145.

7. **Vacating Order.** — *Cummer v. Judge*, 38 Mich. 351; *Moore v. McIntosh*, 18 Wend. (N. Y.) 529.

8. *Phillips v. Germania Mills*, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 381.

9. *Powell v. Northern Pac. R. Co.*, 46 Minn. 249.

10. *Ahoyke v. Wolcott*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 41; *Watts v. Knevals*, 56 N. Y. Super. Ct. 592.

Mandamus to Vacate Order. — *Cummer v. Judge*, 38 Mich. 351.

11. **Failure to Produce.** — See the statutes of the several states. See also the title DISCOVERY, 6 ENCYC. OF PL. AND PR. 812 *et seq.*

12. *Victor G. Bloede Co. v. Bancroft, etc.*, Co., 110 Fed. Rep. 76; *Wills v. Kane*, 2 Grant Cas. (Pa.) 47; *Wright v. Crane*, 13 S. & R. (Pa.) 447.

Court May Strike Out Plea. — *Gould v. McCarty*, 11 N. Y. 575; *Brown v. Georgi*, (N. Y. City Ct. Gen. T.) 56 N. Y. Supp. 851.

Facts Taken as Confessed by Defendant. — *Mills v. Fellows*, 30 La. Ann. 824.

13. **Remedy Exclusive.** — *Victor G. Bloede Co. v. Bancroft, etc.*, Co., 110 Fed. Rep. 76; *Birdsall v. Pixley*, 4 Wend. (N. Y.) 196. *Compare Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 726.

14. **When Necessary.** — *Bull v. Edward Thompson Co.*, 99 Ga. 134; *Georgia Iron, etc., Co. v. Etowah Iron Co.*, 104 Ga. 395; *Marshall v. McNeal*, 114 Ga. 622; *Stiger v. Monroe*, 97 Ga. 479; *Parish v. Weed Sewing Mach. Co.*, 79 Ga. 682;

Under the Federal Statute, before a party to an action at law may be held to be in default for failure to produce documents in his possession there must have been an order of the court,¹ made after a motion therefor, of which notice has been given,² so that before he shall be compelled to produce under the penalty of the statute there may first be a judgment of the court upon the question whether or not the evidence so sought is pertinent to the issues and should be produced.³

c. FAILURE TO COMPLY AS CONTEMPT. — In some jurisdictions one disobeying an order of court for the production of documents is subject to commitment for contempt.⁴ It cannot be urged against committal for refusing to produce that the officer before whom the books were to be produced had no authority to take the evidence. Nor is it any excuse that one did not have the books when he was ordered committed for refusal to produce if he did have them when the motion to produce was made.⁵

d. EXCUSING NONCOMPLIANCE. — To relieve a party failing to produce in accordance with the order from the penalty provided therefor, it is his duty to satisfy the court of his inability to comply with the order.⁶ While this may be done by his agent, it is preferable that the party himself should appear and excuse the nonproduction.⁷

A Failure to Respond Personally does not, however, authorize a judgment against him where it appears affirmatively that the document sought is lost.⁸

Sufficiency of Excuse. — The sufficiency of an excuse for the nonproduction of a document, where a party has been required to produce, is addressed to the discretion of the court in which the requisition is made.⁹

Where the Applicant's Interference Prevents the production of the documents sought, their nonproduction will be excused.¹⁰

III. POWER OF LEGISLATURE TO COMPEL PRODUCTION. — As a general rule Congress has no power to compel a citizen to produce his private books and papers before it for its inspection,¹¹ nor can it confer this power on a special commission created for the purposes of investigating a specific matter over which it has no peculiar jurisdiction.¹² nor has it even the authority to permit the power vested in the federal courts, of compelling the attendance of witnesses and the production of their papers, to be invoked in aid of an

Graham v. Hamilton, 3 Ired. L. (25 N. Car.) 381; *Wright v. Crane*, 13 S. & R. (Pa.) 447; *McDermott v. U. S. Insurance Co.*, 1 S. & R. (Pa.) 357; *Smith v. Mac Kay*, 4 Ter. L. R. 202.

Order Must Allow Reasonable Time for Production. — *Georgia Iron, etc., Co. v. Etowah Iron Co.*, 104 Ga. 395.

Where the Notice Is Vague and Indefinite in Part the order must specify the portion to which it refers. *Georgia Iron, etc., Co. v. Etowah Iron Co.*, 104 Ga. 395.

1. Order of Court Requisite. — *Owyhee Land, etc., Co. v. Tautphaus*, (C. C. A.) 109 Fed. Rep. 547; *Macomber v. Clarke*, 3 Cranch (C. C.) 347; *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342.

2. Notice. — *Thompson v. Selden*, 20 How. (U. S.) 194; *Macomber v. Clarke*, 3 Cranch (C. C.) 347; *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342.

Motion Must Be Made in Reasonable Time. — *U. S. Bank v. Kurtz*, 2 Cranch (C. C.) 342.

3. Owyhee Land, etc., Co. v. Tautphaus, (C. C. A.) 109 Fed. Rep. 547.

4. Attachment for Contempt. — *Tredway v. Van Wagenen*, 91 Iowa 556; *Arbuckle v. Woolson Spice Co.*, 11 Ohio Cir. Dec. 726; *Smith v. Mac Kay*, 4 Ter. L. R. 202; *Ross v. Robertson*,

2 Ch. Chamb. (Ont.) 66; *Paterson v. Bowes*, 4 Grant Ch. (U. C.) 44.

5. Tredway v. Van Wagenen, 91 Iowa 556.

Attachment Against Third Party for Failure to File Public Document in Compliance with Order. — *People v. Vail*, 1 Cow. (N. Y.) 589.

No Attachment for Contempt under South Carolina Statute. — *Jenkins v. Bennett*, 40 S. Car. 393.

6. Excusing Nonproduction. — *Tuttle v. Mechanics, etc., Loan Co.*, 6 Whart. (Pa.) 216; *Wright v. Crane*, 13 S. & R. (Pa.) 447; *Coleman v. Spencer*, 1 Phila. (Pa.) 271, 8 Leg. Int. (Pa.) 239. See also *Wills v. Kane*, 2 Grant Cas. (Pa.) 47.

Substantial Compliance with Order Sufficient. — *Chaffe v. Mackenzie*, 43 La. Ann. 1062.

7. Appearance by Agent. — *Silliman v. Molloy*, 4 Phila. (Pa.) 44, 17 Leg. Int. (Pa.) 117.

8. Sutherlin v. Underwriters' Agency, 53 Ga. 442.

9. Herndon v. Givens, 16 Ala. 261.

10. Seldner v. Smith, 40 Md. 602.

11. Production Before Legislative Body. — *Matter of Pacific R. Commission*, 32 Fed. Rep. 241. See also *Kilbourn v. Thompson*, 103 U. S. 168.

12. Matter of Pacific R. Commission, 32 Fed. Rep. 241.

executive examination pending in an executive department.¹ But it would seem that where there is a judicial investigation before a legislative body which is peculiarly within the jurisdiction of that body it has the power to compel the production of documents containing necessary and material evidence.²

PRODUCTIVE REAL ESTATE. — See note 3.

PROFANITY. — See the title **BLASPHEMY AND PROFANITY**, vol. 4, p. 580.

PROFERT. — In common-law pleading, where a party to an action relied in his pleading on a deed under seal to which he was party or privy, the deed had to be shown forth or produced in court, hence the party in his pleading alleged that he brought the deed into court, although it was not actually done. This was called *profert in curia*, and entitled the opposite party to oyer of the deed.⁴

PROFESSING. — See note 5.

PROFESSION — PROFESSIONAL. (See also **BUSINESS**, vol. 5, p. 71; **OCCUPATION**, vol. 21, p. 769; and the title **OCCUPATION, BUSINESS, AND PRIVILEGE TAXES**, vol. 21, p. 770.) — A profession is a vocation in which a professed knowledge of some department of science or learning is used by its practical application to the affairs of others, either in advising, guiding, or teaching them, or in serving their interests or welfare in the practice of an art founded on it. Formerly theology, law, and medicine were specifically known as "the professions;" but as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge, as distinguished from mere skill; a practical dealing with affairs, as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for one's own purposes.⁶

PROFESSIONAL EXPERT WITNESS. — See the title **EXPERT AND OPINION EVIDENCE**, vol. 12, p. 414.

1. *In re McLean*, 37 Fed. Rep. 648.

2. *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676. See also *Kilbourn v. Thompson*, 103 U. S. 168.

3. **Productive Real Estate.** — In *Holcomb v. Coryell*, 11 N. J. Eq. 476, it was held, where a will authorized the executors to invest in *productive real estate*, that a vacant lot which was good for nothing but for the use of its soil in making bricks was not within the meaning of that term.

4. **Profert.** — See *Germain v. Wilgus*, (C. C. A.) 67 Fed. Rep. 599, in which case it was held that the word *profert* did not imply that the instrument pleaded was annexed to the pleadings or produced in court. See also *Post v. T. C. Richards Hardware Co.*, 26 Fed. Rep. 618; *American Bell Tel. Co. v. Southern Tel. Co.*, 34 Fed. Rep. 803; *Bogart v. Hinds*, 25 Fed. Rep. 484; and the title **PROFERT AND OYER**, 16 ENCYC. OF PL. AND PR. 1082.

5. **Professing to Foretell Future Events.** — See **FORTUNE TELLER**, vol. 13, p. 1163.

6. **Profession.** — Cent. Dict., followed in U. S. v. Laws, 163 U. S. 266. See also *State v. Hunt*, 129 N. Car. 689, per Douglas, J., quoting Webster's Dict.

Calling. — In *Thompson v. Bertrand*, 23 Ark. 733, it was said: "The objection to the testimony of Scull cannot be sustained. Saying that one is a physician by *profession* is equivalent to saying that he is a physician by prac-

tice. In the sense in which the witness used the word *profession*, it means a calling, an employment, and this is one of the legitimate meanings of the word."

Calling — Business — Profession. — See **BUSINESS**, vol. 5, p. 72.

Chemist. — In construing the United States contract-labor law in *U. S. v. Laws*, 163 U. S. 266, the court said: "The chemist who places his knowledge acquired from a study of the science to the use of others as he may be employed by them, and as a vocation for the purpose of his own maintenance, must certainly be regarded as one engaged in the practice of a *profession* which is generally recognized in this country."

Clergyman. — In *Miller v. Kirkpatrick*, 29 Pa. St. 229, it was said: "The term *profession* designates the calling of a minister of the gospel with sufficient precision."

Lawyer. — In *Lanier v. Macon*, 59 Ga. 187, it was held that the word *profession*, in a power to lay taxes, is to be understood as including lawyers, unless the contrary plainly appears.

Public Officers. — The word *profession* is not, in its commonly accepted signification, appropriate to describe the occupancy of a public office. *Schuchardt v. People*, 99 Ill. 505.

Professional Employment. — See **EMPLOY — EMPLOYEE — EMPLOYMENT**, vol. 11, p. 4.

Professional Artist. — See **ARTIST**, vol. 2, p. 949.

PROFIT À PRENDRE.

BY THOMAS JOHNSON MICHIE.

- I. DEFINITION, 186.
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CROSS-REFERENCES.

See the titles *EASEMENTS*, vol. 10, p. 397; *FISH AND FISHERIES*, vol. 13, p. 554; *LICENSE (REAL PROPERTY)*, vol. 18, p. 1127; *STATUTE OF FRAUDS; USAGES AND CUSTOMS*. And see *COMMON*, vol. 6, p. 231; *INCORPOREAL*, vol. 16, p. 155.

I. DEFINITION. — The right to profits, denominated *profit à prendre*, consists of a right to take a part of the soil or produce of the land in which there is a supposable value.¹ Thus, the right of hunting, fishing, or shooting on the land of another, accompanied by the right to keep part or all of the game killed or fish taken;² the right to take gravel, stones, sand, or part of the soil of another's land;³ the right to take seaweed from another's land,⁴ and the right to take wood or timber from the land of another⁵ are *profits à prendre*. And it has been held that the right of landing and depositing lumber, merchandise, or other goods on another's ground is a *profit à prendre*.⁶

1. Definition. — *Pierce v. Keator*, 70 N. Y. 421. To the same effect are *Sutherland v. Heathcote*, (1892) 1 Ch. 484; *Ladd v. Smith*, 107 Ala. 517; *Bingham v. Salene*, 15 Oregon 212.

Profits à Prendre Are Incorporeal Hereditaments. — *Chetham v. Williamson*, 4 East 469. And see *HEREDITAMENTS*, vol. 15, p. 337.

2. Hunting and Fishing. — *Ewart v. Graham*, 7 H. L. Cas. 331; *Greathead v. Morley*, 3 M. & G. 139, 42 E. C. L. 80, 3 Scott N. R. 538; *Tilbury v. Silva*, 45 Ch. D. 98; *Pickering v. Noyes*, 4 B. & C. 639, 10 E. C. L. 429; *Peers v. Lucy*, 4 Mod. 355; *Turner v. Selectmen*, 61 Conn. 175; *Waters v. Lilley*, 4 Pick. (Mass.) 145; *Cobb v. Davenport*, 33 N. J. L. 223, 97 Am. Dec. 718; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21, 100 Am. Dec. 597. See also the titles *EASEMENTS*, vol. 10, p. 401; *FISH AND FISHERIES*, vol. 13, p. 583.

In *Webber v. Lee*, 9 Q. B. D. 315, it was held that a grant of a right to shoot over land and to take away part of the game killed was a grant of an interest in the land, within the statute of frauds. See also the title *STATUTE OF FRAUDS*.

In *Bingham v. Salene*, 15 Oregon 208, 3 Am. St. Rep. 152, it was held that a grant of "the sole and exclusive right, privilege, and easement to shoot, take, and kill" wild fowl on the "lakes and sloughs and waters" of the grantor, executed to the grantees, "their heirs and assigns forever," with a privilege of "in-

gress and egress to and from said lakes, waters, and sloughs for the purpose of shooting and taking wild fowl as aforesaid," was a grant of a *profit à prendre*, and not a mere license revocable at pleasure.

3. Stones, Gravel, etc. — *Blewett v. Tregonning*, 3 Ad. & El. 554, 30 E. C. L. 151; *Constable v. Nicholson*, 14 C. B. N. S. 230, 108 E. C. L. 230; *Merwin v. Wheeler*, 41 Conn. 25; *Perley v. Langley*, 7 N. H. 233; *Texas, etc., R. Co. v. Durrett*, 57 Tex. 52.

4. Seaweed. — *Hill v. Lord*, 48 Me. 83; *Nudd v. Hobbs*, 17 N. H. 527. And see the title *SEAWEED*.

5. Wood and Timber. — *Barrington's Case*, 8 Coke 136b; *Liford's Case*, 11 Coke 46b; *Bailey v. Stephens*, 12 C. B. N. S. 109, 104 E. C. L. 109; *Ladd v. Smith*, 107 Ala. 506; *Texas, etc., R. Co. v. Durrett*, 57 Tex. 52.

In *Morse v. Marshall*, 97 Mass. 519, it was held that in an action of tort for cutting and carrying away wood from the plaintiff's close, an allegation in the answer that the defendant "had a legal right to do all that he has done upon any part of the premises," following an allegation of soil and freehold of the defendant in a part of the close, and a denial that he entered any other part, was not a sufficient allegation of any right of the defendant in the close by way either of easement or of *profit à prendre*.

6. Landing. — *Littlefield v. Maxwell*, 31 Me. 134, 50 Am. Dec. 653; *State v. Wilson*, 42 Me.

For other examples of *profits à prendre* see the note below.¹

Mining. — The grant of an exclusive right to all the coal or minerals in a certain lot of land is a corporeal grant — a part of the land itself. But a grant of a right to dig coal in such a lot and carry it away is an incorporeal hereditament — a right of *profit à prendre*, which does not interfere with the right of the owner of the land to mine in the same lot.²

Water. — The right to take water from another's land has, in a number of cases, been held to be a *profit à prendre*.³ But in other cases the right has been held to be an easement, and not a *profit à prendre*.⁴

II. DISTINGUISHED FROM EASEMENT. — *Profits à prendre* differ from easements in that the former are rights of profit, and the latter are mere rights of convenience without profit.⁵ But the principal distinction is between easements and *profits à prendre* in gross, the latter being held independently of any dominant estate,⁶ whereas for the existence of an easement two estates,

28; *Green v. Chelsea*, 24 Pick. (Mass.) 71; *Post v. Pearsall*, 22 Wend. (N. Y.) 433.

1. **Examples.** — "*A Claim to Enter Another Man's Land and Dig a Hole there can hardly be called a profit à prendre.*" *Peter v. Daniel*, 5 C. B. 576, 57 E. C. L. 576, *per* Maule, J.

A Right to Take Apples Out of the Orchard of Another is a profit à prendre. *Taylor v. Millard*, 118 N. Y. 251.

A Right to Maintain a Boom or Booms on Certain Flats between the high-water and low-water marks of a river has been held to be a profit à prendre. *Engel v. Ayer*, 85 Me. 448.

The Right to Take Ice from the stream of another is a profit à prendre. *Hinckel v. Stevens*, 35 N. Y. App. Div. 8. See also *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224; and see the title ICE, vol. 15, p. 909.

Grant of Railroad Right of Way — Reservation of Right to Cultivate Surplus Ground. — *Pierce v. Keator*, 70 N. Y. 419.

Right of Pasturage Profit à Prendre. — *Welcome v. Upton*, 6 M. & W. 536. See also *Foxall v. Venables*, Cro. Eliz. 180; *Fowler v. Dale*, Cro. Eliz. 363.

2. **Mining.** — *Manning v. Wasdale*, 5 Ad. & El. 763, 31 E. C. L. 436; *Doe v. Wood*, 2 B. & Ald. 724; *Muskett v. Hill*, 5 Bing. N. Cas. 695, 35 E. C. L. 273; *Palmer's Case*, 5 Coke 25; *Chetham v. Williamson*, 4 East 469; *Wilkinson v. Proud*, 11 M. & W. 33; *Rogers v. Brenton*, 10 Q. B. 26, 59 E. C. L. 26; *Sutherland v. Heathcote*, (1892) 1 Ch. 483; *Black v. Elkhorn Min. Co.*, 49 Fed. Rep. 551; *Hughes v. Devlin*, 23 Cal. 506; *Caldwell v. Fulton*, 31 Pa. St. 475, 72 Am. Dec. 760; *Johnstown Iron Co. v. Cambria Iron Co.*, 32 Pa. St. 241, 72 Am. Dec. 783; *Clark v. Way*, 11 Rich. L. (S. Car.) 621; *State v. South Penn Oil Co.*, 42 W. Va. 80. See also the title EASEMENTS, vol. 10, p. 401, note, and generally the title MINES AND MINING CLAIMS, vol. 20, p. 677.

3. **Right to Take Water Profit à Prendre.** — *Owen v. Field*, 102 Mass. 100; *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Hall v. Ionia*, 38 Mich. 493; *Columbia Water Power Co. v. Columbia Electric St. R., etc., Co.*, 43 S. Car. 154, 172 U. S. 475; *Texas, etc., R. Co. v. Durrett*, 57 Tex. 52; *Hill v. Shorey*, 42 Vt. 614; *Poull v. Mockley*, 33 Wis. 482.

4. **Right to Take Water Not Profit à Prendre.** — "The right to enter upon the close of another and take water for domestic purposes from any natural fountain, as a pond, *Manning v.*

Wasdale, 5 Ad. & El. 758, 31 E. C. L. 433; or a running spring, *Race v. Ward*, 4 El. & Bl. 702, 82 E. C. L. 702; has been held to be an easement only, sustainable by proof of custom by the inhabitants. The grounds upon which these decisions rest are that running water is not a product of the soil, whether above or below the surface, and that it does not remain for any appreciable period of time in any one place. The courts, in these cases, expressly affirm that the right to water in wells or cisterns would be an interest in the land, or a right to a *profit à prendre*." *Hill v. Lord*, 48 Me. 99.

In the following cases the right to water was held to be an easement: *Bissell v. Grant*, 35 Conn. 288; *Borst v. Empie*, 5 N. Y. 33; *Spensley v. Valentine*, 34 Wis. 154.

5. **Right of Profit and Not Right of Convenience.**

— Hall on *Profits à Prendre* 1; *Gale* on *Easements* 1; *Manning v. Wasdale*, 5 Ad. & El. 758, 31 E. C. L. 433; *Race v. Ward*, 4 El. & Bl. 702, 82 E. C. L. 702; *Blewett v. Tregonning*, 3 Ad. & El. 554, 30 E. C. L. 151; *Littlefield v. Maxwell*, 31 Me. 134, 50 Am. Dec. 653; *State v. Wilson*, 42 Me. 28; *Boatman v. Lasley*, 23 Ohio St. 614; *Huff v. McCauley*, 53 Pa. St. 206; *Cadwalader v. Bailey*, 17 R. I. 500. And see the title EASEMENTS, vol. 10, p. 399 *et seq.*

Distinction Said to Be Obscure. — *Hill v. Lord*, 48 Me. 99; *Bingham v. Salene*, 15 Oregon 212, 3 Am. St. Rep. 152.

6. **Profit à Prendre May Be Held in Gross —**

England. — *Bailey v. Stephens*, 12 C. B. N. S. 109, 104 E. C. L. 109; *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, 115 E. C. L. 687; *Welcome v. Upton*, 6 M. & W. 536; *Wilkinson v. Proud*, 11 M. & W. 33; *Rowbotham v. Wilson*, 8 El. & Bl. 142, 92 E. C. L. 142; *Barrington's Case*, 8 Coke 1366; *Liford's Case*, 11 Coke 466; *Ewart v. Graham*, 7 H. L. Cas. 331.

Connecticut. — *Turner v. Selectmen*, 61 Conn. 175.

Maine. — *Ring v. Walker*, 87 Me. 550.

Massachusetts. — *Goodrich v. Burbank*, 12 Allen (Mass.) 459.

Michigan. — *Hall v. Ionia*, 38 Mich. 493.

New York. — *Taylor v. Millard*, 118 N. Y. 251.

South Carolina. — *Columbia Water Power Co. v. Columbia Electric St. R., etc., Co.*, 43 S. Car. 154, affirmed 172 U. S. 475.

Capable of Livery. — In *Pierce v. Keator*, 70 N. Y. 421, it was said that a *profit à prendre* "is in its nature corporeal, and is capable of

the dominant and the servient, are necessary.¹

III. APPURTENANT. — The right of *profit à prendre*, if enjoyed by reason of holding a certain other estate, is regarded in the light of an easement appurtenant to such estate.²

IV. IN GROSS. — Where the right of *profit à prendre* belongs to an individual, distinct from ownership in other lands, it takes the character of an interest or estate in the land itself, rather than that of a proper easement,³ and may be held in fee, for life, or for years.⁴

Assignment and Inheritance. — *Profits à prendre* in gross are both assignable and inheritable.⁵

V. HOW ACQUIRED OR CREATED. — *Profits à prendre* are acquired by grant or prescription,⁶ and never by custom.⁷

livery, while easements are not, and may exist independently without connection with or being appendant to other property." And see the title EASEMENTS, vol. 10, p. 404.

1. Dominant Estate Necessary for Easement. — *Welcome v. Upton*, 6 M. & W. 536; *Hill v. Lord*, 48 Me. 96; *Hall v. Ionia*, 38 Mich. 498; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30; *Pierce v. Keator*, 70 N. Y. 421; *Huntington v. Asher*, 96 N. Y. 604; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Boatman v. Lasley*, 23 Ohio St. 614; *Grubb v. Grubb*, 74 Pa. St. 33. And see the title EASEMENTS, vol. 10, p. 402.

2. Easement Appurtenant to Another Estate. — *Goodrich v. Burbank*, 12 Allen (Mass.) 461; *Pierce v. Keator*, 70 N. Y. 422; *Hinckel v. Stevens*, 35 N. Y. App. Div. 7; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Huntington v. Asher*, 96 N. Y. 610; *Huff v. McCauley*, 53 Pa. St. 209. See also *Karmuller v. Krotz*, 18 Iowa 352; *Owen v. Field*, 102 Mass. 103.

"It is immaterial, however, whether we call it [the right to take iron ore from one estate appurtenant to another] an easement or a right of *profit à prendre* annexed to land. It is the same in nature, and is such a right as can be annexed to other land by express grant, and will pass as appurtenant to it." *Grubb v. Grubb*, 74 Pa. St. 33.

3. Interest or Estate in Land Itself. — *Washburn on Easements* (4th ed.) 9, 10; *Wickham v. Hawker*, 7 M. & W. 63; *Black v. Elkhorn Min. Co.*, 49 Fed. Rep. 552; *Goodrich v. Burbank*, 12 Allen (Mass.) 460; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Pierce v. Keator*, 70 N. Y. 421; *Huntington v. Asher*, 96 N. Y. 610; *Taylor v. Millard*, 118 N. Y. 251; *Hinckel v. Stevens*, 35 N. Y. App. Div. 7; *Huff v. McCauley*, 53 Pa. St. 209; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21; *McCotter v. New Shoreham*, 21 R. I. 47; *Cadwalader v. Bailey*, 17 R. I. 495.

Eminent Domain. — In *McCotter v. New Shoreham*, 21 R. I. 43, it was held that a *profit à prendre* in gross in the land of another was such an estate or interest in the land itself as to entitle the owner to be heard on the question of damages arising from taking the land for public use.

That Profits à Prendre May Be Held in Gross, see *supra*, this title, *Distinguished from Easement*.

4. May Be Held in Fee, for Life, or for Years. — *Washburn on Easements* (4th ed.) 80; *Goodrich v. Burbank*, 12 Allen (Mass.) 461; *Huff v. McCauley*, 53 Pa. St. 210; *Tinicum Fishing Co. v. Carter*, 61 Pa. St. 21.

5. Assignment and Inheritance. — *Washburn on Easements* (4th ed.) 79 *et seq.*; *Barrington's Case*, 8 Coke 136b; *Liford's Case*, 11 Coke 46b; *Bailey v. Stephens*, 12 C. B. N. S. 109, 104 E. C. L. 109; *Welcome v. Upton*, 6 M. & W. 536; *Muskett v. Hill*, 5 Bing. N. Cas. 695, 35 E. C. L. 273; *Engel v. Ayer*, 85 Me. 448; *Phillips v. Rhodes*, 7 Met. (Mass.) 324; *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Post v. Pearsall*, 22 Wend. (N. Y.) 425; *Leyman v. Abeel*, 16 Johns. (N. Y.) 30; *Huntington v. Asher*, 96 N. Y. 604; *Gloninger v. Franklin Coal Co.*, 55 Pa. St. 14; *Cadwalader v. Bailey*, 17 R. I. 498; *Poull v. Mockley*, 33 Wis. 482. Compare *Turner v. Selectmen*, 61 Conn. 175.

6. Grant or Prescription — England. — *Sutherland v. Heathcote*, (1892) 1 Ch. 483; *Bird v. Higginson*, 2 Ad. & El. 696, 29 E. C. L. 177; *Bryan v. Whistler*, 8 B. & C. 288, 15 E. C. L. 219; *Tirringham's Case*, 4 Coke 36b, 10 Eng. Rul. Cas. 252; *Barrington's Case*, 8 Coke 136b; *Liford's Case*, 11 Coke 46b; *Bailey v. Stephens*, 12 C. B. N. S. 109, 104 E. C. L. 109; *Constable v. Nicholson*, 14 C. B. N. S. 230, 108 E. C. L. 230.

Maine. — *Engel v. Ayer*, 85 Me. 448. And see *Littlefield v. Maxwell*, 31 Me. 134, 50 Am. Dec. 653.

Massachusetts. — *Goodrich v. Burbank*, 12 Allen (Mass.) 459; *Worcester v. Green*, 2 Pick. (Mass.) 425.

New York. — *Pierce v. Keator*, 70 N. Y. 422; *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Taylor v. Millard*, 118 N. Y. 251; *Post v. Pearsall*, 22 Wend. (N. Y.) 433.

Pennsylvania. — *Sheets v. Allen*, 89 Pa. St. 47.

Parol Agreement. — A right in the nature of a *profit à prendre* cannot be created by a parol agreement for a partition of land. *Taylor v. Millard*, 118 N. Y. 251.

The right reserved, being an incorporeal hereditament, could pass only by deed, and were it otherwise, the assignment of such an interest, since the statute of frauds, must be in writing. *Thompson v. Gregory*, 4 Johns. (N. Y.) 81.

Fee. — In *Morse v. Marshall*, 97 Mass. 519, it was held that a right in A to take growing wood and crops from land of B and to make such other use of the land as was not inconsistent with B's unused right, incident to his title, to flow it for his millpond, was not a right which could be acquired by prescription.

7. Never Acquired by Custom — England. — *Fowler v. Sanders*, Cro. Jac. 446; *Tilbury v. Silva*, 45 Ch. D. 98; *Weekly v. Wildman*, 1 Ld.

PROFITS. (See also the titles **DIVIDENDS**, vol. 9, p. 679; **PARTNERSHIP**, vol. 22, p. 2. And see **EARN — EARNINGS**, vol. 10, p. 394; **MESNE PROFITS**, vol. 20, p. 609.) — Profits are the advantages realized in money by the sale of property at a price exceeding the cost,¹ or the receipts of any enterprise or business exceeding the expenses incident to it,² and in this sense "profits"

Raym. 405; *Mellor v. Spateman*, 1 Saund. 343; *Rogers v. Brenton*, 10 Q. B. 60, 59 E. C. L. 60; *Manning v. Wasdale*, 5 Ad. & El. 758, 31 E. C. L. 433.

Maine. — *Littlefield v. Maxwell*, 31 Me. 141; *Moore v. Cary*, 42 Me. 29.

New Hampshire. — *Nudd v. Hobbs*, 17 N. H. 527.

New York. — *Smith v. Floyd*, 18 Barb. (N. Y.) 529, *Pearsall v. Post*, 20 Wend. (N. Y.) 111, 22 Wend. (N. Y.) 425.

And see the title **EASEMENTS**, vol. 10, p. 407.

1. Sale of Property. — Abb. L. Dict. See also *Carter v. Arnold*, 134 Mo. 208; *Matthews v. Crosby*, 56 N. H. 21; *Chilbeg v. Jones*, 3 Wash. 530.

Increase in Value of Securities. — In *Cross v. Long Island L. & T. Co.*, 75 Hun (N. Y.) 534, a fund representing the increase in value of the securities of an estate was held not to be *profit* within the ordinary acceptance of that term. The court said: "It is an accretion or increase from natural causes."

A provision in a will gave to the widow, for life, the income and *profits* of all the testator's estate. It was held that this did not entitle her to the premiums realized by the executor upon a sale of the securities of the estate. *Matter of Clark*, 62 Hun (N. Y.) 275. To the same effect see *Smith v. Hooper*, (Md. 1902) 51 Atl. Rep. 848; *Duclos v. Benner*, 62 Hun (N. Y.) 428, 136 N. Y. 560; *Thomson's Estate*, 11 Pa. Co. Ct. 198; *Park's Estate*, 173 Pa. St. 190. And see **INCOME**, vol. 16, p. 147.

Slaves. — A gift of *profits* has been held to include the increase of female slaves. *Holmes v. Mitchell*, 4 Md. 550.

Place of Profit. — In *Astley v. New Tivoli*, (1899) 1 Ch. 151, it was held that a trustee of a covering deed relating to debentures issued by a company, who was nominated and paid by the company, was a holder of a "place of *profit*" under the company, and therefore incapable of acting as a director.

Place of Trust or Profit. — See **TRUST**, and see the title **PUBLIC OFFICERS**, *post*.

2. Receipts Exceeding Expenditures. — Abb. L. Dict.; *Dent v. London Tramways Co.*, 16 Ch. D. 344; *Providence Rubber Co. v. Goodyear*, 9 Wall. (U. S.) 804; *Hazeltine v. Belfast*, etc., R. Co., 79 Me. 417; *Freeman v. Freeman*, 142 Mass. 102; *People v. Niagara County*, 4 Hill (N. Y.) 20; *Lepore v. Twin Cities Nat. Bldg.*, etc., Assoc., 5 Pa. Super. Ct. 279. And see *Dent v. London Tramways Co.*, 16 Ch. D. 354; *Prince v. Lamb*, 128 Cal. 120; *Carter v. Arnold*, 134 Mo. 195; *Cross v. Long Island L. & T. Co.*, 75 Hun (N. Y.) 533.

Expenses. — In *Penn v. Whitehead*, 17 Gratt. (Va.) 529, it was said: "The idea of *profits* presupposes the payment of all necessary expenses of the business by which such *profits* are made."

"**Profits**" Used Synonymously with "Dividends." — *Com. v. Pittsburg*, etc., R. Co., 74 Pa. St. 91.

Profits and Good Will Distinguished. — In *Carey v. Gunnison*, (Iowa 1883) 17 N. W. Rep. 885, it was said: "*Profits* are the gains realized from trade; good will is that which brings trade." See also *Nelson v. Hiatt*, 38 Neb. 485.

Profits Derived by Solicitor. — In *In re Gallard*, (1896) 1 Q. B. 68, it was held that the *profits* derived by a solicitor were the amount of his costs, less his disbursements out of pocket in the particular matter, and that no allowance could be made to him in respect of his general office expenses.

Contractors. — The word *profits* applied to a contractor means the difference to the contractor between the cost to him of doing the work and the price to be paid for it. *Allison v. Tennessee Coal, etc., Co.*, (Tenn. Ch. 1897) 46 S. W. Rep. 356. See also *Smith v. O'Donnell*, 8 Lea (Tenn.) 478.

Labor — Wages. (See also the title **MASTER AND SERVANT**, vol. 20, p. 187.) — In *Smith v. Brooke*, 49 Pa. St. 150, it was said: "Both in *Heebner v. Chave*, 5 Pa. St. 117, and in *Pennsylvania Coal Co. v. Costello*, 33 Pa. St. 241, the 'wages of laborers,' which the statute was designed to protect, were defined to be the earnings of the laborer, by his personal manual toil, and not the *profits* which the contractor derives from the labor of others. The cases illustrate the distinction between the two kinds of gains or rewards. It is the difference between the sale of your own labor and a sale of another man's labor at something more than you pay for it. What is received for another's labor over and above what is paid for it is called *profit*, and such *profits* were held not to be within the protection of the statute." And see **EARNINGS**, vol. 10, p. 395.

Profits Used in Construction. (See also **CONSTRUCTION**, vol. 7, p. 2, and see the title **RAILROADS**, *post*.) — Where a railroad company replaced a wooden bridge by a much more costly stone bridge, it was held that the earnings adequate to pay for the latter, beyond the expense of building anew a like wooden bridge, were to be deemed "*profits* used for construction." *Hartford*, etc., R. Co. v. *Grant*, 9 Blatchf. (U. S.) 542, 93 U. S. 225.

Profits and Gains — English Income Tax. — See *New York L. Ins. Co. v. Styles*, 14 App. Cas. 381; *Mersey Loan Co. v. Wootton*, 4 Times Rep. 164; *Gresham L. Assur. Soc. v. Styles*, 24 Q. B. D. 500, 25 Q. B. D. 351; *Erichsen v. Last*, 8 Q. B. D. 414; *Russell v. Town*, etc., Bank, 13 App. Cas. 418, 58 L. J. P. C. 8; *Burial Board v. Revenue Com'rs*, 13 Q. B. D. 9. And see **GAIN**, vol. 14, p. 575.

Partnership or Company Established for Purpose of Profit. — It has been held that a mutual benefit society formed by several persons, being partners or shareholders, who subscribe money and carry on business substantially for the benefit of the individual members among themselves, and not for the benefit of the society, is not a partnership or company established for any purpose of *profit*. *Bear v.*

and "net profits" are for all legal purposes synonymous expressions.¹ But

Bromley, 11 Eng. L. & Eq. 414, 16 Jur. 450. See also Commercial League Assoc. v. People, 90 Ill. 166; State v. Mutual Protection Assoc., 26 Ohio St. 19.

But in the following cases similar organizations were held to be such companies: Bolton v. Bolton, 73 Me. 299; State v. Critchett, 37 Minn. 13; State v. Farmers', etc., Mut. Benev. Assoc., 18 Neb. 281; Farmer v. State, 69 Tex. 561.

See generally the title BENEVOLENT OR BENEFICIAL ASSOCIATIONS, vol. 3, p. 1041.

Profits of a Partnership include the rise in value of partnership assets. Robinson v. Ashton, L. R. 20 Eq. 25.

As to what sharing of *profits* constitutes the relation of partnership, see the title PARTNERSHIP, vol. 22, pp. 17 *et seq.*, 40 *et seq.*

1. Net Profits. — Park v. Tennille, 20 Ga. 118; Fuller v. Miller, 105 Mass. 103; Wallace v. Beebe, 12 Allen (Mass.) 354; Connolly v. Davidson, 15 Minn. 519; Hentz v. Pennsylvania Co., 134 Pa. St. 346; Jones v. Davidson, 2 Sneed (Tenn.) 452.

Profits of Estate. — A testator gave his property to W. subject to the payment to his widow annually for her life of the entire rents and *profits* of the estate remaining after the debts had been paid. It was held that the widow was not entitled to half of the gross income of the estate. The court said: "The word *profits*, used in this connection, necessarily imports the balance of the income after paying expenses." Guthrie v. Wheeler, 51 Conn. 213.

Depreciation of Buildings in which a business is carried on, though they were erected by expenditure of the capital invested, is not ordinarily or necessarily considered in estimating the *profits*. Eyster v. Centennial Board of Finance, 94 U. S. 503.

Profits of Corporation. — In estimating the *profits* of a corporation, the assets, resources, and funds of the company must consist of cash on hand and other property, and if such assets exceed the liabilities, then *profit* exists. Hubbard v. Weare, 79 Iowa 689, 30 Am. & Eng. Corp. Cas. 176, *citing* Miller v. Bradish, 69 Iowa 278. See also People v. San Francisco Sav. Union, 72 Cal. 203.

The *profits* of a company are not such sum as may remain after the payment of every debt, but are the excess of ordinary receipts over expenses properly chargeable to revenue account. Mills v. Northern R. Co., L. R. 5 Ch. 631; Birch v. Cropper, 14 App. Cas. 525; Lee v. Neuchatel Asphalte Co., 41 Ch. D. 1, 58 L. J. Ch. 408.

In Mobile, etc., R. Co. v. Tennessee, 153 U. S. 497, it was said: "The term *profits*, out of which dividends alone can properly be declared, denotes what remains after defraying every expense, including loans falling due, as well as the interest on such loans." See also Corry v. Londonderry, etc., R. Co., 29 Beav. 263.

Winding Up Company — Double Meaning of Term. — In Bishop v. Smyrna, etc., R. Co., (1895) 2 Ch. 269, Kekewich, J., said: "In ordinary parlance, among mercantile men and lawyers, *profits* mean that sum which periodically, at the end of the half-year, or year, or

other time fixed by agreement, is divisible among the partners — a term which, of course, includes members of a company — as income. It is sometimes called 'net *profits*,' only to distinguish it from what are called 'gross *profits*.' It is the sum which is ascertained by the taking of a proper account of what has been made by trading and is therefore distributable between the parties entitled. But the word *profits* is also used properly in this sense: When you come to wind up a concern, you have to pay all the debts; you have to repay to each partner what he has brought in as capital; and after that has all been done, if the concern has been a successful one, there is a balance, and that balance is *profit*; it cannot properly be called anything else."

Articles of association provided that the directors should be paid in each year as remuneration for their services a sum equal to three per cent. on the "net *profits*" of the company of such year. It was held that the term "net *profits*" as thus used applied to *profits* made by the company as a going concern, and not to *profits* made by a sale of the whole undertaking and assets in a winding up. Frames v. Bultfontein Min. Co., (1891) 1 Ch. 140.

Sewer Made for Profit. — Ferrand v. Hallas Land, etc., Co., (1893) 2 Q. B. 141; Minehead Local Board v. Luttrell, (1894) 2 Ch. 178; Croysdale v. Sunbury-on-Thames Urban Dist. Council, (1898) 2 Ch. 519.

Definition of Net Profits. — In Park v. Grant Locomotive Works, 40 N. J. Eq. 121, it was said: "The words 'net *profits*' define themselves. They mean what shall remain as the clear gains of any business venture, after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution." See also Glasier v. Rolls, 42 Ch. D. 453, 30 Am. & Eng. Corp. Cas. 193; Repton v. Hodgson, 7 Q. B. 84, 53 E. C. L. 82; Fuller v. Miller, 105 Mass. 105; Hunter v. Roberts, 83 Mich. 63; McCulsky v. Klosterman, 20 Oregon 111.

"The 'net *profits*' must mean after all charges and expenses deducted." Owston v. Ogle, 13 East 538, *per* Lord Ellenborough.

"Net *profits*" means the surplus left after deducting all losses. Welsh v. Canfield, 60 Md. 475.

Where, in articles of association, it was provided that "in cases of dispute as to the amount of net *profits*, the decision of the company in general meeting shall be final," the court declined to interfere on the question of the meaning of "net *profits*." Lambert v. Neuchatel Asphalte Co., 51 L. J. Ch. 882.

Same — Personal Expenses. — The transfer of a partner's share in the "net *profits*" of a firm does not include his claim against the firm for personal expenses incurred for the benefit of the partnership. Stewart v. Stebbins, 30 Miss. 66.

Same — Sale of Goods. — "Net *profits* consist of the money received from sales of goods, deducting their cost and expenses." Wallace v. Beebe, 12 Allen (Mass.) 357.

Same — Interest. — Under a contract by which a salesman was to receive for his

the term is sometimes used in the sense of gross profits or proceeds.¹ Profit is also the advantage which land procures to the owner by way of compensation for its use. The phrase "rents, issues, and profits of lands" does not import that the land has been sold and an advance in price realized.²

Money. — The term "profits" does not necessarily imply money, but may include property other than money.³

services a share of the net *profits* of the business, the interest on capital invested by the principal in the business was held not to be an expense to be deducted in ascertaining the net *profits*. *Paine v. Howells*, 90 N. Y. 660.

In *Tutt v. Land*, 50 Ga. 350, it was said: "Net *profits* of an adventure do not mean what is made over the losses, expenses, and interest on the amount invested. The term includes simply the gain that accrues on the investment, after deducting the losses and expenses of the business." See also *Sanford v. Barney*, 50 Hun (N. Y.) 108.

Same — Value — Rental Value. — On a question as to damages suffered by the defendant through delay by the plaintiff in furnishing a boiler for the defendant's steamboat, it was held that what the defendant might have made out of his boat during the period of delay represented his loss, whether it was called "value," "rental value," or "net *profits*," all of which terms in such connection mean the same thing. *Logemann v. Pauly*, 100 Wis. 673. See also *Shepard v. Milwaukee Gas Light Co.*, 15 Wis. 318; *Poposkey v. Munkwitz*, 68 Wis. 322.

1. Gross Profits or Proceeds. — *Stewart v. Stewart*, 31 N. J. Eq. 406; *Van Dyck v. McQuade*, 86 N. Y. 38; *People v. New York*, 18 Wend. (N. Y.) 606.

2. Land. — *Abb. L. Dict.* See also RENTS AND PROFITS.

"Under the term *profit* is comprehended the produce of the soil, whether it arise above or below the surface, as herbage, wood, turf, coals, minerals, stones; * * * also fish in a pond or running water." *Bouv. L. Dict.*, quoted in *Russell v. Berry*, (Ark. 1902) 67 S. W. Rep. 884, and in *Jones v. Britton*, 102 N. Car. 190, *per Avery, J.*, dissenting. See also *Ladd v. Smith*, 107 Ala. 506; *Koen v. Bartlett*, 41 W. Va. 559.

Rents, issues, and *profits* of land are equivalent to the yearly products of the land. *Bruce v. Thompson*, 26 Vt. 747.

A father purchased a farm and had it conveyed to himself; one of his sons, with his assent, went into the possession of the farm upon an understanding that he should contribute such sum as could be spared off the farm, after yielding a living to himself, towards the payment of a mortgage thereon, until the mortgage should be paid, when he was to have the farm. It was held that the money that the son contributed was neither rents nor *profits* of the land. *Henderson v. Henderson*, 15 Can. L. T. 397.

Same — Produce Fed to Cattle. — While the defendant was in possession of land as caretaker or tenant at will, the owner put his cattle thereon to be fed and cared for by the defendant. It was held that the produce of the land which the cattle ate was *profits*, which the owner, by means of his cattle, took to himself for his own use and benefit, and as long as the

cattle were upon the land the defendant was not in exclusive possession, and the statute of limitations did not begin to run in his favor. *Rennie v. Frame*, 29 Ont. 586.

Same — Full Use of Property. — In *Land v. Otley*, 4 Rand. (Va.) 225, it was said: "'The full use of property' is an expression equivalent to the *profits* of the property."

Same — Devise. — In *Blamford v. Blamford*, 3 Bulst. 101, it was held that a desire that the *profits* of a lease should be put out to the use and benefit of B was a devise of the lease itself. See also *Land v. Otley*, 4 Rand. (Va.) 225.

Same — Distress. — In *Melick v. Benedict*, 43 N. J. L. 425, it was held that one-half the *profits* of a coalyard reserved as rent might be distrained for if the amount appeared in books of account. The court negated the contention that the word *profits* was too uncertain to allow of distress.

Profits of Plantation. — In *Taylor v. Harwell*, 65 Ala. 11, it was said: "At the death of the testator, in the community in which he lived and died * * * the term *profits*, when applied to the cultivation of a plantation, had * * * a general, popular signification. It was never confounded with rents or with proceeds; it denoted the annual gain, or income, from the sale of products, after a deduction of the expenses of cultivation. There was no deduction because of the value of the labor, for the labor was the property of the owner, as was the land cultivated."

Profits and Damages. — By an Act of Congress, courts of equity were authorized, upon the entry of a decree in any case for an infringement of a patent, to award to the complainant, in addition to the *profits* to be accounted for by the defendant, the damages the complainant had sustained thereby. In construing this act the court said: "The terms *profits* and 'damages' as used in the act are hardly convertible. They seem to mean different things. The latter are to be awarded 'in addition' to the former. *Profits*, doubtless, refer to what the defendant has gained by the unlawful use of the patented invention; and damages, to what the complainant has lost." *Goodyear Dental Vulcanite Co. v. Van Antwerp*, 2 B. & A. Pat. Cas. 252, 10 Fed. Cas. No. 5,600.

Profit and Income. — See *People v. Niagara County*, 4 Hill (N. Y.) 23; *Busby v. Russell*, 10 Ohio Cir. Dec. 25. See also INCOME, vol. 16, p. 150.

A lessee of land agreed to pay to the lessor as rent one third of all the *profits* realized from oil or gas. It was held that the term *profits*, as thus used, was not equivalent to "income," but meant the net amount realized after deducting expenses. *Poterie Gas Co. v. Poterie*, 179 Pa. St. 68. See also INCOME, vol. 16, p. 147.

3. Money Not Necessarily Implied. — *Croysdale*

PROHIBIT — PROHIBITION. (See also the titles INTOXICATING LIQUORS, vol. 17, p. 189; LOCAL OPTION, vol. 19, p. 486.) — Prohibition means a forbidding to do; an inhibition; an interdiction.¹

v. Sunbury-on-Thames Urban Dist. Council, (1898) 2 Ch. 519; *Carter v. Arnold*, 134 Mo. 195; *Jones v. Davis*, 48 N. J. Eq. 493.

1. **Prohibition.** — *Talbott v. Fidelity, etc.*, Co., 74 Md. 545.

Prohibit — Regulation and Restraint. — It has been held that a power to *prohibit* does not embrace a power to regulate. *State v. Fay*, 44 N. J. L. 476. See also *St. Louis v. Smith*, 2 Mo. 113.

But in *Nelson v. State*, 17 Ind. App. 403, where counsel contended that the word *prohibit* when applied to the sale of liquor meant to forbid it altogether, to enjoin it absolutely, the court said: "We cannot concur in this proposition. The statute, without in terms forbidding the sale, provides a penalty. It is the penalty which is effective in the enforcement of laws. The enactment of the penalty is equivalent to forbidding the act; and while this may not *prohibit* in the sense of preventing all sales, it provides for the punishment of such as may be made contrary to the statute."

And that the term may be applied to a re-

straint upon the liquor traffic, as well as to a total *prohibition*, see *People v. Quant*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 410.

Same — Hackmen. — The title of an ordinance was as follows: "An ordinance to *prohibit* hotel porters and runners, hack and 'bus men, and peddlers from soliciting custom on the platform of" a certain depot. The ordinance contained a proviso that standing by their hacks or omnibuses or their horses by hackmen within four feet of the platform should not be considered a violation of its provision. It was held that this proviso did not render the ordinance void as not being covered by the title, although counsel contended that a title that *prohibits* would not include restraint or regulation. *Emporia v. Shaw*, 6 Kan. App. 808.

Marine Insurance. — In *Odiorne v. New England Mut. Marine Ins. Co.*, 101 Mass. 551, it was held that where a policy of insurance on a vessel *prohibited* it from specified waters and ports between certain dates, such *prohibition* constituted a warranty that the vessel should not enter those waters or ports during that time.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 16, p. 1093.

I. DEFINITION AND SCOPE OF TITLE — **Definition.** — A writ of prohibition is an extraordinary writ, issuing out of a superior court, directed to the judge and parties of a suit in an inferior court, commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally or some collateral matter arising therein is beyond the jurisdiction of the court.¹

Scope of Title. — The question most often discussed in prohibition cases is the jurisdiction of some particular tribunal or officer to take some particular action. Obviously a consideration of such jurisdictional questions does not fall within the scope of an article on prohibition, as it involves a consideration of the rights, powers, and duties of all classes of public officers and courts, and depends upon questions not peculiar to, and which do not always arise in, prohibition proceedings.² This article is confined to a consideration of the rules governing the use of the writ, and the special cases cited are intended merely as illustrative of the rules given.

II. NATURE AND ORIGIN OF REMEDY — **1. A Common-law Writ.** — The writ of prohibition is a common-law remedy against the encroachment, excess, or improper assumption of jurisdiction,³ and has been said to be as old as the

1. Prohibition Defined — *United States.* — *Ex p.* Easton, 95 U. S. 68.

Alabama. — Tayloe v. Dugger, 66 Ala. 444; Atkins v. Siddons, 66 Ala. 453; *Ex p.* Brown, 58 Ala. 536; *Ex p.* Roundtree, 51 Ala. 42; *Ex p.* Greene, 29 Ala. 57; *Ex p.* Walker, 25 Ala. 81.

Arkansas. — *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46; Sand. & H. Dig. Stat., § 4892.

California. — Day v. Superior Ct., 61 Cal. 489; North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 326; Maurer v. Mitchell, 53 Cal. 289; Spring Valley Water Works v. San Francisco, 52 Cal. 111.

Colorado. — People v. District Ct., 6 Colo. 534; Leonard v. Bartels, 4 Colo. 95.

District of Columbia. — U. S. v. Kimball, 7 App. Cas. (D. C.) 499.

Florida. — State v. Hocker, 33 Fla. 283; Sherlock v. Jacksonville, 17 Fla. 93.

Illinois. — People v. Circuit Ct., 173 Ill. 272; People v. Circuit Ct., 169 Ill. 201.

Louisiana. — State v. Judge, 20 La. Ann. 177; State v. Judge, 14 La. Ann. 509.

Massachusetts. — Washburn v. Phillips, 2 Met. (Mass.) 296; Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338.

Michigan. — Speed v. Detroit, 98 Mich. 360, 39 Am. St. Rep. 555; Hudson v. Judge, 42 Mich. 239.

Minnesota. — State v. Ward, 70 Minn. 58; State v. McMartin, 42 Minn. 30; Home Ins. Co. v. Flint, 13 Minn. 244.

Mississippi. — Clayton v. Heidelberg, 9 Smed. & M. (Miss.) 623; Planters' Ins. Co. v. Cramer, 47 Miss. 200.

Missouri. — State v. Burckhardt, 87 Mo. 537; Thomas v. Mead, 36 Mo. 232; Morris v. Lenox, 8 Mo. 252.

New York. — Sweet v. Hulbert, 51 Barb. (N. Y.) 312; People v. Works, 7 Wend. (N. Y.) 486; Thomson v. Tracy, 60 N. Y. 31; Appo v. People, 20 N. Y. 531; People v. Fitzgerald, 15 N. Y. App. Div. 539.

North Carolina. — State v. Whitaker, 114 N. Car. 818.

South Carolina. — State v. Commissioners, 1 Mill. (S. Car.) 55; State v. Whyte, 2 Nott & M. (S. Car.) 174; State v. Kirkland, 41 S. Car. 29; State v. Stackhouse, 14 S. Car. 427; State v. Columbia, etc., R. Co., 1 S. Car. 54.

Tennessee. — Memphis v. Halsey, 12 Heisk. (Tenn.) 212.

Texas. — Browne v. Rowe, 10 Tex. 183.

Virginia. — Burch v. Hardwicke, 23 Gratt. (Va.) 59; Mayo v. James, 12 Gratt. (Va.) 23; Nelms v. Vaughan, 84 Va. 696; James v. Stokes, 77 Va. 225.

West Virginia. — Fleming v. Commissioners, 31 W. Va. 608; Buskirk v. Judge, 7 W. Va. 91.

Wisconsin. — State v. Gary, 33 Wis. 93.

Wyoming. — State v. District Ct., 5 Wyo. 227.

2. See generally the special titles of this work dealing with special classes of public officers. See also the title *JURISDICTION*, vol. 17, p. 1039.

3. A Common-law Remedy — *England.* — Mac-konochie v. Penzance, 6 App. Cas. 443, 50 L. J. Q. B. D. 611.

United States. — Smith v. Whitney, 116 U. S. 167.

Alabama. — Atkins v. Siddons, 66 Ala. 453; *Ex p.* Ray, 45 Ala. 15.

California. — Maurer v. Mitchell, 53 Cal. 289.

District of Columbia. — U. S. v. Kimball, 7 App. Cas. (D. C.) 499.

Florida. — Sherlock v. Jacksonville, 17 Fla. 93.

Kentucky. — Arnold v. Shields, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

Massachusetts. — Washburn v. Phillips, 2 Met. (Mass.) 296; Connecticut River R. Co. v. Franklin County, 127 Mass. 50, 34 Am. Rep. 338.

Michigan. — Hudson v. Judge, 42 Mich. 239.

Mississippi. — Planters' Ins. Co. v. Cramer, 47 Miss. 200.

common law itself.¹ It is an available remedy in the *United States*, except in jurisdictions where it has been abolished by statute.²

2. Original Remedial Writ. — Prohibition is an original, remedial writ.³ The proceeding to obtain a writ of prohibition is an independent original proceeding and cannot be considered as a part of the action prohibited.⁴

3. Extraordinary Prerogative Character. — Prohibition is an extraordinary remedy,⁵ and at common law was a prerogative writ.⁶

4. Civil Proceeding. — The writ of prohibition is a civil proceeding, irrespective of whether the action prohibited arises in a civil or criminal proceeding.⁷ The proceeding is a suit,⁸ and a case in prohibition is a *qui tam* action.⁹

5. As Counterpart of Mandamus. — The writ of prohibition is the counterpart of the writ of mandamus, and is frequently so defined by statute. The one forbids the doing of things which ought not to be done, while the other commands the doing of things which ought to be done.¹⁰ A statute defining the writ of prohibition as the "counterpart" of the writ of mandamus is merely declaratory of the common law and does not enlarge the scope of the writ.¹¹

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

Texas. — *Seele v. State*, 1 Tex. Civ. App. 495.

Virginia. — *James v. Stokes*, 77 Va. 225.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134.

1. Antiquity of Writ. — *Thomas v. Mead*, 36 Mo. 233; *State v. Towns*, 153 Mo. 91.

The writ was framed as early as 3 Edw. I., and its purpose was to preserve the right of the king's crown and courts. *Jackson v. Maxwell*, 5 Rand. (Va.) 636. See also *Sherwood v. New England Knitting Co.*, 68 Conn. 547.

2. An Existing Remedy. — *Ex p. Davis*, 41 Me. 57; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669. See also *infra*, this title, *Jurisdiction to Issue Writ*.

3. Original Remedial Writ. — *Maurer v. Mitchell*, 53 Cal. 289; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499; *State v. Whitaker*, 114 N. Car. 818; *State v. Columbia, etc., R. Co.*, 1 S. Car. 46; *McConiha v. Guthrie*, 21 W. Va. 134.

4. Mayo v. James, 12 Gratt. (Va.) 17. But see *Lincoln-Lucky, etc., Min. Co. v. District Ct.*, 7 N. Mex. 486, wherein it was held that the proceeding in prohibition is appellate or relative and not original or abstract.

Upon the dismissal of a petition for a writ of prohibition, it is not competent for the court to go on and affirm the judgment of the lower court in the original proceeding. *Peters v. Rhine*, 10 Tex. 215.

5. Extraordinary Remedy. — *Ex p. Reid*, 50 Ala. 439; *Ex p. Stickney*, 40 Ala. 160; *Ex p. Greene*, 29 Ala. 52; *People v. Circuit Ct.*, 173 Ill. 272; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Wood*, 21 N. Y. App. Div. 245.

6. A Prerogative Writ — *California.* — *Southern Pac. R. Co. v. Superior Ct.*, 59 Cal. 471; *Chester v. Colby*, 52 Cal. 516; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111. But see *Havemeyer v. Superior Ct.*, 84 Cal. 403.

Colorado. — *Leonard v. Bartels*, 4 Colo. 95.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

Georgia. — *Doughty v. Walker*, 54 Ga. 595.

Louisiana. — *State v. Judge*, 10 Rob. (La.) 169.

Massachusetts. — *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Day v. Board of Aldermen*, 102 Mass. 310.

Missouri. — *Vail v. Dinning*, 44 Mo. 210.

Nevada. — *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818; *Perry v. Shepherd*, 78 N. Car. 83.

South Carolina. — *Greir v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731.

Virginia. — *Gresham v. Ewell*, 84 Va. 784.

Wisconsin. — *In re Schumaker*, 90 Wis. 488.

The exercise of unauthorized judicial or quasi-judicial power is regarded as a contempt of the sovereign, which may result in injury to the state or citizens. *State v. Young*, 29 Minn. 474.

7. A Civil Proceeding. — *Farnsworth v. Montana*, 129 U. S. 104; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210; *Mayo v. James*, 12 Gratt. (Va.) 17; *State v. Evans*, 88 Wis. 255.

8. Weston v. Charleston, 2 Pet. (U. S.) 464.

9. Beaufort v. Danner, 1 Strobh. L. (S. Car.) 176.

10. Counterpart of Mandamus. — *Hevren v. Reed*, 126 Cal. 219; *Coronado v. San Diego*, 97 Cal. 440; *State v. Judge*, 4 Rob. (La.) 48; *Thomas v. Mead*, 36 Mo. 247; *State v. Hogan*, 24 Mont. 379; *State v. Whitaker*, 114 N. Car. 818. See also *People v. Tompkins General Sessions*, 19 Wend. (N. Y.) 154.

Prohibition and Mandamus Not Concurrent Remedies. — *Gresham v. Ewell*, 84 Va. 784.

11. Scope of Writ Not Enlarged by Statute. — *Maurer v. Mitchell*, 53 Cal. 289; *Coronado v. San Diego*, 97 Cal. 440; *Camron v. Kenfield*, 57 Cal. 550; *State v. Hogan*, 24 Mont. 379; *State v. Second Judicial Dist. Ct.* 22 Mont. 220; *State v. Whitaker*, 114 N. Car. 818.

Contra. — *Williams v. Lewis*, (Idaho 1898) 54 Pac. Rep. 619, holding that the statute defining writs of prohibition as the counterpart of mandamus authorizes the issuance of the writ to restrain purely ministerial action.

6. Distinguished from Injunction. — Prohibition is a legal remedy; injunction is an equitable remedy.¹ The writ of prohibition is directed to and operates directly upon the court, preventing it from exercising a jurisdiction which it does not possess, while an injunction is directed to the parties and not to the court, and recognizes the jurisdiction of the court as existing.²

7. Distinguished from Procedendo. — A procedendo is a writ commanding an inferior court to proceed to judgment. It gives no decision, but directs one. A prohibition is the opposite of a procedendo. It prohibits courts from exceeding their jurisdiction and meddling with causes that do not belong to them.³

III. PRINCIPLES GOVERNING ISSUANCE OF WRIT — **1. Something to Operate on.** — The writ can only issue where there is some court or person to whom it may be addressed and against whom it may be enforced,⁴ and there must be some pending cause in the court sought to be restrained upon which the writ of prohibition may operate.⁵

2. Nature of Acts Prohibited — *a. WANT OF JURISDICTION.* — The Office of the Writ is to arrest the proceedings of any tribunal, corporation, board, or person when such proceedings are without or in excess of the jurisdiction of such tribunal.⁶

1. See *supra*, this section, *A Common-law Writ*. See also the title INJUNCTIONS, vol. 16, p. 337.

2. **Prohibition Directed to Court and Injunction to Parties** — *Alabama.* — *Ex p. Lyon*, 60 Ala. 650. See also *Southern R. Co. v. Birmingham, etc., R. Co.*, (Ala. 1900) 29 So. Rep. 191. *California.* — *Coronado v. San Diego*, 97 Cal. 440.

Georgia. — *Mealing v. Augusta, Dudley* (Ga.) 221.

Illinois. — *People v. Circuit Ct.*, 169 Ill. 201. *New York.* — See *Matter of Cameron*, 5 Hun (N. Y.) 290.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

Texas. — *Seele v. State*, 1 Tex. Civ. App. 495.

Virginia. — *Burch v. Hardwicke*, 23 Gratt. (Va.) 51.

Washington. — *State v. Superior Ct.*, 13 Wash. 226.

But see *Ex p. Peterson*, 33 Ala. 74, wherein a writ of prohibition was directed to the parties commanding them to cease from the prosecution of a writ of supersedeas. See also *People v. Queens County*, 1 Hill (N. Y.) 195.

A statute authorizing the writ to issue to the "court or party" will be construed to mean court "and" party, since the writ cannot issue to any one but a judicial officer. *Winsor v. Bridges*, 24 Wash. 540.

3. Distinguished from Procedendo. — *Yates v. People*, 6 Johns. (N. Y.) 463.

4. Existence of Court. — *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315.

Court Martial Functus Officio. — Where the plaintiff had been pronounced guilty and sentenced by a court martial, and the sentence had been ratified and approved by the king, and executed, it was held too late to apply for the writ, for the court martial ceased to exist when it had performed all its functions, and there was no one against whom the prohibition could be directed. *Matter of Poe*, 5 B. & Ad. 681, 27 E. C. L. 153.

Office of Judge Expired. — A writ of prohibition will issue where the suit remains in

court contrary to law, although the term of the judge against whom the writ is asked expires before the writ issues. *Com. v. Latham*, 85 Va. 632.

5. Pendency of Cause. — *U. S. v. Hoffman*, 4 Wall. (U. S.) 158; *Sherlock v. Jacksonville*, 17 Fla. 93; *Haldeman v. Davis*, 28 W. Va. 324.

The Writ Cannot Be Used to Prevent the Institution of an Action, but it operates to restrain some already pending action or proceeding. *Haldeman v. Davis*, 28 W. Va. 324.

6. Office and Purpose of Writ — *England.* — *Worthington v. Jeffries*, L. R. 10 C. P. 379.

United States. — *Smith v. Whitney*, 116 U. S. 167.

Alabama. — *Ex p. Roundtree*, 51 Ala. 42.

California. — *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Levy v. Wilson*, 69 Cal. 105; *People v. Election Com'rs*, 54 Cal. 404; *People v. Whitney*, 47 Cal. 584.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Louisiana. — *State v. Judge*, 48 La. Ann. 1501.

Massachusetts. — *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

Mississippi. — *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 523.

Montana. — *State v. Benton*, 12 Mont. 66.

Nevada. — *Low v. Crown Point Min. Co.*, 2 Nev. 75.

New York. — *People v. Queens County*, 1 Hill (N. Y.) 195; *People v. Works*, 7 Wend. (N. Y.) 486; *Appo v. People*, 20 N. Y. 531.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818; *State v. Allen*, 2 Ired. L. (24 N. Car.) 189.

South Carolina. — *State v. Hudnall*, 2 Nott & M. (S. Car.) 419; *Leonard's Case*, 3 Rich. L. (S. Car.) 111; *State v. Kirkland*, 41 S. Car. 29. See also *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95.

West Virginia. — *Ingersoll v. Buchanan*, 1 W. Va. 181. See also *Ensign Mfg. Co. v. Carroll*, 30 W. Va. 532.

The General Rule is that the writ will lie whenever an inferior court is proceeding to act in a matter over which it has no jurisdiction.¹ This rule is

1. Want of Jurisdiction Ground for Writ —
England. — *Edward's Case*, 13 Coke 9; *Stephenson v. Raine*, 2 El. & Bl. 744, 75 E. C. L. 744; *Hunt v. North Staffordshire R. Co.*, 2 H. & N. 451; *Lawford v. Partridge*, 1 H. & N. 621; *Chabot v. Morpeth*, 15 Q. B. 446, 69 E. C. L. 446; *Francis v. Steward*, 5 Q. B. 984, 48 E. C. L. 984; *Richard v. Dyke*, 3 Q. B. 256, 43 E. C. L. 724; *Matter of Oxford University*, 1 Q. B. 952, 41 E. C. L. 854; *Reg. v. Midland R. Co.*, 19 Q. B. D. 540; *Reg. v. Local Government Board*, 10 Q. B. D. 309; *Great Western R. Co. v. Railway Com'rs*, 7 Q. B. D. 182; *Hudson v. Tooth*, 3 Q. B. D. 46, 47 L. J. Q. B. D. 18; *Farquharson v. Morgan*, (1894) 1 Q. B. 552; *London v. Cox*, L. R. 2 H. L. 239, 36 L. J. Exch. 225; *Barker v. May*, 9 B. & C. 489, 17 E. C. L. 426; *Blacket v. Blizard*, 9 B. & C. 851, 17 E. C. L. 508; *Bridge v. Branch*, 1 C. P. D. 633; *Taylor v. Nicholls*, 1 C. P. D. 242; *Grant v. Gould*, 2 H. Bl. 69; *Devonshire v. Foott*, Ir. R. 5 Eq. 314.

United States. — *In re Alix*, 166 U. S. 136; *In re Rice*, 155 U. S. 396; *In re Cooper*, 143 U. S. 472; *Ex p. Phenix Ins. Co.*, 118 U. S. 610; *Smith v. Whitney*, 116 U. S. 167.

Alabama. — *Atkins v. Siddons*, 66 Ala. 453; *Ex p. Boothe*, 64 Ala. 312; *Ex p. Mobile*, etc., R. Co., 63 Ala. 349; *Ex p. Brown*, 58 Ala. 536; *Ex p. State*, 51 Ala. 60; *Ex p. Roundtree*, 51 Ala. 42; *Ex p. Keeling*, 50 Ala. 474; *Ex p. Hill*, 38 Ala. 429; *Ex p. Smith*, 34 Ala. 455; *Ex p. Peterson*, 33 Ala. 74; *Ex p. Greene*, 29 Ala. 52; *Ex p. Walker*, 25 Ala. 81; *Ex p. Smith*, 23 Ala. 94.

Arkansas. — *Russell v. Jacoway*, 33 Ark. 191; *Ex p. Williams*, 4 Ark. 537, 38 Am. Dec. 46.

California. — *Murray v. Superior Ct.*, 129 Cal. 628; *Hevren v. Reed*, 126 Cal. 219; *Kilburn v. Law*, 111 Cal. 237; *Cosby v. Superior Ct.*, 110 Cal. 45; *People v. Superior Ct.*, 100 Cal. 105; *Los Angeles County v. Superior Ct.*, 93 Cal. 380; *Bishop v. Superior Ct.*, 87 Cal. 226; *McDowell v. Bell*, 86 Cal. 615; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Hayne v. Justices' Ct.*, 82 Cal. 284, 16 Am. St. Rep. 114; *Thomas v. Justices' Ct.*, 80 Cal. 40; *Green v. Superior Ct.*, 78 Cal. 556; *Baughman v. Superior Ct.*, 72 Cal. 572; *Chollar Min. Co. v. Wilson*, 66 Cal. 374; *Curtis v. Superior Ct.*, 63 Cal. 435; *Bliss v. Superior Ct.*, 62 Cal. 543; *Rickey v. Superior Ct.*, 59 Cal. 661; *Southern Pac. R. Co. v. Superior Ct.*, 59 Cal. 471; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *People v. Election Com'rs*, 54 Cal. 404; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *Anderson v. Superior Ct.*, 122 Cal. 216; *Hopkins v. Superior Ct.*, 136 Cal. 552.

Colorado. — *People v. District Ct.*, 26 Colo. 380; *People v. District Ct.*, 23 Colo. 466; *People v. District Ct.*, 21 Colo. 251; *Booth v. County Ct.*, 18 Colo. 561; *People v. District Ct.*, 18 Colo. 293; *People v. District Ct.*, 18 Colo. 26; *People v. District Ct.*, 6 Colo. 534; *Leonard v. Bartels*, 4 Colo. 95; *People v. District Ct.*, (Colo. 1901) 66 Pac. Rep. 1068; *People v. District Ct.*, 28 Colo. 161.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — *State v. Baker*, 20 Fla. 616.

Georgia. — *Hart v. Taylor*, 61 Ga. 156; *South Carolina R. Co. v. Ellis*, 40 Ga. 67.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272.

Kentucky. — *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669; *Hindman v. Toney*, 97 Ky. 413; *McCann v. Louisville*, (Ky. 1901) 63 S. W. Rep. 446; *Shackelford v. Patterson*, (Ky. 1901) 62 S. W. Rep. 1040; *Weaver v. Toney*, (Ky. 1899) 54 S. W. Rep. 732; *Common Schools v. Taylor*, (Ky. 1899) 49 S. W. Rep. 38; *Standard Oil Co. v. Linn*, (Ky. 1895) 32 S. W. Rep. 932.

Louisiana. — *State v. Lee*, 106 La. 400; *State v. St. Paul*, 104 La. 280; *State v. St. Paul*, 104 La. 6; *State v. Carreau*, 45 La. Ann. 1446; *State v. Judges*, 41 La. Ann. 955; *State v. Houston*, 40 La. Ann. 393, 8 Am. St. Rep. 532; *State v. Judge*, 20 La. Ann. 177; *State v. Third Dist. Ct.*, 16 La. Ann. 185; *State v. Judge*, 11 La. Ann. 187.

Massachusetts. — *Vermont, etc., R. Co. v. Franklin County*, 10 Cush. (Mass.) 12; *Gilbert v. Hebard*, 8 Met. (Mass.) 129; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Scollay v. Dunn*, Quincy (Mass.) 74; *Henshaw v. Cotton*, 127 Mass. 60; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

Michigan. — *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555; *Scott v. Chambers*, 62 Mich. 532; *Maclean v. Circuit Judge*, 52 Mich. 258; *Hudson v. Judge*, 42 Mich. 239; *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691.

Mississippi. — *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623; *Crisler v. Morrison*, 57 Miss. 791.

Missouri. — *State v. Wood*, 155 Mo. 425; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *State v. Murphy*, 132 Mo. 382, 53 Am. St. Rep. 491; *State v. Elkin*, 130 Mo. 90; *State v. Ross*, 122 Mo. 435; *State v. Rombauer*, 101 Mo. 499; *Warransburg v. Miller*, 77 Mo. 56; *Mechanics' Bank v. Kansas City*, 73 Mo. 555; *Leslie v. St. Louis*, 47 Mo. 474; *Lockwood v. St. Louis*, 24 Mo. 20; *Sayre v. Tompkins*, 23 Mo. 443; *Eckler v. Wood*, (Mo. App. 1902) 69 S. W. Rep. 45.

Montana. — *State v. Benton*, 12 Mont. 66.

New Mexico. — *Lincoln-Lucky, etc., Min. Co. v. District Ct.*, 7 N. Mex. 486.

New York. — *People v. Common Pleas Ct.*, 43 Barb. (N. Y.) 278; *People v. Inman*, 74 Hun (N. Y.) 130; *People v. Petty*, 32 Hun (N. Y.) 443; *People v. McAdam*, 22 Hun (N. Y.) 559; *People v. Parker*, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 3; *People v. Letson*, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381; *People v. Works*, 7 Wend. (N. Y.) 486; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Fitzgerald*, 15 N. Y. App. Div. 539; *People v. Fitzgerald*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 865; *People v. Goldfogel*, 23 Civ. Pro. (N. Y.) 417; *People v. Nichols*, 79 N. Y. 582; *Thomson v. Tracy*, 60 N. Y. 31; *Appo v. People*, 20 N. Y. 531.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

South Carolina. — *Ramsay v. Wardens*, 2 Volume XXIII.

subject to certain well-defined limitations hereinafter explained.¹ It is not necessary that the want of jurisdiction shall appear upon the face of the proceedings of the inferior court.²

Excess of Jurisdiction. — The writ is not confined to cases where the lower court is absolutely devoid of jurisdiction, but extends to cases where such court, although rightfully entertaining jurisdiction of the subject-matter, has exceeded its legitimate powers.³ In such a case the prohibition will be con-

Bay (S. Car.) 180; *State v. Hopkins*, Dudley L. (S. Car.) 101; *Kinloch v. Harvey*, Harp. L. (S. Car.) 508; *Lynah v. Road Com'rs*, Harp. L. (S. Car.) 336; *State v. Wakely*, 2 Nott & M. (S. Car.) 410; *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *State v. Raborn*, 60 S. Car. 78; *State v. Columbia*, 17 S. Car. 83; *State v. Stackhouse*, 14 S. Car. 417; *State v. Fickling*, 10 S. Car. 301; *Hornesby v. Burdell*, 9 S. Car. 303; *Baldwin v. Cooley*, 1 S. Car. 256.

Texas. — *Brown v. Rowe*, 10 Tex. 183.

Vermont. — *Burlington v. Burlington Traction Co.*, 70 Vt. 491.

Virginia. — *Hogan v. Guigon*, 29 Gratt. (Va.) 705; *Ex p. Ellyson*, 20 Gratt. (Va.) 10; *French v. Noel*, 22 Gratt. (Va.) 454; *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484; *West v. Ferguson*, 16 Gratt. (Va.) 270; *Jackson v. Maxwell*, 5 Rand. (Va.) 636; *Grigg v. Dalsheimer*, 88 Va. 508; *Com. v. Latham*, 85 Va. 632; *Miller v. Marshall*, 1 Va. Cas. 158.

Washington. — *State v. Moore*, 21 Wash. 628; *State v. Superior Ct.*, 21 Wash. 469; *State v. Superior Ct.*, 20 Wash. 709; *Clifford v. Parker*, 13 Wash. 518; *State v. Superior Ct.*, 8 Wash. 591; *State v. Superior Ct.*, 5 Wash. 641; *North Yakima v. Superior Ct.*, 4 Wash. 655; *State v. Superior Ct.*, 3 Wash. 696; *State v. Superior Ct.*, 2 Wash. 13; *State v. Superior Ct.*, 17 Wash. 54.

West Virginia. — *Eastham v. Holt*, 43 W. Va. 599; *Wilkinson v. Hoke*, 39 W. Va. 403; *Fleming v. Commissioners*, 31 W. Va. 608; *McConiha v. Guthrie*, 21 W. Va. 134; *Hartigan v. West Virginia University*, 49 W. Va. 14; *Coger v. Coger*, 48 W. Va. 135; *Yates v. Taylor County Ct.*, 47 W. Va. 376; *Hassinger v. Holt*, 47 W. Va. 348; *Norfolk*, etc., R. Co. v. *Pinnacle Coal Co.*, 44 W. Va. 574.

Wisconsin. — *In re Radl*, 86 Wis. 645, 39 Am. St. Rep. 918; *State v. Keyes*, 75 Wis. 288.

Wyoming. — *State v. District Ct.*, 5 Wyo. 227.

No Court Having Jurisdiction. — It is not necessary that the cause or act should be within the cognizance of another court, for prohibition will be issued when no court has the jurisdiction objected to, or when the act is beyond the limits of judicial power. *State v. Houston*, 40 La. Ann. 393, 8 Am. St. Rep. 532.

1. See *infra*, this section, *Other Adequate Remedy; Discretion of Court; Preliminary Objection to Jurisdiction.*

Statutory Limitation. — Under a statute providing that no plea to the jurisdiction shall be allowed in cases where the claim does not exceed a specified sum, no prohibition can issue to prohibit an action in cases where the claim is less than the specified sum. *Hawes v. Paveley*, 1 C. P. D. 418, 46 L. J. C. Pl. 18.

2. *State v. Hudnall*, 2 Nott & M. (S. Car.) 419.

3. **Excess but Not Total Absence of Jurisdiction** — *England.* — *In re Holmes*, (1895) 1 Q. B. 174;

In re London Scottish Permanent Bldg. Soc., 63 L. J. Q. B. D. 112; *Mackonochie v. Penzance*, 6 App. Cas. 443, 50 L. J. Q. B. D. 611; *Wallace v. Allen*, L. R. 10 C. P. 607, 44 L. J. C. Pl. 351; *Reg. v. Westmoreland County Ct. Judge*, 58 L. T. N. S. 417; *Carslake v. Mapledoram*, 2 T. R. 473.

Alabama. — *Ex p. Peterson*, 33 Ala. 74.

California. — *Bruner v. Superior Ct.*, 92 Cal. 239; *McDowell v. Bell*, 86 Cal. 615; *People v. Election Com'rs*, 54 Cal. 404.

Colorado. — *People v. District Ct.*, 21 Colo. 251; *McInerney v. Denver*, 17 Colo. 302.

Florida. — *State v. White*, 40 Fla. 297; *State v. Hocker*, 33 Fla. 283.

Illinois. — *People v. Circuit Ct.*, 169 Ill. 201.

Louisiana. — *State v. Hingle*, 50 La. Ann. 683; *State v. McCrea*, 40 La. Ann. 20; *State v. Judge*, 20 La. Ann. 239.

Massachusetts. — *Washburn v. Phillips*, 2 Met. (Mass.) 296.

Michigan. — *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691.

Mississippi. — *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

Missouri. — *St. Louis*, etc., R. Co. v. *Wear*, 135 Mo. 230; *State v. Withrow*, 133 Mo. 500; *State v. Slover*, 126 Mo. 652; *State v. St. Louis Ct. Appeal*, 99 Mo. 216; *State v. Cline*, 85 Mo. App. 628; *School Dist. No. 6 v. Burris*, 84 Mo. App. 654; *State v. Laughlin*, 7 Mo. App. 529.

Montana. — *State v. McHutton*, 10 Mont. 370.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *People v. Parker*, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 3; *People v. Nichols*, 18 Hun (N. Y.) 530; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Fitzgerald*, 15 N. Y. App. Div. 539; *People v. Doyle*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 411, *affirming* 44 N. Y. App. Div. 402, 162 N. Y. 659; *People v. Goldfogle*, 23 Civ. Pro. (N. Y.) 417; *Appo v. People*, 20 N. Y. 531; *People v. Boswick*, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163.

South Carolina. — *State v. Ridgell*, 2 Bailey L. (S. Car.) 560; *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *State v. Kirkland*, 41 S. Car. 29.

Virginia. — *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484; *West v. Ferguson*, 16 Gratt. (Va.) 270; *Mallan v. Bransford*, 86 Va. 675; *Nelms v. Vaughan*, 84 Va. 696.

West Virginia. — *Wilkinson v. Hoke*, 39 W. Va. 403; *McConiha v. Guthrie*, 21 W. Va. 134; *Swinburn v. Smith*, 15 W. Va. 483.

Illustrations. — The writ lies to prevent a court having jurisdiction of an action from issuing a writ not authorized by law. *State v. Slover*, 126 Mo. 652.

In a case where the court has no power to order a reference, but nevertheless assumes to do so, prohibition will lie. *In re London Scottish Permanent Bldg. Soc.*, 63 L. J. Q. B. D. 112.

A void personal judgment against a tax

fined to that part of the proceedings which is beyond the jurisdiction.¹

Consent to the Jurisdiction is no bar to the issuance of a writ of prohibition founded upon want of jurisdiction of the subject-matter, since consent cannot confer jurisdiction over the subject-matter of the action.² But objection to the jurisdiction over the person may be waived in various ways, and when it is so waived, a writ of prohibition will not be granted.³

Numerous Illustrations of the application of these rules to particular classes of cases are collected in a succeeding section of this article.⁴

b. ERRORS IN EXERCISE OF JURISDICTION — Statement of Rule. — Where the inferior court has jurisdiction of the matter in controversy, prohibition will not lie.⁵ The writ does not lie to prevent a subordinate court from deciding erroneously, or from enforcing an erroneous judgment in a case in which it

collector may be restrained by prohibition. *Mallan v. Bransford*, 86 Va. 675.

A prohibition will be granted wherever an inferior court in handling matters clearly within its jurisdiction transgresses the bounds prescribed to it by law. *State v. Ridgell*, 2 Bailey L. (S. Car.) 560, wherein the court arrested by prohibition the execution of judgment of death, erroneously awarded for an offense not capital.

In *Ex p. Smith*, 23 Ala. 94, it was admitted that the chancellor had jurisdiction to appoint a receiver, but instead of himself exercising that power he had ordered that the receiver be appointed by the register. This was held to be such an excess of jurisdiction as would support a writ of prohibition. Two judges dissented, upon the ground that the order was merely erroneous.

In *Scollay v. Dunn*, Quincy (Mass.) 74, the writ was granted to the court of vice-admiralty on the ground that the suit should have been against the ship and its cargo, and not against the owner.

So prohibition will lie to restrain proceedings of an inferior court, where a collateral matter arising out of the proceedings does not belong to that jurisdiction. *State v. Hopkins*, Dudley L. (S. Car.) 101, *citing State v. Whyte*, 2 Nott & M. (S. Car.) 176.

1. Where a prohibition is sought as to certain matters, part of which are within the jurisdiction of the lower court, the writ of prohibition ought not to be wholly denied, but the court ought to mould the writ and to limit it to so much of the matter as is beyond the jurisdiction of the court. *Per Brett, L. J.*, in *Reg. v. Local Government Board*, 10 Q. B. D. 309. And to the same effect is *Reg. v. Westmoreland County Ct. Judge*, 58 L. T. N. S. 417, 36 W. R. 477.

2. **Consent to Jurisdiction of Subject-matter.** — *Lee v. Cohen*, 71 L. T. N. S. 824; *Farquharson v. Morgan*, (1894) 1 Q. B. 552, 63 L. J. Q. B. D. 474, 70 L. T. N. S. 152; *Darby v. Cosens*, 1 T. R. 552; *Grangers' Bank v. Superior Ct.*, (Cal. 1893) 33 Pac. Rep. 1095; *People v. District Ct.*, (Colo. 1901) 68 Pac. Rep. 242; *James v. Stokes*, 77 Va. 225. See also *Chesterton v. Farlar*, 7 Ad. & El. 713, 34 E. C. L. 210; *Anonymous*, 1 Vern. 301; *State v. McGee*, (S. Dak. 1901) 88 N. W. Rep. 115.

A Motion for Change of Venue in the District Court is not a waiver of the right to contest jurisdiction by prohibition in the Supreme Court. *People v. District Ct.*, (Colo. 1901) 68 Pac. Rep. 242.

3. **Waiver of Objection to Jurisdiction of Person.** — *Jones v. James*, 19 L. J. Q. B. D. 257; *Smith v. District Ct.*, 4 Colo. 235; *Harris v. Brooker*, 8 Wash. 138. See also *Forster v. Forster*, 4 B. & S. 187, 116 E. C. L. 187, 32 L. J. Q. B. D. 312; *State v. Superior Ct.*, 2 Wash. 13.

4. See *infra*, this title, *Particular Persons and Acts Prohibited*.

5. **Writ Will Not Lie Where Court Has Jurisdiction — England.** — *Reg. v. Justices*, 24 Q. B. D. 181, 59 L. J. M. C. 51; *London v. Cox*, L. R. 2 H. L. 239, 36 L. J. Exch. 225; *Reg. v. Twiss*, 10 B. & S. 298, L. R. 4 Q. B. 407; *Chesterton v. Farlar*, 7 Ad. & El. 713, 34 E. C. L. 210; *Matter of The Charkieh*, L. R. 8 Q. B. 197; *Symes v. Symes*, 2 Burr. 813; *Ex p. Cowan*, 3 B. & Ald. 123, 5 E. C. L. 239; *In re Place*, 8 Exch. 704, 18 Eng. L. & Eq. 525; *Anonymous*, 2 Chit. 359, 18 E. C. L. 367; *Tucker v. Innan*, 4 M. & G. 1049, 43 E. C. L. 539; *Hawes v. Paveley*, 1 C. P. D. 418.

United States. — *In re Morrison*, 147 U. S. 14; *In re Fassett*, 142 U. S. 479; *In re Garnett*, 141 U. S. 1; *Smith v. Whitney*, 116 U. S. 167; *Ex p. Pennsylvania*, 109 U. S. 174; *Ex p. Boyer*, 109 U. S. 629; *Ex p. Gordon*, 104 U. S. 515; *Ex p. Slayton*, 105 U. S. 451; *Ex p. Detroit River Ferry Co.*, 104 U. S. 519; *Ex p. Hagar*, 104 U. S. 520; *U. S. v. Maney*, 61 Fed. Rep. 140.

Alabama. — *Ex p. Mobile*, etc., R. Co., 63 Ala. 349; *Ex p. Brown*, 58 Ala. 536; *Ex p. State*, 51 Ala. 60; *Ex p. Hamilton*, 51 Ala. 62; *Ex p. Keeling*, 50 Ala. 474; *Ex p. Scott*, 47 Ala. 609; *Ex p. Smith*, 34 Ala. 455; *Ex p. Peterson*, 33 Ala. 74; *Ex p. Greene*, 29 Ala. 52; *Ex p. Montgomery*, 24 Ala. 98; *Ex p. Due*, 116 Ala. 491.

Arkansas. — *Ex p. Tucker*, 25 Ark. 567; *Ex p. Blackburn*, 5 Ark. 21; *Weaver v. Leatherman*, 66 Ark. 211.

California. — *Hevren v. Reed*, 126 Cal. 219; *Broder v. Superior Ct.*, 103 Cal. 124; *Mines D'Or*, etc., Soc. v. Superior Ct., 91 Cal. 101; *Bishop v. Superior Ct.*, 87 Cal. 226; *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491; *Powelson v. Lockwood*, 82 Cal. 613; *Thomas v. Justice's Ct.*, 80 Cal. 40; *More v. Superior Ct.*, 64 Cal. 345; *Curtis v. Superior Ct.*, 63 Cal. 435; *Spect v. Superior Ct.*, 59 Cal. 319; *Murphy v. Superior Ct.*, 58 Cal. 520; *Kalloch v. Superior Ct.*, 56 Cal. 229; *Clark v. Superior Ct.*, 55 Cal. 199; *Bandy v. Ransom*, 54 Cal. 87; *People v. Whitney*, 47 Cal. 584. *People v. Kern County*, 47 Cal. 81.

Colorado. — *People v. District Ct.*, (Colo. 1901) 68 Pac. Rep. 242; *People v. District Ct.*,

has a right to adjudicate, and it matters not whether the court below has decided correctly or erroneously; its jurisdiction of the matter in controversy being conceded, prohibition will not lie to prevent an erroneous exercise of that jurisdiction.¹ The exercise of power which it is sought to prohibit must

(Colo. 1901) 66 Pac. Rep. 1068; *Leonard v. Bartels*, 4 Colo. 95.

District of Columbia. — U. S. v. *Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — State v. *Smith*, 32 Fla. 476; State v. *Baker*, 20 Fla. 616; *Sherlock v. Jacksonville*, 17 Fla. 93; State v. *Malone*, 40 Fla. 129.

Georgia. — *Tupper v. Dart*, 104 Ga. 179; *Seymour v. Almond*, 75 Ga. 112.

Idaho. — *Willman v. District Ct.*, (Idaho 1894) 35 Pac. Rep. 692.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272.

Indiana. — *Jasper County v. Spitler*, 13 Ind. 235.

Kentucky. — *Owensboro v. Sparks*, 99 Ky. 351; *Goldsmith v. Owen*, 95 Ky. 420; *Preston v. Fidelity Trust, etc., Co.*, 94 Ky. 295; *Scho barg v. Manson*, (Ky. 1901) 61 S. W. Rep. 999; *Scott v. Tully*, (Ky. 1899) 49 S. W. Rep. 1063; *Standard Oil Co. v. Linn*, (Ky. 1895) 32 S. W. Rep. 932.

Louisiana. — State v. *St. Paul*, 104 La. 280; State v. *Guion*, 50 La. Ann. 492; State v. *Wildier*, 49 La. Ann. 1211; State v. *King*, 48 La. Ann. 292; State v. *Ellis*, 45 La. Ann. 241; State v. *McDowell*, 43 La. Ann. 1193; State v. *Holmes*, 43 La. Ann. 1185; State v. *Voorhies*, 43 La. Ann. 553; State v. *Duffel*, 41 La. Ann. 557; State v. *Koenig*, 39 La. Ann. 776; State v. *Judge*, 38 La. Ann. 49; *Troegel v. Judge*, 35 La. Ann. 1164; *Brown v. Ragland*, 35 La. Ann. 837; State v. *Judge*, 34 La. Ann. 782; State v. *Skinner*, 32 La. Ann. 1092; State v. *Judge*, 48 La. Ann. 1372; State v. *Judge*, 29 La. Ann. 360; State v. *Judge*, 20 La. Ann. 239; State v. *Judge*, 14 La. Ann. 509.

Massachusetts. — *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Fairweather v. McKim*, 168 Mass. 103.

Michigan. — *People v. Circuit Ct.*, 11 Mich. 393, 83 Am. Dec. 754; *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691.

Minnesota. — State v. *Cory*, 35 Minn. 178.

Mississippi. — *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

Missouri. — State v. *Klein*, 116 Mo. 259; State v. *Walls*, 113 Mo. 42; State v. *Withrow*, 103 Mo. 1; State v. *Fox*, 85 Mo. 61; *Wilson v. Berkstresser*, 45 Mo. 283; *Coleman v. Dalton*, 71 Mo. App. 14; State v. *Harrison*, 53 Mo. App. 346; *Morris v. Lenox*, 8 Mo. 252; *Eckerle v. Wood*, (Mo. App. 1902) 69 S. W. Rep. 45; *Delaney v. Police Ct.*, 167 Mo. 667; *Wand v. Ryan*, (Mo. 1901) 65 S. W. Rep. 1025; State v. *Zachritz*, 166 Mo. 307; State v. *Moehlenkamp*, 133 Mo. 134.

Montana. — State v. *Benton*, 12 Mont. 66; State v. *Second Judicial Dist. Ct.*, 22 Mont. 220; State v. *Second Judicial Dist. Ct.*, 22 Mont. 376.

New York. — *People v. Common Pleas Ct.*, 43 Barb. (N. Y.) 278; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *People v. Oyer & T. Ct.*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 14; *People v. Letson*, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381; *People v. Putnam*

County, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 241; *People v. Russel*, (Supm. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 136; *Matter of Mason*, 51 Hun (N. Y.) 138; *People v. Seward*, 7 Wend. (N. Y.) 518; *People v. McAdam*, 84 N. Y. 287; *People v. McCue*, (Supm. Ct. App. Div.) 77 N. Y. Supp. 451; *People v. Fitzgerald*, (Supm. Ct. App. Div.) 76 N. Y. Supp. 865; *People v. Sherman*, 66 N. Y. App. Div. 231; *People v. Goldfogle*, 23 Civ. Pro. (N. Y.) 417; *People v. Langbein*, 12 N. Y. Wkly. Dig. 20; *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256; *People v. Grogan*, (Supm. Ct. Spec. T.) 3 N. Y. Crim. 335; *People v. Boswick*, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163.

South Carolina. — State v. *Edwards*, 1 Mc Mull. L. (S. Car.) 215; State v. *Wakely*, 2 Nott & M. (S. Car.) 410; *Cooper v. Stocker*, 9 Rich. L. (S. Car.) 292; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95; State v. *Nathan*, 4 Rich. L. (S. Car.) 513; State v. *Raborn*, 60 S. Car. 78; State v. *Kirkland*, 41 S. Car. 29; State v. *Columbia*, 17 S. Car. 83; State v. *Fickling*, 10 S. Car. 301; State v. *Columbia, etc., R. Co.*, 1 S. Car. 46.

Virginia. — *Hogan v. Guigon*, 29 Gratt. (Va.) 705; *Ex p. Ellyson*, 20 Gratt. (Va.) 10; *Mayo v. James*, 12 Gratt. (Va.) 17; *Nelms v. Vaughan*, 84 Va. 696; *Moss v. Barham*, 94 Va. 12.

Washington. — State v. *Hogg*, 22 Wash. 646; State v. *Ayer*, 17 Wash. 127; State v. *Superior Ct.*, 3 Wash. 705.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52; *Sperry v. Sanders*, 50 W. Va. 70; *Wood County Ct. v. Boreman*, 34 W. Va. 362; *McConiha v. Guthrie*, 21 W. Va. 134; State v. *Kyle*, 8 W. Va. 711; *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770; *King v. Doolittle*, (W. Va. 1902) 41 S. E. Rep. 145; *Ward v. Evans*, 49 W. Va. 184; *Hassinger v. Holt*, 47 W. Va. 348.

Wisconsin. — State v. *Keyes*, 75 Wis. 288; State v. *Gary*, 33 Wis. 93; State v. *Burton*, 11 Wis. 50.

1. Error in Exercise of Jurisdiction Not Ground for Writ — *England*. — *Reg. v. London Corp.*, 62 L. J. Q. B. D. 589; *Enraght v. Penzance*, 7 App. Cas. 240, 51 L. J. Q. B. D. 506; *Reg. v. London Corp.*, 5 Reports 544.

Alabama. — *Ex p. Boothe*, 64 Ala. 312; *Ex p. State*, 51 Ala. 60; *Ex p. Hill*, 38 Ala. 429; *Ex p. Smith*, 34 Ala. 455; *Ex p. Greene*, 29 Ala. 52. But compare *Ex p. Smith*, 23 Ala. 94.

California. — *Goddard v. Superior Ct.*, 90 Cal. 361; *More v. Superior Ct.*, 64 Cal. 345; *Chapman v. Stoneman*, 63 Cal. 490; *Wreden v. Superior Ct.*, 55 Cal. 504.

Colorado. — *McInerney v. Denver*, 17 Colo. 302; *Leonard v. Bartels*, 4 Colo. 95.

District of Columbia. — U. S. v. *Kimball*, 7 App. Cas. (D. C.) 499.

Georgia. — *Savannah v. Grayson*, 104 Ga. 105.

Indiana. — *Jasper County v. Spitler*, 13 Ind. 235.

Minnesota. — State v. *Ward*, 70 Minn. 58.

be wholly unauthorized by law.¹ Mere errors or irregularities in the proceedings which do not go to the jurisdiction will not be considered upon an application for a writ of prohibition.² The sole question is as to the jurisdiction of the inferior court to take the proposed action, and the merits of the action will not be considered.³ Even consent of parties will not authorize the

Mississippi. — Clayton v. Heidelberg, 9 Smed. & M. (Miss.) 623.

Missouri. — Missouri, etc., R. Co. v. Smith, 154 Mo. 300; Wertheimer v. Boonville, 29 Mo. 254; State v. Harrison, 53 Mo. App. 346.

Montana. — Pigott v. Cascade County, 12 Mont. 537.

New York. — People v. Russell, 49 Barb. (N. Y.) 351; *Ex p.* Gordon, 2 Hill (N. Y.) 363; Norton v. Dowling, (N. Y. Super. Ct. Spec. T.) 46 How. Pr. (N. Y.) 7; People v. Seward, 7 Wend. (N. Y.) 518; People v. Fitzgerald, (Supm. Ct. App. Div.) 76 N. Y. Supp. 865; People v. District Ct., 13 Civ. Pro. (N. Y.) 134.

South Carolina. — Lindsay v. Commissioners, 2 Bay (S. Car.) 38; M'Kenna v. Road Com'rs, Harp. L. (S. Car.) 381; State v. Road Com'rs, 3 Hill L. (S. Car.) 314.

Virginia. — Hogan v. Guigon, 29 Gratt. (Va.) 705; *Ex p.* Ellyson, 20 Gratt. (Va.) 10; Grigg v. Dalsheimer, 88 Va. 508.

Washington. — State v. Superior Ct., 9 Wash. 307; State v. Jones, 2 Wash. 662, 26 Am. St. Rep. 897.

West Virginia. — Richards v. Clarksburg, 30 W. Va. 491; McConiha v. Guthrie, 21 W. Va. 134.

The writ will not lie to correct errors of law or fact. State v. Raborn, 60 S. Car. 78.

1. People v. Kern County, 47 Cal. 81.

2. Only Jurisdictional Defects Considered — *England.* — Chesterton v. Farlar, 7 Ad. & El. 713, 34 E. C. L. 210; *Ex p.* Smyth, 2 C. M. & R. 748; St. David v. Lucy, 1 Ld. Raym. 539; *Ex p.* Story, 12 C. B. 767, 74 E. C. L. 767, 8 Exch. 195, 16 Eng. L. & E. 420, 462; Hooper v. Hill, (1894) 1 Q. B. 659; *In re* New Par Consols, (1898) 1 Q. B. 669.

United States. — *In re* Morrison, 147 U. S. 14; *In re* Engles, 146 U. S. 357; *In re* Fassett, 142 U. S. 479; *Ex p.* Pennsylvania, 109 U. S. 174; *Ex p.* Hagar, 104 U. S. 520.

Alabama. — Apperson v. Rice, 102 Ala. 668; *Ex p.* Branch, 63 Ala. 383; *Ex p.* Peterson, 33 Ala. 74; *Ex p.* Smith, 23 Ala. 113.

California. — Broder v. Superior Ct., 103 Cal. 124; Dutertre v. Superior Ct., 84 Cal. 535; Powelson v. Lockwood, 82 Cal. 613; Levy v. Wilson, 69 Cal. 105; Wreden v. Superior Ct., 55 Cal. 504; Clark v. Superior Ct., 55 Cal. 199; People v. Whitney, 47 Cal. 584.

Colorado. — Leonard v. Bartels, 4 Colo. 95.

District of Columbia. — U. S. v. Kimball, 7 App. Cas. (D. C.) 499.

Florida. — State v. Smith, 32 Fla. 476; State v. Malone, 40 Fla. 129.

Illinois. — People v. Circuit Ct., 173 Ill. 272.

Louisiana. — State v. Voorhies, 49 La. Ann. 1717; State v. Judge, 45 La. Ann. 532; State v. LeBlanc, 42 La. Ann. 1190; State v. Robinson, 38 La. Ann. 968; Brown v. Ragland, 35 La. Ann. 837.

Massachusetts. — Fairweather v. McKim, 168 Mass. 103; Hyde Park v. Wiggin, 157 Mass. 94.

Minnesota. — State v. Cory, 35 Minn. 178.

Mississippi. — Clayton v. Heidelberg, 9 Smed. & M. (Miss.) 623.

Missouri. — State v. Moehlenkamp, 133 Mo. 134; State v. Johnson, 132 Mo. 105; State v. St. Louis Ct. Appeal, 99 Mo. 216; Bowman's Case, 67 Mo. 146; Wilson v. Berkstresser, 45 Mo. 283.

New York. — *Ex p.* Gordon, 2 Hill (N. Y.) 363; People v. Russell, 49 Barb. (N. Y.) 351; People v. Common Pleas Ct., 43 Barb. (N. Y.) 278; People v. Letson, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381; People v. Doyle, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 411, affirming 44 N. Y. App. Div. 402, 162 N. Y. 659; People v. Grogan, (Supm. Ct. Spec. T.) 3 N. Y. Crim. 335; People v. Boswick (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163; People v. Nichols, 79 N. Y. 582.

South Carolina. — State v. Wakely, 2 Nott & M. (S. Car.) 412 State v. Columbia, etc., R. Co., 1 S. Car. 46; M'Donald v. Elfe, 1 Nott & M. (S. Car.) 501; Leonard's Case, 3 Rich. L. (S. Car.) 111; Cooper v. Stocker, 9 Rich. L. (S. Car.) 292; State v. Fickling, 10 S. Car. 301.

Virginia. — Hogan v. Guigon, 29 Gratt. (Va.) 705; Moss v. Barham, 94 Va. 12; Grigg v. Dalsheimer, 88 Va. 508.

West Virginia. — Wood County Ct. v. Boreman, 34 W. Va. 362; Fleming v. Commissioners, 31 W. Va. 608; McConiha v. Guthrie, 21 W. Va. 134.

Gross Defects or Irregularities in the proceedings may be ground for prohibition. See State v. King, 48 La. Ann. 292.

See also State v. Ridgell, 2 Bailey L. (S. Car.) 560, wherein a slave was erroneously convicted of burglary and sentenced to death, but the execution was arrested by prohibition upon the ground that the slave was not guilty of burglary, and therefore, could not be sentenced to death. And see comments on this case in State v. Nathan, 4 Rich. L. (S. Car.) 515.

In Gould v. Gapper, 5 East 365, Lord Ellenborough said: "We cannot feel ourselves warranted in holding that the grounds of granting prohibitions are so narrow and limited as to be confined solely to cases of excess of jurisdiction." *Quoted with approval* in State v. Ridgell, 2 Bailey L. (S. Car.) 562.

3. Merits Not Considered — *United States.* — *In re* Fassett, 142 U. S. 479; *Ex p.* Pennsylvania, 109 U. S. 174; *Ex p.* Slayton, 105 U. S. 451; *Ex p.* Hagar, 104 U. S. 520.

Alabama. — *Ex p.* Greene, 29 Ala. 52; *Ex p.* Smith, 23 Ala. 94.

California. — Goddard v. Superior Ct., 90 Cal. 364; Agassiz v. Superior Ct., 90 Cal. 101; Bishop v. Superior Ct., 87 Cal. 226; Dutertre v. Superior Ct., 84 Cal. 535; Powelson v. Lockwood, 82 Cal. 613; Thomas v. Justice's Ct., 80 Cal. 40; Curtis v. Superior Ct., 63 Cal. 435; North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315; Clark v. Superior Ct., 55 Cal. 199.

court to determine the merits.¹ The writ cannot be used as a process for the review and correction of errors in inferior tribunals.² Relief must be sought in one of the appropriate proceedings provided by law for the correction of errors.³ The improper decision of a jurisdictional question is not ground for the writ where the inferior court had jurisdiction to determine that question.⁴

Numerous Illustrations of the application of these rules are given in a succeeding section.⁵

c. JUDICIAL, MINISTERIAL, OR LEGISLATIVE ACTION — **Judicial Action.** — The action which may be restrained by the writ of prohibition must be judicial or *quasi-judicial* in its nature. The writ will not lie to prevent officers or tribunals from acting where such action is not judicial in its nature,⁶

Colorado. — *People v. District Ct.*, 21 Colo. 251; *McInerney v. Denver*, 17 Colo. 302.

Louisiana. — *State v. Hall*, 43 La. Ann. 1059; *State v. Judge*, 41 La. Ann. 953.

Mississippi. — *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

New York. — *People v. Grogan*, (Supm. Ct. Spec. T.) 3 N. Y. Crim. 335.

Washington. — *State v. Superior Ct.*, 13 Wash. 226.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134; *State v. Kyle*, 8 W. Va. 711; *Hassinger v. Holt*, 47 W. Va. 348.

1. *Powelson v. Lockwood*, 82 Cal. 613; *State v. Harrison*, 53 Mo. App. 346.

2. **Not a Process for Correction of Errors** — *England.* — *Mackonochie v. Penzance*, 6 App. Cas. 443. 50 L. J. Q. B. D. 611.

United States. — *Smith v. Whitney*, 116 U. S. 167.

Alabama. — *Epperson v. Rice*, 102 Ala. 668; *Ex p. Smith*, 34 Ala. 455.

California. — *Powelson v. Lockwood*, 82 Cal. 613; *Clark v. Superior Ct.*, 55 Cal. 199.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — *State v. Hocker*, 33 Fla. 283.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272; *People v. Hoglund*, 93 Ill. App. 292.

Michigan. — *People v. Circuit Ct.*, 11 Mich. 393, 83 Am. Dec. 754.

Nevada. — *Low v. Crown Point Min. Co.*, 2 Nev. 75.

New York. — *People v. Russell*, 49 Barb. (N. Y.) 351; *People v. Letson*, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381; *Ex p. Gordon*, 2 Hill (N. Y.) 363; *People v. Seward*, 7 Wend. (N. Y.) 518; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Boswick*, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163; *Thomson v. Tracy*, 60 N. Y. 31.

South Carolina. — *Cooper v. Stocker*, 9 Rich. L. (S. Car.) 292; *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *State v. Kirkland*, 41 S. Car. 29.

Tennessee. — *Memphis v. Halsey*, 12 Heisk. (Tenn.) 212.

Virginia. — *Hogan v. Guigon*, 29 Gratt. (Va.) 705; *Ex p. Ellyson*, 20 Gratt. (Va.) 10; *Grigg v. Dalsheimer*, 88 Va. 508; *Gresham v. Ewell*, 84 Va. 784; *Moss v. Barham*, 94 Va. 12.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52; *McConiha v. Guthrie*, 21 W. Va. 134.

Wyoming. — *Dobson v. Westheimer*, 5 Wyo. 34.

3. See *infra*, this section, *Other Adequate Remedy*.

Where no appeal is given the party is without a remedy, though in a few cases, to pre-

vent a gross injustice, the rules have been relaxed and the writ has been granted. See *State v. Nathan*, 4 Rich. L. (S. Car.) 515.

4. See *infra*, this section, *Other Adequate Remedy*.

5. See *infra*, this title, *Particular Persons and Acts Prohibited*.

6. **Only Judicial Action Prohibited** — *England.* — *Ex p. Kingstown Com'rs*, 18 L. R. Ir. 509; *Ex p. Death*, 18 Q. B. 647, 83 E. C. L. 647.

United States. — *Smith v. Whitney*, 116 U. S. 167; *U. S. v. Berry*, 4 Fed. Rep. 779.

Alabama. — *Atkins v. Siddons*, 66 Ala. 453; *Ex p. Roundtree*, 51 Ala. 42.

California. — *Coronado v. San Diego*, 97 Cal. 440; *Spring Valley Water Works v. Bartlett*, 63 Cal. 245; *Le Conte v. Berkeley*, 57 Cal. 269; *Camron v. Kenfield*, 57 Cal. 550; *People v. Election Com'rs*, 54 Cal. 404; *Maurer v. Mitchell*, 53 Cal. 289.

Colorado. — *People v. District Ct.*, 6 Colo. 534.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Massachusetts. — *Vermont, etc., R. Co. v. Franklin County*, 10 Cush. (Mass.) 12; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Day v. Board of Aldermen*, 102 Mass. 310.

Michigan. — *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555.

Missouri. — *Higgins v. Talty*, 157 Mo. 280.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *People v. Albany County*, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 411; *People v. Cooper*, (Supm. Ct.) 57 How. Pr. (N. Y.) 416; *Ex p. Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *Thomson v. Tracy*, 60 N. Y. 31; *People v. Nussbaum*, 55 N. Y. App. Div. 245.

North Carolina. — *State v. Allen*, 2 Ired. L. (24 N. Car.) 189.

South Carolina. — *Greir v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731; *State v. Haul-over-Cut Com'rs*, 2 Spears L. (S. Car.) 491; *M'Kee v. Anderson*, Rice L. (S. Car.) 24; *State v. Moultrieville*, Rice L. (S. Car.) 158; *State v. Commissioners*, 1 Mill (S. Car.) 55; *State v. Kirkland*, 41 S. Car. 29; *Hunter v. Moore*, 39 S. Car. 394; *State v. Columbia*, 17 S. Car. 83; *State v. Stackhouse*, 14 S. Car. 417; *State v. County Treasurer*, 4 S. Car. 520.

Washington. — *Winsor v. Bridges*, 24 Wash. 540; *State v. State Land Com'rs*, 23 Wash. 700.

West Virginia. — *Fleming v. Commissioners*, 31 W. Va. 609; *Brazie v. Fayette County Com'rs*, 25 W. Va. 213; *Judy v. Lashley*, 50 W. Va. 628. See also *Hartigan v. West Virginia University*, 49 W. Va. 14.

Wisconsin. — *State v. Keyes*, 75 Wis. 288.

though there has been a tendency remarked in some cases to extend the writ to acts not very strongly marked with a judicial character.¹ Where a tribunal is vested with both judicial and non-judicial powers, the writ will lie as to the former, but not as to the latter.²

Ministerial or Executive Action. — The writ will not lie to prevent acts of merely ministerial, administrative, or executive character.³ Where the power to issue writs of prohibition rests upon constitutional provisions and is given in general terms, the legislature cannot enlarge the scope or office of the writ so as to include ministerial functions.⁴

Legislative Action. — The writ will not lie to prevent legislative action.⁵

d. ACTS ALREADY PERFORMED. — The writ will not issue where the act sought to be prohibited has already been performed.⁶ But the writ may properly be granted so long as anything remains to be done to carry into

1. See *State v. Kirkland*, 41 S. Car. 35; *State v. Commissioners*, 1 Mill (S. Car.) 55; *State v. Simons*, 2 Spears L. (S. Car.) 761; *State v. Stackhouse*, 14 S. Car. 427.

2. **Tribunals Exercising Both Judicial and Non-judicial Powers.** — *Atkins v. Siddons*, 66 Ala. 453; *Seymour v. Almond*, 75 Ga. 112; *State v. Spearing*, 31 La. Ann. 122; *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *Norton v. Dowling*, (N. Y. Super. Ct. Spec. T.) 46 How. Pr. (N. Y.) 7; *Fleming v. Commissioners*, 31 W. Va. 609; *Bloxton v. McWhorter*, 46 W. Va. 32. See also *Day v. Board of Aldermen*, 102 Mass. 310.

An Order Discomfounding a Tradesman for violating a decree of the governing board of a university, made by the vice-chancellor, is not a political proceeding which can be prohibited. *Ex p. Death*, 18 Q. B. 647, 83 E. C. L. 647, 21 L. J. Q. B. D. 337.

3. **Ministerial or Executive Acts** — *United States*. — *U. S. v. Berry*, 4 Fed. Rep. 779.

Alabama. — *Ex p. State*, 89 Ala. 177; *Atkins v. Siddons*, 66 Ala. 453.

California. — *Hobart v. Tillson*, 66 Cal. 210; *Hull v. Superior Ct.*, 63 Cal. 179; *Farmers' Co-operative Union v. Thresher*, 62 Cal. 407; *Spring Valley Water Works v. Bartlett*, 63 Cal. 245; *Le Conte v. Berkeley*, 57 Cal. 269; *People v. Election Com'rs*, 54 Cal. 404; *Maurer v. Mitchell*, 53 Cal. 289; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

Colorado. — *People v. District Ct.*, 6 Colo. 534.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Michigan. — *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555.

Minnesota. — *Home Ins. Co. v. Flint*, 13 Minn. 244.

Missouri. — *School Dist. No. 6 v. Burris*, 84 Mo. App. 653; *Hockaday v. Newsom*, 48 Mo. 196; *Vitt v. Owens*, 42 Mo. 512; *State v. Justices*, 41 Mo. 44.

Montana. — *State v. Hogan*, 24 Mont. 379.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *People v. Excise Com'rs*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 514; *Norton v. Dowling*, (N. Y. Super. Ct. Spec. T.) 46 How. Pr. (N. Y.) 7; *Ex p. Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *People v. Queens County*, 1 Hill (N. Y.) 195; *People v. Nussbaum*, 55 N. Y. App. Div. 245; *Thomson v. Tracy*, 60 N. Y. 31; *Matter of Mt. Morris Square*, 2 Hill (N. Y.) 14.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

South Carolina. — *Hunter v. Moore*, 39 S. Car. 394; *State v. Columbia*, 16 S. Car. 412, reheard 17 S. Car. 80.

Washington. — *Clifford v. Parker*, 13 Wash. 518.

West Virginia. — *Fleming v. Commissioners*, 31 W. Va. 609; *Hassinger v. Holt*, 47 W. Va. 348; *Bloxton v. McWhorter*, 46 W. Va. 32.

Wisconsin. — *State v. Keyes*, 75 Wis. 288; *State v. Gary*, 33 Wis. 93.

Wyoming. — *Dobson v. Westheimer*, 5 Wyo. 34.

Contra. — *Williams v. Lewis*, (Idaho 1898) 54 Pac. Rep. 619; *People v. House*, 4 Utah 369.

In *Burger v. Carter*, 1 McMull. L. (S. Car.) 410, it was held that prohibition would lie to restrain the enforcement of a tax although the tax collector was conceded to be a ministerial officer. This case is opposed to the great weight of authority. See *infra*, this title, VI. 58. *Taxation*.

In *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143, it was held that prohibition would lie to prevent a city and its marshal from summarily seizing and selling hogs running at large within the city, upon the ground that the ordinance authorizing such action was unconstitutional and void, in that it did not provide for due process of law. This case is clearly unsound.

4. *Hobart v. Tillson*, 66 Cal. 210; *Farmers' Co-operative Union v. Thresher*, 62 Cal. 407; *Camron v. Kenfield*, 57 Cal. 550; *Sherlock v. Jacksonville*, 17 Fla. 93; *Winsor v. Bridges*, 24 Wash. 540.

5. **Legislative Action.** — *Ex p. Kingstown Com'rs*, 18 L. R. Ir. 509; *Spring Valley Water Works v. Bartlett*, 63 Cal. 245; *People v. Election Com'rs*, 54 Cal. 404; *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *Greir v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731. Compare *Day v. Board of Aldermen*, 102 Mass. 310.

6. **Writ Refused Where Act Fully Performed** — *England*. — *Chabot v. Morpeth*, 15 Q. B. 446, 69 E. C. L. 446, 19 L. J. Q. B. D. 377; *Matter of Poe*, 5 B. & Ad. 681, 27 E. C. L. 153, 2 N. & M. 636, 3 L. J. K. B. 33; *Denton v. Marshall*, 1 H. & C. 654, 9 Jur. N. S. 337.

United States. — *U. S. v. Hoffman*, 4 Wall. (U. S.) 158.

Alabama. — *Ex p. Roundtree*, 51 Ala. 42.

California. — *Cosby v. Superior Ct.*, 110 Cal.

effect the illegal action already taken,¹ and in such a case complete relief may be granted by undoing what has already been improperly done.² The writ may properly command the lower tribunal to perform affirmative acts necessary to carry into effect the prohibition.³ Where the court has completely acted and the judgment or order has been entered and nothing remains but ministerial acts in pursuance of such order, prohibition will not lie to arrest the performance of such acts.⁴ It is the situation existing at the time when the writ of prohibition is ordered, and not at the time when the writ is served, that fixes the extent of the power of the higher court to interfere with the proceedings in the lower court.⁵

3. Persons and Courts Subject to Writ—*a. COURTS*—*Inferior Courts.*—The writ will lie against justices of the peace and other courts of limited and special powers to prevent them from exceeding their jurisdiction.⁶

45; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *More v. Superior Ct.*, 64 Cal. 345; *Hull v. Superior Ct.*, 63 Cal. 179; *Coker v. Superior Ct.*, 58 Cal. 177.

Florida.—*Sherlock v. Jacksonville*, 17 Fla. 93.

Georgia.—*Pope v. Colbert*, 95 Ga. 791.

Idaho.—*Bellevue Water Co. v. Stockslager*, (Idaho 1895) 43 Pac. Rep. 568.

Louisiana.—*State v. St. Paul*, 104 La. 280; *State v. Potts*, 50 La. Ann. 109; *State v. Judges*, 48 La. Ann. 1166; *State v. Judge*, 44 La. Ann. 1093.

Minnesota.—*Dayton v. Paine*, 13 Minn. 493.

Missouri.—*State v. St. Louis Ct. Appeals*, 97 Mo. 276; *State v. Burckhardt*, 87 Mo. 533.

Montana.—*State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

New Mexico.—*In re Roe Chung*, 9 N. Mex. 130.

New York.—*Thomson v. Tracy*, 60 N. Y. 31.

South Carolina.—*State v. Stackhouse*, 14 S. Car. 417.

Utah.—*People v. Carrington*, 5 Utah 531; *Brooks v. Warren*, 5 Utah 89.

Washington.—*Clifford v. Parker*, 13 Wash. 518; *State v. Superior Ct.*, 13 Wash. 226; *State v. Superior Ct.*, 4 Wash. 35; *State v. Superior Ct.*, 2 Wash. 9.

West Virginia.—*Haldeman v. Davis*, 28 W. Va. 324.

Wyoming.—*Dobson v. Westheimer*, 5 Wyo. 34.

See also *infra*, this section, *At What Stage of Proceedings.*

1. *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *State v. Lee*, 106 La. 400; *State v. Elkin*, 130 Mo. 90.

The Granting of an Injunction does not finally terminate the proceeding so that a writ of prohibition cannot be granted, as further action may be necessary to enforce an injunction. *State v. Judge*, 48 La. Ann. 1501.

2. **Undoing Action Already Taken.**—*Ex p. Peterson*, 33 Ala. 74; *Ex p. Smith*, 23 Ala. 121; *Havemeyer v. Superior Ct.*, 84 Cal. 394, 18 Am. St. Rep. 192; *State v. Aloe*, 152 Mo. 466; *State v. Superior Ct.*, 12 Wash. 677.

3. **Compelling Affirmative Acts.**—*People v. District Ct.*, 23 Colo. 466.

The Court Will Not Award Restitution in prohibition when the subject-matter of the suit is no longer within the control of the inferior court. *Denton v. Marshall*, 1 H. & C. 654, 32 L. J. Exch. 89.

4. *Dobson v. Westheimer*, 5 Wyo. 34.

But see *Hutson v. Lowry*, 2 Va. Cas. 42, wherein it was held that the writ would issue even after judgment rendered, execution levied and the money in the hands of the constable, the defendant having given notice to the constable not to pay over the money to the plaintiff.

Sale under Attachment.—Prohibition will not lie to arrest a sale under an attachment, although the court had no jurisdiction either of the property or of the person, where the judgment had been rendered and sale ordered before application for the writ. *Dobson v. Westheimer*, 5 Wyo. 34.

The Issuance of an Execution will not be restrained by prohibition. See *infra*, this title, VI. 29. *Executions.*

5. **What Time Controls.**—*Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192.

6. **Inferior Courts**—*California.*—*Spencer v. Branham*, 109 Cal. 336.

Georgia.—*Doughty v. Walker*, 54 Ga. 595; *South Carolina R. Co. v. Ellis*, 40 Ga. 87.

Louisiana.—*State v. Voorhies*, 49 La. Ann. 1717; *State v. Newman*, 49 La. Ann. 52; *State v. Carreau*, 45 La. Ann. 1446; *State v. McCrea*, 40 La. Ann. 20; *State v. Falls*, 32 La. Ann. 553.

New York.—*People v. McAdam*, 22 Hun (N. Y.) 559.

South Carolina.—*Baldwin v. Cooley*, 1 S. Car. 256.

Utah.—*People v. House*, 4 Utah 369; *People v. Spiers*, 4 Utah 385.

Vermont.—*Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867.

Virginia.—*Hutson v. Lowry*, 2 Va. Cas. 42; *Miller v. Marshall*, 1 Va. Cas. 158; *Burroughs v. Taylor*, 90 Va. 55; *James v. Stokes*, 77 Va. 225.

West Virginia.—*Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574; *Bodley v. Archibald*, 33 W. Va. 229.

"There is no class of cases in which the authority to issue writs of prohibition is better established than in those of courts-martial, ecclesiastical courts, or inferior courts of common law, assuming to take cognizance, in excess of their jurisdiction, of criminal prosecutions." *Connecticut River R. Co. v. Franklin County*, 127 Mass. 60, 34 Am. Rep. 338, *citing* *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Grant v. Gould*, 2 H. Bl. 69; *Com. Dig., Prohibition*, F. 6; *Searle v. Williams*, Hob. 288; *Reg. v. Her-*

Courts of General Jurisdiction. — The writ lies to courts of general jurisdiction as well as to courts of limited or special jurisdiction.¹

Appellate Courts. — The writ lies to appellate courts in proper cases.²

b. JUDICIAL AND QUASI-JUDICIAL OFFICERS. — The writ lies against any person or persons assuming to exercise judicial or *quasi*-judicial power, although not strictly or technically a court.³

c. MINISTERIAL, EXECUTIVE, AND LEGISLATIVE OFFICERS. — The writ will not lie against ministerial, executive, or legislative officers who do not assume to exercise any judicial powers.⁴

d. PRIVATE PERSONS AND CORPORATIONS. — The writ will not lie against private parties alone or against public or private corporations or their officers.⁵

e. APPLICATIONS OF RULE. — Inasmuch as the propriety of issuing the writ depends upon the nature of the act to be restrained rather than upon the general character of the particular officer or tribunal, and as incidental judicial powers are frequently conferred upon persons whose main duties are not judicial, the application of these rules will be given in connection with the consideration of particular grounds for the writ.⁶

4. Threatened Exercise of Power. — It must clearly appear that the inferior tribunal is actually proceeding or is about to proceed in some matter over which it possesses no jurisdiction, and when such intention is not clearly shown the writ will be refused.⁷ It will not be presumed that the inferior

ford, 3 El. & El. 115, 107 E. C. L. 115; Zylstra v. Charleston, 1 Bay (S. Car.) 382.

A Court of Admiralty is an inferior court, subject to the writ of prohibition. *James v. South Western R. Co.*, L. R. 7 Exch. 287, 41 L. J. Exch. 186.

1. Courts of General Jurisdiction. — *Ex p.* Smith, 23 Ala. 125; *People v. District Ct.*, 6 Colo. 534; *Lincoln-Lucky, etc.*, Min. Co. v. District Ct., 7 N. Mex. 486; *State v. McGee*, (S. Dak. 1901) 88 N. W. Rep. 115; *State v. Superior Ct.*, 5 Wash. 641; *State v. Superior Ct.*, 2 Wash. 13.

The District Court Is Relatively Inferior to the Supreme Court, although not technically an "inferior" court. *Lincoln-Lucky, etc.*, Min. Co. v. District Ct., 7 N. Mex. 486.

2. Darby v. Cosens, 1 T. R. 552. See also *infra*, this title, *Particular Persons and Acts Prohibited — Appeal and Error*.

3. Judicial Officers. — *Ex p.* Kingstown Com'rs, 18 L. R. 1r. 509; *State v. Young*, 29 Minn. 523; *State v. Kirkland*, 41 S. Car. 29; *Brazie v. Fayette County Com'rs*, 25 W. Va. 213; *Judy v. Lashley*, 50 W. Va. 628. See also *Hassinger v. Holt*, 47 W. Va. 348. But see *Hunter v. Moore*, 39 S. Car. 394.

The Writ Will Lie to a Single Judge of an inferior court, no less than to the court as such, where he illegally assumes the exercise of judicial power. *State v. Field*, 112 Mo. 554.

The Writ Lies to the Judicial Committee of the privy council if it exceeds its jurisdiction. *Ex p. Smyth*, 2 C. M. & R. 748, 1 Gale 274, 3 Ad. & El. 719, 30 E. C. L. 194.

4. Ministerial, Executive, and Legislative Officers. — See *supra*, this section, *Judicial, Ministerial, or Legislative Action*. *Smith v. Whitney*, 116 U. S. 167; *Patton v. Stephens*, 14 Bush (Ky.) 324; *Grier v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731.

In *re Radl*, 86 Wis. 645, 39 Am. St. Rep. 918, the court said: "It would seem that the writ is not to be applied to any officer or body

on whom the law confers no power of pronouncing any judgment."

"Prohibition is not available as a remedy to prevent the acts of a *de facto* or *de jure* ministerial officer." *Hull v. Superior Ct.*, 63 Cal. 179, *citing* *People v. Election Com'rs*, 54 Cal. 404; *Le Conte v. Berkeley*, 57 Cal. 269.

Contra. — *Williams v. Lewis*, (Idaho 1898) 54 Pac. Rep. 619, wherein the writ was granted to restrain the secretary of state from certifying to the county auditors a political ticket not entitled to be certified.

In *Harbor Line Com'rs v. State*, 2 Wash. 530, it was held that the writ would not be granted for the purpose of preventing harbor line commissioners from defining harbor lines, but this was placed upon the ground that the petitioner had adequate remedies by ordinary proceedings in law or in equity.

"Instances, indeed, are to be found, where the writ of prohibition has been used, not to restrain the action of courts, but to prevent individuals from committing acts of irreparable mischief—in cases of waste and nuisance. These instances, however, are not of modern occurrence, and are viewed as of an anomalous character." *State v. Allen*, 2 Ired. L. (24 N. Car.) 189.

5. Private Persons and Corporations. — *Southern R. Co. v. Birmingham, etc.*, R. Co., (Ala. 1900) 29 So. Rep. 191; *Hevren v. Reed*, 126 Cal. 219; *Sherlock v. Jacksonville*, 17 Fla. 93; *State v. Superior Ct.*, 13 Wash. 226.

The writ may issue to the court and party, but not to a party alone. *Winsor v. Bridges*, 21 Wash. 540; *Sherlock v. Jacksonville*, 17 Fla. 99.

6. See *infra*, this title, *Particular Persons and Acts Prohibited*.

7. Action Must Be Threatened — England. — *Reg. v. Twiss*, L. R. 4 Q. B. 407; *Hallack v. Cambridge University*, 1 Q. B. 593, 41 E. C. L. 687; *Dutens v. Robson*, 1 H. Bl. 100. See also *Gould v. Gapper*, 5 East 345, 7 Rev. Rep. 766.

tribunal will act in a matter over which it has no jurisdiction.¹ The writ will not lie to prevent a judicial officer from taking any proceedings in a cause in the absence of any allegations connecting him actively with the proceedings in question.²

5. Other Adequate Remedy — General Rule. — The writ is never allowed, even in cases of usurpation or abuse of power, unless existing remedies are inadequate or inapplicable. It is always a good reason for withholding the writ if the party aggrieved has another and complete remedy at law, by which the desired end can be satisfactorily and fully accomplished.³ But in order that

Alabama. — *Ex p. Greene*, 29 Ala. 52; *Ex p. Due*, 116 Ala. 491.

Florida. — See also *State v. White*, 40 Fla. 297.

Georgia. — *Mealing v. Augusta*, Dudley (Ga.) 221.

Louisiana. — *State v. Ellis*, 40 La. Ann. 818; *State v. Rightor*, 40 La. Ann. 837; *State v. Judge*, 33 La. Ann. 1284; *State v. Monroe*, 33 La. Ann. 923; *State v. Cassidy*, 7 La. Ann. 273; *State v. Allen*, 51 La. Ann. 1842.

Minnesota. — *Prignitz v. Fischer*, 4 Minn. 366.

Mississippi. — *Romberger v. Water Valley*, 63 Miss. 218.

Missouri. — See also *State v. Spencer*, 164 Mo. 23.

Washington. — *Clifford v. Parker*, 13 Wash. 518; *Harris v. Brooker*, 8 Wash. 138; *State v. Superior Ct.*, 4 Wash. 35; *State v. Superior Ct.*, 2 Wash. 9; *State v. Superior Ct.*, 13 Wash. 638, wherein the circumstances were held sufficient to justify the issuance of the writ.

Refusal to Vacate Void Judgment. — Where the lower court has refused on motion to set aside a void judgment of contempt, prohibition will issue, although the return to the alternative writ recites that the lower court has no intention of proceeding further in the matter. *State v. Langhorne*, 8 Wash. 447.

After Vacation of Void Order. — The writ will not issue to restrain an order after such order has been set aside by the lower court and an appeal from the vacation of such order is pending in the Supreme Court. *State v. Allen*, 51 La. Ann. 1842.

1. Presumption. — *Chesterton v. Farlar*, 7 Ad. & El. 713, 34 E. C. L. 210; *State v. Allen*, 51 La. Ann. 1842; *Romberger v. Water Valley*, 63 Miss. 218; *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

The presumption that an officer will not exceed his power is not ground for refusing the writ, where such officer has asserted the power in a similar case and still adheres to his opinion. *People v. Cooper*, (Supm. Ct.) 57 How. Pr. (N. Y.) 416. See also *State v. Superior Ct.*, 13 Wash. 638.

2. Ex p. Greene, 29 Ala. 52.

3. Writ Lies Only in Absence of Other Adequate Remedy — *United States*. — *In re Alix*, 166 U. S. 136; *In re New York, etc., Steamship Co.*, 155 U. S. 523; *In re Rice*, 155 U. S. 396; *Yesler v. Washington Harbor Line Com'rs*, 146 U. S. 646; *Ex p. Gordon*, 104 U. S. 515; *Ex p. Warmouth*, 17 Wall. (U. S.) 64.

Alabama. — *Atkins v. Siddons*, 66 Ala. 453; *Ex p. Mobile, etc., R. Co.*, 63 Ala. 349; *Ex p. Lyon*, 60 Ala. 650; *Ex p. Hamilton*, 51 Ala. 62; *Ex p. Reid*, 50 Ala. 439; *Ex p. Scott*, 47 Ala. 609; *Ex p. Stickney*, 40 Ala. 160; *Ex p. Smith*, 34 Ala. 455; *Ex p. Peterson*, 33 Ala. 74;

Ex p. Greene, 29 Ala. 52; *Ex p. Smith*, 23 Ala. 94.

Arkansas. — *Weaver v. Leatherman*, 66 Ark. 211.

California. — *Jacobs v. Superior Ct.*, 133 Cal. 364; *McDonald v. Agnew*, 122 Cal. 448; *Grant v. Superior Ct.*, 106 Cal. 324; *White v. Superior Ct.*, 110 Cal. 54; *Woodward v. Superior Ct.*, 95 Cal. 272; *Bruner v. Superior Ct.*, 92 Cal. 239; *Agassiz v. Superior Ct.*, 90 Cal. 101; *Strouse v. Police Ct.*, 85 Cal. 49; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491; *Powelson v. Lockwood*, 82 Cal. 613; *Levy v. Wilson*, 69 Cal. 105; *Kirby v. Superior Ct.*, 68 Cal. 604; *Bliss v. Superior Ct.*, 62 Cal. 543; *Rickey v. Superior Ct.*, 59 Cal. 661; *Clark v. Superior Ct.*, 55 Cal. 199; *Wreden v. Superior Ct.*, 55 Cal. 504; *Hopkins v. Superior Ct.*, 136 Cal. 552; *Terrill v. Superior Ct.*, (Cal. 1899) 60 Pac. Rep. 38, (Cal. 1900) 60 Pac. Rep. 516; *Stoddard v. Superior Ct.*, (Cal. 1895) 40 Pac. Rep. 491; *Mancello v. Bellrude*, (Cal. 1886) 11 Pac. Rep. 501.

Colorado. — *People v. District Ct.*, 26 Colo. 386; *Tomboy Gold Mines Co. v. District Ct.*, 23 Colo. 441; *People v. District Ct.*, 21 Colo. 251; *McInerney v. Denver*, 17 Colo. 302; *People v. District Ct.*, 11 Colo. 574; *People v. District Ct.*, 6 Colo. 534; *Leonard v. Bartels*, 4 Colo. 95; *People v. District Ct.*, (Colo. 1901) 66 Pac. Rep. 1068; *People v. District Ct.*, 11 Colo. 574.

Connecticut. — *Toomey v. Comley*, 72 Conn. 458; *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Georgia. — *Turner v. Forsyth*, 78 Ga. 683; *Hart v. Taylor*, 61 Ga. 156.

Idaho. — *Bellevue Water Co. v. Stockslager*, (Idaho 1895) 43 Pac. Rep. 568.

Illinois. — *People v. Hoglund*, 93 Ill. App. 292.

Indiana. — *Jasper County v. Spitler*, 13 Ind. 235.

Kansas. — *Mason v. Grubel*, (Kan. 1902) 68 Pac. Rep. 660.

Louisiana. — *State v. Judge*, 4 Rob. (La.) 48; *State v. Judge*, 2 Rob. (La.) 566; *State v. King*, 50 La. Ann. 19; *State v. Monroe*, 48 La. Ann. 27; *State v. Perez*, 48 La. Ann. 1348; *State v. Ellis*, 47 La. Ann. 1602; *Langridge v. Judge*, 46 La. Ann. 29; *State v. Kruttschnitt*, 44 La. Ann. 567; *State v. Rightor*, 44 La. Ann. 298; *State v. Judge*, 25 La. Ann. 381; *State v. Judge*, 21 La. Ann. 123; *State v. Judge*, 11 La. Ann. 696.

Massachusetts. — *Washburn v. Phillips*, 2

the existence of another remedy may oust the remedy by prohibition, such other remedy must be equally effective.¹ Where there is another remedy, but such remedy is inadequate or not sufficiently speedy, the writ of prohibition will lie.² But the writ will not be issued because of the greater expense, inconvenience, or delay of other remedies.³ One who had another

Met. (Mass.) 296; *Jaquith v. Fuller*, 167 Mass. 123; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *Fairweather v. McKim*, 168 Mass. 103.

Michigan. — *Hudson v. Judge*, 42 Mich. 239; *People v. Circuit Ct.*, 11 Mich. 393, 83 Am. Dec. 754; *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691.

Minnesota. — *State v. Ward*, 70 Minn. 58; *State v. Cory*, 35 Minn. 178; *State v. Municipal Ct.*, 26 Minn. 162.

Mississippi. — *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

Missouri. — *State v. Klein*, 116 Mo. 259; *Mastin v. Sloan*, 98 Mo. 252; *State v. Cline*, 85 Mo. App. 628; *State v. Bowerman*, 40 Mo. App. 576.

Nevada. — *Low v. Crown Point Min. Co.*, 2 Nev. 75.

New York. — *People v. Russell*, (Supm. Ct. Spec. T.) 19 Abb. Pr. (N. Y.) 136; *People v. Marine Ct.*, 14 Abb. Pr. (N. Y.) 266; *People v. Russell*, (Supm. Ct. Spec. T.) 3 Abb. Pr. N. S. (N. Y.) 232; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *People v. Clute*, (Supm. Ct. Spec. T.) 42 How. Pr. (N. Y.) 157; *People v. Ulster County*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 237; *People v. Common Pleas Ct.*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 477; *People v. Oyer & T. Ct.*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 19; *Ex p. Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *People v. Surrogate's Ct.*, 36 Hun (N. Y.) 218; *People v. Talcott*, 21 Hun (N. Y.) 591; *People v. Westbrook*, 89 N. Y. 152; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Wood*, 21 N. Y. App. Div. 245; *People v. Kings County Ct.*, 23 N. Y. Wkly. Dig. 137.

South Carolina. — *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *Baldwin v. Cooley*, 1 S. Car. 261.

Utah. — *Overland Gold Min. Co. v. McMaster*, 19 Utah 177.

Vermont. — *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867.

Virginia. — *Bedford v. Wingfield*, 27 Gratt. (Va.) 329; *Shell v. Cousins*, 77 Va. 328; *Gresham v. Ewell*, 84 Va. 784.

Washington. — *State v. Hogg*, 22 Wash. 646; *State v. Superior Ct.*, 16 Wash. 444; *State v. Hunter*, 4 Wash. 712; *State v. Harbor Line Com'rs*, 4 Wash. 816; *State v. Jones*, 2 Wash. 662, 26 Am. St. Rep. 897; *Harbor Line Com'rs v. State*, 2 Wash. 530; *Harris v. Brooker*, 8 Wash. 138; *State v. Superior Ct.*, 7 Wash. 77; *State v. Superior Ct.*, 4 Wash. 35; *State v. Superior Ct.*, 3 Wash. 702; *State v. Superior Ct.*, 3 Wash. 696.

West Virginia. — *Eastham v. Holt*, 43 W. Va. 599; *McConiha v. Guthrie*, 21 W. Va. 134; *Buskirk v. Judge*, 7 W. Va. 91.

In *Norfolk*, etc., R. Co. v. *Pinnacle Coal Co.*, 44 W. Va. 574, it was held that this rule did not apply in West Virginia.

Wisconsin. — *In re Schumaker*, 90 Wis. 488; *State v. Evans*, 88 Wis. 255; *In re Radl*, 86

Wis. 645, 39 Am. St. Rep. 918; *State v. Braun*, 31 Wis. 600; *State v. Burton*, 11 Wis. 50.

Wyoming. — *State v. District Ct.*, 5 Wyo. 227.

Contra. — Where a court has clearly no jurisdiction of a matter before it, a writ of prohibition lies to restrain its proceedings, notwithstanding the existence of another legal remedy by appeal or otherwise. *Smith v. Whitney*, 116 U. S. 167.

In *England* the same rule prevails. *Darby v. Cosens*, 1 T. R. 552; *Matter of Maidenhead*, 2 H. & N. 257; *Bridge v. Branch*, 1 C. P. D. 633.

1. Other Remedy Must Be Equally Effective. — *State v. Ekin*, 130 Mo. 90. See also *Connecticut River R. Co. v. Franklin County*, 127 Mass. 59, 34 Am. Rep. 388. And see the preceding note.

The writ lies to arrest an unwarranted exercise of jurisdiction which results in an immediate and wrongful invasion of property rights or personal liberty. *St. Louis*, etc., R. Co. v. *Wear*, 135 Mo. 230; *People v. Spiers*, 4 Utah 385.

The other remedy which will oust the jurisdiction to issue a writ of prohibition must afford the particular right to which the party is entitled. *State v. Cline*, 85 Mo. App. 628.

Habeas Corpus. — Where a judge improperly threatens to punish one for contempt by inflicting immediate imprisonment, prohibition lies, since neither a writ of error nor habeas corpus affords an adequate remedy. *State v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90; *People v. Carrington*, 5 Utah 531.

Habeas corpus may be such an adequate remedy as to prevent the issuance of a prohibition. *People v. Wood*, 21 N. Y. App. Div. 245.

2. Other Remedy Inadequate or Not Sufficiently Speedy — *California*. — *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Kirby v. Superior Ct.*, 68 Cal. 604; *Santa Monica v. Eckert*, (Cal. 1893) 33 Pac. Rep. 880.

Idaho. — *Willman v. District Ct.*, (Idaho 1894) 35 Pac. Rep. 692.

Louisiana. — *State v. Judge*, 4 Rob. (La.) 48; *State v. Richardson*, 49 La. Ann. 1612.

Massachusetts. — *Henshaw v. Cotton*, 127 Mass. 60.

Minnesota. — *State v. Probate Ct.*, 19 Minn. 117.

Missouri. — *State v. Spencer*, 160 Mo. 271; *State v. Elkin*, 130 Mo. 90.

Washington. — *State v. Superior Ct.*, 8 Wash. 591; *State v. Superior Ct.*, 5 Wash. 518; *State v. Superior Ct.*, 4 Wash. 37.

Wisconsin. — *State v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90.

3. Inconvenience, Delay, or Expense of Other Remedy. — *Walker v. District Ct.*, (Ariz. 1894) 35 Pac. Rep. 982; *White v. Superior Ct.*, 110 Cal. 54; *Willman v. District Ct.*, (Idaho 1894) 35 Pac. Rep. 692; *State v. District Ct.*, 26 Minn. 233.

adequate remedy which but for his own neglect would have been effective is not entitled to a writ of prohibition.¹

Appeal, Error, or Certiorari. — Prohibition cannot be used in place of the ordinary remedies provided by law for review and correction of errors.² Accordingly it will not lie where there is an adequate remedy by appeal,³ writ of

1. **Other Remedy Lost by Neglect.** — *People v. District Ct.*, 21 Colo. 251.

2. **Not a Substitute for Other Revisory Proceedings.** — *Wreden v. Superior Ct.*, 55 Cal. 504; *People v. Circuit Ct.*, 11 Mich. 393, 83 Am. Dec. 754. See *supra*, this section, *Errors in Exercise of Jurisdiction*.

Even a Stipulation of the Parties Is Unavailing to make the writ of prohibition serve the purpose of an appeal, and such stipulation must be disregarded. *Powelson v. Lockwood*, 82 Cal. 613.

3. **Remedy by Appeal — England.** — *Barker v. Palmer*, 8 Q. B. D. 9, 51 L. J. Q. B. D. 110; *Forster v. Forster*, 4 B. & S. 187, 116 E. C. L. 187, 32 L. J. Q. B. D. 312; *Ex p. Smyth*, 2 C. M. & R. 748, 1 Gale 274, 3 Ad. & El. 719, 30 E. C. L. 194.

United States. — *In re Huguley Mfg. Co.*, 184 U. S. 297; *In re Alix*, 166 U. S. 136; *In re New York, etc., Steamship Co.*, 155 U. S. 523; *Ex p. Pennsylvania*, 109 U. S. 174; *Ex p. Hagar*, 104 U. S. 520; *Ex p. Gordon*, 104 U. S. 515.

Alabama. — *Ex p. Reid*, 50 Ala. 439; *Ex p. Peterson*, 33 Ala. 74; *Ex p. Smith*, 23 Ala. 94; *Bickley v. Bickley*, 129 Ala. 403.

Arizona. — *Walker v. District Ct.*, (Ariz. 1894) 35 Pac. Rep. 982.

Arkansas. — *Weaver v. Leatherman*, 66 Ark. 211.

California. — *Jacobs v. Superior Ct.*, 133 Cal. 364; *White v. Superior Ct.*, 110 Cal. 54; *Mines D'Or, etc., Soc. v. Superior Ct.*, 91 Cal. 101; *Agassiz v. Superior Ct.*, 90 Cal. 101; *Bishop v. Superior Ct.*, 87 Cal. 226; *Strouse v. Police Ct.*, 85 Cal. 49; *Murphy v. Superior Ct.*, 84 Cal. 592; *Powelson v. Lockwood*, 82 Cal. 613; *Haile v. Superior Ct.*, 78 Cal. 418; *Levy v. Wilson*, 69 Cal. 105; *Bliss v. Superior Ct.*, 62 Cal. 543; *Wreden v. Superior Ct.*, 55 Cal. 504; *Clark v. Superior Ct.*, 55 Cal. 199; *McDonald v. Agnew*, 122 Cal. 448; *Grant v. Superior Ct.*, 106 Cal. 324. But see *White v. Superior Ct.*, 126 Cal. 245.

Colorado. — *Tomboy Gold Mines Co. v. District Ct.*, 23 Colo. 441; *People v. District Ct.*, 21 Colo. 251; *People v. District Ct.*, 11 Colo. 574; *Leonard v. Bartels*, 4 Colo. 95; *People v. District Ct.*, (Colo. 1901) 66 Pac. Rep. 888; *People v. District Ct.*, 21 Colo. 251. See *People v. District Ct.*, 26 Colo. 226.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Idaho. — *Rust v. Stewart*, (Idaho 1901) 64 Pac. Rep. 222.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272; *People v. Hoglund*, 93 Ill. App. 292.

Kentucky. — *Owensboro v. Sparks*, 99 Ky. 351.

Louisiana. — *State v. King*, 50 La. Ann. 19; *State v. Richardson*, 49 La. Ann. 1612; *State v. Rost*, 49 La. Ann. 1451; *State v. Wilder*, 49 La. Ann. 1211; *State v. Monroe*, 48 La. Ann. 27; *State v. Perez*, 48 La. Ann. 1348; *State v.*

Fournet, 45 La. Ann. 943; *Langridge v. Judge*, 46 La. Ann. 29; *State v. Judge*, 44 La. Ann. 1100; *State v. Judge*, 34 La. Ann. 782; *State v. Koenig*, 39 La. Ann. 776; *State v. Skinner*, 32 La. Ann. 1092; *State v. St. Paul*, 52 La. Ann. 1039.

Minnesota. — *State v. Ward*, 70 Minn. 58.

Mississippi. — *Lemon v. Peyton*, 64 Miss. 161; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

Missouri. — *Shaw v. Pollard*, 84 Mo. App. 286; *Bankers' L. Assoc. v. Shelton*, 84 Mo. App. 634; *State v. Harrison*, 53 Mo. App. 346; *State v. Anthony*, 65 Mo. App. 543, 2 Mo. App. Rep. 1224; *Eckerle v. Wood*, (Mo. App. 1902) 69 S. W. Rep. 45; *Wand v. Ryan*, (Mo. 1901) 65 S. W. Rep. 1025; *State v. Johnson*, 132 Mo. 105.

Montana. — *State v. Benton*, 12 Mont. 66.

New York. — *People v. Putnam County*, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 241; *People v. Letson*, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381; *People v. Talcott*, 21 Hun (N. Y.) 591; *People v. Sherman*, 66 N. Y. App. Div. 231; *People v. Williams*, 51 N. Y. App. Div. 102; *People v. Wood*, 21 N. Y. App. Div. 245; *People v. Langbein*, 12 N. Y. Wkly. Dig. 20; *People v. Boswick*, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163; *People v. District Ct.*, 13 Civ. Pro. (N. Y.) 134; *People v. McCue*, (Supm. Ct. App. Div.) 77 N. Y. Supp. 451.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

South Carolina. — *Baldwin v. Cooley*, 1 S. Car. 261; *State v. Wakely*, 2 Nott & M. (S. Car.) 412; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95; *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *Leonard's Case*, 3 Rich. L. (S. Car.) 111.

Utah. — *Overland Gold Min. Co. v. McMaster*, 19 Utah 177.

Washington. — *State v. Moore*, 23 Wash. 115; *State v. Superior Ct.*, 21 Wash. 631; *State v. Benson*, 21 Wash. 571; *State v. Superior Ct.*, 19 Wash. 118; *State v. Superior Ct.*, 16 Wash. 444; *State v. Superior Ct.*, 11 Wash. 63; *State v. Superior Ct.*, 7 Wash. 77; *State v. Jones*, 2 Wash. 662, 26 Am. St. Rep. 897.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52; *McConiha v. Guthrie*, 21 W. Va. 134; *King v. Doolittle*, (W. Va. 1902) 41 S. E. Rep. 145. See also *Cunningham v. Squires*, 2 W. Va. 422, 98 Am. Dec. 770.

Contra. — In *Lincoln-Lucky, etc.*, Min. Co. v. District Ct., 7 N. Mex. 486, it was held that a party should not be compelled to appeal from a judgment void for want of jurisdiction, and that prohibition was the proper remedy, notwithstanding the fact that an appeal would lie. See also *Smith v. Whitney*, 116 U. S. 167.

The Constitutionality of a Statute will not be determined on prohibition in advance of trial where there is a remedy by appeal. *State v. Rost*, 49 La. Ann. 1451. See also *Bellevue Water Co. v. Stockslager*, (Idaho 1895) 43 Pac. Rep. 568, holding that the constitutionality of

error,¹ or writ of certiorari.² Even the erroneous decision of a jurisdictional question, the court having jurisdiction of the general class of cases to which the particular case belongs, is not ground for issuing a writ of prohibition, since there is an adequate remedy by appeal.³ The writ will not lie to restrain an

a statute will not be determined upon application for a writ of prohibition unless it is directly in issue.

1. **Writ of Error** — *United States*. — *Smith v. Whitney*, 116 U. S. 167; *Ex p. Pennsylvania*, 109 U. S. 174; *Ex p. Hagar*, 104 U. S. 520; *Ex p. Detroit River Ferry Co.*, 104 U. S. 519; *Ex p. Gordon*, 104 U. S. 515.

Alabama. — *Ex p. Reid*, 50 Ala. 439.

Colorado. — *People v. District Ct.*, 26 Colo. 380; *Tomboy Gold Mines Co. v. District Ct.*, 23 Colo. 441; *People v. District Ct.*, 21 Colo. 251.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Illinois. — *People v. Hoglund*, 93 Ill. App. 202.

Missouri. — *Eckerle v. Wood*, (Mo. App. 1902) 69 S. W. Rep. 45; *State v. Johnson*, 132 Mo. 105.

New York. — *Thomson v. Tracy*, 60 N. Y. 31.

Virginia. — *Gresham v. Ewell*, 84 Va. 784; *Nelms v. Vaughan*, 84 Va. 696. But see *Culpepper County v. Gorrell*, 20 Gratt. (Va.) 522.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52; *McConiha v. Guthrie*, 21 W. Va. 134.

Wyoming. — *State v. District Ct.*, 5 Wyo. 227.

2. **Certiorari** — *United States*. — *Smith v. Whitney*, 116 U. S. 167; *Ex p. Pennsylvania*, 109 U. S. 174; *Ex p. Gordon*, 104 U. S. 515; *Ex p. Hagar*, 104 U. S. 520; *Ex p. Detroit River Ferry Co.*, 104 U. S. 519.

California. — *Stoddard v. Superior Ct.*, (Cal. 1895) 40 Pac. Rep. 491; *Grant v. Superior Ct.*, 106 Cal. 324.

Colorado. — *People v. De France*, (Colo. 1902) 68 Pac. Rep. 267.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272.

Minnesota. — *State v. Ward*, 70 Minn. 58.

Mississippi. — *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

Missouri. — *State v. Hickman*, 85 Mo. App. 198.

New York. — *People v. Russell*, 49 Barb. (N. Y.) 351; *People v. Clute*, (Supm. Ct. Spec. T.) 42 How. Pr. (N. Y.) 157; *People v. Seward*, 7 Wend. (N. Y.) 518; *Ex p. Gordon*, 2 Hill (N. Y.) 363.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

South Carolina. — *Cooper v. Stocker*, 9 Rich. L. (S. Car.) 292; *State v. Kirkland*, 41 S. Car. 29; *State v. Columbia, etc.*, R. Co., 1 S. Car. 46.

Washington. — *State v. Moore*, 23 Wash. 115.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52; *Davis v. Davis*, 40 W. Va. 464.

Contra. — *Connecticut River R. Co. v. Franklin County*, 127 Mass. 59, 34 Am. Rep. 338; *Henshaw v. Cotton*, 127 Mass. 60.

The object of the writ of prohibition is to prevent further action in a case where jurisdictional power and authority to act are denied; the function of the writ of certiorari is to undo

matters which had taken such shape as not to be remedied by the writ of prohibition; the writ of certiorari is a substantive and far-reaching writ, concurrent with and frequently taking the place of the writ of prohibition. *State v. Judge*, 48 La. Ann. 1502.

3. **Erroneous Decision of Jurisdictional Question** — *England*. — *Matter of The Charkieh*, L. R. 8 Q. B. 197.

United States. — *In re Alix*, 166 U. S. 136; *In re Rice*, 155 U. S. 396.

Alabama. — *Ex p. Mobile, etc.*, R. Co., 63 Ala. 349.

Arizona. — *Crowned King Min. Co. v. District Ct.*, (Ariz. 1901) 64 Pac. Rep. 439.

California. — *Mines D'Or, etc., Soc. v. Superior Ct.*, 91 Cal. 101; *Agassiz v. Superior Ct.*, 90 Cal. 101; *Bishop v. Superior Ct.*, 87 Cal. 226; *Strouse v. Police Ct.*, 85 Cal. 49; *Murphy v. Superior Ct.*, 84 Cal. 592.

Colorado. — *People v. District Ct.*, 18 Colo. 26; *People v. District Ct.*, 11 Colo. 574.

Florida. — *State v. Hocker*, 33 Fla. 283; *Sherlock v. Jacksonville*, 17 Fla. 96; *State v. Malone*, 40 Fla. 129.

Massachusetts. — See *Whately v. Franklin County*, 1 Met. (Mass.) 336. But see *Vermont, etc.*, R. Co. v. *Franklin County*, 10 Cush. (Mass.) 12.

Missouri. — *State v. Moehlenkamp*, 133 Mo. 134; *Bankers' L. Assoc. v. Shelton*, 84 Mo. App. 634; *Coleman v. Dalton*, 71 Mo. App. 14.

Montana. — *State v. Benton*, 12 Mont. 66.

New York. — *People v. Putnam County*, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 241; *People v. Parker*, (Supm. Ct. Spec. T.) 63 How. Pr. (N. Y.) 3; *People v. Peity*, 32 Hun (N. Y.) 443; *People v. Talcott*, 21 Hun (N. Y.) 591. See also *People v. Marine Ct.*, 36 Barb. (N. Y.) 341.

South Carolina. — *State v. Fickling*, 10 S. Car. 301; *State v. Columbia, etc.*, R. Co., 1 S. Car. 46. *Contra*, *State v. Hopkins*, *Dudley L. (S. Car.)* 101; *Gray v. Magistrates' Ct.*, 3 McCord L. (S. Car.) 175.

Washington. — *State v. Superior Ct.*, 17 Wash. 12, 61 Am. St. Rep. 893; *State v. Superior Ct.*, 11 Wash. 111.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134. See also *Bloxton v. McWhorter*, 46 W. Va. 32.

Wyoming. — *State v. District Ct.*, 5 Wyo. 227.

Jurisdiction Dependent on Finding of Fact. — Where the want of jurisdiction does not appear on the face of the proceedings, but depends on matters of fact, the determination of the question of jurisdiction is primarily within the jurisdiction of the court, and prohibition will not lie, as the remedy for an erroneous decision is by appeal. *Matter of The Charkieh*, L. R. 8 Q. B. 197; *Murphy v. Superior Ct.*, 84 Cal. 592; *State v. Withrow*, 141 Mo. 69; *Bankers' L. Assoc. v. Shelton*, 84 Mo. App. 634; *Coleman v. Dalton*, 71 Mo. App. 14; *State v. Lubke*, 29 Mo. App. 555; *State v. Seav*, 23 Mo. App. 623; *State v. Superior Ct.*, 11 Wash. 111; *State v. Superior Ct.*, 17 Wash. 12, 61 Am.

inferior court from exercising jurisdiction in a particular case in a class of cases in which such court has jurisdiction.¹ But where an appeal will not lie, prohibition will lie to correct an erroneous decision of a jurisdictional question by an inferior tribunal.² Where an appeal is a wholly inadequate remedy, the fact that an appeal will lie is not ground for denying a writ of prohibition.³ So, where the remedy by appeal is adequate but not sufficiently speedy, the writ lies.⁴ The absence of a remedy by appeal or writ of error is not of itself sufficient ground to authorize a writ of prohibition, provided the court had jurisdiction.⁵

Proceedings in Cause. — If there is an adequate remedy by proceedings in the cause itself, such remedy must first be exhausted before application for the writ of prohibition will be sustained.⁶ The writ will not be granted where relief may be had by motion.⁷

St. Rep. 893. See *State v. Scott*, 1 Bailey L. (S. Car.) 294; *Liverpool United Gas-Light Co. v. Overseers of Poor*, L. R. 6 C. P. 414, 40 L. J. M. C. 104.

Probate Proceedings — Residence of Decedent. — Prohibition will not lie to arrest proceedings before the surrogate for the probate of a will upon the ground that the decedent was not a resident of the county, there being a complete remedy by appeal. *People v. Putnam County*, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 241; *People v. Surrogate's Ct.*, 36 Hun (N. Y.) 218; *State v. Superior Ct.*, 11 Wash. 111; *Preston v. Fidelity Trust, etc., Co.*, 94 Ky. 295. But see *State v. Benton*, 12 Mont. 66.

In Extraordinary Cases, in the exercise of a sound discretion, the writ may be allowed for the purpose of considering rulings of this class. *People v. District Ct.*, 11 Colo. 574, citing *People v. District Ct.*, 6 Colo. 534, as an instance.

1. Inferior Court — Alabama. — *Ex p. Due*, 116 Ala. 491; *Ex p. Boothe*, 64 Ala. 312.

Arkansas. — *American Casualty Co. v. Lea*, 56 Ark. 539.

California. — *Fischer v. Superior Ct.*, 98 Cal. 67.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

Kentucky. — *Goldsmith v. Owen*, 95 Ky. 420.

Louisiana. — *State v. Judge*, 48 La. Ann. 1372; *State v. Skinner*, 32 La. Ann. 1092.

New York. — *People v. Boswick*, (Supm. Ct. Spec. T.) 2 City Ct. (N. Y.) 163.

Virginia. — *Ex p. Ellyson*, 20 Gratt. (Va.) 10.

West Virginia. — *Haldeman v. Davis*, 28 W. Va. 324; *McConiha v. Guthrie*, 21 W. Va. 134.

2. School Dist. No. 6 v. Burris, 84 Mo. App. 654.

3. Where Appeal Not Adequate Remedy — California. — *Bruner v. Superior Ct.*, 92 Cal. 239; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Kirby v. Superior Ct.*, 68 Cal. 604; *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Anderson v. Superior Ct.*, 122 Cal. 216.

Colorado. — *People v. District Ct.*, 26 Colo. 386; *McInerney v. Denver*, 17 Colo. 302.

Kentucky. — *Weaver v. Toney*, (Ky. 1899) 54 S. W. Rep. 732.

Louisiana. — *Brouillette v. Judge*, 45 La. Ann. 243.

Mississippi. — *Crisler v. Morrison*, 57 Miss. 791.

Missouri. — *State v. Spencer*, 166 Mo. 271.

Washington. — *State v. Superior Ct.*, 7 Wash. 78; *State v. Superior Ct.*, 5 Wash. 518.

Wisconsin. — *State v. Circuit Ct.*, 97 Wis. 1, 65 Am. St. Rep. 90.

An Appeal Is Inadequate when the trial on appeal is *de novo*. *State v. Allen*, 45 Mo. App. 551.

Failure to Require Appeal Bond. — The writ was granted where the lower court failed to require a bond as directed in a statute, appeal being held inadequate because by appeal the relator would incur costs and damages for the recovery of which he would have no security. *Anderson v. Superior Ct.*, 122 Cal. 216.

An Appeal in a Felony Case is not a plain, speedy, and adequate remedy. *Bruner v. Superior Ct.*, 92 Cal. 239.

4. Where Appeal Not Sufficiently Speedy. — *Kirby v. Superior Ct.*, 68 Cal. 604; *Weaver v. Toney*, (Ky. 1899) 54 S. W. Rep. 732; *State v. McGee*, (S. Dak. 1901) 88 N. W. Rep. 115. See also *Crisler v. Morrison*, 57 Miss. 802; *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Bruner v. Superior Ct.*, 92 Cal. 252; *Agassiz v. Superior Ct.*, 90 Cal. 101; *White v. Superior Ct.*, 110 Cal. 54.

5. Mere Absence of Remedy by Appeal Not Ground for Writ. — *Ex p. Detroit River Ferry Co.*, 104 U. S. 519; *Bank Lick Turnpike Co. v. Phelps*, 81 Ky. 613; *Standard Oil Co. v. Linn*, (Ky. 1895) 32 S. W. Rep. 932; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95; *State v. Wakely*, 2 Nott & M. (S. Car.) 410; *State v. Nathan*, 4 Rich. L. (S. Car.) 513; *Nelms v. Vaughan*, 84 Va. 606; *State v. Superior Ct.*, 3 Wash. 705; *Ward v. Evans*, 49 W. Va. 184.

6. Adequate Remedy by Proceedings in Cause. — *Ex p. Hamilton*, 51 Ala. 62; *White v. Superior Ct.*, 126 Cal. 245; *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491; *Toomey v. Comley*, 72 Conn. 458; *People v. Talcott*, 21 Hun (N. Y.) 591; *People v. Wood*, 21 N. Y. App. Div. 245.

For a full discussion of this principle, see *infra*, this section, *Preliminary Objection to Jurisdiction*.

7. Relief by Motion in Cause. — *Toomey v. Comley*, 72 Conn. 458; *State v. Ward*, 70 Minn. 58.

A Motion to Quash an Irregular or Void Execution is an adequate remedy, and, hence prohibition will not lie against the execution. *Atkins v. Siddons*, 66 Ala. 453. But it seems that prohibition does not lie against an execution in any case because it is not a judicial

Equitable Remedies. — The existence of an adequate remedy by proceedings in equity is sufficient ground for denial of the writ.¹

6. Discretion of Court — *a.* **STATEMENT OF RULE.** — It is usually held that a prohibition is not a writ of right, but that its allowance rests in the sound discretion of the court.² In some jurisdictions the rule is that the granting of the writ is obligatory in clear cases where there is an entire absence of jurisdiction, the courts holding that it is discretionary only where there is another legal remedy, or where the jurisdiction is doubtful or depends upon facts not apparent of record, or where the application is made by a stranger instead of by a party in interest.³

proceeding. See *infra*, this title, VI. 29. Executions.

Irregularity in the Form of the Judgment which may be remedied by application to the court which rendered it is not ground for a writ of prohibition. *People v. Talcott*, 21 Hun (N. Y.) 591.

Motion for Change of Venue. — Where there is an adequate remedy by motion for a change of venue, prohibition will not lie. *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491. See also *infra*, this title, VI. 64. *Venue*.

1. See *State v. Hunter*, 4 Wash. 712.

A Remedy in Equity to revise or vacate proceedings of a court of insolvency is such an adequate remedy as will bar a writ of prohibition to restrain the insolvency court from proceeding. *Jaquith v. Fuller*, 167 Mass. 123.

The writ cannot be used to take the place of a suit in equity to prevent or redress fraud. *Thomson v. Tracy*, 60 N. Y. 31.

2. Issuance of Writ Discretionary — *England.* — *Reg. v. Twiss*, 10 B. & S. 298.

Alabama. — *Ex p. Hamilton*, 51 Ala. 62; *Ex p. Reid*, 50 Ala. 439; *Ex p. Stickney*, 40 Ala. 160; *Ex p. Greene*, 29 Ala. 52; *Ex p. Smith*, 23 Ala. 94.

Arizona. — *Crowned King Min. Co. v. District Ct.*, (Ariz. 1901) 64 Pac. Rep. 439.

Colorado. — *People v. District Ct.*, 26 Colo. 386; *People v. District Ct.*, 21 Colo. 251; *McInerney v. Denver*, 17 Colo. 302; *People v. District Ct.*, 11 Colo. 574; *Leonard v. Bartels*, 4 Colo. 95.

District of Columbia. — *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Louisiana. — *State v. Houston*, 35 La. Ann. 538; *State v. Judge*, 33 La. Ann. 1284; *State v. Monroe*, 33 La. Ann. 923; *State v. Rightor*, 32 La. Ann. 1182; *State v. Falls*, 32 La. Ann. 553; *State v. Judge*, 29 La. Ann. 360; *State v. Judge*, 21 La. Ann. 123.

Massachusetts. — *Rutland v. Worcester County*, 20 Pick. (Mass.) 71.

Michigan. — *Hudson v. Judge*, 42 Mich. 239.

Minnesota. — *State v. Ward*, 70 Minn. 58; *State v. Probate Ct.*, 19 Minn. 117.

Missouri. — *State v. Aloe*, 152 Mo. 466; *State v. Laughlin*, 7 Mo. App. 529; *State v. Withrow*, 133 Mo. 500.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312; *People v. Marine Ct.*, 36 Barb. (N. Y.) 341; *Ex p. Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593; *People v. Ulster County*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 237; *People v. Wood*, 21 N. Y. App. Div. 245,

People v. Kings County Ct., 23 N. Y. Wkly. Dig. 137; *People v. Westbrook*, 89 N. Y. 152.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

South Carolina. — *Gray v. Magistrates' Ct.*, 3 McCord L. (S. Car.) 175; *Kinloch v. Harvey*, Harp. L. (S. Car.) 508; *State v. Hudnall*, 2 Nott & M. (S. Car.) 419.

Virginia. — *Bedford v. Wingfield*, 27 Gratt. (Va.) 329; *Gresham v. Ewell*, 84 Va. 784.

Washington. — *Clifford v. Parker*, 13 Wash. 518; *State v. Superior Ct.*, 7 Wash. 74.

This Discretion Is Not Arbitrary, and the court has no right to refuse a writ where it has been granted in like cases, or where by the laws and statutes of the state it ought to be granted. *Ex p. Smith*, 23 Ala. 94. See also *Gray v. Magistrates Ct.*, 3 McCord L. (S. Car.) 175.

Granting Writ on Conditions. — *State v. Judge*, 19 La. 167.

3. When Discretionary and When Not — *England.* — *London v. Cox*, L. R. 2 H. L. 239; *Farquharson v. Morgan*, (1894) 1 Q. B. 552, 9 Reports 202; *Paxton v. Knight*, 1 Burr. 314; *Ex p. Smyth*, 2 C. M. & R. 748; *Taylor v. Nicholls*, 1 C. P. D. 242; *Reg. v. Twiss*, L. R. 4 Q. B. 407; *Forster v. Forster*, 4 B. & S. 187, 116 E. C. L. 187; *Chambers v. Green*, L. R. 20 Eq. 552, *overruling* *Worthington v. Jeffries*, L. R. 10 C. P. 379.

United States. — *In re Alix*, 166 U. S. 136; *In re Rice*, 155 U. S. 396; *In re Cooper*, 143 U. S. 472.

California. — *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Santa Monica v. Eckert*, (Cal. 1893) 33 Pac. Rep. 880. But see *Spring Valley Water Wks v. San Francisco* 52 Cal. 111.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543; *Fayerweather v. Monson*, 61 Conn. 431.

Washington. — *State v. Superior Ct.*, 5 Wash. 518; *North Yakima v. Superior Ct.*, 4 Wash. 656.

West Virginia. — *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574; *Wood County Ct. v. Boreman*, 34 W. Va. 362, *McConiha v. Guthrie*, 21 W. Va. 134.

In such a case neither the smallness of the claim in the suit nor delay on the part of the applicant is a reason for refusing the writ. *Worthington v. Jeffries*, L. R. 10 C. P. 379, 44 L. J. C. Pl. 209.

The writ is one of right, but not of course. *Matter of Prohibition*, 21 Q. B. D. 533, 57 L. J. Q. B. D. 638, 60 L. T. N. S. 8.

Where only a part of the claim below is beyond the jurisdiction of the court, the superior

b. CONSIDERATIONS AFFECTING EXERCISE OF DISCRETION. — Prohibition, like other prerogative writs, should be used with great caution and forbearance,¹ and should be granted only where a want of jurisdiction clearly exists.²

Necessity. — Prohibition will only issue in cases of extreme necessity.³ Thus, the writ will not be issued to restrain an order void upon its face.⁴ So, if no injury can result from the proceedings complained of, the writ will be refused.⁵

Where the Proposed Proceeding Has Been Abandoned, the court in its discretion may refuse the writ.⁶

Negligence or Laches on the part of the applicant is sufficient ground for withholding the writ.⁷

Balance of Benefits. — The writ will not be granted where a greater injustice would be done by its issuance than would be prevented by its operation.⁸

7. Preliminary Objection to Jurisdiction. — It is the usual rule that the writ will not be issued in any case until the party who complains of the abuse of power shall have first sought redress in the inferior tribunal and failed to obtain it.⁹ But this rule is not jurisdictional. It is simply a rule of practice,

court upon an application for a writ of prohibition has a discretion to allow the plaintiff below to abandon that part of his claim which is beyond the jurisdiction and to proceed with the rest. *Ellis v. Fleming*, 1 C. P. D. 237, 45 L. J. C. Pl. 512.

1. Used with Caution and Forbearance. — *Spring Valley Water Works v. San Francisco*, 52 Cal. 111; *U. S. v. Kimball*, 7 App. Cas. (D. C.) 499; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *State v. Whitaker*, 114 N. Car. 818; *Perry v. Shepherd*, 78 N. Car. 83. See *Reg. v. Local Government Board*, 10 Q. B. D. 321, 52 L. J. M. C. 4, 48 L. T. N. S. 181, *per Brett, L. J.*

2. Granted Only in Clear Cases — *England.* — *In re Birch*, 15 C. B. 743, 80 E. C. L. 743; *Matter of The Charkieh*, L. R. 8 Q. B. 197; *Bassano v. Bradley*, (1896) 1 Q. B. 645; *Taylor v. Nicholls*, 1 C. P. D. 242.

United States. — *In re Rice*, 155 U. S. 396.

Alabama. — *Ex p. Reid*, 50 Ala. 439.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

Georgia. — *Hart v. Taylor*, 61 Ga. 156.

Michigan. — *Hudson v. Judge*, 42 Mich. 239.

Washington. — *State v. Superior Ct.*, 13 Wash. 226; *Harbor Line Com'rs v. State*, 2 Wash. 530.

West Virginia. — *Haldeman v. Davis*, 28 W. Va. 324.

3. Extreme Necessity — *England.* — *Butterworth v. Walker*, 3 Burr. 1689.

United States. — See also *Ex p. Virginia*, 19 U. S. (L. ed.) 153.

Alabama. — *Ex p. Greene*, 29 Ala. 52.

Illinois. — *People v. Hoglund*, 93 Ill. App. 292.

Louisiana. — *State v. Mayer*, 52 La. Ann. 255. See also *State v. Allen*, 51 La. Ann. 1842.

Montana. — *State v. Second Judicial Dist. Ct.*, 22 Mont. 220, wherein the writ was refused in a case where unusual harm was not likely to ensue if the proceedings were not prohibited.

New York. — *People v. Wood*, 21 N. Y. App. Div. 245.

North Carolina. — *Perry v. Shepherd*, 78 N. Car. 83.

Washington. — *State v. Superior Ct.*, 19

Wash. 198; *State v. Superior Ct.*, 13 Wash. 226. See also *State v. Superior Ct.*, 11 Wash. 63.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134.

Wisconsin. — *In re Schumaker*, 90 Wis. 488.

Where There Is Imminent Danger of Physical Conflict for possession between the officers of two courts each claiming jurisdiction, prohibition will lie to protect the jurisdiction of the court which was first lawfully acquired. *State v. Ross*, 122 Mo. 435.

4. Orders Void upon Their Face. — *Ex p. Braudlacht*, 2 Hill (N. Y.) 369, 38 Am. Dec. 593; *Woodward v. Superior Ct.*, 95 Cal. 272; *State v. Superior Ct.*, 3 Wash. 702.

The writ will not be issued where, pending the application, the order sought to be restrained has become inoperative. *State v. Perrault*, 48 La. Ann. 474.

5. Where No Injury Can Result. — *Butterworth v. Walker*, 3 Burr. 1689; *Haile v. Superior Ct.*, 78 Cal. 418; *Beckham v. Howard*, 83 Ga. 89; *State v. Superior Ct.*, 11 Wash. 63; *State v. Superior Ct.*, 3 Wash. 702. See also *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

6. Abandonment of Illegal Proceeding. — *Ellis v. Fleming*, 1 C. P. D. 237; *U. S. v. Hoffman*, 4 Wall. (U. S.) 158; *Pezuela v. Superior Ct.*, 83 Cal. 49; *Blade v. Superior Ct.*, 60 Cal. 290; *People v. District Ct.*, 7 Colo. 462; *State v. Marmouget*, 104 La. 1; *State v. Perrault*, 48 La. Ann. 474; *State v. Superior Ct.*, 16 Wash. 347. But see *French v. Noel*, 22 Gratt. (Va.) 454.

7. Negligence or Laches of Applicant. — *Yates v. Palmer*, 6 Dowl. & L. 283; *Denton v. Marshall*, 1 H. & C. 654, 32 L. J. Exch. 89.

8. Balance of Benefits. — *People v. McCue*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 741. See also *Whately v. Franklin County*, 1 Met. (Mass.) 336, wherein the writ was refused because the parties could not be placed *in statu quo*.

9. Preliminary Objection Necessary — *England.* — *Matter of Prohibition*, 21 Q. B. D. 533, 57 L. J. Q. B. D. 638, 60 L. T. N. S. 8. *Contra*, *Wadsworth v. Reg.*, 17 Q. B. 171, 79 E. C. L. 171.

United States. — *In re Rice*, 155 U. S. 396.

noncompliance with which constitutes laches which may or may not be excused, according to circumstances.¹ The writ will not be issued while the preliminary objection in the inferior court remains undetermined.²

8. At What Stage of Proceedings. — Where the want of jurisdiction is apparent upon the face of the record, the writ of prohibition may be granted at any stage of the proceedings, even after verdict, sentence, or judgment.³ Where the want of jurisdiction is not apparent upon the record, prohibition will not lie after a court has proceeded as far as verdict and judgment or sentence,⁴ or at least, in such a case, the granting or refusal of the writ is

Alabama. — *Ex p.* Hamilton, 51 Ala. 62; *Ex p.* Greene, 29 Ala. 52; Hill *v.* Tarver, (Ala. 1901) 30 So. Rep. 499. See also *Ex p.* Smith, 23 Ala. 94.

Arkansas. — *Ex p.* Little Rock, 26 Ark. 52; *Ex p.* McMeechen, 12 Ark. 70; *Ex p.* Williams, 4 Ark. 537, 38 Am. Dec. 46.

California. — *Baughman v.* Superior Ct., 72 Cal. 572; *Southern Pac. R. Co. v.* Superior Ct., 59 Cal. 471; *Chester v.* Colby, 52 Cal. 516.

District of Columbia. — U. S. *v.* Kimball, 7 App. Cas. (D. C.) 499.

Louisiana. — *State v.* Mayer, 52 La. Ann. 255; *State v.* Ellis, 47 La. Ann. 1602; *State v.* Allen, 47 La. Ann. 1600; *Brouillette v.* Judge, 45 La. Ann. 243; *State v.* Judge, 44 La. Ann. 1093; *State v.* Judge, 43 La. Ann. 1119; *State v.* Henry, 41 La. Ann. 908; *State v.* McGuire, 40 La. Ann. 378; *State v.* Steele, 38 La. Ann. 569; *State v.* Judge, 34 La. Ann. 611; *State v.* Judge, 12 La. Ann. 513; *Whipple's Succession*, 2 La. Ann. 236.

Massachusetts. — *Whately v.* Franklin County, 1 Met. (Mass.) 336; *Connecticut River R. Co. v.* Franklin County, 127 Mass. 50, 34 Am. Rep. 338.

Michigan. — *Hudson v.* Judge, 42 Mich. 239.

Missouri. — *State v.* Gill, 137 Mo. 681; *State v.* Laughlin, 9 Mo. App. 486; *Barnes v.* Gottschalk, 3 Mo. App. 111.

Nevada. — *Walcott v.* Wells, 21 Nev. 47, 37 Am. St. Rep. 478.

New Mexico. — *Tapia v.* Martinez, 4 N. Mex. 165.

New York. — *People v.* Wood, 21 N. Y. App. Div. 245. See also *People v.* Williams, 51 N. Y. App. Div. 102.

Utah. — *People v.* Carrington, 5 Utah 531; *People v.* House, 4 Utah 382.

Washington. — *State v.* Hogg, 22 Wash. 646; *State v.* Superior Ct., 19 Wash. 198; *State v.* Superior Ct., 13 Wash. 226; *Harris v.* Brooker, 8 Wash. 138; *State v.* Superior Ct., 4 Wash. 35; *State v.* Superior Ct., 2 Wash. 13.

West Virginia. — *Board of Education v.* Holt, (W. Va. 1902) 41 S. E. Rep. 337.

Wyoming. — *State v.* District Ct., 5 Wyo. 227.

Contra. — *Com. v.* Latham, 85 Va. 632.

1. Rule Not Jurisdictional. — *London v.* Cox, L. R. 2 H. L. 280; *Havemeyer v.* Superior Ct., 84 Cal. 327, 18 Am. St. Rep. 192; *State v.* Aloe, 152 Mo. 466; *Lincoln-Lucky*, etc., Min. Co. *v.* District Ct., 7 N. Mex. 486. See also *Keough v.* Grime, 172 Mass. 519; *Com. v.* Latham, 85 Va. 632.

The rule does not apply to contempt proceedings. *State v.* Wilcox, 24 Minn. 143; *People v.* Carrington, 5 Utah 531. Nor to *ex parte* orders where there has been no opportunity to object. *St. Louis*, etc., R. Co. *v.* Wear, 135 Mo. 230.

Clerical Error. — Where an excessive sentence is the matter complained of, and it appears that such excessive sentence is merely a clerical error in entering the proper sentence upon the record, prohibition will not issue where there is no attempt to have the error corrected. *State v.* Allen, 47 La. Ann. 1600.

2. Preliminary Objection Not Determined. — *Chester v.* Colby, 52 Cal. 516; *State v.* Judge, 44 La. Ann. 190; *State v.* Judge, 40 La. Ann. 607; *State v.* Judges, 37 La. Ann. 845; *State v.* Judge, 29 La. Ann. 806; *People v.* Kelly, (Supm. Ct. Spec. T.) 12 Civ. Pro. (N. Y.) 414; *State v.* District Ct., 5 Wyo. 227.

The Reason is that it cannot be assumed that the court will pronounce an erroneous judgment, but rather the presumption of law is that it will decide correctly and that a writ of prohibition will therefore be unnecessary. See *People v.* Russell, 49 Barb. (N. Y.) 351; *People v.* Kelly, (Supm. Ct. Spec. T.) 12 Civ. Pro. (N. Y.) 414; *People v.* Wood, 21 N. Y. App. Div. 245.

3. Want of Jurisdiction Apparent of Record. — *England.* — *Buggin v.* Bennett, 4 Burr. 2035; *Paxton v.* Knight, 1 Burr. 314; *London v.* Cox, L. R. 2 H. L. 239; *Evans v.* Gwyn, 5 Q. B. 844, 48 E. C. L. 844; *Roberts v.* Humby, 3 M. & W. 120; *Stainbank v.* Bradshaw, 10 East 349, note; *Ex p.* Cowan, 3 B. & Ald. 123, 5 E. C. L. 239; *Carlsake v.* Mapledoram, 2 T. R. 473; *Heyworth v.* London Corp., Cab. & El. 312.

United States. — *In re Cooper*, 143 U. S. 472.

Florida. — *State v.* White, 40 Fla. 297.

Louisiana. — *State v.* Lee, 106 La. 400; *State v.* Rost, 49 La. Ann. 1451.

South Carolina. — *State v.* Scott, 1 Bailey L. (S. Car.) 294; *Withers v.* Road Com'rs, 3 Brev. (S. Car.) 83; *State v.* Whyte, 2 Nott & M. (S. Car.) 174. In *State v.* Ridgell, 2 Bailey L. (S. Car.) 560, the writ was awarded after conviction, and sentence of death. See also *Ex p.* Richardson, Harp. L. (S. Car.) 308.

Virginia. — *French v.* Noel, 22 Gratt. (Va.) 454.

West Virginia. — *Ensign Mfg. Co. v.* Carroll, 30 W. Va. 532.

The writ lies so long as any part of a void judgment remains unexecuted. *State v.* Elkin, 130 Mo. 90.

Where the statute under which the applicant was convicted was unconstitutional, prohibition lies at any time before sentence has been executed. *State v.* Lee, 106 La. 400.

4. Want of Jurisdiction Not Apparent of Record. — *Buggin v.* Bennett, 4 Burr. 2035; *Full v.* Hutchins, 2 Cowp. 424; *Yates v.* Palmer, 6 Dowl. & L. 283; *Matter of Maidenhead*, 2 H. & N. 257; U. S. *v.* Kimball, 7 App. Cas. (D. C.) 499; *State v.* Judge, 45 La. Ann. 213; *State*

discretionary.¹

IV. JURISDICTION TO ISSUE WRIT — 1. In England. — In England the jurisdiction to issue the writ of prohibition was originally exercised only by the court of King's Bench, though other courts, even the court of chancery, afterwards assumed jurisdiction to issue the writ.²

2. In United States — *a. FEDERAL COURTS* — (1) *Supreme Court* — *To District Court.* — By express provision of Act of Congress, the Supreme Court has original jurisdiction to issue writs of prohibition to the District Court when sitting as a court of admiralty.³ But in no other class of cases has the Supreme Court original jurisdiction to issue a writ of prohibition to the District Court.⁴

To Circuit Courts. — The Supreme Court has jurisdiction to issue a writ of prohibition to the Circuit Court in aid of its appellate jurisdiction, but only in such cases. It has no jurisdiction to issue the writ until an appeal is taken, nor in cases where no appeal will lie, in the absence of special statutory authority.⁵

Appellate Jurisdiction. — The Supreme Court has appellate jurisdiction in prohibition when the jurisdictional amount is involved.⁶

(2) *Circuit and District Courts.* — The Circuit and District Courts have jurisdiction to issue the writ, but only when necessary for the exercise of their jurisdiction.⁷ The Circuit Courts of the United States have no jurisdiction to issue writs of prohibition to the state courts.⁸

b. STATE COURTS — (1) *Appellate Courts.* — In many states, by constitutional or statutory provisions, the Supreme Court, or appellate court of last resort, is given original jurisdiction to issue writs of prohibition.⁹ Where

v. Scott, 1 Bailey L. (S. Car.) 294. See also *Stainbank v. Bradshaw*, 10 East 349, note; *In re Roe Chung*, 9 N. Mex. 130.

But see *Bodley v. Archibald*, 33 W. Va. 229, wherein it was held that the writ may issue after judgment, but before the judgment has been fully carried into effect, and that the want of jurisdiction may be made to appear by matters *dehors* the record.

1. *In re Rice*, 155 U. S. 396.

After judgment a prohibition will not be granted unless it is perfectly clear that there has been an excess of jurisdiction. *Matter of Maidenhead*, 2 H. & N. 257.

2. *Jurisdiction—England.* — *Reg. v. Justices*, (1894) 1 Q. B. 453; *Montgomery v. Blair*, 2 Sch. & Lef. 136; *In re Foster*, 3 Jur. N. S. 1238, 24 Beav. 428; *In re Bateman*, L. R. 9 Eq. 660; *Ex p. Lynch*, 1 Madd. 14.

Alabama. — *Ex p. Ray*, 45 Ala. 15.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Massachusetts. — *Washburn v. Phillips*, 2 Met. (Mass.) 296.

Missouri. — *State v. Rombauer*, 104 Mo. 619. *New Mexico.* — *Lincoln-Lucky*, etc., *Min. Co. v. District Ct.*, 7 N. Mex. 486.

New York. — *People v. Common Pleas Ct.*, 43 Barb. (N. Y.) 278.

North Carolina. — *Perry v. Shepherd*, 78 N. Car. 83.

Tennessee. — *Memphis v. Halsey*, 12 Heisk. (Tenn.) 212.

Virginia. — *Jackson v. Maxwell*, 5 Rand. (Va.) 636.

Under the Judiciary Act, the jurisdiction to grant prohibition is conferred upon every judge of the High Court. *Hedley v. Bates*, 13 Ch. D. 498, 49 L. J. Ch. 170.

3. *District Court Sitting in Admiralty.* — *Rev. Stat. U. S.*, § 688; *Ex p. Gordon*, 1 Black (U. S.) 503; *U. S. v. Peters*, 3 Dall. (U. S.) 121; *Ex p. City Bank*, 3 How. (U. S.) 293; *In re Cooper*, 138 U. S. 404; *Ex p. Phenix Ins. Co.*, 118 U. S. 610; *Ex p. Easton*, 95 U. S. 68.

4. *Ex p. City Bank*, 3 How. (U. S.) 292; *Ex p. Graham*, 10 Wall. (U. S.) 541.

In *In re Baiz*, 135 U. S. 403, the writ was refused upon the merits without passing upon the jurisdiction of the Supreme Court to issue the writ.

5. *To Circuit Court in Aid of Appellate Jurisdiction.* — *Ex p. Gordon*, 1 Black (U. S.) 503; *Ex p. City Bank*, 3 How. (U. S.) 292; *Ex p. Warmouth*, 17 Wall. (U. S.) 64; *Bronson v. La Crosse*, etc., R. Co., 1 Wall. (U. S.) 405; *Virginia*, Petitioner, 131 U. S., appendix lxxxix. See also *In re Rice*, 155 U. S. 396; *Chesapeake*, etc., R. Co. *v. White*, 111 U. S. 134.

6. *Appellate Jurisdiction of Supreme Court.* — *Weston v. Charleston*, 2 Pet. (U. S.) 449; *Smith v. Whitney*, 116 U. S. 167.

7. *Circuit and District Courts.* — *Rev. Stat. U. S.*, § 716; *In re Bininger*, 7 Blatchf. (U. S.) 159; *U. S. v. Manev*, 61 Fed. Rep. 140.

8. *Prohibition to State Court.* — *Rogers v. Cincinnati*, 5 McLean (U. S.) 337.

The Circuit Court has no jurisdiction to issue a writ of prohibition to the state court to restrain the prosecution of a suit for a partnership accounting pending proceedings in bankruptcy in the federal court against the partnership. *In re Bininger*, 7 Blatchf. (U. S.) 159.

9. *Jurisdiction of Supreme Court—Arizona.* — *Crowned King Min. Co. v. District Ct.*, (Ariz. 1901) 64 Pac. Rep. 439.

the Supreme Court is given a general supervision or control over inferior courts, it has jurisdiction in the exercise of that control to issue a writ of prohibition.¹ Courts of purely appellate jurisdiction have no jurisdiction to

California. — *Santa Cruz Gap Turnpike Joint Stock Co. v. Santa Clara County*, 62 Cal. 40; *Rickey v. Superior Ct.*, 59 Cal. 661; *Hyatt v. Allen*, 54 Cal. 353; *Perry v. Ames*, 26 Cal. 381; *Tyler v. Houghton*, 25 Cal. 26.

Colorado. — *People v. District Ct.*, 26 Colo. 386.

Florida. — *Singer Mfg. Co. v. Spratt*, 20 Fla. 122; *Sherlock v. Jacksonville*, 17 Fla. 93; *State v. Gleason*, 12 Fla. 190. See also *State v. Johnson*, 13 Fla. 33.

Idaho. — *Bellevue Water Co. v. Stocklager*, (Idaho 1895) 43 Pac. Rep. 568.

Kentucky. — *Shackelford v. Patterson*, (Ky. 1901) 62 S. W. Rep. 1040.

Louisiana. — *State v. Judge*, 48 La. Ann. 1372; *State v. Arnault*, 50 La. Ann. 1.

Massachusetts. — *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Jaquith v. Fuller*, 167 Mass. 123; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50.

Montana. — *State v. Benton*, 12 Mont. 66.

Nevada. — *Low v. Crown Point Min. Co.*, 2 Nev. 75.

New Mexico. — *Lincoln-Lucky, etc., Min. Co. v. District Ct.*, 7 N. Mex. 486; *Tapia v. Martinez*, 4 N. Mex. 165.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818.

Vermont. — *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867.

Virginia. — *Bedford v. Wingfield*, 27 Gratt. (Va.) 329; *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484; *Com. v. Latham*, 85 Va. 632; *Gresnam v. Ewell*, 84 Va. 784; *James v. Stokes*, 77 Va. 225.

Washington. — *State v. Superior Ct.*, 12 Wash. 677.

West Virginia. — *Fleming v. Commissioners*, 31 W. Va. 608; *McConiha v. Guthrie*, 21 W. Va. 134; *Buskirk v. Judge*, 7 W. Va. 91.

Wisconsin. — *State v. Gary*, 33 Wis. 93.

Wyoming. — *Dobson v. Westheimer*, 5 Wyo. 34.

In *Colorado*, the right of the Supreme Court to issue writs of prohibition is directly conferred by Colo. Const., art. 6, § 3, and does not depend upon the statute. *People v. District Ct.*, 26 Colo. 386.

In *Illinois*, the Supreme Court under the constitution has no jurisdiction in prohibition except in aid of its jurisdiction on appeal or writ of error. *People v. Circuit Ct.*, 173 Ill. 277, citing *People v. Circuit Ct.*, 169 Ill. 201.

In *Missouri*, the Court of Appeals has jurisdiction to issue writs of prohibition to all inferior courts whether courts of record or not. *School Dist. No. 6 v. Burris*, 84 Mo. App. 654. The Court of Appeals has power to issue writs of habeas corpus, quo warranto, mandamus, and other original remedial writs, and hence to issue prohibition where the subject-matter is not within the appellate jurisdiction of the Supreme Court. *State v. Allen*, 45 Mo. App. 551. In *State v. Seav*, 23 Mo. App. 623, it was held that the Court of Appeals, in the exercise of its original jurisdiction within its territorial limits, could issue the writ whether the case

was or was not one of which the Supreme Court would have original jurisdiction.

In *Nebraska*, the constitution does not give the Supreme Court original jurisdiction to award a writ of prohibition as an independent remedy, and it is not within the power of the legislature to confer such jurisdiction upon the Supreme Court. *State v. Hall*, 47 Neb. 579.

In *New York*, the special term has no jurisdiction to grant a writ of prohibition to a referee appointed by a justice of the Supreme Court under Laws of 1899, c. 690, § 4, but the writ must issue, if at all, from the appellate division. *People v. Nussbaum*, 53 N. Y. App. Div. 245.

In *South Carolina*, the Supreme Court has no original jurisdiction to issue a writ of prohibition, except in the exercise of a supervisory control over the court to which it is directed. *Hunter v. Moore*, 39 S. Car. 394, following *State v. Columbia*, 16 S. Car. 412, and 17 S. Car. 80.

In *Tennessee*, the Supreme Court has no jurisdiction to issue a prohibition to restrain an inferior tribunal from usurpation of jurisdiction. *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210.

Utah. — Under the Act of Congress giving to the Supreme Court of Utah chancery as well as common-law jurisdiction, it had the power to issue prohibition not only in aid of its appellate jurisdiction, but also as an independent original proceeding, aside from appellate power. *People v. Spiers*, 4 Utah 385, 482.

In *Wisconsin*, it has been held that a statute providing that writs of prohibition shall be issued only by the Supreme Court was unconstitutional upon the ground that the constitution gave the circuit courts supervisory control over all inferior courts and tribunals, which included the power to issue the writ of prohibition. *State v. Pollard*, 112 Wis. 322.

1. *Supervisory Control of Superior Courts*. — *Alabama*. — *Ex p. Ray*, 45 Ala. 15; *Ex p. Russell*, 29 Ala. 717; *Ex p. Greene*, 29 Ala. 52; *Ex p. Walker*, 25 Ala. 81; *Ex p. Smith*, 23 Ala. 94.

Kentucky. — See also *Preston v. Fidelity Trust, etc., Co.*, 94 Ky. 295; *Mengel Jr. Bros. Co. v. Jackson*, 94 Ky. 472; *Standard Oil Co. v. Linn*, (Ky. 1895) 32 S. W. Rep. 932.

Louisiana. — *State v. Carreau*, 45 La. Ann. 1446; *State v. Judge*, 45 La. Ann. 532; *State v. Judge*, 39 La. Ann. 97; *State v. Judges*, 32 La. Ann. 1256; *State v. Judge*, 32 La. Ann. 549; *State v. Falls*, 32 La. Ann. 553.

Maine. — *Harriman v. Waldo County*, 53 Me. 83.

Missouri. — *State v. Ross*, 122 Mo. 435; *Thomas v. Mead*, 36 Mo. 232.

Montana. — *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

New York. — *People v. Common Pleas Ct.*, 43 Barb. (N. Y.) 278.

North Carolina. — *State v. Whitaker*, 114 N. Car. 818; *Perry v. Shepherd*, 78 N. Car. 83.

issue writs of prohibition,¹ except in aid of their appellate jurisdiction,² and even in such cases the power has been denied.³ Where the Supreme Court is expressly authorized to issue writs of prohibition, the power is limited, as it was at common law, to cases where the act sought to be prohibited is of a judicial nature, in the absence of constitutional or valid statutory provision to the contrary.⁴ The Supreme Court will not exercise its jurisdiction to issue the writ where there is any court inferior to it which possesses the authority to afford the same relief, until application has first been made to such inferior court.⁵

(2) *Courts of Original Jurisdiction.* — In the absence of statutory provision to the contrary, courts of general original common-law jurisdiction, such as the Circuit or District Courts, have jurisdiction to issue the writ to inferior courts.⁶ Courts of chancery in the United States have not followed the

South Carolina. — *State v. Hudnall*, 2 Nott & M. (S. Car.) 419; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95; *Hunter v. Moore*, 39 S. Car. 394; *State v. Columbia*, 16 S. Car. 412, 17 S. Car. 80.

Wisconsin. — *State v. Pollard*, 112 Wis. 232.

Under its supervisory control, the Supreme Court is not authorized to issue a writ of prohibition merely to avert probable injury to the applicants for the writ, where the proceeding below is not without jurisdiction. *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

In *Louisiana* prior to the constitution of 1879 the power of the court to issue the writ was limited to cases where its exercise was incidental to and in furtherance of its appellate jurisdiction. *Whipple's Succession*, 2 La. Ann. 236; *State v. Judge*, 8 La. Ann. 288; *State v. Judge*, 19 La. 174; *State v. Parish Judge*, 22 La. Ann. 61; *State v. Judge*, 25 La. Ann. 381; *State v. Judge*, 26 La. Ann. 146.

1. *Courts of Purely Appellate Jurisdiction* — *Illinois.* — *People v. Circuit Ct.*, 173 Ill. 272; *People v. Circuit Ct.*, 169 Ill. 201.

Kentucky. — *Sassee v. Hammond*, 18 B. Mon. (Ky.) 672; *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669.

Louisiana. — *State v. Judge*, 45 La. Ann. 532; *State v. Judge*, 43 La. Ann. 936; *State v. Judge*, 39 La. Ann. 97; *State v. Judge*, 26 La. Ann. 146; *State v. Judge*, 25 La. Ann. 381; *State v. Parish Judge*, 22 La. Ann. 61; *State v. Judge*, 19 La. 174; *State v. Judge*, 8 La. Ann. 288; *Whipple's Succession*, 2 La. Ann. 236.

Nebraska. — *State v. Hall*, 47 Neb. 579.

Mississippi. — *Planters' Ins. Co. v. Cramer*, 47 Miss. 200.

Tennessee. — *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210.

2. *In Aid of Appellate Jurisdiction.* — *People v. Turner*, 1 Cal. 143, 52 Am. Dec. 294; *People v. Circuit Ct.*, 173 Ill. 272; *People v. Circuit Ct.*, 169 Ill. 201, *affirming* 59 Ill. App. 514; *State v. Judge*, 26 La. Ann. 146; *State v. Judge*, 25 La. Ann. 381; *Whipple's Succession*, 2 La. Ann. 236; *State v. Superior Ct.*, 12 Wash. 677; *State v. Superior Ct.*, 3 Wash. 696, *distinguished* in *State v. Superior Ct.*, 3 Wash. 703. See *People v. Shear*, 7 Cal. 140.

3. *Memphis v. Halsey*, 12 Heisk. (Tenn.) 210. See also *State v. Hall*, 47 Neb. 579.

In *State v. Snead*, 105 Tenn. 733, it is intimated that the writs of mandamus, error, certiorari, and supersedeas are the only reme-

dies which the Supreme Court uses or can use in aid of its appellate jurisdiction.

4. *Construction of Statute Conferring Jurisdiction.* — *Hevren v. Reed*, 126 Cal. 219; *Camron v. Kenfield*, 57 Cal. 550; *Maurer v. Mitchell*, 53 Cal. 289; *Sherwood v. New England Knitting Co.*, 68 Conn. 543; *Sherlock v. Jacksonville*, 17 Fla. 93; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

5. *Ex p. Russell*, 29 Ala. 717; *State v. Judge*, 43 La. Ann. 936; *Fleming v. Commissioners*, 31 W. Va. 608; *State v. Pollard*, 112 Wis. 232. See *Santa Cruz Gap Turnpike Joint Stock Co. v. Santa Clara County*, 62 Cal. 40. But see *Ex p. Hill*, 38 Ala. 443, wherein the court held, *citing Ex p. Burnett*, 30 Ala. 461, and *Ex p. Smith*, 23 Ala. 94, that the Supreme Court would grant a writ of prohibition without a previous application to an inferior court.

6. *Courts of Original Jurisdiction* — *Alabama.* — *Ex p. Boothe*, 64 Ala. 312; *Ex p. Ray*, 45 Ala. 15; *Ex p. Russell*, 29 Ala. 717; *Ex p. Campbell*, (Ala. 1901) 30 So. Rep. 385.

Arkansas. — See *Sand. & H. Dig. Stat.*, § 4890 *et seq.*

California. — *Coronado v. San Diego*, 97 Cal. 440; *Perry v. Ames*, 26 Cal. 381, *Code Civ. Pro.*, § 76.

Colorado. — *People v. District Ct.*, 26 Colo. 226.

Connecticut. — *Sherwood v. New England Knitting Co.*, 68 Conn. 543.

Georgia. — *Doughty v. Walker*, 54 Ga. 595.

Indiana. — *Jasper County v. Spitler*, 13 Ind. 235.

Kentucky. — *Code Civ. Pro.* 1895, § 479; *Reese v. Lawless*, 4 Bibb (Ky.) 394; *Arnold v. Shields*, 5 Dana (Ky.) 18, 30 Am. Dec. 669; *Pennington v. Woolfolk*, 79 Ky. 13. See also *Owensboro v. Sparks*, 99 Ky. 351.

Louisiana. — *State v. Voorhies*, 49 La. Ann. 1717.

Maryland. — *Price v. State*, 8 Gill (Md.) 295.

Mississippi. — *Planters' Ins. Co. v. Cramer*, 47 Miss. 200; *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143.

Missouri. — *Howard v. Pierce*, 38 Mo. 296; *Morris v. Lenox*, 8 Mo. 252.

Montana. — *State v. Benton*, 12 Mont. 66.

South Carolina. — *State v. Kirkland*, 41 S. Car. 29; *State v. Stackhouse*, 14 S. Car. 417; *State v. County Treasurer*, 4 S. Car. 520; *Baldwin v. Cooley*, 1 S. Car. 256.

practice of the English chancery court in issuing the writ, either in term time or during the vacation of the law courts.¹ A judge of the Circuit Court in vacation has no authority to issue a writ of prohibition.²

3. Relative Rank of Courts. — The writ lies only as between courts which sustain to each other the relation of superior and inferior, and cannot issue from a court to prohibit another court which is in no manner subordinate or inferior to it.³

V. OPERATION AND ENFORCEMENT OF WRIT. — The Writ Operates Only upon the Particular Suit or proceeding in the court to which it is directed.⁴

An Alternative Writ of prohibition operates as a prohibition until the further order of the court.⁵

Res Judicata. — A decision on an application for a writ of prohibition refusing the writ upon the ground that the court has jurisdiction is *res judicata* and

Virginia. — *Jackson v. Maxwell*, 5 Rand. (Va.) 636.

West Virginia. — *Fleming v. Commissioners*, 31 W. Va. 608.

Wisconsin. — *State v. Pollard*, 112 Wis. 232, holding that such jurisdiction was conferred by the constitution and could not be taken away by statute. But see *State v. Gary*, 33 Wis. 93.

Contra. — *Perry v. Shepherd*, 78 N. Car. 83.

In *Florida*, the power to issue the writ of prohibition as an original proceeding does not belong to the Circuit Court, and can be issued by them only as ancillary to the jurisdiction already acquired. *Singer Mfg. Co. v. Spratt*, 20 Fla. 122.

In *Idaho*, all courts except probate and justices' courts may issue prohibition to inferior tribunals where there is no plain, speedy, and adequate remedy in the ordinary course of law. Rev. Stat., §§ 4994, 4995; *Bellevue Water Co. v. Stockslager*, (Idaho 1895) 43 Pac. Rep. 568.

In *Kentucky*, charters of cities of the second class provide that the validity of city ordinances may be tried by prohibition from the Circuit Court on petition *ex parte*, with appeal to the Court of Appeals. *Lexington's Appeal*, 96 Ky. 258; *Shinkle v. Covington*, 83 Ky. 420.

In *Louisiana*, the power of district and all other courts of appellate jurisdiction except the Supreme Court to issue the writ is limited to cases in aid of appellate jurisdiction. *State v. Judge*, 37 La. Ann. 285; *State v. Judge*, 39 La. Ann. 97; *State v. Henry*, 41 La. Ann. 908; *State v. Judge*, 45 La. Ann. 532.

In *New Mexico*, the power to issue the writ is confined to the Supreme Court or one of the judges thereof. *Tapia v. Martinez*, 4 N. Mex. 165.

In *North Carolina*, the writ of prohibition can issue only from the Supreme Court. *State v. Whitaker*, 114 N. Car. 818, citing *Perry v. Shepherd*, 78 N. Car. 83.

In *Virginia*, superior courts may issue the writ, but county courts cannot. *Jackson v. Maxwell*, 5 Rand. (Va.) 636.

In *Texas*, the district court has no supervisory control over inferior tribunals and cannot issue a writ of prohibition against proceedings in a justice's court. See *State v. State*, 1 Tex. Civ. App. 495.

1. Courts of Chancery. — *Smith v. Whitney*, 116 U. S. 167. See also *Montezuma v. Minor*, 70 Ga. 191.

But in *State v. Hopkins*, Dudley L. (S. Car.) 101, the writ was issued by a chancery court. See also *Bank Lick Turnpike Co. v. Phelps*, 81 Ky. 613.

2. In Vacation. — *Ex p. Boothe*, 64 Ala. 312; *Ex p. Ray*, 45 Ala. 15.

In *Ex p. Withers*, 3 Brev. (S. Car.) 83, it was held that the writ could not be granted by the judge at chambers, but must be awarded by the court in term.

But if the necessity of the case requires it, the circuit judge in vacation may issue a rule to show cause returnable to the next term of the court, which rule, being served on the inferior court or judge and the parties to be affected by it, operates as a prohibition until the further order of the court. *Ex p. Ray*, 45 Ala. 15. See also *Ex p. Boothe*, 64 Ala. 312; *Doughty v. Walker*, 54 Ga. 595.

3. Relation of Superior and Inferior Courts Must Exist. — *Burch v. Hardwicke*, 23 Gratt. (Va.) 51; *Seele v. State*, 1 Tex. Civ. App. 495.

An inferior court is a court whose judgments or decrees can be reviewed by an appellate tribunal, whether that tribunal be the Circuit or the Supreme Court; and not necessarily a court whose jurisdiction is inferior, or limited, within the meaning of that term at common law. *Ex p. Roundtree*, 51 Ala. 42.

Where the district courts are held by one of the judges of the Supreme Court, the writ may be issued to a judge sitting as a district court judge by a judge of the Supreme Court. *Lincoln-Lucky, etc., Min. Co. v. District Ct.*, 7 N. Mex. 486.

4. Operates Only on Particular Suit or Proceeding. — *State v. Ross*, 136 Mo. 259; *Thomson v. Tracy*, 60 N. Y. 31; *State v. Moore*, 16 Wash. 350.

The court will not issue a prohibition in a case not pending, for the sole purpose of establishing a principle to govern other cases. *Sherlock v. Jacksonville*, 17 Fla. 93, citing *U. S. v. Hoffman*, 4 Wall. (U. S.) 158.

A writ prohibiting the trial of a case before an alleged illegal jury is not violated by the trial of such case before another and legal jury. *State v. Superior Ct.*, 16 Wash. 347.

A prohibition against an injunction is violated where the lower court proceeds to punish as a contempt the violation of such injunction. *State v. Judge*, 48 La. Ann. 1501.

5. Alternative Writ. — *Ex p. Campbell*, (Ala. 1901) 30 So. Rep. 385.

binding upon a subsequent appeal from the judgment in the principal case.¹

The Writ, Even if Improvidently Granted, must not be disregarded by an officer to whom or a tribunal to which it is directed, but must be obeyed until vacated or set aside by some regular course of proceedings.²

Disobedience of the Writ is punishable as a contempt.³ Where the disobedience is in good faith, and not wilful, such good faith, though it cannot wholly excuse the technical contempt, will preclude other punishment than by a nominal fine.⁴

VI. PARTICULAR PERSONS AND ACTS PROHIBITED — 1. In General. — Having in view the general principles already considered, the writ has been granted or refused, as stated, in the following classes of cases, viz.:

2. Amendments. — Error in permitting or refusing to permit amendments is not ground for the writ.⁵

3. Amount in Controversy. — Where the jurisdiction of the court depends upon the amount in controversy, prohibition lies to prevent the exercise of jurisdiction in a case where the amount is not such as to confer jurisdiction.⁶ Thus, where a single cause of action has been improperly split in order to confer jurisdiction upon an inferior court,⁷ or to defeat the jurisdiction of a superior court,⁸ it has been held that the writ lies.

4. Appeal and Error — Entertaining Appeal. — The writ lies to prevent a court from entertaining an appeal in cases where no appeal is allowed by law,⁹ or where the steps necessary to confer jurisdiction on the appellate court have not been taken.¹⁰ But mere defects or irregularities in the proceedings which are not jurisdictional are not ground for the writ.¹¹

1. Res Judicata. — *White v. Fresno Nat. Bank*, 98 Cal. 166. See also *Kentucky Bank v. Stone*, 88 Fed. Rep. 383.

A denial of an application for a writ of prohibition without deciding the question of jurisdiction does not take away the right to have such question considered on a writ of review. *Santa Monica v. Eckert*, (Cal. 1893) 33 Pac. Rep. 880.

2. Writ Improvidently Granted. — *Ex p. Boothe*, 64 Ala. 312.

Mandamus Lies to Compel Vacation of a writ improperly granted. *Ex p. Boothe*, 64 Ala. 312; *Ex p. Keeling*, 50 Ala. 474; *Ex p. Ray*, 45 Ala. 15.

3. Disobedience Punishable as Contempt. — *Havemeyer v. Superior Ct.*, 87 Cal. 267; *State v. Judge*, 48 La. Ann. 1501; *State v. Hungerford*, 8 Wis. 345.

4. Nominal Fine. — *Havemeyer v. Superior Ct.*, 87 Cal. 267.

5. State v. Smith, 32 Fla. 476. See *Messenger v. Northcutt*, 26 Colo. 527. But see *Kirby v. Superior Ct.*, 68 Cal. 604, wherein it was held that pending an appeal the trial court has no jurisdiction to allow an amendment to any pleading and that prohibition will lie.

6. Amount in Controversy. — *State v. Newman*, 49 La. Ann. 52; *State v. Boone*, 42 La. Ann. 982; *State v. Judges*, 40 La. Ann. 771; *State v. Lapeyrolerie*, 38 La. Ann. 912; *Zylstra v. Charleston*, 1 Bay (S. Car.) 382; *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867; *Hutson v. Lowry*, 2 Va. Cas. 42; *State v. Superior Ct.*, 6 Wash. 112; *Bodley v. Archibald*, 33 W. Va. 229.

For a full consideration of jurisdiction as affected by the amount in controversy, see article AMOUNT IN CONTROVERSY, 1 ENCYC. OF PL. AND PR. 702.

7. Splitting Cause of Action. — *Rex v. Here-*

fordshire, 1 B. & Ad. 672, 20 E. C. L. 466; *Girling v. Aldas*, 2 Keb. 617; *Lawrence v. Warbeck*, 1 Keb. 260; *State v. Newman*, 49 La. Ann. 52; *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867; *James v. Stokes*, 77 Va. 225; *Hutson v. Lowry*, 2 Va. Cas. 42; *Bodley v. Archibald*, 33 W. Va. 229. *Contra*, *Shaw v. Pollard*, 84 Mo. App. 286, holding that there is an adequate remedy by appeal.

Remittitur Confers Jurisdiction. — *People v. Marine Ct.*, 36 Barb. (N. Y.) 341. *Contra*, *Ramsay v. Wardens Ct.*, 2 Bay (S. Car.) 180.

8. State v. Newman, 49 La. Ann. 52; *Browne v. Rowe*, 10 Tex. 183; *Bullard v. Thorpe*, 66 Vt. 599, 44 Am. St. Rep. 867. But see *State v. Judges*, 38 La. Ann. 377.

9. Where No Appeal Lies. — *Rickey v. Superior Ct.*, 59 Cal. 661; *People v. Tompkins Gen. Sess.*, 19 Wend. (N. Y.) 154.

In *Chandler v. Railroad Com'rs*, 141 Mass. 208, prohibition was issued upon the ground that the appellant was not "a party aggrieved" under the statute providing for appeals. See also *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484.

10. Appeal Not Perfected. — *Gray v. Superior Ct.*, 61 Cal. 337; *Coker v. Superior Ct.*, 58 Cal. 177; *McConky v. Superior Ct.*, 56 Cal. 83; *State v. Superior Ct.*, 20 Wash. 709; *State v. Superior Ct.*, 19 Wash. 198; *State v. Superior Ct.*, 17 Wash. 54, *approved* in *State v. Superior Ct.*, 20 Wash. 709.

11. Defects Not Jurisdictional. — *Gray v. Superior Ct.*, 61 Cal. 337; *Coker v. Superior Ct.*, 58 Cal. 177; *State v. Superior Ct.*, 9 Wash. 307.

Writ of Error Sued Out in Time. — In *State v. Smith*, 104 Mo. 419, the writ was sought upon the ground that the Kansas City Court of Appeals was entertaining a suit where the writ of error was sued out after the expiration of the time allowed by law, but the Supreme

Proceedings Pending Appeal. — The writ lies to prevent further proceedings in a cause after an appeal and supersedeas,¹ but not when the appeal is without supersedeas,² nor, it has been held, where an appeal is attempted to be taken in a case where no appeal lies.³ Of course, a court has power to proceed pending an appeal upon any matter in the cause not affected by the appeal.⁴

After Judgment by the Appellate Court, the court appealed from has authority only to enforce the judgment as rendered, and the writ will be granted to prevent it from attempting to enforce a different judgment.⁵ The writ lies to prevent the lower court from vacating or modifying a judgment rendered by the Supreme Court on appeal.⁶ But it does not lie to compel a lower court to follow the decisions of the Supreme Court in other but similar cases.⁷ The writ lies to prevent the vacation of a judgment and new trial after affirmance of the judgment on appeal.⁸

5. Appointment of Officers. — The appointment of officers is not usually a judicial act and cannot be restrained by prohibition.⁹

6. Attachment. — Prohibition will not lie to restrain proceedings in attachment upon the ground that the action is one in which no attachment will lie, there being a remedy by appeal from an order refusing to dissolve the

Court held that, the case belonging to the general class of actions of which the city court had jurisdiction, the question whether the writ of error was issued "in the time, manner, or form allowed by law was one peculiarly for it to determine," and the writ was denied. But see *contra*, *Liverpool United Gas-Light Co. v. Overseers of Poor*, L. R. 6 C. P. 414.

1. Pending Appeal and Supersedeas — *United States*. — *Bronson v. La Crosse*, etc., R. Co., 1 Wall. (U. S.) 405.

Alabama. — *Birmingham R., etc., Co. v. Birmingham Traction Co.*, 121 Ala. 475, wherein it was held that the remedy was by prohibition and not injunction.

California. — *Ruggles v. Superior Ct.*, 103 Cal. 125; *State Invest., etc., Co. v. Superior Ct.*, 101 Cal. 150; *Pezuela v. Superior Ct.*, 83 Cal. 49; *Livermore v. Campbell*, 52 Cal. 75; *People v. Whitney*, 47 Cal. 584. See also *Bliss v. Superior Ct.*, 62 Cal. 543. But see *Baughman v. Superior Ct.*, 72 Cal. 572.

Georgia. — *Fite v. Black*, 85 Ga. 413.

Illinois. — *People v. Circuit Ct.*, 169 Ill. 201.

Louisiana. — *Stanton v. Parker*, 2 Rob. (La.) 550; *State v. Davey*, 37 La. Ann. 827; *State v. Righthor*, 36 La. Ann. 711; *State v. Judge*, 31 La. Ann. 120; *State v. Judge*, 24 La. Ann. 600; *State v. Judge*, 23 La. Ann. 491; *State v. Judge*, 22 La. Ann. 115; *State v. Parish Judge*, 22 La. Ann. 61; *State v. Judge*, 21 La. Ann. 735; *State v. Judge*, 21 La. Ann. 113; *State v. Judge*, 21 La. Ann. 43; *State v. Judge*, 21 La. Ann. 178; *State v. Judge*, 19 La. 167; *State v. Judge*, 19 La. 174; *Gray v. Lowe*, 9 La. Ann. 478.

Missouri. — *State v. Hirzel*, 137 Mo. 435.

North Carolina. — *State v. Whittaker*, 114 N. Car. 821.

Washington. — *State v. Superior Ct.*, 13 Wash. 638; *State v. Superior Ct.*, 12 Wash. 677; *State v. Superior Ct.*, 10 Wash. 168; *State v. Superior Ct.*, 6 Wash. 112; *State v. Superior Ct.*, 3 Wash. 696.

After Affirmance. — The writ will not issue where the judgment from which the appeal is taken has been affirmed. *State v. Ellis*, 50 La. Ann. 345.

2. Appeal Without Supersedeas. — *Stanton v.*

Parker, 2 Rob. (La.) 550; *State v. Dillon*, 31 Mo. App. 535; *Wand v. Ryan*, (Mo. 1901) 65 S. W. Rep. 1025.

As a Judgment of Ouster in a Quo Warranto Proceeding is self-executing and is not suspended by appeal, prohibition will not lie to prevent the enforcement of such judgment by contempt proceedings pending the appeal. *Fawcett v. Superior Ct.*, 15 Wash. 342, 55 Am. St. Rep. 894. But in *Covarrubias v. Santa Barbara County*, 52 Cal. 622, it was held on demurrer to an application for prohibition that the board of supervisors could not proceed to elect the petitioner's successor as sheriff, when he had appealed from the judgment of the District Court ousting him from office.

3. Where No Appeal Lies. — *State v. Ellis*, 40 La. Ann. 818; *State v. Judge*, 32 La. Ann. 814; *State v. Superior Ct.*, 7 Wash. 74; *Parker v. Superior Ct.*, 25 Wash. 544. But see *State v. Superior Ct.*, 6 Wash. 112; *State v. Judge*, 39 La. Ann. 774; *State v. Lewis*, 76 Mo. 370; *Kaufman v. Superior Ct.*, 108 Cal. 446.

4. Matters Not Affected by Appeal. — *Bliss v. Superior Ct.*, 62 Cal. 543; *State v. Judge*, 17 La. 511.

Independent Proceedings. — *People v. Grogan*, (Supm. Ct. Spec. T.) 3 N. Y. Crim. 335.

Two or More Actions — Appeal in One. — *State v. Judge*, 20 La. Ann. 252; *State v. Houston*, 35 La. Ann. 236.

5. State ex rel. *Boye*, 18 La. Ann. 102.

6. State v. Drew, 38 La. Ann. 274; *State v. Superior Ct.*, 8 Wash. 591.

Disregard of the decision on appeal by the lower court after a reversal and remand is not ground for the writ, since there is a remedy by appeal. *King v. Doolittle*, (W. Va. 1902) 41 S. E. Rep. 145.

7. State v. Judge, 38 La. Ann. 921.

8. Kirby v. Superior Ct., 68 Cal. 604.

9. A Board of Police Justices does not act as a court in the appointment of clerks, etc., and hence cannot be restrained by prohibition. *Norton v. Dowling*, (N. Y. Super. Ct. Spec. T.) 46 How. Pr. (N. Y.) 7.

To Prevent Judge from Appointing Commissioners. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

attachment.¹ Insufficiency of the affidavit in attachment is not ground for a writ of prohibition to restrain the court from proceeding with the case.²

7. Attorney-General. — The attorney-general, in determining what proceedings shall be commenced, acts ministerially and is not subject to the writ.³

8. Commissioners. — State land commissioners, in selling or leasing public lands, do not act judicially and are not subject to the writ.⁴ Railroad commissioners,⁵ and commissioners to adopt plans and specifications for the erection of a state capitol,⁶ have been held subject to the writ under particular circumstances.

9. Condemnation Proceedings. — County commissioners, in determining the damages to be paid in condemnation proceedings, act judicially and are subject to the writ.⁷

10. Conflicting and Concurrent Jurisdiction. — Where a court of competent jurisdiction has assumed cognizance of a cause, it has been held that other courts of concurrent jurisdiction are thereby deprived of it in respect to that cause, and may be restrained by prohibition.⁸ But this has been denied upon the ground that both courts concededly have jurisdiction and that its exercise by one is at most error.⁹

11. Contempt Proceedings. — The writ lies to prevent or arrest contempt proceedings where the particular officer has, under the circumstances, no jurisdiction to punish for contempt,¹⁰ but not where jurisdiction exists,¹¹ or where there is another adequate remedy.¹²

12. Continuance. — An erroneous continuance of a case to the next term is not ground for the writ.¹³

1. Attachment. — *Agassiz v. Superior Ct.*, 90 Cal. 101. See also *People v. Marine Ct.*, 36 Barb. (N. Y.) 341.

2. People v. Marine Ct., 36 Barb. (N. Y.) 341.

3. Attorney-General. — *People v. Nussbaum*, 55 N. Y. App. Div. 245.

4. State Land Commissioners. — *Winsor v. Bridges*, 24 Wash. 540; *State v. State Land Com'rs*, 23 Wash. 700.

5. Railroad Commissioners. — In *Toomer v. London, etc., R. Co.*, 2 Ex. D. 450, the railroad commissioners were prohibited from making an order requiring two railroads to do jointly what neither could do separately.

6. State Capitol Commissioners. — *State v. Smith*, 21 Mont. 148.

7. Condemnation Proceedings. — *Vermont, etc., R. Co. v. Franklin County*, 10 Cush. (Mass.) 12; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

8. Conflicting and Concurrent Jurisdiction. — *Hindman v. Toney*, 97 Ky. 413; *State v. Judge*, 9 Rob. (La.) 480; *State v. Voorhies*, 40 La. Ann. 1; *State v. Rightor*, 39 La. Ann. 619; *Maclean v. Speed*, 52 Mich. 257. See also *State v. Judge*, 38 La. Ann. 178; *State v. Monroe*, 33 La. Ann. 923; *State v. Judge*, 20 La. Ann. 311.

9. In re Alix, 166 U. S. 136; *State v. Withrow*, 108 Mo. 1; *Roper v. Cady*, 4 Mo. App. 593.

10. Contempt Proceedings — England. — *Reg. v. Lefroy*, L. R. 8 Q. B. 134.

Alabama. — But see *Ex p. Hamilton*, 51 Ala. 62.

California. — *Cosby v. Superior Ct.*, 110 Cal. 45; *Ruggles v. Superior Ct.*, 103 Cal. 125; *Gordan v. Buckles*, 92 Cal. 481; *Williams v. Dwinelle*, 51 Cal. 442; *People v. County Judge*, 27 Cal. 151.

Colorado. — *People v. District Ct.*, 6 Colo. 534.

Louisiana. — See *State v. Ellis*, 45 La. Ann. 241.

Michigan. — *Nichols v. Judge*, (Mich. 1902) 89 N. W. Rep. 691.

Minnesota. — *State v. Wilcox*, 24 Minn. 143.

Missouri. — But see *State v. Scarritt*, 128 Mo. 331.

New York. — *People v. Mayer*, 71 Hun (N. Y.) 182. See also *People v. Williams*, 51 N. Y. App. Div. 102.

Utah. — *People v. Carrington*, 5 Utah 531.

Washington. — *State v. Langhorne*, 8 Wash. 447; *State v. Superior Ct.*, 4 Wash. 30.

Generally, as to the jurisdiction to punish for contempt, see the title CONTEMPT, vol. 7, p. 25.

11. Ex p. Boothe, 64 Ala. 312; *Hedges v. Superior Ct.*, 67 Cal. 405; *People v. District Ct.*, 21 Colo. 254; *People v. District Ct.*, 19 Colo. 343; *State v. Skinner*, 32 La. Ann. 1092; *Fawcett v. Superior Ct.*, 15 Wash. 342, 55 Am. St. Rep. 894.

Although a judicial proceeding must ultimately be dismissed for want of jurisdiction, yet the court has power to punish a stranger for contempt of its orders made during the progress of the case, and, therefore, prohibition will not lie to prevent the enforcement of contempt proceedings. *Ex p. Stickney*, 40 Ala. 160.

The fact that the petitioner claims that the justice is prejudiced against him is not sufficient ground for granting a writ of prohibition restraining the justice from taking further action in contempt proceedings. *People v. Williams*, 51 N. Y. App. Div. 102.

12. Other Adequate Remedy. — *Ex p. Hamilton*, 51 Ala. 62; *Toomey v. Cowley*, 72 Conn. 458; *State v. Rightor*, 32 La. Ann. 1182.

13. Moss v. Barham, 94 Va. 12.

13. **Controller.** — A controller is not a judicial officer, and is not subject to be restrained by a writ of prohibition.¹

14. **Coroner.** — The writ lies to a coroner to prevent him from holding an inquest as to the origin of a fire.²

15. **Courts Martial.** — A military or naval court-martial is subject to the writ when it is proceeding in excess of its jurisdiction,³ but the writ will not be granted upon the ground of errors or irregularities in the proceedings or for insufficiency of the charges or specifications.⁴

16. **Court-room.** — The writ lies to prevent the enforcement of an order to the sheriff to complete and furnish a court-room for the use of the court, there being no statutory authority for such an order.⁵

17. **Costs.** — An irregular taxation of costs is not ground for a writ of prohibition.⁶ But a wholly unauthorized judgment for costs may be prohibited.⁷

18. **Defenses.** — The writ will not lie to prevent a court from entertaining a case merely because there is a clear defense to the proceeding.⁸

19. **Discretionary Acts.** — If the inferior tribunal has the jurisdiction or power to take the contemplated action under any circumstances as a judicial or discretionary act, the writ will not lie. It is only where the inferior tribunal is about to do some act wholly unauthorized by law that the writ will lie.⁹

20. **Dismissal or Withdrawal of Proceedings.** — Where proceedings have been dismissed, prohibition lies to prevent further proceedings therein.¹⁰ Prohibition lies to restrain a court from trying a criminal cause after the district attorney has entered a nolle prosequi therein.¹¹ The writ will not lie to prevent a court from passing upon a motion to dismiss.¹²

1. **Controller.** — *Camron v. Kenfield*, 57 Cal. 550.

2. **Coroner.** — *Reg. v. Herford*, 3 El. & El. 115, 107 E. C. L. 115, 29 L. J. Q. B. D. 249, 6 Jur. N. S. 750.

3. **Courts Martial.** — *Smith v. Whitney*, 116 U. S. 167; *U. S. v. Maney*, 61 Fed. Rep. 140; *Washburn v. Phillips*, 2 Met. (Mass.) 296; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338; *People v. Doyle*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 411, affirmed in 44 N. Y. App. Div. 402, 162 N. Y. 659; *State v. Hopkins*, *Dudley L. (S. Car.)* 101. See also *Matter of Poe*, 5 B. & Ad. 681, 27 E. C. L. 153, 2 N. & M. 636, 3 L. J. K. B. 33; *State v. Wakely*, 2 Nott & M. (S. Car.) 410.

4. *Grant v. Gould*, 2 H. Bl. 69; *Smith v. Whitney*, 116 U. S. 167; *U. S. v. Maney*, 61 Fed. Rep. 140; *State v. Edwards*, 1 McMull. L. (S. Car.) 215; *State v. Wakely*, 2 Nott & M. (S. Car.) 412.

5. **Order to Provide Court-room.** — *Los Angeles County v. Superior Ct.*, 93 Cal. 380. But see *State v. Hunter*, 4 Wash. 712, wherein it was held that injunction, and not prohibition, was the proper remedy.

6. **Costs.** — *Reg. v. London Corp.*, etc., 62 L. J. Q. B. D. 589; *Reg. v. London Corp.*, etc., 5 Reports 544.

7. *Wilkinson v. Hoke*, 39 W. Va. 403; *Charleston v. Beller*, 45 W. Va. 44; *West v. Ferguson*, 16 Gratt. (Va.) 270.

8. **Defenses Not Ground for Writ.** — *Ex p. Higgins*, 10 Jur. 838; *Ex p. Easton*, 95 U. S. 68; *U. S. v. Maney*, 61 Fed. Rep. 140; *Goddard v. Superior Ct.*, 90 Cal. 364; *State v. Judge*, 45 La. Ann. 213, *People v. Russell*, 40 Barb. (N. Y.) 351; *Sperry v. Sanders*, 50 W. Va. 70;

State v. Evans, 88 Wis. 255; *State v. Braun*, 31 Wis. 600. See also *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256.

9. **Discretion or Judgment Not Controlled by Writ** — *United States*. — *In re Engles*, 146 U. S. 357; *In re Fassett*, 142 U. S. 479.

California. — *Hevren v. Reed*, 126 Cal. 219; *Murphy v. Superior Ct.*, 84 Cal. 595; *Powelson v. Lockwood*, 82 Cal. 615.

Illinois. — *People v. Circuit Ct.*, 173 Ill. 272. *Missouri*. — *State v. Scarritt*, 128 Mo. 331.

South Carolina. — *State v. Raborn*, 60 S. Car. 78.

Washington. — *State v. Superior Ct.*, 9 Wash. 307.

West Virginia. — *Board of Education v. Holt*, (W. Va. 1902) 41 S. E. Rep. 337; *Hartigan v. Board of Regents*, 49 W. Va. 14; *Davis v. Filler*, 47 W. Va. 413.

10. **Dismissal.** — *Fayerweather v. Monson*, 61 Conn. 431.

A dismissal by the plaintiff will not defeat the jurisdiction of the court where a counterclaim has been filed by the defendant. *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478, holding that the lower court has the right to determine whether the counterclaim was filed before or after a dismissal.

Where a Defendant Has an Absolute Right to the Dismissal of an action for failure to serve the summons within the time limited by statute, prohibition lies to restrain the prosecution of such action. *White v. Superior Ct.*, 126 Cal. 245.

11. **Nolle Prosequi.** — *People v. District Ct.*, 23 Colo. 466.

12. **Motion to Dismiss.** — *Wreden v. Superior Ct.*, 55 Cal. 504.

21. Disregard of Statute or Common Law. — Proceedings by a court in violation of direct statutory provisions are in excess of jurisdiction and may be restrained by a writ of prohibition.¹ It is sometimes said that prohibition will lie where a court proceeds in violation of the settled principles of the common law. But this is not true unless taken with considerable qualification.²

22. Disqualification of Judge. — A writ of prohibition will lie to restrain a judge from proceeding in an action in which he is disqualified by reason of interest, although the court over which he presides may have jurisdiction of the cause.³

23. Drawing Warrants. — The writ will not lie to prevent the drawing of warrants upon the public treasury in payment of claims.⁴

24. Elections. — A board of election officers may exercise both ministerial and judicial powers, in which case the writ of prohibition will lie as to their judicial action, but not as to their ministerial action.⁵ The writ will not lie to arrest the proceedings of a board of election commissioners in ordering an election, as their action is not judicial.⁶

25. Equitable Proceedings. — The writ, although a legal remedy, lies to prevent proceedings either at law or in equity.⁷ Gross abuse of discretion in granting equitable remedies may be restrained by prohibition.⁸

26. Evidence. — Error in the reception or rejection of evidence, or insufficiency of the evidence to support the decision, is not ground for prohibition.⁹ Error in failing to examine witnesses under oath upon a preliminary examination is not ground for a writ of prohibition, as it does not affect the question of jurisdiction.¹⁰

1. Violation of Statute. — *Grant v. Gould*, 2 H. Bl. 100; *Hayne v. Justice's Ct.*, 82 Cal. 284, 16 Am. St. Rep. 114; *Keough v. Grime*, 172 Mass. 519; *People v. Nichols*, 79 N. Y. 582; *State v. Wakely*, 2 Nott & M. (S. Car.) 410; *Wilkinson v. Hoke*, 39 W. Va. 403; *McConiha v. Guthrie*, 21 W. Va. 134. See also *Evans v. Wills*, 1 C. P. D. 229; *Henshaw v. Cotton*, 127 Mass. 60; *Wall v. Warden's Ct.*, 1 Bay (S. Car.) 434.

2. Disregard of Common-law Principles. — 3 Blackstone Com. 112; *State v. Road Com'rs*, 3 Hill L. (S. Car.) 314; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 98; *State v. Nathan*, 4 Rich. L. (S. Car.) 514; *State v. Kirkland*, 41 S. Car. 29. See *Leonard's Case*, 3 Rich. L. (S. Car.) 114.

3. Disqualification of Judge. — *North Bloomfield Gravel Min. Co. v. Keyser*, 58 Cal. 315; *Conolly Gold Min. Co. v. Keyser*, 58 Cal. 328; *Milton Min. Co. v. Keyser*, 58 Cal. 328; *South Feather Co. v. Keyser*, 58 Cal. 329; *Blue Tent Co. v. Keyser*, 58 Cal. 329; *Excelsior Water, etc., Co. v. Keyser*, 58 Cal. 329; *People v. District Ct.*, 26 Colo. 226; *State v. Wear*, 129 Mo. 619; *State v. Board of Education*, 19 Wash. 8, 67 Am. St. Rep. 706. But see *People v. Jerome*, (Supm. Ct. Spec. T.) 36 Misc. (N. Y.) 256, wherein the writ was refused when sought upon the ground that the judge was biased, no interest on the part of such judge being shown.

Generally, as to disqualification of judges, see the title JUDGE, vol. 17, p. 732 *et seq.*

4. Warrants on Public Treasury. — *Camron v. Kenfield*, 57 Cal. 550.

5. Election Officers. — *Seymour v. Almond*, 75 Ga. 112; *State v. Elkin*, 130 Mo. 90; *People v. Albany County*, (Supm. Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 25, note; *Fleming v. Commissioners*, 31 W. Va. 608; *Brown v. Election Canvassers*, 45 W. Va. 826. See also *State v. Spearling*, 31 La. Ann. 122.

6. People v. Election Com'rs, 54 Cal. 404.

7. Writ Lies to Courts of Equity — *Alabama*. — *Ex p. Lyon*, 60 Ala. 650; *Ex p. Greene*, 29 Ala. 52; *Ex p. Walker*, 25 Ala. 81; *Ex p. Smith*, 23 Ala. 94.

Arkansas. — *Henry v. Steele*, 28 Ark. 455.

California. — *Fischer v. Superior Ct.*, 110 Cal. 129.

Louisiana. — *State v. Voorhies*, 40 La. Ann. 1; *State v. Rightor*, 39 La. Ann. 619; *State v. Drew*, 38 La. Ann. 274; *State v. Judge*, 31 La. Ann. 120.

Michigan. — *Houseman v. Montgomery*, 58 Mich. 364.

Missouri. — *State v. Ross*, 136 Mo. 259; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230.

Montana. — *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

Washington. — *State v. Superior Ct.*, 12 Wash. 677.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134.

8. Abuse of Discretion. — *People v. District Ct.*, 26 Colo. 395.

9. Evidence. — *Ex p. Higgins*, 10 Jur. 838; *State v. Fournet*, 45 La. Ann. 943; *State v. Patin*, 47 La. Ann. 1533; *Lemon v. Peyton*, 64 Miss. 161; *Wetheimer v. Boonville*, 29 Mo. 254; *People v. Doyle*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 411, *affirmed* in 44 N. Y. App. Div. 402, 162 N. Y. 659; *State v. Wakely*, 2 Nott & M. (S. Car.) 410; *M'Donald v. Elfe*, 1 Nott & M. (S. Car.) 501; *Ex p. Bradley*, 9 Rich. L. (S. Car.) 95; *Leonard's Case*, 3 Rich. L. (S. Car.) 111; *Fleming v. Commissioners*, 31 W. Va. 608. But see *State v. Finnegan*, 50 La. Ann. 549; *State v. Hudnall*, 2 Nott & M. (S. Car.) 419; *State v. Road Com'rs*, 3 Hill L. (S. Car.) 314; *State v. Ridgell*, 2 Bailey L. (S. Car.) 560.

10. Murphy v. Superior Ct., 58 Cal. 520; *Spect v. Superior Ct.*, 59 Cal. 319.

27. Examining Magistrates. — An examining magistrate acts judicially and is subject to the writ.¹

28. Excessive Sentence. — The writ lies to arrest an excessive sentence rendered in excess of the court's jurisdiction.²

29. Executions. — The writ will not lie to prevent the issuance of an execution, or to prevent or quash proceedings upon a void or voidable execution, since such action is ministerial and not judicial.³

30. Former Jeopardy. — Prohibition will not lie to prevent a second trial, conviction, or punishment for the same offense, since a former conviction or acquittal is a defense to the merits and not to the jurisdiction.⁴

31. Garnishment Proceedings. — The writ lies to restrain a court from entertaining garnishment proceedings where no jurisdiction has been obtained over the principal defendant.⁵

32. Governor of State. — The writ will not lie against the governor of a state.⁶

33. Habeas Corpus. — The writ lies to prohibit a judicial officer not having jurisdiction from entertaining jurisdiction of an application for and the issuance of a writ of habeas corpus.⁷

34. Highways. — County commissioners exercising judicial functions in highway cases are subject to the writ.⁸

35. Illegal Grand Jury. — The writ lies to prevent the trial of indictments presented by an illegal grand jury.⁹

36. Incorporation of Village. — There is conflict of authority as to whether prohibition lies to a court acting in a special proceeding for the incorporation of a village.¹⁰

1. Examining Magistrates. — *State v. Arnould*, 50 La. Ann. 1; *State v. Keyes*, 75 Wis. 288.

A United States Commissioner acting as an examining magistrate is a mere officer of the court and subject to the control of the court, but a writ of prohibition directed to him will not lie. *U. S. v. Berry*, 4 Fed. Rep. 779.

2. Excessive Sentence. — *State v. Allen*, 47 La. Ann. 1600; *State v. Moultrieville*, Rice L. (S. Car.) 158.

3. Executions. — *Atkins v. Siddons*, 66 Ala. 453; *Ex p. Braudlacht*, 2 Hill (N. Y.) 367, 38 Am. Dec. 593.

Contra. — The enforcement by execution of an unauthorized judgment for costs may be arrested by prohibition. *Charleston v. Beller*, 45 W. Va. 44.

4. Former Jeopardy. — *U. S. v. Maney*, 61 Fed. Rep. 140; *Arnett v. Superior Ct.*, (Cal. 1900) 60 Pac. Rep. 534, 128 Cal. xviii.; *State v. Evans*, 88 Wis. 255; *State v. Braun*, 31 Wis. 600.

Contra. — *Ex p. Brown*, 2 Bailey L. (S. Car.) 323, cited with approval in *State v. Ridgell*, 2 Bailey L. (S. Car.) 560.

5. Garnishment. — *McCloskey v. Judge*, 26 Mich. 100.

6. Governor. — *Greir v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731; *People v. Doyle*, 162 N. Y. 659, affirming 44 N. Y. App. Div. 402, holding that prohibition will not lie to prevent the governor from approving or disapproving the findings of the military board of examination as to the character and fitness of officers of the national guard. *Greir v. Taylor*, 4 McCord L. (S. Car.) 206, 17 Am. Dec. 731, holding that prohibition will not lie against the governor to restrain him from granting a commission to an officer who has been improperly elected.

But it seems that the governor, in investigating charges against officers with a view of removing them from office, acts judicially, and may be restrained by prohibition if he acts without jurisdiction. See *Chapman v. Stoneman*, 63 Cal. 490, wherein a writ of prohibition was refused solely upon the ground that under the constitution the governor had jurisdiction to proceed with the investigation.

For a general discussion of the constitutional question as to the power of the courts to control the executive by means of mandamus, prohibition, or other remedies, see the title CONSTITUTIONAL LAW, vol. 6, p. 882, and the title MANDAMUS, vol. 19, p. 709.

7. Habeas Corpus. — *Ex p. State*, 51 Ala. 60; *Ex p. Ray*, 45 Ala. 15; *Ex p. Hill*, 38 Ala. 429; *People v. District Ct.*, 26 Colo. 380; *State v. Murphy*, 132 Mo. 382, 53 Am. St. Rep. 491. See also *Ex p. Keeling*, 50 Ala. 474.

8. Highways. — *Whately v. Franklin County*, 1 Met. (Mass.) 336; *State v. Raborn*, 60 S. Car. 78. See also *Harriman v. Waldo County*, 53 Me. 83. But compare *Lindsay v. Commissioners*, 2 Bay (S. Car.) 38; *Ex p. Withers*, 3 Brev. (S. Car.) 83; *People v. McCue*, (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 741.

9. Illegal Grand Jury. — *Bruner v. Superior Ct.*, 92 Cal. 239; *Levy v. Wilson*, 69 Cal. 106. See also *Terrill v. Superior Ct.*, (Cal. 1899) 60 Pac. Rep. 38. (Cal. 1900) 60 Pac. Rep. 516. But see *People v. District Ct.*, (Colo. 1901) 66 Pac. Rep. 1068.

10. Incorporation of Village. — In *In re Schumaker*, 90 Wis. 488, an application was made for a writ of prohibition to stay a special proceeding before a circuit judge for the incorporation of a village on the ground that the statute authorizing the incorporation of villages was unconstitutional, because it at-

37. Injunction. — The writ lies to prevent the illegal granting of an injunction or to restrain further proceedings in such case.¹ But the writ will not lie to prevent the issuance or enforcement of an injunction which a court of equity had jurisdiction to grant.² Nor will the writ be granted where there is an adequate remedy by appeal³ or certiorari.⁴

38. Insolvency and Bankruptcy. — The writ lies to probate courts proceeding in insolvency.⁵ An order of stay in insolvency proceedings does not deprive other courts of jurisdiction over actions against the insolvent, and though it may be error to proceed in violation of such order, prohibition will not lie.⁶

39. Judgment Without Trial. — Where the court has jurisdiction of the parties and the subject-matter of an action, error in rendering judgment in favor of one of the parties without a trial is neither without nor in excess of its jurisdiction, although it might be erroneous, and therefore prohibition will not lie.⁷

40. Jury Trial. — The writ will not lie to prevent a court from proceeding to try a case without a jury, this being a mere error as to the mode of procedure, and not jurisdictional.⁸

41. Licenses. — The writ does not lie to prevent a municipal corporation from issuing licenses, since it does not act as a judicial body in such matter.⁹ An excise commissioner, exercising statutory authority to revoke a liquor license, is not a judicial officer, and hence not subject to the writ.¹⁰

42. Military Board. — A military board acting simply in an advisory capacity to the governor is not subject to the writ.¹¹

43. Municipal Aid to Railroad. — A county judge, in acting upon a petition to extend municipal aid to a railway, acts judicially, and may be restrained by prohibition.¹²

44. Municipal Corporations. — Ordinarily the writ will not lie to restrain the

tempted to confer upon the court legislative power. The writ was refused, but upon the ground that there was no extreme necessity for its issuance, because the remedies at law were adequate. In a precisely similar case the writ was granted. See *State v. Simons*, 32 Minn. 540. But see *Bloxton v. McWhorter*, 46 W. Va. 32, wherein it was held that the court, in entering an order directing the incorporation of a town, performs a ministerial duty, so that prohibition will not lie.

1. Injunction. — *Ex p. Peterson*, 33 Ala. 74; *People v. District Ct.*, 26 Colo. 386; *People v. District Ct.*, (Colo. 1901) 68 Pac. Rep. 242; *State v. Judge*, 48 La. Ann. 1501; *State v. Aloe*, 152 Mo. 466. See also *Sherwood v. New England Knitting Co.*, 68 Conn. 543. But see *Woodward v. Superior Ct.*, 95 Cal. 272.

The writ lies to prevent an inferior court from interfering with or attempting to control the records and seal of a superior court by injunction. *Thomas v. Mead*, 36 Mo. 232.

2. Ex p. Scott, 47 Ala. 609; *Ex p. Greene*, 29 Ala. 52.

3. Remedy by Appeal. — *Ex p. Reid*, 50 Ala. 439; *State v. Aloe*, 152 Mo. 466; *State v. Jones*, 2 Wash. 662, 26 Am. St. Rep. 897.

4. Remedy by Certiorari. — *Stoddard v. Superior Ct.*, (Cal. 1895) 40 Pac. Rep. 491.

5. Probate Courts. — *Gilbert v. Hebard*, 8 Met. (Mass.) 129.

6. Stay of Proceedings. — *Bandy v. Ransom*, 54 Cal. 87. See also *California Furniture Co. v. Halsey*, 54 Cal. 315. See generally the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, p. 630.

Contra where the statute expressly prohibits

proceedings in other courts after the commencement of insolvency proceedings, since a court that proceeds in the trial of a cause against the express prohibition of a statute is exceeding its jurisdiction and may be restrained by prohibition. *Hayne v. Justice's Ct.*, 82 Cal. 284, 16 Am. St. Rep. 114, *distinguishing* *Bandy v. Ransom*, 54 Cal. 87. See also *Clarke v. Rosenda*, 5 Rob. (La.) 27, holding that the National Bankruptcy Act deprived state courts of jurisdiction. But see *Day v. Superior Ct.*, 61 Cal. 489.

7. Clark v. Superior Ct., 55 Cal. 199.

8. Refusal of Jury Trial. — *Powelson v. Lockwood*, 82 Cal. 613; *Delaney v. Police Ct.*, 167 Mo. 667.

9. Issuance of License. — *State v. Columbia*, 17 S. Car. 83. See also *In re De Walt*, (Pa. 1898) 40 Atl. Rep. 470. But see *Hevren v. Reed*, 126 Cal. 219. See generally *infra*, this section, **Municipal Corporations**.

10. Revocation of License. — *La Croix v. Fairfield County*, 50 Conn. 321; *Higgins v. Talty*, 157 Mo. 280. But see *Hevren v. Reed*, 126 Cal. 219, wherein, however, the writ was refused upon the ground that the board had jurisdiction to revoke the license.

A county board of control, under the *South Carolina dispensary law*, is subject to the writ of prohibition. *State v. Kirkland*, 41 S. Car. 29.

11. People v. Doyle, 162 N. Y. 659, *affirming* 44 N. Y. App. Div. 402.

12. Sweet v. Hulbert, 51 Barb. (N. Y.) 312, wherein the statute under which the proceedings were taken was unconstitutional.

action of the common council of a city, since it is not a judicial body.¹ Thus, the passing of an ordinance by a municipal body is not a judicial act and cannot be restrained by prohibition.² But the mayor of a city, or a city council, in the hearing of charges and removal of officers act judicially and may be restrained by prohibition from exceeding their jurisdiction.³ So the common council of a city and its committees, in passing upon claims presented against the city, act judicially and may be restrained by prohibition.⁴ The writ lies to restrain the board of aldermen of a city from proceeding to widen a street and assess betterments.⁵

45. New Trial. — The writ lies to prevent the granting of a new trial after the expiration of the time fixed by law within which a new trial may be granted,⁶ or where for some other reason there is no authority to grant a new trial.⁷

46. Official Bonds. — The writ lies to prohibit the unauthorized action of a district court in requiring a new or additional official bond.⁸

47. Parties. — An objection to the right of the plaintiff to maintain the suit does not raise a jurisdictional question and is not ground for a writ of prohibition.⁹ But the writ has been granted to prohibit special statutory proceedings by parties who, under the statute, had no right to institute them.¹⁰

48. Pleadings. — If the court has jurisdiction of the subject-matter or class of actions to which the particular action belongs, the writ of prohibition will not issue, based merely upon the insufficiency of the pleadings or proof to maintain the cause of action.¹¹ Error in rulings on objections made to

1. City Council. — *People v. District Ct.*, 6 Colo. 534; *Day v. Springfield*, 102 Mass. 310; *Hunter v. Moore*, 39 S. Car. 394; *Mealing v. Augusta*, *Dudley* (Ga.) 221.

County Council. — In *Reg. v. London County Council*, (1893) 2 Q. B. 454, Lord Esher doubted whether the writ could be issued to the London county council.

To Test Validity of City Ordinance — Kentucky Statute. — *Patton v. Stephens*, 14 Bush (Ky.) 324.

2. Passing of Ordinance. — *Spring Valley Water Works v. Bartlett*, 63 Cal. 245. See also *Spring Valley Water Works v. San Francisco*, 52 Cal. 111.

3. Removal of Officers. — *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555; *People v. Cooper*, (Supm. Ct.) 57 How. Pr. (N. Y.) 416; *People v. Sherman*, 66 N. Y. App. Div. 231.

Where a city council, not being a judicial body, were proceeding to investigate the official conduct of their solicitor for the purpose of removing him from office, the power so to do having been vested in them by statute, it was held that the District Court had no jurisdiction to control the action of the council by the writ of prohibition. *People v. District Ct.*, 6 Colo. 534.

4. Hearing of Claims. — *People v. Amsterdam*, 90 Hun (N. Y.) 495.

5. Day v. Springfield, 102 Mass. 310.

6. New Trial. — *State v. Walls*, 113 Mo. 42; *Burroughs v. Taylor*, 90 Va. 55. See also *People v. District Ct.*, 28 Colo. 161; *State v. Whitaker*, 114 N. Car. 818.

The writ has been granted where, after a conviction for felony, the court has at a subsequent term granted a new trial upon the merits without any legal authority for so doing. *Appo v. People*, 20 N. Y. 531. *Compare State v. Price*, 8 N. J. L. 358.

7. State v. McCrea, 40 La. Ann. 20.

8. Official Bonds. — *People v. District Ct.*, 18 Colo. 293.

9. Parties. — *State v. Zachritz*, 166 Mo. 307. See also *Wood County Ct. v. Boreman*, 34 W. Va. 362.

10. Chandler v. Railroad Com'rs, 141 Mass. 208; *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 484; *Wood County Ct. v. Armstrong*, 34 W. Va. 326; *Ingersoll v. Buchanan*, 1 W. Va. 181.

11. Insufficiency of Pleadings — United States. — *U. S. v. Maney*, 61 Fed. Rep. 140.

Alabama. — *Ex p. Boothe*, 64 Ala. 312; *Ex p. Peterson*, 33 Ala. 74; *Ex p. Greene*, 29 Ala. 52; *Ex p. Walker*, 25 Ala. 81; *Bickley v. Bickley*, 129 Ala. 403.

California. — *Woodward v. Superior Ct.*, 95 Cal. 272; *Bishop v. Superior Ct.*, 87 Cal. 226. See also *Croly v. Sacramento*, 119 Cal. 229. But see *Chollar Min. Co. v. Wilson*, 66 Cal. 374; *Kilburn v. Law*, 111 Cal. 237.

Colorado. — *Leonard v. Bartels*, 4 Colo. 95. But see *People v. District Ct.*, 26 Colo. 386.

Florida. — *State v. Smith*, 32 Fla. 476.

Idaho. — See also *Willman v. District Ct.*, (Idaho 1894) 35 Pac. Rep. 692.

Louisiana. — *State v. Judge*, 48 La. Ann. 1372; *State v. Fournet*, 45 La. Ann. 943.

Missouri. — *State v. Southern R. Co.*, 100 Mo. 59; *State v. Scarritt*, 128 Mo. 331. See also *State v. Klein*, 116 Mo. 259.

New York. — See also *People v. Marine Ct.*, 36 Barb. (N. Y.) 341.

South Carolina. — *State v. Wakely*, 2 Nott & M. (S. Car.) 412.

Washington. — *State v. Moore*, 23 Wash. 115.

West Virginia. — *Bloxton v. McWhorter*, 46 W. Va. 32.

In Criminal Cases, the writ lies to arrest proceedings under a void indictment. *Terrill v. Superior Ct.*, (Cal. 1899) 60 Pac. Rep. 38, (Cal. 1900) 60 Pac. Rep. 516.

pleadings is not ground for the writ.¹

49. Process — Want of Service. — Prohibition lies to arrest proceedings against persons who have not been served with process.²

Error or Insufficiency in the process or service thereof is not ground for prohibition, but the remedy is by appeal.³ Error in proceeding upon service by publication in a case where personal service is necessary is not ground for a writ, as the question is primarily within the jurisdiction of the court, and there is an adequate remedy by appeal.⁴

Restraining Service. — The writ will not lie to restrain a ministerial officer from executing process in his hands.⁵

50. Prohibition. — The unauthorized issuance of a writ of prohibition by an inferior court may be restrained by a writ of prohibition from a superior court.⁶

51. Receivers. — A receiver is a ministerial officer to whom the writ will not lie.⁷ The writ lies to prevent the illegal appointment of a receiver or to restrain further proceedings in such case.⁸ But the writ will not lie where the court has jurisdiction both of the parties and subject-matter,⁹ nor where

1. Error in Rulings on Objections to Pleadings. — *People v. Circuit Ct.*, 173 Ill. 272; *State v. Fournet*, 45 La. Ann. 943; *People v. Letson*, (Supm. Ct. Spec. T.) 3 How. Pr. N. S. (N. Y.) 381.

2. Want of Service of Process. — *Warwick, etc., Canal Nav. v. Birmingham Canal Navigations*, 5 Ex. D. 1; *Stuparich Mfg. Co. v. Superior Ct.*, 123 Cal. 290; *McCloskey v. Wayne County Judge*, 26 Mich. 100; *Howard v. Pierce*, 38 Mo. 296; *People v. Fitzgerald*, 15 N. Y. App. Div. 539; *State v. Mitchell*, 2 Bailey L. (S. Car.) 225; *State v. Superior Ct.*, 15 Wash. 500; *Simmons v. Thomasson*, 50 W. Va. 656.

Privilege from Service. — *People v. Inman*, 74 Hun (N. Y.) 130.

Suit Against Foreign Sovereign. — *Wadsworth v. Reg.*, 17 Q. B. 171, 79 E. C. L. 171, 7 Eng. L. & Eq. 340.

To Annul Ex Parte Order. — *State v. Judge*, 37 La. Ann. 285.

3. Error or Insufficiency of Process or Service — England. — *Barker v. Palmer*, 8 Q. B. D. 9, 51 L. J. Q. B. D. 110.

California. — *McDonald v. Agnew*, 122 Cal. 448.

Florida. — *State v. Malone*, 40 Fla. 129.

Minnesota. — *State v. District Ct.*, 26 Minn. 233.

New York. — *People v. Petty*, 32 Hun (N. Y.) 443. But see *People v. Nichols*, 18 Hun (N. Y.) 530.

Utah. — *People v. House*, 4 Utah 382, rehearing denied 4 Utah 484.

Washington. — *State v. Benson*, 21 Wash. 571.

West Virginia. — *McConiha v. Guthrie*, 21 W. Va. 134. But see *Coger v. Coger*, 48 W. Va. 135.

Wyoming. — *State v. District Ct.*, 5 Wyo. 227. See generally *supra*, this title, III. 2. b. *Errors in Exercise of Jurisdiction.*

Where the Service Is upon an Alleged Agent of a corporation, and it is affirmatively shown that such person was not an agent of the corporation, prohibition lies. *State v. Superior Ct.*, 14 Wash. 203. Compare *State v. District Ct.*, 26 Minn. 233.

4. Service by Publication. — *Mines D'Or, etc., Soc. v. Superior Ct.*, 91 Cal. 101.

5. Restraining Service. — *People v. Queens County, 1 Hill (N. Y.) 195, explaining People v. Works*, 7 Wend. (N. Y.) 486.

6. Prohibition. — *People v. District Ct.*, 6 Colo. 534; *State v. Judge*, 39 La. Ann. 97; *Jackson v. Maxwell*, 5 Rand. (Va.) 636. See also *People v. District Ct.*, 26 Colo. 226.

Where a Circuit Court having general jurisdiction to issue a writ of prohibition improperly or improvidently issues such a writ, the Supreme Court will not issue a writ of prohibition to such Circuit Court to arrest proceedings, but will, by mandamus, compel the Circuit Court to vacate and set aside the writ of prohibition granted. *Ex p. Boothe*, 64 Ala. 312. See also *Ex p. Ray*, 45 Ala. 15, and *Ex p. Keeling*, 50 Ala. 474.

7. Receiver. — *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192.

Distinction Between Acts of Receiver and Acts of Court. — *Havemeyer v. Superior Ct.*, 84 Cal. 330, 18 Am. St. Rep. 192.

8. Appointing Receiver Improperly — Alabama. — *Ex p. Smith*, 23 Ala. 94. But see *Ex p. Walker*, 25 Ala. 81.

California. — *Murray v. Superior Ct.*, 129 Cal. 628; *Fischer v. Superior Ct.*, 110 Cal. 129; *Yore v. Superior Ct.*, 108 Cal. 431; *People's Home Sav. Bank v. Superior Ct.*, 103 Cal. 27; *Harrison v. Hebbard*, 101 Cal. 152; *McDowell v. Bell*, 86 Cal. 615; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *Stuparich Mfg. Co. v. Superior Ct.*, 123 Cal. 290.

Missouri. — *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *State v. Ross*, 122 Mo. 435; *State v. Hirzel*, 137 Mo. 435; *State v. Withrow*, 133 Mo. 500, holding that the writ will not issue as a matter of right in such a case. But see *State v. Scarritt*, 128 Mo. 331.

Montana. — See also *State v. Second Judicial Dist. Ct.*, 22 Mont. 220.

Washington. — *State v. Superior Ct.*, 15 Wash. 668, 55 Am. St. Rep. 907. But see *State v. Superior Ct.*, 7 Wash. 77.

9. Not Where Court Has Jurisdiction. — *Woodward v. Superior Ct.*, 95 Cal. 272; *Goddard v. Superior Ct.*, 90 Cal. 364; *More v. Superior Ct.*, 64 Cal. 345. See also *State v. District Ct.*, 22 Mont. 376.

the appointment can result in no injury to the applicant, his rights being fully protected under the order,¹ nor where there is an adequate remedy by appeal or otherwise.²

52. Referees. — A referee exercising substantially all the powers of a court is subject to the writ.³ Referees appointed under a statute to hear and determine the question of a right of way are judicial officers and may be restrained by the writ of prohibition.⁴

53. Removal of Causes. — The writ will not lie to prevent further proceedings in a case properly removed from a state to a federal court, there being an adequate remedy by certiorari from the federal to the state court in such case.⁵

54. Rules of Court. — The writ lies to prevent the enforcement of a rule of court which the lower court had no power to establish.⁶

55. Schools. — Boards of education in the management and control of schools are ministerial and not judicial officers, and not subject to the writ.⁷ But in proceedings to revoke a teacher's certificate,⁸ or in a trial of charges against a school superintendent,⁹ the tribunal acts judicially, and may be confined within its jurisdiction by prohibition. A board of arbitration, in determining the formation of a school district, acts judicially and is subject to the writ.¹⁰

56. Special Judge. — Error or irregularity in the proceedings for the appointment of a special judge is not ground for a writ of prohibition.¹¹

57. Statutory Proceedings. — In a special proceeding provided by statute, not according to the course of the common law, in order to invest the court with jurisdiction, the requisites of the statute must be complied with, and it must so appear on the face of the record. If not so complied with, the court has no jurisdiction to proceed, and prohibition will lie.¹² But mere errors, omissions, or irregularities in a statutory proceeding are insufficient to authorize the issuance of the writ when they do not go to the jurisdiction.¹³

58. Taxation. — The writ will not lie to officers or boards to restrain them from levying or collecting taxes, since the levy of a tax is a ministerial and not a judicial act.¹⁴

1. *State v. Superior Ct.*, 11 Wash. 63.

2. **Other Adequate Remedy.** — *Jacobs v. Superior Ct.*, 133 Cal. 364; *White v. Superior Ct.*, 10 Cal. 54; *State v. Superior Ct.*, 11 Wash. 63. See also *Haile v. Superior Ct.*, 78 Cal. 418.

3. **Referee.** — *People v. Nussbaum*, 55 N. Y. App. Div. 245.

4. *State v. Stackhouse*, 14 S. Car. 417.

5. **Removal of Causes.** — *Ex p. Mobile, etc.*, R. Co., 63 Ala. 349; *Ex p. Grimbball*, 61 Ala. 598; *Southern Pac. R. Co. v. Superior Ct.*, 63 Cal. 607 [*overruling Sheehy v. Holmes*, 55 Cal. 485]; *Central Pac. R. Co. v. Superior Ct.*, 62 Cal. 618.

6. **Void Rule of Court.** — *State v. Withrow*, 133 Mo. 500.

7. **Management and Control of Schools.** — *Hasinger v. Holt*, 47 W. Va. 348.

8. *Common Schools v. Taylor*, (Ky. 1899) 49 S. W. Rep. 38.

9. In *State v. Board of Education*, 19 Wash. 8, 67 Am. St. Rep. 706, it was held that the writ would issue to the board of education to prevent it from trying the relator on charges against him, on the ground that a member of the board was disqualified by bias, enmity, and personal prejudice.

10. *School Dist. No. 6 v. Burris*, 84 Mo. App. 654.

11. **Special Judge.** — *Epperson v. Rice*, 102 Ala. 668.

12. **Statutory Proceedings** — *England*, — *Gould*

v. Gapper, 5 East 345; *Fellows v. The Lord Stanley* (1893) 1 Q. B. 98.

California. — *Anderson v. Superior Ct.*, 122 Cal. 216; *People's Home Sav. Bank v. Superior Ct.*, 103 Cal. 27; *Long v. Superior Ct.*, 102 Cal. 449; *Bishop v. Superior Ct.*, 87 Cal. 232; *McDowell v. Bell*, 86 Cal. 615; *Chollar Min. Co. v. Wilson*, 66 Cal. 374; *Williams v. Dwinelle*, 51 Cal. 442.

Massachusetts. — See *Vermont, etc., R. Co. v. Franklin County*, 10 Cush. (Mass.) 12; *Gilbert v. Hebard*, 8 Met. (Mass.) 129.

Missouri. — *Thomas v. Mead*, 36 Mo. 232.

Montana. — *State v. McHatton*, 10 Mont. 370.

New York. — *People v. McAdam*, 22 Hun (N. Y.) 559; *People v. Nichols*, 79 N. Y. 582. See *People v. Kelly*, (Supm. Ct. Spec. T.) 12 Civ. Pro. (N. Y.) 414; *People v. McAdam*, (Supm. Ct. Gen. T.) 2 Civ. Pro. (N. Y.) 52.

South Carolina. — *M'Donald v. Elfe*, 1 Nott & M. (S. Car.) 501; *Baldwin v. Cooley*, 1 S. Car. 256.

Virginia. — *West v. Ferguson*, 16 Gratt. (Va.) 270.

West Virginia. — *Wilkinson v. Hoke*, 39 W. Va. 403.

13. *Anderson v. Superior Ct.*, 122 Cal. 216; *Spect v. Superior Ct.*, 59 Cal. 319. *Contra*, *People v. McAdam*, 22 Hun (N. Y.) 559, *reversed* 84 N. Y. 287, but not upon this ground.

14. **Taxation** — *California*. — *Coronado v. San*

59. Termination of Jurisdiction by Final Order. — Where a court has no jurisdiction over its final judgments or decrees, further proceedings may be restrained by prohibition.¹ But the writ will not lie where the court has such jurisdiction.²

60. Territorial Limits of Jurisdiction. — Where a judge is acting outside the limits of his territorial jurisdiction, or where the parties or subject-matter are beyond the territorial jurisdiction of the court, prohibition lies to arrest the proceedings,³ except where there is another adequate remedy by change of venue, appeal, error, or certiorari.⁴

61. Title to Property. — Questions of title to property can rarely, if ever, be tried upon an application for a writ of prohibition.⁵

62. Title to Office. — Prohibition will not lie to try the title to an office or to restrain a *de facto* officer from acting solely upon the ground that he is not the *de jure* officer.⁶ The writ lies to prevent a court from proceeding to try a contest for an office, where the exclusive power to determine such contests is vested in the common council of a city.⁷

Diego, 97 Cal. 440; *Hobart v. Tillson*, 66 Cal. 210; *Farmers' Co-operative Union v. Thresher*, 62 Cal. 407; *Le Conte v. Berkeley*, 57 Cal. 269; *Maurer v. Mitchell*, 53 Cal. 289. But see *People v. Kern County*, 47 Cal. 81, wherein the writ of prohibition to arrest the proceedings of a board of supervisors in levying a special tax was denied solely upon the ground that the board had not exceeded its jurisdiction, but had merely exercised its discretion in an injudicious manner.

Florida. — *Sherlock v. Jacksonville*, 17 Fla. 93.

Georgia. — *Cody v. Lennard*, 45 Ga. 85.

Mississippi. — See also *Clayton v. Heidelberg*, 9 Smed. & M. (Miss.) 623.

New York. — *People v. Queens County*, 1 Hill (N. Y.) 195; *People v. Ulster County*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 237. *Contra*, *People v. Works*, 7 Wend. (N. Y.) 486.

South Carolina. — *State v. Jervey*, 4 Strobb. L. (S. Car.) 304; *State v. County Treasurer*, 4 S. Car. 534. *Contra*, *Burger v. Carter*, 1 McMull. L. (S. Car.) 410; *South Carolina Soc. v. Gurney*, 3 S. Car. 51.

Washington. — But see *State v. Hogg*, 22 Wash. 646.

In *People v. Schoharie County*, 121 N. Y. 345, prohibition was issued to restrain the board of county supervisors from levying and collecting from the towns of residence of paupers sent to the lunatic asylum upon the certificate of the county judge the expenses of their support, on the ground that the county and not the town was liable for such expenses.

In *Pennington v. Woolfolk*, 79 Ky. 13, the writ was issued to prevent the County Court from assessing property not assessed, the act providing for such assessment being held unconstitutional. This use of the writ, however, is expressly authorized by statute in Kentucky.

1. Proceedings After Final Judgment. — *State v. Williams*, 48 Ark. 227; *Spencer v. Branham*, 109 Cal. 336; *Buckley v. Superior Ct.*, 102 Cal. 6, 41 Am. St. Rep. 135; *Wagner v. Superior Ct.*, 100 Cal. 359; *Kirby v. Superior Ct.*, 68 Cal. 604; *Doughty v. Walker*, 54 Ga. 595; *Gilbert v. Hebard*, 3 Met. (Mass.) 129; *State v. Young*, 44 Minn. 76; *State v. Probate Ct.*, 19 Minn. 117; *Burroughs v. Taylor*, 90 Va. 55;

State v. Superior Ct., 19 Wash. 128, 67 Am. St. Rep. 724; *State v. Superior Ct.*, 10 Wash. 168.

2. *Wiggin v. Superior Ct.*, 68 Cal. 398.

3. Excess of Territorial Jurisdiction — *England.* — *Hudson v. Tooth*, 3 Q. B. D. 46, 47 L. J. Q. B. D. 18; *London v. Cox*, L. R. 2 H. L. 239; *Quartly v. Timmins*, L. R. 9 C. P. 416; *Robinson v. Emanuel*, L. R. 9 C. P. 414; *Cooke v. Gill*, L. R. 8 C. P. 107; *Banque de Credit Commercial v. De Gas*, L. R. 6 C. P. 142; *Alderton v. Archer*, 14 Q. B. D. 1; *Bowler v. Barberton Development Syndicate*, (1897) 1 Q. B. 164.

United States. — *U. S. v. Peters*, 3 Dall. (U. S.) 121.

Louisiana. — *Berthaud v. Police Jury*, 7 Rob. (La.) 550. But see *State v. Judge*, 41 La. Ann. 403.

Minnesota. — *U. S. v. Shanks*, 15 Minn. 369.

Missouri. — *State v. Laughlin*, 75 Mo. 147.

Washington. — *North Yakima v. Superior Ct.*, 4 Wash. 655.

West Virginia. — *Johnston v. Hunter*, 50 W. Va. 52.

Wisconsin. — *State v. Keyes*, 75 Wis. 288.

See also *infra*, this section, *Venue*.

Where the county judge of one county presided at the trial of a case in another county without legal authority to do so, the judgment is void and its enforcement may be restrained by a writ of prohibition. *Gresham v. Ewell*, 85 Va. 1.

4. Other Adequate Remedy. — *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491; *State v. Hocker*, 33 Fla. 283; *People v. Hills*, 5 Utah 410.

5. Title. — *Ex p. Stickney*, 40 Ala. 160; *Nuckols v. Mahone*, 15 Ala. 212; *Havemeyer v. Superior Ct.*, 84 Cal. 327, 18 Am. St. Rep. 192; *State v. McMartin*, 42 Minn. 30; *In re Radl*, 86 Wis. 645, 39 Am. St. Rep. 918.

6. Title to Office. — *Buckner v. Veuve*, 63 Cal. 304; *Hull v. Superior Ct.*, 63 Cal. 179; *State v. Laughlin*, 7 Mo. App. 529; *Walcott v. Wells*, 21 Nev. 47, 37 Am. St. Rep. 478; *State v. Allen*, 2 Ired. L. (24 N. Car.) 189; *In re Radl*, 86 Wis. 645, 39 Am. St. Rep. 918. See also *State v. McMartin*, 42 Minn. 30.

7. *Booth v. Arapahoe County Ct.*, 18 Colo. 561.

63. Usurpation of Judicial Power. — The writ lies to prevent unauthorized persons from usurping judicial power and acting as a court without authority of law.¹ Such a case arises where the pretended court was never legally or constitutionally organized.²

64. Venue. — Where the court has jurisdiction both of the person and the subject-matter, an objection to the venue is not ground for a writ of prohibition, as a remedy may be had by motion for a change of venue.³ But where the objection to venue goes to the jurisdiction, the writ will lie.⁴ Error in refusing to change the place of trial or to send the case to another judge or justice for trial is not ground for the writ.⁵ But where a defendant is given by statute the right to remove a suit against him to the county of his residence, and applies for removal in the manner prescribed, the court cannot retain jurisdiction of the suit after the application, and prohibition will lie to prevent it from taking any other step than to certify the case to the right county.⁶ Proceedings under a void order for a change of venue may be restrained by prohibition.⁷

65. Void Judgments and Decrees. — The writ lies to prohibit the enforcement of a void decree, from which no appeal will lie.⁸

66. Void or Repealed Statutes or Ordinances. — Where the jurisdiction depends upon an unconstitutional or void statute or ordinance, prohibition lies,⁹ unless there is another adequate remedy by appeal or otherwise.¹⁰

1. Unauthorized Action as a Court. — *Ex p. Kingstown Com'rs*, 18 L. R. Ir. 509; *Chambers v. Jennings*, 2 Salk. 553; *Ex p. Roundtree*, 51 Ala. 42; *Crisler v. Morrison*, 57 Miss. 801; *State v. Hudnall*, 2 Nott & M. (S. Car.) 419; *State v. Simons*, 2 Spears L. (S. Car.) 761; *Ingersoll v. Buchanan*, 1 W. Va. 181; *Board of Education v. Holt*, (W. Va. 1902) 41 S. E. Rep. 337. See *State v. Elkin*, 130 Mo. 90. See also *State v. Hocker*, 33 Fla. 283.

2. Court Not Legally Organized. — *Ex p. Roundtree*, 51 Ala. 42; *State v. McMartin*, 42 Minn. 30; *Crisler v. Morrison*, 57 Miss. 801; *Ex p. Richardson*, Harp. L. (S. Car.) 308; *Fleming v. Commissioners*, 31 W. Va. 608.

3. Wrong Venue. — *Crowned King Min. Co. v. District Ct.*, (Ariz. 1901) 64 Pac. Rep. 439; *Fresno Nat. Bank v. Superior Ct.*, 83 Cal. 491; *State v. Hocker*, 33 Fla. 283. But see *State v. Stallcup*, 11 Wash. 713.

4. More v. Superior Ct., 64 Cal. 345; *Grangers' Bank v. Superior Ct.*, (Cal. 1893) 33 Pac. Rep. 1095; *State v. Toomer*, Cheves L. (S. Car.) 106; *State v. Superior Ct.*, 5 Wash. 518; *State v. Superior Ct.*, 5 Wash. 639; *North Yakima v. Superior Ct.*, 4 Wash. 655. See also *State v. Superior Ct.*, 14 Wash. 203.

5. Change of Venue. — *Schobarg v. Manson*, (Ky. 1901) 61 S. W. Rep. 999; *People v. District Ct.*, 13 Civ. Pro. (N. Y.) 134. See also *People v. Williams*, 51 N. Y. App. Div. 102; But see *State v. Stallcup*, 11 Wash. 713.

Error in proceeding to the trial of a case pending an appeal from an order denying a motion for a change of venue is not ground for a writ of prohibition. *People v. Whitney*, 47 Cal. 584.

Unreasonable delay in passing on a motion for a change of venue is not ground for a writ of prohibition. *People v. District Ct.*, (Colo. 1901) 68 Pac. Rep. 242.

6. State v. Stallcup, 11 Wash. 713; *State v. Superior Ct.*, 9 Wash. 668; *State v. Superior Ct.*, 7 Wash. 306; *State v. Superior Ct.*, 5 Wash. 518.

7. State v. Judges, 45 La. Ann. 246; *Brouillette v. Judge*, 45 La. Ann. 246.

8. Void Judgments and Decrees. — *Ex p. Lyon*, 60 Ala. 650; *People v. Fitzgerald*, 15 N. Y. App. Div. 539; *Yates v. Taylor County Ct.*, 47 W. Va. 376.

9. Void Statute or Ordinances — *Alabama.* — *Ex p. Roundtree*, 51 Ala. 42.

California. — *Levy v. Superior Ct.*, 105 Cal. 600.

Colorado. — *McInerney v. Denver*, 17 Colo. 302.

Kentucky. — *Pennington v. Woolfolk*, 79 Ky. 13. Compare *Owensboro v. Sparks*, 99 Ky. 351.

Louisiana. — *State v. Rost*, 49 La. Ann. 1451; *State v. Wilder*, 49 La. Ann. 1211; *State v. Judge*, 39 La. Ann. 132. But see *State v. Judge*, 44 La. Ann. 1100.

Massachusetts. — *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 34 Am. Rep. 338.

Michigan. — *Houseman v. Montgomery*, 58 Mich. 364.

Minnesota. — *State v. Simons*, 32 Minn. 540.

Mississippi. — *Donovan v. Vicksburg*, 29 Miss. 247, 64 Am. Dec. 143.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

South Carolina. — *Zylstra v. Charleston*, 1 Bay (S. Car.) 382; *State v. Simons*, 2 Spears L. (S. Car.) 762.

Utah. — *People v. Spiers*, 4 Utah 385.

West Virginia. — *Judy v. Lashley*, 50 W. Va. 628. *Contra*, *McDonald v. Guthrie*, 43 W. Va. 595.

Wisconsin. — *Contra*, *In re Schumaker*, 90 Wis. 488.

10. Owensboro v. Sparks, 99 Ky. 351; *State v. Judge*, 44 La. Ann. 1100; *State v. Judge*, 39 La. Ann. 132; *People v. Wood*, 21 N. Y. App. Div. 245; *State v. Whitaker*, 114 N. Car. 818; *State v. Evans*, 88 Wis. 255.

The mere fact that a justice of the peace is about to declare valid an act which is unconstitutional, is not ground for a writ of prohi-

The exercise of jurisdiction under a repealed statute may be restrained by prohibition.¹

PROJECT. — See note 2.

PROJECTION. — See BALUSTRADE, vol. 3, p. 770, and the title STREETS AND SIDEWALKS.

PROMISE. (See also the titles CONSIDERATION, vol. 6, p. 667; CONTRACTS, vol. 7, p. 88; STATUTE OF FRAUDS.) — A promise is a declaration, verbal or written, made by one person to another for a good or valuable consideration, in the nature of a covenant, by which the promisor binds himself to do or forbear some act, and gives to the promisee a legal right to demand and enforce a fulfilment.³ To promise is to agree; to pledge one's self; to engage; to assure or make sure; to pledge by contract.⁴

PROMISSORY NOTE. — See the title BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 77.

bition, where independently of such act the justice has jurisdiction. *Scott v. Tully*, (Ky. 1899) 49 S. W. Rep. 1063.

1. **Repealed Statute.** — *Norfolk, etc., R. Co. v. Pinnacle Coal Co.*, 44 W. Va. 574.

2. **Project Streets.** — Where an act authorized a city to *project* its streets over and across any tide lands within its corporate limits, it was held that this did not empower the city to lay out over the tide lands of the state a street which was not an extension of any existing street of the city. *Seattle, etc., R. Co. v. State*, 7 Wash. 157.

3. **Promise — Consideration.** — *Davis, etc., Bldg., etc., Co. v. Dix*, 64 Fed. Rep. 414; *Newcomb v. Clark*, 1 Den. (N. Y.) 229

Agreement and Promise Used Synonymously. — *Taylor v. Meek*, 4 Blackf. (Ind.) 388; *Merchants' Nat. Bank v. Columbia Spinning Co.*, 21 N. Y. App. Div. 386. And see *AGREE*, vol. 2, p. 15; *AGREEMENT*, vol. 2, p. 16. See also the title *STATUTE OF FRAUDS*.

Other Definitions. — In *Skelly v. Bristol Sav. Bank*, 63 Conn. 87, it was said: "A contract is an agreement between parties whereby one of them acquires a right to an act by the other and the other assumes an obligation to perform that act. The obligation so assumed is called a *promise*."

Acknowledgment. — The term *promise* includes any acknowledgment from which a *promise* may be legally inferred. *Belles v. Belles*, 12 N. J. L. 339. See also the title *LIMITATION OF ACTIONS*, vol. 19, p. 136

Promise and Intention Distinguished. — See *INTENT* — *INTENTION*, vol. 16, p. 980.

Promise and Declare. — See *DECLARE*, vol. 9, p. 12.

Promise and Representation. — In *Birmingham Warehouse, etc., Co. v. Elyton Land Co.*, 93 Ala. 554, it was said: "A *promise*, strictly speaking, is not a representation. The failure

to make it good may give a cause of action, but it is not a false representation which will authorize the rescission of a contract." *Quoted in Piedmont Land Imp. Co. v. Piedmont Foundry, etc., Co.*, 96 Ala. 389. See also *Cunyus v. Guenther*, 96 Ala. 564.

"A representation applies to the present, a *promise* to the future." *Murdock v. Chenango County Mut. Ins. Co.*, 2 N. Y. 220, *per* Strong, J. See also the title *RESCISSION*.

Collateral Promise. — See *COLLATERAL*, vol. 6, p. 206; also the titles *GUARANTY*, vol. 14, p. 1128; *STATUTE OF FRAUDS*.

Concurrent Promises. — Concurrent *promises* are those where the acts to be performed are simultaneous. *And. L. Dict.*; *Dermott v. Jones*, 23 How. (U. S.) 232.

Dependent Promises — Independent Promises. — "When the agreements go to the whole of the consideration on both sides, the *promises* are dependent, and one of them is a condition precedent to the other. * * * If the agreements go to a part only of the consideration on both sides, the *promises* are so far independent." *Dermott v. Jones*, 23 How. (U. S.) 231, *quoting* 2 *Parsons on Contracts* 189.

Mutual Promises. — In *Schweider v. Lang*, 29 Minn. 256, the court, *per* Berry, J., said: "The case is, then, one of a *promise* on the part of the plaintiff to do something of advantage in law to the defendant, and on the part of the defendant to do something of advantage in law to the plaintiff — a case of mutual *promises*, one of which is the consideration of the other."

New Promise. — See the title *LIMITATION OF ACTIONS*, vol. 19, p. 288.

4. *Knecht v. Mutual L. Ins. Co.*, 90 Pa. St. 121.

Promised in Sense of Expressed Intention. — *Hazleton v. Union Bank*, 32 Wis. 51.

Volume XXIII.

PROMOTERS.

BY HERBERT WHARTON BEALL.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: AGENCY, vol. 1, p. 930; CONTRACTS, vol. 7, p. 88; CONTRIBUTION AND EXONERATION, vol. 7, p. 325; CORPORATIONS (PRIVATE), vol. 8, p. 620; FRAUD AND DECEIT, vol. 14, p. 12; PARTNERSHIP, vol. 22, p. 2; STOCK AND STOCKHOLDERS; TRUSTS AND TRUSTEES; ULTRA VIRES; VENDOR AND PURCHASER.

I. DEFINITION AND NATURE. — A promoter is a person who takes such preliminary steps in the formation of a corporation as to bring himself into a fiduciary relation thereto, analogous to that of trustee and *cestui que trust*.¹

1. **Definitions.** — "A promoter is a person who brings about the incorporation and organization of a corporation. He brings together the persons who become interested in the enterprise, aids in procuring subscriptions, and sets in motion the machinery which leads to the formation of the corporation itself." *Cook on Stock and Stockholders*, §651, adopted by the courts in *Ex-Mission Land, etc., Co. v. Flash*, 97 Cal. 610; *Dickerman v. Northern*

Trust Co., 176 U. S. 203; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 455, 37 Am. St. Rep. 879.

"While the term 'promoter' may not be capable of precise definition, yet, as usually understood, it has reference to the persons who undertake to form and set going a company with reference to a given project." *First Ave. Land Co. v. Hildebrand*, 103 Wis. 530. See further *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 118; *Ladywell Min. Co. v.*

Promoters are often referred to, especially in the *English* cases, as "projectors," "agents," "stewards," or "trustees;" but whatever the term applied it means one who acts in the formation, establishment, and control of a company prior to the incorporation and the assumption of control by the board of directors.¹

Question of Fact. — Whether a person is or is not a promoter is a question of fact and not of law, and must in each case be determined with due regard to all the circumstances.²

II. WHEN PROMOTER BEGINS AND CEASES TO BE SUCH. — As the Acts of Promotion Are a Part of a Series of Acts embracing things done both before and after incorporation, it becomes important to determine at what point of time a promoter becomes such and ceases to be such. In answering the question the courts have applied as a test, the existence of a fiduciary relationship between the promoter and the subsequent company.³

Contemplation of Incorporation. — It is not enough to make one a promoter that when he bought the property he contemplated forming the company which should take it off his hands, no matter how soon after the purchase the company was formed.⁴

Even Where the Promoter Becomes a Director of the company and sells to it property purchased by him two years prior to the formation of the company, it has been held that he could not be treated as having purchased on behalf of the company, since when he acquired his interest he occupied no trust or fiduciary relationship thereto. It seems, however, that rescission of the contract of purchase would be allowed in such a case if asked for in time.⁵

Agreement to Buy Patent. — Nor is one necessarily a promoter of a company who agrees to buy a patent to be paid for partly in cash, and partly in shares of a company which he intends to form to own and operate it; hence an increase in the price of the patent, between the purchase and the sale thereof to the company, is permissible.⁶

Syndicate Buying with Express Purpose of Transferring to Company. — On the other hand it has been held that members of a syndicate which buys property with the express purpose of transferring it to the company are promoters of the company and stand in a fiduciary relation to it, and are bound to make a full and fair disclosure of their interest.⁷

Brookes, 35 Ch. D. 400; *Touche v. Metropolitan R. Warehousing Co.*, L. R. 6 Ch. 676; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1236; *Tyrrell v. London Bank*, 10 H. L. Cas. 26; *In re Great Wheal Polgooth*, 32 W. R. 107; *In re Coal Economising Gas Co.*, L. R. 20 Eq. 122; *St. Louis, etc., R. Co. v. Tiernan*, 37 Kan. 606; *Pitts v. Steele Mercantile Co.*, 75 Mo. App. 227; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219.

Valuable and suggestive articles on promoters may be found in 16 Am. L. Rev. 281, 671.

1. A Term of Business. — It has been asserted that the term "promoter" is a term not of law, but of business, usually summing up in a single word a number of business operations familiar to the commercial world by which a company is generally brought into existence. *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109, 49 L. J. Q. B. D. 326, 41 L. T. N. S. 674, 28 W. R. 351.

2. Question of Fact. — *Bagnall v. Carlton*, 6 Ch. D. 371, 47 L. J. Ch. 30, 37 L. T. N. S. 481, 26 W. R. 243; *Emma Silver Min. Co. v. Grant*, 11 Ch. D. 918, 40 L. T. N. S. 804; *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109.

The Term Ambiguous. — It has also been said that the word is ambiguous, and that it is necessary to ascertain in each case what the so-called promoter really did, before his legal liabilities can be accurately ascertained, and that in every case it is better to look at the facts and ascertain and describe them as they are. *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 93, 24 Am. & Eng. Corp. Cas. 24; *In re Hess Mfg. Co.*, 21 Ont. App. 66.

3. When a Promoter Begins and Ceases to Be Such. — *In re Ambrose Lake Tin, etc., Min. Co.*, 14 Ch. D. 398. But see *contra*, *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 24 Am. & Eng. Corp. Cas. 1.

4. Contemplation of Incorporation Not Enough. — *In re Coal Economising Gas Co.*, 1 Ch. D. 182, L. R. 20 Eq. 114; *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400; *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 85; *In re Hess Mfg. Co.*, 21 Ont. App. 66.

5. In re Cape Breton Co., 29 Ch. D. 795.

6. In re Coal Economising Gas Co., 1 Ch. D. 182, *Mellish and Brett, JJs., dissenting*.

7. New Sombrero Phosphate Co. v. Erlanger, 5 Ch. D. 73, *overruling Malins, V. C., who followed In re Coal Economising Gas Co.*, L. R. 20 Eq. 114.

When He Ceases to Be Such. — While ordinarily a promoter would cease to be such when the corporation is fully formed and the business turned over to the directors, such is not necessarily the case. The promoter may continue to dominate, and the directors selected by him, although legally the agents of the corporation, may be but the passive instruments of the promoter. So long as the work of formation continues, those who carry on that work must retain the character of promoters.¹

III. PROMOTERS DISTINGUISHED FROM AGENTS. — The attempt has often been made to hold the company subsequently formed liable upon contracts of promoters upon the theory of agency; but it has been pointed out that a promoter is not an agent strictly, since an agent must have a principal in existence at the time the services as agent are performed; whereas the corporation for which the promoter acts does not come into existence until after many, or possibly all, of the acts of the promoter have been performed.² It has been held, however, that the strict rule of law may be so modified in courts of equity as to permit the application to a promoter of the principles of the laws of agency and trusteeship.³

Theory of Continuing Offer. — The gap existing between the subscription to the stock of a non-existent corporation, and a subsequent attempt by the corporation to enforce such subscription, has been bridged over by the theory that such subscription is in the nature of a continuing offer to the proposed corporation, which, upon acceptance by it after its formation, becomes as to each subscriber a contract between him and the corporation, aided by the further doctrine that the promoter who obtains the subscriptions occupies the position of agent for the subscribers as a body to hold the subscriptions until the corporation is formed in accordance with the terms and conditions expressed in the agreement, and then to turn them over to the company without any further act of delivery on the part of the subscribers. The corporation in this way becomes a party able to enforce the rights of the whole body of subscribers.⁴

IV. RELATION OF PROMOTER TO COMPANY PROMOTED. — From the definitions above given, it will be clearly seen that the important fact in connection with promoters is the relation of trust and confidence, denoted by the term "fiduciary," in which they stand to the company promoted. This idea is repeated with emphasis in nearly all the cases.⁵

1. May Be Promoter Even After Incorporation. — *Twycross v. Grant*, 2 C. P. D. 540; *Russell v. Rock Run Fuel Gas Co.*, 184 Pa. St. 107, 41 W. N. C. (Pa.) 364, 7 Am. & Eng. Corp. Cas. N. S. 456.

2. Promoters Distinguished from Agents. — *Lydney, etc., Iron Ore Co. v. Bird*, 31 Ch. D. 328, 12 Am. & Eng. Corp. Cas. 6; *Kelner v. Baxter, L. R.* 2 C. P. 183; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 75; *Huron Printing, etc., Co. v. Kittleson*, 4 S. Dak. 520; *Weatherford Mineral Wells, etc., R., etc., Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837.

3. Are Amenable to Same Rules. — *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 85, 24 Am. & Eng. Corp. Cas. 23.

4. Theory of Continuing Offer. — *Athol Music Hall Co. v. Carey*, 116 Mass. 473; *Minneapolis Threshing Mach. Co. v. Davis*, 40 Minn. 110, 12 Am. St. Rep. 701.

5. Relation of Promoter to Company Promoted — *England.* — *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 118, 46 L. J. Ch. 425, 36 L. T. N. S. 222, 25 W. R. 436; *Bagnall v. Carlton*, 6 Ch. D. 385; *Nant-y-glo, etc., Iron works Co. v. Grave*, 12 Ch. D. 738; *In re Am-*

brose Lake Tin, etc., Min. Co., 14 Ch. D. 394; *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 85, 55 L. J. Ch. 875, 55 L. T. N. S. 558, 34 W. R. 749; *Erlanger v. New Sombrero Phosphate Co.*, 3 App. Cas. 1218, 39 L. T. N. S. 269, 26 W. R. 65; *Emma Silver Min. Co. v. Lewis*, 4 C. P. D. 407, 48 L. J. C. Pl. 257, 40 L. T. N. S. 168, 27 W. R. 836; *Walsham v. Stainton*, 1 De G. J. & S. 678; *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400; *Williams v. Page*, 24 Beav. 661; *Central R. Co. v. Kisch*, L. R. 2 H. L. 99.

United States. — *Dickerman v. Northern Trust Co.*, 176 U. S. 204; *Chandler v. Bacon*, 30 Fed. Rep. 538.

California. — *Ex-Mission Land, etc., Co. v. Flash*, 97 Cal. 626; *Burbank v. Dennis*, 101 Cal. 90.

Connecticut. — *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 102, 42 Am. St. Rep. 159.

Missouri. — *South Joplin Land Co. v. Case*, 104 Mo. 572, 38 Am. & Eng. Corp. Cas. 333.

New Jersey. — *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219.

New York. — *Walker v. Anglo-American Mortg., etc., Co.*, 72 Hun (N. Y.) 341; *Munson*

Relation May Arise Subsequently. — Although there may be no confidential or fiduciary relation between the promoters of the corporation at the time the property subsequently sold to the corporation is bought by them, still they may afterwards place themselves in a fiduciary relation to the corporation by promoting it in such a way as to preclude their making secret profits upon the property conveyed.¹

When the Relation Is Not Fiduciary. — Where the promoters who formed the corporation and sold their property to it are themselves the sole members of the corporation and hold all the bonds or stock, they simply sell as individuals, and buy as a corporation; and the doctrine of fiduciary relationship has been held not to apply to such a case.²

V. DUTY OF PROMOTERS TO COMPANY PROMOTED — 1. In General. — Because of the fiduciary relation in which a promoter stands to his company, similar to that of agent or trustee, the courts have extended to the former the general principles of law applicable to the latter.

2. Duty to Disclose Interest. — A promoter who sells to his company his own property, or that of a third person whom he represents as agent, is bound to disclose to the officers and to the subscribers to the stock his interest and position in respect to such property, and all facts relating thereto which would naturally influence those whose duty it is to decide upon the desirability of the purchase.³

Cannot Retain Secret Profits. — But in the absence of a full disclosure of the fact that he is making secret profits not shared by those whose interests he represents, he will not be allowed to retain them, and his attempt to do so gives rise to various remedies on the part of the company or the subscribers.⁴

v. Syracuse, etc., R. Co., 103 N. Y. 73; *Brewster v. Hatch*, 122 N. Y. 361, 19 Am. St. Rep. 498; *Colton Imp. Co. v. Richter*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 26.

Pennsylvania. — *McElhenny's Appeal*, 61 Pa. St. 188; *Simons v. Vulcan Oil, etc., Co.*, 61 Pa. St. 202, 100 Am. Dec. 628; *Densmore Oil Co. v. Densmore*, 64 Pa. St. 43.

Virginia. — *Crump v. U. S. Mining Co.*, 7 Gratt. (Va.) 352, 56 Am. Dec. 116; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 460, 37 Am. St. Rep. 879; *Virginia Land Co. v. Haupt*, 90 Va. 533, 44 Am. St. Rep. 939.

Wisconsin. — *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 24 Am. & Eng. Corp. Cas. 1.

1. *Ex-Mission Land, etc., Co. v. Flash*, 97 Cal. 610.

2. When the Relation Is Not Fiduciary. — *In re British Seamless Paper Box Co.*, 17 Ch. D. 471; *Seymour v. Spring Forest Cemetery Assoc.*, 144 N. Y. 333. See also *Battelle v. Northwestern Cement, etc., Pavement Co.*, 37 Minn. 91.

In view of the familiar doctrine that a corporation is an entity distinct from its constituent members, it is not clear why the doctrine of fiduciary relationship should not apply in the case instanced in the text. It would seem that any one who subsequently purchased the securities of the company should be allowed to call in question the good faith and honesty of those who sold the company its property. See *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 559; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149.

3. Duty to Disclose Interest. — *New Sombrero Phosphate Co. v. Erlanger* 5 Ch. D. 118; *Bag-*

nall v. Carlton, 6 Ch. D. 385, *In re Olympia*, (1898) 2 Ch. 165; *Ex-Mission Land, etc., Co. v. Flash*, 97 Cal. 626; *Burbank v. Dennis*, 101 Cal. 90; *Rice's Appeal*, 79 Pa. St. 168.

May Sell at a Profit. — There is nothing in the relation existing between the promoter and the company which prevents him from selling to the company, when formed, either his own property at any profit which he may be able to obtain over and above the cost, or the property of another at any commission which the vendor is willing to allow him, provided all these facts and figures be communicated to those interested and acquiesced in by them. All that is demanded is that he make a full and fair disclosure of his interest in the property sold. *New Sombrero Phosphate Co. v. Erlanger*, 5 Ch. D. 118; *Ladywell Min. Co. v. Brookes*, 35 Ch. D. 400; *In re Hess Mfg. Co.*, 21 Ont. App. 66; *Lungren v. Pennell*, 10 W. N. C. (Pa.) 297.

Must Specify Interest. — It is the duty of a promoter having any interest in a business transaction of the corporation, not only to declare that interest, but to specify the nature of the same. *Bagnall v. Carlton*, 6 Ch. D. 385.

Remuneration. — If the remuneration of the promoter is provided for by the articles of association, it cannot afterwards be questioned by the stockholders. *In re Anglo-Greek Steam Nav., etc., Co.*, 35 Beav. 399.

4. Cannot Retain Secret Profits — England. — *Whaley Bridge Calico Printing Co. v. Green*, 5 Q. B. D. 109, 49 L. J. Q. B. D. 326, 41 L. T. N. S. 674, 28 W. R. 351; *Emma Silver Min. Co. v. Grant*, 11 Ch. D. 918, 40 L. T. N. S. 804. *California.* — *Burbank v. Dennis*, 101 Cal. 90. *Connecticut.* — *Yale Gas Stove Co. v. Wilcox*, 64 Conn. 101, 42 Am. St. Rep. 159.

3. Duty to Provide Impartial Directors. — Where promoters intend to sell property to the proposed corporation, it is incumbent upon them to provide such company with a board of directors, who shall be made aware that the property which they are asked to buy is the property of the promoters, and who shall be competent and impartial judges as to whether the purchase ought or ought not to be made.¹

4. Cannot Be Both Vendor and Purchaser. — Promoters beneficially interested in the corporation cannot be at the same time sellers and buyers; they cannot sell in one character to themselves in another.²

5. Cannot Accept Secret Commissions. — The same rule forbids a promoter to accept a secret bonus or commission from one who sells property to the company, either in money or by dividing with the vendor stock given in part payment for such property,³ and a prospectus reciting that the company will pay actual costs does not include a commission from the owner of the property to the promoters.⁴ Nor can a promoter claim that he holds such money as an agent of the corporation where it was received by him as vendor of the property to the company.⁵ It is fraudulent for the owners to give to the promoter a document purporting to be an offer made by themselves as owners to sell at a fictitious price, which the promoter is to represent as the real one,⁶ or for promoters to insert their names as vendors, when they have no real interest in the property sold, in order that they may get fully paid-up shares for their services as promoters.⁷

May Retain Legitimate Expenses. — However, in estimating the amount of secret profits for which a promoter is accountable to the company, he has been allowed the legitimate expenses of a promoter; such as the reports of surveyors, services of attorneys and brokers, and advertising.⁸

It Is No Defense to the Charge of Making Secret Profits that the company paid no more for the property than it was really worth;⁹ nor that the corporation obtained in an unlawful way the money which it paid the promoter, as by an illegal issue or sale of its stock to its corporators;¹⁰ nor that the sale was made at a time when the promoters were the only members of the corporation, at least where there are others interested in the formation thereof, but

Missouri. — South Joplin Land Co. v. Case, 104 Mo. 572.

New Jersey. — Plaquemines Tropical Fruit Co. v. Buck, 52 N. J. Eq. 219.

New York. — Dorris v. French, 4 Hun (N. Y.) 296; Colton Imp. Co. v. Richter, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 26.

Pennsylvania. — McElhenny's Appeal, 61 Pa. St. 188; Simons v. Vulcan Oil, etc., Co., 61 Pa. St. 202, 100 Am. Dec. 628; Short v. Stevenson, 63 Pa. St. 95; Densmore Oil Co. v. Densmore, 64 Pa. St. 43.

Wisconsin. — Fountain Spring Park Co. v. Roberts, 92 Wis. 347; Franey v. Warner, 96 Wis. 223.

1. Duty to Provide Impartial Directors. — Er-langer v. New Sombbrero Phosphate Co., 3 App. Cas. 1266; Dickerman v. Northern Trust Co., 176 U. S. 181.

2. Cannot Be Both Vendor and Purchaser. — *In re* Ambrose Lake Tin, etc., Min. Co., 14 Ch. D. 394; Yale Gas Stove Co. v. Wilcox, 64 Conn. 102, 42 Am. St. Rep. 159; Getty v. Devlin, 70 N. Y. 504; Munson v. Syracuse, etc., R. Co., 103 N. Y. 73.

Hence, they cannot sell at an enhanced price options upon property, unless, as before indicated, the options were bought with their own money before they became promoters, or unless the increase in price is known to and

acquiesced in by the company. *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 24 Am. & Eng. Corp. Cas. 1.

3. Cannot Accept Secret Commissions. — *Dillon v. Commercial Cable Co.*, 87 Hun (N. Y.) 444; *Brewster v. Hatch*, 122 N. Y. 349, 19 Am. St. Rep. 498, 36 Am. & Eng. Corp. Cas. 70; *Bosher v. Richmond, etc., Land Co.*, 89 Va. 460, 37 Am. St. Rep. 879.

4. Central Land Co. v. Obenchain, 92 Va. 130.

5. Cannot Hold Such as Agent of Company. — *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 24 Am. & Eng. Corp. Cas. 16.

6. Fictitious Offer. — *Bagnall v. Carlton*, 6 Ch. D. 385, *following* *Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 243.

7. Pretending to Be Vendors. — *In re* Westmoreland Green, etc., Slate Co., (1893) 2 Ch. 612.

8. May Retain Legitimate Expenses. — *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 85, 55 L. J. Ch. 875.

9. A Fair Price No Defense. — *Beck v. Kantoro-wicz*, 3 Kay & J. 230; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 73.

10. Illegal Corporate Acts No Defense. — *U. S. Vinegar Co. v. Schlegel*, 143 N. Y. 537; *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149, 24 Am. & Eng. Corp. Cas. 16.

to whom stock has not been allotted.¹

6. Cannot Divide Stock Among Themselves. — The somewhat common custom among promoters of dividing among themselves a certain portion of the shares of stock of the company promoted, upon the principle of "division and silence," is fraudulent, and the surrender of such stock for cancellation may be required unless it has passed into the hands of *bona fide* purchasers for value;² and the very common bargain between promoters and directors, by which the former agree to give to the latter the necessary shares to qualify them to act as directors upon the condition that the directors return certain of the shares to the promoters, is gross misconduct, and the directors must answer to the company for the real value of the shares given them as a part of the fraudulent arrangement.³ It is equally improper for a promoter to promise a director that his subscription shall be merely nominal, and that he will not be required to pay for the stock,⁴ or that he will be indemnified if the enterprise should prove unprofitable. The value of any such indemnity belongs to the company.⁵

7. Burden of Proof. — Where promoters own most of the stock, control the corporation absolutely, and co-operate with each other in selling land to a company, the burden is upon them to show the fairness of the transaction, and in the absence of such showing the sale of the land will be deemed a fraud, in fact and in law.⁶

VI. LIABILITY OF PROMOTERS UPON THEIR PRE-CORPORATE CONTRACTS — As Agents. — In some instances, where it has been sought to hold promoters personally liable upon contracts made in furtherance of the corporate enterprise, the courts have held them liable as a matter of law, upon the theory that an agent contracting for and in the name of a non-existing principal renders himself liable upon the contract.⁷

As Real Debtors. — A promoter has been held liable further, on the ground that the parties in contracting relied upon the credit of the promoter, and not of the corporation.⁸

As Partners. — It has furthermore been held that where there are several promoters working together for a common end, they may become jointly and severally liable to account as partners, whatever may have been their private intention.⁹

1. Promoters Sole Incorporators. — *Pittsburg Min. Co. v. Spooner*, 74 Wis. 307, 17 Am. St. Rep. 149.

2. Cannot Divide Stock Among Themselves. — *Society for Illustration of Practical Knowledge v. Abbott*, 2 Beav. 559; *Paducah Land, etc., Co. v. Mulholland*, (Ky. 1894) 24 S. W. Rep. 624; *Getty v. Devlin*, 54 N. Y. 403. But see *In re British Seamless Paper Box Co.*, 17 Ch. D. 471.

3. Dividing with Directors. — *In re British Provident L., etc., Assoc.*, 5 Ch. D. 306.

4. Fictitious Subscriptions. — *Litchfield Bank v. Church*, 29 Conn. 137.

5. In re North Australian Territory Co., (1892) 1 Ch. 322, 37 Am. & Eng. Corp. Cas. 678.

6. Burden of Proof. — *Rice's Appeal*, 79 Pa. St. 168; *Colton Imp. Co. v. Richter*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 26.

7. Liability of Promoters upon Their Pre-corporate Contracts — As Agents — England. — *Kelner v. Baxter*, L. R. 2 C. P. 174; *Hopcroft v. Parker*, 16 L. T. N. S. 561.

Colorado. — *Hersey v. Tully*, 8 Colo. App. 110.

Kansas. — *Whetstone v. Crane Bros. Mfg. Co.*, 1 Kan. App. 320; *McLennan v. Hopkins*, 2 Kan. App. 260.

Massachusetts. — *Abbott v. Hapgood*, 150 Mass. 248, 15 Am. St. Rep. 193.

Michigan. — *Carmody v. Powers*, 60 Mich. 26, 13 Am. & Eng. Corp. Cas. 4.

New York. — *Hub Pub. Co. v. Richardson*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 665.

8. As Real Debtors. — *Scott v. Ebury*, L. R. 2 C. P. 255; *Bell v. Francis*, 9 C. & P. 66, 38 E. C. L. 36; *Kerridge v. Hesse*, 9 C. & P. 200, 38 E. C. L. 78; *In re Hereford, etc., Waggon, etc., Co.*, 2 Ch. D. 621; *Lake v. Argyll*, 6 Q. B. 477, 51 E. C. L. 477; *Kirschmann v. Lediard*, 61 Barb. (N. Y.) 573; *Hub Pub. Co. v. Richardson*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 665.

9. As Partners — England. — *Bourne v. Freeth*, 9 B. & C. 632, 17 E. C. L. 460; *Fox v. Clifton*, 6 Bing. 776, 19 E. C. L. 233, 9 Bing. 115, 23 E. C. L. 273.

United States. — *Chandler v. Bacon*, 30 Fed. Rep. 538.

Kansas. — *Mc'ennan v. Hopkins*, 2 Kan. App. 260; *McLennan v. Anspaugh*, 2 Kan. App. 269.

Massachusetts. — *Sproat v. Porter*, 9 Mass. 300.

Pennsylvania. — *McFall v. McKeesport, etc., Ice Co.*, 123 Pa. St. 259.

But see *Hamilton v. Smith*, 5 Jur. N. S. 32; *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332; *Railroad Gazette v. Wherry*, 58 Mo. App. 423.

Question for Jury. — In a great majority of the actions brought against the promoter individually, the chief difficulty has been one of evidence. Was the contract intended to bind the promoter or the corporation? The question is one for the jury to determine.¹

Illustrations — Becoming Member of Provisional Committee. — It is practically impossible to formulate any rule as to what facts are or are not sufficient to fasten liability upon the promoter personally. It has, however, been held that the mere fact of a person's agreeing to become a member of the provisional committee of an intended company amounts to no more than a promise that he will act with other persons to carry the scheme into effect, and is not enough to hold him liable upon obligations assumed by a promoter.²

Adoption of Former Proceedings. — But where the actions of a committee-man show that he has sanctioned and adopted former proceedings of a managing committee, in which he did not take part, he may be held liable to contribute to the payment of the obligations thereby assumed.³

On Contract Adopted by Company. — Where a promoter is individually liable for goods bought for the intended company, he may remain liable therefor although the corporation, when formed, adopts the contract for the goods.⁴

The Provisional Committee May Absolve Themselves from Personal Responsibility by resolution to that effect, provided it can be shown that the creditor knew of such resolution, and acquiesced in its effect, and agreed to be bound thereby.⁵

A Resolution Passed at a Meeting of the Provisional Directors, directing the secretary to take the necessary steps to advertise the company, may be sufficient to cast liability upon such directors personally, notwithstanding the fact that they became such under the assurance that they would incur no personal liability for preliminary expenses, unless it is shown that the secretary acted beyond the scope of his actual or apparent authority.⁶

Attendance at a Meeting of the Provisional Committee proves that the party so attending is a member of the committee, but it proves no more. And if he leaves the meeting before a certain resolution is passed, or does not concur in it, he

1. **Question for Jury.** — *Reynell v. Lewis*, 15 M. & W. 517; *Riley v. Packington*, L. R. 2 C. P. 536; *Patrick v. Reynolds*, 1 C. B. N. S. 727, 87 E. C. L. 727; *Lake v. Argyll*, 6 Q. B. 477, 51 E. C. L. 477; *Bailey v. Macaulay*, 13 Q. B. 815, 66 E. C. L. 815; *Wood v. Argyll*, 6 M. & G. 928, 46 E. C. L. 928; *Higgins v. Hopkins*, 3 Exch. 163; *Brown v. Andrew*, 13 Jur. 938; *De Vries v. Corner*, 13 L. T. N. S. 636; *Matter of Gloucester, etc., R. Co.*, 4 De G. M. & G. 769; *Williams v. Pigott*, 5 R. & Can. Cas. 544, 2 Exch. 201, 17 L. J. Exch. 196, 12 Jur. 313; *Higgins v. Hopkins*, 6 R. & Can. Cas. 75, 3 Exch. 163, 18 L. J. Exch. 113; *Rennie v. Clarke*, 5 Exch. 292, 19 L. J. Exch. 278.

2. **Becoming Member of Provisional Committee.** — *Reynell v. Lewis*, 15 M. & W. 517; *Barker v. Stead*, 3 C. B. 949, 54 E. C. L. 949; *Matter of Wolverhampton, etc., Junction R. Co.*, 2 Macn. & G. 185; *Beale v. Moulds*, 10 Q. B. 976, 59 E. C. L. 976; *Bailey v. Macaulay*, 13 Q. B. 815, 66 E. C. L. 815; *Norris v. Cottle*, 2 H. L. Cas. 647; *Barrett v. Blunt*, 2 C. & K. 271, 61 E. C. L. 271; *Burbridge v. Morris*, 3 H. & C. 664; *Matter of Oxford, etc., R. Co.*, 1 De G. M. & G. 565; *In re Dover, etc., R. Co.*, 1 Drew. 484; *Bright v. Hutton*, 3 H. L. Cas. 341 [overruling directly or indirectly the following cases: *Hutton v. Uphill*, 2 H. L. Cas. 674; *Matter of Direct Exeter, etc., R. Co.*, 2 Macn. & G. 176; *Ex p. Morrison*, 15 Jur. 346; *Nicholay's Case*, 15 Jur. 420; *In re Direct Birmingham, etc., R. Co.*, 1 Sim. N. S. 187; *In re Direct Shrewsbury, etc., R. Co.*, 1 Sim. N. S. 284; *In re Direct Birmingham, etc., R. Co.*, 1 Sim. N. S. 602; *Hole's Case*, 3 De G. & Sm. 241; *Matter of Metropolitan R. Junction Co.*, 5 De G. & Sm. 528]. See, however, *Barnett v. Lambert*, 15 M. & W. 489; *Matter of Midland Union, etc., R. Co.*, 5 De G. & Sm. 423; *Matter of Midland Union, etc., R. Co.*, 3 De G. M. & G. 241.

3. *Matter of Direct Birmingham, etc., R. Co.*, 6 De G. M. & G. 345.

4. The admission of liability by a provisional committee-man is not conclusive against him. *Newton v. Belcher*, 12 Q. B. 921, 64 E. C. L. 921.

5. Even the tender of a partial payment upon account will not prove the provisional committee-man's liability where it does not appear on what account it was tendered. *Barker v. Lyndon*, 2 C. & K. 651, 61 E. C. L. 651.

6. **On Contract Adopted by Company.** — *Queen City Furniture, etc., Co. v. Crawford*, 127 Mo. 356.

7. *Landman v. Entwistle*, 7 Exch. 632.

The transfer of the obligations to a corporation in such a case would have to be effected by a novation to which the assent of the creditor would be essential. See the title *NOVATION*, vol. 21, p. 659.

8. **Effect of Resolution.** — *Maddick v. Marshall*, 17 C. B. N. S. 829, 112 E. C. L. 829.

is not liable for any obligation that may be assumed in consequence of such resolution.¹

Contribution Between Promoters. — Provisional committee-men are not liable as partners on transactions entered into by one of them; hence an action at law will lie by one of them for contribution against such of the other committee-men as were liable to pay a debt which the plaintiff has paid.²

VII. REPRESENTATIONS THROUGH PROSPECTUS — 1. Principles of Fraud Control. — Promoters ordinarily bring themselves into relations with the public by means of prospectuses issued to set forth the nature of the enterprise, and to invite subscriptions to the capital stock. The general principles relating to fraud have been applied to such documents.³

Prospectus Should Be Full and Accurate. — It is a general rule that promoters who appeal to the public by these means are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as a fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature or extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares.⁴

2. What Exaggeration Permissible. — The courts have recognized that in advertisements of this description some allowance must always be made for the sanguine expectations of the promoters of the adventure, and that some high coloring and even exaggeration in the description of the advantages which are likely to be enjoyed may be expected. The same high authority, however, emphasizes the rule that the utmost candor and honesty ought to characterize such public statements, and that no misstatement or concealment of any material facts or circumstances ought to be permitted.⁵ Therefore, a prospectus is held to be fraudulent in which the promoters are not only compelled to hide the truth, but to give such a color to the statement put forth as to render it, while perhaps literally true, yet, in the sense in which they must have known it would be understood by the public, really false.⁶

3. Negligence Not Equivalent to Fraud. — The question whether an action for negligent misrepresentation, as distinguished from fraudulent representation, could be maintained, was, after much controversy, settled in the negative in a leading case in the House of Lords.⁷

Want of Reasonable Ground for the Statements made is not enough to show fraud, but it must be shown that they were made dishonestly, and the onus of proving the dishonesty lies upon the plaintiff.⁸

Asserting Facts Not Known to Be Facts. — The assertion, however, of a fact, as to which the promoter is ignorant whether it is true or untrue, is fraudulent.⁹

1. *Matter of Direct Exeter, etc.*, R. Co., 2 Macn. & G. 192.

2. *Contribution Between Promoters.* — *Batard v. Hawes*, 2 El. & Bl. 287, 75 E. C. L. 287; *Boulter v. Peplow*, 9 C. B. 493; *Edger v. Knapp*, 5 M. & G. 753, 44 E. C. L. 393.

A promoter seeking contribution from his fellow promoters must consent that all the expenses shall be thrown into one common fund, and offer to pay what, if anything, may be found due from him. *Denton v. Macneil*, L. R. 2 Eq. 352. See the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

3. *Representations Through Prospectus.* — For a full discussion of the general principles here summarized, see the title FRAUD AND DECEIT, vol. 14, pp. 12, 86, 151.

4. *Prospectus Should Be Full and Accurate.* — *Per Vice-Chancellor Kindersley*, in *New Brunswick, etc., R., etc., Co. v. Muggeridge*, 1 Drew. & Sm. 363.

5. *What Exaggeration Permissible.* — *Per Lord Chelmsford* in *Central R. Co. v. Kisch*, L. R. 2 H. L. 113; *Denton v. Macneil*, L. R. 2 Eq. 352.

6. *Colored Statements.* — *Peek v. Gurney*, L. R. 6 H. L. 377.

7. *Negligence Not Equivalent to Fraud.* — *Derry v. Peek*, 14 App. Cas. 337, *overruling* *Peek v. Derry*, 37 Ch. D. 541. And see *Angus v. Clifford*, (1891) 2 Ch. 463.

Since the decision just referred to, it has been held that a subscriber seeking to rescind his contract of subscription, or to recover money already paid in, must show that there was a fraudulent representation upon which he relied, and not merely an innocent misrepresentation. *Kennedy v. Panama, etc., Royal Mail Co.*, L. R. 2 Q. B. 580.

8. *Want of Reasonable Ground.* — *Glazier v. Rolls*, 42 Ch. D. 436.

9. *Reese River Silver Min. Co. v. Smith*, L. R. 4 H. L. 64.

But an Ambiguous Statement which may be either true or false is not false unless the plaintiff can prove that he understood it in the sense which would make it false.¹

4 Prospectus Must Be Proximate Cause of Injury. — It is a general principle that "to render a man responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss."² Hence, it has been held that the plaintiff seeking to recover must show that he saw the prospectus and was induced thereby, to some extent at least, to invest in the proposed venture.³

Prospectus as Part of Fraudulent Scheme. — And where a false prospectus has been issued, and subsequently a false representation is made in a newspaper, a plaintiff who subscribed upon the latter representation has been held entitled to connect it with the prospectus as a part of a fraudulent scheme, and to hold the promoters liable.⁴

Promoter Liable as Occasion of Loss. — Where the defendants, advertised in a prospectus as directors, were not guilty of direct fraudulent intention, the court applied to them the rule that where one of two innocent parties is to suffer by the fraud of a third, he who gave occasion for the fraud should bear the loss.⁵

5. Companies Act of 1867. — The Companies Act of 1867⁶ provides that "every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."⁷

1. Ambiguous Statements. — *Smith v. Chadwick*, 9 App. Cas. 187. But see *Glasier v. Rolls*, 42 Ch. D. 436.

2. Prospectus Must Be Proximate Cause of Injury. — *Per Wood, V. C.*, in *Barry v. Croskey*, 2 Johns. & H. 1, quoted with approval by Lord Cairns in *Peek v. Gurney*, L. R. 6 H. L. 413.

3. *Peek v. Gurney*, L. R. 6 H. L. 377; *Belairs v. Tucker*, 13 Q. B. D. 578; *Weir v. Barnett*, 3 Ex. D. 32; *In re Russian Ironworks Co.*, L. R. 1 Ch. 574; *Downes v. Ship*, L. R. 3 H. L. 343; *In re Metropolitan Coal Consumers' Assoc.*, (1892) 3 Ch. 1; *Gerhard v. Bates*, 2 El. & Bl. 476, 75 E. C. L. 476.

Meaning of Rule. — By this it is not meant that it is necessary that the representations should have been made directly by the defendant to the plaintiff, but it is sufficient that the false representations are contained in a document intended to be circulated among the class of persons likely to be deceived by it. Nor is it necessary that the prospectus should be the sole inducement to the plaintiff's action. *Clarke v. Dickson*, 6 C. B. N. S. 453, 95 E. C. L. 453; *Walker v. Anglo-American Mortg., etc., Co.*, 72 Hun (N. Y.) 334.

4. Prospectus as Part of Fraudulent Scheme. — *Andrews v. Mockford*, (1896) 1 Q. B. 378, distinguishing *Peek v. Gurney*, L. R. 6 H. L. 377.

In *In re Metropolitan Coal Consumers, Assoc. (Karberg's Case)*, (1892) 3 Ch. 1, Lord Justice Lindley makes a distinction between subscribing on the faith of a prospectus issued by the promoters and on that of one issued by the company after its formation. The distinction is between a statement made that so and so was the case and a statement that it was expected that so and so would be the case. The latter statement is not fraudulent if it can be shown that such was the real expectation.

5. *Collingwood v. Berkeley*, 15 C. B. N. S. 145, 109 E. C. L. 145.

6. English Companies Acts. — 30 & 31 Vict., c. 131, § 38.

7. In construing this statute a difference of opinion has arisen as to what contracts are required to be specified in the prospectus. It was the opinion of Lord Bramwell (*Twycross v. Grant*, 2 C. P. D. 469) that only those contracts are meant which affect the company, which put an obligation on it whether with or without some benefit attached; contracts made with the company if it has been formed, or with the promoters or directors acting in behalf of the future company with the intent that they shall be ratified.

It was the opinion of Lord Brett (*In re Coal*

VIII. RIGHTS AND LIABILITIES OF COMPANY UNDER CONTRACTS OF PROMOTERS

— 1. Rule at Law. — Regarding promoters in the light of agents of the proposed corporation, the courts applied to them the familiar rule that there can be no agent without an existing principal; with the result that the pre-corporate contracts of promoters were held to impose no duties and to confer no rights upon the corporation subsequently coming into existence. Such was and still is the strict common-law rule when not modified by subsequent adoption or ratification or the application of equitable doctrines.¹

2. Rule in Equity. — The common-law rule just laid down is also the rule in equity where there exist no equitable reasons for modifying it.²

Adopting Contract Cum Onere. — But courts of chancery early adopted the rule that a corporation might, by accepting the benefits of a pre-corporate contract made by its promoters, become bound to discharge the obligations which such contract imposes. It was deemed only equitable that in such a case the corporation should be required to adopt the contract *cum onere*, taking the burdens with the benefits.³ This doctrine, which is known as that of Lord Cottenham, has been severely criticised by some English judges,⁴ but it has been applied freely in subsequent English cases,⁵ and has been adopted by the American courts, "*ex aequo et bono*, to prevent fraud and imposition, and to do substantial justice."⁶

Economising Gas Co. (Gover's Case), 1 Ch. D. 200) that the act included every contract made before the issue of the prospectus the knowledge of which might have an effect upon a reasonable subscriber for shares in determining him to give or withhold faith in the promoter, director, or trustee issuing the prospectus, whether such contract was made by such promoter, director, or trustee before or after he became a promoter, director, or trustee, and whether or not such contract was made on behalf of, or so as if adopted to impose a liability on, the company.

The latter opinion seems to be supported by the weight of authority. *In re* Coal Economising Gas Co., 1 Ch. D. 182; Craig v. Phillips, 3 Ch. D. 722; Arkwright v. Newbold, 17 Ch. D. 302; Cornell v. Hay, L. R. 8 C. P. 328; Sullivan v. Mitcalfe, 5 C. P. D. 455. See also Aaron's Reefs v. Twiss, (1896) A. C. 273.

1. Rights and Liabilities of Company under Contract of Promoters — Rule at Law — *England*. — Preston v. Liverpool, etc., R. Co., 17 Beav. 114; Kelner v. Baxter, L. R. 2 C. P. 174; Caledonian, etc., R. Co. v. Helensburgh Harbour Trustees, 2 Macq. H. L. 391, 2 Jur. N. S. 695; Melhado v. Porto Alegre, etc., R. Co., L. R. 9 C. P. 503.

United States. — Winters v. Hub Min. Co., 57 Fed. Rep. 288.

California. — Morrison v. Gold Mountain Min. Co., 52 Cal. 307; Hawkins v. Mansfield Gold Min. Co., 52 Cal. 513.

Connecticut. — New York, etc., R. Co. v. Ketchum, 27 Conn. 170.

Illinois. — Safety Deposit L. Ins. Co. v. Smith, 65 Ill. 309; Rockford, etc., R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587; Stowe v. Flagg, 72 Ill. 398; Western Screw, etc., Co. v. Cousley, 72 Ill. 531.

Iowa. — Carey v. Des Moines Co-operative Coal, etc., Co., 81 Iowa 674.

Louisiana. — Marchand v. Loan, etc., Assoc., 26 La. Ann. 389.

Maryland. — Franklin F. Ins. Co. v. Hart, 31 Md. 65.

Massachusetts. — Penn Match Co. v. Hap-

good, 141 Mass. 145; Abbott v. Hapgood, 150 Mass. 248, 15 Am. St. Rep. 193.

Michigan. — Carmody v. Powers, 60 Mich. 26. *Minnesota*. — Battelle v. Northwestern Cement, etc., Pavement Co., 37 Minn. 89.

Missouri. — Joy v. Manion, 28 Mo. App. 55; Davis v. Maysville Creamery Assoc., 63 Mo. App. 477; Hill v. Gould, 129 Mo. 106.

Nebraska. — Clarke v. Omaha, etc., R. Co., 5 Neb. 314.

New York. — Central Park F. Ins. Co. v. Callaghan, 41 Barb. (N. Y.) 448; Munson v. Syracuse, etc., R. Co., 103 N. Y. 58; Wilbur v. New York Electric Constr. Co., 12 N. Y. Super. Ct. 539; Hecla Consol. Gold Min. Co. v. O'Neill, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 594; Schmidt v. Nelke Art Lithograph Co., (N. Y. City Ct. Gen. T.) 16 Misc. (N. Y.) 300.

Pennsylvania. — Tift v. Quaker City Nat. Bank, 141 Pa. St. 550.

2. The Rule in Equity. — *In re* Empress Engineering Co., 16 Ch. D. 125; *In re* Northumberland Ave. Hotel Co., 33 Ch. D. 16; Low v. Connecticut, etc., R. Co., 45 N. H. 378.

3. Adopting Contract Cum Onere. — Edwards v. Grand Junction R. Co., 1 Myl. & C. 650, 7 Sim. 337; Stanley v. Chester, etc., R. Co., 3 Myl. & C. 773; Petre v. Eastern Counties R. Co., 1 R. & Can. Cas. 462; *In re* Hereford, etc., Waggon, etc., Co., 2 Ch. D. 621.

4. Doctrine Criticised. — Preston v. Liverpool, etc., R. Co., 5 H. L. Cas. 605, 1 Sim. N. S. 586, 7 Eng. L. & Eq. 124. And see Caledonian, etc., R. Co. v. Helensburgh Harbour Trustees, 2 Macq. H. L. 391, 2 Jur. N. S. 695.

5. Lord Cottenham's View Generally Adopted in England. — Lindsey v. Great Northern R. Co., 10 Hare 664; Gooday v. Colchester, etc., R. Co., 17 Beav. 132, 15 Eng. L. & Eq. 598; Howard v. Patent Ivory Mfg. Co., 38 Ch. D. 163; Greenhalgh v. Manchester, etc., R. Co., 3 Myl. & C. 791; Vigers v. Pike, 8 Cl. & F. 652; Low v. Connecticut, etc., Rivers R. Co., 45 N. H. 370. And see City Bldg. Assoc. No. 2 v. Zahner, 6 Ohio Dec. (Reprint) 1068, 10 Am. L. Rec. 181.

6. In America. — *Per* Eakin, J., in Little Volume XXIII.

Limitations upon the Rule. — It has been pointed out that not all contracts made with promoters would be binding upon a subsequently formed company, but only those that are made upon the credit of the corporation and with a mutual expectation that the promoters would form a company, and that the company would assume the contract.¹ No rights legal or equitable arise in favor of a corporation in respect to transactions, whether complete or inchoate, merely because entered into in contemplation of the creation of such corporation.² The mere fact that a corporation formed from the members of a prior copartnership and others, has received by transfer the assets of such copartnership, will not charge it with the payment of the debts of the copartnership.³ Only those persons who have done work directly for the proposed corporation can claim the benefit of this principle. Those who are employed by promoters must look to their employers.⁴ Where a plaintiff has failed to maintain his claim on the ground that the company has had the benefit of his services, he may possibly recover upon the ground of a novation of the contract originally made between him and the promoter.⁵

3. Adopting or Ratifying Promoters' Contract. — As a part of the doctrine that a promoter could not as agent bind a non-existing principal, it was held that it was legally impossible for the subsequently formed company to transfer to itself, by adoption or ratification, any inchoate rights or obligations created by the contract of the promoter. There must be, it was argued, two parties to a contract, and the rights and obligations it creates cannot be transferred by one of them to a third person who is not in a condition to be bound by it at the time it was made.⁶ The great weight of authority, however, recognizes the power and the right of the corporation when formed to adopt or ratify the pre-corporate contracts of its promoters. The more modern cases claim to see no difference between the corporation making a contract by adopting an agreement originally made in advance for it by promoters, and the making of an entirely new contract. No greater formality is necessary in the one case than in the other.⁷

Election. — Since a contract of a promoter is not binding until adopted, the

Rock, etc., *R. Co. v. Perry*, 37 Ark. 164. See further *Moore, etc., Hardware Co. v. Towers Hardware Co.*, 87 Ala. 211; *Penn Match Co. v. Hapgood*, 141 Mass. 149; *Pitts v. Steele Mercantile Co.*, 75 Mo. App. 227; *Grier v. Hazard*, (N. Y. City Ct. Gen. T.) 13 N. Y. Supp. 584; *Harrison v. Vermont Manganese Co.*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 402; *Weatherford Mineral Wells, etc., R. Co. v. Granger*, 86 Tex. 350, 40 Am. St. Rep. 837; *Buffington v. Bardon*, 80 Wis. 635.

In *Davis, etc., Bldg., etc., Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 44, it was held that the simple acceptance of the benefits of a contract, without adoption or promise to be bound by it, would not make the corporation liable.

And in *Rockford, etc., R. Co. v. Sage*, 65 Ill. 332, 16 Am. Rep. 587, the court questioned the right to recover on the sole ground of acceptance of benefits, but was disposed to think that this circumstance, coupled with an express promise, would warrant recovery.

1. Limitations upon the Rule. — *Little Rock, etc., R. Co. v. Perry*, 37 Ark. 164.

2. *Plaquesimes Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219.

3. *Adams v. Empire Laundry Machinery Co.*, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 740.

4. *In re Skegness, etc., Tramways Co.*, 41 Ch. D. 215.

5. *In re Rotherham Alum, etc., Co.*, 25 Ch. D. 103. See the title *NOVATION*, vol. 21, p. 659.

6. Adopting or Ratifying Promoter's Contract. — *Kelner v. Baxter*, L. R. 2 C. P. 183; *In re Empress Engineering Co.*, 16 Ch. D. 125; *In re Northumberland Ave. Hotel Co.*, 33 Ch. D. 16, 16 Am. & Eng. Corp. Cas. 89; *Abbott v. Hapgood*, 150 Mass. 248, 28 Am. & Eng. Corp. Cas. 59, 15 Am. St. Rep. 193. But see *Gregory v. Williams*, 3 Meriv. 582.

7. *Per Gilfillan, C. J.*, in *Battelle v. Northwestern Cement, etc., Pavement Co.*, 37 Minn. 89. And see as supporting this view, the following cases:

England. — *Caledonian, etc., R. Co. v. Helensburgh Harbour Trustees*, 2 Jur. N. S. 695, 2 Macq. H. L. 391, 4 W. R. 671; *Spiller v. Paris Skating Rink Co.*, 7 Ch. D. 368, 46 W. R. 456; *Lydney, etc., Iron Ore Co. v. Bird*, 33 Ch. D. 94; *Touche v. Metropolitan R. Warehousing Co.*, L. R. 6 Ch. 675; *Williams v. St. George's Harbour Co.*, 2 De G. & J. 547; *Browning v. Great Cent. Min. Co.*, 5 H. & N. 856; *Scott v. Ebury*, L. R. 2 C. P. 255, 36 L. J. C. Pl. 161, 15 L. T. N. S. 506, 15 W. R. 517; *Howard v. Patent Ivory Mfg. Co.*, 38 Ch. D. 156, 57 L. J. Ch. 878, 58 L. T. N. S. 395, 36 W. R. 801.

United States. — *Whitney v. Wyman*, 101 U. S. 392.

Colorado. — *Colorado Land, etc., Co. v. Adams*, 5 Colo. App. 190.

Connecticut. — *Waterman's Appeal*, 26 Conn. 96; *New York, etc., R. Co. v. Ketchum*, 27

corporation is clearly at liberty to refuse to adopt it, and may resist an action for specific performance, certainly in a case where it has not accepted the consideration and taken the benefit.¹

Individual Liability. — On the other hand, the subscribers may be personally liable where, after the act of incorporation is passed, they signed an agreement assuming liability.²

Contracts Authorized by Act of Incorporation. — While a corporation must be completely organized before it can enter into a contract, the act of incorporation may authorize the incorporators to make contracts which will bind the company when it shall have been organized.³

4. Kinds of Contracts that May Be Adopted. — But there is a limitation to this power of adoption. The kind of promoter's contract that a corporation may adopt is only such as the corporation itself could make, and one which the usual agents of the company have express or implied authority to make.⁴ It must also be one within the purposes for which the corporation was organized, and must appear to be a reasonable means of carrying out those purposes.⁵ Hence a contract that is *ultra vires* can no more be adopted, than it can be originally made by the corporation.⁶ The contract must also have been one made primarily for the benefit of the corporation.⁷ And in a few jurisdictions it must be one made by a majority of the promoters, since a minority has no authority to bind a corporation.⁸ But it would seem that the qualification is unnecessary if, as has been held, the contract after adoption

Conn. 181; *Stanton v. New York, etc., R. Co.*, 59 Conn. 272, 21 Am. St. Rep. 110.

Illinois. — *Western Screw, etc., Co. v. Cousley*, 72 Ill. 531, following *Rockford, etc., R. Co. v. Sage*, 65 Ill. 328, 16 Am. Rep. 587; *Wood v. Whelen*, 93 Ill. 154; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439, 5 Am. & Eng. Corp. Cas. 255.

Indiana. — *Bruner v. Brown*, 139 Ind. 600. *Iowa.* — *Dubuque Female College v. District Tp.*, 13 Iowa 555; *Stevenson v. Dubuque Level, etc., Min. Co.*, 34 Iowa 577.

Kansas. — *Davis v. Dexter Butler, etc., Co.*, 52 Kan. 693.

Kentucky. — *Anderson v. West Kentucky College*, 10 Ky. L. Rep. 725.

Minnesota. — *McArthur v. Times Printing Co.*, 48 Minn. 319, 31 Am. St. Rep. 653.

Nevada. — *Paxton v. Bacon Mill, etc., Co.*, 2 Nev. 257; *Alexander v. Winters*, 23 Nev. 485, 24 Nev. 143.

New Hampshire. — *Low v. Connecticut, etc., Rivers R. Co.*, 46 N. H. 284.

New York. — *Oakes v. Cattaraugus Water Co.*, 66 Hun (N. Y.) 634, 21 N. Y. Supp. 851; *Hall v. Herter*, 83 Hun (N. Y.) 19; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 75; *McCallum v. Purssell Mfg. Co.*, (N. Y. City Ct. Gen. T.) 1 N. Y. Supp. 428.

Oregon. — *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 1.

Pennsylvania. — *Titus v. Catawissa R. Co.*, 5 Phila. (Pa.) 172; *Tift v. Quaker City Nat. Bank*, 8 Pa. Co. Ct. 606.

South Dakota. — *Huron Printing, etc., Co. v. Kittleson*, 4 S. Dak. 520.

Texas. — *Weatherford, etc., R. Co. v. Granger*, (Tex. Civ. App. 1893) 23 S. W. Rep. 425.

Wisconsin. — *Pratt v. Oshkosh Match Co.*, 89 Wis. 406.

In *Van Vlieden v. Welles*, 6 Johns. (N. Y.) 85, a pre-corporate contract was held to be

waived and extinguished as a private contract; and the corporation acting by their seal having assumed the contract and become the debtor of the plaintiff with his assent and concurrence, the original contractors were not responsible in their individual capacity. For the principle of such cases, see the title *NOVATION*, vol. 21, p. 659.

1. Adoption Optional with Corporation. — *New York, etc., R. Co. v. Ketchum*, 27 Conn. 179; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 75.

Where a promoter who made the contract subsequently becomes the president of the corporation, he may as president adopt and ratify the contract made by him as promoter. *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430.

2. Liability May Be Individual. — *Salem Mill Dam Corp. v. Ropes*, 6 Pick. (Mass.) 23.

3. Gent v. Manufacturers, etc., Mut. Ins. Co., 107 Ill. 652.

4. What Contracts May Be Adopted. — *McArthur v. Times Printing Co.*, 48 Minn. 321, 31 Am. St. Rep. 653; *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 8.

5. Stanton v. New York, etc., R. Co., 59 Conn. 272, 21 Am. St. Rep. 110; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439.

6. Ultra Vires Contracts. — *Shrewsbury v. North Staffordshire R. Co.*, L. R. 1 Eq. 593, 12 Jur. N. S. 63; *Marshall County v. Schenck*, 5 Wall. (U. S.) 772; *Tift v. Quaker City Nat. Bank*, 8 Pa. Co. Ct. 606. But see *Louis Cook Mfg. Co. v. Randall*, 62 Iowa 244. And see the title *ULTRA VIRES*.

7. It Must Be Beneficial. — *Davis, etc., Bldg., etc., Co. v. Hillsboro Creamery Co.*, 10 Ind. App. 44.

8. Majority of Promoters. — *Low v. Connecticut, etc., R. Co.*, 45 N. H. 370; *Bell's Gap R. Co. v. Christy*, 79 Pa. St. 59, 21 Am. Rep. 39; *Tift v. Quaker City Nat. Bank*, 8 Pa. Co. Ct. 606.

acquires its force and extent from the act of adoption and not from the agreement of the promoter.¹

5. Adoption Inferred from Corporate Acts. — The adoption of the promoter's contract by the subsequently formed corporation need not be expressed, but may be inferred from the acts and general conduct of the corporation in relation to the subject-matter of the contract.²

Evidence of Adoption. — Where the acts of the corporation tend strongly to show adoption, the question should be determined by a jury.³ The acceptance of benefits under the contract has been held to be one of the clearest indications of an intention to adopt it.⁴

Express Promise Sometimes Required. — It has been doubted, however, whether the acceptance of the benefit of a contract without a subsequent express promise to perform would be sufficient. The court has refused to allow recovery upon an implied promise, holding it more reasonable to conclude that any services performed prior to the organization of the corporation were gratuitous, and rendered in view of the general good or private benefit expected to result.⁵

Mere Silence of the Board of Directors, or their failure to object when a claim upon

1. *McArthur v. Times Printing Co.*, 48 Minn. 379, 31 Am. St. Rep. 653.

An agreement between the promoters and a trustee holding property for their benefit until the organization of the corporation, that the company when formed would pay the trustee a certain sum for his services, is not binding upon the corporation. *Hecla Consol. Gold Min. Co. v. O'Neill*, 65 Hun (N. Y.) 619, 19 N. Y. Supp. 592.

Where a corporation has carried on business and held itself out to the world as a corporation before its organization as such, its assets can be made liable for its pre-corporate debts. *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238. See the title *DE FACTO CORPORATIONS*, vol. 8, p. 747.

Lien for Purchase Money. — A company that takes personal property purchased by its promoter with full knowledge of the contract as made by him takes it subject to an equitable lien for the purchase price. *Bridgeport Electric, etc., Co. v. Meader*, (C. C. A.) 72 Fed. Rep. 115.

2. Adoption Inferred from Corporate Acts — England. — *Reuter v. Electric Tel. Co.*, 6 El. & Bl. 346, 88 E. C. L. 346, 26 L. J. Q. B. 46, 2 Jur. N. S. 1245, 4 W. R. 564.

Arkansas. — *Little Rock, etc., R. Co. v. Perry*, 37 Ark. 164, 9 Am. & Eng. R. Cas. 626. *Colorado.* — *Arapahoe Invest. Co. v. Platt*, 5 Colo. App. 515.

Connecticut. — *Stanton v. New York, etc., R. Co.*, 59 Conn. 285.

Illinois. — *Rockford, etc., R. Co. v. Sage*, 65 Ill. 332, 16 Am. Rep. 587; *Wood v. Whelen*, 93 Ill. 153.

Minnesota. — *Battelle v. Northwestern Cement, etc., Pavement Co.*, 37 Minn. 89; *McArthur v. Times Printing Co.*, 48 Minn. 322, 31 Am. St. Rep. 653.

Nebraska. — *Paxton Cattle Co. v. Arapahoe First Nat. Bank*, 21 Neb. 621, 17 Am. & Eng. Corp. Cas. 19.

Nevada. — *Alexander v. Winters*, 23 Nev. 485.

New Hampshire. — *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 237.

New York. — *Bommer v. American Spiral Spring Butt Hinge Mfg. Co.*, 81 N. Y. 468; *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430, reversing 66 Hun (N. Y.) 634, 21 N. Y. Supp. 851.

Oregon. — *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 7.

South Dakota. — *Huron Printing, etc., Co. v. Kittleson*, 4 S. Dak. 520.

Wisconsin. — *Buffington v. Bardon*, 80 Wis. 639.

But see *Leominster Canal Nav. Co. v. Shrewsbury, etc., R. Co.*, 3 Kay & J. 669.

3. Adoption a Question for Jury. — *Oakes v. Cattaraugus Water Co.*, 143 N. Y. 430; *Schreyer v. Turner Flouring Mills Co.*, 29 Oregon 7; *McDonough v. Houston First Nat. Bank*, 34 Tex. 309.

The verbal ratification of the contract by the president after organization, a written recognition of the existence of the agreement, and the payment of money thereunder with a promise to pay a second instalment, leaves no doubt of the company's adoption of the contract. *Hoag v. Lamont*, (Brooklyn City Ct. Gen. T.) 16 Abb. Pr. N. S. (N. Y.) 91.

And where the promoter becomes a director, little additional evidence is required to establish the ratification of contracts made in the name of the association, whether before or after he becomes director. *Roberts Mfg. Co. v. Schlick*, 62 Minn. 332.

4. Accepting Benefits as Evidence of Adoption. — *Arapahoe Invest. Co. v. Platt*, 5 Colo. App. 515; *Paxton Cattle Co. v. Arapahoe First Nat. Bank*, 21 Neb. 621, 59 Am. Rep. 852; *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 237; *Huron Printing, etc., Co. v. Kittleson*, 4 S. Dak. 520. See *supra*, this section, *Rule in Equity*.

5. Express Promise Sometimes Required. — *Rockford, etc., R. Co. v. Sage*, 65 Ill. 332, 16 Am. Rep. 587, following *New York, etc., R. Co. v. Ketchum*, 27 Conn. 170, and *disapproving* *Low v. Connecticut, etc., R. Co.*, 46 N. H. 284, and *distinguishing* *Hall v. Vermont, etc., R. Co.*, 28 Vt. 401.

a pre-corporate contract is mentioned, is not sufficient evidence of ratification thereof.¹

Corporation Estopped. — Such acts as those enumerated, and others, constitute equitable estoppel as against the corporation.²

PROMOTION. (See also the title LOTTERIES, vol. 19, p. 588.) — See note 3.

PROMPT. — The word "prompt" is defined to mean ready; quick; expeditious; done or rendered quickly or immediately.⁴ Prompt is synonymous with "quick;" "sudden;" "precipitate." Indeed, one who is ready is said to be prepared at the moment; one who is prompt is said to be prepared beforehand.⁵

PROMPTLY. — Promptly is defined to mean quickly; expeditiously.⁶

PROMULGATION. — See note 7.

PRONOUNCE. — To pronounce means to utter formally, officially, or solemnly; to declare or affirm; as, to utter formally and solemnly the judgment of a court.⁸

PROOF. (See also the titles BURDEN OF PROOF, vol. 5, p. 21; EVIDENCE, vol. 11, p. 484; REASONABLE DOUBT, *post.*) — I. Proof has been defined to be the logically sufficient reason for assenting to the truth of a proposition advanced.⁹ The terms "proof" and "evidence" are often used indifferently

1. *Tift v. Quaker City Nat. Bank*, 8 Pa. Co. Ct. 606, 47 Leg. Int. (Pa.) 308.

2. **Corporation Estopped.** — *McArthur v. Times Printing Co.*, 48 Minn. 321, 31 Am. St. Rep. 653.

3. **Promotion of Lottery.** — In *Miler v. Com.*, 13 Bush (Ky.) 731, it was held that the term *promotion*, as applied to a lottery, included any act as manager or as agent of those managing a lottery, or by inducing others to buy tickets or chances in the lottery. See also *Com. v. Rose*, (Ky. 1900) 54 S. W. Rep. 863.

4. **Prompt.** — *McKnight v. Whipple*, 25 Colo. 469, *quoting* *Webst. Dict.*

5. *Tobias v. Lissberger*, 105 N. Y. 412, 59 Am. Rep. 509.

A wholesale merchant replied to an order for goods that "the same shall have *prompt* attention." In construing this reply, the court said: "The operative words are 'attention' and *prompt*. The latter, when read in connection with the term of the proposal, that the shoes should be shipped on the succeeding 15th of June, signifies and was intended to signify no more than that attention would be given in time to meet this term. If given within that time, it was as speedy as the nature or necessities of the transaction required." *Manier v. Appling*, 112 Ala. 668.

6. **Promptly.** — *Denver v. Moewes*, 15 Colo. App. 28, in which case it was held that it was error to instruct a jury in an action for damages for personal injuries, alleged to have been suffered by the plaintiff through the negligence of the defendant, that it was the duty of the city to repair *promptly* an alleged defect in a street after the city had knowledge of its existence. The court said: "The city might fail to repair a defect *promptly*, and at the same time might use such reasonable diligence in discharging the duty as would relieve it from liability for accident." See also the title STREETS AND SIDEWALKS.

7. **Promulgation.** — The law of master and servant requires that proper rules for the

government of a servant shall be *promulgated* by the master. See the title MASTER AND SERVANT, vol. 20, p. 102. Upon the meaning of *promulgation*, as thus used, the court said in *Wooden v. Western New York, etc., R. Co.*, (Buffalo Super. Ct. Gen. T.) 18 N. Y. Supp. 769: "*Promulgation* is to make known. It means that such rule shall be brought to the attention of the servants affected thereby, or that it be given such publicity as that the servant, in the proper discharge of his duties, is bound to take notice of it when knowledge is presumed. If the rule was not upon the bulletin board when deceased entered the employment, then as to him there was no *promulgation*, and he was not bound to take notice of it; and search is vain to show that he received information from any other source, or from that. Whether this was a proper *promulgation* of the rule, as to deceased, I think was a question for the jury."

8. **Pronounce.** — *Ex p. Crawford*, 36 Tex. Crim. 181.

9. **Proof.** — *Powell v. State*, 101 Ga. 9, *quoting* *Black's L. Dict.*

"*Proof* is that quantity of appropriate evidence which produces assurance and certainty." *Buffalo, etc., R. Co. v. Reynolds*, (Supm. Ct. Spec. T.) 6 How. Pr. (N. Y.) 98.

Evidence Before Court or Jury. — "*Proof*, in strict legal construction, means evidence before a court or jury, in a judicial way." *Lenox v. United Ins. Co.*, 3 Johns. Cas. (N. Y.) 225.

Full Proof is evidence which satisfies the mind of the truth of the facts in dispute, to the entire exclusion of every reasonable doubt. *Kane v. Hibernia Mut. F. Ins. Co.*, 38 N. J. L. 450.

Of Proof — Hereof. — A statute required that the oaths of the assessors to an assessment roll should state that they had estimated the value of the real estate in accordance with the judgment of the majority of them, "with the exception of those cases in which the value of said estate has been changed by reason of

as synonymous with each other; but the former is applied, by the most accurate logicians, to the effect of evidence, and not to the medium by which truth is established.¹

II. Proof means the act of testing the strength of alcoholic spirits; also the degree of strength, as high proof, first proof, second, third, and fourth proof. In the internal revenue law, it is used in the sense of degree of strength.²

PROOF OF LOSS. — See the titles FIRE INSURANCE, vol. 13, p. 326 *et seq.*; INSURANCE, vol. 16, p. 959; MARINE INSURANCE, vol. 19, p. 1074 *et seq.*

proof produced before us." It appeared that in an oath to an assessment roll of a certain year, instead of the statutory words "of *proof*" the word "hereof" was inserted. This was held a fatal variance. *Shattuck v. Bascomb*, 105 N. Y. 40.

1. **Proof and Evidence.** — 1 *Greenleaf on Evidence* (16th ed.), § 1. See also *Hall v. State*, 40 Ala. 707; *Schloss v. His Creditors*, 31 Cal. 203; *Tift v. Jones*, 77 Ga. 181; *Perry v. Dubuque Southwestern, etc., R. Co.*, 36 Iowa 106; *Jastrzembski v. Marxhausen*, 120 Mich. 677; *People v. Beckwith*, 108 N. Y. 73.

That Proof Is Frequently Used as a Synonym of Evidence, see *O'Reilly v. Guardian Mut. L. Ins. Co.*, 60 N. Y. 173.

In *Hill v. Watson*, 10 S. Car. 268, the term *proof*, as used in a *South Carolina* statute (Acts 1869, p. 214) providing that a judgment might be set aside on "satisfactory *proof*," was held to be synonymous with "evidence."

Proof Means Competent Evidence. — In *Hill v. Hunt*, 20 N. J. L. 476, the court said that *proof* "is a technical word, used in a technical sense, and implies the application, to some extent, of those rules under which evidence is ordinarily admitted; as, thus, a party to the record, and having a direct interest in the event of the suit, cannot be a witness for himself at the trial against the adverse party." See also *Stanley v. Horner*, 24 N. J. L. 513.

A statute gave jurisdiction to justices of the peace to entertain actions for penalties "upon receiving *proof* by affidavit or affidavits of one or more persons of the violation of any of the provisions of this act." In construing this statute, the court said: "The word *proof*, when used in a legislative enactment, means 'competent and legal evidence,' or, in other

words, testimony that conforms to the fundamental rules of *proof*, one of which excludes 'hearsay evidence, however trustworthy the informant, or however implicit may be the deponent's belief in the truth of what he has heard.'" *Inglis v. Schreiner*, 58 N. J. L. 122. See also the title INFORMATION AND BELIEF, 10 ENCYC. OF PL. AND PR. 854.

The word *proof* means legal evidence or such species of evidence as would be received in the ordinary course of judicial proceedings. *Vosburgh v. Welch*, 11 Johns. (N. Y.) 175; *Brown v. Hinchman*, 9 Johns. (N. Y.) 75; *Betts v. Betts*, 1 Johns. Ch. (N. Y.) 199.

Same — Necessary Proof. — The *Alabama* Code (now Civ. Code 1896, § 3372, subdiv. 7), authorizes judges of probate to complete minute entries and decrees in their courts when the same are incomplete, after necessary application and *proof*. In *Dabney v. Mitchell*, 54 Ala. 200, this was held to be merely declaratory of the common law. The court said: "When words of this kind are used in a statute and are not defined, we must look to the common law for the meaning which can properly be given them. It is the evidence or the *proof*, as it is the application, required by the common law, which it must be supposed the statute requires to be made, and not evidence or *proof* the common law rejected as inadmissible or insufficient."

Proof Is Evident and Presumption Strong. — See the title BAIL AND RECOGNIZANCE, vol. 3, p. 668.

Satisfactory Proof. — See SATISFACTORY.

2. **Spirits.** (See also the title REVENUE LAWS.) — *Louisville Public Warehouse Co. v. Collector of Customs*, (C. C. A.) 49 Fed. Rep. 568.

Proof Gallons. — See GALLON, vol. 14, p. 575.

PROOF OF OTHER CRIMES.

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CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *CRIMINAL LAW*, vol. 8, p. 274; *EVIDENCE*, vol. 11, p. 484; *JEOPARDY*, vol. 17, p. 580; *MERGER*, vol. 20, p. 587, and the titles wherein specific offenses are treated.

I. GENERAL RULE EXCLUDING PROOF OF OTHER CRIMES. — All evidence is required to be logically relevant.¹ This is a rule of logic and law alike. But the law, having regard to the character of the tribunal which tries questions of fact, excludes certain classes of evidence logically relevant, the introduction of which, if allowed, would tend to raise collateral issues, distracting and confusing the minds of the jury, and to surprise the prisoner.² Thus have grown up a number of "rules of exclusion,"³ among which is the general rule that a crime distinct from that laid in the indictment cannot be given in evidence against the prisoner.⁴

1. **Relevancy.** — See the title *EVIDENCE*, vol. 11, p. 501.

Collateral Facts Excluded. — Collateral facts or those having no connection with the facts in issue are excluded to preserve the relevancy of the evidence, and the rule investigated in this title is but a special case of this principle. *Farris v. People*, 129 Ill. 528, 16 Am. St. Rep. 283. See the title *EVIDENCE*, vol. 11, p. 503, and see *COLLATERAL*, vol. 6, p. 205.

The Rule Applies in Civil as Well as in Criminal Cases, but the necessity for its observance is greater in criminal cases, and it is more strictly enforced in them. *Blake v. Albion L. Assur. Soc.*, 4 C. P. D. 94; *Ingram v. State*, 39 Ala. 251, 84 Am. Dec. 782; *Farris v. People*, 129 Ill. 528, 16 Am. St. Rep. 283; *State v. Stevens*, 56 Kan. 720; *Lightfoot v. People*, 16 Mich. 507; *Dyson v. State*, 26 Miss. 362; *Hudson v. State*, 3 Coldw. (Tenn.) 355; 3 Russ. on Crimes (9th Am. ed.) 279; 1 Roscoe's Crim. Ev. (8th Am. ed.) 92.

2. **Reasons for Excluding Collateral Facts.** — See the title *EVIDENCE*, vol. 11, p. 503; *Thayer* on Evidence 266, 516. See also *Rex v. Whitley*, 2 Leach C. C. 983, *sub nom.* *Rex v. Wylie*, 1 B. & P. N. R. 92; *Boyd v. U. S.*, 142 U. S. 450, *reversing* 45 Fed. Rep. 851; *Gassenheimer v. State*, 52 Ala. 318; *Billings v. State*, 52 Ark. 309; *People v. Sanders*, 114 Cal. 230; *Farris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283; *Com. v. Merriam*, 14 Pick. (Mass.) 518, 25 Am. Dec. 420; *Temperance Hall Assoc. v. Giles*, 33 N. J. L. 260 (*quoted* under the title *EVIDENCE*, vol. 11, p. 509, note 3); *State v. Brantley*, 84 N. Car. 766.

3. **"Rules of Exclusion."** — *Thayer* on Evidence 265.

4. **Evidence of Distinct Crimes Generally Excluded.** — In *State v. Lapage*, 57 N. H. 289, 24 Am. Rep. 75, the rule was stated in the following propositions: First. It is not permitted to attack the prisoner's character unless he first puts it in issue. (See the titles *CHAR-*

II. EXCEPTIONS TO RULE — 1. In General. — Ordinarily the Rule of Exclusion Is Also the Rule of Logic, for the commission of an independent offense is not in itself proof of the commission of another crime.¹

Principle on Which Exceptions Are Admitted. — Cases, however, occur where the crime laid in the indictment is so connected with the crime of which it is sought to introduce evidence that the existence of the one tends to establish the existence of the other, or (which is frequently the same thing) the existence of the collateral crime tends to show the presence of some element necessary to the crime charged.²

ACTER (IN EVIDENCE), vol. 5, p. 854; **EVIDENCE,** vol. 11, p. 518.) Second. Particular acts are not admissible to show the defendant's bad character. (See the title **CHARACTER (IN EVIDENCE),** vol. 5, p. 875.) Third. A tendency or disposition to commit the crime with which the prisoner is charged cannot be shown. (See *infra*, this title, *Exceptions to Rule — In General.*) Fourth. "It is not permitted to give in evidence other crimes of the prisoner unless they are so connected by circumstances with the particular crime in issue as that the proof of one fact with its circumstances has some bearing upon the issue on trial other than such as is expressed in the foregoing three propositions."

"By the law of England one offense is not allowed to be given in evidence to prove another." *Per* Lord Campbell, C. J., in *Reg. v. Oddy*, 5 Cox C. C. 210. See also to the same effect:

United States. — *Boyd v. U. S.*, 142 U. S. 450, reversing 45 Fed. Rep. 851.

Alabama. — *Maxwell v. State*, 129 Ala. 48.

California. — *People v. Jones*, 32 Cal. 81; *People v. McNutt*, 64 Cal. 116; *People v. Von*, 78 Cal. 1; *People v. Lane*, 100 Cal. 379.

Georgia. — *Whilden v. State*, 25 Ga. 396, 71 Am. Dec. 181.

Illinois. — *Towne v. People*, 89 Ill. App. 258; *Baker v. People*, 105 Ill. 452; *Farris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283; *Addison v. People*, 193 Ill. 405.

Indiana. — *Smith v. State*, 10 Ind. 106; *Bonsall v. State*, 35 Ind. 462.

Iowa. — *State v. Sterrett*, 71 Iowa 386.

Kentucky. — *Wyatt v. Com.*, (Ky. 1886) 1 S. W. Rep. 196; *Combs v. Com.*, (Ky. 1893) 21 S. W. Rep. 352; *Spurlock v. Com.*, (Ky. 1893) 20 S. W. Rep. 1095, 14 Ky. L. Rep. 605.

Louisiana. — *State v. Patza*, 3 La. Ann. 512.

Massachusetts. — *Com. v. M'Pike*, 3 Cush. (Mass.) 181, 50 Am. Dec. 727.

Michigan. — *People v. Ascher*, 126 Mich. 637.

Mississippi. — *Kearney v. State*, 68 Miss. 233.

Missouri. — *State v. Martin*, 74 Mo. 547; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389; *State v. Young*, 119 Mo. 495.

Montana. — *State v. Geddes*, 22 Mont. 68.

Nebraska. — *Cowan v. State*, 22 Neb. 519.

New Hampshire. — *State v. Palmer*, 65 N. H. 216.

New Jersey. — *State v. Raymond*, 53 N. J. L. 260.

New Mexico. — *Roper v. Territory*, 7 N. Mex. 255.

New York. — *People v. Sharp*, 107 N. Y. 467; *People v. Molineux*, 168 N. Y. 264; *People v. Hopson*, 1 Den. (N. Y.) 574; *People v. Flanigan*, 42 N. Y. App. Div. 318.

North Carolina. — *State v. Murphy*, 84 N. Car. 742.

Ohio. — *Coble v. State*, 31 Ohio St. 100; *Knight v. State*, 54 Ohio St. 379.

Pennsylvania. — *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649; *Snyder v. Com.*, 85 Pa. St. 519; *Goersen v. Com.*, 99 Pa. St. 398; *Com. v. Wilson*, 186 Pa. St. 1.

Tennessee. — *Stone v. State*, 4 Humph. (Tenn.) 27.

Texas. — *Campbell v. State*, 35 Tex. Crim. 160.

Utah. — *People v. Hancock*, 7 Utah 170.

Vermont. — *State v. Kelley*, 65 Vt. 531, 36 Am. St. Rep. 884.

Virginia. — *Walker v. Com.*, 1 Leigh (Va.) 574; *Hodges v. Com.*, 89 Va. 265.

West Virginia. — *Watts v. State*, 5 W. Va. 532.

Wisconsin. — *Schaser v. State*, 36 Wis. 429.

Canada. — *Reg. v. Lapierre*, 1 Can. Crim. Cas. (Quebec) 413.

See also the titles **DISORDERLY HOUSES**, vol. 9, p. 536; **EVIDENCE**, vol. 11, p. 513, note; **LARCENY**, vol. 18, p. 495.

Proximity of Time and Place does not render such evidence admissible. *People v. Tucker*, 104 Cal. 440; *Lebkovitz v. State*, 113 Ind. 26.

Evidence of Distinct Offenses Not Admissible in Aggravation of Offense or Fine. — *Rex v. Turner*, 1 Stra. 139; *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *Baker v. State*, 4 Ark. 61.

To Establish Agency in a Criminal Case evidence of similar prior offenses is not admissible. *People v. McLaughlin*, 150 N. Y. 366. See also *Reg. v. Francis*, L. R. 2 C. C. 130, *Blackburn, J., explaining Reg. v. Holt*, Bell Cr. Cas. 280.

Proof of the Fact that a Criminal Charge Has Been Made Against the Defendant before the crime for which he is on trial, by some third person against whom the crime alleged in the indictment is directed, may be given to establish motive, and does not violate the rule where the truth of the charge is not investigated. *Carden v. State*, 84 Ala. 417; *People v. Miller*, 121 Cal. 343; *State v. Geddes*, 22 Mont. 68; *Robinson v. State*, 16 Tex. App. 347. And see *State v. Fortenot*, 48 La. Ann. 305.

1. Exclusive Logical Rule in Ordinary Cases. — *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649.

2. Other Crime Establishing Offense or Element Thereof. — *Rex v. Whitley*, 2 Leach C. C. 983, 1 B. & P. N. R. 92; *Baker v. State*, 4 Ark. 567; *State v. Nugent*, 71 Mo. 136; *Weed v. People*, 56 N. Y. 628. See also *infra*, this section, *To Prove Identity of Criminal; To Prove Common Plan; Res Gestæ, Same Transaction.*

Connection Between Crimes Must Clearly Appear. — *People v. Lane*, 100 Cal. 379; *Farris v. Peo-*

Whether Principle or Precedent Determines Exceptions — Exceptions, therefore, to the generality of the rule of exclusion have been introduced. But the courts are not agreed upon the terms or the extent of the exceptions. Sometimes it is stated that the exclusion of such evidence is founded on the illegality of giving evidence of other crimes merely for the purpose of thereby inferring the defendant's guilt of the crime for which he is on trial, on the ground that he is of a criminal disposition,¹ and it would seem logically to follow that where such evidence can be shown in any way to establish the defendant's guilt of the crime for which he is being tried, its introduction should be permitted.² Many of the exceptions, however, are old and well fixed, and courts take their stand on these established exceptions and will not allow the introduction of evidence of independent offenses unless the particular instance can be shown to fall under one of these recognized classes.³

Discretion of Court. — But a good deal appears to rest on the discretion of the judge as to whether such a connection between the crimes is shown as to warrant its introduction.⁴

ple, 129 Ill. 521, 16 Am. St. Rep. 283; *State v. Wackernagel*, (Iowa 1902), 91 N. W. Rep. 761; *State v. Snyder*, (Iowa 1902) 91 N. W. Rep. 765; *State v. Lapage*, 57 N. H. 245, 24 Am. Rep. 69 (stated under the title EVIDENCE, vol. II, p. 507, note); *People v. Shulman*, 80 N. Y. 376, note (quoted under the title FALSE PRETENSES AND CHEATS, vol. 12, p. 862, note); *People v. McLaughlin*, 150 N. Y. 366; *State v. Vinson*, 63 N. Car. 335; *Shaffner v. Com.*, 72 Pa. St. 65, 13 Am. Rep. 649. See also the title EVIDENCE, vol. II, p. 502.

Visible Reasonable Connection Necessary. — *State v. Brantley*, 84 N. Car. 766.

Connection Existing in Mind of Defendant. — *Brown v. State*, 26 Ohio St. 176. And see *infra*, this section, *To Prove Common Plan*.

Connection Not Established. — For certain cases excluding the evidence of other crimes as not connected with that on trial, see *Sutton v. Johnson*, 62 Ill. 209; *Farris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283; *Bishop v. People*, 194 Ill. 365; *State v. Stevens*, 56 Kan. 722; *Cotton v. State*, (Miss. 1895) 17 So. Rep. 372; *State v. Renton*, 15 N. H. 169; *Roper v. Territory*, 7 N. Mex. 255; *People v. Flanigan*, 42 N. Y. App. Div. 318; *Farrer v. State*, 2 Ohio St. 54.

1. Other Disconnected Offenses No Evidence of Defendant's Guilt nor of His Criminal Disposition. — *People v. Jones*, 31 Cal. 566; *Parkinson v. People*, 135 Ill. 404; *Com. v. Turner*, 3 Met. (Mass.) 19; *Com. v. Scott*, 123 Mass. 222, 25 Am. Rep. 81; *State v. Lapage*, 57 N. H. 289; *People v. Shea*, 147 N. Y. 78.

2. View that if Other Crime Is Logically Pertinent It Is Admissible. — *People v. Molineux*, 168 N. Y. 264, *per Parker*, C. J.

"Although the evidence offered may be proof of another felony, that circumstance does not render it inadmissible if the evidence be otherwise receivable." *Reg. v. Dossett*, 2 C. & K. 306, 61 E. C. L. 306, *per Maule*, J.

For other general statements tending to the same result, see also *Starkie on Evidence* (10th Am. ed.) 618, and the following cases:

United States. — *Moore v. U. S.*, 150 U. S. 57; *Goldsby v. U. S.*, 160 U. S. 70.

Arkansas. — *Austin v. State*, 14 Ark. 555; *Billings v. State*, 52 Ark. 303.

California. — *People v. Cunningham*, 66 Cal.

668; *People v. Walters*, 98 Cal. 138; *People v. Sanders*, 114 Cal. 230.

Illinois. — *Farris v. People*, 129 Ill. 521, 16 Am. St. Rep. 283.

Kansas. — *State v. Folwell*, 14 Kan. 105; *State v. Adams*, 20 Kan. 311; *State v. Reed*, 53 Kan. 766, 42 Am. St. Rep. 322.

Massachusetts. — *Com. v. Choate*, 105 Mass. 451.

Michigan. — *People v. Doyle*, 21 Mich. 221; *People v. Marble*, 38 Mich. 123; *People v. Wilson*, 55 Mich. 506.

Montana. — *State v. Geddes*, 22 Mont. 68.

New Hampshire. — *State v. Palmer*, 65 N. H. 216.

New Jersey. — *State v. Raymond*, 53 N. J. L. 260.

New York. — *People v. Van Tassel*, 156 N. Y. 561.

Wisconsin. — *Halleck v. State*, 65 Wis. 147.

3. Further Exceptions Not to Be Added. — *Ingram v. State*, 39 Ala. 247, 84 Am. Dec. 782; *People v. McLaughlin*, 150 N. Y. 366; *People v. Molineux*, 168 N. Y. 264; *Knight v. State*, 54 Ohio St. 381.

4. Discretion of Trial Court. — *Reg. v. Harris*, 4 F. & F. 342; *Moore v. U. S.*, 150 U. S. 57; *People v. Cunningham*, 66 Cal. 668; *Hatcher v. State*, 18 Ga. 460; *State v. Lapage*, 57 N. H. 245; *Hendrickson v. People*, 10 N. Y. 13, 61 Am. Dec. 721; *Shaffner v. Com.*, 72 Pa. St. 65, 13 Am. Rep. 649.

Something More than Bare Relevancy Is Required, for the law does not permit a decision on remote inferences. See the title EVIDENCE, vol. II, p. 501. And see *Thayer on Evidence* 516; *Best on Evidence* (Chamberlayne's ed.), § 90.

The Interval of Time Intervening Between the Acts goes in general to the weight and not to the admissibility of the evidence. *Spurr v. U. S.*, (C. C. A.) 87 Fed. Rep. 711; *Mudsill Min. Co. v. Watrous*, 22 U. S. App. 12, 61 Fed. Rep. 163; *U. S. v. Doebler*, *Baldw. (U. S.)* 519; *U. S. v. Thirty-Six Barrels High Wines*, 12 Int. Rev. Rec. 40, 28 Fed. Cas. No. 16,469; *State v. Hoyt*, 46 Conn. 330; *People v. Shulman*, 80 N. Y. 376, note (quoted under the title FALSE PRETENSES AND CHEATS, vol. 12, p. 862, note); *State v. Kent*, 5 N. Dak. 516.

But a considerable interval would seem to

Classes of Exceptions Not Mutually Exclusive. — The various established classes of exceptions will now be examined in detail, but it should be borne in mind that the evidence is often admissible under more than one head. Moreover, a perfectly exclusive classification is impossible, as the classes shade into each other by imperceptible degrees, and the placing of particular examples is sometimes almost arbitrary.

Mental State Generally. — It is where, in establishing or interpreting the acts of the accused, some inference as to his state of mind is necessary that evidence of independent offenses is usually permitted.¹ States of mind — psychological facts, as they have been termed² — can rarely be shown by direct evidence, and must generally be inferred from acts.³ Frequently the surest inference as to intent (*i. e.*, guilty knowledge) can be founded on the fact that the defendant has been guilty of other like acts in the past.⁴

2. To Prove Intent and Guilty Knowledge. — In all crimes⁵ a guilty mind or criminal intent must exist. This may be involved in the doing of the act, or a particular intent apart from the doing of the act may be required.⁶ In the latter class of cases especially, proof of independent criminal acts of like kind may be given.⁷ Thus, the fact that a man has previously passed similar counterfeit money lessens the chance of accident and may warrant the jury in inferring a guilty knowledge of the character of the money and therefore a criminal intent.⁸ The same principle is applied in numerous other crimes.⁹ Such

justify the court in the exercise of a fair discretion in excluding such evidence. See *Com. v. Abbott*, 130 Mass. 472. Thus, the evidence of crimes two years before has been excluded. *Billings v. State*, 52 Ark. 303. Evidence of crimes fifteen years before is inadmissible. *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322.

Establishment of Other Crimes. — In forgery and counterfeiting it must be proved that the bills passed on other occasions were actually forged. *Rex v. Millard, R. & R. C. C.* 245, 1 *Lewin C. C.* 107, note. And see *Rex v. Forbes*, 7 C. & P. 224, 32 E. C. L. 497, and the title *FORGERY*, vol. 13, p. 1110. And the bills must be produced. *Dougherty's Case*, 4 City Hall Rec. (N. Y.) 166. But compare *infra* this section, *passim*, especially the subsection *To Negative Accident, Mistake, or Good Faith*, notes, where this rule is shown to be not of general application.

That an Indictment Is Pending for the Other Offenses sought to be shown is no ground of objection. *Kirkwood's Case*, 1 *Lewin C. C.* 103; *Hawes v. State*, 88 Ala. 37. See also *Hodgson's Case*, 1 *Lewin C. C.* 103.

The Record of a Conviction may likewise be given in evidence where the conviction is relevant to show motive. *Crass v. State*, 31 Tex. Crim. 312.

As to the Similarity of Bills Counterfeited to one whose counterfeiting is on trial, see the title *COUNTERFEITING*, vol. 7, p. 891, note.

1. Especially Where Mental State Material. — *Wood v. U. S.*, 16 Pet. (U. S.) 342; *Continental Ins. Co. v. Pennsylvania Ins. Co.*, 1 U. S. App. 212; *Bottomley v. U. S.*, 1 Story (U. S.) 135; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *Farmer v. State*, 100 Ga. 41; *State v. Hinkle*, 6 Iowa 380; *Com. v. Stone*, 4 Met. (Mass.) 47; *Barron v. Mason*, 31 Vt. 189. See also the title *EVIDENCE*, vol. 11, p. 506.

2. Psychological Facts. — Best on Evidence (Chamberlayne's ed.), § 255.

3. Circumstantial Evidence Usually Necessary. — *Castle v. Bullard*, 23 How. (U. S.) 172; *Moore v. U. S.*, 150 U. S. 57; *Com. v. Stone*, 4 Met. (Mass.) 47. And see quotation from *Mullins v. State*, 37 Tex. 338, under the title *CRIMINAL LAW*, vol. 8, p. 287.

4. See *Rex v. Whiley*, 2 Leach C. C. 983, *sub nom. Rex v. Wylie*, 1 B. & P. N. R. 92; *Spurr v. U. S.*, (C. C. A.) 87 Fed. Rep. 710.

Subsequent as Well as Prior Acts are sometimes admitted to prove intent, etc. *U. S. v. Doebler, Baldw.* (U. S.) 526 (counterfeiting); *People v. Walters*, 98 Cal. 138; *People v. Craig*, 111 Cal. 460. See *infra*, this section, *To Negative Accident, Mistake, or Good Faith; To Prove Motive*. And see the title *FORGERY*, vol. 13, p. 1103.

Subsequent Crimes Excluded under Circumstances. — In *People v. Dibble*, (Ct. App.) 5 Park Crim. (N. Y.) 28, a case of counterfeiting, the utterance of forged bills on another bank two or three days after the crime charged was excluded.

A shooting a few minutes after the assault was excluded as evidence in *People v. Lane*, 100 Cal. 379, the acts not being connected. See also, to the same effect, *State v. Hoyt*, 13 Minn. 132.

5. Statutory Offenses Where Intent Immaterial. — See the title *CRIMINAL LAW*, vol. 8, p. 291, and references there given.

6. Criminal Intent Involved in Act and Special Criminal Intent. — See the title *CRIMINAL LAW*, vol. 8, pp. 284, 287, 296.

7. Other Crimes Provable on Issue of Intent and Guilty Knowledge. — See the title *EVIDENCE*, vol. 11, pp. 506, 513.

8. Counterfeiting. — See the title *COUNTERFEITING*, vol. 7, p. 890 *et seq.* See also *Rex v. Balls*, 1 Moody 470; *Tharp v. State*, 15 Ala. 749; *People v. Clarkson*, 56 Mich. 164.

9. Assault. — See the title *ASSAULT AND BATTERY*, vol. 2, p. 1001.

Common Gambler. — *Courtney v. State*, 5 Ind.

evidence may likewise be introduced in corroboration of other evidence establishing guilty knowledge or intent.¹

App. 356; *Com. v. Hopkins*, 2 Dana (Ky.) 418. But see generally the titles GAMING, vol. 14, p. 690; GAMING HOUSES, vol. 14, p. 726.

Embezzlement. — See the title EMBEZZLEMENT, vol. 10, p. 1033.

Exposure of Person. — See the title EXPOSURE OF PERSON, vol. 12, p. 540, note.

Extortion. — State *v. Lewis*, 96 Iowa 286. See also the title THREATS AND THREATENING LETTERS.

False Pretenses. — See the title FALSE PRETENSES AND CHEATS, vol. 12, p. 862. See also *Reg. v. Roebuck, Dears. & B.* 24; *Reg. v. Cooper*, 1 Q. B. D. 19; *State v. Brady*, 100 Iowa 191, 62 Am. St. Rep. 560; *People v. Ascher*, 126 Mich. 637; *State v. Myers*, 82 Mo. 558, 52 Am. Rep. 389.

Forgery. — See the title FORGERY, vol. 13, p. 1109. And as to uttering forged papers, see the same title, vol. 13, pp. 1103, 1112. See also *Rex v. Ball*, 1 Campb. 321, R. & R. C. C. 132; *Rex v. Millard*, R. & R. C. C. 245; *Kirkwood's Case*, 1 Lewin C. C. 104; *Rex v. Hough*, R. & R. C. C. 120; *Reg. v. Colclough*, 15 Cox C. C. 92; *People v. Sanders*, 114 Cal. 216.

Fraud. — *Rex v. Roberts*, 1 Campb. 399; U. S. *v. Kenney*, 90 Fed. Rep. 257. See also the titles EVIDENCE, vol. 11, pp. 510, 513; FRAUD AND DECEIT, vol. 14, p. 196; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 498 *et seq.*

Fraudulent Returns by Postmaster. — U. S. *v. Snyder*, 4 McCrary (U. S.) 621.

Illicit Intercourse Between Sexes. — For the proof of any crime or charge which involves illicit intercourse between the sexes, previous or subsequent acts of familiarity between the parties may be shown to establish the character of the association charged. See the titles ADULTERY (AS A CRIME), vol. 1, p. 753; DIVORCE, vol. 9, p. 757; FORNICATION, vol. 13, p. 1124 *et seq.*; INCEST, vol. 16, p. 139; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 845, note; RAPE, *post.*

Keeping Intoxicating Liquors, etc. — See the title INTOXICATING LIQUORS, vol. 17, pp. 326, 374. See also *State v. Coulter*, 40 Kan. 87 (to show that liquor sold was intoxicating), *State v. Elliott*, 45 Kan. 525 (to show that sale was for use as beverage).

Kidnapping. — *Com. v. Turner*, 3 Met. (Mass.) 19. But see *Cole v. Com.*, 5 Gratt. (Va.) 696.

Larceny. — See the title LARCENY, vol. 18, pp. 495, 511. See also *Crum v. State*, 148 Ind. 401; *Lewis v. State*, 4 Kan. 253; *Moore v. State*, 28 Tex. App. 377; *State v. Kelley*, 65 Vt. 531, 36 Am. St. Rep. 884.

Libel. — See the title LIBEL AND SLANDER, vol. 18, p. 1011, note 1. See also *State v. Riggs*, 39 Conn. 495.

Mailing Threatening or Obscene Letter. — *Rex v. Robinson*, 2 Leach C. C. 749; *Thomas v. State*, 103 Ind. 419. See also the title THREATS AND THREATENING LETTERS.

Malicious Mischief in Killing Animals. — *Rex v. Mogg*, 4 C. & P. 364, 19 E. C. L. 420. Compare *Smith v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 27, where the evidence was excluded on the ground that no connection between the offenses was established.

Obstructing Railway Track. — *Barton v. State*, 28 Tex. App. 483.

Offenses under National Banking Acts. — *Spurr v. U. S.*, (C. C. A.) 87 Fed. Rep. 701, *reversed* on another point, 174 U. S. 728. And see the title NATIONAL BANKS, vol. 21, p. 362.

Perjury. — *State v. Raymond*, 20 Iowa 582.

Rape. — See the title RAPE, *post.* See also the title ASSAULT AND BATTERY, vol. 2, p. 1001, for assaults with intent to rape.

Receiving Stolen Property. — See the title RECEIVING STOLEN PROPERTY, *post.*

Removal of Dead Body. — *State v. Lowe*, 6 Kan. App. 110.

Selling Skimmed Milk. — See the title ADULTERATION, vol. 1, p. 744, note.

Sodomy. — *State v. Place*, 5 Wash. 773.

Soliciting Bribes. — *Higgins v. State*, 157 Ind. 57; *State v. Durnam*, 73 Minn. 150.

Violation of Revenue Laws. — *Wood v. U. S.*, 16 Pet. (U. S.) 342.

Wilfully Disturbing Peace of Neighborhood. — *State v. Burns*, 35 Kan. 387.

Establishing Deliberation or Malice in Murder. — *State v. Deschamps*, 42 La. Ann. 567, 21 Am. St. Rep. 392; *People v. Shea*, 147 N. Y. 78. See also *infra*, this section, *To Prove Motive*. And see the title EVIDENCE, vol. 11, p. 513.

Knowledge of Character of Drug and Purpose of Administration. — *Weed v. People*, 56 N. Y. 628. See also *infra*, this section, *To Prove Common Plan*. And see the title EVIDENCE, vol. 11, p. 508.

Criminal Negligence — Not Admissible. — When the charge is homicide flowing from a surgeon's criminal negligence, the result of the surgeon's treatment of former cases is not relevant either for or against him. *Reg. v. Whitehead*, 3 C. & K. 202. See also the title PHYSICIANS AND SURGEONS, vol. 22, p. 809.

Such evidence is generally inadmissible where the homicide is chargeable to negligence. *People v. Thompson*, 122 Mich. 411. See further the title NEGLIGENCE, vol. 21, p. 518. Compare, however, the titles EVIDENCE, vol. 11, pp. 510, 512; FIRES, vol. 13, p. 518.

In Some Civil Cases such evidence is admissible, as in cases of:

Divorce. — See the title DIVORCE, vol. 9, p. 757.

Fraud. — See the titles FRAUD AND DECEIT, vol. 14, p. 196 *et seq.*; FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 499. And see *Mud-sill Min. Co. v. Watrous*, 22 U. S. App. 12, 61 Fed. Rep. 163; *Edwards v. Warner*, 35 Conn. 517; *Knotwell v. Blanchard*, 41 Conn. 614.

False Answers in Applications for Insurance. — See the title INSURANCE, vol. 16, p. 960.

Fires by Locomotives. — See the title FIRES, vol. 13, p. 518.

Libel. — To show malice. *Barrett v. Long*, 3 H. L. Cas. 414.

Malicious Prosecution. — To rebut inference of malice and show probable cause. *Barron v. Mason*, 31 Vt. 189.

Passing Notes Knowing Payee to Be Fictitious. — *Gibson v. Hunter*, 2 H. Bl. 288.

1. Corroboration of Inference of Guilty Intent. — *State v. Balch*, 136 Mo. 103; *State v. Moore*, 101 Mo. 316; *Proper v. State*, 85 Wis. 615.

3. To Negative Accident, Mistake, or Good Faith. — Falling really under the same exception as that previously stated as to intent are the cases where independent crimes are admitted in evidence to show that the act charged was done purposely, and was not the result of accident or mistake, nor done in good faith.¹ The main difference between cases usually placed under this head and those previously considered under intent is that here the act is itself evidence of the intent, while there an extraneous intent must exist. Proof of distinct offenses is also introduced to establish the criminal act, the *corpus delicti*,² consisting in the felonious use of dangerous agencies.³ Such are cases of prior or subsequent crimes under circumstances similar to the case on trial,⁴ or prior attempts at the commission of the same crime, to show the absence of mistake or accident.⁵ Such prior attempts have sometimes been

1. On Issue of Accident or Good Faith. — Penn Mut. L. Ins. Co. v. Mechanic's Sav. Bank, etc., Co., 37 U. S. App. 692, 72 Fed. Rep. 413. See also the titles EVIDENCE, vol. II, p. 513; INSURANCE, vol. 16, p. 960.

Act Not Done in Good Faith. — Rex v. Winkworth, 4 C. & P. 444, 19 E. C. L. 465.

2. Previous Crimes to Establish Corpus Delicti. Reg. v. Flannagan, 15 Cox C. C. 403; Reg. v. Bailey, 2 Cox. C. C. 311.

Simultaneous Murders. — State v. Tettaton, 159 Mo. 354.

Sale of Slave Without License. — Chambers v. State, 26 Ala. 59 (previous sale admitted to show that defendant was slave trader). See also Taylor v. Horsey, 5 Harr. (Del.) 131.

3. That Use of Agencies Was Felonious. — See State v. Kelley, 65 Vt. 534. Illustrations are given in the next note, *infra*.

4. Murders by Poisoning — *Previous Deaths.* — Where a murder is alleged to have been committed by poisoning, it may be shown that other persons who had previously received food or medicine from the defendant had died from the same poison. Reg. v. Garner, 3 F. & F. 681, 4 F. & F. 346; Reg. v. Cotton, 12 Cox C. C. 400; Reg. v. Flannagan, 15 Cox C. C. 403 [*disapproving* Reg. v. Winslow, 8 Cox C. C. 397]; Farrer v. State, 2 Ohio St. 71; Zoldoske v. State, 82 Wis. 581. See also People v. Doyle, 21 Mich. 221.

Subsequent Deaths. — Reg. v. Geering, 18 L. J. M. C. 215, *quoted in* Reg. v. Heesom, 14 Cox C. C. 40; Reg. v. Neill, *cited in* Stephen on Evidence (Chase's 2d ed.) 52, note 2.

In the first case, Pollock, C. B., observed that subsequent poisonings had a tendency to prove that the death under investigation was due to poison, and from this point of view the fact that they were subsequent was wholly immaterial. "The domestic history of the family," he continued, "during the period in which all the deaths occurred is also receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine whether such taking was accidental or not."

Murder of an Infant by Suffocation while in bed with the mother. Previous similar deaths in the same family may be proved. Reg. v. Roden, 12 Cox C. C. 630.

Murder of Infant by Keeper of "Baby Farm." — The body was found buried in the garden. Proof was admitted that in the gardens of houses previously occupied by the defendant the bodies of children were found buried.

Makin v. Atty-Gen., (1894) A. C. 57, 17 Cox C. C. 704.

Contemporaneous Death of Another Infant. — People v. Foley, 64 Mich. 148.

Abortion. — The fact that other abortions have been committed by the defendant in the same house is relevant on the issue of accident. People v. Seaman, 107 Mich. 348, 61 Am. St. Rep. 326. See also Hatchard v. State, 79 Wis. 357, stated under the title ABORTION, vol. I, p. 188, note 7. Compare Baker v. People, 105 Ill. 452.

Arson. — Property was set on fire by the prisoner by firing a gun. Evidence that the property had been on fire previously when the prisoner was near it with a gun was held to be admissible on the issue of accident. Reg. v. Dossett, 2 C. & K. 306, 61 E. C. L. 306. Where the charge was arson to obtain money from an insurance company, evidence of two previous fires in houses occupied by the defendant, followed by claims on insurance companies, was admitted in negating accident. Reg. v. Gray, 4 F. & F. 1102.

For other cases of arson, see Com. v. McCarthy, 119 Mass. 354; Com. v. Bradford, 126 Mass. 42; People v. Murphy, 135 N. Y. 450 (stated with other cases under the title ARSON, vol. 2, p. 940, note); Kramer v. Com., 87 Pa. St. 299.

Evidence of previous fires was excluded in Reg. v. Harris, 4 F. & F. 342, as having, under the circumstances detailed, no tendency to show design.

Assault. — To negative accident where the assault was by shooting, evidence of a previous intentional assault on the same person by the prisoner may be given. Rex v. Voke, R. & R. C. C. 531. To the same general effect is State v. Patza, 3 La. Ann. 512. See also the title ASSAULT AND BATTERY, vol. 2, p. 1001.

5. Previous Attempts to commit the same crime may be shown where these attempts are connected with the prisoner and directed against the same person or property. Rex v. Donnell, 2 C. & K. 307 note, 61 E. C. L. 307 note; Reg. v. Tawell, 2 C. & K. 309 note, 61 E. C. L. 309 note; People v. Ebanks, 117 Cal. 652; People v. Shainwold, 51 Cal. 468; Com. v. Kennedy, 170 Mass. 18; State v. Nugent, 71 Mo. 136, *affirming* 8 Mo. App. 563; People v. O'Sullivan, 104 N. Y. 481; Goersen v. Com. 99 Pa. St. 388, State v. Ward, 61 Vt. 153.

A Subsequent Attempt has been admitted. Lamb v. State, 66 Md. 285.

admitted even when they were unconnected with the defendant, as negating accident and therefore establishing the *corpus delicti*.¹

4. To Prove Motive. — In criminal cases depending on circumstantial evidence,² proof of motive is often of the highest importance,³ and independent criminal acts which flow from and are explainable as the results of the same motive charged in the case on trial,⁴ or which in themselves form the motive

1. Previous Attempts Unconnected with Defendant to Establish Corpus Delicti. — *Reg. v. Bailey*, 2 Cox C. C. 312, a case of arson before Pollock, C. B., who cited Donallan's Case, a murder trial, where prior unconnected attempts to bring about the death of the victim were admitted to prove the criminal fact. See also *People v. Clarkson*, 56 Mich. 164.

So previous crimes tending to throw suspicion on the prisoner may be shown. *State v. Rohfrisch*, 12 La. Ann. 382; *State v. Ward*, 61 Vt. 153.

2. See the title MURDER AND MANSLAUGHTER, vol. 21, p. 213.

3. Motive. — "Where the crime is clearly proved and the criminal positively identified, it is not important to prove motives. But where the case depends on circumstantial evidence and the circumstances point to any particular person as the criminal, the case against him is much fortified by proof that he had a motive to commit the crime. Where the motive appears, the probabilities created by the other evidence are much strengthened." *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, *per* Earl, J.

"To prove the intention you may show the motive." *Reg. v. Heesom*, 14 Cox C. C. 44, *per* Lush, J.

As to the nature of motive and the distinction between it and intention, see the titles CRIMINAL LAW, vol. 8, p. 290; EVIDENCE, vol. 11, p. 506. And see INTENT — INTENTION, vol. 16, p. 980; MOTIVE, vol. 20, p. 1077.

4. Proof of Motive Generally by Other Crimes. — See the title EVIDENCE, vol. 11, p. 506.

Acts Flowing from Same Motive — *United States*. — *Moore v. U. S.*, 150 U. S. 57.

Alabama. — *Hawes v. State*, 88 Ala. 37; *Horn v. State*, 102 Ala. 144.

Arkansas. — *Austin v. State*, 14 Ark. 555; *Melton v. State*, 43 Ark. 367.

California. — *People v. Walters*, 98 Cal. 138; *People v. Craig*, 111 Cal. 460.

Connecticut. — *State v. Green*, 35 Conn. 203.

Florida. — *Johnson v. State*, 24 Fla. 162; *Killins v. State*, 28 Fla. 313.

Idaho. — *State v. Davis*, (Idaho 1898) 53 Pac. Rep. 678.

Illinois. — *Lyons v. People*, 137 Ill. 603; *Siebert v. People*, 143 Ill. 571; *Painter v. People*, 147 Ill. 444.

Iowa. — *State v. Hinkle*, 6 Iowa 380; *State v. Walters*, 45 Iowa 389; *State v. Kline*, 54 Iowa 183.

Kentucky. — *O'Brien v. Com.*, 89 Ky. 362; *Franklin v. Com.*, 92 Ky. 612; *Green v. Com.*, (Ky. 1895) 33 S. W. Rep. 100.

Louisiana. — *State v. Patza*, 3 La. Ann. 512; *State v. Mulholland*, 16 La. Ann. 376.

Maryland. — *Kernan v. State*, 65 Md. 253.

Massachusetts. — *Com. v. Robinson*, 146 Mass. 571.

Missouri. — *State v. Williamson*, 106 Mo. 162; *State v. Duestrow*, 137 Mo. 44.

New York. — *People v. Donovan*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 79; *People v. Otto*, (Supm. Ct. Gen. T.) 4 N. Y. Crim. 149.

Ohio. — *Brown v. State*, 26 Ohio St. 176.

Pennsylvania. — *Com. v. Ferrigan*, 44 Pa. St. 386; *Com. v. Mudgett*, 174 Pa. St. 211; *Com. v. Fry*, 198 Pa. St. 379.

Texas. — *Morris v. State*, 30 Tex. App. 95; *Morrison v. State*, 40 Tex. Crim. 473; *Crass v. State*, 31 Tex. Crim. 312; *Powell v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1114; *Rucker v. State*, 7 Tex. App. 549; *Powell v. State*, 13 Tex. App. 244; *Dubose v. State*, 13 Tex. App. 418; *Taylor v. State*, 14 Tex. App. 351; *Hart v. State*, 15 Tex. App. 202, 49 Am. Rep. 188; *Johnson v. State*, 29 Tex. App. 150; *Blackwell v. State*, 29 Tex. App. 194.

Wisconsin. — *Halleck v. State*, 65 Wis. 147.

Illustrations. — Where the charge was of unnatural crime for the purpose of extorting money, previous instances were held to be admissible on the question of motive or intent. *Reg. v. Cooper*, 3 Cox C. C. 547. See also *Rex v. Egerton*, R. & R. C. C. 375; *Rex v. Fuller*, R. & R. C. C. 408.

On a trial for the murder of the prisoner's child, evidence of the murder of his wife and another child was admitted, on the theory that all the deaths were to remove obstacles to a second marriage consummated a few days after the last death. *Hawes v. State*, 88 Ala. 37. See also the title MURDER AND MANSLAUGHTER, vol. 21, p. 216.

Upon an indictment for murder, evidence that the defendant, who had a wife living, married the widow of the deceased a few days after the crime, and of his oath that he knew of no legal obstacle to the marriage, though tending to prove the crimes of perjury and bigamy, was admitted. *Pierson v. People*, 79 N. Y. 424, 35 Am. Rep. 524, *affirming* 18 Hun (N. Y.) 239.

In a case of murder, proof of a prior incestuous or adulterous connection with the wife of the deceased was allowed. *State v. Reed*, 53 Kan. 767, 42 Am. St. Rep. 322; *Stout v. People*, (Supm. Ct.) 4 Park Crim. (N. Y.) 132. See also the title MURDER AND MANSLAUGHTER, vol. 21, p. 216.

Evidence of adulterous relations with another woman may be shown where the defendant is charged with killing his own wife. *State v. Watkins*, 9 Conn. 47, 21 Am. Dec. 712.

Upon an indictment for murder of the prisoner's wife, evidence of previous abortions performed on her by the prisoner was admitted to establish concealment of the marriage as a motive. *People v. Harris*, 136 N. Y. 443.

On a trial for the murder of the defendant's brother and the brother's wife, proof of an attempt on the lives of the brother's children and subsequent forgeries against his estate were admitted to show the motive to possess

of the act under consideration, may be introduced in evidence.¹ Such evidence may also be introduced to rebut the motive set up by the defense.²

5. To Prove Identity of Criminal. — It appears to be clearly established that evidence of collateral offenses is sometimes admissible to prove the identity of the perpetrator of the crime under investigation.³ But it has been held that the crimes must be very closely connected in order to render such evidence admissible, as that one must be in preparation for the other or in execution of the same plan, and that a mere parallelism between the two crimes in plan and means employed does not render such evidence relevant in a legal sense.⁴

6. To Prove Common Plan. — This exception, that evidence of other crimes is admissible where a common plan is shown,⁵ is closely connected with the

his estate. *People v. Wood*, (Supm. Ct.) 3 Park Crim. (N. Y.) 681.

Prior Threats May Thus Be Proved. — An intention to do the violence alleged may be established not only by showing threats of violence, but by showing indictable attempts to do the injury. *Edmonds v. State*, 34 Ark. 732. And see the titles ARSON, vol. 2, p. 940; ASSAULT AND BATTERY, vol. 2, p. 1001; EVIDENCE, vol. 11, p. 505; MURDER AND MANSLAUGHTER, vol. 21, p. 219.

1. Prior Criminal Acts Which Form Motive of That on Trial. — *Rex v. Clewes*, 4 C. & P. 221, 19 E. C. L. 354 (see *infra*, this section, *To Prove Identity of Criminal*); *Moore v. U. S.*, 150 U. S. 57; *Dunn v. State*, 2 Ark. 229, 35 Am. Dec. 54; *People v. Pool*, 27 Cal. 572; *State v. Kent*, 5 N. Dak. 516; *Kunde v. State*, 22 Tex. App. 65; *Blackwell v. State*, 29 Tex. App. 194; *Hamblin v. State*, 41 Tex. Crim. 135; *State v. Morgan*, 22 Utah 162.

Crime or Attempt Committed in Trying to Escape Consequences of Prior Crime. — *Revel v. State*, 26 Ga. 275; *Johnson v. State*, 88 Ga. 203; *State v. Sanders*, 76 Mo. 35; *People v. Place*, 157 N. Y. 584; *State v. Mace*, 118 N. Car. 1244; *Com. v. Major*, 198 Pa. St. 290, 24 Pa. Co. Ct. 199.

2. Rebutting Motive. — See *State v. Bryant*, 93 Mo. 273.

Where, upon a trial for murder, the defense was the insanity of the defendant, occasioned by fear that the person killed was attempting to debauch the defendant's daughter, the fact that the defendant had been guilty of incest with his daughter was held to be relevant. *People v. Lane*, 101 Cal. 513.

3. Identity. — 1 Taylor on Evidence (8th ed.), § 335. As admitting the principle *arguendo*, see also *Ingram v. State*, 39 Ala. 252, 84 Am. Dec. 782; *Gassenheimer v. State*, 52 Ala. 319; *People v. Sharp*, 107 N. Y. 467; *People v. Molineux*, 168 N. Y. 264.

Illustrations — Murder. — C. was indicted for the murder of H. Proof that C., being hostile to P., hired H. to murder P., and that H. was detected in the fact, was admitted to show motive and identify the criminal, the theory being that C. then murdered H. to prevent detection. *Rex v. Clewes*, 4 C. & P. 221, 19 E. C. L. 354.

Where it is shown that a murder was committed by a person who broke into the house with certain tools, and used a weapon of a certain character in effecting the murder, evidence may be introduced that the defendant had committed a previous burglary in which

such tools and such a weapon were feloniously taken along with other property, as this evidence tends to identify the defendant as the murderer. *People v. Rogers*, 71 Cal. 565.

On a murder trial, where the evidence is circumstantial, the fact that the defendant had committed previous assaults on the deceased is admissible with other facts to prove identity and show his animus. *Washington v. State*, 8 Tex. App. 377.

Where the defendant was indicted for the murder of one of two traveling companions, the evidence being all circumstantial, testimony to show that the other was killed at about the same time and place was held to be admissible to exclude the hypothesis of his being the guilty person. *Smart v. Com.*, (Ky. 1889) 11 S. W. Rep. 431. See also *Fernandez v. State*, 4 Tex. App. 419; *Morris v. State*, 30 Tex. App. 95.

Arson. — To connect a prisoner on trial for arson with the crime for which he is being tried, evidence which involves other attempts at arson may be received. *Com. v. Choate*, 105 Mass. 451.

Burglary. — On a trial for burglary, a subsequent burglary during which the defendant was arrested is provable, and the fact may be shown that articles taken in the burglary on trial, together with burglar's tools, were found on the defendant. *People v. McGilver*, 67 Cal. 55. See also the title BURGLARY, vol. 5, p. 67.

Robbery. — On an indictment for robbery by taking from a person the key to a bank, where it was shown that the robbery was committed by a gang of masked persons, it was held to be admissible, in order to identify the prisoner as one of the gang, to prove that the bank was burglarized on the same occasion, that the prisoner was one of the gang who committed the burglary, and that the two gangs of criminals were the same. *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460. And see the title ROBBERY.

Rebutting Alibi. — Evidence to rebut an alibi has been admitted though it tended to prove the defendant guilty of another felony. *Reg. v. Briggs*, 2 M. & Rob. 199.

4. Connection Must Be Close. — *People v. Molineux*, 168 N. Y. 264. See also *Boyd v. U. S.*, 142 U. S. 450, *reversing* 45 Fed. Rep. 851, because of admission of evidence of this kind for purposes of identification.

5. System of Mutually Dependent Crimes. — See generally the title EVIDENCE, vol. 11, pp. 508, 514.

prior exceptions of motive and negating mistake. "Common plan" may mean a plan common to two or more persons, or the general plan underlying the commission of two or more criminal acts by one person. In the former case the relations between the conspirators and the fact and scope of the conspiracy may be shown even by evidence involving other criminal acts.¹ In the latter case acts committed in carrying out one criminal design may be shown.²

7. To Prove Preparation or Opportunity. — Other exceptions sometimes enumerated are evidence of collateral crimes to show preparation³ or opportunity and capacity⁴ for the commission of the crime on trial. Instances of this kind have been already considered to some extent under previous heads in this title.

8. Res Gestæ, Same Transaction. — Evidence of other crimes which form a

The connection between the crimes must be traced in the general design, purpose, or plan of the defendant, or it may be shown by such circumstances of identification as necessarily tend to establish that the person who committed one must have been guilty of the other. *Swan v. Com.*, 104 Pa. St. 218; *Shaffner v. Com.*, 72 Pa. St. 60, 13 Am. Rep. 649. See also *Com. v. Campbell*, 7 Allen (Mass.) 541, 83 Am. Dec. 705.

When two crimes are so linked together in point of time or circumstance that one cannot be fully shown without proving the other, evidence of that other is admissible. *State v. Kelley*, 65 Vt. 534, 36 Am. St. Rep. 884.

In *Com. v. Robinson*, 146 Mass. 571, the court declared that perhaps a better wording of this rule is that evidence of other crimes may be introduced "where they have some connection with each other, as a part of the same plan, or induced by the same motive. Precedent acts which render the commission of the crime charged more easy, more safe, more certain, more effective to produce the ultimate result which formed the general motive and inducement, if done with that intention and purpose have such a connection with the crime charged as to be admissible, though they are also of themselves criminal."

Mutually Dependent Crimes Committed under System. — *Frazier v. State*, 135 Ind. 38.

1. Conspiracy. — *Rex v. Roberts*, 1 Campb. 399; *Mason v. State*, 42 Ala. 532; *Glory v. State*, 13 Ark. 236; *State v. Adams*, 20 Kan. 311; *People v. Van Tassel*, 156 N. Y. 561; *Tarbox v. State*, 38 Ohio St. 581; *Hester v. Com.*, 85 Pa. St. 139. See also the title CONSPIRACY, vol. 6, p. 864 *et seq.*

In Treason overt acts amounting to direct proof of the overt acts laid in the indictment may be given in evidence. *Foster's Crown Law* 245; 1 East P. C., c. 2, § 57; *Rookwood's Case*, 13 How. St. Tr. 217; *Lowick's Case*, 13 How. St. Tr. 267; *Layer's Case*, 16 How. St. Tr. 220; *Deacon's Case*, *Foster* 9; *Wedderburn's Case*, *Foster* 22. See also *Burr's Trial*, 4 Cranch (U. S.) 489. And see the title TREASON.

2. Common Scheme or Plan for Commission of Several Crimes by Same Person. — Upon an indictment for robbery, a burglary which formed part of the same scheme may be proved. *Hope v. People*, 83 N. Y. 418, 38 Am. Rep. 460.

Separate arsons in pursuance of the same

plan to defraud insurance companies may be shown. *People v. Zucker*, 20 N. Y. App. Div. 363, *affirmed* 154 N. Y. 770.

And see to the same general effect *Mason v. State*, 42 Ala. 532; *Hawes v. State*, 88 Ala. 37; *People v. Bidleman*, 104 Cal. 608; *State v. Brady*, 100 Iowa 191, 62 Am. St. Rep. 560; *Guthrie v. State*, 16 Neb. 667; *People v. Murphy*, 135 N. Y. 451; *Kramer v. Com.* 87 Pa. St. 301. But compare *State v. Raymond*, 53 N. J. L. 260.

Many cases previously cited under other heads may be classed here. See for instance, *supra*, this section, *To Prove Intent and Guilty Knowledge*; *To Prove Motive*. And see the titles BURGLARY, vol. 5, p. 67; EVIDENCE, vol. 11, p. 514; FRAUD AND DECEIT, vol. 14, p. 197.

Subsequent Offenses Admissible to Show Scheme. — *State v. Balch*, 136 Mo. 103; *Com. v. Mudgett*, 174 Pa. St. 211.

3. See generally the titles EVIDENCE, vol. 11, p. 508; MURDER AND MANSLAUGHTER, vol. 21, p. 224.

Any Act of Preparation to Commit a Crime is relevant on the question of intent. *State v. Wintzingerode*, 9 Oregon 153. See also *supra*, this section, *To Prove Intent and Guilty Knowledge*.

Where One Crime Is Committed to Prepare the Way for Another, and the commission of the second crime is made to depend upon the perpetration of the first, the two become connected and related transactions, and proof of the commission of the first offense becomes relevant to show the motive for the perpetration of the second. *People v. Zucker*, 20 N. Y. App. Div. 366. See also *supra*, this section, *To Prove Motive*; *To Prove Common Plan*.

Acts in Preparation for a Homicide May Be Proved though they involve another crime. *State v. Rider*, 95 Mo. 474.

Possession of Implements. — The possession of burglar's tools may be shown on a trial for burglary, to show preparation. See the title BURGLARY, vol. 5, pp. 64, 65, notes. And see *supra*, this section, *To Prove Identity of Criminal*.

So the possession of instruments to produce abortion may be shown on a trial for abortion, to indicate preparation. See the title ABORTION, vol. 1, p. 194.

4. Opportunity. — See generally the titles EVIDENCE, vol. 11, p. 508; MURDER AND MANSLAUGHTER, vol. 21, p. 224.

part of the *res gestæ* may, of course, be introduced,¹ and the like evidence is admissible where the several offenses form a part of one entire transaction.²

III. EXTENT TO WHICH COLLATERAL CRIMES GONE INTO. — It has been held that when the evidence of a collateral crime is admitted from necessity, no testimony should be allowed as to the particulars thereof further than is essential for the purpose which renders the evidence relevant.³ Nor can the jury consider such evidence except in the particular connection in which it is introduced.⁴

IV. INDICTMENT — ELECTION. — From the principle excluding proof of other crimes, it follows that where the indictment charges only a single criminal act and the evidence discloses several offenses for either of which the accused may be convicted, the prosecution may be required to elect upon which offense it will ask a conviction, and the evidence should be confined to that offense, unless the case is such that proof of other crimes is admissible on the principles stated in this title.⁵ Giving evidence of one complete offense is usually held to be an election to proceed on that charge.⁶ The court may exercise some discretion in requiring an election in cases of this character.⁷

1. Res Gestæ. — The crimes done in pursuance of the same plan may be so related as to be proved as parts of the *res gestæ*.

England. — *Rex v. Pearce*, 1 Peake N. P. (ed. 1795) 75 (stated under the title EVIDENCE, vol. II, p. 515, note).

Alabama. — *Seams v. State*, 84 Ala. 410.

Georgia. — *Revel v. State*, 26 Ga. 275; *Johnson v. State*, 88 Ga. 203.

Illinois. — *Parkinson v. People*, 135 Ill. 401.

Iowa. — *State v. Gainor*, 84 Iowa 209.

Louisiana. — *State v. Vines*, 34 La. Ann. 1079.

Michigan. — *People v. Foley*, 64 Mich. 148.

Missouri. — *State v. Testerman*, 68 Mo. 408.

Nebraska. — *Neal v. State*, 32 Neb. 120.

New York. — *People v. Parker*, 137 N. Y. 535, 49 N. Y. St. Rep. 884; *People v. Pallister*, 138 N. Y. 601, 51 N. Y. St. Rep. 723.

Pennsylvania. — *Brown v. Com.*, 76 Pa. St. 319.

Texas. — *Leeper v. State*, 29 Tex. App. 63; *Hargrove v. State*, 33 Tex. Crim. 431; *Crews v. State*, 34 Tex. Crim. 533; *Wilkerson v. State*, 31 Tex. Crim. 86; *Powell v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 1114.

Utah. — *People v. Coughlin*, 13 Utah 58.

See also the title *RES GESTÆ*.

A subsequent distinct crime after an interval of a few minutes has been held not to be provable as part of the *res gestæ*. *People v. Lane*, 100 Cal. 379.

2. Different Offenses All Virtually Part of One and the Same Transaction, or of one entire transaction, are admissible.

England. — *Reg. v. Rearden*, 4 F. & F. 76; *Rex v. Long*, 6 C. & P. 179, 25 E. C. L. 343; *Rex v. Ellis*, 6 B. & C. 145, 13 E. C. L. 123.

Arkansas. — *Glory v. State*, 13 Ark. 236.

California. — *People v. Lopez*, 59 Cal. 362; *People v. Cunningham*, 66 Cal. 668; *People v. Walters*, 98 Cal. 138; *People v. Smith*, 106 Cal. 73.

Illinois. — *Hickam v. People*, 137 Ill. 75; *Lyons v. People*, 137 Ill. 602; *Scott v. People*, 141 Ill. 195.

Iowa. — *State v. Dooley*, 89 Iowa 584.

Kentucky. — *Com. v. Green*, 98 Ky. 21.

Massachusetts. — *Com. v. Sturdivant*, 117 Mass. 122, 19 Am. Rep. 401.

Michigan. — *People v. Marble*, 38 Mich. 117.

Missouri. — *State v. Perry*, 136 Mo. 126; *State v. Tettaton*, 159 Mo. 354.

New Hampshire. — *State v. Wentworth*, 37 N. H. 197.

Oregon. — *State v. Wong Gee*, 35 Oregon 276.

Texas. — *Fernandez v. State*, 4 Tex. App. 419.

Utah. — *State v. Hayes*, 14 Utah 118.

Virginia. — *Heath v. Com.*, 1 Rob. (Va.) 796.

Washington. — *Blanton v. State*, 1 Wash. 265; *State v. Craemer*, 12 Wash. 217.

See also *Ingram v. State*, 39 Ala. 252, 84 Am. Dec. 782. And see the title EVIDENCE, vol. II, p. 514.

3. Extent to Which Investigated. — *Martin v. Com.*, 93 Ky. 189; *Com. v. Green*, 98 Ky. 21; *Com. v. McCarthy*, 119 Mass. 354; *People v. Ascher*, 126 Mich. 637; *State v. Geddes*, 22 Mont. 68; *State v. Lewis*, 19 Oregon 478. See also *Com. v. Shepard*, 1 Allen (Mass.) 575, quoted under the title EMBEZZLEMENT, vol. 10, p. 1034, note.

The Description of a Wound, the infliction of which was admitted in evidence on the principle of *res gestæ*, may be given. *People v. Coughlin*, 13 Utah 58.

4. Evidence Not to Be Considered as Makeweight Against Defendant. — *State v. Marshall*, 2 Kan. App. 792; *State v. Hughes*, 3 Kan. App. 95; *Morrison v. State*, 40 Tex. Crim. 473. But compare *Norris v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 493.

5. Indictment for Single Offense — Election. — *Baker v. People*, 105 Ill. 452; *Long v. State*, 56 Ind. 182, 26 Am. Rep. 19; *Richardson v. State*, 63 Ind. 192; *King v. State*, 66 Miss. 502; *State v. Chisnell*, 36 W. Va. 659. See also the title INTOXICATING LIQUORS, II ENCYC. OF PL. AND PR. 576.

6. What Amounts to Election. — *Richardson v. State*, 63 Ind. 192; *King v. State*, 66 Miss. 502.

But that the court may in its discretion allow evidence of other acts, and require an election when all the evidence has been given, see *State v. Schweiter*, 27 Kan. 512; *State v. Chisnell*, 36 W. Va. 659.

7. Discretion of Court in Requiring Election. — *Sanders v. State*, 88 Ga. 254; *State v. Crimmins*, 31 Kan. 376.

PROPER.—"Proper" has been defined as meaning essential, suitable, adapted, and correct.¹

1. Proper.—Pickle v. Smalley, 21 Wash. 473, quoting Bouv. L. Dict.

Proper Books.—The California Insolvency Act of 1880 required that merchants should have kept "proper books," in order to obtain a discharge. It was held that books which did not contain a loan to the firm which, if entered, would have shown that the firm was utterly insolvent were not "proper books" within the meaning of the statute. Matter of Good, 78 Cal. 399. See generally the title INSOLVENCY and BANKRUPTCY, vol. 16, p. 799.

Proper Case—Constitutional Law.—By the Constitution of West Virginia, if the legislature enacts any law that is expressly prohibited by the constitution, it is made the duty of the courts, upon a proper case presented before them, to declare such law null and void. In construing this provision in Slack v. Jacob, 8 W. Va. 660, the court said: "'Proper case,' as employed in the constitution, means a case in which the courts have jurisdiction of the subject-matter and the parties, for the purposes of the case, in whole or in part."

United States Constitution—"Laws Necessary and Proper."—See NECESSARY—NECESSITY—NECESSARILY, vol. 21, p. 449.

Proper County.—A statute provided that the plaintiff should not proceed against the bail until execution had been returned that the defendant was not to be found in his proper county. In construing this statute the court said: "Stress has been laid in argument upon the word proper, as changing the practice in this particular; and it is argued that by the 'proper county' we are to understand the county of the defendant's residence. We think otherwise, and understand it to refer to the law as it existed at the passage of the act, and to be declaratory of it. The proper county for the purposes of the action must be taken to be the county in which the defendant is found when suit is brought." Kennedy v. Spencer, 4 Port. (Ala.) 432. See also State v. Lake, 28 Minn. 362.

Same—Removal of Cause.—See State v. Lake, 28 Minn. 362.

Proper Court.—In Sargent v. Kindred, 49 Fed. Rep. 488, upon the question of the proper court in which to file a request for the transfer of a cause upon the formation of a territory into a state, the court said: "I am of the opinion that the 'proper court' is that court where the files and records of the case are found at the time the request is to be filed; that court whose clerk has the custody of the files and records, and who can transfer the same to the federal court; and that the requests in this case were filed in the 'proper court.'"

In Wells v. Clarkson, 5 Mont. 343, quoting from Wait on Fraudulent Conveyances, § 422, it was said "By 'proper court' is meant not merely a duly constituted tribunal, but one having authority over the subject-matter of the particular case in question."

Proper Delivery.—In Arguello v. Edinger, 10 Cal. 161, it was said: "The proper delivery of an instrument is necessary to give it vitality, and is a part of its execution; and when

that delivery is induced under circumstances which do not leave the party free to act advisedly, there is no proper delivery."

Proper Forms of Entertainment.—A will bequeathed property to an incorporated Masonic lodge to be used for proper forms of entertainment. In construing the will the court said that the phrase "proper forms of entertainment" authorized the lodge "to provide such forms of entertainment, both for body and mind, as it might seem proper. * * * At any rate, the phrase 'proper forms of entertainment' would include such as are customary in Masonic bodies, and we fail to see how a court of equity could regulate or control the discretion of the trustee in regard thereto." Mason v. Perry, 22 R. I. 492.

Proper Instructions.—Within the meaning of a statute which provided that in a contested will case an issue should be made up and submitted to the jury "under proper instructions by the court," it was held that "proper instructions are such as the law of the case and the testimony before the jury make pertinent." Wagner v. Ziegler, 44 Ohio St. 69.

Proper and Lawful Authority and Manner.—Adjoining owners agreed that a certain line should be the boundary between them, provided a corner which they supposed to be the true southwest corner of the town should not be moved "on proper and lawful authority and manner," and that if the true corner should ever be established to be in any other place, the boundary line between them should be located in accordance therewith. It was held that the parties must have intended to refer to such a tribunal for ascertaining the true corner of the town as the law had invested with authority to decide the question. Bishop v. Babcock, 22 Vt. 295.

Proper Lodgings—English Public Health Act.—See Warwick v. Graham, (1899) 2 Q. B. 191.

"Working Expenses and Other Proper Outgoings"—English Railway Companies Act.—Re Wrexham, etc., R. Co., (1900) 2 Ch. 436, (1900) 1 Ch. 261.

Proper Person—Garnishment.—The Georgia Code (now 2 Code 1895, § 4771) provides that a constable may be ruled for money collected by him from a garnishee, by any proper person. It was held that by "proper person" is meant "the party entitled thereto," in the language of the same section. Smith v. Johnston, 71 Ga. 749.

Proper Representative—Revival of Action.—In Zægel v. Kuster, 51 Wis. 39, it was held that the term "proper representative," as used in a Wisconsin statute providing for the revival of actions, must be construed as meaning "successor in interest."

Proper Residence—Paupers.—A statute provided that the support of an insane person should be charged to the proper county when his proper residence should have been ascertained. It was held that "proper residence," as here used, meant something more than the stopping in a county for a mere temporary purpose, as on business or for pleasure, and that only a person taking up his abode in a county with a present intention of remaining

PROPERLY. — See note 1.

PROPER PARTIES. — See the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 651.

there could be said to have a *proper* residence in the county. *State v. Dodge County*, 56 Wis. 86. See generally the titles POOR AND POOR LAWS, vol. 22, p. 944; RESIDENCE.

"Proper Title" — Erroneously Used in Statute Instead of "Paper Title." — *Knight v. Lawrence*, 19 Colo. 425. See also *Latta v. Clifford*, 47 Fed. Rep. 618.

Proper Use — Married Woman. (See also the title SEPARATE PROPERTY OF MARRIED WOMEN.) — The phrases "own use" and "*proper* use," in deeds to married women, have been held not to create a separate estate. *Blacklow v. Laws*, 2 Hare, 49; *Kensington v. Dollond*, 2 Myl. & K. 184; *Mitchell v. Gates*, 23 Ala. 446; *Rudisell v. Watson*, 2 Dev. Eq. (17 N. Car.) 430.

But in *Caldwell v. Pickens*, 39 Ala. 520, the words "only *proper* use" were held to create a separate estate.

In *Snyder v. Snyder*, 10 Pa. St. 423, a bequest to a widow for her own *proper* use during her lifetime, remainder over, was held to give her a separate use.

1. Properly Acknowledged. — The *Alabama* Code of 1886, § 592, relating to tax deeds, provided that a deed of a probate judge, when *properly* acknowledged and recorded, should convey title. In construing this statute in *Jackson v. Kirksey*, 110 Ala. 551, the court said: "Before the deed of the probate judge can be said to be '*properly* acknowledged,' as required by the Code of 1886, the certificate should substantially conform to the only model therein given 'to be used in this state on conveyances of every description admitted to record.'" See also the title ACKNOWLEDGMENTS, vol. 1, p. 483.

Properly Cleaned. — A agreed to dig a certain quantity of iron ore annually, to clean it *properly* of all clay, sand, stones, etc., and to deliver it to B. In construing this contract the court said: "'*Properly* cleansed' may mean fitted for making iron — reduced to the pure ore — or it may mean cleaned as iron ore is usually cleaned before it is hauled to the furnace; but in this contract, this expression

must be interpreted with reference to the facilities which the defendants bound themselves to furnish, and implies that degree of cleansing which reasonable skill and diligence, combined with these facilities, were capable of producing." *Campbell v. Gates*, 10 Pa. St. 485.

Properly Guarded. — In *Glassheim v. New York Economical Printing Co.*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 174, it was held that where the main belt of certain machinery was boxed to a height which prevented any one from being caught by it, and the shafting was suspended at a height of over nine feet from the floor, the machinery was *properly* guarded, within the meaning of the requirement of the *New York Factory Act*.

Properly Made — Survey. (See also the title PUBLIC LANDS.) — In *Adams v. Houston*, etc., R. Co., 70 Tex. 276, it was said: "Such surveys as were within the contemplation of the statute must have been '*properly* made by virtue of genuine or valid land certificates.' The words '*properly* made' doubtless may apply to the mathematical correctness with which lands embraced in surveys returned are delineated, but they are as aptly applied to the legality of surveys — to the legal right of a survey to appropriate the land covered by it."

Properly Provisioned. — Every master, when sailing to or from a foreign port, is bound to see, before he sets sail, that his vessel is *properly* provisioned for the intended voyage. In *U. S. v. Reed*, 86 Fed. Rep. 311, it was said: "By '*properly* provisioned' is not meant a bare sufficiency for a quick passage. He is bound to make reasonable provision for what is liable to happen upon the seas, though it be unexpected. He is bound to provide for such storms, such delays, such calms as often happen, which may prolong a voyage." See generally the title MASTERS OF VESSELS, vol. 20, p. 200.

"Duly Sworn" Equivalent to "Properly Sworn." — See *Doe v. King*, 3 How. (U. S.) 142.

PROPERTY.

By THOMAS JOHNSON MICHIE.

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CROSS-REFERENCES.

For other matters related to this subject, see CHATTELS, vol. 5, p. 1022; EFFECTS, vol. 10, p. 446; ESTATE, vol. 11, p. 358; GOODS, vol. 14, p. 1079; LIBERTY, vol. 18, p. 1124.

*As to the question whether certain interests are property, see the titles and definitions treating of those interests, such as ABUTTING OWNERS, vol. 1, p. 224; ANIMALS, vol. 2, p. 341; ATTACHMENT, vol. 3, p. 181; CIVIL DAMAGE ACTS, vol. 6, p. 36; COMMUNITY PROPERTY, vol. 6, p. 293; CONSTITUTIONAL LAW, vol. 6, p. 882, and cross-references; DEAD BODY, vol. 8, p. 834; DUE PROCESS OF LAW, vol. 10, p. 287; EMINENT DOMAIN, vol. 10, p. 1043; EXECUTIONS, vol. 11, p. 604; EXPERT AND OPINION EVIDENCE, vol. 12, p. 497; FALSE PRETENSES AND CHEATS, vol. 12, p. 792; FIRE INSURANCE, vol. 13, p. 86; FRANCHISES, vol. 14, p. 4; GARNISHMENT, vol. 14, p. 731; GOODWILL, vol. 14, p. 1085; IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1030; INSURANCE, vol. 16, p. 830, and cross-references; INTERFERENCE WITH CONTRACT RELATIONS, vol. 16, p. 1109; INTOXICATING LIQUORS, vol. 17, p. 189; LABOR COMBINATIONS, vol. 18, p. 80; MARKETS, vol. 19, p. 1151; OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770; PARTNERSHIP, vol. 22, p. 2; PERSONAL PROPERTY, vol. 22, p. 746; PEWS AND PEW RIGHTS, vol. 22, p. 761; PUBLIC OFFICERS, *post*; RAILROADS, *post*; REAL PROPERTY, *post*; SEPARATE PROPERTY OF MARRIED WOMEN; TAXATION, *etc.* Numerous references also are given in the notes.*

I. GENERAL DEFINITION. — Property means that dominion or indefinite right of user and disposition which one may lawfully exercise over particular things or subjects, and generally to the exclusion of all others. Property is ownership, the exclusive right of any person freely to use, enjoy, and dispose of any determinate object, whether real or personal.¹

1. Right of User, Disposition, *etc.* — *United States.* — Hamilton *v.* Rathbone, 175 U. S. 421; Jones *v.* Van Zandt, 4 McLean (U. S.) 603.

Alabama. — Dorman *v.* State, 34 Ala. 239.

California. — Dow *v.* Gould, *etc.*, Silver Min. Co., 31 Cal. 637.

Colorado. — Denver *v.* Bayer, 7 Colo. 113 (*quoted* under the title EMINENT DOMAIN, vol. 10, p. 1106); Arapahoe County *v.* Rocky Mountain News Printing Co., 15 Colo. App. 189.

Illinois. — Metropolitan City R. Co. *v.* Chicago West Div. R. Co., 87 Ill. 318; Rigney *v.*

Chicago, 102 Ill. 77; Chicago, *etc.*, R. Co. *v.* Englewood Connecting R. Co., 115 Ill. 385, 56 Am. Rep. 173; Knebelkamp *v.* Fogg, 55 Ill. App. 563; Dixon *v.* People, 168 Ill. 179.

Iowa. — Tallman *v.* Treasurer, 12 Iowa 534. *Kansas.* — Bennett *v.* Wolverton, 24 Kan. 287.

Louisiana. — State *v.* New Orleans, 32 La. Ann. 709, *quoted* under the title DUE PROCESS OF LAW, vol. 10, p. 289, note 1.

Massachusetts. — M'Carthy *v.* Guild, 12 Met. (Mass.) 291.

Missouri. — St. Louis *v.* Hill, 116 Mo. 529; State *v.* Associated Press, 159 Mo. 410.

The Word "Property" Is Nomen Generalissimum, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments.¹

Everything That Is Subject of Ownership. — Standing alone, the term includes everything that is the subject of ownership.²

Absolute and Qualified or Special Property. — With respect to things personal in possession, property is either absolute, qualified, limited, or special. Absolute property denotes a full and complete title, the union of the right in and the possession of any chattel; qualified property denotes a temporary or special interest, liable to be totally divested on the happening of some particular event.³

Montana. — *Wilson v. Harris*, 21 Mont. 374.
Nebraska. — *Jaynes v. Omaha St. R. Co.*, 53 Neb. 631.

New Hampshire. — *Eaton v. Boston*, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147 (quoted under the title EMINENT DOMAIN, vol. 10, p. 1108); *Thompson v. Androscoggin River Imp. Co.*, 54 N. H. 545.

New Jersey. — *Bruch v. Carter*, 32 N. J. L. 561; *State Board of Assessors v. Central R. Co.*, 48 N. J. L. 327.

New York. — *Buffalo v. Babcock*, 56 N. Y. 268; *Ayers v. Lawrence*, 59 N. Y. 192; *Law of Burial*, 4 Bradf. (N. Y.) 516.

North Carolina. — *Staton v. Norfolk*, etc., R. Co., 111 N. Car. 285.

Pennsylvania. — *Morrison v. Semple*, 6 Binn. (Pa.) 94.

South Carolina. — *Griffith v. Charlotte*, etc., R. Co., 23 S. Car. 38.

Texas. — *Gulf*, etc., R. Co. *v. Fuller*, 63 Tex. 467; *Ft. Worth*, etc., R. Co. *v. Jennings*, 76 Tex. 373; *Gray v. Dallas Terminal R.*, etc., Co., 13 Tex. Civ. App. 158.

Canada. — *Reg. v. Lorrain*, 28 Ont. 123.

Blackstone's Definition. — The right of property "consists in the free use, enjoyment, and disposal of all his [a person's] acquisitions, without any control or diminution, save only by the laws of the land." 1 Black. Com. 138. Again, "The right of property [is] * * * that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 Black. Com. 2. See also *Pumpelly v. Green Bay*, etc., Canal Co., 13 Wall. (U. S.) 166; *Stevens v. State*, 2 Ark. 291, 35 Am. Dec. 72; *Dixon v. People*, 168 Ill. 179; *Crow v. State*, 14 Mo. 262; *St. Louis v. Hill*, 116 Mo. 533; *Jenal v. Green Island Draining Co.*, 12 Neb. 166; *Bruch v. Carter*, 32 N. J. L. 561; *People v. Toynbee*, 20 Barb. (N. Y.) 194; *Matter of Jacobs*, 98 N. Y. 106; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138.

Constitutional Law. — The phrase "life, liberty, or property" in the first section of the Fourteenth Amendment to the Federal Constitution (see the title DUE PROCESS OF LAW, vol. 10, pp. 288, 299) protects every valuable right which a man has, and the term "property" therein "embraces all valuable interests which a man may possess outside of himself, that is to say, outside of his life and liberty." Board of Education *v. Blodgett*, 155 Ill. 441, quoting *Bradley, J.*, dissenting, in *Campbell v. Holt*, 115 U. S. 630.

See also the next note *infra*.

1. Nomen Generalissimum. — *Boston*, etc., R. Corp. *v. Salem*, etc., R. Co., 2 Gray (Mass.) 35. See also *Smith v. McCullough*, 104 U. S. 27; *Wilson v. Ward Lumber Co.*, 67 Fed. Rep. 677; *Brown v. Chambers*, 12 Ala. 708; *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189; *Neyfong v. Wells, Hard.* (Ky.) 571; *Williston Seminary v. Hampshire County*, 147 Mass. 427; *Gray v. Central Massachusetts R. Co.*, 171 Mass. 125; *Wilson v. Beckwith*, 140 Mo. 372; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389, 3 Am. Rep. 711; *People v. Brooklyn*, 9 Barb. (N. Y.) 535.

"The Word in Its Appropriate Sense Means Tangible Things, and rights which accompany or are incident to the use, enjoyment, or disposition of such things. See authorities collected in note 1, page 294, 19 AM. AND ENG. ENCYC. OF LAW [1st ed.]" *Dixon v. People*, 63 Ill. App. 590.

The Term "Property" Is Much Wider than "Appurtenances." — *Wilson v. Ward Lumber Co.*, 67 Fed. Rep. 677.

2. Everything Which Can Be Owned. — *Jones v. Skinner*, 5 L. J. Ch. 90; *Morrison v. Hoppe*, 4 De G. & Sm. 234; *Washington County v. Weld County*, 12 Colo. 152; *Stanton v. Lewis*, 26 Conn. 449; *Baker v. State*, 109 Ind. 58; *Pell v. Ball, Spears Eq.* (S. Car.) 48.

The word "property" includes "everything which goes to make up one's wealth or estate" *Carlton v. Carlton*, 72 Me. 116, 39 Am. Rep. 307.

The term "describes any estate, whether goods, money, or lands, and in its general signification includes anything capable of ownership." *People v. New York*, etc., R. Co., 84 N. Y. 568, affirming 22 Hun (N. Y.) 95.

3. Absolute and Qualified Property. — 2 Black. Com. 389 *et seq.*; 2 Kent Com. 347; 2 Steph. Com. (13th ed.) 6; 1 Bouv. Inst., §§ 468, 475; *Griffith v. Charlotte*, etc., R. Co., 23 S. Car. 25, 55 Am. Rep. 1. See also the title PERSONAL PROPERTY, vol. 22, p. 751; and see ABSOLUTE, vol. 1, p. 205.

Qualified Property subsists in animals *fera natura* so long as they are kept in possession, but is liable to be divested by their escape. See the title ANIMALS, vol. 2, p. 342. A qualified property may subsist also in fire or light, air, or water, in which elements a man can have no absolute permanent property. 2 Black. Com. 395. See also the title LIGHT AND AIR, vol. 10, p. 112. And as to water see *Crandall v. Woods*, 8 Cal. 141.

A Special Property, also known as a qualified or limited property, may subsist on the part of the bailee in a thing bailed, and is sufficient

Applied to Rights of Owner or to Thing Itself. — In its proper use, the term "property" applies only to the rights of the owner in the thing possessed.¹ The term, however, often means the thing possessed, as well as the estate or interest which the party possessing it may have in it.²

Whether Special Things Are Property. — Where the question under investigation is whether a particular sort of interest or right is property, the title in this

to support a possessory action against third parties. *Phelps v. People*, 72 N. Y. 357; 2 Black. Com. 452; *Jones on Bailments* 80; *Story on Bailments* (9th ed.), § 93, questioning the proposition, however, as to deposits. See also the title *BAILMENTS*, vol. 3, p. 761, and cross-references there given, especially the title *DEPOSIT*, vol. 9, p. 286.

General and Special Ownership. — "A chattel may be the subject of distinct properties held by several persons. One may have the right to possession or use, or both, while another holds the legal title to the corporeal thing, subject to the interest of the possessor. The one has the special and the other the general ownership." *Wilson v. Harris*, 21 Mont. 374.

1. Property Applies Only to Owner's Rights in Thing. — *Ex p. Koser*, 60 Cal. 210; *Ex p. Law*, 35 Ga. 294; *Braceville Coal Co. v. People*, 147 Ill. 71; *Low v. Rees Printing Co.*, 41 Neb. 146; *Smith v. Furbish*, 68 N. H. 123; *Wynehamer v. People*, 13 N. Y. 378; *Griffith v. Charlotte, etc., R. Co.*, 23 S. Car. 25, 55 Am. Rep. 1.

A Wilful Injury to One's Right of Property in a thing is a wilful injury to his property therein. So held under Code Civ. Pro. N. Y., § 553, exempting women from arrest except, *inter alia*, in case of wilful injury to property. See the title *IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS*, vol. 16, p. 45, note 1.

Property Is the Highest Right which a man can have to anything. *Jac. L. Dict.*, quoted in *Stief v. Hart*, 1 N. Y. 24.

A Will of the Testator's "Property," therefore, has been held to pass the whole of his real and personal estate to the donee. *Jackson v. Housel*, 17 Johns. (N. Y.) 281. See also *Morrison v. Sample*, 6 Pa. St. 94.

A Gift by Will of "All My Property That I Have Not Before Given Away and lent" conveys every residuary interest whatsoever. *Harrell v. Hoskins*, 2 Dev. & B. L. (19 N. Car.) 479.

The Right to Have and Use a Thing subject to law is the first essential of property. *Denver v. Bayer*, 7 Colo. 113 (quoted under the title *EMINENT DOMAIN*, vol. 10, p. 1106); *Fears v. State*, 102 Ga. 274; *St. Louis v. Hill*, 116 Mo. 534. And depriving a person of the use of property is depriving him of the property. *In re Marshal*, 102 Fed. Rep. 324; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich. 309. See also the titles *DUE PROCESS OF LAW*, vol. 10, p. 299; *EMINENT DOMAIN*, vol. 10, p. 1103 *et seq.*

"Property" Includes the Right to Acquire as well as to enjoy. *Braceville Coal Co. v. People*, 147 Ill. 66, quoted in *Low v. Rees Printing Co.*, 41 Neb. 127. See also *Holden v. Hardy*, 169 U. S. 366, quoted in the title *DUE PROCESS OF LAW*, vol. 10, p. 299.

"Property" Includes the Right to Alienate and Transfer as well as the right to use and enjoy. 2 Kent Com. 317 *et seq.*; *Slaughter House*

Cases, 16 Wall. (U. S.) 127; *In re Marshal*, 102 Fed. Rep. 324; *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189; *Ex p. Law*, 35 Ga. 295; *Kuhn v. Detroit*, 70 Mich. 537; *Wynehamer v. People*, 13 N. Y. 397; *Sherman v. Elder*, 24 N. Y. 381; *Toledo Bank v. Toledo*, 1 Ohio St. 623; *Columbus Bank v. Hines*, 3 Ohio St. 8; *Tod v. Wick*, 36 Ohio St. 385; *Com. v. Maury*, 82 Va. 883; *Stall v. Kreutzberg*, (Wis. 1902) 90 N. W. Rep. 1100.

But the Right to Alienate May Be Taken Away or Regulated under the Police Power, as in the case of intoxicating liquors. *Fears v. State*, 102 Ga. 279. And see the titles *INTOXICATING LIQUORS*, vol. 17, pp. 206 *et seq.*, 302 *et seq.*; *POLICE POWER*, vol. 22, pp. 926, 937; also the title *DUE PROCESS OF LAW*, vol. 10, p. 307.

2. Thing Itself. — *Hamilton v. Rathbone*, 175 U. S. 421; *Wilson v. Ward Lumber Co.*, 67 Fed. Rep. 677; *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189; *Perkerson v. Overby*, 59 Ga. 418; *Rigney v. Chicago*, 102 Ill. 64; *Borden v. Croak*, 33 Ill. App. 392; *St. Louis v. Hill*, 116 Mo. 529; *Wilson v. Harris*, 21 Mont. 374; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 395, 3 Am. Rep. 711; *Toledo Bank v. Toledo*, 1 Ohio St. 623; *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 328; *Priester v. Priester*, 12 Rich. Eq. (S. Car.) 370; *State v. South Penn Oil Co.*, 42 W. Va. 80.

Property is properly everything which has an exchangeable value. *In re Marshal*, 102 Fed. Rep. 324; *Arapahoe County v. Rocky Mountain News Printing Co.*, 15 Colo. App. 189.

"Property is a thing in being which is capable of becoming the subject of dominion or ownership, and which actually has a master or proprietor, and is actually reduced into possession." *Townsend v. Townsend*, Peck (Tenn.) 17, 14 Am. Dec. 722.

"The word in its appropriate sense means tangible things, and rights which accompany or are incident to the use, enjoyment, or disposition of such things." *Dixon v. People*, 63 Ill. App. 590.

Double Meaning. — The term "property" will be construed to describe the quantity of interest or the subject of it or both, as may be required by the context of the will. *Priester v. Priester*, 12 Rich. Eq. (S. Car.) 370.

Use in Statute. — **The Rule of Ejusdem Generis** is applied where "property" is preceded by other words descriptive of particular kinds of property. *Reg. v. Neath*, L. R. 6 Q. B. 707; *Chidsey v. Canton*, 17 Conn. 475; *Harwood v. Lowell*, 4 Cush. (Mass.) 310; *Roberts v. Detroit*, 102 Mich. 67. See also generally *OTHER*, vol. 21, p. 1012.

"Property" Held to Be Synonymous with "Goods," "Wares," and "Merchandise." — *Chamberlain v. Western Transp. Co.*, 44 N. Y. 305, reversing 45 Barb. (N. Y.) 218.

work treating that sort of right or interest should be consulted.¹

II. INCLUDES BOTH REAL AND PERSONAL PROPERTY.—When used in its general and popular sense, the term "property" includes both lands² and

1. See generally the cross-references at the beginning of this title.

After-acquired Property.—"If no terms are used conducting the mind to future acquisitions, the word 'property' refers to present ownership only. In common acceptation 'property' means that which is susceptible of present possession or enjoyment. That which is to be acquired is not property." *Borden v. Croak*, 33 Ill. App. 392. See also *Tapfield v. Hillman*, 6 M. & G. 245, 46 E. C. L. 245; *Matter of Joint-Stock Co.'s Winding-up Acts*, 4 De G. J. & S. 407; *In re Streatham, etc., Co.*, (1897) 1 Ch. 15.

Corporeal and Incorporeal Property.—See INCORPOREAL, vol. 16, p. 155. See also *Reh fuss v. Moore*, 134 Pa. St. 471; *Harrison v. Willis*, 7 Heisk. (Tenn.) 44. 19 Am. Rep. 604; *Sansbury v. State*, 4 Tex. App. 99.

Movable Property.—That cotton is not movable property, see *Hardeman v. State*, 16 Tex. App. 4, 49 Am. Rep. 824. See further MOVABLES—MOVABLE PROPERTY, vol. 20, p. 1078.

Enemy Property.—See *The Benito Estenger*, 176 U. S. 571, and the title INTERNATIONAL LAW, vol. 16, p. 1148 *et seq.*

English Statute—"Property Recovered or Preserved or preserved"—As to the phrase "property recovered or preserved" in the English statute regulating the right of attorneys or solicitors to a charge for the costs in an action, see *Clover v. Adams*, 6 Q. B. D. 625; *Moxon v. Sheppard*, 24 Q. B. D. 627; *Ex p. Tweed*, (1899) 2 Q. B. 167. See also RECOVERED.

"A Property Taxpayer, within the meaning of the act in question [Acts Texas, 1899, p. 258], is one whose property rights were such on the first day of January of the year in which he offers to vote as to bring him within the class denominated 'property taxpayers' of the county in which he offers to vote for that year." *Hendrick v. Culberson*, 23 Tex. Civ. App. 409. See also the title ELECTIONS, vol. 10, p. 593 *et seq.*

Property of United States.—In *Crocker v. Donovan*, 1 Okla. 165, it was held that improvements made upon government land by homestead settlers were not property of the United States.

2. "Property" Includes Real Property—*England*.—*Doe v. Langlands*, 14 East 370; *Rex v. George*, 5 Ch. D. 627, 22 Moak 364; *Holmes v. Barker*, 2 Madd. 460; *Doe v. Morgan*, 6 B. & C. 512, 13 E. C. L. 239; *Tyrone v. Waterford*, 1 De G. F. & J. 613; *Arnold v. Arnold*, 2 Myl. & K. 365.

United States.—*White v. Keller*, (C. C. A.) 68 Fed. Rep. 800; *Myers v. Northern Pac. R. Co.*, (C. C. A.) 83 Fed. Rep. 363.

Alabama.—*Brown v. Chambers*, 12 Ala. 708; *Fretwell v. McLemore*, 52 Ala. 141; *Patterson v. Jones*, 89 Ala. 390.

California.—*De Witt v. San Francisco*, 2 Cal. 289.

Florida.—*Robinson v. Randolph*, 21 Fla. 638.

Illinois.—*Rhinehart v. Schuyler*, 7 Ill. 527; *Primm v. Belleville*, 59 Ill. 143.

Indiana.—*Sims v. State*, 136 Ind. 358.

Iowa.—*Tallman v. Treasurer*, 12 Iowa 534; *Benkert v. Jacoby*, 36 Iowa 275; *Iowa Lumber Co. v. Foster*, 49 Iowa 28, 31 Am. Rep. 140; *Briggs v. Briggs*, 69 Iowa 617; *Meek v. Briggs*, 87 Iowa 619.

Kansas.—*Bennett v. Wolverton*, 24 Kan. 287.

Maine.—*Chapman v. Chick*, 81 Me. 109.

Maryland.—*McChesney v. Bruce*, 1 Md. 347.

Massachusetts.—*Hunt v. Hunt*, 4 Gray (Mass.) 193; *Chandler v. Simmons*, 97 Mass. 508, 93 Am. Dec. 117; *Howland v. Howland*, 100 Mass. 222; *Laing v. Barbour*, 119 Mass. 525.

Missouri.—*Wilson v. Beckwith*, 140 Mo. 359.

Montana.—*Courtney v. Missoula County*, 21 Mont. 591.

New Jersey.—*Tomlinson v. Stiles*, 29 N. J. L. 430.

New York.—*Porter v. Williams*, 9 N. Y. 148, 59 Am. Dec. 519; *Farnham v. Campbell*, 10 Paige (N. Y.) 598; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138, 19 Am. L. Reg. N. S. 284; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Prescott v. Hull*, 17 Johns. (N. Y.) 284; *Toerge v. Toerge*, 9 N. Y. App. Div. 202; *Owen v. Smith*, 31 Barb. (N. Y.) 641.

North Carolina.—*Lockhart v. Bear*, 117 N. Car. 298.

Ohio.—*Salt Creek Valley Turnpike Co. v. Parks*, 50 Ohio St. 576.

Pennsylvania.—*Rossetter v. Simmons*, 6 S. & R. (Pa.) 452.

Rhode Island.—*Monroe v. Jones*, 8 R. I. 526.

South Carolina.—*Williams v. Kibler*, 10 S. Car. 420; *Priester v. Priester*, 12 Rich. Eq. (S. Car.) 370.

Tennessee.—*Den v. Payne*, 5 Hayw. (Tenn.) 104; *Hooberry v. Harding*, 3 Tenn. Ch. 684; *Fry v. Shipley*, 94 Tenn. 522.

Texas.—*Moffett v. Moffett*, 67 Tex. 644.

Virginia.—*Mayo v. Carrington*, 4 Call (Va.) 472, 2 Am. Dec. 580.

West Virginia.—*Chapman v. Pittsburg, etc., R. Co.*, 26 W. Va. 325.

Wisconsin.—*Russell v. Ralph*, 53 Wis. 331.

So in Testaments and Conveyances.—*Morris v. Henderson*, 37 Miss. 493; *Mason v. Hackett*, 35 Hun (N. Y.) 240.

Mixed Property.—See MIXED PROPERTY, vol. 20, p. 834.

Estate—Fee Simple.—The term "property" is equivalent to "estate," and when applied to real estate is sufficient *per se* to pass the fee. *Roe v. Pattison*, 16 East 221; *Robinson v. Randolph*, 21 Fla. 638; *Marks' Succession*, 35 La. Ann. 1056; *Stanley v. Stanley*, 26 Me. 198; *Beall v. Holmes*, 6 Har. & J. (Md.) 217; *Hunt v. Hunt*, 4 Gray (Mass.) 193; *Fogg v. Clark*, 1 N. H. 167; *Foster v. Stewart*, 18 Pa. St. 24; *Drayton v. Rose*, 7 Rich. Eq. (S. Car.) 328, 64 Am. Dec. 731; *Williams v. Kibler*, 10 S. Car. 428; *Mayo v. Carrington*, 4 Call (Va.) 472, 2 Am. Dec. 580. See also ESTATE, vol. 11, p. 359.

But in *Webb v. Bowler*, 5 Jones L. (50 N. Car.)

chattels,¹ but the meaning may be restricted by the context.²

As Applied to Real Property, the term comprehends every species of title, inchoate or complete, and embraces those rights which lie in contract, those which are executory as well as those which are executed.³ It includes equita-

365, it was said: "'Property' is sometimes used in a broad sense as synonymous with 'estate,' but the legal signification of the two words is not the same. 'Estate' is the broadest term, and includes choses in action. 'Property' is confined to things that are tangible."

In *Whitehill v. Gotwalt*, 3 P. & W. (Pa.) 328, it was said that the word "property" in a will is sufficient to carry the fee, but it does not have that effect in a deed.

"Separate Property" has not the technical sense of "separate estate" as denoting the equitable, as distinguished from the legal, estate of a married woman. *Cochran v. Thomas*, 131 Mo. 258.

1. "Property" Includes Personal Property. — *Alabama*. — *Fretwell v. McLeomore*, 52 Ala. 141; *Patterson v. Jones*, 89 Ala. 390.

California. — *DeWitt v. San Francisco*, 2 Cal. 289.

Illinois. — *Rheinehart v. Schuyler*, 7 Ill. 528; *Primm v. Belleville*, 59 Ill. 143.

Indiana. — *Sims v. State*, 136 Ind. 358.

Iowa. — *Tallman v. Treasurer*, 12 Iowa 534; *Benkert v. Jacoby*, 36 Iowa 275; *Iowa Lumber Co. v. Foster*, 49 Iowa 28, 31 Am. Rep. 140; *Briggs v. Briggs*, 69 Iowa 617; *Meek v. Briggs*, 87 Iowa 619.

Kansas. — *Bennett v. Wolverton*, 24 Kan. 287.

Missouri. — *Wilson v. Beckwith*, 140 Mo. 359.

New York. — *Owen v. Smith*, 31 Barb. (N. Y.) 641; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138, 19 Am. L. Reg. N. S. 376; *Farnham v. Campbell*, 10 Paige (N. Y.) 598; *Purdy v. Purdy*, 36 N. Y. App. Div. 538; *Porter v. Williams*, 9 N. Y. 148, 59 Am. Dec. 519.

North Carolina. — *Lockhart v. Baer*, 117 N. Car. 298.

Ohio. — *Salt Creek Valley Turnpike Co. v. Parks*, 50 Ohio St. 576.

South Carolina. — *Priester v. Priester*, 12 Rich. Eq. (S. Car.) 370.

Tennessee. — *Hooberly v. Harding*, 3 Tenn. Ch. 684; *Fry v. Shipley*, 94 Tenn. 252.

Texas. — *Moffett v. Moffett*, 67 Tex. 644.

Wisconsin. — *Russell v. Ralph*, 53 Wis. 331.

Canada. — *Kidd v. O'Connor*, 43 U. C. Q. B. 193.

2. "Property" Confined by Context to Personal Property. — *Buchanan v. Harrison*, 1 Johns. & H. 662; *Belaney v. Belaney*, L. R. 2 Ch. 138; *Chapman v. Prickett*, 6 Bing. 602, 19 E. C. L. 174; *Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400; *Wheeler v. Dunlap*, 13 B. Mon. (Ky.) 291; *Harwood v. Lowell*, 4 Cush. (Mass.) 313; *Brailey v. Southborough*, 6 Cush. (Mass.) 142; *Bancroft v. Curtis*, 108 Mass. 50; *Smith v. Hutchinson*, 61 Mo. 87; *Merritt v. Carpenter*, 3 Keyes (N. Y.) 142; *Bridgers v. Taylor*, 102 N. Car. 86.

Confined to Personalty by Rule Ejusdem Generis. — *People v. New York, etc.*, R. Co., 84 N. Y. 565. See also *Miller v. Worrall*, (N. J. 1901)

48 Atl. Rep. 587; *Brawley v. Collins*, 88 N. Car. 605.

So in Statute Defining Pawnbroker. — *Chicago v. Hulbert*, 118 Ill. 633, 59 Am. Rep. 400.

False Pretenses. — Land is not property within the *California* statute as to obtaining money or property by false pretenses. *People v. Cummings*, 114 Cal. 437.

Will Where Intention Not to Include Realty Is Manifest. — *Brown v. Dysinger*, 1 Rawle (Pa.) 408.

In *Clark v. Hyman*, 1 Dev. L. (12 N. Car.) 382, it was held that real estate did not pass by the words in a will, "all my property and possessions, consisting of both personal and perishable."

3. Every Species of Title. — *Soulard v. U. S.*, 4 Pet. (U. S.) 511; *Delassus v. U. S.*, 9 Pet. (U. S.) 133; *Slidell v. Grandjean*, 111 U. S. 423; *Smith v. U. S.*, 10 Pet. (U. S.) 326; *Knight v. U. S. Land Assoc.*, 142 U. S. 201; *Pollard v. Kibbe*, 14 Pet. (U. S.) 390; *Bryan v. Kennett*, 113 U. S. 179; *Eslava v. Doe*, 7 Ala. 553; *Sloan v. Frothingham*, 72 Ala. 603; *Teschmacher v. Thompson*, 18 Cal. 24; *Estes Park Toll Road Co. v. Edwards*, 3 Colo. App. 74; *Figg v. Snook*, 9 Ind. 204. See also *Strother v. Lucas*, 12 Pet. (U. S.) 438.

The Phrase "Property of Every Kind and Description Whatsoever," in a Will, has been held to carry all interest in real estate otherwise undisposed of by the will, whether such interest be vested, future, contingent, or reversionary. *Williams v. Kibler*, 10 S. Car. 428.

"Property" in Massachusetts Constitutional Provision as to Eminent Domain. — See the title EMINENT DOMAIN, vol. 10, p. 1088, note 3; and see *Bryan v. Kennett*, 113 U. S. 179.

The Term Includes Perfect and Imperfect Titles. — *Teschmacher v. Thompson*, 18 Cal. 12; *Thompson v. Doaksum*, 68 Cal. 597.

Includes Leaseholds and Rights of Possession. — *State v. Moore*, 12 Cal. 70. See also *King v. Gotz*, 70 Cal. 240; *In re Erie R. Co.*, 65 N. J. L. 608.

Mining Claim Held to Be Property. — See *Forbes v. Gracey*, 94 U. S. 762; *Crocker v. Donovan*, 1 Okla. 165.

Lien upon Real Estate Included in Term "Property." — *Old Colony, etc.*, R. Co. v. *Plymouth County*, 14 Gray (Mass.) 161.

A Mortgage Is Property — *Wilson v. Ward Lumber Co.*, 67 Fed. Rep. 677; *Horton v. McKee*, 68 Fed. Rep. 404; *People v. Eddy*, 43 Cal. 331, 13 Am. Rep. 143; *Stebbins v. Stebbins*, 86 Mich. 481; *Aggs v. Shackelford County*, 85 Tex. 145; *Judge v. Spencer*, 15 Utah 242.

Fire Insurance Application. — When an applicant states the property to be "his property," this is not a warranty, and the policy is not vitiated, though the property is his wife's and he has merely a marital interest therein. *Mutual F. Ins. Co. v. Deale*, 18 Md. 26, 79 Am. Dec. 674. See also the title FIRE INSURANCE, vol. 13, pp. 226, 231.

ble as well as legal titles to land,¹ incorporeal hereditaments, and easements.²

III. MONEY. — In the broad sense of the term the word "property" will include money, and in a large number of cases it has been so construed.³ But it has been said that in the more popular and ordinary acceptance of the term it does not embrace money, and this restricted meaning has been given to the word wherever it appeared from the context or otherwise that that was the sense in which it was used.⁴

IV. CHOSSES IN ACTION. — In general, the word "property" standing alone will include choses in action.⁵ Thus, the word without the qualifying term

Highways. — In an act conferring a right of eminent domain upon a company, the term "property" has been held not to include public highways. *Cake v. Philadelphia, etc., R. Co.*, 87 Pa. St. 311.

1. Equitable Titles. — *Teschemacher v. Thompson*, 18 Cal. 12; *Thompson v. Doaksum*, 68 Cal. 597; *Tallman v. Treasurer*, 12 Iowa 534; *Gray v. Central Massachusetts R. Co.*, 171 Mass. 116.

2. Incorporeal Hereditaments and Easements. — *In re Sanders*, (1896) 1 Ch. 480; *Hurt v. Atlanta*, 100 Ga. 274; *Metropolitan City R. Co. v. Chicago West Div. R. Co.*, 87 Ill. 318; *Old Colony, etc., R. Co. v. Plymouth County*, 14 Gray (Mass.) 161; *Wilson v. Beckwith*, 140 Mo. 359; *Caro v. Metropolitan El. R. Co.*, 46 N. Y. Super. Ct. 138, 19 Am. L. Reg. N. S. 376; *Mellis v. Munson*, 108 N. Y. 458; *Thompson v. Manhattan R. Co.*, 130 N. Y. 360; *Salt Creek Valley Turnpike Co. v. Parks*, 50 Ohio St. 576.

Irrigation. — As to irrigating ditches and water rights as property, see the title IRRIGATION, vol. 17, p. 513 *et seq.*

3. Property Includes Money — *England.* — *Nevinson v. Lennard*, 34 Beav. 490.

Alabama. — *St. John v. Mobile*, 21 Ala. 228.

California. — *Matter of Miller*, 48 Cal. 171.

District of Columbia. — *In re McKnight*, 1 App. Cas. (D. C.) 28.

Indiana. — *Baker v. State*, 109 Ind. 58.

Michigan. — *Williams v. Detroit*, 2 Mich. 566.

Mississippi. — *Tishomingo Sav. Inst. v. Allen*, (Miss. 1898) 23 So. Rep. 958; *Mitchell v. Mitchell*, 35 Miss. 114; *Philadelphia Invest. Co. v. Bowling*, 72 Miss. 566.

New York. — *Brown v. Brown*, 41 N. Y. 513; *People v. Brooklyn*, 9 Barb. (N. Y.) 535.

Pennsylvania. — *Jacobs's Estate*, 140 Pa. St. 274.

Texas. — *Davison v. State*, 12 Tex. App. 215; *Brown v. State*, 23 Tex. App. 214; *Taylor v. State*, 29 Tex. App. 499.

Examples. — An act carving two new counties out of an old one reserved "all county records or other property" to the old county. It was held that money was included in the term "property." *Washington County v. Weld County*, 12 Colo. 152.

Bankruptcy Act. — Payment of money in due course of business has been held a "transfer of property." *In re Fixen*, (C. C. A.) 102 Fed. Rep. 296. Compare *In re Ratliff*, 107 Fed. Rep. 80. And see generally the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 662, 663.

Money Is "Property" Within Michigan Statute Against Bringing Stolen Property into State. — *People v. Williams*, 24 Mich. 156, 9 Am. Rep. 119. See also the title LARCENY, vol. 18, p. 526.

Money Is Property Within Texas Statute Regulating Venue as to Embezzlement. — *Brown v. State*, 23 Tex. App. 214.

4. Money Not Property. — *Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400; *Martin v. McNeeley*, 101 N. Car. 634; *Sellers' Estate*, 82 Pa. St. 157. See also *Patterson v. Wilson*, 101 N. Car. 588.

5. Choses in Action Included in Term "Property" — *England.* — *In re Turcan*, 40 Ch. D. 5. *United States.* — *Jenkins v. International Bank*, 106 U. S. 571.

Arkansas. — *Cross v. Haldeman*, 15 Ark. 202. *Louisiana.* — *Savings, etc., Soc. v. Austin*, 46 Cal. 416; *McClain v. Buck*, 73 Cal. 322.

Connecticut. — *Stanton v. Lewis*, 26 Conn. 449; *Hubbard v. Brainard*, 35 Conn. 563.

Illinois. — *Stahl v. Webster*, 11 Ill. 511; *Johnson v. Jones*, 44 Ill. 142, 92 Am. Dec. 159; *Cooper v. Beers*, 143 Ill. 25.

Indiana. — *Griffin v. Wilcox*, 21 Ind. 370.

Iowa. — *Calanian v. Brown*, 31 Iowa 337.

Louisiana. — *New Orleans v. Mechanics', etc., Ins. Co.*, 30 La. Ann. 876, 31 Am. Rep. 232.

Maine. — *Carlton v. Carlton*, 72 Me. 116, 39 Am. Rep. 307.

Maryland. — *Barton v. Barton*, 32 Md. 224.

Massachusetts. — *Lombard v. Willis*, 147 Mass. 13.

Michigan. — *Power v. Harlow*, 57 Mich. 111.

Minnesota. — *Banning v. Sibley*, 3 Minn. 389; *Crone v. Braun*, 23 Minn. 239; *Ide v. Harwood*, 30 Minn. 195.

Nevada. — *State v. Carson City Sav. Bank*, 17 Nev. 155.

New Hampshire. — *Fling v. Goodall*, 40 N. H. 215.

New York. — *Matter of Whiting*, 2 N. Y. App. Div. 593.

North Carolina. — *Winfree v. Bagley*, 102 N. Car. 515; *Redmond v. Tarboro*, 106 N. Car. 122.

Ohio. — *Cincinnati v. Hafer*, 49 Ohio St. 60.

Rhode Island. — *Cooney v. Lincoln*, 20 R. I. 183.

South Carolina. — *M'Lemore v. Blocker*, Harp. Eq. (S. Car.) 272.

Tennessee. — *Bennett v. Winfield*, 4 Heisk. (Tenn.) 443; *Harrison v. Willis*, 7 Heisk. (Tenn.) 44, 19 Am. Rep. 604.

Texas. — *Ezell v. Dodson*, 60 Tex. 332; *Gulf, etc., R. Co. v. Goldman*, 87 Tex. 567.

Utah. — *Home F. Ins. Co. v. Lynch*, 19 Utah 189.

Wisconsin. — *State v. Black*, 75 Wis. 493.

"There is no doubt that a right in action, where it comes into existence under common-law principles, and is not given by statute as a mere penalty, or without equitable basis, is

"personal" has been held to include solvent credits.¹ So it has been held to include banknotes,² promissory notes,³ bills of exchange,⁴ bonds,⁵ insurance policies,⁶ judgments,⁷ and stock.⁸

as much property as any tangible possession, and as much within the rules of constitutional protection." *Dunlap v. Toledo, etc., R. Co.*, 50 Mich. 474.

Choses in Action Pass under Bequest of "All My Property of Every Description."—*Hurdle v. Outlaw*, 2 Jones Eq. (55 N. Car.) 75.

Supplementary Proceedings.—A chose in action is "property" as to which a judgment debtor can be examined under the *New York* statute relating to supplementary proceedings. *Ten Broeck v. Sloo*, (Supm. Ct.) 13 How. Pr. (N. Y.) 28.

The Right to Take an Appeal Is Property within the *California* statute against extorting property by threatening letters. *People v. Cadman*, 57 Cal. 562.

Property in Action.—In *Bibb v. M'Kinley*, 9 Port. (Ala.) 644, it was said: "Property may be said to be in possession where a man hath both the right and also the occupation of the thing; it is in action where a man hath not the possession, but merely a right to possess the thing."

1. Solvent Credits—*United States*.—*Doty v. Johnson*, 6 Fed. Rep. 481; *Jenkins v. International Bank*, 106 U. S. 571.

Alabama.—*Boyd v. Selma*, 96 Ala. 149.

California.—*People v. McCreery*, 34 Cal. 433; *Saving, etc., Assoc. v. Austin*, 46 Cal. 416; *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97.

Illinois.—*Knebelkamp v. Fogg*, 55 Ill. App. 563.

Kentucky.—*Louisville v. Henning*, 1 Bush (Ky.) 381.

Maryland.—*Barton v. Barton*, 32 Md. 224.

Mississippi.—*Vaiden v. Hawkins*, 59 Miss. 419.

New York.—*Bowen v. Delaware, etc., R. Co.*, 153 N. Y. 476.

Vermont.—*Catlin v. Hull*, 21 Vt. 152.

Wisconsin.—*Bragg v. Gaynor*, 85 Wis. 468.

It has been held that a debt due to an American citizen from a foreign government is property. *Meade's Case*, 2 Ct. Cl. 224.

In *Tyrone v. Waterford*, 1 De G. F. & J. 613, it was held that a bequest of all the testator's property in a certain county carried debts due to his collieries in that county.

Whether Property in Bar of Statute of Limitations.—See the titles CONSTITUTIONAL LAW, vol. 6, p. 951; LIMITATION OF ACTIONS, vol. 19, p. 170.

2. Banknotes.—*Whiton v. Old Colony Ins. Co.*, 2 Met. (Mass.) 1; *Sansbury v. State*, 4 Tex. App. 99; *Davison v. State*, 12 Tex. App. 215. *Compare Sellers's Estate*, 82 Pa. St. 157.

3. Promissory Notes.—*People v. Reed*, 70 Cal. 529; *People v. Skidmore*, 123 Cal. 267; *Nordyke v. Charleston*, 108 Iowa 414; *New Orleans v. Mechanics', etc., Ins. Co.*, 30 La. Ann. 876, 31 Am. Rep. 232; *Barton v. Barton*, 32 Md. 224; *People v. Summers*, 115 Mich. 537.

Notes and Drafts under Statute Against Obtaining Property by False Pretenses.—See also the

title FALSE PRETENSES AND CHEATS, vol. 12, p. 829 *et seq.*

Promissory Notes Not Included.—It may appear from the context that the word "property" was not used in its broad sense so as to include promissory notes. *Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400.

So in the *Minnesota* garnishment statute in force in 1851. *Hubbard v. Williams*, 1 Minn. 55, 55 Am. Dec. 66. See also the title GARNISHMENT, vol. 14, p. 770.

4. Bill of Exchange.—*State v. Orwig*, 24 Iowa 105; *New Orleans v. Mechanics', etc., Ins. Co.*, 30 La. Ann. 876, 31 Am. Rep. 232; *Morse v. Slasson*, 16 Vt. 325.

5. Bonds.—*Ex p. Huggins*, 21 Ch. D. 90; *Callanan v. Brown*, 31 Iowa 337; *Matter of Whiting*, 2 N. Y. App. Div. 593.

Bonds of a railroad are property. See *Mackay v. San Francisco*, 113 Cal. 392.

Bonds Held Not to Be Property.—*Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400. See also *Smith v. McCullough*, 104 U. S. 25; *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243, 21 Am. Rep. 704.

In *Matter of Bronson*, 150 N. Y. 1, 55 Am. St. Rep. 632, it was held that bonds of a local corporation, kept at the residence of a non-resident owner, were not "property within the state," as that phrase was used in a transfer tax act.

It has been held that the term "property" in tax statutes did not include municipal or state bonds. *Augusta v. Dunbar*, 50 Ga. 387; *Goepp v. Bethlehem*, 28 Pa. St. 254; *Mifflintown v. Jacobs*, 69 Pa. St. 151. See also the title LOCATION.

6. Insurance Policy.—The right which an insolvent debtor has in a policy of insurance on his life payable to him in case he survives a certain day, which day is after the first publication of notice, passes to his assignee as "property" within the meaning of Pub. Stat. Mass. (1882), c. 157, § 46. *Bassett v. Parsons*, 140 Mass. 169. See also *Pierce v. Charter Oak L. Ins. Co.*, 138 Mass. 151; *Goreley v. Butler*, 147 Mass. 10.

A life-insurance policy is property. *Ionia County Sav. Bank v. McLean*, 84 Mich. 629.

But in *White v. Robbins*, 21 Minn. 370, it was held that a fire-insurance policy on a stock of goods did not pass by a sale of all the vendor's personal property.

7. Judgments.—*Barton v. Barton*, 32 Md. 224; *McLaughlin v. Alexander*, 2 S. Dak. 226.

8. Stock Shares or Certificates.—*Puget Sound Nat. Bank v. Mather*, 60 Minn. 362; *Adams v. Jones*, 6 Jones Eq. (59 N. Car.) 221; *Richmond v. Daniel*, 14 Gratt. (Va.) 393.

The Phrase "Property at" a Particular Bank, used in a bequest, has been held to include certificates of shares in certain commercial adventures in France, which were at the bank. *In re Prater*, 37 Ch. D. 481.

"Property" Not Used to Include Stock.—*Chicago v. Hulbert*, 118 Ill. 632, 59 Am. Rep. 400. See also *People v. Hibernia Sav., etc., Soc.*, 51 Cal. 243, 21 Am. Rep. 704; *Matter of Enston*, 113 N. Y. 181.

Choses in Action Not Always Within Term. — The term, however, may be used in such a manner as to make it referable solely to such an estate or interest as one may have in land or goods, subject to manual occupation.¹ And some cases have gone so far as to hold that in its ordinary meaning the term "property" does not include a chose in action.²

PROPERTY RATIONE SOLI. — Property *ratione soli* is "the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil."³

PROPORTION — PROPORTIONAL. (See also GRADUATE — GRADUATION, vol. 14, p. 1109; PRO RATA, *post*; RATIO.) — See note 4.

PROPOSE — PROPOSAL. — See note 5.

1. **Choses in Action Not Included.** — Johnson v. Lexington, 14 B. Mon. (Ky.) 521; Covington v. Powell, 2 Met. (Ky.) 226; Jameson, Appellant, 1 Mich. 102; Goepf v. Bethlehem, 28 Pa. St. 255; Mifflintown v. Jacobs, 69 Pa. St. 152. And see illustrations in the notes to the last paragraph above.

2. **Choses in Action Not Included.** — In Pippin v. Ellison, 12 Ired. L. (34 N. Car.) 61, 55 Am. Dec. 403, it was held that the term "property" in its legal sense does not include choses in action, and in reference to personalty is confined to "goods," which embraces things inanimate, as furniture, etc., and to "chattels," which embraces living things, as horses, etc. See also Vaughan v. Murfreesboro, 96 N. Car. 318 ("property" in a statute permitting municipal taxation held not to include solvent credits, money, or bonds); Pullen v. Raleigh, 68 N. Car. 451; Smith v. Campbell, 3 Hawks (10 N. Car.) 590. These cases were *disapproved* in Redmond v. Tarboro, 106 N. Car. 122.

Debts Not Property Where Debtor Resides. — Railey v. Board of Assessors, 44 La. Ann. 765. See also Murray v. Charleston, 96 U. S. 432.

Capital of Company Uncalled for from Subscribers Not Property. — *In re* Russian Spratts Patent, (1898) 2 Ch. 152.

Unliquidated Damages for Breach of Covenant Not Property. — Miller v. Miller, 44 Pa. St. 172.

Torts May Be Divided into Two General Classes, the first, designated as 'property torts,' embracing all injuries and damages to property, real or personal; the second, known as 'personal torts,' including all injuries to the person, whether to reputation, feelings, or to the body. A tort which is not an injury to property is a personal tort." Mumford v. Wright, 12 Colo. App. 214. See also Hopkins v. Fogler, 60 Me. 266; Stone v. Boston, etc., R. Co., 7 Gray (Mass.) 539.

3. **Property Ratione Soli.** — Blades v. Higgs, 11 H. L. 621, *quoted* in Rexroth v. Coon, 15 R. I. 37. See also the title ANIMALS, vol. 2, p. 341.

4. **The Term Proportion Has Been Said to Be Synonymous with pro rata.** Hager v. McDonald, 65 Fed. Rep. 202.

A devise to several persons "after paying their *proportion* of my debts equally between them" was held to mean that they "should pay according to the value and amount devised to each respectively." Heyward v. Glover 2 McCord Eq. (S. Car.) 395.

Death by Wrongful Act — Texas Statute. — A statute giving a right to damages for death by wrongful act provided that the damages should be "*proportioned* to the injury resulting from such death." This expression was construed to mean in *proportion* to the losses sustained by those entitled to sue, and not to the pain and suffering caused to the deceased by the injury. Houston, etc., R. Co. v. Cowser, 57 Tex. 301. See also the title DEATH BY WRONGFUL ACT, vol. 8, pp. 909, 952.

Proportion in Sense of Share or Portion. — The word *proportion* "is as appropriately and generally employed to indicate one's share or portion when the whole of a thing is distributed according to value as when it is arranged and divided with relation to magnitude or quantity." State v. School, etc., Com'rs. 34 Wis. 167.

Proportion — Whether to Quantity or Value. — See State v. School, etc., Com'rs, 34 Wis. 162.

Equal Proportions. — See EQUAL — EQUALLY, vol. 11, p. 53.

Proportional Share — Special Assessments for Widening Streets under Massachusetts Statutes. — See Bancroft v. Boston, 115 Mass. 379. See also generally the title SPECIAL ASSESSMENTS.

5. **Propose in Sense of Promise.** — In a letter the words "I *propose* to settle" have been construed to mean "I promise to settle," and so to rebut the operation of the statute of limitations. Taylor v. Miller, 113 N. Car. 340. See also Wells v. Hill, 118 N. Car. 900. And see the title LIMITATION OF ACTIONS, vol. 19, p. 288 *et seq.*

Same — Admission of Attorneys. — A statute provided that an attorney must take an oath "in the court in which he *proposes* to practice." The idea expressed by the word *proposes* in this statute was declared to be prospective and to relate "to the time of admission and the act of admission and qualification." *Ex p.* Quarrier, 4 W. Va. 214.

Proposal to Sell Lottery Tickets. — A Connecticut statute made it a crime to publish in the state any written *proposal* to sell lottery tickets. It was held that an advertisement cautioning the public against bogus lotteries and stating that the advertiser's lottery was lawful, but which did not *propose* to sell lottery tickets, was not within the statute. State v. Sykes, 28 Conn. 125. See also the title LOTTERIES, vol. 19, p. 595.

PROPRIETARY.—The word “proprietary” is defined as “belonging to ownership;” “pertaining to a proprietor;” “relating to a certain owner or proprietor.”¹

PROPRIETOR. (See also the title TITLE, OWNERSHIP, AND POSSESSION.)—The word “proprietor” is defined to mean an owner; the person who has the legal right or exclusive title to anything, whether in possession or not.²

1. Proprietary — Proprietary Medicines. — *Ferguson v. Arthur*, 117 U. S. 487, *quoting* Webster's, Worcester's, and the Imperial Dictionaries. This case involved the meaning of the term “*proprietary* medicines” in the Internal Revenue Law, Rev. Stat. U. S., schedule A to § 3419, the court declaring that any medicinal preparation might be *proprietary* without being made by a private formula, or under an exclusive right claimed to the making or preparing it, or under a patent, but by reason alone that it was recommended to the public as a *proprietary* medicine or as a remedy for disease.

Proprietary Preparations.—It has been held that not all goods protected by a trademark come within the description of “*proprietary* preparations,” as that term was used in a tariff law, but only those goods which by reason of the care bestowed upon their preparation, the directions for their use, and the special use for which they are intended, were brought within the fair commercial meaning of those words. *Grommes v. Seeberger*, 41 Fed. Rep. 32. See generally the title REVENUE LAWS. And see PATENT MEDICINE, vol. 22, p. 259.

2. Proprietor.—*Ferguson v. Arthur*, 117 U. S. 487, *Davis v. Murphy*, 3 Minn. 119.

Broad Sense of Term.—It has been said that the term *proprietor* extends to any person who has a beneficial interest in the land. *Lister v. Loble*, 6 N. & M. 340, 36 E. C. L. 435.

Corporation.—A *Massachusetts* statute provided that if the life of a passenger was lost by the negligence “of the *proprietor* or *proprietors* of any railroad, steamboat,” etc., such “*proprietor* or *proprietors*” should be liable to a fine. In *Com. v. Boston*, etc., R. Corp., 11 Cush. (Mass.) 516, it was held that the word *proprietors* in the statute applied to all common carriers, whether corporate or joint-stock companies, the terms used being general, and embracing common carriers, incorporated or unincorporated.

Equitable Estate.—In *Baltimore v. Bouldin*, 23 Md. 328, it was held that one holding an equitable estate in fee, accompanied by possession or an interest equivalent to that of a tenant for ninety-nine years renewable forever, an executor or administrator of such, a mortgagee or mortgagor in possession, or a vendee under a deed of trust who subsequently acquired title in fee, was a *proprietor*. See also *Holland v. Baltimore*, 11 Md. 196.

Equitable ownership is sufficient to constitute a *proprietor*. *Rossiter v. Miller*, 5 Ch. D. 648. See also the title REAL PROPERTY, *post*.

Lessee and Lessor.—The term *proprietor* includes, in ordinary parlance, a tenant or lessee. *Wilson v. Hampden F. Ins. Co.*, 4 R. I. 167. See also *Lister v. Loble*, 7 Ad. & El. 124, 34 E. C. L. 51; *Brown v. Grand Trunk R. Co.*, 24 U. C. Q. B. 350; *Jacob Tome Institute v. Davis*, 87 Md. 605.

The term “*proprietor* of a still” includes the lessee of a still, but not the lessor. *U. S. v. Van Slyke*, 8 Biss. (U. S.) 227. See generally the title REVENUE LAWS.

Proprietor of Gaming House Includes Tenant or Lessee.—See the title GAMING HOUSES, vol. 14, p. 721, *note*.

Lessee of Railroad “Proprietor” under Statute Creating Liability for Fires.—See the title FIRES, vol. 13, p. 440, *note*.

Alterations Which Are “Act of the Proprietors” within Fire-insurance Policy.—To be within this clause, the alteration must be made by the owner, authorized by him, or adopted as his, before the loss accrues. *Padelford v. Provident Mut. F. Ins. Co.*, 3 R. I. 102. See also the title FIRE INSURANCE, vol. 13, pp. 289, 290.

Licensee.—In *Hall v. Brown*, 54 N. H. 495, the defendants, being the owners of a private railroad, with the consent of a railroad corporation ran their cars and engines over a part of the track of said corporation, including a highway crossing. It was held that the defendants, while thus in occupation of the track, were to be considered the *proprietors* of the railroad so far as regarded their rights and liabilities in obstructing the crossing.

Proprietor and Owner Synonymous.—*Baltimore v. Bouldin*, 23 Md. 328; *Holland v. Baltimore*, 11 Md. 196.

“Printer” of Newspaper Includes Proprietor Thereof.—See PRINT — PRINTER, ETC., vol. 22, p. 1297, *note*.

Public Land. (See also the title PUBLIC LANDS, *post*).—In *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112, it was held that one who had entered public land with cash, but had not received a patent therefor, was not a *proprietor* thereof, and was therefore not thereby disqualified to acquire the right of pre-emption.

A stipulation described certain persons as the original *proprietors* of public lands. In construing this stipulation the court said: “We are bound to suppose that in order to have become the *proprietors*, they had done all that the Act of Congress contemplates to acquire such an occupation as would entitle them, in preference to any other persons, to claim and receive the land from the trustee.” *Davis v. Murphy*, 3 Minn. 119.

Receiver.—In *Turner v. Cross*, 83 Tex. 218, it was held that a receiver was not a *proprietor* within the meaning of that term as used in a statute giving a right of action for death caused by the negligence of a *proprietor*, owner, charterer, or hirer of a railroad. To the same effect, see *Allen v. Dillingham*, (C. C. A.) 60 Fed. Rep. 176; *Burke v. Dillingham*, (C. C. A.) 60 Fed. Rep. 729; *Dillingham v. Scales*, (Tex. Civ. App. 1893) 24 S. W. Rep. 975; *Bonner v. Thomas*, (Tex. Civ. App. 1892) 20 S. W. Rep. 722; *Dillingham v. Blake*, (Tex.

PROPRIETY.—See note 1.

PROPRIOS.—In Spanish law *proprios* were productive lands the usufruct of which had been set apart to the several municipalities for the purpose of defraying the charges of their respective governments. The vacant lands, that is to say, the unappropriated royal domain, were designated as *baldios o realezgos*.²

PRO RATA. (See also PROPORTION—PROPORTIONAL, *ante*.—According to a certain part; in proportion.³

PRORATE.—“Prorate” is a verb meaning to divide or distribute proportionately; to assess *pro rata*.⁴

PROROGATION.—See note 5.

PROSCRIBED.—See note 6.

PROSECUTE—PROSECUTION. (See also CRIME—CRIMINAL, vol. 8, p. 248.)—To prosecute is to proceed against judicially.⁷ A prosecution is the act of conducting or waging a proceeding in court;⁸ the means adopted to

Civ. App. 1894) 32 S. W. Rep. 77; *Yoakum v. Selph*, 83 Tex. 607; *Houston, etc., R. Co. v. Roberts*, (Tex. 1892) 19 S. W. Rep. 512; *Brown v. Record*, (Tex. Civ. App. 1893) 23 S. W. Rep. 704; *Culpeper County v. Gorrell*, 20 Gratt. (Va.) 511; *Pitzer v. Williams*, 2 Rob. (Va.) 253.

Trustee Held Not to Be Proprietor.—See *Aiken v. Ferry*, 6 Sawy. (U. S.) 79, 1 Fed. Cas. No. 112.

Proprietor in Occupancy.—In *Reg. v. Parlee*, 23 U. C. C. P. 359, an indictment charging an innkeeper “in and at his tavern” with unlawfully selling liquors was held to be bad, as not necessarily bringing the defendant within the class designated by the statute 32 Vict., c. 32, § 24, O., viz., “the person or persons who are the *proprietors* in occupancy, or tenants or agents in occupancy, of the said place or places,” the court holding that the word “innkeeper” amounts only to a mere description, and not to an averment of his filling such a character, and the words “in and at his tavern” would not necessarily mean the *proprietor* in occupancy, etc., to whom the license is granted, and who alone is liable, but would also include the owner or *proprietor*, even if he were not the occupant.

Proprietor in Copyright Law.—See the title COPYRIGHT, vol. 7, p. 546 *et seq.*

The term *proprietor*, as used in a copyright law, has been held to extend to an assignee. *Liverpool Gen. Brokers' Assoc. v. Commercial Press Telegram Bureaux*, (1897) 2 Q. B. 1. See also the title COPYRIGHT, vol. 7, p. 548.

1. **Propriety.**—In *Com. v. Alger*, 7 Cush. (Mass.) 70, the word *propriety*, as used in an ancient *Massachusetts* ordinance, was held to be “nearly, if not precisely,” equivalent to the word “property.”

2. **Proprios.**—*Sheldon v. Milmo*, 90 Tex. 14, in which case it was further said: “As indicating the sources of revenue of a municipality, the words *proprios* and *arbitrios* are usually found linked together, and when so connected they are sometimes used as meaning ‘ways and means.’”

3. **Pro Rata.**—*Rosenberg v. Frank*, 58 Cal. 405, quoting *Webster's* and *Worcester's* Dictionaries. See also *Pratt v. Dwelling House Mut. F. Ins. Co.*, 7 N. Y. App. Div. 547; *Low v. Blackford*, (C. C. A.) 87 Fed. Rep. 408, *per Purnell, J., dissenting*.

In *Brombacher v. Berking*, 56 N. J. Eq.

253, it was said: “*Pro rata* means according to a measure which fixes proportions. It has no meaning unless referable to some rule or standard.”

Pro Rata the Loss.—Two persons jointly agreeing with another party “to *pro rata* the loss or gain in the value” of certain shares of hotel stock at the end of two years were held to be jointly liable for half the loss. *Penniman v. Stanley*, 122 Mass. 310.

4. **Prorate.**—*Rosenberg v. Frank*, 58 Cal. 405. And see PRO RATA, *supra*.

5. **Prorogation of Parliament Distinguished from Adjournment or Continuance.**—See ADJOURN—ADJOURNMENT, vol. 1, p. 639, note.

6. **Proscribed—Described.**—In *Rochester v. Harris*, (1893) P. 142, in construing a statute which defined certain offenses as those *proscribed* by a canon of 1603, to *proscribe* was defined as meaning to condemn capitally, and it was held that as nothing was *proscribed* by the canon, the word should be understood as meaning “described” or “mentioned.”

7. **Prosecute.**—*Brooks v. Bates*, 7 Colo. 580.

The Word Prosecute Has Been Held to Have the Sense of Commence, in Code Civ. Pro. Oregon. § 27, providing that every action “shall be *prosecuted* in the name of the real party in interest;” so that, after an action has been duly commenced, the plaintiff may assign his interest therein and the assignee is not required to become a party thereto or to commence another action in his own name. See also the title PARTIES TO ACTIONS, vol. 15, ENCYC. OF PL. AND PR. 707 *et seq.*

Claim under Fire Insurance Policy to Be “Prosecuted” in Given Time.—Presentation of claim and demand is not sufficient *prosecution*. See the title FIRE INSURANCE, vol. 13, p. 394.

8. **The Word “Prosecution” May Refer to a Civil Proceeding.**—*Dolloway v. Turrill*, 26 Wend. (N. Y.) 399. See also *State v. Strong*, 39 La. Ann. 1083, *per Fenner, J., dissenting*.

The Provision that No One Shall Be “Prosecuted for Any Fine or Forfeiture” in a statute limiting the time for such prosecution applies to any proceeding for its recovery whether civil or criminal. *Johnson v. Hughes*, 1 Stew. (Ala.) 265.

An Agreement to Prosecute and Recover Claims was construed as an undertaking to bring an action on the claims, the court saying: “The word *prosecution*, when applied to legal pro-

bring a supposed offender to justice and punishment by due course of law. It is also defined as the institution or commencement and continuance of a criminal suit; the process of exhibiting formal charges against an offender before a legal tribunal, and pursuing them to final judgment on behalf of the state or government, as by indictment or information.¹

ceedings, means to begin a civil action." *Hirshbach v. Ketchum*, 5 N. Y. App. Div. 326.

Usually Applied to Criminal Proceedings. — *Rawlins v. Jenkins*, 4 Q. B. 419, 45 E. C. L. 419; *U. S. v. Reisinger*, 128 U. S. 403. See also *Com. v. Clarke*, 1 A. K. Marsh. (Ky.) 323, and the succeeding note.

1. Criminal Proceeding. — *Tennessee v. Davis*, 100 U. S. 269; *Corbin v. People*, 52 Ill. App. 356; *Schulte v. Keokuk County*, 74 Iowa 293; *State v. Williams*, 34 La. Ann. 1198; *State v. Missouri Pac. R. Co.*, (Neb. 1902) 90 N. W. Rep. 878. See also *State v. Rogum*, 8 N. Dak. 548.

By Pen. Code Tex. (1895), art. 26, a *prosecution* is defined to be "the whole or any part of the procedure which the law provides for bringing offenders to justice." *Ex p. Fagg*, 38 Tex. Crim. 573.

Prosecution and Case Distinguished. — In *Counsellman v. Hitchcock*, 142 U. S. 563, it was said that a "criminal *prosecution*" is much narrower than a "criminal case," as those terms are used in the Fifth and Sixth Amendments to the Constitution of the United States.

A "Prosecution" Is Distinguished from an Action or Suit in *State v. Hardenburgh*, 2 N. J. L. 339, and is defined to be "the following up or carrying on of an action or suit already commenced, until the remedy be attained." See also *Knowlton Tp. v. Read*, 11 N. J. L. 321.

May Apply to Defense. — Under a *Vermont* statute providing that the court "may, when necessary, require of either party sufficient security for the costs of *prosecution*," it was held that the word *prosecution* as so used applied as well to the defense as to the plaintiff's action, whenever the defense consisted of an affirmative claim in avoidance of the orator's demand. *Badger v. Taft*, 58 Vt. 585.

Does Not Apply to Investigation of Grand Jury. — Under the *Connecticut* Bill of Rights, providing that "in all criminal *prosecutions* the accused shall have a right to be heard by himself and by counsel," etc., it was held that the word *prosecution* did not apply to an investigation by the grand jury. *State v. Wolcott*, 21 Conn. 279.

Arrest and Commitment. — In *Hartnett v. State*, 42 Ohio St. 568, it was held that where a person is arrested and duly committed for a crime for which he is thereafter indicted, the *prosecution* of that crime is pending as soon as he is arrested and committed.

May Be Synonymous with Indictment. — Within the meaning of the *Pennsylvania* Act of March 31, 1860, § 77 (*Bright. Purd. Dig. Laws Pa.*, 1894, p. 1218), providing that all indictments and *prosecutions* for all misdemeanors, perjury excepted, shall be brought or exhibited within two years next after such misdemeanor shall have been committed, the term *prosecution* is synonymous with "indictment." *Com. v. Haas*, 57 Pa. St. 443.

Confined to Presentment or Indictment. — An *Indiana* statute respecting crimes and punishments provided that in all cases of conviction of any offense named in the statute, the costs of *prosecution* should be included in the judgment rendered against the convict. In construing this provision the court said: "We think the term *prosecution*, in the 80th section of the act respecting crime and punishment, in reference to the costs for which a convicted person is liable, has the same meaning expressed by it in the 78th section, and does not extend beyond the presentment or indictment." *State v. Thurston*, 7 Blackf. (Ind.) 149.

Number of Counts — Indictment. — In *Schulte v. Keokuk County*, 74 Iowa 293, it was held that proceedings under an information or indictment constituted but a single *prosecution*, no matter how many distinct offenses were stated in as many counts or charged in the information upon which the *prosecution* was based.

Costs of Prosecution. — A statute provided that when a person was convicted of an offense under any statute, or at common law, the court should give judgment that the offender pay the costs of the *prosecution*. It was held that the effect of this statute was to impose upon a convicted defendant the duty and liability of paying all the costs and fees legally earned and taxable in the case. *Corbin v. People*, 52 Ill. App. 356.

Filing of Complaint. — The filing of a complaint before a justice of the peace has been held not to be the institution of a criminal *prosecution*. The court said: "The term *prosecution*, as used in section 2, article 12 of the constitution of this state, has been construed to mean a *prosecution* instituted by some officer whose duty it is to *prosecute* criminal offenses. *State v. Kelm*, 79 Mo. 515; *State v. Shortell*, 93 Mo. 123; *Kansas City v. O'Connor*, 36 Mo. App. 594. It is further declared in the above-cited cases that an affidavit of a private individual, made under the statutory provisions already referred to, was not an information and would not support a *prosecution*." *Pilot Grove v. McCormick*, 56 Mo. App. 533.

Malicious Prosecution. — See the title MALICIOUS PROSECUTION, vol. 19, p. 647.

Penalty — Ordinance. — A city began a proceeding by a warrant sued out in its favor charging an assault for the violation of one of its ordinances. This was held to be a civil action. The court said: "It is not a *prosecution*, but a suing in court to recover a penalty for the violation of a city ordinance." *Sparta v. Lewis*, 91 Tenn. 374. See also *Alexander v. Greenville*, 54 Miss. 659, stated under CRIME — CRIMINAL, vol. 8, p. 253, note.

A provision that "in all *prosecutions*" the accused shall have a speedy and public trial, (*Kansas* Bill of Rights, § 10) has been held to

A Preliminary Examination before a committing magistrate is a criminal prosecution.¹

PROSECUTE WITH EFFECT.—See the titles BONDS, vol. 4, p. 618; REPLEVIN; and see, EFFECT, vol. 10, p. 445. See also the title APPEAL BONDS AND UNDERTAKINGS, 1 ENCYC. OF PL. AND PR. 963.

apply only to criminal *prosecutions* for violation of state laws, and not to *prosecutions* for the violation of city ordinances. The court said: "But will the plaintiff claim that juries are required before examining magistrates, or in courts-martial, or in cases of impeachment before the legislature? We suppose not; but the plaintiff will undoubtedly claim that juries are required in all *prosecutions* before police courts or police magistrates for violations of city ordinances; for such is virtually the claim made in this case. But we do not think that even this claim of the plaintiff is tenable. In our opinion, the words 'all *prosecutions*,' as used in section 10 of the Bill of Rights, were intended to mean only all criminal *prosecutions* for violations of the laws of the state, and were not intended to mean or to include *prosecutions* for the violation of ordinary city ordinances which have relation only to the local affairs of the city. This is the view that almost every court of the United States which has had the subject under consideration has taken concerning similar provisions in the constitutions of their states. It is well settled that one and the same act committed by a person in a city may constitute two offenses—one against the laws of the state, and the other against the ordinances of the city; and both may be *prosecuted* against the offender. (1 Dill. Mun. Corp., § 368 *et seq.*, and note, and the numerous cases there cited.) Now this could not be the case if the language of said section 10 was intended to include *prosecutions* for violations of city ordinances as well as for violations of the laws of the state; for that same section not only provides that 'in all *prosecutions* the accused shall be allowed to have a speedy public trial by an impartial jury,' but it also provides that the accused shall not 'be twice put in jeopardy for the same offense.' Hence, if a *prosecution* for the violation of a city ordinance is as much a *prosecution* within the meaning of said section 10 as a *prosecution* for the violation of a state law, and if both kinds of *prosecutions* can be had for one and the same act, then the accused would as effectually 'be twice put in jeopardy for the same offense' as if both *prosecutions* were had strictly and ex-

clusively under the laws of the state." *State v. Topeka*, 36 Kan. 76.

In *Ex p. Fagg*, 38 Tex. Crim. 576, the court said: "All *prosecutions* shall be in the name and by the authority of the state." Const., art. 4, § 12. Every exercise of judicial power by a municipal corporation is as much an exercise of such power by the state as though exercised through its own officers. *Harris County v. Stewart*, 91 Tex. 133. Every limitation upon the judicial power of the state is as much a limitation upon such power when exercised by an agent as when exercised by it directly. 1 *Desty on Tax.*; *Knowlton v. Rock County*, 9 Wis. 410; 1 Dill. 430. The provision applies to all *prosecutions*, not to all *prosecutions* except *prosecutions* by the city, etc. *Railroad Tax Cases*, 13 Fed. Rep. 722. 'A *prosecution* is a criminal proceeding at the suit of the government.' *Tennessee v. Davis*, 100 U. S. 269. 'Applies to criminal actions.' *Sparta v. Lewis*, 91 Tenn. 370; *Iowa R. Land Co. v. Mickel*, 42 Iowa 406. The proceedings by a municipal corporation to enforce such fines and penalties as are ordinarily but by usage enforced by them are not criminal; they are civil in their nature, and are not *prosecutions*. 17 AM. AND ENG. ENCYC. OF LAW 260, note; *Sparta v. Lewis*, 91 Tenn. 370. But whenever imprisonment is a part of the punishment which may be imposed, and which is also imposed by statute or common law, the proceeding is criminal in its nature. 1 Dill. 432, 427, note; *Huron v. Carter*, 5 S. Dak. 4; *Wayne County v. Detroit*, 17 Mich. 400; *Davenport v. Bird*, 34 Iowa 524; *Sioux Falls v. Kirby*, 6 S. Dak. 62; *Sparta v. Lewis*, 91 Tenn. 370. And in such case *prosecution* must be in the name and by the authority of the state, and all process must run in the name of the state. *Leach v. State*, 36 Tex. Crim. 248; *Ex p. Boland*, 11 Tex. App. 159; 1 Dill., 429; *Santa Barbara v. Sherman*, 61 Cal. 57; *State v. Bartlett*, 35 Wis. 287; *Platteville v. McKernan*, 54 Wis. 487; *Brownville v. Cook*, 4 Neb. 101."

Prosecution in Sense of Trial.—*Edwards v. State*, 2 Wash. 295.

1. Preliminary Examination.—*Ex p. Bedard*, 106 Mo. 623; *State v. McO'Brien*, 24 Mo. 402.

PROSECUTING AND DISTRICT ATTORNEYS.

BY HERBERT WHARTON BEALL.

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CROSS-REFERENCES.

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I. NATURE OF OFFICE — SCOPE OF TITLE. — The present title will discuss the law relating to those officers who, whatever their designation, are authorized by law to appear for and represent a circuit, district, county, or municipality in actions and proceedings before courts and judicial officers.¹ Ordinarily the office of prosecuting attorney is provided for by the state constitution,² but in some states the duties of such officer are prescribed by statute and not

1. The office of attorney-general of a state or of the United States is elsewhere discussed, as are also attorneys at law in general. See the titles *ATTORNEY AND CLIENT*, vol. 3, p. 278; *ATTORNEY-GENERAL*, vol. 3, p. 475. See generally the title *PUBLIC OFFICERS*, *post*.

The prosecuting officers of a state, inferior to the attorney-general, are variously desig-

nated in the different states as "prosecuting attorney," "commonwealth's attorney," "district attorney," "solicitor," "attorney for the state," "county attorney," "circuit attorney," etc. In this article the title "prosecuting attorney" will be used as a generic term.

2. **Constitutional Office.** — See the respective state constitutions and statutes. See also

by the constitution.¹ In at least one state a "prosecuting attorney" and a "district attorney" are distinct and separate officers; the one owes his office to the constitution, the other to a statute, and their functions are to be performed in different courts.² In another, the prosecuting attorney and the county attorney are identical officers.³ While the office of county attorney is generally a county office,⁴ a prosecuting attorney may be neither a state, a county, nor a township officer, but a "judicial circuit" officer.⁵ A district attorney of the United States is a statutory officer.⁶

II. MANNER OF FILLING OFFICE.—There are only two constitutional ways of filling the office of prosecuting attorney, viz., election and appointment.⁷ Usually the constitution provides that this officer shall be elected by the qualified voters of the jurisdiction in which he is to exercise his functions.⁸

The Right of Appointment is usually confined to filling a vacancy caused by the absence or disqualification of the regularly elected incumbent⁹ or by the formation of additional districts or circuits having no regularly elected officer,¹⁰ and is vested either in the governor,¹¹ or in the court in session or the presiding judge thereof,¹² or in the county board of supervisors,¹³ or in the police jury,¹⁴ or in the mayor and council of a municipal corporation.¹⁵ Sometimes the power of appointment is conferred upon two persons or bodies, and the one first exercising the power exhausts it.¹⁶ One appointed to fill a vacancy

Moser v. Long, 64 Ind. 189; *Thompson v. Carr*, 13 Bush (Ky.) 220; *Jeter v. State*, 1 McCord L. (S. Car.) 233.

1. **Statutory Office.**—*State v. Morrison*, 64 Ind. 141; *Bruce v. Fox*, 1 Dana (Ky.) 447.

2. *Dodd v. Sweetser*, 14 Ind. 293.

3. *Spokane County v. Allen*, 9 Wash. 229, 43 Am. St. Rep. 830.

4. **County Office.**—*Clark v. Tracy*, 95 Iowa 470; *State v. Kovolosky*, 92 Iowa 498.

5. **Circuit Office.**—*State v. Tucker*, 46 Ind. 355.

6. **District Attorney of United States.**—*The Anna, Blatchf. Prize Cas.* 337, 1 Fed. Cas. No. 402.

7. *People v. Annis*, 10 Colo. 53.

8. **How Elected.**—*People v. Brown*, 16 Cal. 441; *Hays v. Hays*, (Idaho 1897) 47 Pac. Rep. 732; *Walsh v. Knickerbocker*, 18 La. Ann. 180; *Keithler v. State*, 10 Smed. & M. (Miss.) 192; *State v. Davis*, 44 Mo. 129; *State v. Saline County*, 60 Neb. 275; *State v. Franklin County*, 20 Ohio St. 421; *State v. Beal*, 60 Ohio St. 208; *In re Snell*, 58 Vt. 207; *State v. Whitney*, 9 Wash. 377.

9. **To Fill Vacancy.**—*Ex p. Lusk*, 82 Ala. 519; *Korth v. State*, 46 Neb. 631.

10. **Newly Created Office.**—*McCall v. Gardner*, 125 N. Car. 238.

11. **Appointment by Governor.**—*Moser v. Long*, 64 Ind. 189; *State v. Peterson*, 74 Ind. 174; *State v. Garrett*, 29 La. Ann. 637; *State v. Barrow*, 30 La. Ann. 657; *State v. Johnson*, 41 La. Ann. 1076; *Territory v. Ashenfelter*, 4 N. Mex. 85; *Upshaw v. Booth*, 37 Tex. 125; *In re Snell*, 58 Vt. 207.

12. **Appointment by Court.**—*Alabama.*—*Ex p. Diggs*, 50 Ala. 78; *Joyner v. State*, 78 Ala. 448. *Colorado.*—*Roberts v. People*, 11 Colo. 213. *Idaho.*—*State v. Corcoran*, (Idaho 1900) 61 Pac. Rep. 1034.

Iowa.—*White v. Polk County*, 17 Iowa 413.

Kansas.—*State v. Mechem*, 31 Kan. 435.

Kentucky.—*Tesh v. Com.*, 4 Dana (Ky.) 523.

Louisiana.—*State v. Viaux*, 8 La. Ann. 514; *State v. Boudreaux*, 14 La. Ann. 88; *State v. Bass*, 12 La. Ann. 862.

Massachusetts.—*Com. v. King*, 8 Gray (Mass.) 501.

Mississippi.—*Keithler v. State*, 10 Smed. & M. (Miss.) 193.

Missouri.—*State v. Sweeney*, 93 Mo. 38.

Nebraska.—*Spaulding v. State*, 61 Neb. 289.

New York.—*People v. Albany C. Pl.*, 19 Wend. (N. Y.) 27; *People v. Lytle*, 7 N. Y. App. Div. 553.

Ohio.—*Matter of Prosecuting Atty.*, 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

Pennsylvania.—*Com. v. McHale*, 97 Pa. St. 397; *Com. v. Dawson*, 3 Pa. Dist. 603.

South Dakota.—*State v. Marshall County*, 14 S. Dak. 149.

Tennessee.—*Douglass v. State*, 6 Yerg. (Tenn.) 525; *Wilson v. State*, 8 Yerg. (Tenn.) 509; *Hite v. State*, 9 Yerg. (Tenn.) 198; *Turner v. State*, 89 Tenn. 547.

Texas.—*State v. Johnson*, 12 Tex. 231; *State v. Gonzales*, 26 Tex. 197; *State v. Manlove*, 33 Tex. 798; *Harris County v. Stewart*, 91 Tex. 133.

Wisconsin.—*Bird v. State* 77 Wis. 276.

A Justice of the Peace has no power to appoint an attorney to conduct a criminal prosecution before him. *Davis v. Linn County*, 24 Iowa 508; *People v. Albany C. Pl.*, 19 Wend. (N. Y.) 27.

Nor Can a Circuit Judge appoint an attorney to investigate a charge or conduct a case before a justice of the peace. *Sayles v. Newton*, 82 Mich. 84.

13. **Board of Supervisors.**—*People v. Brown*, 16 Cal. 441; *Freeman v. Barnum*, 131 Cal. 386; *Tatlock v. Louisa County*, 46 Iowa 138; *People v. Bemis*, 51 Mich. 424; *State v. Walker*, 30 Neb. 501; *State v. Rankin*, 33 Neb. 266. See also the title COUNTY COMMISSIONERS, vol. 7, p. 992.

14. **Police Jury.**—*State v. Lynch*, 23 La. Ann. 786; *State v. Barrow*, 30 La. Ann. 657.

15. **Mayor and Council.**—*Tesh v. Com.*, 4 Dana (Ky.) 522.

16. *State v. Montgomery*, 25 La. Ann. 138.

A Special Prosecuting Attorney cannot be ap-

that occurs between the election and the installation of the officer elected cannot deprive the regularly elected officer of his term or postpone its beginning.¹ The court will presume that an incumbent of the office has been regularly appointed or elected.² Acts of the legislature changing the mode of appointment are not retroactive,³ and special provisions as to filling vacancies in the office control provisions of a general law as to vacancies.⁴

III. APPOINTMENT OF ASSISTANT COUNSEL. — Counsel to assist the prosecuting attorney may be appointed by the court in its discretion,⁵ or by the attorney-general,⁶ or with the court's sanction by the prosecuting attorney himself,⁷ or by the board of supervisors.⁸ But the prosecutor has no power to employ counsel to aid the prosecuting attorney.⁹

IV. ELIGIBILITY — Fourteenth Amendment. — It has been held that the Fourteenth Amendment to the Constitution of the United States, which disqualifies from holding office any executive or judicial officer of any state who, having taken an oath to support the constitution, has subsequently engaged in insurrection or rebellion against it, applies to county attorneys.¹⁰

Age. — State statutes have sometimes prescribed a certain age as necessary to make one eligible to the office of prosecuting attorney.¹¹

Residence. — So under some statutes residence in the county or district for a specified time is a prerequisite to eligibility.¹² But an assistant to the prosecuting attorney need not be a resident of the county in which his services are to be rendered,¹³ and when the county of his residence is transferred by the legislature to another judicial district, the attorney does not thereby become the attorney of the latter district.¹⁴

Whether Prosecuting Attorney Must Be Attorney at Law. — Strangely enough, most state constitutions have failed to enact that only attorneys at law are eligible to the office of prosecuting attorney.¹⁵ In consequence of this omission the question whether such officer must be a lawyer has been warmly discussed and not uniformly decided. Some states holding the affirmative base their conclusion upon the self-evident import of the words, a "prosecuting attor-

pointed for the sole purpose of certifying a bill of costs. *State v. Seibert*, 130 Mo. 202.

1. *State v. Wells*, 8 Nev. 106.

2. **Appointment Presumed to Be Regular.** — *McLaughlin v. U. S.*, 107 U. S. 526; *Nesbit v. People*, 19 Colo. 442; *State v. Nield*, 4 Kan. App. 626; *People v. Wright*, 89 Mich. 70 [*distinguishing* *People v. Bussey*, 82 Mich. 49]; *Matter of Arnett*, 49 Hun (N. Y.) 599; *Kelly v. State*, 36 Tex. Crim. 480.

3. *State v. Parlange*, 26 La. Ann. 548.

4. *State v. Saline County*, 60 Neb. 275.

5. **Appointment of Assistant Counsel** — *United States*. — *Moreland v. Marion County*, 8 Chicago Leg. N. 25, 17 Fed. Cas. No. 9,794.

California. — *People v. Blackwell*, 27 Cal. 65.

Florida. — *Thalheim v. State*, 38 Fla. 169.

Idaho. — *State v. Crump*, (Idaho 1897) 47 Pac. Rep. 814.

Illinois. — *People v. Warren*, 14 Ill. App. 296.

Indiana. — *Tull v. State*, 99 Ind. 238.

Kansas. — *State v. Nield*, 4 Kan. App. 626, following *Matter of Gilson*, 34 Kan. 641.

Maine. — *State v. Bartlett*, 55 Me. 200.

Massachusetts. — *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534.

Michigan. — *Ulrich v. People*, 39 Mich. 245;

People v. O'Neill, 107 Mich. 556.

Missouri. — *State v. Sweeney*, 93 Mo. 38.

Nebraska. — *Bush v. State*, (Neb. 1901) 86 N. W. Rep. 1062.

Tennessee. — *Chambers v. State*, 3 Humph. (Tenn.) 237.

Wisconsin. — *Richards v. State*, 82 Wis. 172.

Wyoming. — *Ross v. State*, 8 Wyo. 351.

But it has been held that the court has no power to appoint an assistant at the suggestion of the district attorney, or to make the county liable for the services rendered by such appointee. *Seaton v. Polk County*, 59 Iowa 626.

6. *State v. Nield*, 4 Kan. App. 626; *State v. Russell*, 26 La. Ann. 68; *State v. Anderson*, 29 La. Ann. 774.

7. *State v. Bezou*, 48 La. Ann. 1369; *Sneed v. People*, 38 Mich. 251.

Having employed an associate, the prosecuting attorney may intrust to him exclusive conduct of the case. *State v. Anderson*, 29 La. Ann. 774.

8. *People v. Bemis*, 51 Mich. 422.

9. *Ex p. Gillespie*, 3 Verg. (Tenn.) 325.

10. **Eligibility.** — *Worthy v. Barrett*, 63 N. Car. 199, *In re Tate*, 63 N. Car. 308.

11. **Age.** — *Parker v. Smith*, 3 Minn. 240, 74 Am. Dec. 749; *State v. Jackson*, 9 Mont. 508; *State v. Phelps*, 5 S. Dak. 486.

12. **Residence.** — *State v. Johnston*, 101 Ind. 223; *Parker v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

13. *People v. Thacker*, 108 Mich. 652. But see *Ross v. State*, 8 Wyo. 351.

14. *People v. Annis*, 10 Colo. 53.

15. In the Constitutions of *Kentucky* (§ 100) and of *Maryland* (art. 5, § 10), it is provided that the prosecuting officer must be an attorney at law when chosen.

ney" evidently meaning an attorney chosen to act as prosecutor.¹ Others regard this reason as inconclusive and contend that any such construction of the words places a limitation upon the right and power of the electors to choose whom they will to act for them — a limitation unwarranted because not fixed by the constitution.² It has even been held that the legislature has no power to go beyond the constitution and prescribe additional qualifications.³ Where the prosecuting attorney need not be an attorney at law, a disbarred lawyer may hold the office.⁴

How Eligibility Determined. — Where a prosecuting officer has been performing his duties for some time, the question of his eligibility can be determined only in a *quo warranto* proceeding in the proper court. The board of county commissioners cannot declare the office vacant;⁵ nor can the question be raised indirectly by a motion to quash an indictment on the ground of the legal incapacity of the attorney who drew the bill.⁶

The Office Is Not One under the Civil Service Acts, and an applicant for the position is not subject to the civil service examination.⁷

Women Ineligible. — It has been held, not without vigorous dissent, that a woman, although admitted as an attorney, is ineligible to the office of prosecuting attorney.⁸

V. TENURE, REMOVAL, AND RESIGNATION. — **The Term of Office** of a prosecuting attorney is fixed either by the constitution or by the statutes of the state,⁹ and if elected under one act his term is not abridged by the election of another prosecuting attorney under another act.¹⁰ An appointee to fill a vacancy holds only until the vacancy is filled by the removal of the cause thereof or by the holding of another election,¹¹ and until his successor qualifies;¹² but sometimes failure to qualify within a specified time creates a vacancy which must be filled by appointment.¹³ Sometimes an appointee holds during good behavior; and when so holding the term may continue as long as the statute remains in force.¹⁴ In other jurisdictions he holds during the pleasure of the court, which may remove him and appoint his successor without assigning any reason therefor.¹⁵

Removal. — A prosecuting attorney may be removed from office for official misconduct,¹⁶ habitual drunkenness,¹⁷ or conviction of a felony, which will vacate the office from the date of the sentence.¹⁸ But if the judgment of conviction is reversed, the officer is entitled to be restored to his office, and may compel restoration by mandamus.¹⁹

The Election of a Successor has been held to be equivalent to a revocation of the

1. **Whether Prosecuting Attorney Must Be Lawyer.** — *People v. Hallett*, 1 Colo. 358; *Com. v. Adams*, 3 Met. (Ky.) 6; *People v. May*, 3 Mich. 606; *Howard v. Burns*, 14 S. Dak. 383.

A **Suspended Attorney** cannot act as prosecuting attorney. *Brown v. Woods*, 2 Okla. 601.

2. *People v. Dorsey*, 32 Cal. 302; *People v. Hallett*, 1 Colo. 363 [*dissenting opinion*], *State v. Clough*, 23 Minn. 17.

3. *Howard v. Burns*, 14 S. Dak. 383.

4. *State v. Swan*, 60 Kan. 461.

5. *Howard v. Burns*, 14 S. Dak. 383.

6. *State v. Gonzales*, 26 Tex. 197.

7. See title CIVIL SERVICE, vol. 6, p. 93, note.

8. **Women Ineligible.** — *Atty.-Gen. v. Abbott*, 121 Mich. 540.

As to disqualification, for any reason, to appear in a case, see *infra*, this title, *Powers and Duties*.

9. **Tenure.** — *Reynolds v. McAfee*, 44 Ala. 237; *Hays v. Hays*, (Idaho 1897) 47 Pac. Rep. 752; *Cropsey v. Henderson*, 63 Ind. 268; *Moser v. Long*, 64 Ind. 189; *Hench v. State*, 72 Ind. 297; *State v. Johnston*, 101 Ind. 223;

Walsh v. Knickerbocker, 18 La. Ann. 180; *State v. Davis*, 44 Mo. 129; *Jeter v. State*, 1 McCord L. (S. Car.) 233.

10. *Barkwell v. State*, 4 Ind. 179.

11. **Appointment to Fill Vacancy.** — *Ex p. Diggs*, 50 Ala. 78; *Moser v. Long*, 64 Ind. 189; *Elam v. State*, 75 Ind. 518; *Craft v. State*, 3 Kan. 450; *State v. Mechem*, 31 Kan. 435; *State v. Rankin*, 33 Neb. 266; *State v. Saline County*, 60 Neb. 275; *Bechtel v. Farquhar*, 21 Pa. Co. Ct. 580.

12. *Elam v. State*, 75 Ind. 518; *State v. Wells*, 8 Nev. 106.

13. *State v. Barrow*, 30 La. Ann. 657.

14. *Mills v. Pulaski Circuit Ct.*, Hard. (Ky.) 146; *Bruce v. Fox*, 1 Dana (Ky.) 447.

15. *Ex p. Bouldin*, 6 Leigh (Va.) 639.

16. **Removal.** — *Graham v. Stein*, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770; *Killits v. State*, 10 Ohio Cir. Dec. 722, 19 Ohio Cir. Ct. 740; *Trigg v. State*, 49 Tex. 645.

17. *Trigg v. State*, 49 Tex. 645.

18. *Ex p. Diggs*, 50 Ala. 78.

19. **Restoration.** — *Ex p. Diggs*, 50 Ala. 78.

authority of the incumbent.¹

Where the Term Is Fixed by the Constitution, the legislature may not abolish the office nor abridge the term thereof,² nor has the governor the right to remove a prosecuting officer during his term and to appoint another in his stead.³

President. — The President of the United States has the power to remove a district attorney before the expiration of his term.⁴

The Resignation of a Prosecuting Attorney of a county must be tendered to the board of supervisors⁵ or to the Court of Common Pleas of his county; it is not effectual if made to a judge in vacation.⁶

Indefinite Absence of the incumbent from the county does not create a vacancy in the office.⁷

VI. POWERS AND DUTIES — 1. In General. — The powers and duties of prosecuting attorneys cannot be implied or loosely inferred from general principles. They must be found clearly and explicitly defined by statute or ordinance.⁸ These powers and duties may in a general way be divided into those pertaining to criminal prosecutions, those pertaining to civil proceedings, and certain miscellaneous powers and duties not belonging exclusively to either of these two classes.

2. In Criminal Prosecutions. — It is the exclusive right and duty of a prosecuting attorney to conduct for the government all criminal cases in the courts of his jurisdiction, and to do whatever is essential to such prosecution.⁹ He may by an information bring accused persons before justices of the peace,¹⁰ and may advise those officers as to the law, but may not stop criminal proceedings instituted before them,¹¹ though in some jurisdictions he may dismiss before a justice a complaint for felony if it does not, in his opinion, charge a sufficiently high degree of crime.¹² In other jurisdictions, while he may move for such dismissal, the power to dismiss rests with the court.¹³ While in some states he may appear and prosecute cases before a justice of the peace,¹⁴ he is not required to do so.¹⁵ He may send in an indictment to the grand jury without first binding over the accused.¹⁶ As a judicial or quasi-judicial officer he has a certain discretion as to when, how, and against whom to proceed;¹⁷ may enter the room of the grand jury when it is in session, for the purpose of informing and instructing the jurors as to their duties,¹⁸ and may be a competent witness as to proceedings before the grand jury;¹⁹ but he may not

1. Election of Successor. — *Munson v. Morris County*, 18 Kan. 240.

2. *Moser v. Long*, 64 Ind. 189.

3. Removal by Governor. — *Territory v. Ashenfelter*, 4 N. Mex. 85; *Upshaw v. Booth*, 37 Tex. 125.

4. President. — *Parsons v. U. S.*, 167 U. S. 324.

5. Resignation. — *State v. Kovolosky*, 92 Iowa 498.

6. *State v. Brown*, 12 Ohio St. 614.

7. *Kouns v. Draper*, 43 Mo. 225.

8. Powers and Duties. — *Fish v. U. S.*, 36 Fed. Rep. 677; *Hughes County v. Ward*, 81 Fed. Rep. 314; *State v. Morrison*, 64 Ind. 141; *Bevington v. Woodbury County*, 107 Iowa 424; *State v. Board of Education*, 5 Ohio Cir. Dec. 450; *State v. Allen*, 32 Tex. 276; *Spencer v. Galveston County*, 56 Tex. 393.

9. In Criminal Prosecutions. — *Snow v. U. S.*, 18 Wall. (U. S.) 317; *The Anna, Blatchf. Prize Cas.* 337, 1 Fed. Cas. No. 402; *U. S. v. Hoskins*, 5 Mackey (D. C.) 478; *Blalock v. Pillsbury*, 76 Ga. 493; *State v. Morrison*, 64 Ind. 141; *Com. v. Grand Cent. Bldg., etc., Assoc.*, 97 Ky. 325; *State v. Bezou*, 48 La. Ann. 1369; *State v. McMillan*, 108 Mo. 157; *Dinsmore v. State*, 61 Neb. 418; *People v. Columbia*

County, 134 N. Y. 1; *Terrell v. Greene*, 88 Tex. 539.

10. *State v. Judge*, 33 La. Ann. 1222; *Treasurer v. Brooks*, 23 Vt. 698.

11. *Beecher v. Anderson*, 45 Mich. 543.

12. Power to Dismiss Complaint. — *Ex p. Claunch*, 71 Mo. 233.

13. *People v. Ward*, 85 Cal. 585; *Ex p. Claunch*, 71 Mo. 233; *People v. Kurminsky*, (Supm. Ct. Crim. T.) 23 Misc. (N. Y.) 504.

14. Before Justices of the Peace. — *State v. Morrison*, 64 Ind. 141.

15. *Sayles v. Newton*, 82 Mich. 84; *Smith v. Portage County*, 9 Ohio 26; *Cincinnati, etc., R. Co. v. Lee*, 37 Ohio St. 480.

16. Sending Indictment to Grand Jury. — *Com. v. English*, 11 Phila. (Pa.) 439, 33 Leg. Int. (Pa.) 72.

17. Discretion as to Prosecution. — *Clark v. Lyon County*, 37 Iowa 469; *Farrar v. Steele*, 31 La. Ann. 640; *State v. Cole*, 38 La. Ann. 843; *Engle v. Chipman*, 51 Mich. 524.

18. Relations to Grand Jury. — *People v. Van Wyck*, 4 Cow. (N. Y.) 260; *Fairlie v. Maxwell*, 1 Wend. (N. Y.) 17; *State v. McNinch*, 12 S. Car. 89. And see the title JURY AND JURY TRIAL, vol. 17, p. 1292.

19. *State v. Grady*, 84 Mo. 220.

prevent that body from considering charges by declaring that the government will not prosecute.¹ In some states he may and should follow a case commenced in his district into any other district or court to which the case may be taken by change of venue or writ of error, and conduct it there;² in others he is not allowed to do so, that duty devolving upon the prosecuting attorney of the other district.³ But he cannot institute proceedings out of his jurisdiction without the consent of the attorney-general.⁴ He may move to set aside a stay of proceedings or to quash a writ of error,⁵ and may agree that a forfeiture of a recognizance shall, on certain terms, be set aside.⁶ In some states the prosecuting attorney must prosecute for penalties incurred by the sale of intoxicating liquors on Sunday or on election day.⁷ In examining witnesses he has the power to administer an oath.⁸

Right to Enter Nolle Prosequi. — The prosecuting attorney's right to enter a nolle prosequi has been the subject of much discussion and much difference of opinion. The old rule that he has such power by virtue of his office and independently of the court has been reaffirmed in many cases.⁹ Other cases hold that the power to enter a nolle prosequi is to be exercised only with the assent and approval of the court.¹⁰ Where the case has gone so far as the impaneling of a jury, the prosecuting attorney cannot enter a nolle prosequi without the consent of the accused. The latter is entitled, if he so insists, to a verdict the effect of which is to bar any subsequent action on the same charge.¹¹

Must Be Just and Impartial. — The prosecuting attorney must not suggest false charges against a prisoner, nor introduce improper testimony against him, nor distort or withhold evidence in order to convict.¹² He must not draw damaging conclusions from the defendant's failure to testify in his own behalf.¹³

He Should Not Act in a Case if he has before appeared in a civil suit against the

1. *U. S. v. Schumann*, 7 Sawy. (U. S.) 439.
2. **Change of Venue.** — *State v. Carothers*, 1 Greene (Iowa) 464; *Bevington v. Woodbury County*, 107 Iowa 424.
3. *Thompson v. Carr*, 13 Bush (Ky.) 220; *Gandy v. State*, 27 Neb. 707.
4. *Martin v. State*, 39 Kan. 576.
5. **Power over Proceedings.** — *Carnal v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 262. And see *People v. Strong*, (N. Y. Gen. Sess.) 1 Abb. Pr. N. S. (N. Y.) 244.
6. *Esmond v. People*, 18 Ill. App. 114.
7. **Prosecuting Violations of Liquor Laws.** — *People v. New York*, 32 N. Y. 473.
8. **Power to Administer Oath.** — *Bailey v. State*, 41 Tex. Crim. 157. And see the title OATHS AND AFFIRMATIONS, vol. 21, p. 748.
9. **Right to Enter Nolle Prosequi** — *United States*. — *U. S. v. Schumann*, 7 Sawy. (U. S.) 439; *U. S. v. Schoemaker*, 2 McLean (U. S.) 114; *U. S. v. Stowell*, 2 Curt. (U. S.) 153.
10. *Alabama*. — *Wooster v. State*, 55 Ala. 217; *Lacey v. State*, 58 Ala. 385.
11. *Colorado*. — *People v. District Ct.*, 23 Colo. 466.
12. *Connecticut*. — *Merwin v. Huntington*, 2 Conn. 209.
13. *Massachusetts*. — *Com. v. Wheeler*, 2 Mass. 172; *Com. v. Smith*, 98 Mass. 10; *Com. v. Scott*, 121 Mass. 33; *Com. v. Tuck*, 20 Pick. (Mass.) 356.
14. *Mississippi*. — *Clarke v. State*, 23 Miss. 261.
15. *New Hampshire*. — *State v. Smith*, 49 N. H. 155, 6 Am. Rep. 480; *State v. Tufts*, 56 N. H. 137.
16. *New Jersey*. — *State v. Hickling*, 45 N. J. L. 152.
17. *New York*. — *People v. McLeod*, 25 Wend. (N. Y.) 483.
18. *Pennsylvania*. — *Agnew v. Cumberland County*, 12 S. & R. (Pa.) 94.
19. *Alabama*. — *State v. Dunham*, 9 Ala. 76; *Willingham v. State*, 14 Ala. 539.
20. *California*. — *People v. Indian Peter*, 48 Cal. 250.
21. *Georgia*. — *Newsom v. State*, 2 Ga. 60; *Durham v. State*, 9 Ga. 306; *Statham v. State*, 41 Ga. 507.
22. *Indiana*. — *Halloran v. State*, 80 Ind. 586; *State v. Davis*, 4 Blackf. (Ind.) 345.
23. *Missouri*. — *Ex p. Donaldson*, 44 Mo. 149.
24. *New York*. — *People v. McLeod*, 25 Wend. (N. Y.) 483. See also *Moulton v. Beecher*, (Supm. Ct. Gen. T.) 1 Abb. N. Cas. (N. Y.) 193.
25. *North Carolina*. — *State v. Moody*, 69 N. Car. 529.
26. *Pennsylvania*. — *Com. v. Seymour*, 2 Brews. (Pa.) 567.
27. *South Carolina*. — *State v. Howard*, 15 Rich. L. (S. Car.) 274.
28. *Vermont*. — *State v. Roe*, 12 Vt. 93.
29. *Virginia*. — *Anonymous*, 1 Va. Cas. 139.
30. **11. After Impaneling Jury.** — *Joy v. State*, 14 Ind. 139; *State v. Washington*, 33 La. Ann. 1473; *Com. v. Scott*, 121 Mass. 33; *Com. v. Tuck*, 20 Pick. (Mass.) 366; *Mount v. State*, 14 Ohio 295, 45 Am. Dec. 542.
31. **12. Must Be Just and Impartial.** — *Smith v. People*, 8 Colo. 457; *People v. Montague* 71 Mich. 447; *People v. Vanderhoof*, 71 Mich. 159.
32. *Long v. State*, 56 Ind. 183, 26 Am. Rep. 19; *State v. Balch*, 31 Kan. 465; *Com. v. Scott*, 123 Mass. 239, 25 Am. Rep. 87; *State v. Brownfield*, 15 Mo. App. 593.

same party and based substantially upon the same facts,¹ or if he is interested pecuniarily in the result of the trial,² or is closely related to the defendant or to a chief witness.³

Certain Miscellaneous Matters. — He has no power to enter a remittitur of a portion of the verdict of a jury,⁴ nor to agree that judgment may be rendered for less than is due to the state,⁵ nor to waive a part of the imprisonment prescribed by statute,⁶ nor by his consent to confer jurisdiction to hear an appeal after the prescribed time for taking an appeal has elapsed,⁷ nor to extend the time for filing a bill of exceptions,⁸ nor to compromise upon other terms than those prescribed by statute.⁹ While it is the better practice for the prosecuting attorney to sign all bills of indictment, such signature is not indispensable to the validity of such bill.¹⁰

3. In Civil Actions. — It is the privilege and duty of the prosecuting attorney to appear for the state in the several counties of his district in civil actions to which the state, county, or other political division is a party,¹¹ and it is his duty so to appear without reference to the locality of the court in which the action may be pending.¹² He may appeal when he thinks the state is injured by the decision,¹³ but only during his term of office,¹⁴ and with the consent of the County Court, when such consent is required by statute.¹⁵ He may apply for a writ of certiorari to carry a case to the Supreme Court,¹⁶ and must appear in that court in cases removed from his county.¹⁷ He may file *quo warranto* proceedings to test the right of an incumbent to an office or of a corporation to its charter,¹⁸ and may be compelled by mandamus to do so.¹⁹ He may sue on an undertaking given as bail in a criminal case,²⁰ may institute injunction proceedings against a state board²¹ or city officers,²² may sue upon the official bond of a county official,²³ may bring suit to annul a patent granted by the state²⁴ or to recover a statutory penalty against a foreign corporation,²⁵ may

1. Appearance in Prior Civil Suit. — *Roberts v. People*, 11 Colo. 213; *State v. Halstead*, 73 Iowa 376; *People v. Hurst*, 41 Mich. 328; *People v. Hillhouse*, 80 Mich. 580; *People v. Bussey*, 82 Mich. 49; *People v. Whittemore*, 102 Mich. 519; *Jackson v. State*, 81 Wis. 127; *Ross v. State*, 8 Wyo. 351.

2. People v. Wabash, etc., R. Co., 12 Ill. App. 263.

3. People v. Cline, 44 Mich. 290.

4. Power to Enter Remittitur. — *State v. Brewer*, 7 Blackf. (Ind.) 45; *Allen v. Com.*, 2 Leigh (Va.) 727.

5. To Compromise Judgment. — *Whittington v. Ross*, 8 Ill. App. 234; *State v. Schloss*, 92 Ind. 295; *State v. Allen*, 32 Tex. 273.

6. To Waive Imprisonment. — *U. S. v. Morin*, 4 Biss. (U. S.) 93, 26 Fed. Cas. No. 15,810.

7. To Extend Time for Appeals. — *State v. Fleming*, 13 Iowa 444.

8. Bartley v. State, 111 Ind. 358.

9. Fleming v. State, 28 Tex. App. 234.

10. Signing of Bills. — *Keithler v. State*, 10 Smed. & M. (Miss.) 193.

11. Duty to Appear in Civil Actions — *United States v. Delaware v. Emerson*, 8 Fed. Rep. 411; *Bliss v. U. S.*, 37 Fed. Rep. 191.

Arkansas. — *Graham v. Parham*, 32 Ark. 677.

Colorado. — *People v. Hallett*, 1 Colo. 357; *Atchison, etc., R. Co. v. People*, 5 Colo. 60.

Idaho. — *State v. Fitzpatrick*, (Idaho 1897) 51 Pac. Rep. 112.

Iowa. — *State v. Fleming*, 13 Iowa 444.

Oklahoma. — *Coulson v. Territory*, 8 Okla. 113.

Texas. — *Spencer v. Galveston County*, 56 Tex. 392; *San Antonio, etc., Pass. R. Co. v. State*, 79 Tex. 264.

12. Moreland v. Marion County, 8 Chicago

Leg. N. 25, 17 Fed. Cas. No. 9,794; *Hennepin County v. Robinson*, 16 Minn. 381. But see *Herrington v. Santa Clara County*, 44 Cal. 496.

13. Right to Appeal. — *Jefferson County v. Waters*, 63 S. W. Rep. 669, 23 Ky. L. Rep. 669; *Fields v. State, Mart. & Y. (Tenn.)* 168.

14. State v. Duff, 83 Wis. 291.

15. Montgomery County v. Tipton, (Ky. 1891) 15 S. W. Rep. 249.

16. State v. New Jersey Jockey Club, 52 N. J. L. 493.

17. Appearing in Supreme Court. — *Fambrough v. State*, 113 Ga. 934; *State v. Fleming*, 13 Iowa 443; *People v. Bussey*, 80 Mich. 501. *Contra*, *Eagle River v. Oneida County*, 86 Wis. 266.

18. May Begin Quo Warranto Proceedings. — *State v. McMillan*, 108 Mo. 153; *Carnal v. People*, (Supm. Ct. Gen. T.), 1 Park. Crim. (N. Y.) 262; *Gilroy v. Com.*, 105 Pa. St. 484; *Com. v. Allen*, 15 Pa. Co. Ct. 257; *State v. Southern Pac. R. Co.*, 24 Tex. 80. But see *Hawkins v. State*, 81 Md. 306.

19. Berhil v. Fisk, 24 La. Ann. 149. See the title MANDAMUS, vol. 19, p. 781.

20. Miscellaneous Rights and Duties. — *Hannah v. Wells*, 4 Oregon 249.

21. Hornaday v. State, 62 Kan. 822.

22. State v. Kansas City, 60 Kan. 518. But see *State v. Board of Education*, 5 Ohio Cir. Dec. 450, 11 Ohio Cir. Ct. 41.

23. People v. Love, 25 Cal. 521; *Fuhrer v. State*, 55 Ind. 150; *Whitnell v. Justices*, 4 Litt. (Ky.) 147; *Terrell v. Greene*, 88 Tex. 539. But see *Spencer v. Galveston County*, 56 Tex. 392.

24. State v. Smith, 13 La. Ann. 424.

25. Tennessee Mut. Bldg., etc., Assoc. v. State, 99 Ala. 198.

institute a proceeding to enforce a public charity,¹ may receive and receipt for fines imposed by the courts in his district, collect judgments rendered for such fines, and pay the proceeds over to the school superintendents of the proper counties,² must prosecute all suits for the collection of the public revenue,³ and must add his indorsement to papers properly executed when such indorsement is necessary to their completeness.⁴ But he has no power to bring a suit in behalf of the people of a state, which is able to appear by itself and to sue and be sued in its own name.⁵ He cannot bring an action in the name of the county against the county commissioners.⁶ He may not institute process or proceedings which the county commissioners alone are authorized to institute,⁷ nor act independently of the board of supervisors in matters peculiarly or exclusively within their prerogatives,⁸ nor control the action of the sheriff or marshal in the execution of warrants,⁹ nor purchase in the name of the state lands sold to satisfy a judgment in favor of the state.¹⁰ He cannot, after the expiration of his term of office, accept money due to the county so as to discharge the debtor,¹¹ nor act at all in an official capacity.¹²

4. Miscellaneous. — By virtue of his election or appointment, a prosecuting attorney is entitled to an undisputed and exclusive exercise of the functions of his office, and if illegally ousted therefrom he may be restored by writ of mandamus.¹³ He may also prosecute an action upon his own relation against one who intrudes into his office.¹⁴

Employing Assistants. — He may, with the sanction of the court, procure counsel to assist him in a trial and bind the county to pay for their services;¹⁵ and where such assistants are employed by the County Court or other power, the prosecuting attorney may control the proceedings in court.¹⁶ While he may delegate to such counsel the right to open and close the argument,¹⁷ he may not make a general delegation of his powers as prosecuting attorney.¹⁸ A United States district attorney may employ a stenographer without first getting permission from the attorney-general.¹⁹

Right to Examine Papers. — He is entitled to an inspection and examination of all papers and documents in the office of a city magistrate.²⁰

To Hold Two Offices. — He may hold at the same time another office whose duties are not incompatible with those of prosecuting attorney, such as notary public, or captain in the volunteer service of the United States.²¹

To Control Case. — While a case is under the control of the prosecuting attorney, any agreement he may make with reference to the disposition thereof is binding so far as it is proper and legal.²² He may, acting for the state, consent to the selection of a special judge to try a case when the regular judge is disqualified.²³

1. *Parker v. May*, 5 Cush. (Mass.) 336.

2. *People v. Christerson*, 59 Ill. 157; *State v. St. Johnsbury*, 59 Vt. 332.

3. *Mix v. People*, 116 Ill. 265.

4. *Fornoff v. Nash*, 23 Ohio St. 335.

5. **Limitations upon His Powers.** — *Patterson v. Temple*, 27 Ark. 202.

6. *Spokane County v. Bracht*, 23 Wash. 102.

7. *Walton v. Greenwood*, 60 Me. 356.

8. *Ventura County v. Clay*, 119 Cal. 213; *State v. Zumstein*, 2 Ohio Cir. Dec. 539, 4 Ohio Cir. Ct. 268; *Prosecuting Atty. v. Spencer*, 9 Ohio Dec. 826.

9. *U. S. v. Scroggins*, 3 Woods (U. S.) 529, 27 Fed. Cas. No. 16,244; *Beecher v. Anderson*, 45 Mich. 543. See also *Levy Ct. v. Ringgold*, 2 Cranch (C. C.) 659.

10. *Littleton v. State*, 2 Lea (Tenn.) 669.

11. *Munson v. Morris County*, 18 Kan. 240.

12. *State v. Schloss*, 92 Ind. 293.

13. **Right to His Office.** — *State v. Jackson*, 68 Ind. 58; *Lewis v. Lyon County*, 38 Iowa 695; *Terrell v. Greene*, 88 Tex. 540.

14. *State v. Peterson*, 74 Ind. 175.

15. **Employing Assistance.** — *Sneed v. People*, 38 Mich. 251; *Bush v. State*, (Neb. 1901) 86 N. W. Rep. 1062; *State v. Harris*, 12 Nev. 414. *Contra*, *Foster v. Clinton County*, 51 Iowa 541.

16. *Moreland v. Marion County*, 8 Chicago Leg. N. 25, 17 Fed. Cas. No. 9,794; *San Francisco v. U. S.*, 36 Fed. Cas. 553, 21 Fed. Cas. No. 12,316; *Allen v. San Bernardino County*, 72 Cal. 450.

17. *State v. Mack*, 45 La. Ann. 1155; *State v. Robb*, 90 Mo. 30.

18. *Engle v. Chipman*, 51 Mich. 524.

19. *Fish v. U. S.*, 36 Fed. Rep. 677.

20. **Right to Examine Papers.** — *People v. Olmstead*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 346.

21. **To Hold Two Offices.** — *Bryan v. Cattell*, 15 Iowa 538; *State v. Jackson*, 9 Mont. 508.

22. **To Control Case.** — *State v. Fleming*, 13 Iowa 444.

23. *Early v. State*, 9 Tex. App. 476; *Davis v. State*, 44 Tex. 523.

Medium of Communication with Executive Branch. — As the recognized officer of the government, he is the only medium through whom the court can communicate with the executive authorities.¹

Appearance of Government. — But he is not so far an officer of the court that it may compel him to enter an appearance for the government.²

Upon Retirement he must surrender to his successor the prosecution of all pending suits.³

Things He May Not Do. — Besides the numerous powers and duties already enumerated, there are certain other things of a general character which it is the duty of this officer to refrain from doing. He must not usurp or assume powers not pertaining to his office, nor use corruptly those which properly belong to it.⁴ He must not consort with jurors or witnesses in such a way as to influence them to act and speak unfairly or with prejudice.⁵ After ceasing to be prosecuting attorney he must not do any act that would embarrass or defeat any action prosecuted by his successor or by the attorney-general, or that would prejudice the rights of the state.⁶ He may not compromise with the debtors of the government on the ground that judgments against them could not be collected,⁷ nor dismiss a criminal charge pending before a grand jury⁸ or a commissioner.⁹

A United States District Attorney cannot appear in cases arising under territorial laws; but only when the court sits as a District or Circuit Court of the United States.¹⁰

5. Of Assistant Prosecuting Attorneys. — An assistant or one chosen *pro tempore* can usually do whatever the regular prosecuting attorney is authorized to do, and his acts have the same validity as though done by the principal in person.¹¹ Such assistant, however, need not be sworn and need not give bond.¹² It is no objection to such assistants that they were employed on private account and paid for their services by parties personally interested in the issue of the action.¹³

VII. COMPENSATION — 1. In General. — The compensation of a prosecuting attorney may be paid by salary, or by fees, or by a percentage of the costs or fines, or by two or more of these methods at the same time. As a general rule he is not entitled to compensation except for services which he is expressly authorized and empowered to perform.¹⁴

2. Salary. — The salary of this officer is fixed usually by statute or by a

1. *U. S. v. Blaisdell*, 3 Ben. (U. S.) 133. See also *U. S. v. Doughty*, 7 Blatchf. (U. S.) 424, 25 Fed. Cas. No. 14,986.

2. *Fifth Nat. Bank v. Long*, 7 Biss. (U. S.) 502, 9 Fed. Cas. No. 4,780.

3. *Cole v. McKune*, 19 Cal. 422.

4. **Things He May Not Do.** — *State v. Wedge*, 24 Minn. 150.

5. *People v. Montague*, 71 Mich. 447; *Ross v. State*, 8 Wyo. 351.

6. *State v. Schloss*, 92 Ind. 295.

7. *U. S. v. Beebe*, 180 U. S. 343.

8. *U. S. v. Schumann*, 7 Sawy. (U. S.) 439.

9. *U. S. v. Schumann*, 2 Abb. (U. S.) 523.

10. *People v. Heed*, 1 Idaho 402.

11. **Assistant Prosecuting Attorneys** — *California*. — *People v. Magallones*, 15 Cal. 426.

Indiana. — *Choen v. State*, 85 Ind. 209.

Kansas. — *State v. Shearman*, 51 Kan. 686.

Kentucky. — *Wiggins v. Com.*, (Ky. 1899) 53 S. W. Rep. 649.

Louisiana. — *State v. Ryder*, 36 La. Ann. 294; *State v. Montgomery*, 41 La. Ann. 1087.

Michigan. — *People v. Trombley*, 62 Mich. 278.

Mississippi. — *Carlisle v. State*, 73 Miss. 388.

Missouri. — *State v. Hynes*, 39 Mo. App. 569;

State v. Daly, 49 Mo. App. 184; *Browne's Appeal*, 69 Mo. App. 159.

Nebraska. — *Korth v. State*, 46 Neb. 631.

Ohio. — *Matter of Prosecuting Atty.*, 2 Ohio Dec. (Reprint) 602, 4 West. L. Month. 147.

Texas. — *State v. Lackey*, 35 Tex. 358.

Wisconsin. — *Richards v. State*, 82 Wis. 172.

Wyoming. — *Sheridan County v. Hanna*, 9 Wyo. 368.

12. *Martin v. State*, 16 Ohio 364.

13. *Kansas*. — *State v. Wilson*, 24 Kan. 191, 36 Am. Rep. 257.

Maine. — *State v. Bartlett*, 55 Me. 200.

Nebraska. — *Polin v. State*, 14 Neb. 545;

Gandy v. State, 27 Neb. 707.

Wisconsin. — *Bird v. State*, 77 Wis. 276.

14. **Paid Only for Authorized Services** — *California*. — *San Diego County v. California Southern R. Co.*, (Cal. 1884) 1 Pac. Rep. 897.

Georgia. — *Fite v. Black*, 92 Ga. 364.

Indiana. — *Jay County v. Templer*, 34 Ind. 323.

Iowa. — *Tatlock v. Louisa County*, 46 Iowa 138; *Seaton v. Polk County*, 59 Iowa 628;

Davis v. Linn County, 24 Iowa 508; *Blair v. Dubuque County*, 27 Iowa 181.

Missouri. — *Kouns v. Draper*, 43 Mo. 225.

contract between him and the board of supervisors or other governmental authority, and when so fixed for a definite term, cannot be either increased or diminished during such term.¹ Where a maximum salary is fixed, a sum paid to a prosecuting attorney *pro tem.* may be deducted from the amount.² Extra compensation paid for services performed in another county after the expiration of the attorney's term of office is not an increase of salary.³ Payment of salary cannot be refused because the officer was inefficient or without learning.⁴ A prosecuting attorney legally entitled to the office is entitled to the salary for the term, whether in possession of the office or not, and although the salary may have been paid to one wrongly in possession.⁵ It is sometimes provided that the salary shall not exceed the aggregate amount of fees earned and collected during the term of office.⁶ Abolishing the office, of course, abolishes the salary attached.⁷

3. Fees. — Where paid by fees, the prosecuting attorney is entitled only to such fees as the statute prescribes.⁸ Ordinarily, the character of the crime is the criterion by which the amount of the fee is fixed.⁹

A Prosecuting Attorney Is Not Entitled to a Fee unless the case is actually tried,¹⁰ or sentence is passed,¹¹ nor until a conviction is secured,¹² nor if the judgment of conviction is reversed,¹³ nor for making a motion for judgment after verdict,¹⁴ nor in a case in which he did not actually appear,¹⁵ nor, sometimes, even

Pennsylvania. — Ulrich *v.* Lebanon County, 1 Pa. Co. Ct. 83.

Texas. — Spencer *v.* Galveston County, 56 Tex. 395.

1. Salary. — *California.* — McPhail *v.* Jeffers, 130 Cal. 480.

Dakota. — Polk *v.* Minnehaha County, 5 Dak. 129.

Indiana. — State *v.* Shufflebarger, 4 Ind. 532; Dodd *v.* Sweetser, 14 Ind. 293.

Iowa. — Curtis *v.* Cass County, 49 Iowa 421; Goetzman *v.* Whitaker, 81 Iowa 527.

Minnesota. — Hawkins *v.* Watkins, 34 Minn. 554.

Mississippi. — Fant *v.* Gibbs, 54 Miss. 397.

Montana. — Penwell *v.* Lewis, etc., County, 23 Mont. 351.

New Jersey. — State *v.* Chosen Freeholders, 42 N. J. L. 533.

Ohio. — Cincinnati, etc., R. Co. *v.* Lee, 37 Ohio St. 479.

Pennsylvania. — Lewis *v.* Lackawanna County, 17 Pa. Super. Ct. 25.

2. White *v.* Berry, 28 Ark. 198; Cole *v.* Humphries, 78 Miss. 163.

3. Jones *v.* Morgan, 67 Cal. 308.

4. O'Connor *v.* East Baton Rouge, 31 La. Ann. 221.

5. Dorsey *v.* Smyth, 28 Cal. 22.

6. Com. *v.* Grier, 152 Pa. St. 176.

7. Reynolds *v.* McAfee, 44 Ala. 237.

8. Fees. — *United States.* — District Attorneys' Fees, 1 Blatchf. (U. S.) 647, 30 Fed. Cas. No. 18,290.

Alabama. — Murphy *v.* State, 71 Ala. 15.

California. — Pillsbury *v.* Brown, 45 Cal. 46.

Georgia. — Johnston *v.* Lovett, 65 Ga. 716;

Blalock *v.* Pillsbury, 76 Ga. 493.

Indiana. — Wood *v.* Madison County, 125 Ind. 270.

Iowa. — Farr *v.* Seaward, 82 Iowa 221.

Kentucky. — Com. *v.* Shanks, 10 B. Mon. (Ky.) 304.

Missouri. — Davis *v.* Justices, 1 Mo. 151; Freeman *v.* Henry County, 32 Mo. 446.

Montana. — Territory *v.* Cascade County, 8 Mont. 396.

Oregon. — Colvig *v.* Klamath County, 16 Oregon 244.

Pennsylvania. — Geiser *v.* Northampton County, 20 W. N. C. (Pa.) 259.

Texas. — Hare *v.* Grayson County, (Tex. Civ. App. 1899) 51 S. W. Rep. 656.

9. How Fees Are Determined. — *United States.* — U. S. *v.* Ingersoll, Crabbe (U. S.) 135, 26 Fed. Cas. No. 15,440; Bashaw *v.* U. S., 47 Fed. Rep. 40.

Alabama. — Adams *v.* State, 48 Ala. 421; Caldwell *v.* State, 55 Ala. 133.

Arkansas. — Bales *v.* State, 19 Ark. 220.

California. — Pillsbury *v.* Brown, 47 Cal. 477.

Georgia. — Taylor *v.* Van Epps, 58 Ga. 139; Blalock *v.* Pillsbury, 76 Ga. 493; *In re* Kenan, 109 Ga. 819; *In re* Maddox, 111 Ga. 647; Tanner *v.* O'Neill, 108 Ga. 245.

Illinois. — People *v.* Warren, 14 Ill. App. 296.

Indiana. — State *v.* Armstrong, 3 Blackf. (Ind.) 42.

Kentucky. — Love *v.* Harris, 18 B. Mon. (Ky.) 122.

Mississippi. — Charter *v.* State, 36 Miss. 75.

Missouri. — State *v.* Hannibal, etc., R. Co., 30 Mo. App. 494.

North Carolina. — State *v.* Tyler, 85 N. Car. 569.

Oregon. — State *v.* Moore, 37 Oregon 536.

Tennessee. — Knox *v.* State, 9 Baxt. (Tenn.) 202; Dyer *v.* State, 9 Yerg. (Tenn.) 395.

10. When Not Entitled to Fees. — Sheffield *v.* Oliver, 94 Ga. 500.

11. State *v.* Barnes, 24 Fla. 153.

12. State *v.* Barnes, 24 Fla. 153; State *v.* Thompson, 39 Mo. 427; State *v.* Foss, 52 Mo. 416; State *v.* Bachman, 6 Lea (Tenn.) 649.

But see Ammerman *v.* Montour County, 19 Pa. Co. Ct. 658.

13. People *v.* Flynn, 59 Ill. App. 173; Keys *v.* State, 7 Lea (Tenn.) 408.

14. Sullivan County *v.* Dimmick, 18 Wend. (N. Y.) 538.

15. Edwards *v.* Fresno County, 74 Cal. 475; State *v.* Jackson, 68 Ind. 58; Foute *v.* New Orleans, 20 La. Ann. 22.

where he appears but does nothing more,¹ nor where the accused escapes after trial but before final conviction,² nor for appearing in a case not within the statute,³ nor when the case is settled⁴ or nol. prossed⁵ or the indictment is dismissed or quashed,⁶ nor for cases of violation of city ordinances,⁷ nor where the grand jury fails to return a true bill.⁸ Fees have been refused in certain cases of minor importance, such as upon a recognizance to keep the peace,⁹ or binding over to good behavior,¹⁰ or contempt proceedings, judgments on scire facias, and forfeited recognizances,¹¹ or a judgment overruling a demurrer,¹² or where a delinquent juror is discharged without costs.¹³

Insolvent Costs. — Sometimes the prosecuting attorney is empowered to retain fines in his hands for the payment of his "insolvent costs."¹⁴

Number of Fees Allowed. — Under the statutes of the various states it has sometimes been held that where several persons are jointly indicted and convicted, the prosecuting attorney is entitled to a separate fee for each one.¹⁵ The same is true where several judgments are rendered against the same defendant,¹⁶ or where the bill of indictment contains several counts.¹⁷ So likewise he is entitled to his fee in all the courts through which the cause may pass, when the defendant is ordered to pay costs.¹⁸ In other cases the court has held that only one docket fee can be taxed, whatever the number of defendants,¹⁹ or the number of convictions of the same defendant,²⁰ or the number of counts in the indictment,²¹ or the number of bills of exceptions.²² He cannot charge a fee for conviction in addition to a fee allowed for a jury trial.²³ Under the old practice in *New York* he was not entitled to charge for a subpœna ticket besides a subpœna for each witness,²⁴ and could charge for only two subpœnas for the same witness in the same case.²⁵

Conflicting Claims to Fees. — The claim for fees of a prosecuting attorney in office upon money brought by him into court is superior to a claim of his prede-

1. *Willcox v. Hosmer*, 83 Mich. 1.

2. *Leach v. State*, 8 Lea (Tenn.) 35.

He is entitled to costs up to the time of the escape. *Robinson v. Smith*, 57 Ga. 332.

3. *Lackland v. Dougherty*, 15 Mo. 260.

4. *Ulrich v. Lebanon County*, 1 Pa. Co. Ct. 83.

5. *Dunkle v. Warren County*, 17 Pa. Co. Ct. 400. See also *Union County v. Hyde*, 26 Oregon 24; *Koch v. Schuylkill County*, 12 Pa. Super. Ct. 567; *Donaldson v. Walker*, 101 Tenn. 236. *Contra*, *Peeples v. Walker*, 12 Ga. 353.

6. *State v. Beard*, 31 Mo. 34; *State v. Narramore*, 52 Mo. 27; *Williams v. Jefferson County*, 2 Mont. 26; *State v. Ellis*, 6 Baxt. (Tenn.) 549.

7. *Pillsbury v. Brown*, 47 Cal. 478.

8. *Arapahoe County v. Graham*, 4 Colo. 201; *Union County v. Hyde*, 26 Oregon 24.

9. *State v. Red*, 2 Ired. L. (24 N. Car.) 265.

10. *Mooneys v. State*, 2 Yerg. (Tenn.) 579.

11. *Buckingham v. People*, 26 Ill. App. 269; *Randolph County Ct. v. Johnson*, 3 Hawks (10 N. Car.) 238.

12. *Patton v. State*, 41 Ark. 486.

13. *State v. Whitsenhunt*, 1 Murph. (5 N. Car.) 287, 3 Am. Dec. 693.

14. "Insolvent Costs." — *Hardeman v. McManus*, 82 Ga. 20; *Adam v. Wright*, 84 Ga. 720; *Black v. Fite*, 88 Ga. 238; *Gamble v. Clark*, 92 Ga. 696.

15. **Several Fees Allowed** — *Arkansas*. — *Hempstead County v. McCollum*, 58 Ark. 159.

Colorado. — *Arapahoe County v. Graham*, 4 Colo. 201.

Indiana. — *State v. Cripe*, 5 Blackf. (Ind.) 6 (statute 1831); *State v. Kinneman*, 39 Ind. 36

(statute 1871). *Contra* under the statute of 1852. *Bunday v. State*, 6 Ind. 398.

Iowa. — *State v. Hunter*, 33 Iowa 361.

Tennessee. — *Penland v. State*, 1 Humph. (Tenn.) 383; *Wright v. Shelby County*, 9 Baxt. (Tenn.) 145.

16. *Blalock v. Pillsbury*, 76 Ga. 494; *State v. Cripe*, 5 Blackf. (Ind.) 6; *State v. Graves*, 6 Baxt. (Tenn.) 488; *State v. McDonald*, 9 Humph. (Tenn.) 606.

17. *Borschenious v. People*, 41 Ill. 236.

18. *Aid v. State*, 114 Ind. 542; *Fields v. State*, Mart. & Y. (Tenn.) 168. But see *State v. Reed*, 8 N. J. L. 178.

19. **Only One Fee Allowed** — *United States*. — *Durant v. Washington County*, Woolw. (U. S.) 377, 8 Fed. Cas. No. 4,191.

Alabama. — *Dent v. State*, 42 Ala. 514; *Brown v. State*, 46 Ala. 148.

Arkansas. — *Fanning v. State*, 47 Ark. 442.

Kansas. — *State v. Granville*, 26 Kan. 159.

Missouri. — *Matter of Murphy*, 22 Mo. App. 476.

Oregon. — *Union County v. Hyde*, 26 Oregon 24.

Tennessee. — *Carraway v. State*, 5 Humph. (Tenn.) 523; *State v. Robinson*, 8 Yerg. (Tenn.) 370.

20. *Banks v. State*, 96 Ala. 41; *State v. Peck*, 51 Mo. 111.

21. *Ex p. Craig*, 19 Mo. 337.

22. *In re Kenan*, 109 Ga. 819.

23. *Ellis v. Jackson County*, 38 Iowa 175.

24. *Sullivan County v. Dimmick*, 18 Wend. (N. Y.) 538.

25. *Matter of Slosson*, (Supm. Ct. Spec. T.) 4 How. Pr. (N. Y.) 236.

cessor upon the same fund for his unpaid fees;¹ but this rule is not followed where the case was begun and all the work done by the predecessor.² And where a part of the services was performed by each of the claimants, the court may divide the fund equitably between them.³ Where a fine is imposed in a case appealed from a justice's court, the fee is to be paid to the attorney appearing in the lower court.⁴

4. Percentage Commissions. — Sometimes a prosecuting attorney is paid wholly or partly by allowing to him a commission on fines and forfeitures actually collected by him, or on judgments obtained by him.⁵ He is entitled to his commission whether the money passes through his hands or is collected through his agency,⁶ and sometimes even before collection if the case is determined.⁷ He is not entitled to commissions on a forfeited bond or recognizance,⁸ nor where no judgment is rendered and collected,⁹ nor on fines worked out by the prisoner,¹⁰ nor on money paid upon a compromise made by the board of supervisors pending an action,¹¹ nor on sums recovered in actions on official undertakings,¹² nor for any services which it is his duty to perform for his salary, even though he has a special contract with the county commissioners.¹³

Remission, Commutation, etc. — Neither the governor nor the attorney-general has the power to deprive the prosecuting attorney of his fees or commissions, either by commutation, respite, remission, or postponement,¹⁴ but the legislature has such power of remission up to a certain time.¹⁵ Where the fee is reduced upon a retaxation of costs, however, the attorney may not appeal, since the state is not interested in the result.¹⁶

Lien for Commissions. — Sometimes the prosecuting attorney has a lien upon the fund so arising for his fees and commissions.¹⁷

5. Extra Services. — A prosecuting attorney is sometimes entitled to extra pay for extra services. Thus, if he goes beyond the limits of his county

1. *Peeples v. Walker*, 12 Ga. 353; *Gordon County v. Harris*, 81 Ga. 719; *Flint v. Jones County*, 20 Tex. Civ. App. 641. But see *Hackett v. Jones*, 2 Ga. 282.

2. *Arnsperger v. Norman*, 101 Ky. 208; *Vastine v. Voullaire*, 45 Mo. 504. Compare *Ashlock v. Com.*, 7 B. Mon. (Ky.) 44.

3. *Ex p. Robbins*, 2 Gall. (U. S.) 320, 20 Fed. Cas. No. 11,879; *Swayne v. Terrell*, 20 Tex. Civ. App. 31.

4. *Com. v. Rogers*, 9 Gray (Mass.) 278. But see *Thomas v. Thomas*, 61 Ga. 70.

5. **Percentage Commissions** — *Alabama*. — *State v. Stone*, 72 Ala. 185.

California. — *Higby v. Calaveras County*, 18 Cal. 176; *People v. Hagar*, 52 Cal. 190.

Indiana. — *State v. Barron*, 74 Ind. 374. Compare *Ex p. Ford*, 74 Ind. 415; *Wood v. Madison County*, 125 Ind. 270.

Kentucky. — *Christian v. Byars*, 90 Ky. 537; *Bryant v. Com.*, 3 Bush (Ky.) 9; *Gross v. Jones*, 3 Met. (Ky.) 295; *Routt v. Feemster*, 7 J. J. Marsh. (Ky.) 132; *Com. v. Spraggins*, 18 B. Mon. (Ky.) 512; *Fultz v. Crofton*, (Ky. 1897) 42 S. W. Rep. 841.

Louisiana. — *Fisk v. Police Jury*, 26 La. Ann. 20.

Montana. — *Territory v. Cascade County*, 8 Mont. 396.

Ohio. — *State v. Brewster*, 44 Ohio St. 249.

Pennsylvania. — *Com. v. Grier*, 152 Pa. St. 176.

Texas. — *Smith v. State*, 26 Tex. App. 49; *State v. Dyches*, 28 Tex. 536; *State v. Moore*, 57 Tex. 307; *Fears v. Ellis County*, 20 Tex. Civ. App. 159.

6. *Buckingham v. People*, 26 Ill. App. 269; *Smith v. Linn County*, 55 Iowa 232; *Donelson v. Howard County*, 23 Kan. 70.

7. *Purifoy v. Godfrey*, 105 Ala. 142.

8. *Stamper v. State*, 11 Ga. 643; *Ex p. Ford*, 74 Ind. 415; *Christian v. Byars*, 90 Ky. 536; *Williams v. Shelbourne*, 102 Ky. 579; *People v. Van Wyck*, 4 Cow. (N. Y.) 260; *Fairlie v. Maxwell*, 1 Wend. (N. Y.) 17; *Colvig v. Klamath County*, 16 Oregon 244.

9. *Com. v. Offutt*, 82 Ky. 326.

10. *Power v. Fleming County*, 99 Ky. 200; *Abbott v. Louisville*, (Ky. 1890) 14 S. W. Rep. 540; *Fears v. Ellis County*, 20 Tex. Civ. App. 159.

11. *Herrington v. Santa Clara County*, 44 Cal. 497. But see *Donelson v. Howard County*, 23 Kan. 70.

12. *Miller v. State*, 69 Miss. 112; *Matter of Ison*, 6 Oregon 469.

13. *Kern County v. Fay*, 131 Cal. 547; *Scarborough v. Stevens*, 3 Rob. (La.) 148; *Lancaster County v. Fulton*, 128 Pa. St. 48.

14. **Right to Commissions.** — *Dewey v. Com.*, 7 B. Mon. (Ky.) 78; *Frazier v. Com.*, 12 B. Mon. (Ky.) 370; *Berry v. Sheehan*, 87 Ky. 434; *Stone v. Riddell*, 5 Bush (Ky.) 349; *Bennett v. State*, 2 Verg. (Tenn.) 472; *State v. Hill*, 3 Coldw. (Tenn.) 98. But see *State v. Dyches*, 28 Tex. 536.

15. *Lyon v. Morris*, 15 Ga. 480.

16. *State v. Tyler*, 85 N. Car. 569.

17. **Lien for Commissions.** — *Pittman v. Glenn*, 61 Ga. 377; *People v. Nedrow*, 122 Ill. 363. *Contra*, *Wood v. State*, 125 Ind. 219; *State v. Beebe*, 87 Iowa 637.

when not required to do so, a reasonable compensation may be allowed to him,¹ and although he has no contract for such services the law will imply a contract.² But where the services are within the scope of his duties nothing can be claimed therefor, although they may be prolonged and arduous.³ The allowance of extra compensation by the court is a judicial act and must be by order entered under the judge's authority.⁴

6. Expenses. — A prosecuting attorney is empowered to do whatever is necessary to the prosecution of criminal offenses, and all necessary expenses incurred in the performance of his duty are a charge upon the county.⁵

7. Of Assistant Attorneys. — Where the court or the commissioners have the power to appoint an assistant to the prosecuting attorney, or special counsel for special services, they may also fix the compensation to be allowed to him.⁶ An assistant attorney cannot recover for services not authorized by competent authority.⁷ Sometimes the office of assistant prosecuting attorney is a distinct office created by statute, with an independent salary attached.⁸ Sometimes the statute authorizing the appointment fixes the compensation.⁹ In some cases the judge's certificate has been held conclusive of the necessity of appointment and of the compensation to be paid, and as justifying a mandamus to compel the county board to pay.¹⁰ The sum fixed by the commissioners is not conclusive against the attorney, but suit may be brought against the county for a reasonable sum.¹¹ The board of supervisors may likewise reduce an exorbitant sum allowed by the court.¹²

8. Liability of State or County. — While the fees of the prosecuting attorney are sometimes made payable out of the state treasury¹³ or out of a specified fund therein,¹⁴ they are much more often a tax upon the county in which the case arose.¹⁵ Such claims against the county cannot be enforced by man-

1. Extra Services. — *Bevington v. Woodbury County*, 107 Iowa 424; *Leavenworth County v. Brewer*, 9 Kan. 210; *Hennepin County v. Robinson*, 16 Minn. 381; *People v. Schoharie*, 6 Wend. (N. Y.) 506.

2. Huffman v. Greenwood County, 23 Kan. 281. But see *Stone v. Marion County*, 78 Iowa 14; *Huffman v. Greenwood County*, 25 Kan. 64; *Sands v. Frontier County*, 42 Neb. 837.

3. Harris v. Beaven, 11 Bush (Ky.) 254; *State v. Shearer*, 23 Nev. 76; *Geiser v. Northampton County*, (Pa. 1887) 11 Atl. Rep. 507; *McHenderson v. Anderson County*, 105 Tenn. 591.

4. Baltimore v. Baltimore County, 19 Md. 555; *People v. Fulton County*, 14 Barb. (N. Y.) 52; *Com. v. Morningstar*, 144 Pa. St. 103; *Geiser v. Northampton County*, (Pa. 1887) 11 Atl. Rep. 507.

5. Expenses. — *People v. Columbia County*, 134 N. Y. 1; *Onondaga County v. Briggs*, 2 Den. (N. Y.) 26; *Matter of District Attorney's Fees*, 6 Hill (N. Y.) 402. But see *Matter of Pinney*, (Supm. Ct. Spec. T.) 17 Misc. N. Y. 24; *Spokane County v. Allen*, 9 Wash. 229, 43 Am. St. Rep. 830.

A claim for expenses is not within the prohibition against asking or receiving compensation for expenses incurred in procuring the extradition of a fugitive from justice. *People v. Columbia County*, 134 N. Y. 1.

6. Of Assistant Attorneys — *Georgia*. — *Mize v. Bialock*, 71 Ga. 861.

Indiana. — *Tull v. State*, 99 Ind. 238.

Iowa. — *Stone v. Marion County*, 78 Iowa 14; *Farr v. Seaward*, 82 Iowa 221.

Nebraska. — *Fuller v. Madison County*, 33

Neb. 422. See also *Gandy v. State*, 27 Neb. 707. Compare *Cuming County v. Tate*, 10 Neb. 193.

New York. — *People v. Coler*, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 454.

Ohio. — *State v. Wallace*, 24 Ohio St. 597; *State v. Hocking County*, 40 Ohio St. 331; *Geauga County v. Osborn*, 46 Ohio St. 271; *State v. Moore*, 1 Ohio Dec. (Reprint) 506, 10 West L. J. 219.

Pennsylvania. — *Edwards v. Allegheny County*, 181 Pa. St. 216.

7. McHenderson v. Anderson County, 105 Tenn. 591.

8. Com. v. Grier, 152 Pa. St. 176.

9. Work v. Wapello County, 73 Iowa 357; *Farr v. Seaward*, 82 Iowa 221; *Harris County v. Stewart*, 91 Tex. 133.

10. Lindabury v. Chosen Freeholders, 47 N. J. L. 417.

11. Stone v. Marion County, 78 Iowa 14. *Contra*, *Geauga County v. Osborn*, 46 Ohio St. 271.

12. People v. Genesee County, 61 N. Y. App. Div. 545, 15 N. Y. Crim. 463; *Fayette County v. State*, 60 Ohio St. 475.

13. Liability of State or County. — *Trapp v. State*, 120 Ala. 397; *Jewett v. Talbott*, 11 Ind. 298.

14. Trapp v. State, 117 Ala. 227, 120 Ala. 397.

15. Arkansas. — *Phillips County v. Clayton*, 29 Ark. 246.

Florida. — *State v. Barnes*, 24 Fla. 30.

Indiana. — *Cropsey v. Henderson*, 63 Ind. 268.

New York. — *Onondaga County v. Briggs*, 2 Den. (N. Y.) 26; *People v. New York*, 1 Hill (N. Y.) 362.

damus, but must be audited by the county commissioners.¹ A prosecuting attorney who has advanced unauthorized sheriffs' fees cannot collect them from the county;² nor can he collect fees from the county where he should have collected them from the defendants but made no attempt to do so.³

9. Of United States District Attorneys — *a. FEES.* — Except in a few special cases, the compensation of district attorneys of the United States is paid by fees. The federal statutes enumerate what the fees shall be for the various services required and how such fees shall be paid.⁴ It is further provided that the fees and emoluments of the office, over and above necessary expenses, shall not exceed six thousand dollars a year.⁵ The compensation derived from fees is virtually a salary restriction, and in effect forbids all additional allowances for extra services within the scope of the appointment, unless such extra reward be authorized by express law.⁶ But the statute allows district attorneys to charge other clients a reasonable and customary fee for services in cases in which they are specially interested.⁷

In Construing These Sections of the Statute it has been held that two fees cannot be charged for two days' work done in one,⁸ or for appearing in two cases before the same commissioner on the same day;⁹ but a double *per diem* may be earned by appearing on the same day before a United States commissioner and before the court.¹⁰ If the court is open for business, the prosecuting attorney may claim the *per diem* fee although not in attendance.¹¹ The fee is payable in cases tried before a jury although there is a mistrial and no verdict,¹² for attending before a commissioner when recognizances are taken,¹³ or for time spent in investigating a charge before arrest when witnesses are examined, or even though no witnesses were examined if for the reason that the commissioner adjourned the case;¹⁴ but not in investigating cases never brought to trial, and where no witnesses were heard,¹⁵ nor for Sundays or legal holidays falling within the term of court,¹⁶ nor for warrants removing prisoners from one district to another,¹⁷ nor when a case is remitted from a Circuit to a District Court.¹⁸ Under the clause allowing a counsel fee for a criminal conviction, the fee is payable when the defendant pleads not guilty, although he offers no evidence and subsequently consents to a verdict of guilty.¹⁹ For procuring a compromise of a civil suit the district attorney is entitled to the discontinuance fee of five dollars, but for a discontinuance before a commissioner the *per diem* fee, and not the discontinuance fee, is paid.²⁰ The appointment of special counsel to try a case does not deprive

North Carolina. — Moore v. Roberts, 87 N. Car. 11.

Pennsylvania. — Com. v. March, 1 Pa. Co. Ct. 81.

1. State v. Bonebrake, 4 Kan. 211. Compare Farr v. Seaward, 82 Iowa 221.

2. People v. New York, (Supm. Ct.) 18 Abb. Pr. (N. Y.) 8.

3. Edwards v. Fresno County, 74 Cal. 475.

4. Fees of United States District Attorneys. — Rev. Stat. U. S., §§ 823-828.

5. Rev. Stat. U. S., § 835; Stanton v. U. S., 75 Fed. Rep. 357 [affirmed in U. S. v. Stanton, (C. C. A.) 87 Fed. Rep. 698]; U. S. v. Smith, 158 U. S. 346.

6. The Anna, Blatchf. Prize Cas. 337, 1 Fed. Cas. No. 402; Bashaw v. U. S., 47 Fed. Rep. 40.

7. Gibson v. Peters, 35 Fed. Rep. 721.

8. Stanton v. U. S., 37 Fed. Rep. 252.

9. U. S. v. Colman, 76 Fed. Rep. 214, 46 U. S. App. 133.

10. U. S. v. Erwin, 147 U. S. 685. Contra, Baxter v. U. S., 51 Fed. Rep. 671, 10 U. S. App. 243.

By a supplementary provision, double fees are allowed in certain cases. Weed v. U. S., 65 Fed. Rep. 399, 82 Fed. Rep. 414.

11. U. S. v. Colman, 76 Fed. Rep. 214, 46 U. S. App. 133. See also U. S. v. Smith, 158 U. S. 352. Contra, U. S. v. Stanton, 70 Fed. Rep. 890, 35 U. S. App. 799.

12. Van Hoorebeke v. U. S., 46 Fed. Rep. 456; Weed v. U. S., 82 Fed. Rep. 414.

13. Bird v. U. S., 45 Fed. Rep. 110.

14. Stanton v. U. S., 37 Fed. Rep. 252.

15. U. S. v. Stanton, 70 Fed. Rep. 890, 35 U. S. App. 799.

16. U. S. v. Perry, (C. C. A.) 50 Fed. Rep. 743; Sill v. U. S., (C. C. A.) 87 Fed. Rep. 699.

17. Bird v. U. S., 45 Fed. Rep. 110.

18. Stanton v. U. S., 37 Fed. Rep. 252.

19. Tuthill v. U. S., 38 Fed. Rep. 538.

Where several defendants were joined in the same indictment, some of them pleading guilty and others not guilty, it was held, under Rev. Stat. U. S., § 824, that the district attorney was entitled to only one fee of ten dollars and one of twenty dollars. Waters v. U. S., 31 Ct. Cl. 307.

20. Stanton v. U. S., 37 Fed. Rep. 252.

the district attorney of the right to his fees,¹ and the fee allowed by the court cannot be reduced by the attorney-general or the accounting officer.²

b. MILEAGE. — The act allows to the district attorney ten cents mileage for travel in each direction between his home and the place of holding court. Such fee is a substitute for expenses and relieves the officer from keeping an itemized expense account,³ but it is not to be included in the fees or emoluments going to make up his salary.⁴ He may travel by the most convenient and practicable route, although it is not the shortest, and is entitled to mileage in traveling from his home to the place of examination although this is his official headquarters,⁵ or from one place where he is officially engaged to another to appear before a commissioner,⁶ and for successive days of attendance where travel is necessary.⁷ But mileage is not allowed for travel in going home on Saturday and returning on Monday,⁸ nor where mileage has already been once allowed for travel to the same place to appear the preceding day before a commissioner, nor for travel to appear before a judge or commissioner where no charges have been made against any one and no witnesses are examined,⁹ nor for traveling expenses of assistants appointed by the attorney-general and advanced by the district attorney.¹⁰

c. SUITS UNDER REVENUE LAWS. — Each district attorney is entitled to two per cent. on all moneys collected or realized in suits arising under the revenue laws, to be in lieu of all costs and fees in such proceeding.¹¹ For the prosecution of frauds on the revenue, the district attorney is entitled to an allowance, for expenses and services, of such sum as the secretary of the treasury shall deem just and reasonable.¹² Such allowance is payable even in cases in which the district attorney decides that no prosecution shall be instituted.¹³

d. EXTRA SERVICES. — Extra compensation is, however, allowed by statute for services which the district attorney is not regularly obliged to perform, but only in case such services are authorized by law or notorious usage and a special appropriation is made therefor.¹⁴ Under this section of the statute extra compensation has been allowed to a district attorney for services rendered in the Circuit Court of Appeals of his own district.¹⁵ Extra compensation has been refused for conducting proceedings to condemn lands for the site of a fortification¹⁶ or public park,¹⁷ for assisting special counsel in defending the United States in damage suits,¹⁸ for appearing in an appellate court outside the district,¹⁹ for appearing in suits brought by receivers of

1. *Gibson v. Peters*, 35 Fed. Rep. 721. But see *Gibson v. Peters*, 36 Fed. Rep. 487; *Stanton v. U. S.*, 37 Fed. Rep. 252.

2. *U. S. v. Waters*, 133 U. S. 208; *Waters v. U. S.*, 21 Ct. Cl. 30; *Hillborn v. U. S.*, 27 Ct. Cl. 547; *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456.

3. *Mileage.* — *U. S. v. Smith*, 158 U. S. 346; *Smith v. U. S.*, 26 Ct. Cl. 568.

4. *Winston v. U. S.*, 63 Fed. Rep. 690; *U. S. v. Winston*, 73 Fed. Rep. 149, 44 U. S. App. 401; *Smith v. U. S.*, 26 Ct. Cl. 568.

5. *U. S. v. Perry*, (C. C. A.) 50 Fed. Rep. 743.

6. *Van Hoorebeke v. U. S.*, 46 Fed. Rep. 456.

7. *U. S. v. Colman*, 76 Fed. Rep. 214, 46 U. S. App. 133.

8. *U. S. v. Shields*, 153 U. S. 88; *Baxter v. U. S.*, 51 Fed. Rep. 671, 10 U. S. App. 243.

9. *U. S. v. Colman*, 76 Fed. Rep. 214, 46 U. S. App. 133.

10. *Townsend v. U. S.*, 22 Ct. Cl. 207.

11. *Suits under Revenue Laws.* — Rev. Stat. U. S., § 825; *The Pacific, Deady (U. S.)* 192, 18 Fed. Cas. No. 10,645; *U. S. v. Five Hundred*

Barrels Whisky, 2 Bond (U. S.) 7, 25 Fed. Cas. No. 15,115; *Bliss v. U. S.*, 37 Fed. Rep. 191; *U. S. v. Stanton*, 70 Fed. Rep. 890, 35 U. S. App. 799; *Beckwith's Case*, 16 Ct. Cl. 250.

12. *Revenue Frauds.* — Rev. Stat. U. S., § 838; *Carlisle v. U. S.*, 7 App. Cas. (D. C.) 517; *U. S. v. Bashaw*, 152 U. S. 436.

13. *In re Dist. Atty.*, 23 Fed. Rep. 26; *Sill v. U. S.*, (C. C. A.) 87 Fed. Rep. 699. *Contra*, *Waters v. U. S.*, 32 Ct. Cl. 277; *Stanton v. U. S.*, 37 Fed. Rep. 252.

14. *Extra Services.* — Rev. Stat. U. S., § 1765; *U. S. v. Ingersoll*, *Crabbe (U. S.)* 135, 26 Fed. Cas. No. 15,440; *Ruhm v. U. S.*, 66 Fed. Rep. 531; *U. S. v. Ady*, 76 Fed. Rep. 359, 40 U. S. App. 312; *Bentley v. U. S.*, 26 Ct. Cl. 241; *Milchrist v. U. S.*, 31 Ct. Cl. 403; *Garter v. U. S.*, 31 Ct. Cl. 344.

15. *U. S. v. Garter*, 170 U. S. 527.

16. *U. S. v. Johnson*, 173 U. S. 363.

17. *Cole v. U. S.*, 28 Ct. Cl. 501.

18. *Colman v. U. S.*, 24 U. S. App. 632.

19. *U. S. v. Fleming*, 80 Fed. Rep. 372, 49 U. S. App. 354. But compare *U. S. v. Winston*, 73 Fed. Rep. 149, 44 U. S. App. 401.

national banks in winding up their affairs,¹ for examining titles to land taken by the government,² and for a suit to recover a fraudulent pension.³

Assimilated Fees. — Under another section special compensation is allowed in cases instituted in the United States or state courts wherein the United States is interested but is not a party of record, or in which officers of the United States are defendants.⁴ The fees in such cases must be assimilated, as nearly as may be, to those provided for similar cases in which the United States is a party.⁵ Further, when appearing in behalf of a revenue officer the district attorney is entitled to such compensation as the trial court certifies to be proper and the secretary of the treasury approves.⁶

Fees Can Be Paid to an Attorney Other than the District Attorney when specially authorized by law and on the certificate of the attorney-general that such services have been performed and that special counsel was necessary.⁷ The determination of the attorney-general as to the necessity and the amount of compensation due is conclusive, but if the amount is not fixed by that officer, the district attorney may recover in *quantum meruit*.⁸

Necessary Expenses. — The district attorney is also entitled to recover expenses of necessary telegrams, printing, stenographer, stationery, and clerk hire.⁹

Allowance by President. — Extraordinary expenses otherwise unprovided for may be allowed by the President of the United States.¹⁰

VIII. LIABILITY OF PROSECUTING ATTORNEYS. — A prosecuting attorney is not liable for libel in reading in open court an indictment known to be false, nor for malicious prosecution in including in an indictment one against whom no bill has been found,¹¹ nor is he liable for procuring a conviction unless he acted maliciously,¹² nor for clerk's fees which he has not collected,¹³ nor for the shortcomings of the marshal,¹⁴ nor for neglect to enter a default against a defendant upon failing to appear and answer.¹⁵ But he is liable for fines collected and not paid into the treasury,¹⁶ or for other official misconduct.¹⁷

PROSECUTING WITNESS. — See note 18.

PROSECUTOR. (See also the title PROSECUTING AND DISTRICT ATTORNEYS, *ante*.) — See note 19.

1. Gibson v. Peters, 150 U. S. 342.

2. U. S. v. Advy, 76 Fed. Rep. 359, 40 U. S. App. 312; Sill v. U. S., (C. C. A.) 87 Fed. Rep. 699. But see Weed v. U. S., 65 Fed. Rep. 399, 82 Fed. Rep. 141.

3. Ruhm v. U. S., 66 Fed. Rep. 531.

4. **Assimilated Fees.** — Rev. Stat. U. S., § 299.

5. Gibson v. Peters, 35 Fed. Rep. 721; U. S. v. Winston, 73 Fed. Rep. 149, 44 U. S. App. 401.

6. Rev. Stat. U. S., § 827; U. S. v. Ingersoll, Crabbe (U. S.) 135.

7. **Fees of Special Counsel.** — Rev. Stat. U. S., § 365; Winston v. U. S., 63 Fed. Rep. 690; U. S. v. Winston, 170 U. S. 522; Cole v. U. S., 28 Ct. Cl. 501.

8. Crosthwaite v. U. S., 30 Ct. Cl. 300. See also U. S. v. Smith, 158 U. S. 346.

9. **Necessary Expenses.** — Stanton v. U. S., 75 Fed. Rep. 357, affirmed 87 Fed. Rep. 698; U. S. v. Stanton, 70 Fed. Rep. 890, 35 U. S. App. 799, affirming as to this point 37 Fed. Rep. 252; Ruhm v. U. S., 66 Fed. Rep. 531; U. S. v. Colman, 76 Fed. Rep. 214, 46 U. S. App. 133; Sill v. U. S., (C. C. A.) 87 Fed. Rep. 699.

10. **Allowance by President.** — Rev. Stat. U. S., § 846; Stanton v. U. S., 37 Fed. Rep. 252; Tuthill v. U. S., 38 Fed. Rep. 538.

11. Griffith v. Slinkard, 146 Ind. 117.

12. Arnold v. Hubble, (Ky. 1897) 38 S. W. Rep. 1041.

13. People v. Van Wyck, 4 Cow. (N. Y.) 260; Fairlie v. Maxwell, 1 Wend. (N. Y.) 17.

14. U. S. v. Ingersoll, Crabbe (U. S.) 135, 26 Fed. Cas. No. 15,440.

15. State v. Egbert, 123 Ind. 448.

16. People v. Warren, 14 Ill. App. 296; Graham v. Stein, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

17. State v. Foster, 32 Kan. 14; Graham v. Stein, 4 Ohio Cir. Dec. 140, 18 Ohio Cir. Ct. 770.

18. **Prosecuting Witness.** — Under the Illinois Act of 1869, which provided that one-half the penalty to be recovered against a railroad company for an omission to ring the bell or sound the whistle on the approach of a train to a crossing of a public highway should go to the *prosecuting witness*, it was held not to be essential, to entitle the person in whose name the suit was brought to recover, that he should actually have testified in the case. Illinois Cent. R. Co. v. Herr, 54 Ill. 356.

19. **Prosecutor.** — In Wight v. Rindskopf, 43 Wis. 354, it was said: "A public *prosecutor* is a quasi-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty; never voluntarily to acquiesce in an acquittal upon certain presumption of guilt, or

PROSPECT. — To prospect signifies to explore for unworked deposits of ore, as a mining region; to do experimental work upon, as a new mining claim, for the purpose of ascertaining its probable value.¹

PROSTITUTE—PROSTITUTION. (See also the titles ABDUCTION, vol. 1, p. 162; DISORDERLY HOUSES, vol. 9, p. 508; FORNICATION, vol. 13, p. 1118; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841; NIGHT WALKER, vol. 21, p. 540; SEDUCTION; WHORE.) — A *Prostitute* is a woman who is given to indiscriminate lewdness for gain.²

The Word "*Prostitution*," in its most general sense, is understood to mean the act of letting one's self to sale, or of devoting to infamous purposes what is in one's power; as, the prostitution of talents or abilities; the prostitution of the press, etc. In a more restricted sense, the word means the act or practice of a woman offering her body to an indiscriminate intercourse with men; the common lewdness of a woman.³

Intercourse with One Man Not Prostitution. — The phrase "illicit sexual intercourse" and the word "prostitution" are not convertible terms. "Prostitution," as the term is used in the criminal statutes of the several states, means common, indiscriminate, meretricious, illicit intercourse, and not sexual intercourse which is confined exclusively to one man.⁴

in conviction upon doubtful presumption of guilt." In *State v. Cohn*, 9 Nev. 180, it was held that a *prosecutor* is one who instigates the prosecution by making the affidavit upon which the accused is arrested; so that a person named in the indictment as the owner of property in respect to which the alleged crime is charged to have been committed is not necessarily the *prosecutor*.

Prosecutor and Witness Distinguished. — In *State v. Millain*, 3 Nev. 409, it was held that a *prosecutor* was one who preferred an accusation against the party whom he suspected to be guilty, and that a party who appeared in response to a subpoena was not a *prosecutor*, but only a witness.

As to the Meaning of "Prosecutor" in the Vermont Statute Regulating Fishing in Lake Champlain and tributary rivers, see *Drew v. Hilliker*, 56 Vt. 641.

1. **Prospect.** — Cent. Dict., *quoted* in *Martin v. Eagle Creek Development Co.*, (Oregon 1902), 69 Pac. Rep. 219.

In *Bishop v. Baisley*, 28 Oregon 136, it was said: "The word *prospecting*, when used with reference to annual labor to be expended upon a mining claim, * * * is not used in the sense of 'exploration and discovery,' which is necessary before a valid location can be made, but rather in the sense of 'development and demonstration,' that the value of the ledge may be determined, as distinguished from the ascertainment of its existence." See also the title MINES AND MINING CLAIMS, vol. 20, p. 734 *et seq.*

2. **Prostitute.** — *State v. Stoyell*, 54 Me. 27; *Com. v. Cook*, 12 Met. (Mass.) 97; *Davis v. Sladden*, 17 Oregon 259; *Reg. v. Rehe*, 6 Quebec Q. B. 276.

Common Prostitute. — In *Springer v. State*, 16 Tex. App. 593, it was said: "A common prostitute is a public *prostitute*, who makes a business of selling the use of her person to the male sex for the purpose of illicit intercourse. A woman may be a *prostitute* and yet have illicit connection with one man only; but to be a common *prostitute* her lewdness must be

more general and indiscriminate." See, however, the cases cited *infra*, this definition, *Intercourse with One Man Not Prostitution*.

3. **Prostitution.** — *Miller v. State*, 121 Ind. 297; *Nichols v. State*, 127 Ind. 409; *State v. Stoyell*, 54 Me. 26; *Com. v. Cook*, 12 Met. (Mass.) 97; *State v. Gibson*, 111 Mo. 92 (*quoted* under CONCUBINAGE, vol. 6, p. 433); *Carpenter v. People*, 8 Barb. (N. Y.) 610; *Reg. v. Rehe*, 6 Quebec Q. B. 274. See also the title ABDUCTION, vol. 1, p. 177.

Concubinage and Prostitution Distinguished. — See CONCUBINAGE, vol. 6, p. 433.

Federal Statute Prohibiting Importation for Prostitution. — See the title IMMIGRATION, vol. 15, p. 1028.

That the word *prostitution* is sufficiently definite in an indictment under the statute, see *U. S. v. Pagliano*, 53 Fed. Rep. 1001.

Not Dependant on Compensation. — A woman who submits to indiscriminate sexual intercourse, which she invites, is a *prostitute*, regardless of the compensation she receives for such acts. *State v. Clark*, 78 Iowa 492.

"**Prostitution** is in No Sense a Technical Term, and has no common-law meaning. *Com. v. Cook*, 12 Met. (Mass.) 97; *Henderson v. People*, 124 Ill. 607; *People v. Cummons*, 56 Mich. 544; *Tores v. State*, (Tex. Crim. 1901), 63 S. W. Rep. 881.

4. **Common and Indiscriminate Intercourse.** — *U. S. v. Zes Cloya*, 35 Fed. Rep. 493; *Haygood v. State*, 98 Ala. 62; *Bunfill v. People*, 154 Ill. 640; *Osborn v. State*, 52 Ind. 526; *Fahnestock v. State*, 102 Ind. 163; *Miller v. State*, 121 Ind. 296; *State v. Ruhl*, 8 Iowa 447; *State v. Stoyell*, 54 Me. 24; *Com. v. Cook*, 12 Met. (Mass.) 93; *State v. Gibson*, 111 Mo. 96; *State v. Brow*, 64 N. H. 577; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *Reg. v. Rehe*, 6 Quebec Q. B. 276.

Enticing Female "for Purpose of Prostitution." — Enticing or taking away any female (or any unmarried female) of chaste life for the purpose of *prostitution* (or concubinage) is a crime in several states. See the titles ABDUCTION, vol. 1, p. 177 *et seq.*; SEDUCTION.

The contrary, however, has been held.¹

PROTECT — PROTECTION. — See note 2.

PROTEST. (See also the titles *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 378; *NOTARY PUBLIC*, vol. 21, p. 552.) — To protest means to make a solemn declaration of opposition.³

PROTESTANDO. — See *PROTESTATION*, *post*.

PROTESTANT. — A Protestant is a Christian who protests against the doctrines and practices of the Roman Catholic church; one who adheres to the doctrines of the Reformation.⁴

Under the *Illinois* statute a conviction was sustained where the woman enticed had intercourse with one man only, it appearing that the purpose of the enticement was to induce her to enter a life of indiscriminate *prostitution*. *Slocum v. People*, 90 Ill. 274.

The *Indiana* statute requires such a woman to be enticed "to a house of ill-fame, or elsewhere, for the purpose of *prostitution*," and the phrase "or elsewhere" implies a place of like character, so that an enticement to a place not of such character for intercourse with a single person is not within the statute. *Nichols v. State*, 127 Ind. 406.

Under this statute an indictment averring that the female was enticed "for the purpose of unlawfully and feloniously *prostituting* her" has been held bad. *Miller v. State*, 121 Ind. 294, the court saying that the phrase used was of doubtful signification, and had no legal and technical meaning whatever.

So an indictment alleging the abduction of a female "for the purpose of having illicit intercourse with her" is bad as leaving out the indiscriminate intercourse which is an element of *prostitution*. *Osborne v. State*, 52 Ind. 526.

Same — Vagrancy. — In *Reg. v. Rehe*, 6 Quebec Q. B. 274, it was held that a woman who was kept by a married man, and who surrendered herself to sexual intercourse to him alone, did not come under the purview of a statute which declared any one to be a vagrant who, having no peaceable profession or calling to maintain herself by, for the most part supported herself by the avails of *prostitution*. See also the title *VAGRANCY*.

1. In *State v. Rice*, 56 Iowa 432, it was held that "incontinence with one or two persons" may constitute a woman a *prostitute*; and that it is not essential that she should have "submitted her person to illicit sexual intercourse with various persons." See also *Springer v. State*, 16 Tex. App. 593, set out *supra*, this definition, note *Common Prostitute*.

2. **Protection.** — A *Wisconsin* statute provides that every person who, as principal contractor, etc., furnishes any material in or about the erection, construction, *protection*, or removal of any machinery erected or constructed so as to be or become a part of the freehold shall have a lien for such materials. In *Standard Oil Co. v. Lane*, 75 Wis. 637, the court, *per* Cole, C. J., said: "It will be noticed that the word *protection* is used in connection with 'erection, construction, and repairs,' as well as 'removal.' And while the word *protect* often means to cover, shield, or defend from injury, harm, or danger of any kind, the word imports in the statute something used or furnished for

the machinery which not only preserves from injury, but becomes a part of the machinery itself."

Protect and Guarantee. — In *Beymer Bauman Lead Co. v. Haynes*, 81 Me. 27, it was held that an agreement by a manufacturer and seller of white lead to *protect* and *guarantee* a customer on lead meant that the manufacturer would supply the article to his customer as low as the most favorable market price at the time of delivery. Sales or offers exceptionally low for special reasons, not representing the fair market price, were held not to govern.

Landlord and Tenant. — In *Peters v. Grubb*, 21 Pa. St. 455, an agreement by a lessor "to *protect*" the lessee in "the use and enjoyment" of the premises, in connection with other words, was held to constitute a covenant for quiet enjoyment. See generally the title *LEASES*, vol. 18, p. 593.

3. **To Protest.** — *Tombaugh v. Grogg*, 156 Ind. 355, *quoting* *Webst. Int. Dict.*

Protest in Writing to Payment of Tax. — The clerk of a city treasurer, under oral instructions from a person paying a tax, wrote upon the receipt given therefor, that it was paid under *protest*, and made a memorandum to that effect on the books of the treasurer. It was held that there was not a "*protest* in writing" by the person paying, within the *Massachusetts* statute (Rev. Laws Mass., 1902, c. 13, § 86). *Knowles v. Boston*, 129 Mass. 551.

Practice — Protest and Exception to Ruling Distinguished. — In *Robinson v. State*, 152 Ind. 307, it was said: "*Protest* and 'exception' are not equivalent terms in law. *Protested*, in the sense conveyed by the record, means an expression of dissent to the act of the court, on the ground of impropriety or illegality, and nothing more. In law, 'exception' has a technical signification. It implies that the exceptant reserves the right to present an adverse ruling to a court having cognizance of error, for review. Its office is to put the decision objected to of record for the information of an appellate tribunal." See also *EXCEPT — EXCEPTION*, vol. 11, p. 556; *OBJECTION — OBJECTING*, vol. 21, p. 756.

4. **Protestant.** — *Webst. Dict.*, *followed* in *Hale v. Everett*, 53 N. H. 10, 57, in which case it was held that the term *Protestant* includes all Christians who deny the authority of the Pope of Rome, but that the term is not broad enough to include any who do not, nominally at least, assent to the truth of Christianity as a distinct system of religion. See also *CATHOLIC*, vol. 5, p. 771.

Charities. — A bequest to indigent unmarried *Protestant* females, residents of B., has been

PROTESTATION. (See also the title PLEAS AT LAW, 16 ENCYC. OF PL. AND PR. 568.)—Where it is expedient to plead, so as to avoid any implied admission of a fact which cannot safely be directly affirmed or denied without falling into duplicity, at common law a protestation was made use of. By this the party interposed an oblique allegation or denial to the fact, protesting (by the gerund *protestando*) that such a matter did, or did not, exist. The only use of a protestation was that in case the party making it succeeded in the point to be tried he thereby saved to himself the liberty of disputing in another suit the truth of the allegation protested against.¹

PROTOCOL. (See also the title TREATIES.)—See note 2.

PROVABLE.—See note 3.

PROVED. (See also PROOF, *ante.*)—See note 4.

PROVEN.—See note 5.

held sufficiently definite. Tappan's Appeal, 52 Conn. 418. So of *Protestant* widows and orphans of B. Beardslev *v* Bridgeport, 53 Conn. 493. See also the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, pp. 906, 931.

Protestant Charitable Institutions must be such as are managed and controlled exclusively by *Protestants* and are designed for the bestowal of charity among *Protestants* alone. So held in construing a bequest. Manning *v* Robinson, 29 Ont. 483.

1. *Protestation.*—Co. Litt. 124*b*; 3 Bl. Com. 311; 1 Chitty Pl. (16th Am. ed.) 646, 647; And. Steph. Pl., § 132; Graysbrook *v* Fox, Plowd. 276; Holdipp *v* Otway, 2 Saund. 103, note; Dills *v* Stobie, 81 Ill. 202; Richards *v* Allen, 1 Bibb (Ky.) 189; State *v* Beasom, 40 N. H. 367.

2. *Protocol.*—In Sheldon *v* Milmo, 90 Tex. 21, it is said: "Under the Spanish system of conveyancing, 'a public instrument is divided into three classes; the original draft, register or *protocol* (*registro*), the original, and the copy. The register is the original draft or writing, which is delivered and remains in the possession of the *escribano*, which we also call *protocol*, by which doubts are determined that may be offered with respect to the instruments which are copied from it. The deed which is immediately copied from the *protocol* is the original which causes faith, inasmuch as it is authorized by the public *escribano*, before whom it passed, or by him to whom the *protocols* of the latter have passed, but if another *escribano* copies it, with the authority of the judge and citation of the party, it is valid. The *traslado* is called the copy which is taken from this original, which ought to be done with the same circumstances of the latter.'" Azo & Manuel's Institutes, 1 White 297.

3. *Debt Provable in Bankruptcy.*—See the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 680 *et seq.* See also Buckwell *v* Norman, (1898) 1 Q. B. 622; Brouillard's Petition, 20 R. I. 618.

4. *Proved.*—"A fact *proved* is a fact established by the evidence so as to put it beyond reasonable controversy." Shiver *v* Shiver, 45 Ala. 353. See also Kitchen *v* Tyson, 3 Murph. (7 N. Car.) 315.

Proved His Debt—Bankruptcy.—See generally the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 673, and see Matter of Bigelow, 2 Ben. (U. S.) 483.

Deeds. (See the titles ACKNOWLEDGMENTS, vol. 1, p. 483; EXECUTION AND PROOF OF DOCUMENTS, vol. 11, p. 583; RECORDING ACTS.)—The requirement in a Tennessee statute that deeds for lands lying outside the state should "be *proved* as heretofore" was held to include the solemn authentication of the instrument, either by the acknowledgment of the bargainor or by the proof of witnesses. Knowles *v* Masterson, 3 Humph. (Tenn.) 671, *distinguishing* Denn *v* Reid, 10 Pet. (U. S.) 524.

Deed of Proof.—A statute provided that deeds of trust should be *proved* or acknowledged in the same manner as deeds and conveyances of real estate. In construing this provision in Bradford *v* Dawson, 2 Ala. 208, the court said: "It is obvious that '*proved* or acknowledged' must refer to the recording of the instrument and nothing further."

Account Books Proved by Oath.—See the title DOCUMENTARY EVIDENCE, vol. 9, p. 912 *et seq.*

"To Make Out by Oath" and "to Prove" are synonymous expressions. Kitchen *v* Tyson, 3 Murph. (7 N. Car.) 315.

Proved in Sense of Offered Evidence.—In Rigin *v* Patapco Ins. Co., 7 Har. & J. (Md.) 295, the statement in the bill of exceptions that the plaintiffs *proved* such and such facts, was received as meaning nothing more than that they offered evidence thereof.

Statement on Appeal—Uncontradicted Testimony.—Where, in a statement on appeal, instead of setting out the testimony of witnesses, it was said that the plaintiff and the defendant respectively *proved* certain facts, it was held that, as the parties made no effort to contradict one another on questions of fact, questions of law being alone involved, the form of expression used was a proper one. Wilson *v* Hill, 17 Nev. 401.

Wills. (See also the title PROBATE AND LETTERS OF ADMINISTRATION, *ante*, p. 109.)—A statute provided that no written will might be *proved* after the expiration of five years from the death of the testator. It was held that the statute was intended only to limit the time within which original proof might be made, and that it did not apply to cases of ancillary proof. Matter of Newell, 10 Hawaii 82.

5. *Proven and Found.*—Upon the margin of the several paragraphs of the findings of a court, the court had written "found" and "not found" instead of *proven* and "not *proven*," which were the statutory words. It was contended on appeal that the court below used the word "found" in a strict technical

PROVER. — See APPROVE — APPROVER — APPROVEMENT, vol. 2, p. 519.

PROVIDE — PROVISION. (See also PROVISIO — PROVIDED, *post.*) — To provide is to procure beforehand for future use; to furnish; to supply; to procure supplies or means of defense; and to make provision is to provide means or supplies. The merchant makes provision for his bills by putting the drawee in funds to pay them. Provision is made for the poor by the raising of moneys for their support. Provision is made for a government by placing at its disposal the ways and means for the payment of its officers and its necessary expenditures.¹ The word "provision" is a word in common use to express the terms, stipulations, and conditions in deeds, contracts, statutes, and constitutions. In law, the word "provision" is a stipulation; a rule provided; a distinct clause in an instrument or statute; a rule or principle to be referred to for guidance; as, the provisions of law, the provisions of the constitution, etc.²

sense, and not as synonymous with *proven*, regarding the paragraphs marked "not found" simply as immaterial. But it was held that the judge used "found" as meaning *proven*, and "not found" as signifying "not *proven*." *Ketchum v. Packer*, 65 Conn. 544.

1. **Provide.** — *Huber v. People*, 49 N. Y. 136. To *provide* means to make ready; to prepare; to furnish; to supply; to secure beforehand; to procure as suitable or necessary. *Swartz v. Lake County*, (Ind. 1902) 63 N. E. Rep. 34.

Provided and Prepared. — A *New York* election act declared that "none but ballots *provided* in accordance with the provisions of this act shall be counted." In *People v. Wood*, 148 N. Y. 148, it was said: "It is impossible to suppose that the legislature used the word *provided* as synonymous with 'prepared,' so as to visit upon voters a forfeiture of the franchise if an official should make any departure in preparing the ballot from the strict authority conferred upon him."

Providing — Buying — Acquiring. — A statute enacted that no new burial ground should be *provided* and used within certain specified limits, without the approval of the secretary of state. In construing this provision *Lindley, M. R.*, said: "'Buying' and *providing* are not synonymous expressions. *Providing* may include buying, but it must include acquiring; you cannot *provide* a thing without acquiring it, but a burial ground may be acquired without buying. The words '*providing*,' which occur in the proviso in section 30, to which I have already alluded, can hardly mean buying or acquiring. They point to a later stage in the process of rendering the land referred to fit for a burial ground." *Ward v. Portsmouth*, (1898) 2 Ch. 200.

Where a statute made it the duty of a board of county commissioners to *provide* a suitable and convenient place for holding the Superior Court, it was held that the board had discretion either to lease some suitable house or to purchase a site and erect a building for the use of the court. *Swartz v. Lake County*, (Ind. 1902) 63 N. E. Rep. 34.

Pauper. — The constitution of a state provided that the counties of the state should *provide* as might be prescribed by law for those inhabitants who by reason of age, infirmity, or misfortune might have a claim upon the sympathy and aid of society. It was

held that to *provide* for paupers meant to feed and clothe and house them, and that an act to establish and maintain a state asylum for the indigent poor was in plain conflict with this provision of the constitution. *State v. Hallock*, 14 Nev. 205.

2. **Provision.** — *Snyder v. Dwelling-House Ins. Co.*, 59 N. J. L. 548, quoting Cent. Dict., and holding that there was no distinction between the phrase "any *provision* or condition of the policy" and the words "terms and conditions of insurance."

Provision as Equivalent to Bequest, Deeds of Trust, or Conveyances. — *Jolliffe v. Fanning*, 10 Rich. L. (S. Car.) 198.

Wills. (See also the title *WILLS*.) — A statute provided that a husband who was not a tenant by curtesy should, if his wife did not *provide* otherwise by her will, hold one-half of her lands for his life. In construing this provision the court said: "The expression in the Stat. of 1877, c. 83, 'unless the wife shall by will *provide* otherwise,' and in the Pub. Stat., c. 124, § 1, 'if his wife does not *provide* otherwise by her will,' does not intend a *provision* for the husband, but a *provision* in relation to the property." *Burke v. Colbert*, 144 Mass. 162.

Same — Provision for Children. — A statute enacted that in order that a will should be valid as to children, such children should be named or *provided* for therein. It was held, where a married woman gave all her property to her husband, *providing* that if he should marry again after her death the property should belong to her child or children, that this was not a *provision* for the children within the meaning of the statute. *Purdy v. Davis*, 13 Wash. 164.

A will made in *extremis* bequeathed two-thirds of the estate to the testator's wife while she remained his widow, and upon remarriage one-half of the bequest was to go "to her heir." The testator had no living children, but knew that his wife was pregnant. It was held that such bequest to the unborn child was either a *provision* for such child or showed that the testator intended to make no *provision* for him. *Verrinder v. Winter*, 98 Wis. 287.

So in *Rhodes v. Weldy*, 46 Ohio St. 234, it was held that a contingent remainder did not constitute a *provision* for a child. But see *contra*, *Osborn v. Jefferson Nat. Bank*, 116 Ill. 130.

PROVINCE OF COURT AND JURY. — See the title QUESTIONS OF LAW AND FACT, *post*.

PROVISIONAL. — See note 1.

PROVISIONAL REMEDY. — A provisional remedy is a remedy provided for present need or for the occasion; one adapted to meet a particular exigency.²

PROVISIONS. (See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 114.) — The ordinary meaning of the word "provisions" is food, victuals, eatables.³

In *Bower v. Bower*, 5 Wash. 227, it was said: "The positive provisions of our statute are that the children must be named or *provided* for in the will. What is meant by the term '*provided* for,' as so used? In our opinion, it refers to some beneficial legal *provision*, and we are unable to agree with the contention of the respondent that such children can be said to have been *provided* for by an absolute devise to another, even although the testator thought that the interests of the children would be better subserved by such devise than by one directly to them."

In *Matter of Barker*, 5 Wash. 391, it was said: "Under our statute (§ 1465, Gen. Stat.), there must be some substantial *provision* for the children of which they legally avail themselves, or else there must be an actual naming of such children in the will, or the same will be ineffectual as against such children."

1. **Provisional.** — In *De Haro v. U. S.*, 5 Wall. (U. S.) 628, it was said: "The term *provisional* excludes the idea of permanency; it means something temporary and for the occasion."

A Provisional Committee. — A *provisional* committee is an association formed for carrying into effect the preliminary arrangements necessary to promote a scheme; it is not a partnership, for it constitutes no agreement to share in profit or loss. *Reynell v. Lewis*, 15 M. & W. 517, 16 L. J. Exch. 25.

Provisional Appointment. — See *State v. Lovell*, 70 Miss. 318.

2. **Provisional Remedy.** — In *McCarthy v. McCarthy*, 13 Hun (N. Y.) 579, an order authorizing a substituted or constructive service of a summons was held not to be an order granting a *provisional remedy*, although the court held that in a broad sense the term *provisional remedy* would include every special order out of the usual course in the progress of an action.

The order which, in *Wisconsin*, is a substitute for a bill of discovery is a *provisional remedy*, and as such is appealable under the statute (now Stat. Wis. 1898, § 3069, subdiv. 3) which gives an appeal from an order that grants a *provisional remedy*. *Noonan v. Orton*, 28 Wis. 386. See also *Blossom v. Ludington*, 31 Wis. 283.

The approval of a plaintiff's undertaking by the sheriff in an action of claim and delivery of personal property has been held not to be the allowance of a *provisional remedy* within the *New York* statute (now Code Civ. Pro., § 416) which declares that from the time of the allowance of a *provisional remedy*, the court acquires jurisdiction and has control of all subsequent proceedings. *Nosser v. Corwin*, (C. Pl. Spec. T.) 36 How. Pr. (N. Y.) 540.

3. **Provisions.** — *State v. Angelo*, (N. H. 1902) 51 Atl. Rep. 906.

Not Confined to Food for Man. — *Gundling v. Chicago*, 176 Ill. 346.

Fat Cattle have been held to be *provisions* within the meaning of Act Cong. July 7, 1812, prohibiting American vessels from trading with the enemy. *U. S. v. Barber*, 9 Cranch (U. S.) 243; *U. S. v. Sheldon*, 2 Wheat. (U. S.) 119.

Fruits. — The term *provisions* has been held to include fruits, as used in a statute providing for the licensing of peddlers. *State v. Angelo*, (N. H. 1902) 51 Atl. Rep. 906.

Groceries Kept for Sale. — In *In re Lentz*, 97 Fed. Rep. 487, it was said: "*Provisions* mean articles of food stored at home, or growing in the fields for home consumption; not canned beans, peas, tomatoes, corn beef, sardines, or red herring kept for sale by a mercantile firm of which the debtor is a member." And see the title EXEMPTIONS (FROM EXECUTION), vol. 12, pp. 114, 115.

Ice Peddler. — In *Com. v. Reid*, 175 Mass. 325, it was said: "The word *provisions* means food, victuals, fare, provender. Ice is neither food, victuals, fare, nor provender."

Money and Supplies. — As used in Rev. Code Ala., in force in 1875, § 1858, giving a lien for advances to make a crop, *provisions* was held to mean food for man and beast employed in making the crop, and not to include money or supplies to pay the hire of laborers. *McLester v. Somerville*, 54 Ala. 675.

Oleomargarine. — In *Com. v. Lutton*, 157 Mass. 392, it was held that oleomargarine and butterine were *provisions*. The court said: "The word includes all articles of food."

Tobacco—Cigarettes. — A statute provided that municipalities should have the power to regulate the sale of meats, poultry, fish, butter, cheese, lard, vegetables, and all other *provisions*. It was held that the term "all other *provisions*" could extend only to articles of the same character as those specifically enumerated, and therefore did not extend to cigarettes. *Gundling v. Chicago*, 176 Ill. 340.

Wines and Liquors. — The owners of a tavern employed an agent to keep the tavern and empowered him to purchase, use, and vend all necessary *provisions* for such house. It was held that the agent was authorized to purchase spirituous liquors, wines, and sugar on the credit of the owners. *Cummings v. Sargent*, 9 Met. (Mass.) 172. And that the term includes wine and brandy, see *Mooney v. Evans*, 6 Ired. L. (N. Car.) 363.

Wood and Coal—Provisions and Stores. — A *New York* statute (2 Rev. Stat. 493, § 1) gave a lien and summary remedy for debts created by masters of vessels for such "*provisions* and stores furnished within this state as may be fit and proper for the use of such vessel," etc.

PROVISO — PROVIDED. (See also **PROVIDE**, *ante*, and see the titles **DEEDS**, vol. 9, p. 87; **STATUTES**; **WILLS**.)—A proviso is, in deeds and statutes, a limitation or exception to a grant made or authority conferred, the effect of which is to declare that the one shall not operate, or the other be exercised, unless in the case provided.¹ The words "proviso" and "provided" are apt words to create a condition.² But though their usual, this is not their invariable, effect; and they may be shown by the context to express simply a covenant or limitation.³

In *Crooke v. Slack*, 20 Wend. (N. Y.) 177, the court, *per* Nelson, C. J., said: "The word *provisions*, strictly considered, would be confined to such articles as enter into the food or subsistence for hands and passengers, but 'stores' is a more general term;" and it was held that stores might include wood or coal.

1. **Proviso.**—*Austin v. U. S.*, 155 U. S. 431; *Minis v. U. S.*, 15 Pet. (U. S.) 445; *Voorhees v. Jackson*, 10 Pet. (U. S.) 471; *Carroll v. State*, 58 Ala. 401; *Stockton v. Weber*, 98 Cal. 440; *Sloat v. McComb*, 42 N. J. L. 485. See also *Farmers' Bank v. Hale*, 59 N. Y. 53; *Clark Thread Co. v. Kearney Tp.*, 55 N. J. L. 44; *Sherman v. Santa Barbara County*, 59 Cal. 483.

Provided Does Not Necessarily Import Proviso.—In *Carroll v. State*, 58 Ala. 401, it was said: "It does not necessarily follow, because the term *provided* is used, that which may succeed it is a *proviso*, though that is the form in which an exception is generally made to or a restraint or qualification imposed on the enacting clause. It is the matter of the succeeding words, and not the form, which determines whether it is or not a technical *proviso*."

Proviso and Exception Distinguished.—See **EXCEPT — EXCEPTION**, vol. 11, pp. 555, 556. See also *Rowell v. Janvrin*, 151 N. Y. 60. Compare *Sherman v. Santa Barbara County*, 59 Cal. 484.

2. **Condition.** (See also the titles **CONDITIONS**, vol. 6, p. 499; **STATUTES**; **WILLS**.)—*Atkinson v. Turner*, 2 Atk. 41; *Stockton v. Weber*, 98 Cal. 440; *Sherman v. Santa Barbara County*, 59 Cal. 483; *Hill v. Decatur*, 22 Ga. 206; *Turner v. Forsyth*, 78 Ga. 686; *Gibert v. Peteler*, 38 N. Y. 168; *Raley v. Umatilla County*, 15 Oregon 172.

"There is no word more proper to express a condition than the word *provided*, and it shall always be so taken, unless it appears from the context to be the intent of the parties that it shall constitute a covenant." *Rich v. Atwater*, 16 Conn. 419.

A statute enacted that the directors of the poor might bring an action for the recovery of a bet on election, *provided* that the right be exercised within a certain fixed time. In construing this statute in *Forscht v. Green*, 53 Pa. St. 140, the court said: "Undoubtedly, the word *provided* generally creates a condition; and while it may and often does express an exceptional or different meaning, we feel satisfied that that is not the case here."

Same — Provide.—In *State v. Zeigler*, 46 N. J. L. 311, it was said: "While the word *provide* is in the present tense, which ordinarily indicates present time, the context plainly shows that it is here used conditionally, and that the time indicated by it is not restricted to the

present, but by relation includes the future as well."

Same — Providing in Sense of Provided.—A testator gave a certain sum to his son "*providing* the said amount and interest is collected from the assets or stockholders of said bank." In construing this bequest the court said: "Manifestly, the word *providing* is used in the sense of *provided*, and means upon condition, or with the understanding, that said two thousand dollars shall be collected out of that debt." *Smith's Appeal*, 103 Pa. St. 562.

3. **Does Not Invariably Express Condition.**—"This word (*proviso*) hath divers operations. Sometime it worketh a qualification or limitation; * * * sometime a condition; and sometime a covenant." Co. Litt. 146b. See also Co. Litt. 203b; *Cromwell's Case*, 2 Coke 69; *Stanley v. Colt*, 5 Wall. (U. S.) 166; *Woodruff v. Woodruff*, 44 N. J. Eq. 353.

"*Provided* is an apt word to create a condition. Yet * * * it does not necessarily import a condition, and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only serves to qualify or restrain the generality of a former clause." *Chapin v. Harris*, 8 Allen (Mass.) 596.

Trust.—A testator gave the residue of his estate to a certain charitable institution, "*provided* the trustees and managers of said homes admit and receive into said homes, during the existence or continuance of said homes, one aged man or one aged woman each and every year." It was contended that the word *provided* following the gift to the homes created and was intended to create a trust in favor of indefinite beneficiaries. The court refused to sustain this contention, saying: "The word *provided* may denote a trust when the context justifies such a rendering. But obviously this can only occur when, apart from the word itself, the intention to fasten a trust on the gift is apparent." *Bennett v. Baltimore Humane Impartial Soc.*, 91 Md. 20.

Contingent Estate.—A testatrix bequeathed and devised her estate to her daughter, *provided* that such daughter died leaving issue or did not die before reaching the age of twenty-one years. In construing this provision the court said: "If the first article of the will stood alone, there could be no question but that the daughter took a contingent estate only. The word *provided* is an apt and appropriate word to indicate an intention to give contingently; yet words literally contingent in their meaning and import must bend to the construction in favor of vesting the estate or interest, if the will, in its other parts and features, shows that such was the intention of the testator." *Hersey v. Purington*, (Me. 1902) 51 Atl. Rep. 866.

PROVOCATION. (See also the titles MURDER AND MANSLAUGHTER, vol. 21, pp. 162, 174 *et seq.*; SELF-DEFENSE.) — Provocation is that which provokes or excites passion.¹

PROVOKE. — To provoke means to excite to anger or passion; exasperate; irritate; enrage.²

PROWL. — See note 3.

1. **Provocation.** — *Per* Mullett, J., in *People v. Shorter*, 4 Barb. (N. Y.) 475, *affirmed* 2 N. Y. 193. See also *Steffy v. People*, 130 Ill. 98.

In *State v. Workman*, 39 S. Car. 153, the trial court said: "A legal *provocation* means some injury, or at least some indignity offered to the person of another."

In *State v. Ellis*, 74 Mo. 217, it was said: "The words 'reasonable,' 'adequate,' 'sufficient,' 'lawful,' and 'legal' are used interchangeably in connection with the word *provocation* in defining manslaughter." See also *State v. Kotovsky*, 74 Mo. 247.

2. **Provoke.** — Cent. Dict., *quoted* in *Casner v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 915; *Cook v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 874.

Upon an indictment under a *Connecticut* statute (now Gen. Stat. 1888, § 1509) for breach of the peace, the court, construing the word *provoke*, said: "To *provoke* is to excite, to stimulate, to arouse." *State v. Warner*, 34 Conn. 279.

3. **Prowl — False Imprisonment.** — In an action to recover damages for false imprison-

ment it appeared that the warrant on which the plaintiff was arrested was issued upon a deposition made by the defendant, which, after stating facts showing the commission of a burglary in the nighttime, stated that the deponent believed the offense to have been committed by the accused from the fact that at about the time of its commission the accused was *prowling* around the premises. It was held that, giving to the word *prowl* the full effect of its general meaning, viz., "to rove or wander stealthily, as one in search of plunder," the statement of facts was sufficient to justify the magistrate in determining that there was reasonable ground to believe the accused guilty of the crime charged; that consequently, the deposition gave to the magistrate jurisdiction to issue the warrant; that the warrant was a protection to the defendant; and that the action for false imprisonment could not be maintained. *Swart v. Rickard*, 148 N. Y. 264.

Armed Prowlers. — See ARMED, vol. 2, p. 827.

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See the titles *BY-LAWS*, vol. 5, p. 86; *VOTING TRUSTS*.

I. DEFINITION. — The term "proxy" is used in several senses: first, to designate a person deputed to represent another; second, the office or authority of the deputy; and, third, the document setting forth his authority.¹

II. RIGHT TO VOTE BY PROXY — 1. At Common Law — a. GENERAL RULE. — The rule of the common law was that unless the right was expressly conferred, a member of a corporation could not vote by proxy, such right being considered as not necessarily incident to the corporate rights of members.² The rule had its origin in reasons peculiarly applicable to the earlier forms of corporations, namely, municipal and charitable corporations. Membership with these was coupled with no pecuniary interest. The voting privilege was of the nature of a personal trust committed to the discretion of the member as an individual, and hence not susceptible to exercise through delegation.³

b. EXCEPTIONS. — This method of voting was, however, allowable in the case of the peers of England, and this was said to be in virtue of a special permission of the crown.⁴ Where stock is held jointly by executors, administrators, trustees, or other persons acting in a fiduciary capacity, they have the right to designate one of their number to represent at corporate meetings the interest held by them.⁵

2. Under Statutes and By-laws — a. WHERE RIGHT EXPRESSLY CONFERRED BY STATUTE. — A statute or charter provision expressly giving the right to vote by proxy is, of course, unobjectionable. And at present, in perhaps all jurisdictions, such laws obtain, some imposing certain conditions and limitations, others giving the right unrestricted.⁶

b. WHETHER EXPRESS STATUTORY AUTHORIZATION ESSENTIAL. — A question of some difficulty is whether express statutory authority is necessary; in other words, whether, in case the act of incorporation neither confers upon nor denies to members the right to vote by proxy, being silent upon the subject, power to pass a by-law conferring it is implied. The question first arose in a *Connecticut* case, wherein it was decided affirmatively,⁷ but later it was resolved negatively by the *New Jersey* court.⁸ The rule of the former case has the

1. Cent. Dict.

2. **Not Allowed at Common Law.** — Harben *v.* Phillips, 23 Ch. D. 14; Howard *v.* Hill, 5 R. & Corp. L. J. 255; Perry *v.* Tuskaloosa Cotton Seed Oil Mill Co., 93 Ala. 364; Phillips *v.* Wickham, 1 Paige (N. Y.) 590; People *v.* Twaddell, 18 Hun (N. Y.) 427; Craig *v.* Pittsburgh First Presb. Church, 88 Pa. St. 42, 32 Am. Rep. 417; Com. *v.* Bringham, 103 Pa. St. 134, 49 Am. Rep. 119; Wilson *v.* American Academy of Music, 2 Pa. Co. Ct. 280.

3. Walker *v.* Johnson, 17 App. Cas. (D. C.) 144.

4. Phillips *v.* Wickham, 1 Paige (N. Y.) 590; Wilson *v.* American Academy of Music, 2 Pa. Co. Ct. 280.

5. Scanlan *v.* Snow, 2 App. Cas. (D. C.) 137.

6. See the local statutes.

7. **Case of State *v.* Tudor.** — A by-law of a corporation whose object is the acquisition of property, which authorizes stockholders in all

their meetings to vote by proxy, is valid. *Quære*, whether the stockholders could vote by proxy in the absence of such by-law. State *v.* Tudor, 5 Day (Conn.) 329, 5 Am. Dec. 162. In this case there was no provision empowering the members to vote by proxy, but there was given the power to "establish such by-laws and regulations as they may deem necessary for the government of the corporation, not contrary to the charter or the laws of this state." The court said: "So much, however, I think, may be said, that those incorporated societies whose object is the acquisition of property stand on a different ground as to this question from those of every other kind; that is to say, it is not so clear that every vote given in a corporation of the former kind must be personal, as it is that it must be so in one of the latter."

8. **Case of Taylor *v.* Griswold.** — Here the corporation was, by a general clause of its charter,

support of both authority and reason,¹ though a very respectable court has intimated its preference for the rule of the latter case.² The rule of the *Connecticut* case is promotive of convenience, and has to recommend it that it allows members of a private corporation instituted for merely private purposes to regulate their manner of voting in a way to suit their own sense of convenience and interest.³ And, furthermore, the reasons of the common-law rule have no substantial foundation, in so far as they relate to modern trading corporations. Suffrage and the right to representation in the elections and other affairs of such institutions stand upon essentially different foundations.⁴

c. **BY-LAWS RESTRICTIVE OF CHARTER PRIVILEGE.** — A by-law purporting to restrict in any manner the privilege of voting by proxy, conferred upon the members by the act of incorporation, is void and of no effect.⁵ This principle has been applied to by-laws requiring proxies to be executed and attested in a designated manner,⁶ or confining the right of selection as proxies to persons who are stockholders,⁷ or subjecting those offering to vote to "a sort of inquisitorial examination."⁸

3. **Effect of Long-continued Usage.** — A long-continued and unbroken usage of proxy voting has been considered as having all the effect of a by-law until regularly revoked.⁹

III. WHO MAY APPOINT OR BE APPOINTED — 1. **Who May Appoint** — a. **RECORD OWNER.** — The owner of the legal title to stock, as disclosed by the transfer books of the company, is the one authorized to delegate the right to vote on the stock.¹⁰

b. **DIRECTOR OR TRUSTEE** — In the absence of authority in the charter or by-laws, a director or trustee of a corporation cannot vote by proxy, for the reason that the corporation is entitled to the personal judgment, influence, and vote of each director.¹¹

authorized to make by-laws for its government, provided they were not repugnant to the law of the land; and it was held that as the common law required all votes to be given in person, and that being a part of the law of the land, a by-law authorizing voting by proxy was repugnant thereto and consequently void. *Taylor v. Griswold*, 14 N. J. L. 222, 27 Am. Dec. 33. See also *Cone v. Russell*, 48 N. J. Eq. 213.

1. *Walker v. Johnson*, 17 App. Cas. (D. C.) 144; *People v. Crossley*, 69 Ill. 195; *Com. v. Detwiller*, 131 Pa. St. 614; *Wilson v. American Academy of Music*, 2 Pa. Co. Ct. 280.

In *California* it is competent for a corporation to provide by its by-laws that stockholders may vote by proxy at all meetings of the stockholders, and a provision of this kind authorizes proxy voting at a meeting authorizing bonded indebtedness. *Market St. R. Co. v. Hellman*, 109 Cal. 571.

2. **Term "Present" Construed.** — In *Brown v. Com.*, 3 Grant Cas. (Pa.) 209, the court, while not deciding the question, intimated that stockholders could not vote by proxy in the absence of a special charter provision permitting them to do so. In this case a provision that "each person being present at the election" shall be entitled to vote was held not to authorize voting by proxy. The court considered that the term "present" contemplated an actual, not a constructive, presence. See also *Cone v. Russell*, 48 N. J. Eq. 213.

3. See *People v. Crossley*, 69 Ill. 195.

4. *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

5. **By-law Limiting Charter Right.** — *White v. New York State Agricultural Soc.*, 45 Hun (N. Y.) 581.

6. *Com. v. Cox*, 1 Leg. Chron. (Pa.) 89.

7. *Matter of Lighthall Mfg. Co.*, 47 Hun (N. Y.) 258; *People's Home Sav. Bank v. Superior Ct.*, 104 Cal. 640, 43 Am. St. Rep. 147.

8. *People v. Kip*, 4 Cow. (N. Y.) 382.

9. **Usage.** — *Walker v. Johnson*, 17 App. Cas. (D. C.) 144.

10. **Successor to Bank Cashier—Stock in Latter's Name Followed by Word "Cashier."** — Where on the transfer books appeared the name of a certain person with the term "cashier" thereto subjoined, as the owner of certain shares, the shares could be voted upon only by such person or his duly authorized agent, and a proxy from another person would not confer such authority although accompanied with proof that he was the successor of the first-named person as cashier, and had authority to act and vote in his place in reference to all stock standing in his name as cashier. The court considered that though it should be admitted that the word "cashier" indicated that the stock was held in trust, nevertheless no one but the trustee in whose name the stock stood, or his duly authorized agent, was authorized to vote it. *Matter of Mohawk, etc., R. Co.*, 19 Wend. (N. Y.) 135.

11. **Directors.** — *Perry v. Tuskaloosa Cotton Seed Oil Mill Co.*, 93 Ala. 364; *Craig Medicine Co. v. Merchants' Bank*, 59 Hun (N. Y.) 561.

Where a decree directed trustees of a parish to meet and present and elect a clergyman, it was held that they could not make proxies to vote in such a personal trust. *Atty.-Gen. v. Scott*, 1 Ves. 413.

But in *Dudley v. Kentucky High-School*, 9 Bush (Ky.) 576, where the result was changed

c. CORPORATION OWNING STOCK. — Whenever a corporation may own stock in another company, there is no legal objection to the corporation giving a proxy to vote stock which it in fact owns.¹

d. ALIEN STOCKHOLDER. — Where by the terms of the act of incorporation the right to vote by proxy is given to "each stockholder being a citizen," an alien stockholder has no right to vote by proxy.²

e. HOLDER OF STOCK ENJOINED FROM VOTING IT. — Where the holder of stock is enjoined from voting it directly, on the ground of public policy, he cannot be permitted to vote it by proxy.³

2. Who May Be Appointed — *a.* OFFICER OF CORPORATE OWNER. — The secretary of a corporation that owns stock in another corporation may be constituted the proxy to vote such stock.⁴

b. UNDER NATIONAL BANK LAWS. — By the National Bank Laws "no officer, clerk, teller, or bookkeeper of such association shall act as proxy."⁵ While there has been no judicial decision in regard to the matter, the present view of the comptroller's office is that by the term "officer" a director is precluded from acting, as well as the president, cashier, or other like executive officer. Formerly, however, the contrary opinion obtained in this department.⁶

IV. FORMAL REQUISITES — **1. No Particular Form Necessary.** — A stockholder who desires to delegate his right to vote should furnish his representative with such written evidence as will reasonably assure the inspectors that the agent is acting by the authority of his principal, but the power need not be in any prescribed form nor be executed with any particular formality. It is sufficient if it appears on its face to confer the requisite authority, and is free from all reasonable grounds of suspicion of its genuineness and authenticity.⁷

2. Presumption of Regularity. — Where at the time of the election the objection was as to the right of voting by proxy, and none was made as to the form, execution, or validity of the proxies themselves, it was held on *quo warranto* against the directors elected that in the absence of proof that the persons executing the proxies were members of the society and that the proxies were properly executed, it would be presumed that the proxies were regular and proper.⁸

3. Description of Stockholder. — Although a form of proxy is prescribed, but there is nothing to show that such form must be literally followed, a description of the person giving the proxy as a "proprietor of shares," instead of as a "member," is immaterial.⁹

4. Description of Corporation. — It is immaterial that the designation in the

by the vote of a director so made, it was nevertheless held that this did not authorize the interference of equity. Here the corporation was not organized to make money, but merely to establish and maintain a high school.

1. Corporation. — *In re* Indian Zoedone Co., 26 Ch. D. 70.

2. Alien. — *Matter of Barker*, 6 Wend. (N. Y.) 509.

3. *Clarke v. Central R., etc., Co.*, 50 Fed. Rep. 338.

4. *Market St. R. Co. v. Hellman*, 109 Cal. 571.

5. Rev. Stat. U. S., § 5144.

6. Pratt's Digest (1901), 38.

7. *Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

Where a Form of Proxy Was Given in the Appendix to the Rules of the Institution, the court said in passing that this must be regarded as merely suggesting a form, and that a properly drawn proxy would be good though it might

not follow the form. *Howard v. Hill*, 5 R. & Corp. L. J. 255.

Winding Up Proceedings — Proxies by Telegraph. — In *In re* English, etc., Chartered Bank, (1893) 3 Ch. 385, a chartered banking company the principal business of which was in Australia stopped payment and was ordered to be wound up in England. The judge made an order directing a form of proxy to be sent by the official receiver by telegraph to Australia, where the large majority of the creditors lived, appointing certain persons to vote upon a proposed scheme of reconstruction; the proxy papers were to be executed by the Australian creditors and deposited at the offices of the company by a certain day, and the particulars and numbers of the proxies for and against the scheme were to be telegraphed to the official receiver. This course was considered proper under the circumstances.

8. *People v. Crossley*, 69 Ill. 195.

9. *In re* Indian Zoedone Co., 26 Ch. D. 70.

proxy of the corporation is not literally correct, when the same name appeared in the notice of meeting and there is no pretense that any stockholder was misled.¹

5. Effect of Blanks — Power to Fill. — Where a proxy is in proper form, save that the day of the month of the meeting is left blank because the exact date had not been fixed when the proxy was given, and the intention of the owner of the stock is unmistakable, the proxy is unobjectionable.² And it was so held of a proxy in which the day and month of its execution were blank.³ And it has been held that the person to whom a proxy is given may fill a blank with regard to the day of the month,⁴ or the name of the person who is to exercise the privilege,⁵ even at the moment when the proxies are presented to the inspectors, and the right to vote thereon is claimed.

6. Acknowledgment — Filing — Attestation. — It has been held that where a proxy is subscribed by a subscribing witness it may not be rejected because it is not acknowledged or proved.⁶ A statutory provision that proxies should be "duly filed" has been held to be directory only.⁷ But in an *English* case a clause in the articles requiring the signature of the stockholder to a proxy to be attested was adjudged to be not merely directory, but under such clause attestation was essential to the validity of the proxy.⁸

V. RIGHTS AND POWERS OF PROXY — 1. General Rule — Acts Binding on Principal. — Where a proxy is duly constituted, and there is no limitation upon his power, a vote by such proxy binds the owner of the stock to the same extent as if cast by the latter personally.⁹

2. When Authority Limited. — When the authority conferred is restricted to a particular purpose, a vote for another and different purpose is unauthorized. To illustrate: A proxy to vote for the election of directors simply, carries no right to vote to ratify a sale of corporate property made by the directors.¹⁰ And where the authority is to vote upon the question of increase of the capital stock, a vote upon the matter of disposing of such increase of

1. *Langan v. Francklyn*, (Brooklyn City Ct. Spec. T.) 29 Abb. N. Cas. (N. Y.) 102. In the notice and proxy the words "of East New York" were added to the corporate title, "Union Gaslight Company."

2. **Blanks.** — *Matter of Townshend*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 135.

3. *Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

4. *Matter of Townshend*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 135. In this case and the one following there was no doubt as to the intention of the stockholder.

Although the name of the proxy was left blank by the maker of the power, and the blank was filled by the holder of the proxy immediately before the election, in the absence of any challenge by the maker it will be presumed that the name of the proxy was written in the blank by the authority of such maker. *White v. New York State Agricultural Soc.*, 45 Hun (N. Y.) 581.

Blank Filled by Secretary — Stamp Act — *In Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1, accompanying a notice of an extraordinary general meeting of stockholders was a circular signed by the secretary and emanating from the chairman and directors, with a form of proxy to be returned, and various proxies were returned (duly stamped) signed by the shareholders, but omitting the day and hour of the meeting; the secretary filled up these particulars before the proxies were lodged with the company. The proxies were held to

be valid within section 80 of the Stamp Act of 1891, which requires the date of meeting to be specified.

5. *Ex p. Lancaster*, 5 Ch. D. 911. In this case the proxy was given by a creditor to his solicitor with verbal authority to use it for him in the matter of a bankruptcy. Compare *Howard v. Hill*, 5 R. & Corp. L. J. 255.

6. **Acknowledgment.** — *Matter of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

7. **Filing.** — *Farwell v. Houghton Copper Works*, 8 Fed. Rep. 66.

8. **Attestation — Repeal of Regulation.** — *Harben v. Phillips*, 23 Ch. D. 14. In this case the articles of association provided for voting by proxy, and declared that the instrument appointing a proxy should be in writing under the hand of the appointor and should be attested by one or more witness or witnesses, and prescribed a form of proxy containing an attestation clause. By special resolution the article prescribing the form of proxy was repealed and a new form given without an attestation clause, but the resolution did not purport to repeal the article requiring attestation of the signature of the appointor. It was held that the provision requiring the signature to be attested remained in force.

9. *Mobile, etc.*, R. Co. v. Nicholas, 98 Ala. 92. **Ratification by Corporate Owner of Acts of Proxy Appointed by the Pledgee of the Stock.** — *Market St. R. Co. v. Hellman*, 109 Cal. 571.

10. *Cumberland Coal, etc., Co. v. Sherman*, 30 Barb. (N. Y.) 553.

stock is unwarranted.¹ Likewise a proxy given for the purpose of voting upon the question of issuance of "bonds" merely, confers no authority to vote for "third mortgage bonds."²

3. Transactions Outside Scope of Articles. — Where the deed of association commits the company affairs to a committee of shareholders, called managing directors, who are authorized to vote by proxy, a director so represented at a meeting is not bound by a resolution imposing obligations outside the scope of the deed.³

4. Fundamental Changes in Organization. — Proxies conferring ordinary powers will not authorize votes for radical and fundamental changes in the organization, or for the dissolution thereof and the formation of a new one.⁴

5. Fraud or Bad Faith. — It cannot be said that a proxy was voted fraudulently and in bad faith, because in one view the vote was contrary to the principal's interest, where in another and broader view it was for the best interests of the company.⁵

6. Notice to Proxy Is Notice to Stockholder. — In accordance with a familiar principle of agency,⁶ a stockholder who is represented by proxy is chargeable with notice of all matters connected with the proceedings of the meeting which were known to his proxy.⁷

7. Waiver of Irregularities. — Under a proxy general in character and without limit as to time or any specific acts, the stockholder is estopped by the vote of his representative as regards any irregularity in the proceedings or calls of the meeting which could have been waived by himself if personally present.⁸

8. Right to Demand Poll — Method of Counting in Absence of Poll. — In *England* it has been held that where, under the articles, a poll may be demanded by "shareholders qualified to vote and holding" a specified number of shares, a holder of proxies is not within the meaning of the provision, and a poll had upon the demand of such a one is illegal.⁹ And in the event no poll is demanded, but there is simply a show of hands, the vote of each member who also holds proxies is to be counted as a single vote, and not as a vote for each of the members so represented;¹⁰ but if the proxy is a non-member and represents only one person, the proxy's vote should be counted.¹¹

9. Right to Vote on Motions to Ballot or Adjourn. — The general rule is that a person holding a proxy may do all that a stockholder may do in the matter, and accordingly may vote on motions to take a ballot or to adjourn.¹²

10. Ruling of Chairman Against Proxy's Right to Vote. — The holder of a proxy, who, upon the expression by the chairman of the meeting of an opinion unfavorable to his right to vote, does not offer to vote or present his claim to the meeting so that it may be passed upon, cannot claim that his right to vote was excluded, but must be taken to have voluntarily refrained from voting.¹³

1. *Matter of Wheeler*, (Supm. Ct. Spec. T.) 2 Abb. Pr. N. S. (N. Y.) 361.

2. *Marie v. Garrison*, (N. Y. Super. Ct.) 13 Abb. N. Cas. (N. Y.) 210.

3. *Brown v. Byers*, 16 M. & W. 252.

4. *Smith v. Smith*, 3 Desaus. (S. Car.) 557. This was a case of representation by proxies of subordinate lodges of Masons in the Grand Lodge.

5. *Mutual Reserve Fund L. Assoc. v. Taylor*, 99 Va. 208. Here the proxy represented a member of a mutual life insurance company and voted for a large increase in the assessment upon members of the class to which his principal belonged; but it appeared that the increase was necessary to keep the company alive.

6. See the title *AGENCY*, vol. I, p. 1144.

7. *Thames v. Central City Ins. Co.*, 49 Ala. 577.

8. *Columbia Nat. Bank v. Mathews*, (C. C. A.) 85 Fed. Rep. 934, reversing 79 Fed. Rep. 558.

9. *Poll*. — *Reg. v. Government Stock Invest. Co.*, 3 Q. B. D. 442.

10. *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1, overruling *In re Bidwell*, (1893) 1 Ch. 603; *In re Caloric Engine, etc., Co.*, 52 L. T. N. S. 846. And see *In re Horbury Bridge Coal, etc., Co.*, 11 Ch. D. 109.

11. *Ernest v. Loma Gold Mines*, (1897) 1 Ch. 1.

12. *Forsyth v. Brown*, 13 Pa. Co. Ct. 576.

13. *State v. Chute*, 34 Minn. 135.

11. Duration of Authority. — A proxy in the usual form confers authority to act only at the meeting then in contemplation, and may not be voted at another and different meeting resolved upon subsequently to the time of the one originally contemplated.¹

VI. COMPELLING EXECUTION OF PROXY — **1. To Receiver.** — Where a receiver has been appointed on a creditor's bill, and the property includes corporate stock, the court may order the judgment debtor to execute a proxy to the receiver so as to enable him to vote at a stockholders' meeting.²

2. To Pledgor — Laches. — And equity will, in a proper case, compel a pledgee of stock to give the pledgor a proxy.³ But the pledgor may disentitle himself to such relief by long-continued acquiescence or laches.⁴

3. To Testamentary Co-trustee. — Where trustees of stock for certain life beneficiaries were, by the will creating the trust, directed to give one of their number a proxy to vote the stock, upon their refusal to do so they were required by the court to execute the proxy.⁵

VII. REVOCATION OF PROXY — **1. When About to Be Used for Improper Purpose.** — The owner of stock may revoke his proxy where it is about to be used for a fraudulent purpose, although given for a valuable consideration.⁶

2. When Coupled with Power of Sale. — It has been held that where a stockholder deposits his stock with a director with authority to vote upon it and to sell it, such power is, before sale, revocable.⁷

3. Validity of Irrevocable Proxy. — An irrevocable proxy reserving certain privileges to the owner of the stock in regard to the manner of dealing in it, and withdrawing from the ownership, is not contrary to public policy or in any wise open to objection.⁸ An agreement between joint owners of stock whereby one was constituted a proxy to vote the shares, such proxy to be irrevocable for ten years, unless its revocation was assented to by both parties before that time, was held not void as against public policy.⁹ In *New York*, where by statute a proxy is revocable at the pleasure of the person executing it, it is held that parties cannot by agreement create a proxy irrevocable in its nature, for to do this would be to repeal an act of legislature.¹⁰

1. *Howard v. Hill*, 5 R. & Corp. L. J. 255. In this case there was to be an election to the post of surgeon in a hospital. The meeting originally designated fell through for some reason, and another meeting was resolved upon and held, at which one of the original candidates withdrew and another was substituted in his place.

2. *Compelling Execution of Proxy*. — *Atkinson v. Foster*, 27 Ill. App. 63.

3. *Vowell v. Thompson*, 3 Cranch (C. C.) 428; *Matter of Argus Printing Co.*, 1 N. Dak. 434, 26 Am. St. Rep. 639; *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291.

4. *Hoppin v. Buffum*, 9 R. I. 513, 11 Am. Rep. 291. In this case it was held that after long-continued acquiescence in the control of the stock by the pledgee, who was the record owner, and failure to inform the corporation that he (the pledgor) was the owner until a contested election occurred, and even then not until the votes were being counted or had been counted, it was too late to ask equitable interference with the result of the election as declared.

5. *Trustees*. — *Lafferty's Estate*, 154 Pa. St. 430. Here a testator gave stock to trustees for certain life beneficiaries, and directed that at all elections of the corporation the stock should be voted as his son, one of the trustees, should appoint, and also directed the trustees to give a proxy to vote the stock as the son

might desire to vote it. At the time of the testator's death the son was president of the corporation. The two trustees refused to execute the proxy as directed by the will, and the son applied to the Orphans' Court for an order compelling them to do so; that court found that the evidence was insufficient to sustain the allegation that the voting trustee intended to make a fraudulent use of the proxy, and granted the order prayed for. On appeal to the Supreme Court it was held by an equally divided court that the decree of the lower court should be affirmed.

6. *Fraudulent Use of Proxy*. — *Reed v. Newburgh Bank*, 6 Paige (N. Y.) 337. Here the court said: "I think he was also right in revoking the proxy and voting upon the hypothecated stock himself, and this without referring to the question whether the agreement to give the complainant a proxy to vote upon the hypothecated stock was not void as against public policy."

7. *Woodruff v. Dubuque, etc.*, R. Co., 30 Fed. Rep. 91.

8. *Brown v. Pacific Mail Steamship Co.*, 5 Blatchf. (U. S.) 525.

9. *Hey v. Dolphin*, 92 Hun (N. Y.) 230.

10. *New York Statute*. — *Matter of Germicide Co.*, 65 Hun (N. Y.) 607. And it was held that a proxy coupled with an interest, and therefore irrevocable, was void.

In *Hey v. Dolphin*, 92 Hun (N. Y.) 230, it

VIII. RESTRAINING PROXY FROM VOTING — *Fraud on Statute.* — An injunction will be granted to restrain the voting by proxy, where this form of voting has been resorted to in fraud of the act of incorporation.¹

Breach of Trust — Public Policy. — Where executors and trustees who held certain stock, in pursuance of an agreement with certain of the members, executed to the latter a proxy irrevocable for a limited period, and they in consideration thereof agreed to so vote as that one of the former should be continuously engaged as manager at a specified salary, the use of the proxy was enjoined.²

Federal Court — Stockholders' Meeting in Another State. — A federal court sitting in one state will not restrain by injunction the voting by proxy at a stockholders' meeting to be held in another state, on the ground that such manner of voting was legal only when expressly authorized by statute, and that there was no such statute in the latter state.³

Arrangement Alleged to Create Trust. — Where the corporate officers obtained from stockholders deposits of stock, together with proxies authorizing them, among other things, to sell the corporate property and to vote such stock at a stockholders' meeting, a single stockholder may not restrain the voting on the stock of others so deposited upon the theory that such transaction created a trust for the corporation, in the absence of a showing that what was done in this behalf was done with corporate funds for the corporation.⁴

IX. REJECTION OF PROXY — *Result of Election Changed.* — If the result of an election is changed by an improper refusal to accept proxies and to permit the holders to vote thereon, a new election may be ordered.⁵

Proxy Regular on Its Face. — Where a proxy, apparently executed by the stockholder and regular in form, is presented to the inspectors, it is not competent for them to refuse to receive the vote, or to assume to themselves the power of a judicial tribunal to try its genuineness. If for any reason not apparent upon its face the instrument is invalid, redress must be sought from the courts after the election, if by its reception any detriment was done.⁶

Unauthorized By-law. — The act of inspectors in rejecting proxies because the holders refused to make oath to causes of challenge and to submit to "a sort of inquisitorial examination at variance with the fundamental principles of our civil and political institutions, at the pleasure of the inspectors," in pursuance of an unauthorized by-law, was held unauthorized and void.⁷

X. AGREEMENT NOT TO VOTE BY PROXY. — An agreement among certain shareholders that no one of them should vote by proxy has been held to be pernicious and unlawful.⁸

was held that § 21, c. 687, N. Y. Laws of 1892, providing, among other things, that every proxy shall be revocable at the pleasure of the person executing it, did not apply to the agreement involved therein, which was made before the enactment of the statute, and that it would seem that if the statute were to be allowed a retrospective effect, it would not apply to the case of a proxy on stock so situated that neither owner could vote on it without the consent of the other.

1. *Injunction.* — *Webb v. Ridgely*, 38 Md. 364.

2. *Cone v. Russell*, 48 N. J. Eq. 208. The reasons assigned were that the arrangement was against public policy and also constituted a breach of trust.

3. In *Woodruff v. Dubuque, etc., R. Co.*, 30 Fed. Rep. 91, the court held that it would be presumed that the officers would proceed according to law, and that even if they did not the complainant would still have an adequate remedy.

4. *Woodruff v. Dubuque, etc., R. Co.*, 30 Fed. Rep. 91.

5. *Rejection — Inspectors.* — *Matter of Townshend*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 135.

6. *Matter of Cecil*, (Supm. Ct. Spec. T.) 36 How. Pr. (N. Y.) 477. In this case it was also held that the corporation not being a moneyed corporation, the inspectors could not require a person voting by proxy to make affidavit that the stock was not hypothecated.

7. *People v. Kip*, 4 Cow. (N. Y.) 382, note.

8. *Agreement Not to Give Proxy.* — *Fisher v. Bush*, 35 Hun (N. Y.) 641.

In *Tomlin v. Farmers', etc., Bank*, 52 Mo. App. 430, the question whether an agreement between certain shareholders, declared to be for the benefit of the company, not to sell their stock, or to grant proxies to persons outside those executing the agreement, was against public policy, was left undecided.

XI. PROXY GIVEN FOR CONSIDERATION — STATUTE. — A *New York* statute expressly prohibits the issuance of a proxy in consideration of any sum of money or other thing of value.¹ And a transfer, though absolute on its face, but designed simply to give to the transferee the right to vote on the stock for a designated period, is void; and the right to attack such a transaction is not confined to the owner of the stock, but belongs to any stockholder, each of whom is presumed to be interested in having only legal votes cast.²

XII. MATTERS OF EVIDENCE — 1. Evidence of Authority to Execute Proxy. — On an application to set aside an election of directors, it seems that proof of authority to execute a proxy to vote thereat not shown to the inspectors will not be received by the court to establish the allegation of an erroneous rejection of votes.³

2. Evidence that One Acted as Proxy. — Where the interests of several members were represented generally by another member, but the capacity in which he represented them and the extent of his authority were not shown, the circumstance that in a meeting of stockholders for the adoption of an amendment to its by-laws he appeared to have voted his individual stock only, was held not to indicate that he did, or intended to, express the assent of those other stockholders to the adoption of such amendment, even if he had the power to do so.⁴

3. Proxy as Evidence of Membership. — Where, in an action to enforce the liability of a stockholder, the evidence to show that the defendant was a stockholder at the time the debt was contracted consisted of a proxy given by him shortly afterwards to vote at an election, the time for holding which was less than thirty days from the time when the debt was contracted, and by the charter no stockholder could vote upon stock which he had not held for thirty days preceding the election, this evidence was held *prima facie* sufficient.⁵

4. Evidence of Contents of Lost Proxy. — Where the writings appointing proxies were, after being used, thrown aside as useless, it was held not to be necessary to show that search had been made for them before admitting secondary evidence of their contents.⁶

PROXIMATE CAUSE. — See the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; DAMAGES, vol. 8, p. 537, and the cross-references there given; NEGLIGENCE, vol. 21, p. 455. As used in insurance law, see the titles ACCIDENT INSURANCE, vol. 1, p. 327; FIRE INSURANCE, vol. 13, p. 127; MARINE INSURANCE, vol. 19, p. 1036.

PRUDENCE — PRUDENT. — Prudence is that degree of care required by the exigency of circumstances under which it is to be exercised.⁷

1. *New York Laws* 1890, c. 564, § 54. *Matter of Germicide Co.*, 65 Hun (N. Y.) 607.

2. *Matter of Glen Salt Co.*, 17 N. Y. App. Div. 234, *affirmed* 153 N. Y. 688.

3. *Matter of Mohawk, etc.*, R. Co., 19 Wend. (N. Y.) 135.

4. *Steiner v. Steiner Land, etc., Co.*, 120 Ala. 128.

5. *Harger v. McCullough*, 2 Den. (N. Y.) 119.

6. *Lost Proxy — Secondary Evidence as to Contents.* — *Haywood, etc.*, Plank Road Co. v. Bryan, 6 Jones L. (51 N. Car.) 82.

7. *Prudence.* — *Cronk v. Chicago, etc.*, R. Co., 3 S. Dak. 93.

In *Cotes v. Davenport*, 9 Iowa 236, it was said: "The *prudent* man is a cautious man — practically wise."

Cautious and Prudent Distinguished. — See CAUTIOUS, vol. 5, p. 777.

"Ordinary Prudence and Caution" is a syno-

nym of "ordinary care." *Matson v. Maupin*, 75 Ala. 313.

Prudence Synonym of Due Care. — *Florida Cent., etc.*, R. Co. v. Williams, 37 Fla. 419.

Ordinary Care and Prudence. — In *Fassett v. Roxbury*, 55 Vt. 556, the court defined the phrase "ordinary care and *prudence*" as meaning that degree of *prudence* that a careful and *prudent* man would exercise under the circumstances. Cited in *Cronk v. Chicago, etc.*, R. Co., 3 S. Dak. 98. See generally the title NEGLIGENCE, vol. 21, p. 463 *et seq.*

Ordinary Care and Common Prudence Synonymous. — See *Richmond, etc.*, R. Co. v. Howard, 79 Ga. 53.

Relative Terms. — "The terms 'ordinary care,' 'reasonable prudence,' and such like terms, as applied to the conduct and affairs of men, have a relative significance, and cannot be arbitrarily defined." *Grand Trunk R. Co.*

PRUDENTIAL. — See note 1.

PT. — "Pt." has been recognized by the courts as an abbreviation for "part."²

PUBERTY. — See the titles AGE, vol. 1, p. 927; INFANTS, vol. 16, p. 255; RAPE, *post*; SEDUCTION.

PUBLIC. (See also QUASI-PUBLIC, *post*, and see the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.) — The word "public" is a convertible term, and when used in an Act of Assembly may refer to the whole body politic, that is to say, to all the inhabitants of the state, or to the inhabitants of a particular place only; it may be properly applied to the affairs of the state or of a county or of a community.³ Public signifies of or pertaining or belonging to the people,⁴ as opposed to private.⁵ The term is frequently joined to other terms to designate those things which have a relation to the public, as public officer, public house, public lands, public places, etc.; for instances of which usage see the various titles beginning with this word, and the phrases collected in the notes. When applied thus to property, the word sometimes describes the use to which the property is applied,⁶ at other

v. Ives, 144 U. S. 417, quoted in *Sommer v. Carbon Hill Coal Co.*, (C. C. A.) 89 Fed. Rep. 59; and *Johnson v. Boston*, etc., Consol. Copper, etc., Min. Co., 16 Mont. 176.

1. **Prudential Affairs of Town.** — A Massachusetts statute (now Pub. Stat. 1882, c. 27, § 15) empowers towns to make such orders and by-laws as are necessary for managing and ordering their "prudential affairs." In *Willard v. Newburyport*, 12 Pick. (Mass.) 231, the phrase "prudential affairs" was said by Shaw, C. J., to embrace "that large class of miscellaneous subjects affecting the accommodation and convenience of the inhabitants, which have been placed under the municipal jurisdiction of towns by statute or by usage." And in this case it was held that a town had authority to provide for the maintenance of a town clock.

But in *State v. Boardman*, 93 Me. 77, in construing a similar provision in the Maine statute, it was said: "The words 'prudential affairs' are certainly very indefinite and unsatisfactory, and it might be a very difficult matter in many cases to determine just what is or is not included within the meaning of the expression." See also *Spaulding v. Lowell*, 23 Pick. (Mass.) 71.

2. **Pt.** — *Blakeley v. Bestor*, 13 Ill. 714; *Jackson v. Cummings*, 15 Ill. 453; *Hunt v. Smith*, 9 Kan. 153. See also *Atkins v. Hinman*, 7 Ill. 444. And see the titles ABBREVIATIONS, vol. 1, p. 97; JUDICIAL NOTICE, vol. 17, p. 897.

3. **Public Referred to Part of State.** — *Baker v. Johnston*, 21 Mich. 335; *Huston Tp. v. Benzette Tp.*, 135 Pa. St. 398; *Wyatt v. Larimer*, etc., Irrigation Co., 1 Colo. App. 495.

In *State v. Whitesides*, 30 S. Car. 585, it was said: "But to make a matter a public matter, it need not pertain to the whole nation or state. It is sufficient if it pertains to any separate or distinct portion thereof or community." See also *State v. Brown*, 10 Ark. 107; *Pine City v. Munch*, 42 Minn. 344; *Lien v. Norman County*, 80 Minn. 67.

Same — **Municipality.** — A deed of property to a municipal corporation contained a condition requiring a public hall to be erected upon the property within a certain time. In construing the word public, as thus used, the court said:

"The words public and 'public good' obviously relate to the town or town benefit, which, as embracing the good of the inhabitants of a large town, is not improperly designated as public or 'public good.'" *Clarke v. Brookfield*, 81 Mo. 512.

Same — **Nuisance.** — By the words "the public," used with respect to the collective body in whose behalf a prosecution to abate a common nuisance must be brought, are meant all those who are affected by the nuisance in the same way, or who, having occasion to come in contact with it, may be affected in the same way, though differing in the extent or degree to which they may be injured. *Jones v. Chanute*, 63 Kan. 243. See also the title NUISANCES, vol. 21, p. 679.

Same — **Public Health.** — In *Thomas v. County Com'rs*, 5 Ohio Dec. 503, the word public used in connection with the words "health, convenience, or welfare" was held to have reference to the people of the neighborhood.

But the Term May Refer to the Whole People. — *Weeks v. Sparke*, 1 M. & S. 600; *Wyatt v. Larimer*, etc., Irrigation Co., 1 Colo. App. 495; *Huston Tp. v. Benzette Tp.*, 135 Pa. St. 398; *Newcomb v. Smith*, 2 Pinn. (Wis.) 154.

Public in Sense of State or Government. — *Fisk v. Cuthbert*, 2 Mont. 593.

May Refer Both to Whole Public and to Part Thereof. — *Byrne v. Chicago General R. Co.*, 169. Ill. 84.

Public and People. — See PEOPLE, vol. 22, p. 675.

4. See *Commercial Bank v. New Orleans*, 17 La. Ann. 190.

5. **Opposed to Private.** (See also PRIVATE, vol. 22, p. 1312.) — *Jones v. State*, 69 Miss. 406; *Huston Tp. v. Benzette Tp.*, 135 Pa. St. 398; *State v. Whitesides*, 30 S. Car. 584.

"Public" and "General" Convertible. — *Holland's Case*, 4 Coke 75; *Samuel v. Evans*, 2 T. R. 569; *Youngs v. Hall*, 9 Nev. 218; *Clark v. Janesville*, 10 Wis. 178; *State v. Lean*, 9 Wis. 287; *Burhop v. Milwaukee*, 21 Wis. 259. See also the title STATUTES.

6. **Use as Test** — *England.* — *Blake v. London*, 19 Q. B. D. 79.

Canada. — *Struthers v. Sudbury*, 27 Ont. App. 217.

times the character in which it is held.¹

PUBLIC ACT OR STATUTE. — See the title STATUTES.

Illinois. — *Montgomery v. Wyman*, 130 Ill. 25.

Iowa. — *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229.

Ohio. — *Gerke v. Purcell*, 25 Ohio St. 241; *Willyard v. Hamilton*, 7 Ohio (pt. ii.) 113, 30 Am. Dec. 195.

Pennsylvania. — *Northampton County v. Lafayette College*, 128 Pa. St. 132; *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565; *Beaver County v. Geneva College*, 2 Pa. Dist. 70; *Dickinson College v. Cumberland County*, 2 Pa. Dist. 378.

Texas. — *Shihagan v. State*, 9 Tex. 430; *Comer v. State*, 26 Tex. App. 513; *Cole v. State*, 28 Tex. App. 537.

Vermont. — *Austin v. Soule*, 36 Vt. 648.

1. Ownership as Test. — *Branch of State Bank v. Collins*, 7 Ala. 101; *Collum v. State*, 109 Ga. 531; *Montgomery v. Wyman*, 130 Ill. 17; *Davenport Gas Light, etc., Co. v. Davenport*, 13 Iowa 229; *State v. Troth*, 34 N. J. L. 377; *Bloodgood v. Mohawk, etc., R. Co.*, 18 Wend. (N. Y.) 69; *Gerke v. Purcell*, 25 Ohio St. 241; *Shihagan v. State*, 9 Tex. 430; *Comer v. State*, 26 Tex. App. 513.

"The word *public* has two proper meanings. A thing may be said to be *public* when owned by the *public*, and also when its uses are *public*." *Hennepin County v. Gethsemane Church*, 27 Minn. 462.

Public Act or Statute. — See the title STATUTES.

Public Address — Sermon. — In *Com. v. Davis*, 162 Mass. 510, *affirmed Davis v. Massachusetts*, 167 U. S. 43, it was held that a city ordinance providing that no person should, except by permission of the mayor, make any *public* address in or upon any of the *public* grounds of the city was constitutional, and that the words "*public* address" applied to a sermon delivered on the common.

Public Administration. — See PUBLIC ADMINISTRATION, *post*.

Public Affairs. — "*Public* affairs are matters relating to government." *Montgomery v. Com.*, 91 Pa. St. 133.

Public Assemblies. — Within the meaning of a *Texas* statute regulating the "keeping and bearing" of deadly weapons, a justice's court which was in session and engaged in the trial of a cause was held to be a "*public* assembly." *Summerlin v. State*, 3 Tex. App. 444. And see the title CARRYING WEAPONS, vol. 5, p. 729.

Public Bar. — In *Com. v. Rogers*, 135 Mass. 536, it was held that a person licensed as a common victualer and to sell intoxicating liquors to be drunk on the premises, might be convicted of keeping a *public* bar if he sold and delivered, not in connection with food, intoxicating liquors indiscriminately to such persons as called for them, over a bar or counter, although there was no *public* display of liquors, and the bar was also used for luncheon purposes.

Public Bonds. — See *infra*, this note, *Public Stocks and Securities*.

Public Bridge. — See PUBLIC BRIDGE, *post*.

Public Buildings. — See the title PUBLIC BUILDING OR PROPERTY, *post*.

Public Buyer. — In *Jones v. State*, 69 Miss. 406, it was held that one whose business it was to buy cotton seed from the *public* was liable to a privilege tax imposed by an act on "a *public* buyer of cotton seed," although he bought as agent for a single oil mill. The court said: "He was a *public* as contradistinguished from a private buyer."

Public Character. — See the title PRIVACY, RIGHT OF, vol. 22, p. 1311.

Public Charity. — See PUBLIC TRUST OR CHARITY, *post*.

Public Company — Life-insurance Company. — An unincorporated life-insurance company has been held to be a *public* company within the meaning of the English Apportionment Act of 1870, § 5. *In re Griffith*, 12 Ch. D. 655. See also PUBLIC CORPORATIONS, *post*.

Public Conveyances or Vehicles. — A city forbade *public* conveyances to stand on certain streets. It was held that an omnibus owned by the proprietor of a hotel in the city, and used to convey guests of the hotel to and from the different railroad stations and steamboat landings in the city, free of charge, was not a *public* conveyance within the meaning of the ordinance. *Oswego v. Collins*, 38 Hun (N. Y.) 171. See also *New York v. Hexamer*, 59 N. Y. App. Div. 4.

A city ordinance imposed a license tax upon all *public* vehicles using the streets of the city for trade, traffic, or other purposes. It was held under this ordinance that the carts of a person engaged in the business of sprinkling the streets of the city with water for compensation paid by the owners of property fronting on the streets were *public* vehicles. *St. Louis v. Woodruff*, 71 Mo. 92.

Public Corporations. — See PUBLIC CORPORATIONS, *post*.

Public Department. — See PUBLIC WORKS, *post*.

Public Documents. — See PUBLIC DOCUMENTS, *post*.

Public Dominion. — See PUBLIC DOMAIN, *post*.

Public Enemy. — See the titles CARRIERS OF GOODS, vol. 5, p. 235; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 208; MARINE INSURANCE, vol. 19, p. 930.

Public Exhibition. — See PUBLIC AMUSEMENT, EXHIBITION, ETC., *post*.

Public Franchises. (See also FRANCHISES, vol. 14, p. 4, and the title QUO WARRANTO, *post*.) — A statute provided that an information in the nature of a quo warranto might be instituted when any person unlawfully exercised "any *public* office or franchise." It was held that the words "*public* franchise" included the exercise by a corporation of a right to use the city's streets for gas pipes for lighting purposes. *Winston v. Seattle Gas, etc., Co.* (Wash. 1902) 68 Pac. Rep. 946.

Public Funds and Money. — See PUBLIC FUNDS AND MONEY, *post*.

Public Grants. — See PUBLIC GRANT, *post*.

Public Grounds. — See PUBLIC GROUND, *post*.

Public Highways. — See the title HIGHWAYS, vol. 15, p. 343.

Public Hospital. (See also the title HOSPITALS AND ASYLUMS, vol. 15, p. 757.) — In *Struthers v. Sudbury*, 27 Ont. App. 217, it was held that

PUBLIC ADMINISTRATION — ADMINISTRATOR. (See also the title EXECUTORS AND ADMINISTRATORS, vol. 11, p. 806.) — Public administration is

a hospital carried on by and for the benefit of two medical practitioners, and used chiefly by patients paying fees, though to some extent by indigent patients, and in receipt of a government grant under the Charity Aid Act, was a *public* hospital.

Public House. — See PUBLIC HOUSE, *post*.

Public Improvements. — See PUBLIC IMPROVEMENTS, *post*.

Public Indecency. — See the titles EXPOSURE OF PERSON, vol. 12, p. 536; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841.

Public Institutions. — See PUBLIC CORPORATIONS, *post*.

Public Law. — See PUBLIC LAW, *post*.

Public Letting. — In *Eppes v. Mississippi*, etc., R. Co., 35 Ala. 61, it was said: "While we concede that a letting of railroad contracts by oral outcry, and to the lowest bidder, pursuant to public proclamation, would be a *public* letting, yet we do not think that the only mode in which a letting may be *public*."

Public Libraries. — See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 332.

Public Markets. — See the title MARKETS, vol. 19, p. 1139.

Public Messenger. — In *Pfister v. Central Pac. R. Co.*, 70 Cal. 169, it was held that a county treasurer was not a *public* messenger within the meaning of a statute imposing upon a railroad company the duty of transporting *public* messengers without compensation.

Public Minister. — See PUBLIC MINISTERS, *post*.

Public Money. — See PUBLIC FUNDS AND MONEY, *post*.

Public Notice. (See also the title NOTICE, vol. 21, p. 580.) — Fence commissioners were by law required to give due *public* notice before acting on petition. Upon the meaning of the term "*public* notice," as thus used, the court, in *Matter of Lishman*, 7 Hawaii 267, said: "*Public* notice must mean a notice to the *public*, and is not made by one or several notices to one or several individuals. The statute requires *public* notice to be given, without prescribing the method."

Mutual Insurance — Assessments — Public Notice Held to Mean Notice by Advertising in Newspaper. — *Pennsylvania Training School v. Independent Mut. F. Ins. Co.*, 127 Pa. St. 559.

Public Nuisances. — See PUBLIC NUISANCES, *post*.

Public Offense. — See PUBLIC OFFENSE, *post*.

Public Parks. — See the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1065.

Public Peace. — See PUBLIC PEACE, *post*.

Public Performance or Exhibition. — See PUBLIC AMUSEMENT, EXHIBITION, ETC., *post*.

Public Place. — See PUBLIC PLACE, *post*.

Public Policy. — See PUBLIC POLICY, *post*.

Public Printing. — In *Post Office Printing*, 7 Op. Atty.-Gen. 680, it was held that the postmaster-general might lawfully contract with printers out of the city of Washington to execute such printing for the post-office department as might be required for use out of Washington.

Public Property — Gas. — In *Toledo v. Yeager*,

6 Ohio Cir. Dec. 273, 9 Ohio Cir. Ct. 279, it was held that a gas well, pipes, lines, machinery, and fixtures, owned and used by a city for supplying the city and its inhabitants with natural gas, were *public* property.

Same — Church Property. — In *Smith v. State*, 63 Ga. 168, it was held that when benches and books in a church edifice are described as the *public* property of the church, the meaning is that they are its common property, or for common use by the members or by the congregation.

Public Prosecutor. — See PUBLIC PROSECUTOR, *post*, and see the title PROSECUTING AND DISTRICT ATTORNEYS, *ante*.

Public Purpose. — See PUBLIC PURPOSE, *post*.

Public Quarters. — Under an army regulation an officer on duty without troops at a station where there are no *public* quarters, is entitled to commutation therefor. In *U. S. v. Dempsey*, 104 Fed. Rep. 199, it was held that any suitable quarters provided by the national government were *public* quarters within this regulation.

Public Records. — See PUBLIC RECORDS, *post*.

Public River. (See also the title NAVIGABLE WATERS, vol. 21, p. 424.) — See *The Propeller Genesee Chief v. Fitzhugh*, 12 How. (U. S.) 454; *Willow River Club v. Wade*, 100 Wis. 86.

Public Roads. — See PUBLIC ROADS, *post*.

Public Schools. — See the titles EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; SCHOOLS.

Public Services. — The *Virginia* Bill of Rights contains the provision that "no man or set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of *public* services." In *Turpin v. Lockett*, 6 Call. (Va.) 151, Tucker, J., said that *public* services were such as the community had or might be presumed to have a common interest in.

Public Show. — See PUBLIC AMUSEMENT, EXHIBITION, ETC., *post*.

Public Squares. — See the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1065.

Public Statutes. — See the title STATUTES.

Public Stocks and Securities. — In *Hale v. Hampshire County*, 137 Mass. 111, it was held that bonds issued by a railroad company which was managed by its stockholders for the purpose of private gain, were not *public* stocks and securities. See also *Oahu R. Co. v. Brown*, 8 Hawaii 165.

In *Hall v. Middlesex County*, 10 Allen (Mass.) 100, it was held that bonds issued under special legislative authority by a state or city, for aiding in the construction of a railroad, were *public* stocks. See also the titles MUNICIPAL SECURITIES, vol. 21, p. 13; MUNICIPAL AID, vol. 20, p. 1082.

Public Taxes. — In *Morgan v. Cree*, 46 Vt. 773, 14 Am. Rep. 640, it was held that where a township was granted to a college by a charter providing that the lands of the township should be exempt from *public* taxes, it was not exempt from taxation for municipal purposes. See also the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 266.

Public Things — Louisiana Code. — See New

conducted by a special public officer, or the guardians of the poor, where there is no relative entitled to apply for letters.¹ The officer conducting the administration is called a public administrator.

PUBLIC AMUSEMENT, EXHIBITION, ETC. (See also AMUSEMENT, vol. 2, p. 318, and the title THEATRES.) — See note 2.

Orleans, etc., R. Co. v. New Orleans, 26 La. Ann. 488.

Public Trade. — Gibson v. Ireson, 3 Q. B. 44, 43 E. C. L. 623. See also Simpson v. Hartopp, Willes 515.

Public Trial. — In State v. Brooks, 92 Mo. 573, it was held that the right of the defendant in a criminal case to a *public* trial was not violated where, after admitting the *public* until the courtroom was full, others seeking admission were excluded.

Public Trust or Charity. — See PUBLIC TRUST OR CHARITY, *post*.

Public Vehicle. — See *supra*, this note, *Public Conveyances or Vehicles*.

Public War. — "To constitute a *public* war at least two nations are essential parties, in their corporate capacities." People v. McLeod, 1 Hill (N. Y.) 409, and see the title WAR.

Public Warehouse. (See also the titles ELEVATORS, vol. 10, p. 944; WAREHOUSE AND WAREHOUSEMEN.) — A statute provided that the term "*public* warehouse" should embrace all warehouses in which grain in bulk was stored and in which the grain of different owners was mixed together, or in which grain was stored in such a manner that the identity of the different lots could not be accurately preserved. It was held that a warehouse in which bins were leased for storing grain and keeping it separated from that of others, and which issued no warehouse receipts, was not a *public* warehouse. State v. Smith, 114 Mo. 180. See also State v. Brass, 2 N. Dak. 495.

Public or Private Waters. (See also the title NAVIGABLE WATERS, vol. 21, p. 424.) — In Cobb v. Davenport, 32 N. J. L. 378, it was said: "The test by which to determine whether waters are *public* or private is the ebb and flow of the tide. Waters in which the tide ebbs and flows, so far only as the sea flows and reflows, are *public* waters; and those in which there is no ebb and flow of the tide are private waters."

Public Ways. — See PUBLIC WAYS, *post*.

Public Welfare. — The term "*public* welfare" includes both *public* health and convenience. Sessions v. Crunkilton, 20 Ohio St. 356.

Public Wharf. (See also the title WHARVES AND WHARFINGERS.) — In Horn v. People, 26 Mich. 224, it was said: "There is no instance in which the term '*public* wharf' has been used in our legislation to indicate anything analogous to a dedication to any *public* use, like that of highways. Such a *public* right is unknown to the common law. Wharfage involves exclusive use, for longer or shorter periods, by each vessel, depending on the nature of its business and the extent of its cargo. All that is meant in the charter by a *public* wharf is a wharf belonging to the city, and to be used like any other wharf property. The term is applied as well to wharves on city property away from streets as to wharves at the end of streets."

Public Whore. — In Zimmerman v. McMakin, 22 S. Car. 372, it was held that there was no substantial difference between the words "*public* whore," as charged in the complaint, and "*whoreish* bitch," the words proved at the trial.

Public Works. — See PUBLIC WORKS, *post*.

Public Worship. — See PUBLIC WORSHIP, *post*.

Purely Public Charity. — See PUBLIC TRUST OR CHARITY, *post*.

1. And. L. Dict.

2. **Public Amusement, Etc.** — In Harris v. Com., 81 Va. 240, 59 Am. Rep. 666, it was held that a skating rink was not a public performance or exhibition within a statute requiring a license to be taken out for public performances or exhibitions.

A statute required a license for "theatrical exhibitions, public shows, *public* amusements, and exhibitions." It was held that a dance hall to which the public was admitted upon the payment of a small fee was a *public* amusement within the meaning of this statute. Com. v. Quinn, 164 Mass. 11. See AMUSEMENT, vol. 2, p. 318.

Public Show. — "Every public show and exhibition which outrages decency, shocks humanity, or is contrary to good morals, is punishable at common law." Knowles v. State, 3 Day (Conn.) 108.

PUBLICATION.

- I. DEFINITION, 307.
- II. EFFECT OF PUBLICATION AS NOTICE, 307.
- III. MODE OF PUBLICATION, 308.
 - 1. *In Newspapers*, 308.
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CROSS-REFERENCES.

As to Various Matters and Proceedings in respect to which publication is required or permitted by statute and the effect thereof, see the following titles in this work: *ARBITRATION AND AWARD*, vol. 2, p. 727; *ASSIGNMENTS FOR THE BENEFIT OF CREDITORS*, vol. 3, p. 115; *BENEVOLENT OR BENEFICIAL ASSOCIATIONS*, vol. 3, p. 1098; *CHATTEL MORTGAGES*, vol. 5, p. 1005; *DEBTS OF DECEDENTS*, vol. 8, p. 1082; *DEPOSITIONS*, vol. 9, p. 329; *ELECTIONS*, vol. 10, p. 632; *EXECUTORS AND ADMINISTRATORS*, vol. 11, p. 1104; *FORECLOSURE OF MORTGAGES*, vol. 13, p. 783; *HIGHWAYS*, vol. 15, p. 370; *JUDICIAL SALES*, vol. 17, p. 966; *LIMITED PARTNERSHIP*, vol. 19, p. 350; *LOCAL OPTION*, vol. 19, p. 508; *ORDINANCES*, vol. 21, p. 972; *PARTITION*, vol. 21, p. 1203; *PARTNERSHIP*, vol. 22, p. 180; *SHERIFFS' SALES*; *SPECIAL AND LOCAL ASSESSMENTS*; *STATUTES*; *TAXATION*; *TAX SALES*; *TRUST DEEDS AND POWER OF SALE MORTGAGES*.
Publication in Copyright Law, see the title COPYRIGHT, vol. 7, p. 508.
Publication of Labels, see the title TRADE-MARKS.
Publication of Obscene Matter, see the title OBSCENITY, vol. 21, p. 762.
Publication of Offer of Reward, see the title CONTRACTS, vol. 7, p. 136 *et seq.*
Publication of Wills, see the title WILLS.
Right to Publish Private Letters, see the title LETTERS, vol. 18, p. 829.
For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject see DAILY NEWSPAPERS, vol. 8, p. 535; *NEWSPAPERS*, vol. 21, p. 533; *NOTICE*, vol. 21, p. 580.

I. DEFINITION. — In its literal sense publication is the act of bringing a matter to public notice.¹ This may be done either by words spoken, as, for instance, the declaration of a testator, in the presence of witnesses, that the instrument is his last will and testament;² but more usually a publication is the putting forth of some printed or written matter, so as to bring it to the notice either of the public generally, as in the case of newspaper advertisements and the like,³ or of one or more particular individuals, *e. g.*, the publication of a libel,⁴ or of obscene matter.⁵

II. EFFECT OF PUBLICATION AS NOTICE. — In the absence of a statute on the subject, no person can be charged with notice of an advertisement or other matter printed in a newspaper of the vicinity, even though he is a subscriber

1. **Publication Defined.** — Polk *v.* Oliver, 56 Miss. 566; North Baptist Church *v.* Orange, 54 N. J. L. 111.

2. **Publication of Will.** — Lewis *v.* Lewis, 13 Barb. (N. Y.) 23. See also the title *WILLS*.

3. See generally the following divisions of

this title. See also *ADVERTISE*, vol. 1, p. 892; *ADVERTISEMENT*, vol. 1, p. 893.

4. **Publication of Libel.** — See the title *LIBEL AND SLANDER*, vol. 18, p. 851.

5. **Publication of Obscenity.** — See the title *OBSCENITY*, vol. 21, p. 762.

thereto, unless it is proved that he actually saw or read such matter.¹ And it has been said that the fact of publication in a newspaper is not even a circumstance from which the jury may infer notice of the matter so published.² By modern legislation, however, the publication of notices operates to charge with knowledge of the contents thereof the person to whom the notices are addressed or whose rights are to be affected by the proceedings in which the notices are given. Thus, provision is generally made for the service of summons by publication in certain cases where personal service cannot be had,³ and publication of notice of various other judicial proceedings and official acts is required either as a prerequisite to the validity of such proceedings or acts, or as concluding the persons affected from denying their validity.⁴

III. MODE OF PUBLICATION — 1. In Newspapers. — Where publication in a newspaper is required, the statute or order of court generally either designates a particular paper,⁵ or requires the publication to be made in one which answers a description more or less particular, as, for instance, a "daily newspaper,"⁶ a "public newspaper,"⁷ or merely a "newspaper."⁸

Language of Publication. — In the absence of a direction to the contrary, the publication of a notice must be in the English language and in a newspaper printed in that language.⁹

2. By Posting. — The statutes sometimes provide for the giving of notices by posting them at some designated¹⁰ or "public" place or places,¹¹

1. Subscriber to Newspaper Not Ipso Facto Chargeable with Notice of Its Contents. — *Watkins v. Peck*, 13 N. H. 360, 40 Am. Dec. 156; *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 Am. Dec. 330; *Keckely v. Road Com'rs*, 4 McCord L. (S. Car.) 463.

In *King v. Paterson, etc., R. Co.*, 29 N. J. L. 82, there is a dictum by Haines, J., that an advertisement in a newspaper, circulating in the neighborhood where a stockholder had his place of business, is presumptive evidence of notice to him that the company's dividend is made payable at a designated banking house; but that the presumption may be overcome by positive proof that such notice did not come to his knowledge. But this case actually decides only that the stockholder was not shown to have read or seen the notice.

The Publicity of an Advertisement is no reason for supposing it known to those who are not proved to have read the paper containing it. *Yocum v. Morice*, 4 Phila. (Pa.) 106, 17 Leg. Int. (Pa.) 324.

Newspaper Circulating in Vicinity. — *Clark v. Ricker*, 14 N. H. 44.

Proof that a Person Usually Read a Certain Newspaper and that a statement appeared in that newspaper is not constructive notice of such statement. *Lincoln v. Wright*, 23 Pa. St. 76, 62 Am. Dec. 316.

2. Publication Not Evidence of Notice. — *Beltzhoover v. Blackstock*, 3 Watts (Pa.) 20, 27 Am. Dec. 330.

3. Service of Process by Publication. — See the title PUBLICATION, 17 ENCYC. OF PL. AND PR. 26.

4. See generally the cross-references given at the commencement of this title.

5. Designation of Particular Newspaper. — *Soule v. Chase*, (N. Y. Super. Ct. Gen. T.) 1 Abb. Pr. N. S. (N. Y.) 48; *Melms v. Pfister*, 59 Wis. 186.

Official Newspapers. — Thus, state and municipal legislative bodies sometimes designate a particular newspaper as the official paper for

the publication of the acts and proceedings of such bodies. See *Albany County v. Chaplin*, 5 Wyo. 74.

6. Publication in Daily Newspaper. — *Richardson v. Tobin*, 45 Cal. 30; *Guest v. Brooklyn*, 8 Hun (N. Y.) 98.

7. Statute Specifying Public Newspaper. — *Maass v. Hess*, 140 Ill. 576, *affirming* 41 Ill. App. 282; *Pentzel v. Squire*, 161 Ill. 346, 52 Am. St. Rep. 373.

8. A "Newspaper" within the meaning of a statute requiring the publication of legal notices is one which gives items of current news though it is devoted chiefly to some special interest, such as the dissemination of legal intelligence. *Kerr v. Hitt*, 75 Ill. 51; *Railton v. Lauder*, 26 Ill. App. 655, *affirmed* 126 Ill. 219; *Lynch v. Durfee*, 101 Mich. 171, 45 Am. St. Rep. 404. See also NEWSPAPERS, vol. 21, p. 533.

9. Language of Publication. — *Chicago v. McCoy*, 136 Ill. 352; *Graham v. King*, 50 Mo. 22, 11 Am. Rep. 401; *Tyler v. Bowen*, 1 Pittsb. (Pa.) 225; *Road in Upper Hanover*, 44 Pa. St. 277; *Kratz's Appeal*, 2 Pittsb. (Pa.) 452, 21 Leg. Int. (Pa.) 4. But see *Richardson v. Tobin*, 45 Cal. 30, holding that it is sufficient to publish the notice in a German paper, if such notice is printed therein in the English language.

10. Posting Notices at Specified Place — Court-house Door. — *Drew v. Gant*, 1 Oregon 197; *Falkner v. Guild*, 10 Wis. 563.

Posting on Door of Parish Church. — *Reg. v. Meath*, (1897) 2 Ir. 21.

11. Posting at Public Place. — *Tidd v. Smith*, 3 N. H. 178 (holding that a shoemaker's shop is not a "public place"); *Scammon v. Scammon*, 28 N. H. 419 (holding a church to be, *prima facie*, a "public place"); *Hoit v. Burnham*, 61 N. H. 620 (holding an inn and post office to be, *prima facie*, public places).

Any place where the inhabitants of a town and others most frequently meet or have occa-

or at a "conspicuous" public place.¹

Proof of Posting. — Proof that a notice was posted as required by law may be made by the return of the officer, in case it was required to be done by an officer,² or by affidavit,³ or by the testimony of any competent witness.⁴

IX. PROOF OF PUBLICATION. — The statutes which authorize or require the publication in a newspaper of a notice or other matter sometimes provide for the mode of proving the fact of publication. The mode usually prescribed is by producing the affidavit or certificate of a person sustaining a certain relation to the newspaper in which the matter was required to be published, showing that the requirements of the statute have been fully complied with in the premises,⁵ or by the return of the officer in a case where an officer is required to give notice in a newspaper.⁶

If the Newspaper Is Not Specifically Designated by the statute or by any order of publication, that is, if the publication is required to be made in a newspaper of a certain character or description, *e. g.*, that it circulates in the vicinity, the proof must show that it is of such character or description.⁷

If the Proof Cannot Be Made as Required by the Statute, then the fact of publication must be proved like other facts, by any competent evidence that may be available.⁸

V. PERIOD OF PUBLICATION. — The statutes relating to the publication of notices generally provide that the publication shall be for a specified time,⁹ and where the requirement is that a notice shall be published for a certain period before a given time, and there are several insertions of the notice, it has been held that such period will be computed from the time of the first insertion.¹⁰

PUBLIC BRIDGE. — A "public bridge" is a structure which affords a safe, convenient, and complete passageway over some obstacle that without it would prevent, hinder, or delay the free transit of those who desire to pass along a public highway.¹¹

sion to be is a public place. *Russell v. Dyer*, 40 N. H. 173.

A Dwelling House in a sparsely inhabited town may be regarded as a public place for the purpose of posting a legal notice. *Cahoon v. Coe*, 57 N. H. 556.

Public Character of Place a Mixed Question of Law and Fact. — *Tidd v. Smith*, 3 N. H. 178; *Cahoon v. Coe*, 57 N. H. 556; *Hoitt v. Burnham*, 61 N. H. 620.

1. Conspicuous Public Place. — *Lewey's Island R. Co. v. Bolton*, 48 Me. 451, 77 Am. Dec. 236.

2. Proof of Posting — Return of Officer. — *Gibney v. Crawford*, 51 Ark. 34.

3. Proof by Affidavit. — The *Iowa* statute provides that the posting of any notice may be proved by affidavit of a competent witness, but it is held that this does not exclude proof of service by other competent evidence. *Shawhan v. Loffer*, 24 Iowa 217. See also *Opening of Albany St.*, (Supm. Ct. Spec. T.) 6 Abb. Pr. (N. Y.) 273.

4. Proof by Testimony of Witness. — *Alvord v. Collin*, 20 Pick. (Mass.) 418.

5. Affidavit of Publisher. — *Cissell v. Pulaski County*, 10 Fed. Rep. 891; *Gibney v. Crawford*, 51 Ark. 34; *Ullman v. Lion*, 8 Minn. 381, 83 Am. Dec. 783; *Soule v. Chase*, 39 N. Y. 342.

Proof by Certificate of Publisher. — *McChesney v. People*, 145 Ill. 614; *Smith v. Chicago*, etc., R. Co., 67 Ill. 191.

Relation to Newspaper of Person Making Affidavit or Certificate. — *Pentzel v. Squire*, 161 Ill. 346, 52 Am. St. Rep. 373; *Andrews v. Ohio*,

etc., R. Co., 14 Ind. 169; *Ullman v. Lion*, 8 Minn. 381, 83 Am. Dec. 783.

Certificate of Agent of Corporation. — *Maass v. Hess*, 140 Ill. 576, *affirming* 41 Ill. App. 282.

6. Proof by Return Officer. — *Bailey v. Myrick*, 50 Me. 171.

7. Proof of Character of Newspaper. — *Gibney v. Crawford*, 51 Ark. 34.

8. Inability to Make Statutory Proof. — Thus, after the publisher of a newspaper has ceased to be such, his certificate of the publication of notice required by law to be published is inadmissible as evidence of the publication, but in such case he can only verify the fact by his testimony as a witness. *Smith v. Chicago*, etc., R. Co., 67 Ill. 191.

9. Period of Publication Prescribed. — *Taylor v. Palmer*, 31 Cal. 240; *Ricketts v. Hyde Park*, 85 Ill. 110; *Loughridge v. Huntington*, 56 Ind. 253; *Swett v. Sprague*, 55 Me. 190; *Bachelor v. Bachelor*, 1 Mass. 256; *Montour v. Purdy*, 11 Minn. 384, 88 Am. Dec. 88; *Mitchell v. Woodson*, 37 Miss. 567; *State v. Yellow Jacket Silver Min. Co.*, 5 Nev. 415; *Cass v. Bellows*, 31 N. H. 501, 64 Am. Dec. 347; *Stoevers Appeal*, 3 W. & S. (Pa.) 154.

Twenty Days' Notice by publication means publication each day. *Allen v. Kerr*, 13 Lea (Tenn.) 256.

10. Harper v. Ely, 56 Ill. 179; *Fry v. Bidwell*, 74 Ill. 381; *Colman v. Anderson*, 10 Mass. 105.

11. Public Bridge. — *Westfield v. Tioga County*, 150 Pa. St. 153. See also the title *BRIDGES*, vol. 4, p. 918.

PUBLIC BUILDING OR PROPERTY.

I. DEFINITION, 310.

II. DIVERSION FROM PUBLIC USE, 310.

CROSS-REFERENCES.

See the titles COUNTIES, vol. 7, p. 898; COUNTY-SEAT, vol. 7, p. 1011; EXEMPTIONS (FROM EXECUTION), vol. 12, p. 59; EXEMPTIONS (FROM TAXATION), vol. 12, p. 266; MARKETS, vol. 19, p. 1139; MECHANICS' LIENS, vol. 20, p. 255; MUNICIPAL CORPORATIONS, vol. 20, p. 1123; PARKS AND PUBLIC SQUARES, vol. 21, p. 1065; PRISONS AND PRISONERS, vol. 22, p. 1298; PUBLIC OFFICERS, *post*; STATES; TAXATION; TOWNS AND TOWNSHIPS. *And see* PUBLIC HOUSE, *post*.

I. DEFINITION. — By the term “public buildings or property” is meant buildings or property in which the property together with the possession and use is in the public.¹

II. DIVERSION FROM PUBLIC USE. — It has been held in a number of cases that the public authorities have no power to divert public buildings or property from the public to a private use, or to lease a public building or a part thereof.² But in some cases it has been held that where a building has been

1. Definition. — *State v. Troth*, 34 N. J. L. 377.

Confined to Municipal Buildings to Exclusion of County Buildings. — Land was platted into blocks and lots by the owner, one block not being platted into lots, but being reserved and dedicated for public buildings. It was held that this dedication did not authorize the erection on the block of a county court house. *McIntyre v. El Paso County*, 15 Colo. App. 78.

Academy. — Public buildings of a county are such as are ordinarily used in, or are indispensable to, the conduct of the business of the county. *Kittaning Academy v. Brown*, 41 Pa. St. 270, in which case it was held that an academy was not a public building under an act setting apart certain land for the public buildings of the county.

Boarding School — Exemption. — It has been held that where there is an exemption of public property, the word “public” refers to ownership by the government or some municipal subdivision, and does not apply to a boarding school. *St. Edwards College v. Morris*, 82 Tex. 1. But see the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 375.

Church. — In *Collum v. State*, 109 Ga. 531, it was held that a church was not a public building within the meaning of a statute making it a misdemeanor to destroy, injure, or deface any public building.

But in *Reg. v. Carruthers*, 4 B. & S. 804, 116 E. C. L. 804, a church was treated as being within a statute providing that the walls of public buildings should be constructed “in such manner as may be approved by the district surveyor.”

Court House. — See the title MALICIOUS MINCHIEF, vol. 19, p. 637.

Electric-light Plant. — See *State v. Columbia*, 111 Mo. 365.

Fire-engine House. — *State v. Troth*, 34 N. J. L. 377.

Town Hall. — A town hall has been held to be a public building. *Clarke v. Brookfield*, 81 Mo. 512.

Waterworks. — In a statute authorizing a city to raise funds for the erection of public buildings, the term “public buildings” has been held not to include waterworks. *State v. Columbia*, 111 Mo. 365.

2. Diversion Not Allowed. — *Scofield v. Eighth School Dist.*, 27 Conn. 499; *White v. Stamford*, 37 Conn. 578; *Young v. Bethany*, 73 Conn. 170; *State v. Hart*, 144 Ind. 107; *Reynolds v. Waterville*, 92 Me. 303; *Henderson v. Sibley County*, 28 Minn. 519; *Allegheny County v. Parrish*, 93 Va. 618. See also *Heibert v. Benson*, 2 La. Ann. 770; *Stetson v. Kempton*, 13 Mass. 272; *Kingman v. Brockton*, 153 Mass. 255; *Crumph v. Colfax County*, 52 Miss. 107.

Jail. — In *Thompson v. Probert*, 2 Bush (Ky.) 144, it was held that a contract by which a jailer undertook for a reward to appropriate the jail or rooms in the jail to the accommodation of private persons, for uses not prescribed or plainly implied by law, was against public policy.

Slaves. — In *Miller v. Porter*, 8 B. Mon. (Ky.) 282, it was held that it was against public policy to permit a jailer to place slaves in the public jail at the instance of their owners, and that no contract to pay was implied on the

erected for public purposes, the proper authorities may allow it to be used incidentally for other purposes, either gratuitously or for compensation.¹ And of course a public building may be used for private purposes where there is express legislative authority.²

PUBLIC CHARITY.—See PUBLIC TRUST OR CHARITY, *post*.

PUBLIC CONTEMPT.—See the title CONTEMPT, vol. 7, p. 25.

PUBLIC CORPORATIONS. (See also the titles BOROUGH, vol. 4, p. 721; COUNTIES, vol. 7, p. 898; EMINENT DOMAIN, vol. 10, p. 1043; MUNICIPAL CORPORATIONS, vol. 20, p. 1123; TOWNS AND TOWNSHIPS.)—A public corporation is one which is created for political purposes, with political powers to be exercised for purposes connected with the public good in the administration of civil government; an instrument of government subject to the control of the legislature, such as towns, cities, counties, etc.³ "Strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature and objects of the institution."⁴ In a broader sense a public corporation has been defined as one which cannot carry out the purposes of its organization without chartered rights from the commonwealth.⁵

PUBLIC CROSSINGS.—See the title CROSSINGS, vol. 8, p. 335.

PUBLIC DEBT. (See also the title DEBT, vol. 8, p. 982.)—See note 6.

part of the owner for slaves so kept by the jailer, nor would such a contract be enforceable.

1. **Incidental Use.**—*Sheldon v. Centre School Dist.*, 25 Conn. 224; *Nichols v. School Directors*, 93 Ill. 61; *Camden v. Camden Village Corp.*, 77 Me. 536; *Worden v. New Bedford*, 131 Mass. 23; *Kingman v. Brockton*, 153 Mass. 258; *French v. Quincy*, 3 Allen (Mass.) 9; *Spaulding v. Lowell*, 23 Pick. (Mass.) 71; *Bell v. Platteville*, 71 Wis. 139; *Stone v. Oconomowoc*, 71 Wis. 155. See also *Greeley v. People*, 60 Ill. 19; *George v. Second School Dist.*, 6 Met. (Mass.) 510; *Neff v. Wellesley*, 148 Mass. 487; *Eddy v. Wilson*, 43 Vt. 362; *Greenbanks v. Boutwell*, 43 Vt. 208; *Bates v. Bassett*, 60 Vt. 530; *Bolling v. Petersburg*, 8 Leigh (Va.) 224.

Sheriff's Residence.—In *Franklin County v. Bunting*, 111 Ind. 143, it was held that a board of commissioners of a county had authority to build a jail and a sheriff's residence in connection therewith.

School.—In *Spencer v. Joint School Dist.* No. 6, 15 Kan. 259, 22 Am. Rep. 268, it was held that the use of a public-school building for other than school purposes was unlawful and might be enjoined at the suit of any one injured thereby. See also the title SCHOOLS.

2. *White v. Stamford*, 37 Conn. 586.

3. **Public Corporations.**—*Branch of State Bank v. Collins*, 7 Ala. 101; *Matter of Madera Irrigation Dist.*, 92 Cal. 325; *Sloan v. State*, 8 Blackf. (Ind.) 361; *Aurora v. West*, 9 Ind. 84; *State University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72; *Baltimore v. State*, 15 Md. 490; *Pumphrey v. Baltimore*, 47 Md. 146; *Wooster v. Plymouth*, 62 N. H. 209; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148; *Ten Eyck v. Delaware, etc., Canal Co.*, 18 N. J. L. 200, 37 Am. Dec. 233; *Armstrong v. Dalton*, 4 Dev. L. (15 N. Car.) 570.

In *Ex p. Slattery*, 3 Ark. 487, it was said: "A public corporation is defined to be 'an investing the people of a place with the local government thereof.'"

A public corporation is "the embodiment of political power for the purposes of public government." *People v. New York*, 25 Wend. (N. Y.) 684.

Municipal Corporations Are Public Corporations.—*Covington v. Kentucky*, 173 U. S. 242; *New Orleans v. New Orleans Water Works Co.*, 142 U. S. 91. And see the title MUNICIPAL CORPORATIONS, vol. 20, pp. 1130, 1131.

Public Corporations Distinguished from Municipal Corporations—Irrigation District.—*Middle Kittitas Irrigation Dist. v. Peterson*, 4 Wash. 153.

School Districts.—See *Mobile School Com'rs v. Putnam*, 44 Ala. 506; *Ford v. Kendall School Dist.*, 121 Pa. St. 547; *School Dist. v. Fuess*, 98 Pa. St. 600. And see the title SCHOOLS.

4. **Public Corporations.**—*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 668, *per* Story, J., *quoted in* *Edwards v. Jagers*, 19 Ind. 413. See also *Covington v. Kentucky*, 173 U. S. 242.

Public Corporations Distinguished from Private.—See the title CORPORATIONS (PRIVATE), vol. 7, p. 637.

5. **Broad Sense of Term.**—*Schuylkill County v. Citizens' Gas Co.*, 148 Pa. St. 163; *West Chester Gas Co. v. Chester County*, 30 Pa. St. 232; *Coatesville Gas Co. v. Chester County*, 97 Pa. St. 476.

6. **Public Debt—Public Securities.**—In *Morgan v. Cree*, 46 Vt. 786, 14 Am. Rep. 640, the court, *per* Peck, J., said: "The terms public debt and 'public securities,' used in legislation, are terms generally applied to national or state obligations and dues, and would rarely, if ever, be construed to include town debts or obligations."

In *State v. Hickman*, 11 Mont. 541, it was

PUBLIC DEPARTMENT. — See PUBLIC WORKS, *post*.

PUBLIC DOCUMENTS. (See also titles DOCUMENTARY EVIDENCE, vol. 9, p. 877; JUDICIAL NOTICE, vol. 17, p. 892; RECORD; STATUTES.)—See note 1.

PUBLIC DOMAIN. (See also DOMAIN, vol. 10, p. 3.)—See note 2.

PUBLIC ENEMY. — See the titles CARRIERS OF GOODS, vol. 5, p. 235; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 208; MARINE INSURANCE, vol. 19, p. 930.

PUBLIC EXHIBITION. — See PUBLIC AMUSEMENT, EXHIBITION, ETC., *ante*.

PUBLIC FUNDS AND MONEY. — Public money is defined as that belonging to the state.³

PUBLIC GRANT. (See also the title PUBLIC LANDS, *post*.) — Public grant is the mode of creating a title in an individual to land which had previously belonged to the government.⁴

PUBLIC GROUND. (See also the title DEDICATION, vol. 9, p. 20.) — "Public ground, in the ordinary sense, is ground in which the general public has a common use; and it would not accord with the common understanding of the language used to say that land devoted to the use of a local religious society, or hospital, or academy, created for church, hospital, or academic purposes, is public ground, even if the use be considered in a sense public."⁵

PUBLIC HIGHWAY. — See the title HIGHWAYS, vol. 15, p. 343.

held that the term *public debt* could not be confined to what was evidenced by one form of indebtedness or liability, but embraced warranties as well as bonds.

Under a constitutional provision that a county might levy a tax to pay the public indebtedness, it was held that a judgment entered upon a claim or evidence of indebtedness incurred in excess of the ordinary revenue of the county, without a vote of the people, or in excess of the constitutional limitation upon the indebtedness which a county might incur, was not a *public debt*. Grand Island, etc., R. Co. v. Baker, 6 Wyo. 369.

1. **Public Documents.** — By Act Cong. June 23, 1874, c. 476, *public documents* were defined to be all publications printed by order of Congress or either house thereof. See McCall v. U. S., 1 Dak. 314.

2. **"Public Domain" in Sense of "Unappropriated Public Domain."** — Day Land, etc., Co. v. State, 68 Tex. 547. And see the title PUBLIC LANDS, *post*.

3. **Public Money.** — People v. Murray, 4 N. Y. App. Div. 191; Seneca County v. Allen, 99 N. Y. 532.

In People v. New York Soc., etc., 162 N. Y. 431, the court defined a charitable institution as "one that in some form or to some extent receives *public money* for the support and maintenance of indigent persons. By *public money* is meant money raised by taxation, not only in the state at large, but in any city, county, or town."

Same — United States. — In the statutes of the United States, the term *public money* ordinarily means the money of the federal government received from the public revenues, or intrusted to its fiscal officers, wherever it may be. "It does not include the money of states, counties, cities, and towns, although, with reference to those governments and municipalities, such funds in other connections would be deemed *public money*. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by

them under authority of law to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the government." Branch's Case, 12 Ct. Cl. 290.

The money appropriated to the payment of the Cherokee Indians upon their removal and the cession of their lands was properly *public money*, although it was money stipulated by treaty to be paid to them upon such cession and removal. Minis v. U. S., 15 Pet. (U. S.) 448.

Public Funds. — See FUND — FUNDS, vol. 14, p. 565.

4. **Public Grant.** — Estes Park Tool Road Co. v. Edwards, 3 Colo. App. 77. See also Johnson v. McIntosh, 8 Wheat. (U. S.) 543; Martin v. Waddell, 16 Pet. (U. S.) 367.

5. **Public Grounds.** — Patrick v. Young Men's Christian Assoc., 120 Mich. 191. This case was upon the construction of a statute providing that the recording of a plat of a town describing the *public grounds* should vest the fee in the public.

Streets and Other Public Grounds. — An act was entitled: "An act relating to actions against cities, villages, or boroughs, for damages to persons injured on streets and other *public grounds*." It was held that the words *public grounds* were not to be construed as *ejusdem generis* with the word "streets." Winters v. Duluth, 82 Minn. 130.

Same — Sidewalks. — A charter of a city provided that the city should be liable to any one for loss or injury to person or property growing out of any casualty or accident happening to any such person or property on account of any street or *public ground*. It was held that *public ground*, in this sense, included sidewalks. Giffen v. Lewiston, (Idaho 1898) 55 Pac. Rep. 545; McLean v. Lewiston, (Idaho 1902) 69 Pac. Rep. 478.

Public Square. (See also the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1065.) — Where certain town lots were dedicated to the public by recording the official town plat upon which

PUBLIC HOUSE. (See also the titles GAMING, vol. 14, p. 664; GAMING HOUSES, vol. 14, p. 692; INNS AND INNKEEPERS, vol. 16, p. 505.)—A house may be said to be a public house either in respect to its proprietorship or its occupancy and usages.¹

PUBLIC IMPROVEMENTS. (See also the title TAXATION.)—See note 2.

PUBLIC INDECENCY.—See the titles EXPOSURE OF PERSON, vol. 12, p. 536; LEWD AND LASCIVIOUS COHABITATION AND CONDUCT, vol. 18, p. 841.

PUBLIC LANDING. (See also LANDING, vol. 18, p. 148.)—See note 3.

PUBLIC LANDS.—See the title STATE AND PUBLIC LANDS.

PUBLIC LAW.—See the titles INTERNATIONAL LAW, vol. 16, p. 1121; STATUTES. And see LAW, vol. 18, p. 572.

PUBLIC LIBRARIES.—See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 332.

PUBLIC MINISTERS. (See the title MINISTERS AND AMBASSADORS, vol. 20, p. 794.)—See note 4.

PUBLIC MONEY.—See PUBLIC FUNDS AND MONEY, *ante*.

PUBLIC NEWSPAPER. (See also the title NEWSPAPERS, vol. 21, p. 533.)—See note 5.

PUBLIC NUISANCES.—See the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; NUISANCES, vol. 21, p. 683; POLICE POWER, vol. 22, p. 914. And see PURPRESTURE, *post*.

PUBLIC OFFENSE. (See also CRIME—CRIMINAL, vol. 8, p. 248.)—See note 6.

they were designated as *public ground*, it was held that they should be taken for a public square for the use of the town. The court, *per* Lane, C. J., said: "The words expressed in the act of dedication were *public ground*; a phrase which, in reference to a lot in a town, of shape, dimensions, and position suitable for this purpose, naturally, though not necessarily, means a public square." *Lebanon v. Warren County*, 9 Ohio 80, 33 Am. Dec. 422.

1. **Public House.**—*Lockhart v. State*, 10 Tex. 275; *Shihagan v. State*, 9 Tex. 430; *Comer v. State*, 26 Tex. App. 513. See also the title PUBLIC BUILDING OR PROPERTY, *ante*.

Opera House.—In *Galloway v. State*, (Tex. Crim. 1894) 26 S. W. Rep. 67, it was held that an opera house in which there had been but two performances in six months, and which was closed between performances, was not a *public house*, as the term was used in a statute against gaming.

Barber Shop.—A barber shop has been held to be a *public house* within a statute against gaming. *Moore v. State*, 30 Ala. 550.

Public House and Public Place Distinguished.—See *Windham v. State*, 26 Ala. 60.

Store.—A country storehouse has been held to be a *public house* within the prohibition of a statute against gaming. *Huffman v. State*, 30 Ala. 532.

Schoolhouse.—A schoolhouse has been held to be a *public house* within a gaming statute. *Cole v. State*, 28 Tex. App. 536.

Tavern, Hotel, and Public House used Synonymously.—See *HOTEL*, vol. 15, p. 766.

2. **Public Improvements.**—A statute provided that convicts in the penitentiary might be employed upon *public improvements*. It was held that *public improvements* included all public works belonging to or prosecuted by a state, a county, or a city. *Ward v. Little Rock*, 41 Ark. 529. See also *Brace v. Gloversville*, 39 N. Y. App. Div. 29.

Same—Municipal Corporations.—In *Low v. Marysville*, 5 Cal. 215, it was said: "The words *public improvements*, when applied to a municipal government, must be taken in a limited sense, as applying to those improvements which are the proper subject of police and municipal regulation, such as gas, water, almshouses, hospitals, etc., and cannot be extended to subjects foreign to the object of the incorporation, and beyond its territorial limits."

Public and Local Improvements Distinguished.—*Kinsella v. Auburn*, 4 Silv. Sup. (N. Y.) 102. See also the title SPECIAL ASSESSMENTS.

3. **Public Landing Equivalent to Public Levee.**—*Napa v. Howland*, 87 Cal. 84.

4. **Public Ministers.**—*In re Baiz*, 135 U. S. 419.

5. **Public Newspapers.**—In *Maass v. Hess*, 130 Ill. 576, it was held that the court could not show, as matter of law, that a weekly publication devoted to the interest of business, corporations, commerce, and finance was not a *public newspaper*.

6. **Public Offense.**—Within the meaning of a *Minnesota* statute authorizing a peace officer to arrest without a warrant for a "*public offense* committed or attempted in his presence," the term *public offense* was held, in *State v. Cantieny*, 34 Minn. 8, to include the violation of a city ordinance. The court, *per* Dickinson, J., said: "The word 'public' was not intended to express the idea of a distinction between offenses made such by common law or by general statute, and those defined by a law having but a limited territorial operation. * * * It [the term *public offense*] includes all such violations of municipal ordinances as are punishable by fine or imprisonment." *Compare* *State v. Lee*, 29 Minn. 451. And see *Dyer v. Placer County*, 90 Cal. 276, for the statutory definition of this term in *California*. See also *People v. Holmes*, 118 Cal. 460.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 17, p. 139.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *AGENCY*, vol. 1, p. 930; *AMOTION*, vol. 2, p. 310; *ARREST*, vol. 2, p. 832; *ASSIGNMENTS*, vol. 2, p. 1033; *ATTACHMENT*, vol. 3, p. 213; *ATTORNEY AND CLIENT*, vol. 3, p. 282; *BONDS*, vol. 4, p. 618; *BRIBERY*, vol. 4, p. 907; *CIVIL SERVICE*, vol. 6, p. 88; *CONSTITUTIONAL LAW*, vol. 6, p. 882; *CONTEMPT*, vol. 7, p. 27; *COUNTIES*, vol. 7, p. 898; *DE FACTO OFFICERS*, vol. 8, p. 771; *DEPUTY*, vol. 9, p. 368; *ELECTIONS*, vol. 10, p. 552; *EMBEZZLEMENT*, vol. 10, p. 976; *EXEMPTIONS (FROM EXECUTION)*, vol. 12, p. 69; *EXEMPTIONS (FROM TAXATION)*, vol. 12, p. 333; *EXTORTION*, vol. 12, p. 576; *GARNISHMENT*, vol. 14, p. 817; *ILLEGAL CONTRACTS*, vol. 15, p. 963; *IMPEACHMENT*, vol. 15, p. 1061; *LIBEL AND SLANDER*, vol. 18, p. 851; *MANDAMUS*, vol. 19, p. 709; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123; *PENSIONS AND BOUNTIES*, vol. 22, p. 657; *QUO WARRANTO*, *post*; *RAILROAD COMMISSIONERS*, *post*; *REPRIEVE, PARDON, AND AMNESTY*; *REWARDS*; *STATES*; *SURETYSHIP*; *TERRITORIES*; *TOWNS AND TOWNSHIPS*; *UNITED STATES*.

And for discussions as to particular officers, see such titles as *ATTORNEY-GENERAL*, vol. 3, p. 475; *CLERKS OF COURTS*, vol. 6, p. 132; *GOVERNOR*,

vol. 14, p. 1095; *JUDGE*, vol. 17, p. 714; *JUSTICES OF THE PEACE*, vol. 18, p. 6; *SHERIFFS, MARSHALS, AND CONSTABLES*.

I. DEFINITIONS. — In the most general and comprehensive sense, a public office is an agency for the state, and a person whose duty it is to perform this agency is a public officer.¹ Stated more definitely, a public office is a charge or trust conferred by public authority for a public purpose,² the duties of which involve in their performance the exercise of some portion of the sovereign power, whether great or small.³ A public officer is an individual who has been appointed or elected in the manner prescribed by law, who has a designation or title given to him by law, and who exercises the functions concerning the public assigned to him by law.⁴

Criteria. — There are numerous criteria which are not in themselves conclusive, yet which aid in determining whether a person is an officer and whether his employment is an office. Thus, a public officer is usually required to take

1. Office and Officer Defined. — *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488. See also *U. S. v. Maurice*, 2 Brock. (U. S.) 96; *Kreitz v. Behrensmeyer*, 149 Ill. 496; *State v. Moores*, 52 Neb. 770; *State v. Judges*, 21 Ohio St. 1; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Blackstone's Definition. — From the definition of office in general given by Blackstone, it seems that a public office is a right to exercise a public employment or function and to take the fees and emoluments thereunto belonging. 2 Black. Com. 36, *approved* in *People v. Ridgley*, 21 Ill. 65. To the same effect see *Gosman v. State*, 106 Ind. 203; *Leach v. Cassidy*, 23 Ind. 449; *State v. Spaulding*, 102 Iowa 639; *State v. Cobb*, 2 Kan. 27; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *People v. Nostrand*, 46 N. Y. 375; *People v. Tweed*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 419; *Olmstead v. New York*, 42 N. Y. Super. Ct. 481; *Jones v. Shaw*, 15 Tex. 577. See also 3 Kent's Com. 454; *Bowers v. Bowers*, 26 Pa. St. 74, 67 Am. Dec. 398; *Com. v. Gamble*, 62 Pa. St. 343, 1 Am. Rep. 422.

Justice Swayne's Definition. — "An office is a public station or employment conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties." *U. S. v. Hartwell*, 6 Wall. (U. S.) 385, *quoted* in *Hall v. Wisconsin*, 103 U. S. 5; *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66; *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197; *State v. Spaulding*, 102 Iowa 639; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *People v. Duane*, 121 N. Y. 375; *Bryan v. Patrick*, 124 N. Car. 651; and *State v. Brennan*, 49 Ohio St. 33.

Other Definitions. — *Rex v. Burnell*, Carth. 478; *Henly v. Lyme*, 5 Bing. 91, 15 E. C. L. 376; *Miller v. Sacramento County*, 25 Cal. 95; *State v. Goss*, 69 Me. 22; *State v. Bus*, 135 Mo. 325; *Collins v. State*, 46 Neb. 37; *Oliver v. Jersey City*, 63 N. J. L. 96; *Matter of Oaths*, 20 Johns. (N. Y.) 402; *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; *Matter of Hathaway*, 71 N. Y. 238; *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677; *State v. Taylor*, 7 S. Dak. 533; *Hendricks v. State*, 20 Tex. Civ. App. 178.

United States Officer Defined. — Unless a per-

son in the service of the government holds his place by virtue of an appointment by the President, or by one of the heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States. *U. S. v. Germaine*, 99 U. S. 508; *U. S. v. Perkins*, 116 U. S. 483; *U. S. v. Mouat*, 124 U. S. 303; *U. S. v. Smith*, 124 U. S. 525. See also *U. S. v. Hendee*, 124 U. S. 309; *Platt v. Beach*, 2 Ben. (U. S.) 303; *U. S. v. Bloomgart*, 2 Ben. (U. S.) 356; *Armstrong v. U. S.*, Gilp. (U. S.) 399; *U. S. v. Martin*, 17 Fed. Rep. 150.

Incumbent Defined. — See *INCUMBENT*, vol. 16, p. 157, and see *Chadwick v. Earhart*, 11 Oregon 389.

Persons Exercising the Power of Appointment and Removal of State Officers Are Officers. — *Bunn v. People*, 45 Ill. 397; *State v. Kennon*, 7 Ohio St. 546.

2. Public Trust. — *Matter of Dorsey*, 7 Port. (Ala.) 371. To the same effect are *Polk v. James*, 68 Ga. 128; *Smith v. Moore*, 90 Ind. 294; *Clark v. Easton*, 146 Mass. 43; *Throop v. Langdon*, 40 Mich. 673; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Wood's Case*, 2 Cow. (N. Y.) 29, note; *Eliason v. Coleman*, 86 N. Car. 235; *Doyle v. Raleigh*, 89 N. Car. 133, 45 Am. Rep. 677.

3. Portion of Sovereignty Delegated. — *Atty.-Gen. v. Drohan*, 169 Mass. 534, 61 Am. St. Rep. 301. To the same effect are *Bunn v. People*, 45 Ill. 403; *People v. Kipley*, 171 Ill. 44; *Opinion of Judges*, 3 Me. 481; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606; *Eliason v. Coleman*, 86 N. Car. 235; *Doyle v. Raleigh*, 89 N. Car. 133, 45 Am. Rep. 677; *State v. Jennings*, 57 Ohio St. 415, 63 Am. St. Rep. 723.

4. Bradford v. Justices, 33 Ga. 332. To the same effect are *Polk v. James*, 68 Ga. 128; *Massenburg v. Bibb County*, 96 Ga. 614; *North Bennington First Nat. Bank v. Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

Extent of Authority Immaterial. — *Rex v. Burnell*, Carth. 478; *Polk v. James*, 68 Ga. 128; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Robinson v. Chamberlain*, 34 N. Y. 397, 90 Am. Dec. 713; *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 17; *State v. Wilson*, 29 Ohio St. 347; *State v. Brennan*, 49 Ohio St. 33; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372; *Ex p. Faulkner*, 1 W. Va. 302.

an oath,¹ and frequently has to give a bond.² Usually an officer is entitled to a salary or fees, but this is not necessary.³ The term "office" also embraces the ideas of tenure⁴ and duration or continuance.⁵ Generally speaking, one of the requisites of an office is that it must be created by a constitutional provision, or it must be authorized by some statute.⁶ Official or unofficial character is to be determined not by the presence or absence of an official designation, but by the nature of the functions to be performed.⁷ Designation by the law as an officer is, however, of some significance.⁸

1. Oath. — *Kavanaugh v. State*, 41 Ala. 399; *Perry v. Otay Irrigation Dist.*, 127 Cal. 565; *State v. Spaulding*, 102 Iowa 639; *Goud v. Portland*, 96 Me. 125; *Throop v. Langdon*, 40 Mich. 673; *Collins v. New York*, 3 Hun (N. Y.) 680; *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488; *Bryan v. Patrick*, 124 N. Car. 651; *State v. Wilson*, 29 Ohio St. 347; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677. And see *infra*, this title, *Acceptance and Qualification*.

2. Bond. — *Perry v. Otay Irrigation Dist.*, 127 Cal. 565; *Throop v. Langdon*, 40 Mich. 673; *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113. And see *infra*, this title, *Acceptance and Qualification*.

3. Salary or Fees — *England*. — *Henly v. Lyme*, 5 Bing. 91, 15 E. C. L. 376.
United States. — *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *Hall v. Wisconsin*, 103 U. S. 5.
Colorado. — *Matter of House Bill No. 166*, 9 Colo. 623.

Florida. — *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174.

Illinois. — *People v. Ridgley*, 21 Ill. 65.
Indiana. — *Waldo v. Wallace*, 12 Ind. 569; *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197; *Gosman v. State*, 106 Ind. 203.

Iowa. — *State v. Spaulding*, 102 Iowa 639.
Kansas. — *State v. Cobb*, 2 Kan. 27.
Maine. — *Goud v. Portland*, 96 Me. 125.

New York. — *People v. Nostrand*, 46 N. Y. 375; *People v. Duane*, 121 N. Y. 375; *People v. Tweed*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 419; *Miller v. Warner*, 42 N. Y. App. Div. 208; *Olmstead v. New York*, 42 N. Y. Super. Ct. 481.

North Carolina. — *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488; *Bryan v. Patrick*, 124 N. Car. 651.

Ohio. — *State v. Kennon*, 7 Ohio St. 546; *State v. Wilson*, 29 Ohio St. 347; *State v. Brennan*, 49 Ohio St. 33; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372.

Oregon. — *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Tennessee. — *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Texas. — *Jones v. Shaw*, 15 Tex. 577; *Hendricks v. State*, 20 Tex. Civ. App. 178.

Wisconsin. — *Hall v. State*, 39 Wis. 79.
4. Tenure — *United States*. — *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *Hall v. Wisconsin*, 103 U. S. 5.

Arkansas. — *Chism v. Martin*, 57 Ark. 83.
Colorado. — *Matter of House Bill No. 166*, 9 Colo. 628.

Indiana. — *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197.

Maine. — *Goud v. Portland*, 96 Me. 125.

Michigan. — *Throop v. Langdon*, 40 Mich. 673.

New York. — *People v. Nostrand*, 46 N. Y.

375; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *People v. Duane*, 121 N. Y. 375; *Miller v. Warner*, 42 N. Y. App. Div. 208; *Olmstead v. New York*, 42 N. Y. Super. Ct. 481.
North Carolina. — *Bryan v. Patrick*, 124 N. Car. 651.

Ohio. — *State v. Brennan*, 49 Ohio St. 33; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372.

Oklahoma. — *Guthrie Daily Leader v. Cameron*, 3 Okla. 677.

5. Duration or Continuance — *United States*. — *U. S. v. Maurice*, 2 Brock. (U. S.) 96; *U. S. v. Hartwell*, 6 Wall. (U. S.) 385; *Hall v. Wisconsin*, 103 U. S. 5.

Alabama. — *Matter of Dorsey*, 7 Port. (Ala.) 393.

Arkansas. — *Chism v. Martin*, 57 Ark. 83.
Colorado. — *Matter of House Bill No. 166*, 9 Colo. 628.

Illinois. — *Bunn v. People*, 45 Ill. 397.

Indiana. — *Foltz v. Kerlin*, 105 Ind. 221, 55 Am. Rep. 197.

Iowa. — *State v. Spaulding*, 102 Iowa 639
Michigan. — *Underwood v. McDuffee*, 15 Mich. 361, 93 Am. Dec. 194; *Shurbun v. Hooper*, 40 Mich. 504.

New York. — *Matter of Oaths*, 20 Johns. (N. Y.) 492; *People v. Nostrand*, 46 N. Y. 375; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *People v. Duane*, 121 N. Y. 375; *Olmstead v. New York*, 42 N. Y. Super. Ct. 481; *Nuttall v. Simis*, (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 19, *affirmed* in 31 N. Y. App. Div. 503.

North Carolina. — *Bryan v. Patrick*, 124 N. Car. 651. But see *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488.

Ohio. — *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Wilson*, 29 Ohio St. 347; *State v. Brennan*, 49 Ohio St. 33; *Shaw v. Jones*, 6 Ohio Dec. 453, 4 Ohio N. P. 372.

Tennessee. — *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Utah. — *McCornick v. Thatcher*, 8 Utah 294.

6. Requirement as to Creation. — *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66; *State v. Spaulding*, 102 Iowa 639; *Miller v. Warner*, 42 N. Y. App. Div. 208; *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

7. Not Determined by Official Designation. — *State v. Kennon*, 7 Ohio St. 546. See also *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174.

8. Bradford v. Justices, 33 Ga. 332; *Massenburg v. Bibb County*, 96 Ga. 614; *Brown v. Turner*, 70 N. Car. 99; *State v. Wilson*, 29 Ohio St. 347; *State v. Anderson*, 45 Ohio St. 196; *State v. Brennan*, 49 Ohio St. 33; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677; *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Distinction Between Office and Employment. — While an office is a public charge or employment, not every employment is an office. It is difficult, however, to distinguish between employments which are and those which are not public offices. The distinction has been thus stated: Where an employment or a duty is a continuing one, defined by rules prescribed by law and not by contract, such a charge or employment is an office. A duty or employment arising out of a contract and dependent for its duration and extent upon the terms of such contract is not an office.¹ And again, in distinguishing between these terms, it has been said that an office differs from an employment in that the former implies a delegation of a portion of the sovereign power to, and the possession of it by, the person filling the office.²

In Applying These General Principles the courts have arrived at conclusions which are not always harmonious, but such differences are probably due in large part to the varying constitutional and statutory provisions under which many of the cases were decided.³

1. Office and Employment Distinguished. — U. S. v. Maurice, 2 Brock. (U. S.) 96, *per* Marshall, C. J. To the same effect are *White v. Alameda*, 124 Cal. 95; *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174; *People v. Kipley*, 171 Ill., 44; *Anne Arundel County v. Duvall*, 54 Md. 350, 39 Am. Rep. 393; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Hill v. Boyland*, 40 Miss. 618; *State v. Valle*, 41 Mo. 29; *State v. Bus*, 135 Mo. 325; *State v. Wilson*, 29 Ohio St. 347; *Com. v. Evans*, 74 Pa. St. 124; *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113; *McCornick v. Thatcher*, 8 Utah 294. See also EMPLOY — EMPLOYEE — EMPLOYMENT, vol. II, p. 4, note; and see *McDaniel v. Yuba County*, 14 Cal. 444.

Employee Defined. — See EMPLOY — EMPLOYEE — EMPLOYMENT, vol. II, p. 5.

Officer and Placeman Distinguished. — *Worthy v. Barrett*, 63 N. Car. 199.

2. Opinion of Judges, 3 Me. 481, *quoted* under EMPLOY — EMPLOYEE — EMPLOYMENT, vol. II, p. 4, note. To the same effect are *Montgomery v. State*, 107 Ala. 372; *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66; *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174; *Bunn v. People*, 45 Ill. 397; *State v. Spaulding*, 102 Iowa 639; *Goud v. Portland*, 96 Me. 125; *Olmsted v. New York*, 42 N. Y. Super. Ct. 481; *State v. Jennings*, 57 Ohio St. 415, 63 Am. St. Rep. 723; *Guthrie Daily Leader v. Cameron*, 3 Okla. 677; *U. S. v. Hatch*, 1 Pin. (Wis.) 182. See also *Darley v. Reg.*, 12 Cl. & F. 520.

3. Who Are Public Officers — *Alderman or Councilman*. — *In re Newport Charter*, 14 R. I. 655. See also *State v. Anderson*, 45 Ohio St. 196.

Assessors and Tax Collectors. — *Castle v. Lawlor*, 47 Conn. 340; *State v. Walton*, 62 Me. 106; *Morse v. Lowell*, 7 Met. (Mass.) 152; *People v. Bedell*, 2 Hill (N. Y.) 199; *Lorillard v. Monroe*, 11 N. Y. 392, 62 Am. Dec. 120; *People v. Zundel*, 157 N. Y. 513; *Houseman v. Com.*, 100 Pa. St. 22; *Steward v. Euard*, 8 Quebec Q. B. 404. See also *Seiple v. Elizabeth*, 27 N. J. L. 407.

Chief of Police. — *Ellis v. Lennon*, 86 Mich. 468.

Clerk of Municipal Council. — *Costello v. New York*, 63 N. Y. 48.

Clerk in Tax Collector's Office. — *Enkle v.*

Edgar, 63 Cal. 188. Compare *Snapp v. Com.*, 82 Ky. 173; *Throop v. Langdon*, 40 Mich. 673.

Colonel in United States Army. — *Kerr v. Jones*, 19 Ind. 351; *Oliver v. Jersey City*, 63 N. J. L. 96.

Commissioners and Superintendents of Public Works. — *State v. Wells*, 112 Ind. 237; *State v. Valle*, 41 Mo. 29; *State v. May*, 106 Mo. 488; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *Matter of Ryers*, 72 N. Y. 1, 28 Am. Rep. 88; *Flynn v. Hurd*, 118 N. Y. 19; *People v. State Board of Canvassers*, 129 N. Y. 360. Compare *Bunn v. People*, 45 Ill. 397; *McArthur v. Nelson*, 81 Ky. 67; *Wood County v. Pargillis*, 6 Ohio Cir. Dec. 717; *David v. Portland Water Committee*, 14 Oregon 98; *State v. George*, 22 Oregon 142, 29 Am. St. Rep. 586.

Court Attendant. — *Rowland v. New York*, 83 N. Y. 372 [*distinguishing and limiting* *Holley v. New York*, 59 N. Y. 170; *Brennan v. New York*, 62 N. Y. 365; *Wines v. New York*, 9 Hun (N. Y.) 659]; *Sweeney v. New York*, 5 Daly (N. Y.) 274 [*distinguishing* *Sullivan v. New York*, 53 N. Y. 652]; *Moser v. New York* 21 Hun (N. Y.) 163. See also *Ryan v. New York*, (N. Y. Super. Ct. Spec. T.) 50 How. Pr. (N. Y.) 91.

Court Crier. — *Ricketts v. New York*, (C. Pl. Gen. T.) 67 How. Pr. (N. Y.) 320.

Directors and Officials of State Institutions. — *Comer v. Bankhead*, 70 Ala. 493; *People v. Sanderson*, 30 Cal. 160; *Dickson v. People*, 17 Ill. 191; *Porter v. Pillsbury*, (Supm. Ct. Spec. T.) 11 How. Pr. (N. Y.) 240; *People v. McKee*, 68 N. Car. 429; *People v. Bledsoe*, 68 N. Car. 457; *State Prison v. Day*, 124 N. Car. 362; *State v. Wilson*, 29 Ohio St. 347. Compare *Macdonald v. New York*, 32 Hun (N. Y.) 89.

District Detective. — *Brown v. Russell*, 166 Mass. 14, 55 Am. St. Rep. 357.

Fire Marshal. — *People v. Scannel*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 298.

Member of Congress. — *People v. Brooklyn*, 77 N. Y. 503, 33 Am. Rep. 659.

Member of Legislature. — *Hill v. Boyland*, 40 Miss. 619; *Morril v. Haines*, 2 N. H. 246; *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488, *explaining* *Worthy v. Barrett*, 63 N. Car. 199.

Member of New York Police Board. — *People v. French*, 91 N. Y. 265.

Notary Public. — *Kirksey v. Bates*, 7 Port.

II. CLASSIFICATION — 1. With Reference to Duties. — Classified with respect to the nature and duties pertaining thereto, public officers and offices are either executive, legislative, judicial, or ministerial.

(Ala.) 529, 31 Am. Dec. 722; Matter of Notaries Public, 8 Hawaii 561; Matter of Election Law, 8 Hawaii 605. And see the title **NOTARY PUBLIC**, vol. 21, p. 555.

Policeman. — Farrell v. Bridgeport, 45 Conn. 191; Jacksonville v. Allen, 25 Ill. App. 54; Thornton v. Missouri Pac. R. Co., 42 Mo. App. 58. See also State v. Walbridge, 153 Mo. 194. Compare Atty.-Gen. v. Cain, 84 Mich. 223; Com. v. Stokley, 20 W. N. C. (Pa.) 315, 4 Pa. Co. Ct. 334.

Police Surgeon. — People v. Board of Police, 75 N. Y. 38.

Postmaster. — Spence v. Harvey, 22 Cal. 336, 83 Am. Dec. 69; Rodman v. Harcourt, 4 B. Mon. (Ky.) 224; Hoglan v. Carpenter, 4 Bush (Ky.) 89; Wiggins v. Hathaway, 6 Barb. (N. Y.) 632.

Railroad Policeman. — Dempsey v. New York Cent., etc., R. Co., 146 N. Y. 290.

School Superintendent of County. — Crawford v. Dunbar, 52 Cal. 36.

Trustees of Public School Districts. — Ogden v. Raymond, 22 Conn. 379, 58 Am. Dec. 429; Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; Com. v. Morrissey, 86 Pa. St. 416; Hendricks v. State, 20 Tex. Civ. App. 178. See also Kennedy v. Independent School Dist., 48 Iowa 189; State v. Thompson, 122 N. Car. 493. And see the title **SCHOOLS**.

Who Are Not Public Officers — Assistant Postmaster. — Coleman v. Frazier, 4 Rich. L. (S. Car.) 146, 53 Am. Dec. 727. Compare Maxwell v. M'Ilvoy, 2 Bibb (Ky.) 211; Schroyer v. Lynch, 8 Watts (Pa.) 453.

Attorney. — Matter of Dorsey, 7 Port. (Ala.) 293; Cohen v. Wright, 22 Cal. 293; *Ex p.* Law, 35 Ga. 288; Hester v. Park Com'rs, 84 Mich. 450. Compare Merritt v. Lambert, 10 Paige (N. Y.) 352; Wallis v. Loubat, 2 Den. (N. Y.) 607; Wood's Case, 2 Cow. (N. Y.) 29, note; Richardson v. Brooklyn City, etc., R. Co., (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 368; Matter of Mosness, 39 Wis. 509, 20 Am. Rep. 55. And see the title **ATTORNEY AND CLIENT**, vol. 3, p. 283.

District-school Teacher. — Seymour v. Over-River School Dist., 53 Conn. 509.

Enrolling Clerk of Legislature. — State v. Gardner, 43 Ala. 234.

Fireman. — People v. Pinckney, 32 N. Y. 377; Exempt Firemen's Benev. Fund v. Roome, 93 N. Y. 313, 45 Am. Rep. 217; State v. Jennings, 57 Ohio St. 415, 63 Am. St. Rep. 723.

Jurors and Jury Commissioners. — State v. Bradley, 48 Conn. 535; Reg. v. Self, 8 Hawaii 434; State v. Montgomery, 25 La. Ann. 138; State v. Kendle, 52 Ohio St. 346; State v. Mounts, 36 W. Va. 179. Compare People v. Dunlap, 66 N. Y. 162.

Mail Carrier. — Sawyer v. Corse, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

Mail Contractor. — Whitehouse v. Langdon, 10 N. H. 331. Compare Conwell v. Voorhees, 13 Ohio 523, 42 Am. Dec. 206.

Professor in State University. — Butler v. Regents of University, 32 Wis. 124.

Superintending Architect of Public Works. — Olmstead v. New York, 42 N. Y. Super. Ct. 481. See also State v. Bloome, 61 N. J. L. 115.

Membership in a Political Committee, belonging to one party or another, does not come within the description of what constitutes public office. Atty.-Gen. v. Drohan, 169 Mass. 534, 61 Am. St. Rep. 301.

For Other Decisions upon This Question see:

United States. — Clapp's Case, 7 Ct. Cl. 351; Talbot's Case, 10 Ct. Cl. 426; Aufmordt v. Hedden, 30 Fed. Rep. 360; Travelers' Ins. Co. v. Oswego Tp., 59 Fed. Rep. 58, 19 U. S. App. 321; U. S. v. Sears, 1 Gall. (U. S.) 215; U. S. v. Strobach, 4 Woods (U. S.) 592; *Ex p.* Hennen, 13 Pet. (U. S.) 230; Parks v. Ross, 11 How. (U. S.) 362; Sanford v. Boyd, 2 Cranch (C. C.) 78; *Ex p.* Smith, 2 Cranch (C. C.) 693; U. S. v. Tinklepaugh, 3 Blatchf. (U. S.) 430.

Alabama. — Scruggs v. State, 111 Ala. 60.

California. — Dwinelle v. Henriquez, 1 Cal. 389; Vaughn v. English, 8 Cal. 39; People v. Stratton, 28 Cal. 382; People v. Middleton, 28 Cal. 603.

Connecticut. — Goshen v. Stonington, 4 Conn. 218; Rocky Hill v. Hollister, 59 Conn. 446.

Delaware. — State v. Wilmington, 3 Harr. (Del.) 294; State v. Churchman, (Del. 1901) 49 Atl. Rep. 381; State v. Platt, 4 Harr. (Del.) 154.

Georgia. — Jones v. Russell, 44 Ga. 460.

Illinois. — McPhail v. People, 160 Ill. 77, 52 Am. St. Rep. 306.

Indiana. — Ellis v. State, 4 Ind. 1; Walker v. Dunham, 17 Ind. 483; Owen v. State, 25 Ind. 107; Peelle v. State, 118 Ind. 512.

Iowa. — State v. Brandt, 41 Iowa 593; State v. Spaulding, 102 Iowa 639.

Kansas. — Cooper v. Armstrong, 4 Kan. 30.

Kentucky. — Perkins v. Auditor, 79 Ky. 306; Goodloe v. Fox, 96 Ky. 627, 16 Ky. L. Rep. 653; Angell v. Rowlett, 4 Ky. L. Rep. 909.

Louisiana. — Conrey v. Copland, 4 La. Ann. 307; State v. Castell, 22 La. Ann. 15.

Massachusetts. — Com. v. Swasey, 133 Mass. 538; Bates v. Worcester Protective Dept., 177 Mass. 130.

Michigan. — Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194; Portman v. Fish Com'rs, 50 Mich. 258; Trainor v. Board of Auditors, 89 Mich. 162; Cohnen v. Sweeney, 105 Mich. 643.

Mississippi. — Lindsey v. Atty.-Gen., 33 Miss. 508.

New Hampshire. — Jones v. Gibson, 1 N. H. 266; State v. Boddy, 53 N. H. 610.

New Jersey. — Lewis v. Board of Public Works, 51 N. J. L. 240.

New York. — Bissel v. Campbell, 54 N. Y. 353; Emmitt v. New York, 128 N. Y. 117; People v. Peck, 138 N. Y. 386; Matter of Whiting, 1 Edm. Sel. Cas. (N. Y.) 498; People v. Hayes, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 248; People v. Niagara County, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 353; Schuster v. Metropolitan Board of Health, 49 Barb. (N. Y.) 450; Smith v. New York, 67 Barb. (N. Y.) 223; People v. Lee, 28 Hun (N. Y.) 469;

a. **EXECUTIVE OFFICERS.** — An executive officer is one whose duties are mainly to cause the laws to be executed.¹

b. **LEGISLATIVE OFFICERS.** — Legislative officers are those whose duties relate mainly to the enactment of laws, such as members of Congress or of the several state legislatures.²

c. **JUDICIAL OFFICERS.** — A judicial officer is one whose duties are to decide controversies between individuals, and accusations made in the name of the public against persons charged with violations of the law.³

d. **MINISTERIAL OFFICERS.** — A ministerial officer is one whose duty it is to execute the mandates, lawfully issued, of his superiors.⁴

2. With Reference to Kind of Service. — Officers may be classified as civil, military, or naval, according as they belong to the civil, military, or naval service.

a. **CIVIL OFFICERS.** — Civil officers are those who are not engaged in the military or naval service.⁵

b. **MILITARY OFFICERS.** — A military officer is one who has command in the army.⁶

c. **NAVAL OFFICERS.** — A naval officer is one who is in command in the navy.⁷

3. With Reference to Compensation. — Offices are classified with reference to compensation as offices of profit and honorary offices.

a. **OFFICES OF PROFIT.** — An office of profit, or a lucrative office, is one to which is attached a compensation for services rendered.⁸ The term "office of trust" is often found in connection with "office of profit" in constitutional and statutory provisions regulating eligibility to office and such like matters, and means an office the incumbent of which must be possessed of skill, experience, and integrity. It is not necessarily an office relating to pecuniary affairs.⁹

Wood's Case, 2 Cow. (N. Y.) 29, note; *People v. Bedell*, 2 Hill (N. Y.) 196; *People v. Coler*, 33 N. Y. App. Div. 617.

North Carolina. — *Brown v. Turner*, 70 N. Car. 93; *Eliason v. Coleman*, 86 N. Car. 235; *State v. Connelly*, 104 N. Car. 794; *State v. Bell*, Phil. L. (61 N. Car.) 76.

Ohio. — *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *Woodworth v. State*, 26 Ohio St. 195; *Smith v. Lynch*, 29 Ohio St. 261; *State v. Anderson*, 57 Ohio St. 429; *State v. Funk*, 8 Ohio Cir. Dec. 782, 16 Ohio Cir. Ct. 155.

Pennsylvania. — *Com. v. Evans*, 74 Pa. St. 124; *Hummell's Case*, 9 Watts (Pa.) 416; *Com. v. Sutherland*, 3 S. & R. (Pa.) 149; *Com. v. Binns*, 17 S. & R. (Pa.) 219.

Wisconsin. — *State v. Myers*, 52 Wis. 628.

Canada. — *Stalker v. Dunwich Tp.*, 15 Ont. 342; *Holton v. Aikins*, 3 Quebec 289.

And see such titles as **DEPUTY**, vol. 9, p. 369; **PILOTS**, vol. 22, p. 814.

1. Executive Officer Defined. — *Bouv. L. Dict.* See to the same effect *Black's L. Dict.*; *People v. Hays*, 4 Cal. 127. And see **EXECUTIVE**, vol. 11, p. 718, and the titles **CONSTITUTIONAL LAW**, vol. 6, p. 1009; **GOVERNOR**, vol. 14, p. 1097; **PRESIDENT OF THE UNITED STATES**, vol. 22, p. 1229.

A Member of the Board of Education Is an Executive Officer. — *State v. Womack*, 4 Wash. 19.

2. Legislative Officer Defined. — *Bouv. L. Dict.*; *And. L. Dict.* And see the title **CONSTITUTIONAL LAW**, vol. 6, p. 1020.

3. Judicial Officer Defined. — *Bouv. L. Dict.* See to the same effect *Black's L. Dict.* See also *People v. Ransom*, 58 Cal. 558; *Bishop*

v. Oakland, 58 Cal. 572; *People v. Ridgley*, 21 Ill. 65. And see the titles **CONSTITUTIONAL LAW**, vol. 6, p. 1053; **COURTS**, vol. 8, p. 21; **JUDGE**, vol. 17, p. 714; **JUSTICES OF THE PEACE**, vol. 18, p. 6.

4. Ministerial Officers. — *Bouv. L. Dict.* See also *Black's L. Dict.*; *People v. Ridgley*, 21 Ill. 65. And see **MINISTERIAL**, vol. 20, p. 793.

Assessors Ministerial Officers. — *McLean v. Jephson*, 123 N. Y. 142.

County Solicitor Held to Be Ministerial Officer. — *Diggs v. State*, 49 Ala. 311, stated under **MINISTERIAL**, vol. 20, p. 793.

Auditor Not Mere Ministerial Officer. — *People v. Schoonmaker*, 13 N. Y. 238; *Boner v. Adams*, 65 N. Car. 639.

5. Civil Officer Defined. — *Black's L. Dict.*; *And. L. Dict.*

6. Military Officer Defined. — *Bouv. L. Dict.* And see the title **MILITARY LAW**, vol. 20, p. 615.

Noncommissioned Officers are not included within the term "officers" as used in the United States statutes. *Babbitt's Case*, 16 Ct. Cl. 202.

7. Naval Officer Defined. — *Bouv. L. Dict.* See also *U. S. v. Baker*, 125 U. S. 646; *U. S. v. Cook*, 128 U. S. 254. And see the title **MILITARY LAW**, vol. 20, p. 615.

8. Office of Profit Defined. — *State v. Clarke*, 3 Nev. 566; *State v. De Gress*, 53 Tex. 387. And see **LUCRATIVE** — **LUCRATIVE OFFICE**, vol. 19, p. 601.

9. Office of Trust Defined. — *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538. See also *Ellis v. State*, 4 Ind. 1; *Doyle v. Raleigh*, 89 N. Car.

b. HONORARY OFFICES. — An honorary office is one to which are attached no fees, perquisites, profits, or salary.¹

4. With Reference to Title. — Classified according to the legality and character of their title, officers are either *de jure* officers, *de facto* officers, or usurpers.

a. OFFICERS DE JURE. — An officer *de jure* is one who is clothed with the full legal right and title to the office; in other words, one who has been legally elected or appointed to an office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law.²

b. OFFICERS DE FACTO. — Public officers *de facto* have been defined and fully discussed elsewhere in this work.³

c. USURPERS. — A usurper is one who assumes the right of government by force, contrary to and in violation of the constitution of the country;⁴ or, as the term is most generally used, a usurper is one who undertakes to act as an officer without any color of right.⁵ The acts of a usurper are utterly void,⁶ both as to the public and as to individuals,⁷ unless he continues to act for so long a time or under such circumstances as to afford a presumption of his right to act, and then his acts are valid as to the public and third persons, but he has no defense in a direct proceeding against himself.⁸

5. With Reference to Nature of Public Body. — Officers, with regard to the public body for which they act, are officers of the general government,⁹ state officers, county officers, and municipal officers.

a. STATE OFFICERS. — In a popular sense a state officer is one whose jurisdiction is coextensive with the state.¹⁰ In a more enlarged sense a state officer is one who receives his authority under the laws of the state and performs some of the governmental functions of the state.¹¹

133, 45 Am. Rep. 677. And see *infra*, this title, *Eligibility; Termination of Authority*.

1. Honorary Office Defined. — *Dickson v. People*, 17 Ill. 191; *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488. See also HONORARY, vol. 15, p. 745.

Director of State Institution Holds Office of Honor. — *Dickson v. People*, 17 Ill. 191.

2. Officer de Jure Defined. — *McMillin v. Richards*, 45 Neb. 786. To the same effect are *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Kimball v. Alcorn*, 45 Miss. 151; *Norfleet v. Staton*, 73 N. Car. 546, 21 Am. Rep. 479; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176; *McCraw v. Williams*, 33 Gratt. (Va.) 510. And see Abb. L. Dict.; And. L. Dict.

3. See the title DE FACTO OFFICERS, vol. 8, p. 781.

4. Usurper Defined. — Bouv. L. Dict.; Black's L. Dict.

5. *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Brown v. O'Connell*, 36 Conn. 449; *Soudant v. Wadhams*, 46 Conn. 218; *Hooper v. Goodwin*, 48 Me. 79; *Tucker v. Aiken*, 7 N. H. 113; *Norfleet v. Staton*, 73 N. Car. 546, 21 Am. Rep. 479; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176; *McCraw v. Williams*, 33 Gratt. (Va.) 510. See also And. L. Dict.; *Gunterman v. People*, 138 Ill. 518.

Distinction Between Usurper and Officer de Facto. — *Fitchburg R. Co. v. Grand Junction R., etc., Co.*, 1 Allen (Mass.) 552; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335. See also the title DE FACTO OFFICERS, vol. 8, pp. 782, 783, notes.

Penalty for Usurpation. — *People v. Miller*, 16 Mich. 205; *Davis v. Davis*, 57 N. J. L. 203;

People v. Nolan, (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 468; *People v. Ferguson*, 20 N. Y. Wkly. Dig. 276; *St. Stephen Church Cases*, (C. Pl. Tr. T.) 25 Abb. N. Cas. (N. Y.) 253. And see the title DE FACTO OFFICERS, vol. 8, p. 807.

Kentucky Statute as to Usurpation. — *Wheeler v. Com.*, 98 Ky. 50.

Louisiana Intrusion Act. — *State v. Jorda*, 26 La. Ann. 374; *State v. Ward*, 27 La. Ann. 659.

6. Acts Wholly Void. — *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574; *Hooper v. Goodwin*, 48 Me. 80; *Tucker v. Aiken*, 7 N. H. 113; *Norfleet v. Staton*, 73 N. Car. 546, 21 Am. Rep. 479; *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176; *McCraw v. Williams*, 33 Gratt. (Va.) 510. And see the title DE FACTO OFFICERS, vol. 8, p. 820.

7. *Tweed's Case*, 16 Wall. (U. S.) 504; *Plymouth v. Painter*, 17 Conn. 585, 44 Am. Dec. 574.

8. *Norfleet v. Staton*, 73 N. Car. 546, 21 Am. Rep. 479. To the same effect are *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; *Gilliam v. Reddick*, 4 Ired. L. (26 N. Car.) 368.

9. See U. S. v. Maurice, 2 Brock. (U. S.) 96. And see the title PRESIDENT OF UNITED STATES, vol. 22, p. 1229.

10. Definition of State Officer. — *State v. Hocker*, 39 Fla. 477, 63 Am. St. Rep. 174; *State v. Dillon*, 90 Mo. 229; *State v. Spencer*, 91 Mo. 206; *State v. Bus*, 135 Mo. 325; *State v. Higgins*, 144 Mo. 410. And see the titles GOVERNOR, vol. 14, p. 1098; STATES.

11. *State v. Walker*, 132 Mo. 210; *State v. Bus*, 135 Mo. 325. See also *Garnier v. St. Louis*, 37 Mo. 554; *St. Louis v. Sommers*, 148

b. COUNTY OFFICERS. — An officer of the county is one by whom the county performs its usual political functions, its functions of government.¹

c. MUNICIPAL OFFICERS. — A municipal officer is an officer of a borough, city, incorporated town or village, or the like.²

III. CREATION OF OFFICE. — Constitutions generally provide for the necessary public offices,³ and the legislative branch of the government may create offices or agencies not specifically provided for by the constitution, the limitation being that there must not be any invasion of the plan of the fundamental law or anything inconsistent with its provisions and their unobstructed operation.⁴

IV. NATURE AND INCIDENTS OF PUBLIC OFFICES — LEGISLATIVE CONTROL —

1. In England. — At common law offices were incorporeal hereditaments, and one might have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only. Offices of public trust, especially if they concerned the administration of justice, could not be granted for a term of years, nor could any judicial office be granted in reversion.⁵ The nature of offices of modern origin depends upon the statutes creating them, and in the absence of an express provision to that effect no life estate or irrevocable tenure is conferred.⁶

2. In United States. — It is well settled in the United States that an office is not the property of the officeholder, but is a public trust or agency; that it is not held by contract or grant; that the officer has no vested right therein; and that, subject to constitutional restrictions, the office may be vacated or abolished, the duties thereof changed, and the term and compensation increased or diminished.⁷ The fact that a constitution may forbid the legis-

Mo. 398; *People v. Court Gen. Sess.*, 13 Hun (N. Y.) 395.

Special Judge Not State Officer. — *Chism v. Martin*, 57 Ark. 83.

Police Boards and Policemen Are State Officers. — *Perkins v. New Haven*, 53 Conn. 215; *State v. Mason*, 153 Mo. 23. And see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1204.

Constables and Deputy Constables Are State Officers. — *State v. McKee*, 69 Mo. 504; *State v. Dierberger*, 90 Mo. 369.

County Judge Is State Officer. — *State v. Glenn*, 7 Heisk. (Tenn.) 472.

Distinction Between State and Municipal Officers. — *People v. Curley*, 5 Colo. 419. See also *Britton v. Steber*, 62 Mo. 370.

1. County Officer Defined. — *Sheboygan County v. Parker*, 3 Wall. (U. S.) 94. See also *Masseyburg v. Bibb County*, 96 Ga. 614; *Matter of Whiting*, 2 Barb. (N. Y.) 517; *Matter of Carpenter*, 7 Barb. (N. Y.) 30; *People v. Bennett*, 54 Barb. (N. Y.) 480; *Dolan v. New York*, 6 Hun (N. Y.) 506, *affirmed* 67 N. Y. 609; *State v. Brennan*, 49 Ohio St. 33. And see such titles as CORONERS, vol. 7, p. 958; COUNTY COMMISSIONERS, vol. 7, p. 975; REGISTER OF DEEDS.

Commissioner of Jurors Not County Officer. — *People v. Dunlap*, 66 N. Y. 162.

2. Municipal Officers Defined. — *Abb. L. Dict.*; *Black's L. Dict.* And see *People v. Henry*, 62 Cal. 557; *State v. Castell*, 22 Ia. Ann. 15; *Britton v. Steber*, 62 Mo. 370; *People v. McKinney*, 52 N. Y. 374; *People v. State Board of Canvassers*, 129 N. Y. 360; *Greaton v. Griffin*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 310; *Sun Printing, etc., Assoc. v. New York*, 8 N. Y. App. Div. 230; *Rowell v. Horton*, 58 Vt. 1. See also the title MUNICIPAL CORPORATIONS, vol. 20, p. 1216.

3. See the Constitution of the United States and those of the several states.

4. Right of Legislature to Create. — *State Revenue Agent v. Hill*, 70 Miss. 106. See also *Kavanaugh v. State*, 41 Ala. 399; *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66; *State v. Spaulding*, 102 Iowa 639; *State v. Cobb*, 2 Kan. 27; *State v. Finn*, 8 Mo. App. 341; *Miller v. Warner*, 42 N. Y. App. Div. 208; *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Number of Officers Increased by Legislature. — *State v. Woodbury*, 17 Nev. 337; *Britton v. Moody*, 2 Coldw. (Tenn.) 15.

Creation of Municipal Officers. — *State v. Swift*, 11 Nev. 218.

5. Common-law Doctrine as to Offices. — 2 *Black. Com.* 36; 3 *Kent's Com.* 454; 2 *Min. Inst.* 24. See also *State v. Dews*, R. M. Charl. (Ga.) 397; *Kreitz v. Behrensmeier*, 149 Ill. 496; *State v. Davis*, 44 Mo. 129; *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; *Jones v. Shaw*, 15 Tex. 577.

6. Smyth v. Latham, 9 Bing. 692, 23 E. C. L. 424; *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285.

7. Legislative Control — United States. — *Butler v. Pennsylvania*, 10 How. (U. S.) 402; *Newton v. Mahoning County*, 100 U. S. 548; *Crenshaw v. U. S.*, 134 U. S. 99; *Taylor v. Beckham*, 178 U. S. 548.

Alabama. — *Benford v. Gibson*, 15 Ala. 521; *Reynolds v. McAfee*, 44 Ala. 237; *Beebe v. Robinson*, 52 Ala. 66; *Lane v. Kolb*, 92 Ala. 636.

Arkansas. — *Robinson v. White*, 26 Ark. 139; *State v. McDiarmid*, 27 Ark. 176; *Allen v. State*, 32 Ark. 241; *Humphry v. Sadler*, 40 Ark. 100.

California. — *People v. Squires*, 14 Cal. 12; *People v. Banvard*, 27 Cal. 470; *Christy v.*

lature to abolish a public office or diminish the salary thereof during the term of the incumbent does not change the character of the office, nor make it property. True, the restrictions limit the power of the legislature to deal with the office, but even such restrictions may be removed by constitutional amendment.¹

In North Carolina, however, it has been expressly decided in a number of carefully considered cases that a public officer has, by contract between the state and himself, a vested right of property in his office of which he can be

Sacramento County, 39 Cal. 3; *In re Bulger*, 45 Cal. 553; *Spring Valley Water Works v. San Francisco*, 61 Cal. 7; *Miller v. Kister*, 68 Cal. 142; *Pennie v. Reis*, 80 Cal. 266; *Ford v. Harbor Com'rs*, 81 Cal. 19.

Georgia. — *State v. Dews*, R. M. Charl. (Ga.) 397; *Lyon v. Norris*, 15 Ga. 480. See also *Hall v. Burks*, 96 Ga. 622.

Illinois. — *People v. Auditor*, 2 Ill. 537; *People v. Lippincott*, 67 Ill. 333; *People v. Wright*, 70 Ill. 398; *People v. Brown*, 83 Ill. 95; *Donahue v. Will County*, 100 Ill. 94; *Kreitz v. Behrensmeyer*, 149 Ill. 496; *People v. Kipley*, 171 Ill. 44.

Indiana. — *Coffin v. State*, 7 Ind. 157; *Walker v. Dunham*, 17 Ind. 483; *Walker v. Peelle*, 18 Ind. 264; *Jeffries v. Rowe*, 63 Ind. 592; *Gilbert v. Board of Com'rs*, 8 Blackf. (Ind.) 81; *State v. Hyde*, 129 Ind. 296. See also *Ellis v. State*, 4 Ind. 1.

Iowa. — *Bryan v. Cattell*, 15 Iowa 538.

Kansas. — *Lynch v. Chase*, 55 Kan. 367.

Kentucky. — *Standeford v. Windgate*, 2 Duv. (Ky.) 440; *Sinking Fund Com'rs v. George*, 104 Ky. 260.

Maine. — *Farwell v. Rockland*, 62 Me. 296; *Prince v. Skillin*, 71 Me. 361; *Goud v. Portland*, 96 Me. 125.

Massachusetts. — *Taft v. Adams*, 3 Gray (Mass.) 126.

Michigan. — *Board of Auditors v. Benoit*, 20 Mich. 176, 4 Am. Rep. 382; *Frey v. Michie*, 68 Mich. 323; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606.

Minnesota. — *Hennepin County v. Jones*, 18 Minn. 199.

Mississippi. — *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *Hyde v. State*, 52 Miss. 665; *Kendall v. Canton*, 53 Miss. 526.

Missouri. — *Primm v. Carondelet*, 23 Mo. 22; *State v. Davis*, 44 Mo. 129; *Wilcox v. Rodman*, 46 Mo. 322; *Westberg v. Kansas City*, 64 Mo. 493; *State v. Evans*, 166 Mo. 347; *State v. Hermann*, 11 Mo. App. 43; *State v. Ford*, 41 Mo. App. 122.

Montana. — *People v. Van Gaskin*, 5 Mont. 352; *Territory v. Carson*, 7 Mont. 428; *In re Dewar*, 10 Mont. 440; *Lloyd v. Silver Bow County*, 11 Mont. 408.

Nebraska. — *Douglas County v. Timme*, 32 Neb. 272.

Nevada. — *Denver v. Hobart*, 10 Nev. 28; *State v. Hobart*, 12 Nev. 408; *State v. Trousdale*, 16 Nev. 357.

New Jersey. — *Kenny v. Hudspeth*, 59 N. J. L. 320.

New York. — *Conner v. New York*, 5 N. Y. 285, affirming 2 Sandf. (N. Y.) 355; *Smith v. New York*, 37 N. Y. 518; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Koch v. New York*, 152 N. Y. 72; *People v.*

Murray, 5 Hun (N. Y.) 42. See also *Long v. New York*, 81 N. Y. 428.

Ohio. — *State v. Wright*, 7 Ohio St. 333; *State v. Hawkins*, 44 Ohio St. 98. See also *Hulse v. State*, 35 Ohio St. 421.

Oregon. — *State v. Ware*, 13 Oregon 402, criticizing *State v. Johns*, 3 Oregon 533.

Pennsylvania. — *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Barker v. Pittsburgh*, 4 Pa. St. 51; *Com. v. McCombs*, 56 Pa. St. 436; *Kilgore v. Magee*, 85 Pa. St. 401; *Com. v. Weir*, 165 Pa. St. 284. See also *Com. v. Mann*, 5 W. & S. (Pa.) 418.

Tennessee. — *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Texas. — See *Jones v. Shaw*, 15 Tex. 577.

Virginia. — *Loving v. Auditor*, 76 Va. 942; *Holladay v. Auditor*, 77 Va. 425; *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637.

Wisconsin. — *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 90.

Wyoming. — *Reals v. Smith*, 8 Wyo. 159.

And see *infra*, this title, *Compensation*; *Duration of Officer's Authority*; *Termination of Authority*.

Offices Said to Be Property. — In a few cases it has been said that a public office is the property of the officer. *Wammack v. Holloway*, 2 Ala. 31; *State v. Owens*, 63 Tex. 261; *Bastrop County v. Hearn*, 70 Tex. 563. But such statements have been characterized as figures of speech. *Conner v. New York*, 2 Sandf. (N. Y.) 355, affirmed 5 N. Y. 285.

Offices Not Hereditaments. — *State v. Dews*, R. M. Charl. (Ga.) 397; *Kreitz v. Behrensmeyer*, 149 Ill. 496; *State v. Davis*, 44 Mo. 129; *Conner v. New York*, 2 Sandf. (N. Y.) 355, affirmed 5 N. Y. 285; *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Jones v. Shaw*, 15 Tex. 577.

Authority Derived from Delegation of Part of Sovereign Power. — *State v. Dews*, R. M. Charl. (Ga.) 397; *People v. Kipley*, 171 Ill. 44; *Smith v. New York*, 37 N. Y. 518.

Limitations upon Right to Take Duties from Officer. — *Warner v. People*, 2 Den. (N. Y.) 272, 43 Am. Dec. 740; *King v. Hunter*, 65 N. Car. 603, 6 Am. Rep. 754; *Hulse v. State*, 35 Ohio St. 421; *State v. Brunst*, 26 Wis. 412. See also *People v. Raymond*, 37 N. Y. 428; *People v. Albertson*, 55 N. Y. 50; *Wenzler v. People*, 58 N. Y. 516; *People v. Howland*, 155 N. Y. 270. Compare *State v. Dews*, R. M. Charl. (Ga.) 397; *Com. v. McCombs*, 56 Pa. St. 436.

Office Cannot Be Sold, Encumbered, Nor Assigned. — *People v. Kipley*, 171 Ill. 44; *Smith v. New York*, 37 N. Y. 518; *State Prison v. Day*, 124 N. Car. 362. And see the titles *ASSIGNMENTS*, vol. 2, p. 1033; *ILLEGAL CONTRACTS*, vol. 15, pp. 964, 966.

1. Effect of Constitutional Restrictions. — *Taylor v. Beckham*, 178 U. S. 548, *per Fuller*, C. J.

deprived only in accordance with the law of the land, and that while the legislature may abolish the office, it cannot continue the office and transfer its duties and emoluments to another against the will of the vested incumbent.¹

V. ELIGIBILITY — 1. In General. — The constitutions and statutes of most of the states contain an enumeration, more or less full, of the qualifications and disqualifications for public office. Although they possess a general similarity, these provisions are too diverse to permit of a summary at once comprehensive and exact, and hence should be consulted for details.

2. Power of Legislature to Define. — Within constitutional limitations the legislature may define qualifications of officeholders² or impose qualifications in addition to those enumerated in the constitution;³ but it cannot change or add to those imposed by the constitution unless such power is conferred by that instrument.⁴ And where the constitution declares that certain persons are eligible to "any office within the gift of the people," those offices filled by the legislature as well as those filled by popular vote are included.⁵

One May Be Elected to an Office to which he may not be appointed on account of an express prohibition against appointment.⁶ State authorities cannot prescribe qualifications for federal offices.⁷ Qualifications necessary to an election are likewise necessary, as a general rule, to an appointment to office.⁸

3. Meaning of "Eligible." — The term "eligible" has already been defined.⁹

4. As of What Time. — Whether the necessary qualifications must exist at the time of the election or at the time of entering upon the duties of the office may depend upon the wording of the statute, which may refer to the one or the other. This question has already been discussed.¹⁰

5. Special Qualifications — a. CITIZENSHIP. — It is quite often provided by the state constitutions that no one is eligible to certain offices unless he has been a citizen of the United States or of the state for a specified time.¹¹ This

1. North Carolina Doctrine. — *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 704; *Cotten v. Ellis*, 7 Jones L. (52 N. Car.) 545; *State v. Smith*, 65 N. Car. 369; *King v. Hunter*, 65 N. Car. 603, 6 Am. Rep. 754; *Clark v. Stanley*, 66 N. Car. 69, 8 Am. Rep. 488; *Brown v. Turner*, 70 N. Car. 93; *Bunting v. Gales*, 77 N. Car. 283; *Vann v. Pipkin*, 77 N. Car. 408; *Prairie v. Worth*, 78 N. Car. 169; *Trotter v. Mitchell*, 115 N. Car. 193; *McDonald v. Morrow*, 119 N. Car. 676; *Wood v. Bellamy*, 120 N. Car. 216; *Ward v. Elizabeth City*, 121 N. Car. 3; *Caldwell v. Wilson*, 121 N. Car. 425; *Wilson v. North Carolina*, 169 U. S. 586; *State Prison v. Day*, 124 N. Car. 362; *Bryan v. Patrick*, 124 N. Car. 651; *Atlantic, etc., R. Co. v. Dortch*, 124 N. Car. 663; *Wilson v. Jordan*, 124 N. Car. 683; *White v. Hill*, 125 N. Car. 194; *Greene v. Owen*, 125 N. Car. 212; *Abbott v. Reddingfield*, 125 N. Car. 256; *McCall v. Webb*, 125 N. Car. 243; *Gattis v. Griffin*, 125 N. Car. 332; *White v. Ayer*, 126 N. Car. 570; *Taylor v. Vaun*, 127 N. Car. 243. See also *Bailey v. Caldwell*, 68 N. Car. 472.

Change of Duties and Name. — When the office is continued with the same duties, and even some additional duties, although under a different name, the original owner of the office is entitled to it as his property. *Abbott v. Beddingfield*, 125 N. Car. 256; *Gattis v. Griffin*, 125 N. Car. 332.

Duties May Be Changed and Reduced. — *Bunting v. Gales*, 77 N. Car. 283; *Bryan v. Patrick*, 124 N. Car. 663.

Abolition and Restoration of Office. — In *North Carolina*, when the office of county treasurer is abolished the duties thereof devolve upon the sheriff of the county, who, however, has

no such vested interest therein as may not be taken away by a restoration of the office and an appointment of another person. *Rhodes v. Hampton*, 101 N. Car. 629.

Consolidation of Offices. — *Troy v. Wooten*, 10 Ired. L. (32 N. Car.) 377.

2. Power of Legislature to Define. — *State v. Woodson*, 41 Mo. 227; *State v. McSpaden*, 137 Mo. 628; *Bray v. Stubblefield*, 5 Okla. 310; *State v. Von Baumbach*, 12 Wis. 310.

3. Lee v. Dunn, 73 N. Car. 595. *Contra*, *State v. Holman*, 58 Minn. 219.

4. Morgan v. Vance, 4 Bush (Ky.) 325; *Thomas v. Owens*, 4 Md. 189.

5. Black v. Trower, 79 Va. 123.

6. Carpenter v. People, 8 Colo. 116; *State v. McCollister*, 11 Ohio 46.

7. State Laws Not Applicable to Federal Offices. — *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 228.

8. Qualifications for Appointment. — *People v. Clute*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 399; *Bray v. Stubblefield*, 5 Okla. 310. See also the title **APPOINTMENT**, vol. 2, p. 474.

9. See ELIGIBLE, vol. 10, p. 970.

The Word "Qualified" signifies the absence of all disqualifications. *Hall v. Hostetter*, 17 B. Mon. (Ky.) 785, *quoted in Com. v. Jones*, 10 Bush (Ky.) 744.

10. As of What Time. — See **ELIGIBLE**, vol. 10, p. 970 *et seq.* See also *State v. Williams*, 99 Mo. 291; *State v. Holman*, 58 Minn. 219. See the enumeration of compatible and incompatible offices, *infra*, this section, *Disqualifications*.

11. Citizenship. — See the various state constitutions, and generally the title **CITIZENSHIP**, vol. 6, p. 14.

rule has been applied to the offices of governor,¹ sheriff,² chief of police,³ and county treasurer.⁴ One who has declared his intention of becoming a citizen of the United States and has qualified as an elector is eligible to hold office,⁵ and in *Wisconsin* even without such declaration he may be elected to office provided his disability is removed before the beginning of his term;⁶ but it is otherwise where only electors are eligible to office, and the declaration of intention to become a citizen was not made until after election.⁷ Where a "voter" is declared to be eligible he need not be a citizen of the United States if he is a qualified voter under the state laws.⁸ Alienage at the time of election may be removed before the date of installation.⁹

b. RESIDENCE. — A very common qualification in an officeholder is that of residence for a specified period prior to his election or installation.¹⁰ In this connection the words "residence" and "domicil" are usually regarded as synonymous, the former being more often used by the legislature, the latter by the courts.¹¹ But it has been held that "inhabitant" and "citizen" are not synonymous, and that where the former word alone is used, the candidate need not necessarily have been a citizen for the designated period.¹² Usually the specified period is to be measured from the date of election, and not from that of installation.¹³ The requirement of residence relates merely to qualification for election, and does not prescribe the place of abode after election.¹⁴ Where one resides and has his business in a place other than that in which he claims a domicil and a vote, it is a question for the jury whether he is eligible to appointment in the one place or the other.¹⁵ The residence abroad of a consul does not of itself change his domicil.¹⁶ One may be qualified for office by a residence too short to entitle him to vote.¹⁷ Residence within a city is not essential save for city officers,¹⁸ and removal from or non-residence in a borough or city will disqualify an officer from longer holding his office only when the law so provides.¹⁹ The acts of a duly appointed officer are valid although he was not qualified by residence.²⁰

c. AGE. — Statutory provision is usually made that candidates for the more important offices must have reached a certain age, and where an officer elect has not reached the requisite age, his office may be declared to be vacant.²¹ Such a provision placing the minimum age limit above twenty-one

1. *State v. Boyd*, 31 Neb. 682.

2. *Scott v. Strobach*, 49 Ala. 477; *State v. Van Beek*, 87 Iowa 569, 43 Am. St. Rep. 397; *State v. Smith*, 14 Wis. 497.

3. *Drew v. Rogers*, (Cal. 1893) 34 Pac. Rep. 1081.

4. *Walther v. Rabolt*, 30 Cal. 186.

5. *Declaration of Intention.* — *State v. Fowler*, 41 La. Ann. 381; *State v. Abbott*, 41 La. Ann. 1096; *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729; *State v. Streukens*, 60 Minn. 325. See also *Matter of Conway*, 17 Wis. 526.

6. *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489. See also *infra*, this section, *Removal of Disqualifications*.

7. *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729.

8. *Eligibility of "Voters."* — *McCarthy v. Froelke*, 63 Ind. 507.

9. *Removal of Disability.* — *State v. Van Beek*, 87 Iowa 569, 43 Am. St. Rep. 397; *State v. Smith*, 14 Wis. 497; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103. And see *infra*, this section, *Removal of Disqualifications*.

10. *Residence.* — *Donne v. Martyr*, 2 M. & R. 98, 8 B. & C. 62, 15 E. C. L. 154, 6 L. J. K. B. 246; *Yonkey v. State*, 27 Ind. 237; *Patterson v. Miller*, 2 Met. (Ky.) 493; *People v. Sheffield*,

47 Hun (N. Y.) 481. And see the constitutions and statutes of the various states.

11. *State v. Banta*, 71 Mo. App. 32; *People v. Platt*, 50 Hun (N. Y.) 454. And see the title DOMICIL, vol. 10, p. 9.

12. *State v. Kilroy*, 86 Ind. 118. See further INHABIT — INHABITANT, vol. 16, pp. 331, 332. notes.

13. *State v. McMillen*, 23 Neb. 385.

14. *State v. Holman*, 58 Minn. 219.

15. *Jain v. Bossen*, 27 Colo. 423; *State v. Banta*, 71 Mo. App. 32; *People v. Platt*, 50 Hun (N. Y.) 454.

16. See the title DOMICIL, vol. 10, p. 37.

17. *Steusoff v. State*, 80 Tex. 428.

18. *Police Com'rs v. Louisville*, 3 Bush (Ky.) 598.

19. *State v. George*, 23 Fla. 585; *State v. Swearingen*, 12 Ga. 23; *State v. Blanchard*, 6 La. Ann. 515; *State v. Holman*, 58 Minn. 219; *Com. v. Jones*, 12 Pa. St. 365; *Com. v. Lally*, 10 Phila. (Pa.) 507, 30 Leg. Int. (Pa.) 296; *Com. v. Coolbaugh*, 2 Kulp (Pa.) 206.

20. *Waterloo Bridge Co. v. Cull*, 5 Jur. N. S. 464, 28 L. J. Q. B. D. 70, 1 El. & El. 213, 102 E. C. L. 213. And see the title DE FACTO OFFICERS, vol. 8, pp. 788, 789, 815 *et seq.*

21. *Age.* — *State v. Gastinel*, 20 La. Ann. 115.

years does not violate a provision of the constitution making electors eligible to any office.¹ An army officer retired for age may be eligible to appointment to a state or municipal office.² Discharged veterans are sometimes allowed to hold office as long as physically qualified, regardless of age.³ Statutory provisions disqualifying as judges those who have attained the age of seventy years do not apply to justices of the peace,⁴ surrogates,⁵ or county commissioners.⁶ It has been held that an infant, though not eligible to any office of importance, may be capable of acting as a sheriff's special deputy, as a notary public, or as clerk of a company in the militia, or even of holding the office of deputy county clerk, and as such qualified to administer an oath. But an infant cannot hold any office in the discharge of whose duties judgment, discretion, and experience are necessary. Hence, he cannot act as justice of the peace.⁷

d. SEX. — Where only qualified voters are eligible to office, women are, of course, excluded in any state that has not extended to them the right of suffrage.⁸ But where eligibility depends upon citizenship only, women are eligible. This test admits them to some offices, but excludes them from others, their eligibility in the particular case depending upon the wording and construction of the statutes and constitution.⁹ Thus, it has been held that a woman may be county clerk or deputy county clerk,¹⁰ or county superintendent,¹¹ or a master in chancery,¹² or a member of a school committee;¹³ but not a jailer,¹⁴ nor a school director,¹⁵ nor county superintendent of common schools,¹⁶ nor director of a workhouse,¹⁷ nor a justice of the peace.¹⁸ She may be confirmed by a retroactive statute in any office to which she was ineligible when chosen.¹⁹ The words "he" or "his" in the statute will include women as well as men, and hence furnish no argument in favor of excluding women from office.²⁰ The eligibility of women to the office of attorney at law is discussed elsewhere.²¹

e. PROPERTY. — It is quite common in *England* to make the possession of a specified amount of property a necessary qualification of officeholders.²² And

1. *State v. Bradley*, 48 Conn. 548.

2. *People v. Duane*, 121 N. Y. 367. And see the title MILITARY LAW, vol. 20, pp. 637, 661, 662.

3. *People v. French*, 52 Hun (N. Y.) 464. See also the title CIVIL SERVICE, vol. 6, p. 93 *et seq.*, and see INCOMPETENCY — INCOMPETENT, vol. 16, p. 153.

4. *Justices of the Peace.* — See the title JUSTICES OF THE PEACE, vol. 18, p. 11.

5. *Surrogates.* — *People v. Carr*, 100 N. Y. 236. And see the title SURROGATE AND PROBATE COURTS.

6. *County Commissioners.* — See the title COUNTY COMMISSIONERS, vol. 7, p. 978, note.

7. *Infants.* — See the title INFANTS, vol. 16, p. 266.

8. *Women Excluded.* — *Atchison v. Lucas*, 83 Ky. 451; *State v. McSpaden*, 137 Mo. 628; *State v. Rust*, 2 Ohio Cir. Dec. 577, 4 Ohio Cir. Ct. 329; *State v. Stevens*, 29 Oregon 465.

9. *Jeffries v. Harrington*, 11 Colo. 191; *Wright v. Noell*, 16 Kan. 607; *State v. Hostetter*, 137 Mo. 636, 59 Am. St. Rep. 515.

10. *Offices to Which Women Eligible* — *County Clerk.* — *Jeffries v. Harrington*, 11 Colo. 191; *Wilson v. Newton*, 87 Mich. 493, 24 Am. St. Rep. 173; *State v. Hostetter*, 137 Mo. 636, 59 Am. St. Rep. 515; *Warwick v. State*, 25 Ohio St. 22.

11. *County Superintendent.* — *Huff v. Cook*, 44 Iowa 639; *Wright v. Noell*, 16 Kan. 607; *State*

v. Gorton, 33 Minn. 345. *Contra*, *State v. Stevens*, 29 Oregon 464.

12. *Master in Chancery.* — *Schuchardt v. People*, 99 Ill. 501, 39 Am. Rep. 34.

13. *Member of School Committee.* — *Opinion of Justices*, 115 Mass. 602.

14. *Offices to Which Women Ineligible* — *Jailer.* — *Atchison v. Lucas*, 83 Ky. 451.

15. *School Director.* — *State v. McSpaden*, 137 Mo. 628.

16. *Superintendent of Schools.* — *State v. Stevens*, 29 Oregon 465.

17. *Director of Workhouse.* — *State v. Rust*, 2 Ohio Cir. Dec. 577, 4 Ohio Cir. Ct. 329.

18. *Justice of the Peace.* — See the title JUSTICES OF THE PEACE, vol. 18, p. 11.

19. *Confirmed by Subsequent Statute.* — *Huff v. Cook*, 44 Iowa 639.

20. *Meaning of "He" and "His."* — *State v. Hostetter*, 137 Mo. 636, 59 Am. St. Rep. 515. And see *HE*, vol. 15, p. 303.

21. See the title ATTORNEY AND CLIENT, vol. 3, p. 285.

22. *Property Qualification.* — *Dumelow v. Lees*, 1 C. & K. 408, 47 E. C. L. 408; *Reg. v. Ed-dowes*, 1 El. & El. 330, 102 E. C. L. 330, 5 Jur. N. S. 469, 28 L. J. Q. B. D. 84; *Easton v. Alce*, 7 H. & N. 452, 8 Jur. N. S. 156, 31 L. J. Exch. 115, 5 L. T. N. S. 323, 10 W. R. 110; *Childers v. Childers*, 3 Jur. N. S. 1277, 26 L. J. Ch. 743, 1 De G. & J. 482, *reversing* 3 Kay & J. 310.

while such a qualification for voting is not unknown in the *United States*,¹ it is extremely rare as a qualification for holding office. In a few jurisdictions it is required that members of municipal councils and similar bodies shall be freeholders,² or shall have paid their taxes.³

f. RIGHT TO VOTE. — It is provided in several state constitutions that none but qualified voters shall be elected or appointed to office.⁴ But an officeholder who, as an elector, was eligible at the time of his election does not become ineligible because subsequently his name is stricken from the list of registered voters.⁵

6. Disqualifications — *a. IN GENERAL.* — Under the Federal Constitution and the constitutions of many states certain disqualifications to public office are enumerated.⁶

b. HOLDING INCOMPATIBLE OFFICES — (1) *In General.* — Probably the most frequent ground of ineligibility to office is the holding of another office by the candidate. Such ground rests not upon the physical impossibility of performing the duties of both offices,⁷ but upon express constitutional or statutory provisions. Sometimes the incompatible offices are enumerated, but more often there is found a general prohibition against holding two offices, with possibly the exception of certain specified offices not deemed incompatible.⁸ The holder of a judicial office may be elected to another office not judicial, provided the term of the latter does not begin until after the former ends;⁹ and it seems that two offices wholly or chiefly ministerial are not incompatible unless made so by express legislation.¹⁰ Two offices are incompatible where the one includes the power of removal over the other, as those of governor and mayor.¹¹

(2) *Lucrative Office.* — Sometimes the prohibition is aimed against those who already hold a "lucrative" office under some other power, and extends only to the holding of "a civil office of profit." Usually postmasters of small offices are excepted.¹²

Interpreting the Word "Lucrative" as descriptive of an office, it has been held that the following are lucrative offices: inspector of customs,¹³ postmaster¹⁴ or deputy postmaster,¹⁵ school trustee,¹⁶ township collector,¹⁷ deputy treasurer,¹⁸ trustee of a deaf and dumb institute,¹⁹ and a position upon the retired list of the United States army;²⁰ but it has been held that the office of president of the board of trustees of a benevolent institution is not a lucrative office.²¹

1. See the title ELECTIONS, vol. 10, p. 595.

2. State v. McAllister, 38 W. Va. 485.

3. Darrow v. People, 8 Colo. 417; People v. Hamilton, 24 Ill. App. 609.

4. Right to Vote. — Darrow v. People, 8 Colo. 417; *In re* Thomas, 16 Colo. 441; State v. Holman, 58 Minn. 219; State v. Williams, 99 Mo. 291; State v. Rebenack, 135 Mo. 340; State v. McMillen, 23 Neb. 385; State v. Covington, 29 Ohio St. 102; State v. Wilson, 29 Ohio St. 347; State v. Rust, 2 Ohio Cir. Dec. 577, 4 Ohio Cir. Ct. 329; State v. Wagar, 10 Ohio Cir. Dec. 160, 19 Ohio Cir. Ct. 149; State v. Crawford, 17 R. I. 292.

This clause, which appeared in the old Florida Constitution, was omitted in the revision of 1885. State v. George, 23 Fla. 585.

5. McPherson v. State, 3 W. Va. 564.

6. Disqualifications. — See the constitutions.

7. Holding Incompatible Offices. — People v. Green, 58 N. Y. 295. And see INCOMPATIBLE, vol. 16, p. 152.

8. See the constitutions and statutes of the various states.

9. Holding Judicial and Nonjudicial Office. — Smith v. Moore, 90 Ind. 299; Vogel v. State, 107 Ind. 374.

10. Two Ministerial Offices. — State v. Feibleman, 28 Ark. 424.

11. Superior and Inferior Offices. — Atty.-Gen. v. Detroit, 112 Mich. 145.

12. Lucrative Office. — As in the Constitutions of California (art. 4, § 20) and Illinois (art. 4, § 3). See further the Constitutions of North Carolina (art. 14, § 7), Texas (art. 16, § 40), and Missouri (art. 9, § 18).

13. Crawford v. Dunbar, 52 Cal. 36. But see Saunders v. Haynes, 13 Cal. 145.

14. Foltz v. Kerlin, 105 Ind. 221, 55 Am. Rep. 197; Wood v. State, 130 Ind. 366; McGregor v. Balch, 14 Vt. 429, 39 Am. Dec. 231.

15. Bishop v. State, 149 Ind. 223, 63 Am. St. Rep. 279.

16. Chambers v. State, 127 Ind. 365.

17. Packingham v. Harper, 66 Ill. App. 96.

18. Lucas v. Shepherd, 16 Ind. 368.

19. Chambers v. State, 127 Ind. 366.

20. State v. DeGress, 53 Tex. 387.

21. State v. Harrison, 116 Ind. 311.

For Other Illustrations of what have been held to be and what not to be lucrative offices, see LUCRATIVE — LUCRATIVE OFFICE, vol. 19, p. 601.

In California, however, it has been held that the lucrative office referred to by the constitution was a federal office only.¹

(3) *Meaning of "Civil Office."* — A "civil office of profit" includes that of school superintendent of a county,² but not that of city clerk.³

One Who Is an Officer de Facto Only is not disqualified to hold a civil office of profit.⁴

(4) *Incompatible State Offices.* — In construing the various statutes on the subject it has been held that the following state offices are incompatible: mayor and governor;⁵ mayor of a city and any other office not judicial;⁶ mayor and prison director;⁷ major-general and colonel of a company attached to a brigade of the division commanded by the major-general;⁸ state senator and paymaster in the army;⁹ member of Congress and Supreme Court judge;¹⁰ judge and member of the legislature;¹¹ judge of the Supreme Court and commissioner of appraisal;¹² chancery clerk and member of the legislature;¹³ town clerk and alderman;¹⁴ jurat and town clerk;¹⁵ member of the board of health and jury commissioner;¹⁶ jury commissioner and police commissioner;¹⁷ coroner and county commissioner or justice of the peace;¹⁸ justice of the peace and township trustee;¹⁹ justice of the peace and clerk of the court;²⁰ notary public and county clerk or receiver of public money;²¹ highway commissioner and sheriff;²² deputy sheriff and tax collector;²³ attorney-general and prosecutor of the pleas;²⁴ prosecuting attorney and representative in Congress;²⁵ counsel to the health department and chief supervisor of election;²⁶ trustee and schoolteacher;²⁷ prudential committeeman and auditor of a school district;²⁸ school director and deputy treasurer of the township;²⁹ county commissioner and member of the county board of education;³⁰ county auditor and school comptroller;³¹ supervisor of a town and superintendent of the poor;³² supervisor and township treasurer;³³ superintendent of a county infirmary and member of the board of directors of the same institution;³⁴ or treasurer and president of the same institution;³⁵ member of the board of health and sanitary policeman;³⁶ city assessor and member of a board of state tax commissioners;³⁷ Circuit Court commissioner and supervisor of election;³⁸ city marshal and city councilman;³⁹ secretary of a city and recorder;⁴⁰

1. *Meaning in California.* — *People v. Leonard*, 73 Cal. 230, stated under LUCRATIVE — LUCRATIVE OFFICE, vol. 19, p. 601.

2. *Meaning of "Civil Office."* — *Crawford v. Dunbar*, 52 Cal. 36.

3. *Mohan v. Jackson*, 52 Ind. 599.

4. *De Facto Officer May Hold Civil Office of Profit.* — *People v. Turner*, 20 Cal. 142; *Crawford v. Dunbar*, 52 Cal. 36; *Reg. v. Smith*, 4 U. C. Q. B. 322; *In re Brennan*, 6 U. C. Q. B. O. S. 330; *Reg. v. Cornwall*, 25 U. C. Q. B. 293.

5. *Incompatible State Offices.* — *Atty.-Gen. v. Detroit*, 112 Mich. 145.

6. *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49.

7. *Howard v. Shoemaker*, 35 Ind. 111.

8. *State v. Brown*, 5 R. I. 1.

9. *State v. Sadler*, 25 Nev. 131.

10. *Calloway v. Sturm*, 1 Heisk. (Tenn.) 764.

11. *State v. Draper*, 45 Mo. 355.

12. *Matter of Gilroy*, 11 N. Y. App. Div. 65.

13. *Brady v. West*, 50 Miss. 68.

14. *Rex v. Pateman*, 2 T. R. 777; *Rex v. Tizzard*, 9 B. & C. 418, 17 E. C. L. 411.

15. *Milward v. Thatcher*, 2 T. R. 81.

16. *State v. Arata*, 32 La. Ann. 193.

17. *State v. Newhouse*, 29 La. Ann. 824.

18. See the title CORONERS, vol. 7, p. 600.

19. *Vogel v. State*, 107 Ind. 380.

20. *Adam v. Mengel*, (Pa. 1887) 8 Atl. Rep. 606.

For Other Illustrations of offices held to be incompatible with that of justice of the peace, see the title JUSTICES OF THE PEACE, vol. 18, pp. 11, 12.

21. See the title NOTARY PUBLIC, vol. 21, p. 557.

22. *People v. Nostrand*, 46 N. Y. 375.

23. *Keating v. Covington*, (Ky. 1896) 35 S. W. Rep. 1026.

24. *State v. Thompson*, 20 N. J. L. 689.

25. *State v. Buttz*, 9 S. Car. 156.

26. *Davenport v. New York*, 67 N. Y. 456.

27. *Ferguson v. True*, 3 Bush (Ky.) 255.

28. *Cotton v. Phillips*, 56 N. H. 220.

29. *Ex p. Meehan*, 1 Leg. Chron. (Pa.) 307.

30. *State v. Thompson*, 122 N. Car. 493.

31. *Ex p. Carey*, 3 Leg. Gaz. (Pa.) 78.

32. *People v. Clute*, 50 N. Y. 451.

33. *Carbondale Tp.*, 2 Luz. Leg. Reg. (Pa.) 15.

34. *State v. Taylor*, 12 Ohio St. 130; *State v. Oglevee*, 37 Ohio St. 142.

35. *State v. Heddleston*, 8 Ohio Dec. (Reprint) 77, 5 Cinc. L. Bul. 502.

36. *State v. Newark*, 8 Ohio Dec. 344, 6 Ohio N. P. 523.

37. *Atty.-Gen. v. Oakman*, 126 Mich. 717, 8 Detroit Leg. N. 196.

38. *Davenport v. New York*, 67 N. Y. 456.

39. *State v. Hoyt*, 2 Oregon 246.

40. *State v. Brinkerhoff*, 66 Tex. 45.

county commissioner and any city officer.¹ Clerks of one class of courts cannot be made *ex officio* clerks of another class.²

(5) *Incompatible Federal and State Offices.* — It is a general rule that a federal officeholder may not at the same time hold a state office.³ Under this rule the following offices have been held to be incompatible: United States centennial commissioner and elector for President;⁴ United States senator and clerk of the Court of Common Pleas;⁵ paymaster in the United States army and clerk of the County Court;⁶ United States district attorney and attorney-general;⁷ colonel in a United States regiment and member of a board of street and water commissioners;⁸ an officer of the United States army on the retired list and mayor of a city⁹ or treasurer of a county;¹⁰ member of assembly and federal judge;¹¹ postmaster and judge of a County Court, or justice of the peace,¹² or county commissioner,¹³ or township collector,¹⁴ or township trustee;¹⁵ deputy United States marshal and commissioner of an incorporated district;¹⁶ deputy inspector and collector of customs and sheriff;¹⁷ major of volunteers in the service of the United States and auditor of accounting;¹⁸ director in a deaf and dumb institution and United States marshal.¹⁹ A lieutenant of a gang of workmen in the navy yard, or a post-office letter carrier, or a clerk in the mint cannot be appointed an election officer.²⁰

A Pending Contest for a State Office does not prevent the contestant from accepting a federal office.²¹

A Formal Surrender of the Federal Office qualifies the incumbent to accept a state office.²²

(6) *Incompatible Departments.* — A judge cannot hold another office belonging to the executive department of the government,²³ nor can a member of the legislative department hold an office in either of the other two departments.²⁴

(7) *Offices Not Incompatible* — (a) *State Offices.* — The following offices have been held not to be incompatible, generally on the ground that one of the offices was not deemed to be included in the constitutional or statutory prohibition: state senator and city attorney;²⁵ secretary of state and state senator;²⁶ secretary of state and adjutant-general;²⁷ common councilman and town clerk;²⁸ supervisor and deputy circuit clerk;²⁹ clerk of District Court and court commissioner;³⁰ district clerk and collector of the district;³¹ city

1. *State v. Plymell*, 46 Kan. 294.

2. *Bouanchaud v. D'Hebert*, 21 La. Ann. 138.

3. *Incompatible Federal and State Offices.* — *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 224, 499; *De Turk v. Com.*, 129 Pa. St. 151, 15 Am. St. Rep. 705.

4. *In re Corliss*, 11 R. I. 638, 23 Am. Rep. 538.

5. *State v. Parkhurst*, 9 N. J. L. 427.

6. *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 407. For Illustrations of Offices Held Not to Be Incompatible with Federal Court Clerkships, see the title CLERKS OF COURTS, vol. 6, p. 134.

7. *State v. Clarke*, 3 Nev. 566.

8. *Oliver v. Jersey City*, 63 N. J. L. 96.

9. *State v. De Gress*, 53 Tex. 387.

10. *Hill v. Territory*, 2 Wash. Ter. 147. But see *In re Treasurer's Appointment*, 5 Kulp (Pa.) 98.

11. *State v. Mason*, 61 Ohio St. 513.

12. *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 229; *Justices v. Harcourt*, 4 B. Mon. (Ky.) 500; *Hoglan v. Carpenter*, 4 Bush (Ky.) 89; *McGregor v. Balch*, 14 Vt. 428, 39 Am. Dec. 231.

13. *De Turk v. Com.*, 129 Pa. St. 151, 15 Am. St. Rep. 705.

14. *Packingham v. Harper*, 66 Ill. App. 96.

15. *Bishop v. State*, 149 Ind. 223, 63 Am. St. Rep. 279; *State v. Crowe*, 150 Ind. 455.

16. *Com. v. Ford*, 5 Pa. St. 67.

17. *Bunting v. Willis*, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

18. *Mehringer v. State*, 20 Ind. 103.

19. *Dickson v. People*, 17 Ill. 191.

20. *Matter of Certain Election Officers*, 2 Brews. (Pa.) 133.

21. *State v. Kelly*, (Miss. 1902) 31 So. Rep. 901.

22. *De Turk v. Com.*, 129 Pa. St. 151, 15 Am. St. Rep. 705.

23. *Incompatible Departments.* — *State Bank v. Curran*, 10 Ark. 142; *People v. Sanderson*, 30 Cal. 160.

24. *People v. Provines*, 34 Cal. 520.

25. *State Offices Not Incompatible.* — *Carpenter v. People*, 8 Colo. 129.

26. *State v. Clendenin*, 24 Ark. 78.

27. *State v. Weston*, 4 Neb. 234.

28. *Rex v. Jones*, 1 B. & Ad. 677, 20 E. C. L. 467.

29. *State v. Feibleman*, 28 Ark. 424.

30. *Kenney v. Goergen*, 36 Minn. 190.

31. *Howland v. Luce*, 16 Johns. (N. Y.) 135.

clerk and clerk of the District Court; ¹ clerk of the Circuit Court and of a County Court; ² clerk of the District Court or member of the municipal council and member of the jury commission; ³ member of the police jury and clerk of the District Court of the same parish; ⁴ member of the legislature and clerk of court ⁵ or deputy clerk of court; ⁶ assistant clerk and member of assembly; ⁷ member of the legislature and of a bridge committee appointed thereby; ⁸ supervisor of a city ward and commissioner of excise; ⁹ township supervisor and deputy sheriff; ¹⁰ coroner and sheriff; ¹¹ sheriff and city marshal; ¹² deputy sheriff and school director; ¹³ school director and judge of election; ¹⁴ overseer and assistant overseer of parish; ¹⁵ city assessor and member of the board of state tax commissioners; ¹⁶ town marshal and bailiff; ¹⁷ alderman and public printer; ¹⁸ master commissioner of a Circuit Court and city attorney; ¹⁹ chief burgess and justice of the peace; ²⁰ justice of the peace and constable; ²¹ justice of the peace and associate judge; ²² county treasurer and associate judge; ²³ justice of the County Court and member of the board of school directors; ²⁴ register of deeds and trial justice; ²⁵ judge and member of a commission to receive Washington relics; ²⁶ notary public and chief burgess of a county or librarian to the district attorney. ²⁷ A sheriff who, after the expiration of his term of office, continues to collect unpaid taxes for which he is accountable does not for this reason still hold an office or "place of trust or profit" so as to render him ineligible to the office of clerk of the court. ²⁸ Under the Constitution of *Texas*, holding the office of justice of the peace, or county commissioner, or notary public, or postmaster does not disqualify the incumbent to hold any other office at the same time. ²⁹

(b) **Federal and State Offices.** — Federal and state offices respectively that have been held not to be incompatible are the following: district attorney of the United States and city recorder; ³⁰ retired army officer and aqueduct commissioner; ³¹ examiner in the department of justice and special assistant attorney; ³² clerk in a United States pension agency and member of the legislature; ³³ district clerk and collector of the district; ³⁴ district attorney and captain in the volunteer service of the United States; ³⁵ pension officer and clerk of the penitentiary; ³⁶ surveyor-general and state comptroller; ³⁷ captain in the United States army and district attorney; ³⁸ night watchman in a post office and alderman; ³⁹ district judge and inspector of customs of the United States,

1. *Abry v. Gray*, 58 Kan. 148.

2. *State v. Lusk*, 48 Mo. 242.

3. *State v. Somnier*, 33 La. Ann. 237; *State v. Taylor*, 44 La. Ann. 783.

4. *Voorhies v. Fournet*, 15 La. Ann. 597. See also *State v. Montgomery*, 25 La. Ann. 138.

5. *Stewart v. New York*, 15 N. Y. App. Div. 548.

6. *People v. Green*, 58 N. Y. 296.

7. *People v. Murray*, 73 N. Y. 535.

8. *State v. George*, 22 Oregon 142, 29 Am. St. Rep. 586.

9. *People v. Lahr*, 71 Hun (N. Y.) 271.

10. *People v. Gosch*, 82 Mich. 22.

11. *Powell v. Wilson*, 16 Tex. 59. See also the title *CORONERS*, vol. 7, p. 601, note.

12. *Atty.-Gen. v. Connors*, 27 Fla. 329.

13. *State v. Bus*, 135 Mo. 325.

14. *Matter of District Atty.*, 11 Phila. (Pa.) 645, 32 Leg. Int. (Pa.) 59; *McPherson's Case*, 2 York Leg. Rec. (Pa.) 135.

15. *Worth v. Newton*, 10 Exch. 247, 23 L. J. Exch. 338.

16. *Atty.-Gen. v. Oakman*, 126 Mich. 717, 8 Detroit Leg. N. 106.

17. *Lewis v. Wall*, 70 Ga. 646.

18. *Com. v. Binns*, 17 S. & R. (Pa.) 219.

19. *Goodloe v. Fox*, 96 Ky. 627.

20. *Com. v. Shindle*, 19 Pa. Co. Ct. 258.

21. *Com. v. Kirby*, 2 Cush. (Mass.) 577.

22. *Com. v. Northumberland County*, 4 S. & R. (Pa.) 275.

For Other Offices held to be compatible with that of justice of the peace, see the title *JUSTICES OF THE PEACE*, vol. 18, p. 12, note.

23. *State v. McCollister*, 11 Ohio 46.

24. *Heller v. Stremmel*, 52 Mo. 309.

25. *Opinions of Justices*, 68 Me. 594.

26. *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734.

27. See the title *NOTARY PUBLIC*, vol. 21, p. 557.

28. *McNeill v. Somers*, 96 N. Car. 467.

29. *Gaal v. Townsend*, 77 Tex. 464.

30. **Federal and State Offices.** — *Com. v. Dallas*, 4 Dall. (Pa.) 229, 3 Yeates (Pa.) 300.

31. *People v. Duane*, 121 N. Y. 367.

32. *Crosthwaite v. U. S.*, 30 Ct. Cl. 300.

33. *State v. Mason*, 61 Ohio St. 62.

34. *Howland v. Luce*, 16 Johns. (N. Y.) 135.

35. *Bryan v. Cattell*, 15 Iowa 538.

36. *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

37. *People v. Whitman*, 10 Cal. 38.

38. *Bryan v. Cattell*, 15 Iowa 538.

39. *Doyle v. Raleigh*, 89 N. Car. 133, 45 Am. Rep. 677.

both federal offices.¹

c. HAVING SERVED PRIOR TERM. — It is sometimes provided by constitution or statute that certain officers shall not hold office for more than a specified number of consecutive terms.² This has been construed to refer to strictly consecutive terms, so that the officer is rendered again eligible by an interregnum between his terms.³ No tenure of office short of a full term counts in estimating a term,⁴ and illegality of method in securing one term is no bar to holding office during a subsequent term.⁵ A prohibition against two successive terms does not make one who has filled one term ineligible to fill a vacancy for a part of a term.⁶ Suspension from office does not render the suspended officer ineligible for a succeeding term in the same office.⁷

d. CONVICTION OF CRIME. — A very common disqualification to hold office is conviction of crime,⁸ such as bribery,⁹ embezzlement or defalcation of public funds,¹⁰ duelling,¹¹ polygamy,¹² obtaining votes corruptly,¹³ or insurrection or rebellion against the United States.¹⁴ Previous bad character or habits or mere official misdemeanors will not disqualify one otherwise eligible.¹⁵

Failure to Account for Public Money renders a candidate ineligible to public office.¹⁶

An Officer Who Resigns Pending Proceedings to Remove Him may not be reappointed until he is acquitted or the proceedings are dismissed.¹⁷

e. COLOR. — In *Georgia* it was decided, soon after the close of the civil war, that in the absence of constitutional prohibition color did not disqualify one from holding office.¹⁸

f. POLITICAL OPINION. — Political opinion cannot be made a test of eligibility to office. And in *Indiana* and *Michigan* a law providing for the appointment of election inspectors from each of the two leading political parties has been held to be unconstitutional.¹⁹ In other states, however, a contrary view obtains.²⁰

1. *People v. Turner*, 20 Cal. 142.

2. *Having Served Prior Term.* — *Davis v. Pat-ten*, 41 Kan. 480; *Hall v. Hostetter*, 17 B. Mon. (Ky.) 785; *Owensboro v. Webb*, 2 Met. (Ky.) 577; *State v. Giles*, 1 Chand. (Wis.) 112.

3. *Horton v. Watson*, 23 Kan. 229.

4. *Meaning of "Term."* — *State v. Linkhauer*, 142 Ind. 94; *Koontz v. Kurtzman*, 12 Wash. 59; *Smalley v. Snell*, 6 Wash. 161. But see *Jeffries v. Rowe*, 63 Ind. 592.

5. *Dryden v. Swinburne*, 20 W. Va. 89.

6. *Gorrell v. Bier*, 15 W. Va. 311.

7. *Effect of Suspension.* — *In re Advisory Opinion*, 31 Fla. 1.

8. *Conviction of Crime.* — *People v. Kiple*, 171 Ill. 44; *Gandy v. State*, 10 Neb. 243; *Barker v. People*, 3 Cow. (N. Y.) 686.

9. *Bribery.* — See the title BRIBERY, vol. 4, p. 913; and see *Brady v. Howe*, 50 Miss. 607.

10. *Embezzlement.* — Const. Cal., art. 4, § 21; *State v. Moores*, 52 Neb. 770.

11. *Duelling.* — *Morgan v. Vance*, 4 Bush (Ky.) 325; *Cochran v. Jones*, (Ky.) 14 Am. L. Reg. N. S. 222. And see the title DUELLING, vol. 10, p. 315.

As to the constitutionality of a statute requiring officeholders to take an oath that they have not countenanced duelling, see *Matter of Dorsey*, 7 Port. (Ala.) 294.

12. *Polygamy.* — *Wenner v. Smith*, 4 Utah 238.

13. *Election Corruption.* — See the title ELECTIONS, vol. 10, pp. 781, 792; and see *People v. Goddard*, 8 Colo. 432.

14. *Rebellion.* — *Matter of Executive Communication*, 12 Fla. 651; *Privett v. Stevens*, 25 Kan. 275; *State v. Watkins*, 21 La. Ann. 631;

Hudspeth v. Garrigues, 21 La. Ann. 684; *Worthy v. Barrett*, 63 N. Car. 199.

But involuntary service in the Confederate army does not disqualify one for the office of sheriff. *Privett v. Stevens*, 25 Kan. 275.

15. *Previous Bad Character.* — *Dassey v. Sanders*, (Ky. 1895) 33 S. W. Rep. 193; *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555.

16. *Failure to Account for Public Funds.* — *George v. State*, 1 Ark. 21; *Taylor v. Governor*, 1 Ark. 21; *Swepton v. Barton*, 39 Ark. 549; *People v. Whitman*, 10 Cal. 38; *Cawley v. People*, 95 Ill. 249; *Schuck v. State*, 136 Ind. 63; *State v. Echeveria*, 33 La. Ann. 709; *State v. Reid*, 45 La. Ann. 162; *Brady v. Howe*, 50 Miss. 607; *Hoskins v. Brantley*, 57 Miss. 814; *State v. Moores*, 56 Neb. 1; *Pucket v. Bean*, 11 Heisk. (Tenn.) 600.

17. *Resigning under Fire.* — *State v. Dart*, 57 Minn. 261.

18. *Color.* — *White v. Clements*, 39 Ga. 232. See also *Smith v. Moody*, 26 Ind. 299.

19. *Political Opinion.* — *Evansville v. State*, 118 Ind. 426. For the *Michigan* cases see the title ELECTIONS, vol. 10, p. 667.

20. See the title ELECTIONS, vol. 10, p. 667.

It has been held that a proviso declaring that "no Black Republican or indorser or supporter of the Helper book" should be appointed to any office was unconstitutional if it meant to debar one on account of political or religious opinion. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 573.

It has been held that neither the Constitution nor the Civil Service Act was violated by a provision that not more than a certain proportion of the board of commissioners could be taken

g. BEING CLERGYMAN. — A "civil office in this state," from which clergymen are excluded in *Delaware*, does not mean the office of treasurer of a municipal corporation.¹

h. INTEREST. — It has often been enacted that members of legislative bodies are ineligible to offices created by such bodies, or the salary of which has been increased, and that official participation in the conduct of an election bars one as a candidate at such election.² The same rule applies to officers with the power of appointment. They cannot appoint themselves.³ Thus, it has been held that a registrar of voters cannot be a candidate at the succeeding election,⁴ and that a member of a board of aldermen cannot fill an office by appointment of the board,⁵ even if he resigns from the board during his term of office.⁶ A member of the legislature cannot fill the office of levee commissioner,⁷ nor can a clerk of the bureau of city revenue in New York city hold the position of instructor in the evening high school.⁸ But a candidate for the office of township collector may, it seems, act as judge of his own election,⁹ and a county clerk is not disqualified for election by exercising statutory supervision over the election.¹⁰

i. BEING CORPORATION. — Since it possesses no moral qualities and cannot take the oath, a corporation is not eligible to office.¹¹

7. Removal of Disqualifications. — A disqualification to hold office existing at the time of election may be removed before installation in office,¹² but it cannot be removed by repealing the statute which at the time of his election disqualified the officeholder.¹³ Ineligibility by reason of a conviction of crime is removed by a pardon.¹⁴ One who is ineligible to a second office during the term of his first office does not render himself eligible by resigning the first during the term thereof.¹⁵ The objection to electing an officeholder to an incompatible office is of no force where the acceptance of the latter office *ipso facto* vacates the former.¹⁶

8. Effect of Electing Ineligible Person. — The election or appointment to office of a person who is not eligible gives him no right to hold the office. The election is simply void.¹⁷ But if he assumes to exercise the functions of the office his acts have the validity of those of a *de facto* officer.¹⁸ The action

from one party. *Rogers v. Buffalo*, 123 N. Y. 173.

1. Being Clergyman. — *State v. Wilmington*, 3 Harr. (Del.) 294.

2. Disqualification by Interest. — *Montgomery v. State*, 107 Ala. 372; *People v. Curtis*, 1 Idaho 753; *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169; *State v. Valle*, 41 Mo. 29; *State v. Boyd*, 21 Wis. 208.

3. Charlesworth v. Rudyard, 1 C. M. & R. 498, 4 Tyrw. 824; *People v. Thomas*, 33 Barb. (N. Y.) 287.

4. Sublett v. Bedwell, 47 Miss. 266, 12 Am. Rep. 338.

But where the prohibition was simply against a candidate holding the office of supervisor of registration, it was held that one who received a majority of the votes for the office of assessor while acting as such supervisor was not debarred from holding the office of assessor. *State v. Cosgrove*, 34 Neb. 386.

5. Doyle v. Board of Education, 54 N. J. L. 313.

6. Ellis v. Lennon, 86 Mich. 468.

7. Shelby v. Alcorn, 36 Miss. 273, 72 Am. Dec. 169.

8. McAdam v. New York, 36 Hun (N. Y.) 340.

9. McKenzie's Election, 13 Pa. Co. Ct. 546.

10. Kindel v. Le Bert, 23 Colo. 385, 58 Am. St. Rep. 234.

11. Corporations Not Eligible. — *Fox v. Mohawk, etc.*, *Humane Soc.*, 25 N. Y. App. Div. 26, affirmed 165 N. Y. 517.

12. Removal of Disqualification. — *Smith v. Moore*, 90 Ind. 294; *Vogel v. State*, 107 Ind. 374; *Brown v. Goben*, 122 Ind. 113; *Privett v. Bickford*, 26 Kan. 52, 40 Am. Rep. 301; *Demaree v. Scates*, 50 Kan. 275, 24 Am. St. Rep. 113; *Kirkpatrick v. Brownfield*, 97 Ky. 558, 53 Am. St. Rep. 422; *Com. v. Pyle*, 18 Pa. St. 519; *Com. v. Shoener*, 1 Leg. Chron. (Pa.) 177. See also *supra*, this section, *Special Qualifications — Citizenship*.

13. Hill v. Territory, 2 Wash. Ter. 147.

14. Pardon. — *Hildreth v. Heath*, 1 Ill. App. 82; *Jones v. Board of Registrars*, 56 Miss. 766, 31 Am. Rep. 385. And see the title *REPRIEVE, PARDON, AND AMNESTY*.

15. By Resignation. — *Ellis v. Lennon*, 86 Mich. 468; *Com. v. Hatter*, 1 Leg. Rec. (Pa.) 86.

16. Northway v. Sheridan, 111 Mich. 18. See also *infra*, this title, *Termination of Authority — subdiv. 3. d. Acceptance of Incompatible Office*.

17. Effect of Electing Ineligible Person. — *Spear v. Robinson*, 29 Me. 531; *State v. Newman*, 91 Mo. 445; *State v. Crawford*, 17 R. I. 292.

18. See the title DE FACTO OFFICERS, vol. 8, p. 788; and see Brady v. Howe, 50 Miss. 607;

of a board of aldermen declaring a person to be elected cannot oust the court of its jurisdiction to inquire into the matter.¹ But adjudging a person to be incapable of holding the office gives to the candidate receiving the next highest number of votes no claim thereto;² on the contrary, the old incumbent has a right to qualify and to hold over until a lawful successor is elected and qualified.³

9. Evidence. — The question of eligibility is one which the courts must settle,⁴ but it cannot be tried in a collateral proceeding.⁵ It has been held that an election certificate is not *prima facie* evidence of eligibility.⁶ Where one claims to act under special statutory authority, he must show that he has the qualifications thereby required,⁷ and the law may require him to produce a certificate of fitness.⁸

Presumption of Eligibility. — That an officer has been elected and commissioned creates a strong presumption of eligibility.⁹ And the same presumption is indulged in case of appointment to office. Where the appointment is coupled with a condition which has not been performed, it becomes valid if the appointing power subsequently dispenses with the condition.¹⁰

VI. METHODS OF CONFERRING OFFICE — 1. In General. — Public offices are conferred either by election or by appointment.

2. By Election. — All questions concerning elections are fully discussed elsewhere in this work.¹¹

3. By Appointment — *a.* **DEFINITION.** — An appointment, as the term is applied to public officers, may be defined as the selection or designation of a person by the person or persons having authority therefor to fill an office or public function and to discharge the duties thereof.¹²

Distinguished from Election. — The term "appointment" is to be distinguished from "election." Election means that the person is chosen by the principle of selection in the nature of a vote, participated in by the public generally or by the entire class of persons qualified to express their choice in this manner.¹³ The fact that the selection or designation for office is made by a collective body does not render it an election as distinguished from an appointment,¹⁴ even if the selection is made by ballot, as this is but a means which the appointing body may adopt for making its choice of the individual to be appointed;¹⁵ nor does the fact that the collective body is directed to "elect" the one whom it will designate for the office render its designation of a certain person an election as distinguished from an appointment.¹⁶ Where the constitution provides that certain officers shall be "elected," the legislature has no power to select or to provide for the designation or selection of such officers by the governor or by a limited collective body, as such designation

Ferris v. Miller, 24 Vt. 32. *Contra*, *Shelby v. Alcorn*, 36 Miss. 273. 72 Am. Dec. 169.

1. *Flatam v. State*, 56 Tex. 93.

2. For a full discussion of this rule and certain exceptions to it, see the title ELECTIONS, vol. 10, p. 758.

3. *Richards v. McMillen*, 36 Neb. 352.

4. **Evidence.** — *Palmer v. Woodbury*, 14 Cal. 43.

5. *Turner v. Melony*, 13 Cal. 621; *Satterlee v. San Francisco*, 23 Cal. 314; *Ross v. Williamson*, 44 Ga. 501; *Creighton v. Piper*, 14 Ind. 182.

6. *Hoglan v. Carpenter*, 4 Bush (Ky.) 91.

7. **Burden of Proof on Candidate.** — *State v. Williamstown*, etc., *Turnpike Co.*, 24 N. J. L. 547.

8. *Burnham v. Sumner*, 50 Miss. 517.

9. **Presumption of Eligibility.** — *People v. Connell*, 28 Ill. App. 285; *Hannon v. Grizzard*, 96 N. Car. 293. *Compare* *Smith v. People*, 44 Ill. 16. And see generally the title PRESUMPTIONS, vol. 22, p. 1266.

10. *State v. Ring*, 29 Minn. 78.

11. See the title ELECTIONS, vol. 10, p. 552.

12. **Definition.** — *Wickersham v. Brittan*, 93 Cal. 34; *Speed v. Crawford*, 3 Met. (Ky.) 207; *Police Com'rs v. Louisville*, 3 Bush (Ky.) 597; *People v. Lord*, 9 Mich. 227; *State v. Irwin*, 5 Nev. 111; *Sturgis v. Spofford*, 45 N. Y. 446.

13. **Appointment and Election Distinguished.** — See the title APPOINTMENT, vol. 2, p. 474; and see ELECT — ELECTION, vol. 10, p. 550. See also *Carpenter v. People*, 8 Colo. 116; *Matter of Executive Communication*, etc., 25 Fla. 426; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302.

14. *Conger v. Gilmer*, 32 Cal. 75; *State v. McCollister*, 11 Ohio 46. *Compare* *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663.

15. *Conger v. Gilmer*, 23 Cal. 75; *Wickersham v. Brittan*, 93 Cal. 34.

16. *Wickersham v. Brittan*, 93 Cal. 34. See also *Sturgis v. Spofford*, 45 N. Y. 446.

is an appointment as distinguished from an election.¹ So a constitutional provision prohibiting a state senator from being appointed to any civil office does not prohibit his election to such an office.²

Extension of Term. — An extension by the legislature of the term of an officer is in effect an appointment for such additional term.³

Distinguished from Increase of Power. — An act of the legislature increasing the powers and duties of a public officer is not unconstitutional as an appointment by the legislature to a new office, where such increased duties and powers are germane to those attached to the office at the time of the enactment.⁴

Change in Rank. — So a change in rank is not necessarily an appointment to another office. This is shown in the instances in which the Federal Congress has exercised the power of changing the rank of military officers of the United States army.⁵

b. APPOINTING POWER — (1) *In General.* — Under the common law of *England*, the sovereign power belonged to the king, and the power to appoint to public office was unquestionably a sovereign prerogative.⁶ In the *United States* the general power to appoint officers is not inherent in the executive or in any other branch of the government, but is a prerogative of the people, to be exercised by them or by those departments of government to which it has been either expressly or impliedly confided or reserved in the Constitution.⁷ The several departments of the government have implied authority as incident to their principal power — that is, where necessary to their respective legislative, executive, or judicial powers — to appoint the necessary officers to execute their functions.⁸

Requirement of Election Does Not Apply in Emergencies. — A constitutional provision requiring that particular officers shall be elected does not apply to cases of emergency, such as the creation of a new office, or a vacancy, so as to prevent the appointment of the particular officers in such cases.⁹

(2) *Power of Legislature* — (a) *To Make Appointments.* — It has been considered that the legislature has implied power to appoint to public offices unless it is expressly restricted by the constitution with regard to such appointment or unless such power is expressly or impliedly conferred upon some other department or person.¹⁰ A constitutional clause providing for the separation of the legislative, executive, and judicial departments, and declaring that no person shall exercise functions under more than one of them, does not deprive the legislature of the power of appointment.¹¹ The legislature may likewise fill

1. *Speed v. Crawford*, 3 Met. (Ky.) 209.

2. *Carpenter v. People*, 8 Colo. 116.

3. **Extension of Term.** — *People v. Bull*, 46 N. Y. 57. 7 Am. Rep. 302; *People v. McKinney*, 52 N. Y. 374; *People v. Foley*, 148 N. Y. 677. Compare *People v. Batchelor*, 22 N. Y. 128. See also the title CONSTITUTIONAL LAW, vol. 6, p. 929.

4. **Increase of Powers.** — *Shoemaker v. U. S.*, 147 U. S. 282; *Stuart v. Laird*, 1 Cranch (U. S.) 299; *U. S. v. Cooper*, 20 D. C. 104; *Kilgour v. Drainage Com'rs*, 111 Ill. 342; *People v. Inglis*, 161 Ill. 256; *Wales v. Belcher*, 3 Pick. (Mass.) 508; *People v. Raymond*, 37 N. Y. 428; *State v. Pugh*, 43 Ohio St. 98. See also *People v. Fitch*, 147 N. Y. 355.

5. *Wood's Case*, 15 Ct. Cl. 151. And see the title MILITARY LAW, vol. 20, p. 635.

6. **England — Appointing Power in King.** — *People v. Murray*, 70 N. Y. 525 [citing Com. Dig., tit. Officer, A. 1]; 1 Black. Com. 272. See also *State v. Boucher*, 3 N. Dak. 395.

7. **United States — In People.** — *Hovey v. State*, 119 Ind. 395; *State v. Boucher*, 3 N. Dak. 395. And see the title CONSTITUTIONAL LAW, vol. 6, p. 1010.

8. *State v. Hyde*, 121 Ind. 31.

9. **Appointment in Emergencies.** — *State v. Irwin*, 5 Nev. 111; *People v. Fisher*, 24 Wend. (N. Y.) 219; *People v. Snedeker*, 14 N. Y. 52. See also *State v. Crow*, 20 Ark. 209. Compare *State v. Messmore*, 14 Wis. 165.

10. **Legislature — Implied Power.** — *State v. Boucher*, 3 N. Dak. 396.

11. **Effect of Separation of Powers — United States.** — *Travelers' Ins. Co. v. Oswego Tp.*, 19 U. S. App. 321.

Alabama. — *State v. Adams*, 2 Stew. (Ala.) 231.

California. — *People v. Freeman*, 80 Cal.

233, 13 Am. St. Rep. 122.

Dakota. — *Territory v. Scott*, 3 Dak. 357.

Indiana. — *Collins v. State*, 8 Ind. 344; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; *Hovey v. State*, 119 Ind. 386. Compare *State v. Denny*, 118 Ind. 382; *Evansville v. State*, 118 Ind. 426; *State v. Hyde*, 121 Ind. 20.

Maryland. — *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

Michigan. — *People v. Hurlbut*, 24 Mich. 64, 9 Am. Rep. 103.

Nevada. — *State v. Swift*, 11 Nev. 128; *State v. Irwin*, 5 Nev. 111.

offices which it is authorized to create, though the duties of the incumbents may be purely executive.¹

Where the Power to Establish and Maintain Particular Institutions Is Expressly Conferred upon the Legislature, it may appoint the officers for the management and control of such institutions in the absence of a clause expressly denying such power to it.²

Constitutional Provision that Offices Be Filled as Directed by Law. — A general constitutional provision that offices which may be created by the legislature, or whose election or appointment is not otherwise provided for, shall be filled in such manner as may be directed by law, does not prohibit the legislature from making appointments to such offices, nor require that their appointment should be confided to the governor or to some other executive or administrative officer or board.³

A Constitutional Provision Conferring upon the Executive the Power of Appointing All Officers not otherwise provided for, "unless a different mode of appointment be prescribed by the law creating the office," does not deprive the legislature of the power, in creating the office, itself to provide for the appointment of the officer to fill such office.⁴

A Constitutional Provision Conferring General Power upon the Governor to Fill Vacancies in Offices does not prohibit the legislature, in creating a new office, from appointing at the same time a person to fill the office, as in such a case there is no vacancy.⁵ And a constitutional provision conferring upon the governor the power to fill vacancies in a particular office does not prevent the legislature from authorizing the incumbent of a different office to perform the duties of the former office in case of a vacancy, and until an appointment is made by the governor.⁶

Where the Constitution Has Expressly Provided that No Appointing Power Shall Be Exercised by the Legislature except as therein expressly provided, the legislature is absolutely without power to make appointments to public offices unless expressly authorized by the constitution.⁷

Effect of Constitutional Provision for Particular Method of Selection. — If the power to appoint particular officers is expressly conferred upon the governor by the constitution of a state or the organic act of a territory, the legislature has, of course, no power to appoint to such offices;⁸ and the same is, of course, true where the selection of particular officers is required to be by election.⁹ But in *Virginia* a constitutional provision that certain town officers should be elected was held not to prohibit the legislature, in incorporating a new town, from appointing the officers to exercise their functions until other officers

New York. — *Greaton v. Griffin*, (Supm. Ct. Spec. T.) 4 Abb. Pr. N. S. (N. Y.) 310. See also *People v. Bennett*, 54 Barb. (N. Y.) 481.

Oregon. — *Biggs v. McBride*, 17 Oregon 640; *State v. George*, 22 Oregon 142, 29 Am. St. Rep. 586.

Virginia. — *Roche v. Jones*, 87 Va. 484.

Wisconsin. — *U. S. v. Hatch*, 1 Pin. (Wis.) 182.

See also *State v. Boucher*, 3 N. Dak. 389.

1. **Legislature May Fill Offices Whose Creation Is Authorized.** — *People v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; *Biggs v. McBride*, 17 Oregon 640; *State v. George*, 22 Oregon 152, 29 Am. St. Rep. 586; *Eddy v. Kincaid*, 28 Oregon 537.

2. **Provision for Particular Institution.** — *Hovey v. State*, 119 Ind. 395.

3. **Offices to Be Filled as Directed by Law.** — *Travelers' Ins. Co. v. Oswego Tp.*, 19 U. S. App. 321; *People v. Freeman*, 80 Cal. 233, 13

Am. St. Rep. 122; *Hovey v. State*, 119 Ind. 395. Compare *State v. Denny*, 118 Ind. 382.

4. *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572. See to the same effect *State v. Swift*, 11 Nev. 128.

5. *State v. Irwin*, 5 Nev. 111. Compare *State v. Messmore*, 14 Wis. 163.

6. *State v. Monk*, 3 Ala. 415. See also *Kelley v. Edwards*, 38 Mich. 210.

7. **Legislature Prohibited from Exercising Power.** — *University R. Co. v. Holden*, 63 N. Car. 410; *Clark v. Stanley*, 66 N. Car. 59, 8 Am. Rep. 488; *People v. Bledsoe*, 68 N. Car. 457; *People v. McKee*, 68 N. Car. 429; *State v. Kennon*, 7 Ohio St. 546; *State v. Covington*, 29 Ohio St. 102. See also *Cherry v. Burns*, 124 N. Car. 761.

8. **Constitutional Provision for Appointment by Governor.** — *Taylor v. Stevenson*, 2 Idaho 166; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *McCornick v. Thatcher*, 8 Utah 294.

9. *Lawrence v. Hanley*, 84 Mich. 399.

should be regularly elected.¹

Court's Power to Review Legislative Appointments. — The judicial department may, where the legislature has asserted a power to appoint to public office, inquire whether such power exists under the constitution;² but the courts cannot inquire into the motive actuating an appointment.³

(b) **To Provide Mode of Appointment.** — Except when the constitution expressly provides the mode of appointment to office, as by intrusting the appointment of particular officers to some other department or board,⁴ the legislature may provide the mode of appointment to offices which it creates or change existing modes of appointment to offices which it has already created.⁵ Thus, it may undoubtedly commit the power to the governor⁶ or other executive or administrative officer,⁷ or to official collective bodies or boards,⁸ or even to a private body or individual⁹ or a judicial tribunal.¹⁰ In the latter instance, the general constitutional provision dividing the powers of government into the three departments — the legislative, the executive, and the judicial — and prohibiting officers belonging to one department from exercising functions appertaining to another, does not prohibit the legislature from providing for the appointment of particular officers by a judicial tribunal,¹¹ especially where the functions of the officer to be appointed are of a judicial character, or he

1. *Roche v. Jones*, 87 Va. 484. See also *People v. Hayt*, 7 Hun (N. Y.) 39.

2. *State v. Porter*, 1 Ala. 688. Compare *State v. Paul*, 5 Stew. & P. (Ala.) 40.

3. *State v. Adams*, 2 Stew. (Ala.) 231. See also *State v. Paul*, 5 Stew. & P. (Ala.) 40.

4. **Special Method of Appointment Provided in Constitution.** — *Christy v. Sacramento County*, 39 Cal. 3; *Barton v. Kalloch*, 56 Cal. 95; *State v. Towns*, 153 Mo. 91; *Johnson v. State*, 59 N. J. L. 535; *People v. Angle*, 47 Hun (N. Y.) 183; *People v. Raymond*, 37 N. Y. 428; *People v. Blair*, 21 N. Y. App. Div. 213; *State v. Brennan*, 49 Ohio St. 33; *Ice v. Marion County Ct.*, 40 W. Va. 118.

Creating New Office with Same Duties. — Where the constitution provides for the appointment of an officer in a particular manner, the legislature has no power to create a new office for the performance of the same or the principal part of the same duties, and to direct that the appointment be made in another manner. *Warner v. People*, 2 Den. (N. Y.) 272, 43 Am. Dec. 740.

5. **Legislature Providing or Creating Mode of Appointment.** — *Alabama.* — *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

Arkansas. — *State v. Sorrels*, 15 Ark. 574; *State v. Crow*, 20 Ark. 209.

California. — *In re Bulger*, 45 Cal. 553; *Barton v. Kalloch*, 56 Cal. 95.

Colorado. — *People v. Osborne*, 7 Colo. 605; *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236.

Georgia. — *Russell v. Cooley*, 69 Ga. 215.

Illinois. — *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

Indiana. — *French v. State*, 141 Ind. 618; *State v. Hyde*, 129 Ind. 296.

Kentucky. — *Paducah v. Cully*, 9 Bush (Ky.) 325; *Ader v. Newport*, (Ky. 1888) 6 S. W. Rep. 577, 9 Ky. L. Rep. 748.

Louisiana. — *State v. Blanchard*, 6 La. Ann. 515.

Maryland. — *Anderson v. Baker*, 23 Md. 627; *Warfield v. Baltimore County*, 28 Md. 84; *Davis v. State*, 7 Md. 151, 61 Am. Dec. 331; *Townsend v. Kurtz*, 83 Md. 331.

Massachusetts. — *Com. v. Certain Intoxicating Liquors*, 110 Mass. 172.

Mississippi. — *Brady v. West*, 50 Miss. 68.

Missouri. — *Ex p. Lucas*, 160 Mo. 218.

New York. — *People v. Woodruff*, 32 N. Y. 355; *People v. Pinckney*, 32 N. Y. 377.

North Carolina. — *Cherry v. Burns*, 124 N. Car. 761; *Cunningham v. Sprinkle*, 124 N. Car. 638.

Ohio. — *State v. Kennon*, 7 Ohio St. 546; *State v. Covington*, 29 Ohio St. 102; *Chalfant v. State*, 37 Ohio St. 60.

Oregon. — *David v. Portland Water Committee*, 14 Oregon 98.

Pennsylvania. — *Com. v. Armstrong*, 9 Phila. (Pa.) 479, 30 Leg. Int. (Pa.) 432.

Tennessee. — *Luehrman v. Taxing Dist.*, 2 Lea (Tenn.) 425.

6. **Legislature Committing Appointment to Governor.** — *Hovey v. State*, 119 Ind. 395; *State v. Seavey*, 22 Neb. 454; *State v. Bemis*, 45 Neb. 724; *People v. Draper*, 15 N. Y. 532; *Matter of Bartlett*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 414.

7. *State v. Hyde*, 129 Ind. 296.

8. **Appointment Committed to Official Bodies.** — *People v. Reid*, 11 Colo. 138; *Smith v. Thursby*, 28 Md. 244; *Denver v. Hobart*, 10 Nev. 28; *People v. Conover*, 17 N. Y. 64; *People v. Comstock*, 78 N. Y. 356. See also *Keating v. Stack*, 116 Ill. 191; *Opinion of Justices*, 138 Mass. 601.

9. *Overshiner v. State*, 156 Ind. 187 (statute authorizing dental association to appoint examiners to license persons to practice dentistry); *Sturgis v. Spofford*, 45 N. Y. 446.

The legislature may confer the power of appointing a fire commissioner in a city upon a board of underwriters which is a voluntary association and not a corporation. *In re Bulger*, 45 Cal. 553.

10. *Staudé v. San Francisco*, 61 Cal. 313.

11. *Alabama.* — *Fox v. McDonald*, 101 Ala. 51, 46 Am. St. Rep. 98.

California. — *People v. Provines*, 34 Cal. 520; *Staudé v. San Francisco*, 61 Cal. 313.

Georgia. — *Russell v. Cooley*, 69 Ga. 215.

Illinois. — *People v. Williams*, 51 Ill. 63;

is in the nature of an officer of the court.¹ In some instances the constitutions have expressly prohibited the legislature from conferring appointing power upon courts.² A constitutional provision expressly depriving the legislature of power to make appointments to office, but not vesting the power in any other department or officer, does not deprive the legislature of power to provide the manner in which officers shall be appointed.³ The legislature may provide the mode in which vacancies in offices may be filled by appointment, though the constitution makes provision for the election of the incumbents of such offices for specified terms.⁴ In some jurisdictions there are provisions in the constitutions intended to secure the local self-government of municipal or *quasi*-municipal corporations, which restrict the power of the legislature in providing for the appointment of local officers.⁵

(3) *Power of Executive.* — The right to make appointments to office is not inherently an executive prerogative of the governor, in the absence of any express constitutional provision or legal enactment conferring the power.⁶

People v. Morgan, 90 Ill. 558; *Cornell v. People*, 107 Ill. 372; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793; *People v. Nelson*, 133 Ill. 505.

Indiana. — *Terre Haute v. Evansville*, etc., R. Co., 149 Ind. 174.

Kentucky. — *Johnson v. De Hart*, 9 Bush (Ky.) 640; *Hoke v. Field*, 10 Bush (Ky.) 145, 19 Am. Rep. 58.

New York. — *Sweet v. Hulbert*, 51 Barb. (N. Y.) 312.

Ohio. — *State v. Judges*, 21 Ohio St. 1; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24; *State v. Baughman*, 38 Ohio St. 455.

See also *Ford v. North Des Moines*, 80 Iowa 626. *Compare State v. Barbour*, 53 Conn. 85, 55 Am. Rep. 65; *Election Supervisors' Case*, 114 Mass. 247, 19 Am. Rep. 341; *Matter of Cleveland*, 51 N. J. L. 311.

1. *Court Appointing Judicial Officers or Officers of Court.* — *Tuolumne County v. Stanislaus County*, 6 Cal. 440 (where authority was given to county judges to appoint commissioners upon the division of a county to ascertain indebtedness to be assumed by the new county); *Starry v. Winning*, 7 Ind. 311; *State v. Dufour*, 63 Ind. 567; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401; *State v. Kendle*, 52 Ohio St. 346 (jury commissioner); *State v. Mounts*, 36 W. Va. 184; *Matter of Janitor of Supreme Ct.*, 35 Wis. 410. See further on this subject the titles CONSTITUTIONAL LAW, vol. 6, p. 1060 *et seq.*; ELECTIONS, vol. 10, p. 665 *et seq.*

2. *Houseman v. Montgomery*, 58 Mich. 364.

3. *State v. Kenyon*, 7 Ohio St. 546; *State v. Covington*, 29 Ohio St. 102. See also the title CONSTITUTIONAL LAW, vol. 6, p. 1011.

4. *Filling Vacancies.* — *State v. Crow*, 20 Ark. 209. See also *Hedley v. Franklin County*, 4 Blackf. (Ind.) 116.

5. *State v. Arrington*, 18 Nev. 412; *Devoy v. New York*, 35 Barb. (N. Y.) 264; *Matter of Brenner*, 170 N. Y. 185, *affirmed* 67 N. Y. App. Div. 375; *People v. McKinney*, 52 N. Y. 374; *People v. Crooks*, 53 N. Y. 648; *People v. Raymond*, 37 N. Y. 428; *Harbeck v. New York*, 10 Bosw. (N. Y.) 366; *People v. Blake*, 49 Barb. (N. Y.) 9; *People v. Acton*, 48 Barb. (N. Y.) 524. See also *People v. Albertson*, 55 N. Y. 50, and the title CONSTITUTIONAL LAW, vol. 6, p. 1011.

6. *Appointment Not Inherent Executive Function* — *California.* — *People v. Freeman*, 80 Cal. 233, 13 Am. St. Rep. 122.

Georgia. — *Russell v. Cooley*, 69 Ga. 215.

Illinois. — *People v. Morgan*, 90 Ill. 558; *People v. Hoffman*, 116 Ill. 587, 56 Am. Rep. 793.

Indiana. — *Collins v. State*, 8 Ind. 344; *State v. Peelle*, 124 Ind. 515.

Maryland. — *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

Mississippi. — *Kimball v. Alcorn*, 45 Miss. 151.

Missouri. — *State v. Lusk*, 18 Mo. 333; *Ex p. Lucas*, 160 Mo. 218.

Nevada. — *State v. Irwin*, 5 Nev. 111; *State v. Swift*, 11 Nev. 128.

New York. — *People v. Conover*, 17 N. Y. 64; *People v. Molyneux*, 40 N. Y. 113.

North Dakota. — *State v. Boucher*, 3 N. Dak. 389.

Oregon. — *State v. George*, 22 Oregon 142, 29 Am. St. Rep. 586; *Eddy v. Kincaid*, 28 Oregon 537; *Biggs v. McBride*, 17 Oregon 640.

Constitutional Provisions Conferring Power of Appointment on Governor — *California.* — *People v. Hammond*, 66 Cal. 654; *People v. Tilton*, 37 Cal. 614; *People v. Parker*, 37 Cal. 639; *People v. Stratton*, 28 Cal. 382.

Colorado. — *Union Depot, etc., Co. v. Smith*, 16 Colo. 369.

Florida. — *Matter of Executive Communication, etc.*, 25 Fla. 426; *State v. Day*, 14 Fla. 9.

Idaho. — *Taylor v. Stevenson*, 2 Idaho 166.

Indiana. — *State v. Hyde*, 121 Ind. 20; *State v. Peelle*, 121 Ind. 495.

Kentucky. — *Berry v. McCollough*, 94 Ky. 247; *Opinion of Judges*, 79 Ky. 621.

Louisiana. — *State v. Wharton*, 25 La. Ann. 2; *Wittgenstein v. Herron*, 24 La. Ann. 432; *Monroe v. Hoffman*, 29 La. Ann. 651, 29 Am. Rep. 345; *State v. Van Tromp*, 27 La. Ann. 569; *State v. Garrett*, 29 La. Ann. 637; *State v. State Assessors*, 24 La. Ann. 410; *State v. Tucker*, 23 La. Ann. 139; *State v. Dubuc*, 9 La. Ann. 237.

Maine. — *Burton v. Kennebec County*, 44 Me. 388.

Mississippi. — *State v. Lovell*, 70 Miss. 309, *Brady v. Howe*, 50 Miss. 607.

Montana. — *Territory v. Rodgers*, 1 Mont. 252.

(4) *Power of Particular Officers or Boards.* — The extent of the appointive power of inferior officers or boards depends solely upon the construction of the statutes or constitutional provisions conferring the power.¹

c. EXERCISE OF POWER — (1) *In General.* — The exercise of the power to appoint officers must, of course, pursue the mode prescribed by the statutes conferring the power.²

The Determination of the Seniority of Officers Appointed upon the Same Day is fixed by the actual time of their appointment.³

(2) *Form of Appointment.* — As a general rule, a written instrument is necessary, and oral appointments have usually been held to be invalid.⁴

Nebraska. — State *v.* Weston, 4 Neb. 234.

New York. — People *v.* Salisbury, 24 Wend. (N. Y.) 409; People *v.* Fisher, 24 Wend. (N. Y.) 215; People *v.* Molineux, 53 Barb. (N. Y.) 9; People *v.* Conover, 17 N. Y. 64; People *v.* Murray, 70 N. Y. 521.

North Carolina. — People *v.* Bledsoe, 68 N. Car. 457.

Oregon. — Biggs *v.* McBride, 17 Oregon 640.

Pennsylvania. — Com. *v.* Maxwell, 27 Pa. St. 444; Com. *v.* Oellers, 140 Pa. St. 457; Com. *v.* Bussier, 5 S. & R. (Pa.) 451; Johns *v.* Nichols, 2 Dall. (Pa.) 184, 1 Yeates (Pa.) 180.

South Dakota. — State *v.* Sheldon, 8 S. Dak. 525.

Tennessee. — State *v.* Manson, 105 Tenn. 232.

Wyoming. — *In re* Fourth Judicial Dist., 4 Wyo. 433.

Presidential Appointments to fill vacancies expire at the end of the next session of the senate. Matter of Farrow, 3 Fed. Rep. 112.

Such an appointee holds until notified of the rejection of his nomination by the next senate. Gould *v.* U. S., 10 Ct. Cl. 593.

Constitution Conferring General Power of Appointment on Governor Where No Different Mode Provided in Act Creating Office. — Davis *v.* State, 7 Md. 151, 61 Am. Dec. 331.

1. Inferior Officers or Boards — *Alabama.* — Thompson *v.* State, 21 Ala. 48.

California. — Wetherbee *v.* Cazneau, 20 Cal. 503; People *v.* Harrington, 63 Cal. 257.

Georgia. — Gormley *v.* Taylor, 44 Ga. 76.

Illinois. — People *v.* Callaghan, 83 Ill. 128.

Louisiana. — State *v.* Leovy, 21 La. Ann. 538; State *v.* Rareshide, 32 La. Ann. 934.

Maryland. — Ijams *v.* Duvall, 85 Md. 252.

Massachusetts. — Atty.-Gen. *v.* Varnum, 167 Mass. 477.

Michigan. — People *v.* Witherell, 14 Mich. 48; Mead *v.* Ingham County, 36 Mich. 416; Frey *v.* Michie, 68 Mich. 323; Vrooman *v.* Michie, 69 Mich. 42; Seabury *v.* Board of Auditors, 96 Mich. 46.

Missouri. — State *v.* McAdoo, 36 Mo. 453; State *v.* Straat, 41 Mo. 58; State *v.* Smith, 82 Mo. 51.

Montana. — State *v.* Page, 20 Mont. 238.

Nebraska. — State *v.* Board of Public Lands, etc., 7 Neb. 42; State *v.* Rankin, 33 Neb. 266; State *v.* Saline County, 60 Neb. 275.

New York. — People *v.* Woodruff, 32 N. Y. 355; People *v.* Benton, 29 N. Y. 534.

Ohio. — State *v.* Darby, 4 Ohio Cir. Dec. 124, 12 Ohio Cir. Ct. 235; State *v.* McGregor, 44 Ohio St. 628; Brady *v.* French, 9 Ohio Dec. 195, 6 Ohio N. P. 122.

Pennsylvania. — Mattis *v.* Ruth, 1 Lack. Leg. Rec. (Pa.) 311; Com. *v.* Stevens, 3 Lack.

Jur. (Pa.) 113; Jayne *v.* Smith, 9 Pa. Co. Ct. 494; Erie County Coroner, 11 Pa. Co. Ct. 136; Com. *v.* Bussier, 5 S. & R. (Pa.) 451; Com. *v.* Grant, 2 Woodw. (Pa.) 379.

South Dakota. — *In re* Supreme Ct. Vacancy, 4 S. Dak. 532.

Tennessee. — Pippin *v.* State, 2 Sneed (Tenn.) 43.

Washington. — State *v.* Cronin, 5 Wash. 398.

Wisconsin. — State *v.* Beloit, 21 Wis. 280, 91 Am. Dec. 474.

See also the titles treating of particular officers and boards, such as ATTORNEY-GENERAL, vol. 3, p. 484; CORONERS, vol. 7, p. 614; COUNTY COMMISSIONERS, vol. 7, p. 993; FIRE DEPARTMENT, vol. 13, pp. 73, 74; JUSTICES OF THE PEACE, vol. 18, p. 40.

2. Exercise Must Conform to Statute. — Ward *v.* Cook, 78 Ill. App. 111; Com. *v.* Boice, 5 Luz. Leg. Reg. (Pa.) 162.

Must Be Intent to Exercise the Particular Power. — People *v.* Hall, 104 N. Y. 170. See also State *v.* Peelle, 124 Ind. 515.

Appointment for Too Long a Term Good for Term Authorized. — Rosslyn *v.* Aytoun, 11 Cl. & F. 742. See also Hartshorn *v.* Schoff, 51 N. H. 316.

3. Seniority of Officers Appointed on Same Day. — People *v.* Richmond County, 20 N. Y. 252; People *v.* Martin, (Supm. Ct.) 52 N. Y. St. Rep. 641 (appointment of two police inspectors on same day). And see generally the title DAY, vol. 8, p. 742.

4. Writing Necessary — *England.* — Curle's Case, 11 Coke 26; Craig *v.* Norfolk, 1 Mod. 122. See also Hunt *v.* Ellisdon, 2 Dyer 152b.

California. — Conger *v.* Gilmer, 32 Cal. 75. See also People *v.* Tyrrell, 87 Cal. 475.

Florida. — State *v.* Crawford, 28 Fla. 441.

Indiana. — State *v.* Allen, 21 Ind. 516, 83 Am. Dec. 367.

Nevada. — State *v.* Meder, 22 Nev. 264.

New York. — People *v.* Murray, 70 N. Y. 521, reversing 8 Hun (N. Y.) 577; People *v.* Willard, 44 Hun (N. Y.) 580. See, however, People *v.* Murray, 5 Hun (N. Y.) 42; Cotanch *v.* Grover, 57 Hun (N. Y.) 272, where the adoption of a resolution by a board of village trustees appointing a street commissioner and the subsequent qualification of the appointee were held to constitute a valid appointment.

Showing Term of Appointment. — Where the appointment is in writing, the term for which it was made may be shown by parol. State *v.* Fulkerson, 10 Mo. 681. See, however, State *v.* Meder, 22 Nev. 264.

Signing Instrument of Appointment. — A statute requiring the appointment of a town collector *pro tempore* to be made by a writing

When Appointment Complete. — Though an appointment when complete cannot be rescinded or revoked,¹ it is not complete before the written certificate of appointment or commission is made out and signed by the appointing power, whether an individual officer or a collective body; and delivery to the appointee is not required.²

No Particular Form of Writing Is Required; it is sufficient if it evidences the intention of the appointing power to make the appointment.³

Issuing or Countersigning Commission. — Where the statute requires that the commission of the appointing power be issued, countersigned, or sealed by some other officer, such issuance, countersigning, and sealing are purely ministerial acts, the performance of which may be compelled by mandamus,⁴ and the refusal of the officer to countersign and seal a commission signed by the appointing power does not render the appointment void.⁵

The Acceptance of the Office by the appointee is distinct from the appointment and is not necessary to render the appointment complete.⁶

A Commission Is Not Conclusive that the officer holding it was duly commissioned, but the courts will, when the authority of such officer is in issue, inquire whether the appointing power was in fact clothed with power to make the appointment;⁷ but if the commission is regular upon its face, it is *prima facie* evidence of the appointee's right to the office,⁸ and in such a case, if in fact the appointment was unauthorized, the appointment is not absolutely void, but is voidable only, and confers upon the appointee such right to exercise the functions of his office as to render his acts done therein valid so far as they concern the public and third persons.⁹

(3) Appointments by Collective Bodies. — Where the power to appoint is vested in a collective body, and there are no directions as to the mode of appointment, the body may proceed as it pleases in making its selection — by ballot, by resolution, by the adoption of a verbal motion, or in any other manner.¹⁰ It is not necessary that the appointment should be unanimous. The selection may be made by a majority vote of the persons constituting the appointing body,¹¹ or, where there is a sufficient number of the members of

under the hands of the selectmen is not satisfied by a writing with the names of all written upon it by one selectman, in the absence of the others, with no other authority than that implied from an oral agreement that the person should be appointed. *Phelon v. Granville*, 140 Mass. 386.

Oral Appointment Sustained. — *Hoke v. Field*, 10 Bush (Ky.) 145, 19 Am. Rep. 58.

1. See *infra*, this subsection, *Rescinding Appointments*.

2. **When Appointment Complete.** — *Marbury v. Madison*, 1 Cranch (U. S.) 137; *People v. Tyrrell*, 87 Cal. 475; *People v. Fitzsimmons*, 68 N. Y. 514. See also the title **APPOINTMENT**, vol. 2, p. 475.

3. **Writing Evidencing Intent.** — See *People v. Fitzsimmons*, 68 N. Y. 514; *Saunders v. Owen*, 2 Salk 467, 1 Ld. Raym. 158.

4. *State v. Crawford*, 28 Fla. 441; *State v. Wrotnowski*, 17 La. Ann. 156.

5. *State v. Page*, 20 Mont. 238.

6. **Acceptance Not Necessary.** — *Justices v. Clark*, 1 T. B. Mon. (Ky.) 84; *Com. v. Donovan*, 170 Mass. 228; *Haight v. Love*, 39 N. J. L. 476, 23 Am. Rep. 234. See also *U. S. v. Bradley*, 10 Pet. (U. S.) 343; *Conklin v. Cunningham*, 7 N. Mex. 445.

7. **Commission Not Conclusive.** — *Hill v. State*, 1 Ala. 559; *Union Depot, etc., Co. v. Smith*, 16 Colo. 361; *State v. Towns*, 8 Ga. 366; *State*

v. Chapin, 110 Ind. 272; *State v. Peelle*, 124 Ind. 515; *State v. Wrotnowski*, 17 La. Ann. 156; *State v. Bankston*, 23 La. Ann. 376.

8. *Thompson v. State*, 21 Ala. 48; *Conklin v. Cunningham*, 7 N. Mex. 445. Compare *Hoglan v. Carpenter*, 4 Bush (Ky.) 51.

9. *Flournoy v. Clements*, 7 Ala. 535; *Thompson v. State*, 21 Ala. 48. And see the title **DE FACTO OFFICERS**, vol. 8, pp. 789, 815.

10. *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65.

Appointment at Joint Session of Two Bodies. — *People v. Whiteside*, 23 Wend. (N. Y.) 9, 26 Wend. (N. Y.) 634; *Cherry v. Burns*, 124 N. Car. 761; *Com. v. Chittenden*, 13 Pa. Co. Ct. 362. See also *Snow v. Hudson*, 56 Kan. 378, quoted under **JOINT — JOINTLY**, vol. 17, p. 615, note.

Where the law required an appointment by joint ballot of two branches, it was held that an appointment by the separate action of each branch was sufficient to give at least color of title to the office. *Belfast v. Morrill*, 65 Me. 580.

Appointment at Adjourned Meeting. — *Carter v. McFarland*, 75 Iowa 196.

11. **Selection by Majority.** — *In re Bulger*, 45 Cal. 553; *Whiteside v. People*, 26 Wend. (N. Y.) 634, reversing 23 Wend. (N. Y.) 9. See also *Atty.-Gen. v. Davy*, 2 Atk. 212; *Collopy v. Cloherly*, 95 Ky. 330.

the body present at a meeting duly convened to constitute a quorum, by a majority vote of those present,¹ or by a majority vote of those voting though the number of the members voting is not sufficient to constitute a quorum.² It has been held, however, that there must be a majority of the members of the body present at the meeting at which the officer is selected;³ and all members of the body are entitled to notice of any meeting for the purpose of making appointments.⁴ It has been held that where the appointing body is unable to agree upon the officer to be appointed, it is illegal to determine who shall be appointed by drawing lots.⁵

Reconsidering Vote. — The selection by ballot of a person to be appointed does not conclude the appointing body, but it may at the same meeting, and before the result has been communicated to the person selected, reconsider the vote and appoint another person.⁶

(4) *Confirmation of Appointment.* — In many cases the power to appoint is subject to the provision that the appointment shall be with the consent or advice or confirmation of some particular collective body.⁷ Where the appointing officer or body is authorized to make the appointment only with the consent of some other body, there can be no appointment until such consent has been given; the appointment does not take effect prior to such consent, subject to be defeated by the nonconcurrence of such body. This rule has been applied where appointments were authorized by the governor with the consent of the senate,⁸ or by a mayor with the consent of the city council.⁹ To constitute a valid confirmation, the nominee must receive the confirming votes of a majority of the members of the body voting upon the question,¹⁰ and where he does not receive the required number of votes for confirmation, the fact that the body accepted his official bond is immaterial.¹¹

Time of Nomination and Confirmation. — The appointing power, in the absence of any express limitation, may, of course, nominate and the confirming body consent to the nomination whenever the latter is duly convened.¹²

Confirmation at Special Sessions. — A constitutional limitation on the power of

1. *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430. See also *Collopy v. Cloherty*, 95 Ky. 330.

Thus, where a statute vested the appointment of officers in the board of supervisors and the judges of two courts, to act by joint ballot, it was held that on due notice to all, a majority of all constituted a quorum able to make the appointment. *People v. Walker*, 23 Barb. (N. Y.) 304, 2 Abb. Pr. (N. Y.) 421.

2. *State v. Dillon*, 125 Ind. 65; Atty.-Gen. v. Shepard, 62 N. H. 384. See also *Hendrickson v. Shotwell*, 1 N. J. Eq. 577. Compare *Stanford v. Ellington*, 117 N. Car. 158, 53 Am. St. Rep. 580.

3. *Benson v. People*, 10 Colo. App. 175 (where the body was composed of ten members and only five were present); *State v. Porter*, 113 Ind. 79. See also *State v. Edwards*, 114 Ind. 581; *Com. v. Hargest*, 7 Pa. Co. Ct. 333. Compare *Hendrickson v. Shotwell*, 1 N. J. Eq. 577.

Presumption in Favor of Presence of Quorum. — *Cherry v. Burns*, 124 N. Car. 761.

4. **Notice of Meeting.** — *Com. v. Douglass*, 1 Binn. (Pa.) 77.

5. **Determination by Lot Illegal.** — *Com. v. County Com'rs*, 5 Binn. (Pa.) 534. Compare *Seymour v. Bennett*, 2 Atk. 483.

6. *Wood v. Cutter*, 138 Mass. 149; *Reed v. Deerfield School Committee*, 176 Mass. 473; *State v. Foster*, 7 N. J. L. 101. See also *Baker v. Cushman*, 127 Mass. 105. Compare *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65.

7. **Pennsylvania** — When Quarter Sessions Should Confirm Appointment of Prison Warden by County Commissioners. — *Dunkelberger's Case*, 14 Pa. Co. Ct. 641; *Martin's Case*, 11 Pa. Co. Ct. 279.

8. **Consent of Senate, Etc.** — *People v. Bissell*, 49 Cal. 407; *Watkins v. Watkins*, 2 Md. 341; *Dyer v. Bayne*, 54 Md. 90; *Com. v. Collins*, 8 Watts (Pa.) 331.

In *North Carolina* it was held that the governor, in whom was vested the power of appointing the directors of a railroad with the consent of the senate, need not send to the senate the names of his appointees for confirmation where the general assembly, by an unconstitutional act, attempted to exercise the power independently of the governor. *State v. Tate*, 68 N. Car. 546.

9. **Consent of City Council.** — *Com. v. Allen*, 128 Mass. 308; *Jones v. Easton*, 5 Northam. Co. Rep. (Pa.) 13.

10. *Com. v. Allen*, 128 Mass. 308.

11. *Com. v. Allen*, 128 Mass. 308.

12. *U. S. v. Bradley*, 10 Pet. (U. S.) 364.

Time for Nomination to Senate Limited. — A constitutional provision that the governor shall nominate, within a specified time after the senate convenes, all officers to be appointed by him with the consent of the senate does not, where the nomination is made within the proper time, restrict the right of the senate to confirm the nomination after such time. *Dyer v. Bayne*, 54 Md. 87.

the legislature when convened in extra or special session applies only to acts of legislation — the joint actions of the senate and assembly — and the senate may confirm nominations and appointments by the governor whenever convened, either at general or special sessions.¹

Withdrawing Confirmation. — In *Michigan* it has been held that where the senate is required to concur in a nomination to office made by the governor, it has power at the same session, before any action on the vote has been taken, to reconsider its vote and refuse to consent to the appointment.² After the session of the confirming body has been adjourned and the result of the vote in confirmation made known, it cannot, at a subsequent session, though the officer nominated had not been informed of his confirmation, revoke its action of confirmation.³

Effect of Confirmation of Nomination. — The confirmation of a nomination by the body whose consent to an appointment is required has been held not to constitute such nomination and confirmation an appointment, but unless the appointing officer has acted on such confirmation by making an appointment, the appointment is still incomplete, and the appointing officer may refuse to complete the appointment.⁴

Compelling Action by Confirming Body. — The courts cannot compel the senate to take action on a nomination by the appointing officer and either confirm or reject the nomination.⁵

(5) **Time of Appointment.** — It is a common practice and undoubtedly proper for the appointing power, when the necessity for the exercise of the power is ascertained, to make appointments prior in time to that at which the term of office of the appointee is to begin, where the appointing power of the officer or body making the appointment will continue until the term of the appointee is to begin.⁶ Where, however, the appointing power of the officer or body making the appointment will expire before the term of office of its appointee will begin, and vest in its successors, it cannot forestall the right and prerogative of its successors by making appointments to such office.⁷ Statutory provisions directing the time at which appointments are to be made have been held to be directory merely, and when the appointing officers or body failed to make the appointment at the time specified, subsequent

It has been held that such a provision as to the time of nomination, though it applied to offices to be filled under laws existing at the commencement of the session, did not require nominations to offices to be filled under laws enacted during the session to be made within the specified time. *Merrill v. Garrett County*, 70 Md. 269; *Calvert County v. Hellen*, 72 Md. 603.

1. *People v. Blanding*, 63 Cal. 333.

2. **Revocation of Confirmation.** — *Atty.-Gen. v. Oakman*, 126 Mich. 717.

3. *Whitney v. Van Buskirk*, 40 N. J. L. 463.

4. *Conger v. Gilmer*, 32 Cal. 75; *People v. Tyrrell*, 87 Cal. 475. See also *People v. Murray*, 70 N. Y. 526; *Com. v. Waller*, 145 Pa. St. 235, reversing 10 Pa. Co. Ct. 111.

The Issuance of a Commission Is a Ministerial Act when the officer is elected by the people. *Conger v. Gilmer*, 32 Cal. 75. And see the title **ELECTIONS**, vol. 10, p. 812.

This doctrine seems to be considered applicable in the case of a nomination by the governor to the senate, in *Dyer v. Bayne*, 54 Md. 87.

5. *Watkins v. Watkins*, 2 Md. 341.

6. **Time of Appointment** — *California*. — *People v. Blanding*, 63 Cal. 333, stated under **AT**, vol. 3, p. 169, note.

Massachusetts. — *Com. v. Donovan*, 170 Mass. 236.

Michigan. — *People v. Lord*, 9 Mich. 227.

Minnesota. — *State v. O'Leary*, 64 Minn. 207.

New Jersey. — *Whitney v. Van Buskirk*, 40 N. J. L. 463; *Haight v. Love*, 39 N. J. L. 476, 23 Am. Rep. 234.

Ohio. — *State v. Darby*, 4 Ohio Cir. Dec. 124, 12 Ohio Cir. Ct. 235. See also *State v. McCollister*, 11 Ohio 46; *State v. Ermston*, 8 Ohio Cir. Dec. 83, 14 Ohio Cir. Ct. 614.

Texas. — *State v. Catlin*, 84 Tex. 48.

Virginia. — *Smith v. Dyer*, 1 Call (Va.) 562.

An appointment by the governor after the passage of a statute creating an office and conferring upon him the power of appointment, but before the statute was to go into effect, has been upheld. *People v. Inglis*, 161 Ill. 256. See also *State v. Irwin*, 5 Nev. 111. Compare *State v. Meares*, 116 N. Car. 582.

7. **Where Appointing Power Expires Before Time of Office Begins.** — *People v. Ward*, 107 Cal. 236; *Ivy v. Lusk*, 11 La. Ann. 486; *Bownes v. Meehan*, 45 N. J. L. 189; *State v. Thompson*, 6 Ohio Cir. Dec. 106. See also *Sigur v. Crenshaw*, 8 La. Ann. 401. Compare *People v. North*, 72 N. Y. 124; *State v. Ermston*, 8 Ohio Cir. Dec. 83.

appointments have been sustained as valid.¹

(6) *Delegation of Appointing Power.* — A public officer, an official board, or an individual upon whom the legislature has conferred the power of appointing officers cannot delegate the appointing power, but they must themselves act in making the appointment.² But an appointment made pursuant to the general direction of the officer in whom the appointing power is vested, and with his sanction, has been held to be in effect an appointment by him.³

(7) *Ratification of Unauthorized Appointments.* — When a person who is not invested with power to appoint an officer exercises such power, the officer or body in whom the power of appointment is vested may by ratification render the appointment valid.⁴

(8) *Rescinding Appointments.* — Where the officer or body clothed with the power of appointment has exercised the power and made an appointment, and the appointee is not removable at the will of the appointing officer or body,⁵ such appointing officer or body cannot rescind its appointment.⁶

d. WHO MAY BE APPOINTED TO OFFICE. — As a general rule, any one having the necessary qualifications to hold the office in question may be appointed.⁷

Public Policy. — On the ground of public policy, it has been held that the person or a member of the collective body invested with the appointing power cannot be appointed,⁸ and an appointment to the office of a member of the body invested with the appointing power is especially unauthorized where the vote of such appointee was necessary to secure his appointment.⁹

Civil-service Statutes. — In many jurisdictions statutes have been enacted having for their object the ascertainment of the qualifications of candidates for appointments to official positions, and for the continuance in public service of persons found competent to discharge the duties thereof. This subject has been fully treated in another place in this work.¹⁰

e. FILLING VACANCIES — (1) *In General.* — The power to fill an office by appointment carries by implication the power to fill vacancies occurring in the office.¹¹

(2) *When Vacancy Exists* — (a) *In General.* — As a general rule, there is a

1. **Provisions as to Time Directory.** — *People v. Murray*, 15 Cal. 221; *Saunders v. Grand Rapids*, 46 Mich. 467; *People v. Allen*, 6 Wend. (N. Y.) 486; *Com. v. Steel*, 2 Northam Co. Rep. (Pa.) 1; *Com. v. Painter*, 1 Pa. Dist. 393; *In re Census Superintendent*, 15 R. I. 614. See also *Rex v. Sparrow*, 2 Stra. 1123.

"**Forthwith.**" — *Omro v. Kaime*, 39 Wis. 468, stated under FORTHWITH, vol. 13, p. 1158, note.

2. **Power Cannot Be Delegated.** — *Hannon v. Agnew*, 96 N. Y. 439; *Com. v. Crogan*, 155 Pa. St. 448, reversing 7 Kulp (Pa.) 23.

3. *Platt v. Beach*, 2 Ben. (U. S.) 303.

4. **Ratification.** — *Smith v. New York*, 67 Barb. (N. Y.) 223.

Where an officer was appointed by the legislature and the governor granted him a commission as such, it was held that, irrespective of whether the appointing power resided in the legislature or the governor, the officer was lawfully appointed. *State v. Irwin*, 5 Nev. 111. But see *State v. Peelle*, 124 Ind. 515.

Ratification by Congress of Appointment of Timber Agents. — *Wells v. Nickles*, 104 U. S. 444.

5. See *infra*, this title, *Termination of Authority*, as to the removal of officers.

6. **Rescission** — *United States*. — *Marbury v. Madison*, 1 Cranch (U. S.) 137.

California. — *Wetherbee v. Cazneau*, 20 Cal. 503; *Conger v. Gilmer*, 32 Cal. 75.

Michigan. — *People v. Lord*, 9 Mich. 227; *Speed v. Detroit*, 97 Mich. 198.

New Jersey. — *Haight v. Love*, 39 N. J. L. 476, 23 Am. Rep. 234. See also *Whitney v. Van Buskirk*, 40 N. J. L. 463.

New York. — *Achley's Case*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 35.

Pennsylvania. — *Ewing v. Thompson*, 43 Pa. St. 372.

See also *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Thomas v. Burrus*, 23 Miss. 550, 57 Am. Dec. 154.

7. See the section *Eligibility*, *supra*.

8. **Appointment of Person Exercising the Appointing Power.** — *Com. v. Douglass*, 1 Binn. (Pa.) 77.

This is especially true where the collective body invested with the power of appointment is also required to supervise the action of the appointee. *Kinyon v. Duchene*, 21 Mich. 498.

9. *Hornung v. State*, 116 Ind. 462; *State v. Hoyt*, 2 Oregon 246.

10. See *infra*, this section, *Termination of Authority*; and the title CIVIL SERVICE, vol. 6, p. 88. And see the following cases:

11. **Filing Vacancies.** — *People v. Fitch*, 1 Cal. 519; *People v. Campbell*, 2 Cal. 135.

Appointing Power in Legislature — **Governor May Fill Vacancies Only During Recess Thereof.** — *People v. Fitch*, 1 Cal. 519.

vacancy in an office whenever there is no incumbent to discharge the duties of the office, that is, whenever the office is empty or unfilled,¹ but as long as there is any one authorized to discharge the duties of the office the office is not to be deemed vacant so as to authorize the exercise of the power to fill vacancies in the office.²

New Office. — Whenever a new office is created and no one is designated by the legislature to fill it, there exists a vacancy in the office so as to authorize the exercise of a power to fill vacancies in such office,³ but if, at the time a new office is created by the legislature, the legislature designates the person to fill the office, a vacancy in the office does not arise so as to authorize the governor to exercise his general constitutional power to fill vacancies in office.⁴

Termination of Term. — Where the authority of an officer to discharge the duties of his office absolutely terminates upon the termination by lapse of time of his express term, and at such time there is no one to qualify for the discharge of the duties of the office, there is a vacancy in the office.⁵

Officer Holding Over. — But where the incumbent of an office holds over after the expiration of his express term until the qualification of his successor, there does not exist, upon the expiration of his express term, a vacancy in the office so as to authorize the exercise of a power to fill vacancies in such office.⁶

The Failure of an Elected Candidate to Qualify so as to enable him to enter upon the discharge of the duties of the office creates a vacancy in the office.⁷

1. When Office Vacant — *Arkansas.* — *Smith v. Askew*, 48 Ark. 89.

California. — *Quigg v. Evans*, 121 Cal. 546.

Colorado. — *People v. Osborne*, 7 Colo. 605.

Georgia. — *Gormley v. Taylor*, 44 Ga. 76.

Indiana. — *Stocking v. State*, 7 Ind. 326; *Collins v. State*, 8 Ind. 344; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663.

Missouri. — *State v. Boone County Ct.*, 50 Mo. 317, 11 Am. Rep. 415; *State v. Hostetter*, 137 Mo. 636, 59 Am. St. Rep. 515.

Nevada. — *State v. Irwin*, 5 Nev. 112.

New Jersey. — *Davis v. Davis*, 57 N. J. L. 80.

Oregon. — *State v. Johns*, 3 Oregon 537; *Cline v. Greenwood*, 10 Oregon 230.

Pennsylvania. — *Walsh v. Com.*, 89 Pa. St. 419, 33 Am. Rep. 771.

South Dakota. — *In re Supreme Ct. Vacancy*, 4 S. Dak. 532.

When the Constitution Clearly Enumerates Events That Shall Constitute a Vacancy in a particular office, this has been held to include impliedly all other causes of vacancy, especially when this construction can lead to no injurious results. *People v. Whitman*, 10 Cal. 38.

2. *People v. Wells*, 2 Cal. 204; *People v. Tilton*, 37 Cal. 614; *People v. Edwards*, 93 Cal. 157; *People v. Ward*, 107 Cal. 236; *People v. Osborne*, 7 Colo. 605; *Biddle v. Willard*, 10 Ind. 62; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; *Baxter v. Latimer*, 116 Mich. 356; *Kouns v. Draper*, 43 Mo. 225; *State v. Ralls County Ct.*, 45 Mo. 58; *State v. Baird*, 47 Mo. 301; *Tappan v. Gray*, 9 Paige (N. Y.) 507; *People v. Van Horne*, 18 Wend. (N. Y.) 518; *State v. Henderson*, 4 Wyo. 535.

That an Office Is Filled Temporarily according to law, does not deprive the officer empowered to appoint in due course thereto of his right to fill the office on the ground of vacancy. *Matter of Farrow*, 3 Fed. Rep. 112.

3. Vacancy in New Office. — *Arkansas.* — *Smith v. Askew*, 48 Ark. 89. *Compare Ex p. Dodd*, 11 Ark. 152.

Colorado. — *People v. Rucker*, 5 Colo. 455; *In re District Judges*, 11 Colo. 373.

Georgia. — *Gormley v. Taylor*, 44 Ga. 76.

Indiana. — *Stocking v. State*, 7 Ind. 326; *State v. Gorby*, 122 Ind. 17. See also *State v. Hyde*, 121 Ind. 20.

Missouri. — *State v. Boone County Ct.*, 50 Mo. 317, 11 Am. Rep. 415; *State v. McMillan*, 108 Mo. 153. See also *State v. Boecker*, 56 Mo. 17.

Nevada. — *State v. Irwin*, 5 Nev. 111.

North Dakota. — *State v. Harris*, 1 N. Dak. 190.

Oregon. — *Cline v. Greenwood*, 10 Oregon 230.

Pennsylvania. — *Walsh v. Com.*, 89 Pa. St. 419, 33 Am. Rep. 771.

South Dakota. — *Driscoll v. Jones*, 1 S. Dak. 8.

Wyoming. — *In re Fourth Judicial Dist.*, 4 Wyo. 133.

See also *People v. Mott*, 3 Cal. 504. *Compare Rosborough v. Boardman*, 67 Cal. 116; *People v. Opel*, 188 Ill. 194; *Conely v. Detroit*, 93 Mich. 446; *O'Leary v. Adler*, 51 Miss. 28; *State v. Messmore*, 14 Wis. 163.

Vacancy That May Happen. — See *HAPPEN*, vol. 15, p. 283, note.

4. *State v. Irwin*, 5 Nev. 111. See also *Eward v. Jones*, 116 N. Car. 570.

Designation Unconstitutional — No Vacancy. — *People v. Sanderson*, 30 Cal. 160.

5. Expiration of Term. — *People v. Addison*, 10 Cal. 1; *People v. Ward*, 107 Cal. 236. *Compare People v. Mizner*, 7 Cal. 519.

6. See *infra*, this title, *Duration of Officer's Authority*.

7. Failure to Qualify. — *People v. Taylor*, 57 Cal. 620; *Matter of Executive Communication*, etc., 25 Fla. 426; *Winneshiek County v. Maynard*, 44 Iowa 15; *State v. Matheny*, 7 Kan. 327; *State v. Hunt*, 54 N. H. 431; *State v. Hopkins*, 10 Ohio St. 509; *State v. Cocke*, 54 Tex. 482.

Death of Elected Candidate Before Entering into Office. — Where a newly elected officer qualifies but dies before the time he is to enter upon the discharge of his duties, a vacancy occurs at the time he was entitled to enter into the office, if his predecessor was entitled to hold only until the election and qualification of his successor,¹ but not at the time of his death.²

Nonuser. — An office may become vacant by reason of the incumbent's ceasing to discharge the duties of the office so as to authorize an exercise of a power to appoint to fill vacancies.³

Accepting Incompatible Office. — When the incumbent of one office accepts another incompatible office, the nature and duties of the two offices being such as to render it improper, from considerations of public policy, for him to retain both, a vacancy in the first office is created.⁴

Resignation. — The resignation of the incumbent may create a vacancy,⁵ provided his resignation has been accepted.⁶ When the resignation is to take effect in the future, there is no vacancy until the time comes when the incumbent is to give up his office.⁷

Statutory Provisions. — The statutes in some instances expressly enumerate certain contingencies and circumstances which shall create a vacancy in public offices,⁸ such as the insanity of the incumbent;⁹ absence from the state;¹⁰ in case of local offices, change of residence, or removal from the locality or district with which the office is connected;¹¹ the absconding of an incumbent.¹² A statutory enumeration of the circumstances and contingencies which shall create a vacancy in office is not necessarily an exclusive enumeration, but a vacancy may occur under circumstances which at common law would create a vacancy,¹³ and the fact that the constitution provides in some instances what shall operate a vacancy in office does not prohibit the legislature from enumerating other causes.¹⁴

(b) **Time of Vacancy.** — Where the executive is authorized to fill by appointment vacancies "which may happen during the recess of the senate" or of the "legislature," it has been held that the phrase "which may happen" meant "which may happen to exist," and that a vacancy existed in an office during a recess of the senate or legislature, though the vacancy first occurred while it was in session.¹⁵ In *Illinois*, however, it was held, under the state

1. **Death of Elected Candidate.** — *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206; *In re Supreme Ct. Vacancy*, 4 S. Dak. 532; *Gold v. Fite*, 2 Baxt. (Tenn.) 237. See also *State v. Hopkins*, 10 Ohio St. 509.

Contra, where the incumbent is entitled to hold over until his successor's qualification. *Com. v. Hanley*, 9 Pa. St. 513.

2. *People v. Ward*, 107 Cal. 236.

3. **Nonuser.** — *People v. Haitwell*, 67 Cal. 11.

4. **Accepting Incompatible Office.** — *Bryan v. Cattell*, 15 Iowa 538.

5. **Resignation.** — *State v. Page*, 20 Mont. 239; *State v. Newark*, 27 N. J. L. 185; *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430.

6. *Patrick v. Hagins*, (Ky. 1897) 41 S. W. Rep. 31.

7. *State v. McGrath*, 64 Mo. 139.

8. **Statutes Regulating Vacancies.** — *Wapello County v. Bigham*, 10 Iowa 39, 74 Am. Dec. 370; *Bryan v. Cattell*, 15 Iowa 538; *Stokes v. Kirkpatrick*, 1 Met. (Ky.) 138; *State v. Hunt*, 54 N. H. 431; *People v. Crissey*, 91 N. Y. 616; *People v. Van Horne*, 18 Wend. (N. Y.) 515; *Builer Tp. School Dist. Case*, 158 Pa. St. 159; *Wenner v. Smith*, 4 Utah 238.

9. **Insanity.** — *Matter of Moore*, 68 Cal. 281; *State v. Baird*, 47 Mo. 301.

Temporary insanity of the incumbent does not *ipso facto* create a vacancy in the office. *Huth's Case*, 4 Pa. Dist. 233.

10. **That Absence from the State Is Caused by Reason of Sickness** is immaterial. *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310.

11. **Local Offices** — **Change of Residence.** — *Ross v. Barber*, 86 Mich. 380.

Temporary residence out of the locality is not necessarily a removal. *Matter of Board of Health*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 147. See also *People v. Glass*, 19 N. Y. App. Div. 454.

12. **Absconding.** — *Erie County Coroner*, 11 Pa. Co. Ct. 136.

13. **Effect of Statutory Enumeration.** — *People v. Hammond*, 66 Cal. 654; *Bryan v. Cattell*, 15 Iowa 538. Compare *Rosborough v. Boardman*, 67 Cal. 116.

14. *State v. Irwin*, 5 Nev. 111; *State v. Lansing*, 46 Neb. 514.

15. **"Happen" Equivalent to "Happen to Exist."** — *Matter of Farrow*, 3 Fed. Rep. 112; 1 Op. Atty.-Gen. 631; 2 Op. Atty.-Gen. 525; 4 Op. Atty.-Gen. 523; 7 Op. Atty.-Gen. 186; 12 Op. Atty.-Gen. 32; 12 Op. Atty.-Gen. 449. Compare 7 Am. L. Reg. N. S. 786; 4 Op. Atty.-Gen. 361 (new office created during session but not filled). See also *Kimball v. Alcorn*, 45

constitution empowering the governor to make appointments to fill certain offices which "shall during the recess" of the general assembly "become vacant," that the governor had no power during the recess of the general assembly to fill a vacancy which first occurred while the assembly was in session.¹

(c) **Determination as to Existence of Vacancy.** — When there is no method provided for determining whether a vacancy in fact exists, it follows that, as the office must be filled, the appointing officer or body is to inquire into and decide whether a vacancy exists, but while his commission to fill a vacancy which he has determined existed is *prima facie* evidence of the existence of the vacancy and his appointee's right to the office, still it is not conclusive upon such fact so as to destroy the incumbent's title to the office,² and where the vacancy occurs by reason of the happening of the certain contingencies which would create a vacancy, it is not necessary that there should be a judicial investigation and decision that the vacancy exists before the power to fill the vacancy may be exercised;³ but if there was in fact no vacancy the attempted exercise of the power to fill vacancies is absolutely void and the appointee acquires no title to the office, even if the incumbent surrenders the office to him.⁴

VII. TITLE TO OFFICE — 1. In General. — Most questions concerning title to office are discussed fully elsewhere, and therefore only a few brief statements will be made here.⁵

Title Necessary to Support Action. — In an action to recover a public office the plaintiff must recover upon the strength of his own title rather than upon the weakness of the title of his adversary; and the burden rests upon the plaintiff to show legal title to the office.⁶

Validity of Law Creating Office. — When the parties to the action treat the law creating the office as a valid enactment, and each makes his title to the office he is claiming through the law, they do not stand in a position to call in question the validity of such law.⁷

2. Method of Determining Title. — The proper method of determining title to office is by quo warranto.⁸ Mandamus is not the proper remedy.⁹ Nor can the right to an office be determined upon a bill for an injunction.¹⁰ As

Miss. 151; Brady v. Howe, 50 Miss. 607; and HAPPEN, vol. 15, p. 283.

That a Session of the Senate Intervenes between the occurrence of a vacancy and an appointment to fill it, has been considered not to render the appointment invalid. 3 Op. Atty.-Gen. 673; 11 Op. Atty.-Gen. 179.

1. People v. Forquer, 1 Ill. 104. See also State v. Rareshide, 32 La. Ann. 934.

2. Effect of Commission Issued to Fill Vacancy — Alabama. — Hill v. State, 1 Ala. 559 (commission by governor to fill alleged vacancy).

California. — People v. Shorb, 100 Cal. 537, 38 Am. St. Rep. 310. See also People v. Marin County, 10 Cal. 344.

Indiana. — State v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663; Knox County v. Johnson, 124 Ind. 145, 19 Am. St. Rep. 88.

Kentucky. — Page v. Hardin, 8 B. Mon. (Ky.) 669. See also Tompert v. Lithgow, 1 Bush (Ky.) 183.

Louisiana. — State v. McNeely, 24 La. Ann. 19. See also State v. Bankston, 23 La. Ann. 375.

Missouri. — State v. Seay, 64 Mo. 89, 27 Am. Rep. 206.

Texas. — Honey v. Graham, 39 Tex. 1.

3. Vacancy from Enumerated Causes. — People v. Brite, 55 Cal. 79 (vacancy caused by change of residence of incumbent); People v. Shorb, 100 Cal. 537, 38 Am. St. Rep. 310 (vacancy caused by absence from state); State v. Jones,

19 Ind. 356, 81 Am. Dec. 403; Osborne v. State, 128 Ind. 130; State v. Lovell, 70 Miss. 309; Prather v. Hart, 17 Neb. 598.

4. State v. Peelle, 124 Ind. 515.

5. See *supra*, this title, *Methods of Conferring Office*; and *infra*, *Termination of Authority*. See also the titles DE FACTO OFFICERS, vol. 8, p. 823; ELECTIONS, vol. 10, p. 796; QUO WARRANTO, *post*.

6. Plaintiff Must Recover on Strength of His Own Title. — Toney v. Harris, 85 Ky. 453; McCall v. Webb, 125 N. Car. 243.

7. Estopped to Deny the Constitutionality of Law Creating Office. — State v. Gorby, 122 Ind. 17.

8. Quo Warranto the Proper Remedy. — People v. Scannell, 7 Cal. 432; State v. Gleason, 12 Fla. 190; Burgess v. Davis, 138 Ill. 578, *affirming* 37 Ill. App. 353. And see the titles ELECTIONS, vol. 10, p. 796; QUO WARRANTO, *post*.

A Feigned Issue to try the right to a public office is against the policy of the law. Fahnestock v. Clark, 24 Pa. St. 501.

Extraordinary Remedial Writs of Appellate Court Not the Proper Remedy. — Vail v. Dining, 44 Mo. 210.

9. See the titles ELECTIONS, vol. 10, p. 803; MANDAMUS, vol. 19, p. 766.

10. Injunction Not Proper Remedy — Alabama. — Beebe v. Robinson, 52 Ala. 66; Moulton v. Reid, 54 Ala. 321.

a general rule, title to office cannot be inquired into collaterally.¹ It cannot be determined in a proceeding to gain possession of books, papers, and other property pertaining to a public office,² and it has been held that it cannot be determined in an action for the fees of the office.³

3. Rights Pending Contest. — The holder of a certificate of election or duly issued commission has *prima facie* title, and pending the determination of the court in which the contest is originally brought is entitled to take possession of the office, discharge its duties, and receive the emoluments thereof.⁴ After the determination of such court, the holder of the judgment thereof has *prima facie* title, with the rights above enumerated, pending an appeal. The judgment is self-executing, except so far as the question of costs is concerned, and its force and effect are neither stayed, suspended, nor obstructed by an appeal therefrom.⁵

VIII. ACCEPTANCE AND QUALIFICATION — 1. Acceptance — a. NECESSITY OF ACCEPTANCE. — To constitute the holding of an office, there must be the concurrence of two wills; that of the appointing power, be that power vested in the electors or an executive officer or board, and that of the person so appointed.⁶ In no case can the office itself be considered as filled until an

Colorado. — *People v. McClees*, 20 Colo. 403.

Florida. — *McDonald v. Rehner*, 22 Fla. 198.

Illinois. — *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 353, *affirming* 56 Ill. App. 581.

Iowa. — *Cochran v. McCleary*, 22 Iowa 75; *State v. Alexander*, 107 Iowa 177.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333; *State v. Judge*, 42 La. Ann. 1172; *Goldman v. Gillespie*, 43 La. Ann. 83.

Minnesota. — *Burke v. Leland*, 51 Minn. 355.

Missouri. — *State v. Aloe*, 152 Mo. 466.

New York. — *Bundy v. Knights of St. John*, 1 N. Y. L. Rec. 250.

North Carolina. — *Patterson v. Hubbs*, 65 N. Car. 119; *Jones v. Granville*, 77 N. Car. 280.

Ohio. — *Harding v. Eichinger*, 57 Ohio St. 371.

Pennsylvania. — *Updegraff v. Crans*, 47 Pa. St. 103.

Virginia. — *Johnson v. Barham*, 99 Va. 305.

Washington. — *Mullen v. Tacoma*, 16 Wash. 82.

And see the titles ELECTIONS, vol. 16, p. 816; INJUNCTIONS, vol. 16, p. 352.

No Injunction to Prevent Performance of Duties by Incumbent. — *Breslin v. Quinn*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 577; *Campbell v. Wolfenden*, 74 N. Car. 103.

No Injunction to Prevent Occupancy by Appointees of Governor. — *State v. Judge*, 48 La. Ann. 1501.

No Injunction to Prevent Occupancy by Person Adjudged Entitled to Office. — *State v. Kearney*, 28 Neb. 103.

Protection of Incumbent by Injunction. — *Rhodes v. Driver*, 69 Ark. 606; *Huntington v. Cast*, 149 Ind. 255; *State v. Alexander*, 107 Iowa 177; *Guillotte v. Poincy*, 41 La. Ann. 333; *Stenglein v. Beach*, (Mich. 1901) 87 N. W. Rep. 449; *Armijo v. Baca*, 3 N. Mex. 294; *State v. Superior Ct.*, 17 Wash. 12, 61 Am. St. Rep. 893.

Injunction to Prevent Usurpation. — *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424.

1. Not Subject to Collateral Attack. — *Lockhart v. Troy*, 48 Ala. 579; *Police Jury v. Foulhouse*, 30 La. Ann. 64; *Prince v. Boston*, 148 Mass. 285; *Hallgren v. Campbell*, 82 Mich.

255, 21 Am. St. Rep. 557; *Ex p. Johnson*, 15 Neb. 512; *Colton v. Beardsley*, 38 Barb. (N. Y.) 29; *Shartzer v. School Dist.*, 90 Pa. St. 192; *North Western Lumber Co v. Chehalis County*, 25 Wash. 95. And see the title DE FACTO OFFICERS, vol. 8, p. 823.

2. Proceeding to Recover Official Property Not Proper Method to Try Title — *California.* — *Hull v. Superior Ct.*, 63 Cal. 174.

Iowa. — *Desmond v. McCarthy*, 17 Iowa 525.

New Mexico. — *Eldodt v. Territory*, 10 N. Mex. 141.

New York. — *Matter of Bradley*, 141 N. Y. 527; *Matter of Sells*, 15 N. Y. App. Div. 571; *Matter of Board of Health*, 43 N. Y. App. Div. 236; *Case v. Campbell*, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 269, 17 N. Y. Wkly. Dig. 473; *Matter of Davis*, (Supm. Ct.) 19 How. Pr. (N. Y.) 323; *Conover's Case*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 73; *North v. Cary*, 4 Thomp. & C. (N. Y.) 357; *Matter of Brenner*, 67 N. Y. App. Div. 375, *reversing* 35 Misc. (N. Y.) 212; *Matter of Guden*, 71 N. Y. App. Div. 422, *reversing* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 390.

Oklahoma. — *Ewing v. Turner*, 2 Okla. 94. And see the title MANDAMUS, vol. 19, p. 777.

3. Title Not Determined in Action for Fees. — *Hunter v. Chandler*, 45 Mo. 452; *Hagan v. Brooklyn*, 126 N. Y. 643, *affirming* (Brooklyn City Ct. Gen. T.) 5 N. Y. Supp. 425. See also *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 515. *Contra*, *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Wenner v. Smith*, 4 Utah 238.

4. Rights Pending Determination of Lower Court. — *Beebe v. Robinson*, 52 Ala. 66; *Allen v. Robinson*, 17 Minn. 113; *State v. Frantz*, 55 Neb. 167; *Tappan v. Gray*, 9 Paige (N. Y.) 509; *People v. Draper*, 24 Barb. (N. Y.) 265; *Swinburn v. Smith*, 15 W. Va. 483; *State v. Oates*, 86 Wis. 634, 39 Am. St. Rep. 912. And see the title DE FACTO OFFICERS, vol. 8, p. 813.

5. Rights Pending Appeal. — *Allen v. Robinson*, 17 Minn. 113; *State v. Woodson*, 128 Mo. 497; *Sullivan v. Haacke*, 7 Ohio Dec. 113, 5 Ohio N. P. 26; *Fylpaa v. Brown County*, 6 S. Dak. 634.

6. Acceptance Prerequisite to Holding of Office. — *People v. Whitman*, 10 Cal. 38.

acceptance by the person chosen.¹ The acceptance need not, however, in the absence of statutory requirement, be signified in express terms. It may be implied from previous conduct, as well as a subsequent receipt of a commission, taking the oath of office, giving bond, or discharging some of the duties of the office.² The fact that a person consents to being voted for as a candidate for an office does not constitute an acceptance of the office.³

Statutory Requirement of Express Acceptance. — Statutes requiring an officer-elect to file a written acceptance of the office within a designated time are generally regarded as directory and not mandatory, and failure to comply does not work a forfeiture of the office,⁴ nor create a vacancy therein, especially where the officer-elect immediately enters upon the performance of the duties of the office and continues therein.⁵ Where the statute further provides that failure to file the acceptance shall be deemed a refusal to serve, it has been held that filing of the acceptance is essential to complete the title of the officer-elect, and if he exercises the functions of the office without so doing, it is as an officer *de facto* and not *de jure*.⁶

b. DUTY OF APPOINTEE OR OFFICER-ELECT TO ACCEPT. — It is held in numerous *English* decisions that by the common law it was the duty of every person having the requisite qualifications elected or appointed to a public office to accept the same, and that a refusal to accept was punishable.⁷ This duty has been recognized in several of the *American* states,⁸ and is enforceable by mandamus.⁹ Nor does the fact that the legislature has imposed a penalty for refusal to accept preclude resort to mandamus where the statute does not provide that the penalty shall be in lieu of service.¹⁰

Power of Legislature to Compel Acceptance. — The legislature has the power to require any citizen to serve in a public office, even against his will.¹¹ A

Refusal to Accept Creates Vacancy. — The refusal of a person elected to a newly-created office to accept the same constitutes a vacancy in such office, authorizing the appointment of another person thereto by the governor under a constitutional provision authorizing him to appoint in case of a vacancy. *People v. Wilson*, 72 N. Car. 155.

Acceptance No Part of Appointment. — Under a statute providing that the executive may in certain contingencies appoint one of several persons who shall be recommended by the justices of a court, to a designated office, the executive having appointed one of several persons so designated cannot, on such appointee's refusal to act, appoint another one of the persons so recommended to the office, since the acceptance is no part of the appointment, and one appointment having been made the recommendation is *functus officio*. *Justices v. Clark*, 1 T. B. Mon. (Ky.) 82.

1. Office Not Filled until Acceptance. — *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50.

2. Acceptance May Be Implied. — *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50. See also *Matter of Bradley*, 141 N. Y. 527.

Qualifying under Void Election Not Acceptance Thereunder. — Where one who is regularly appointed to an office, and is the valid incumbent thereof, is by a void election elected to the same office, the filing of an oath of office by him for the purpose of qualifying under the void election does not preclude him from averring that he did not accept and enter upon the duties of the office under the election. On the other hand he is at liberty to assert that he is exercising the functions of the office under his appointment rather than by virtue

of the election, being entitled to the office until his successor is elected and qualified. *Forristal v. People*, 3 Ill. App. 470.

3. Candidacy Not an Acceptance. — *Smith v. Moore*, 90 Ind. 294.

4. Statute Directory. — *State v. Weatherby*, 17 Neb. 553.

5. Frans v. Young, 30 Neb. 360, 27 Am. St. Rep. 412.

6. Bentley v. Phelps, 27 Barb. (N. Y.) 524.

7. Common-law Duty to Accept. — *Rex v. Lone*, 2 Stra. 920; *Rex v. Jones* 2 Stra. 1146; *Rex v. Burder*, 4 T. R. 778; *Rex v. Larwood*, 4 Mod. 270. See also *Rex v. Bedford*, 1 East 79; *London v. Vanacker*, 1 Ld. Raym. 496; *Rex v. Whitwell*, 5 T. R. 86.

8. Edwards v. U. S., 103 U. S. 471; *People v. Williams*, 145 Ill. 573, 36 Am. St. Rep. 514; *State v. Ferguson*, 31 N. J. L. 107; *State v. Chadwick*, 10 Oregon 465.

But see *State v. McEntyre*, 3 Ired. L. (25 N. Car.) 171, in which the court said: "We are aware of no principle of the common law that renders such an omission criminal."

9. Acceptance Compelled by Mandamus. — *Rex v. Bower*, 1 B. & C. 585, 8 E. C. L. 247; *People v. Williams*, 145 Ill. 574, 36 Am. St. Rep. 514. See also *Reg v. Hungerford*, 11 Mod. 142; *Rex v. Grosvenor*, 1 Wils. C. Pl. 18. Compare *People v. Metropolitan Police*, 26 N. Y. 316.

10. Imposition of Penalty Does Not Preclude Mandamus. — *Rex v. Bower*, 1 B. & C. 585, 8 E. C. L. 247; *People v. Williams*, 145 Ill. 573, 36 Am. St. Rep. 514.

11. Power of Legislature. — *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677; *State v. McEntyre*, 3 Ired. L. (25 N. Car.) 171.

statute imposing a penalty for refusing to accept a public office is constitutional.¹ In an action to recover a penalty it has been held that the fact that the officer was elected to another office and that he has accepted it is a good defense.² Where the statute requires the appointment of another in the place of one who refuses to serve, the same person cannot be reappointed so as to make him liable for the payment of the penalty a second time.³

2. Qualification — *a. DEFINITION.* — The term "qualification" as used in the statutes herein referred to means the taking of the required oath of office, or the giving of an official bond, or both, as may be required.⁴

b. NECESSITY OF QUALIFYING AND EFFECT OF OMISSION — (1) *Qualification Condition Precedent to Holding Office.* — The constitutions of the various states and the statutes generally, or in reference to particular offices, usually provide that a person elected or appointed to office shall, before he enters upon the duties of his office, take an oath to faithfully perform the duties of the office and give a bond so conditioned. Where such statutes exist compliance therewith is a condition precedent to the officer's right to exercise the functions of the office.⁵ In the United States courts statutes requiring an appointed officer to take an oath or give bond before entering on the discharge of his duties are held to be directory only, and not conditions precedent to the right to exercise the functions of the office.⁶ Mere irregularities in the qualification of an officer or in his attempt to qualify, where he has entered upon the discharge of his duties, cannot be inquired into in a collateral proceeding for the purpose of invalidating his right or title to the office.⁷

(2) *Presumption of Qualification.* — It will be presumed, as to third persons, that an officer who has been regularly elected to an office and who is in discharge of the functions thereof, has taken the required oath and given an official bond.⁸ No such presumption exists, however, in favor of the officer

As to the duty of an officer to serve as affecting the right to resign office, see *infra*, this title, XV. 2. *Resignation and Surrender.*

1. Statutes Imposing Penalties Constitutional. — Brooklyn *v.* Scholes, 31 Hun (N. Y.) 110; London *v.* Headen, 76 N. Car. 72.

2. Acceptance of Another Office as Defense. — Hartford Tp. *v.* Bennett, 10 Ohio St. 441.

Penalty Not Incurred by Failure to File Written Acceptance. — Under a statute providing that a person elected to a designated office shall within a designated time after the election deliver a written acceptance of the office to a designated officer, and further providing that in case he neglects so to do his failure shall be considered a refusal to serve and the person elected be subjected to a penalty, it was held that the object of the act was to enforce the performance of the duties of the office by the person elected thereto, and his failure to deliver a written acceptance, where he entered upon and discharged the duties of the office, did not subject him to the penalty. Winnegar *v.* Roe, 1 Cow. (N. Y.) 258.

Sufficiency of Excuse. — Under a statute imposing a penalty for refusing to serve in a public office unless excused by a designated board, the sufficiency of the reason is not a matter for judicial investigation, but is for the board. Brooklyn *v.* Scholes, 31 Hun (N. Y.) 110.

3. Payment of Penalty Is in Lieu of Service. — Haywood *v.* Wheeler, 11 Johns. (N. Y.) 432.

4. State *v.* Remenderfer, 96 Ind. 374; Steinback *v.* State, 38 Ind. 483; State *v.* Boyd, 31 Neb. 632; People *v.* Palen, 74 Hun (N. Y.) 289;

People *v.* McKinney, 52 N. Y. 374; State *v.* Neibling, 6 Ohio St. 40; Com. *v.* Hanley, 9 Pa. St. 513. See also Archer *v.* State, 74 Md. 443, 28 Am. St. Rep. 261.

5. Compliance with Statute Condition Precedent to Enjoyment. — People *v.* Whitman, 10 Cal. 38; Hull *v.* Superior Ct., 63 Cal. 174; Wells *v.* Atlanta, 43 Ga. 77; Foster *v.* Justices, 9 Ga. 185; Jones *v.* Gridley, 20 Kan. 590; Jump *v.* Spence, 28 Md. 1; George *v.* Second School Dist., 6 Met. (Mass.) 497; Oregon *v.* Colvig, 15 Oregon 57; Com. *v.* Slifer, 25 Pa. St. 23, 64 Am. Dec. 680.

Failure to Qualify Creates Vacancy. — Childrey *v.* Rady, 77 Va. 518; Owens *v.* O'Brien, 78 Va. 116.

Qualification Prerequisite of Incumbency. — Where the statutes provide that an officer shall before he enters on the discharge of the duties of his office take an oath and give bond, an appointee, prior to his qualification, is not an "incumbent" of the office to which he was appointed within the purview of a statute providing that it shall not be applicable to "present incumbents." State *v.* McCollister, 11 Ohio 46.

6. Glavey *v.* U. S., 182 U. S. 595, and U. S. *v.* Eaton, 169 U. S. 331, following U. S. *v.* Bradley, 10 Pet. (U. S.) 343, and U. S. *v.* Linn, 15 Pet. (U. S.) 290, and distinguishing U. S. *v.* Le Baron, 19 How. (U. S.) 73.

7. Irregularities Cannot Be Attacked in Collateral Proceeding. — Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143. See also title DE FACTO OFFICERS, vol. 8, p. 802.

8. Presumption of Qualification. — Adams *v.*

himself, and if he seeks to justify the doing of an act as having been done in his official capacity¹ or seeks to enforce some right by virtue thereof, he must show that he had duly qualified.²

(3) *Effect of Failure to Qualify* — (a) **Official Acts of Officer as to Public and Third Persons.** — The failure of a person duly elected or appointed to an office to take the prescribed oath or give a bond as required, or either, does not, when he has proceeded to exercise the functions of the office, invalidate his acts so far as the public or third persons are concerned. As to them, his acts are as valid as though he were an officer *de jure*. His title to the office cannot be attacked collaterally, but only by direct proceedings in the nature of quo warranto.³ The failure to qualify constitutes a ground for ousting him from the office.⁴

(b) **As to Rights of Officer.** — The officer cannot in such case recover compensation for services rendered in his official capacity.⁵ In the United States courts, where the taking of the oath or giving of the bond by appointees is not regarded as a condition precedent to the enjoyment of the office, it is held that an officer who has entered on the discharge of the duties of the office without qualifying may on subsequently qualifying recover compensation for services rendered before qualifying.⁶ In jurisdictions where qualification is regarded as a condition precedent to the enjoyment of the office, he is not entitled to compensation for services rendered before qualification.⁷ Nor can an officer who has not qualified justify the doing of any act which it would be unlawful for him to do as a private citizen, on the ground that it was done in his official capacity.⁸ The fact that he took the prescribed oath

Jackson, 2 Aik. (Vt.) 145; Panton Turnpike Co. v. Bishop, 11 Vt. 198; Putnam v. Dutton, 8 Vt. 396. See also Gilbert v. Huston, Litt. Sel. Cas. (Ky.) 223. And see the succeeding subdivision, *Official Acts of Officer as to Public and Third Persons*.

1. Blake v. Sturtevant, 12 N. H. 567, and cases cited in the succeeding subdivision, *As to Rights of Officer*.

2. Otterbourg v. U. S., 5 Ct. Cl. 430. But see People v. Clingan, 5 Cal. 389.

3. **Effect of Failure to Qualify.** — Scott v. Watkins, 22 Ark. 556, *criticising* Parker v. Overman, 18 How. (U. S.) 143; Gunn v. Tackett, 67 Ga. 725; Matter of Kendall, 85 N. Y. 302; Greenleaf v. Low, 4 Den. (N. Y.) 168; Weeks v. Ellis, 2 Barb. (N. Y.) 320; People v. Crissey, 91 N. Y. 616; Drew v. Morrill, 62 N. H. 23; Keyser v. M'Kissan, 2 Rawle (Pa.) 139; Com. v. Slifer, 25 Pa. St. 23, 64 Am. Dec. 680; Kottman v. Ayer, 3 Strobb. L. (S. Car.) 92. See also the title DE FACTO OFFICERS, vol. 8, p. 786.

4. Kottman v. Ayer, 3 Strobb. L. (S. Car.) 92; People v. Crissey, 91 N. Y. 616.

5. **Qualification Necessary to Recovery of Compensation** — *California*. — Payne v. San Francisco, 3 Cal. 122.

Indiana. — Albaugh v. State, 145 Ind. 356.

Minnesota. — State v. Schram, 52 Minn. 420. See also State v. McLeod County, 27 Minn. 90.

New York. — McVeany v. New York, 80 N. Y. 185, 36 Am. Rep. 600. See also Halbeck v. New York, (C. Pl. Gen. T.) 10 Abb. Pr. (N. Y.) 439.

North Carolina. — Wiley v. Worth, 1 Phil. L. (61 N. Car.) 171.

Ohio. — State v. Eshelby, 1 Ohio Cir. Dec. 592.

Pennsylvania. — Com. v. Slifer, 25 Pa. St. 23, 64 Am. Dec. 680; Riddle v. Bedford County,

7 S. & R. (Pa.) 386; Philadelphia v. Given, 60 Pa. St. 136.

South Carolina. — Kottman v. Ayer, 3 Strobb. L. (S. Car.) 92; McBee v. Hoke, 2 Spears L. (S. Car.) 138.

See also title DE FACTO OFFICERS, vol. 8, p. 808.

6. **Recovery for Services Rendered Before Qualifying.** — U. S. v. Flanders, 112 U. S. 88; U. S. v. Eaton, 169 U. S. 331.

Total Failure to Give Bond. — In Glavey v. U. S., 182 U. S. 595, the appointee was allowed to recover salary for the time he was in office though he never gave a bond as required by statute.

Express Requirement of Oath that Officer Has Not Aided Rebellion as Prerequisite to Compensation. — Otterbourg v. U. S., 5 Ct. Cl. 430.

7. Thomas v. Owens, 4 Md. 189.

The Fact that an Officer-elect Was Ready and Willing to Qualify and discharge the duties of the office, but was prevented from so doing by the acts of others, will not entitle him to compensation for the time he was so kept out of office. Jump v. Spence, 28 Md. 1.

8. **Cannot Justify Acts as Done in Official Capacity.** — Schlencker v. Risley, 4 Ill. 483, 38 Am. Dec. 100; Creighton v. Com., 83 Ky. 142, 4 Am. St. Rep. 143; Rounds v. Mansfield, 38 Me. 586; Rounds v. Bangor, 46 Me. 547, 74 Am. Dec. 469; Blake v. Sturtevant, 12 N. H. 567; Cavis v. Robertson, 9 N. H. 524; Courser v. Powers, 34 Vt. 517, *criticising* Taylor v. Nichols, 29 Vt. 104. See also Colburn v. Ellis, 5 Mass. 427. And see the title DE FACTO OFFICERS, vol. 8, p. 804.

Justification in Criminal Prosecution. — In a prosecution for murder, the defendant, who had been regularly appointed as a deputy constable, was allowed to show in justification of the homicide that he was acting in his official

before he was legally appointed or elected to the office does not operate as such justification.¹

(c) **As to Tenure of Predecessor in Office.** — When the statutes provide that officers shall continue in office until their successors are elected and qualified, the failure of an officer-elect to qualify does not create a vacancy authorizing the appointment or election of another thereto, but the incumbent continues not merely as an officer *de facto* but as an officer *de jure*.²

(4) **Time Within Which Officer Must Qualify.** — Where the statutes provide that persons elected to a designated office shall qualify within a certain number of days after the election, the officer may qualify at any time after election and before the expiration of such time and thereupon immediately supersede the authority of his predecessor who holds until a successor is elected and qualified.³

If There Is No Statute in reference to an office prescribing the time within which the oath and bond shall be filed, a duly elected officer who files his oath before the commencement of quo warranto proceedings against him will be adjudged entitled to the office.⁴

Effect of Contest. — When the election under which an office is claimed is contested, statutes prescribing the time within which the officer shall qualify do not apply until the termination of the contest,⁵ and he will be entitled to the office if he thereafter qualifies,⁶ though the statute also provides that failure to qualify within the prescribed time shall create a vacancy.⁷ So, too, it has been held under such a statute that where an officer does some of the things necessary to qualify, and through no fault of his own is precluded from completing the qualification within the prescribed time, the subsequent performance of the acts necessary to completion of the qualification will be deemed to relate to the prior acts and constitute a compliance with the statute.⁸ A statute giving a specified time for qualification after the determination of a contest has been held to afford a reasonable time for qualification after the determination of proceedings analogous to, though not technically, a contest, and which had prevented earlier qualification.⁹ The constructions placed on various dissimilar statutes prescribing the time within which the oath shall be taken or the bond given are set forth in the notes.¹⁰

capacity and killed the deceased while he was resisting arrest, though the defendant had never taken the prescribed oath of office; this on the theory that the defendant was a *de facto* officer and was entitled to protection to the extent that others were bound to respect his official character. *State v. Dierberger*, 90 Mo. 369.

When Statute Does Not Make Taking of Oath Condition Precedent. — *Foot v. Stiles*, 57 N. Y. 399.

The mere fact that a person elected to office has omitted to take the "duelling oath" prescribed by the constitution does not prevent his justification of certain acts as having been done by virtue of his office. *Morgan v. Vance*, 4 Bush (Ky.) 325.

1. *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50.

2. **Failure to Qualify as Affecting Predecessor's Tenure.** — *French v. Santa Clara County*, 69 Cal. 519; *Richards v. McMillin*, 36 Neb. 352; *People v. McKinney*, 52 N. Y. 374. See also *infra*, *Duration of Officer's Authority*, subdiv. 4, a. (2) *Right to Hold Over*.

3. **Time for Qualifying.** — *Loomis v. Coleman*, 51 Mo. 21.

4. *Jones v. Gridley*, 20 Kan. 590.

5. **Contest Extends Time for Qualifying.** — *Peo-*

ple v. Potter, 63 Cal. 127; *Pearson v. Wilson*, 57 Miss. 848.

6. *Kreitz v. Behrensmeyer*, 149 Ill. 496, affirming 52 Ill. App. 291; *Farwell v. Adams*, 112 Ill. 57; *State v. Kraft*, 18 Oregon 550.

Issuance of Certificate of Election to Rival Candidate. — *People v. Miller*, 16 Mich. 56.

Refusal of Officer to Issue Certificate of Election. — *People v. Mayworm*, 5 Mich. 146.

7. *State v. Frantz*, 55 Neb. 167; *State v. Kraft*, 20 Oregon 28.

8. *State v. Tool*, 4 Ohio St. 553.

9. **Injunction Proceedings.** — *State v. Van Beek*, 87 Iowa 569, 43 Am. St. Rep. 397.

10. **Designated Time After Notice Where No Notice Given.** — *Atty.-Gen. v. Elderkin*, 5 Wis. 300. Compare *People v. Perkins*, 85 Cal. 509.

Actual Receipt of Commission. — *State v. Hadley*, 27 Ind. 406.

Bond and Oath. — An ordinance providing that a designated officer shall give a bond "and before he enters upon his office shall also take and subscribe" a designated oath, was held to require that he must both give the bond and take the oath before he entered upon the office. *Howell v. Com.*, 97 Pa. St. 332.

Within Designated Time After Receipt of Commission Not Conferring Right of Office. — *State v. Lewis*, 10 Ohio St. 129.

(5) *Effect of Failure to Qualify Within Prescribed Time.* — Statutes prescribing the time within which an official oath¹ shall be taken, or a bond² given or filed,³ are generally held to be directory only, and a failure to comply therewith does not *ipso facto* forfeit the office, and if the officer subsequently and before the commencement of proceedings to forfeit the office complies with the requirements of the statute, he is entitled to the office.⁴ Such omission at the utmost merely affords a ground for forfeiture in direct proceedings therefor.⁵

Where Statute Declares Vacancy. — In some instances the statutes prescribing the time within which the officer must qualify also provide that the office shall be deemed or become vacant on the refusal, failure, or neglect of the officer to give his bond or take the oath within the time prescribed. In some jurisdictions such statutes are regarded as directory only.⁶ And if the officer qualifies before proceedings are commenced to oust him from the office,⁷

1. Oath. — *Smith v. Cronkhite*, 8 Ind. 134; *Glidden v. Towle*, 31 N. H. 147; *Kearney v. Andrews*, 10 N. J. Eq. 70; *People v. Watts*, 73 Hun (N. Y.) 404.

2. Bond. — *Arkansas.* — *Bosely v. Woodruff* County Ct., 28 Ark. 306.

Georgia. — *Fulton County v. Clarke*, 73 Ga. 666.

Illinois. — *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182.

Indiana. — *State v. Porter*, 7 Ind. 204.

Louisiana. — *State v. Peck*, 30 La. Ann. 280.

Missouri. — *State v. Churchill*, 41 Mo. 41; *State v. Howard County Ct.*, 41 Mo. 247; *State v. Texas County Ct.*, 44 Mo. 230.

New York. — *Cronin v. Stoddard*, 97 N. Y. 271; *McRoberts v. Winant*, (Supm. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 210; *People v. Holley*, 12 Wend (N. Y.) 481.

See also *Schuff v. Pflanz*, 99 Ky. 97; *People v. Benfield*, 80 Mich. 265; *State v. Lafayette County Ct.*, 41 Mo. 545; *Duntley v. Davis*, 42 Hun (N. Y.) 229.

3. Statutes Directory. — *Minnick v. State*, 154 Ind. 379; *People v. Holley*, 12 Wend. (N. Y.) 481; *Oregon v. Colvig*, 15 Oregon 57.

4. Compliance After Prescribed Time Sufficient. — *Minnick v. State*, 154 Ind. 379; *Howard v. Proctor*, 7 Gray (Mass.) 128; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Howland v. Luce*, 16 Johns. (N. Y.) 135. See also *George v. Second School Dist.*, 6 Met. (Mass.) 497. But see *Branham v. Long*, 78 Va. 352.

Completion of Qualification After Commencement of Quo Warranto. — Where the statute requires an officer to give several bonds before entering upon the performance of his duties his failure to give one of the prescribed bonds does not operate to deprive him of the office where he subsequently gives such bond, though it be not given until after the commencement of quo warranto proceedings to oust him from the office. *Worley v. Smith*, 81 N. Car. 305.

5. Ground for Forfeiture. — *Cawley v. People*, 95 Ill. 249; *Cronin v. Stoddard*, 97 N. Y. 271; *State v. Ruff*, 4 Wash. 234. See also *People v. Benfield*, 80 Mich. 265.

In a Criminal Prosecution against an officer for misconduct in office the fact that he did not file his bond within the time prescribed by law is no defense. Having occupied the office and discharged its duties it is immaterial so far as his criminal liability is concerned whether he was an officer *de facto* or *de jure*.

Bartley v. State, 53 Neb. 310. See also title DE FACTO OFFICERS, vol. 8, p. 806.

6. Statutes Declaring Vacancy Held Directory. — *Cawley v. People*, 95 Ill. 249; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Albaugh v. State*, 145 Ind. 356; *State v. Toomer*, 7 Rich. L. (S. Car.) 216. See also *Ex p. Plowman*, 53 Ala. 440; *Com. v. Stambaugh*, 164 Pa. St. 437. But see *People v. Percells*, 8 Ill. 59.

Statute Not Self-executing. — Under a statute providing that if the officer shall neglect, refuse, or be unable to file his bond within the prescribed time, the office shall immediately expire and be deemed and taken to be vacant, a regularly elected officer exercising the functions of the office who has failed to give a bond within the required time is a *de facto* officer whose acts as to third persons and the public are valid until his office has been declared forfeited in a direct proceeding. *Clark v. Ennis*, 45 N. J. L. 69, criticised in *State v. Lansing*, 46 Neb. 523; *Crawford v. Howard*, 9 Ga. 314; *Stokes v. Kirkpatrick*, 1 Met. (Ky.) 138; *Horton v. Parsons*, 37 Hun (N. Y.) 42. See also *Monteith v. Com.*, 15 Grant. (Va.) 172.

Effect of Failure to Renew Bond. — Under a statute requiring an officer to renew his official bond annually and further providing that his failure to do so shall create a vacancy, the office does not *ipso facto* become vacant by reason of the officer's failure to renew his bond. He continues the rightful incumbent of the office until a vacancy is declared by a competent tribunal, authorized by law to declare a vacancy, and his bond is liable for delinquencies during the time he so continues in office. *Vann v. Pipkin*, 77 N. Car. 408.

7. Appointment of Another Precludes Qualification After Prescribed Time. — Where an officer fails to file a sufficient bond within the prescribed time, and a vacancy is declared, and another elected thereto who duly qualifies, the first officer cannot by subsequently giving a sufficient bond entitle himself to the office. *Cole v. Patterson*, 97 N. Car. 360.

The officer's failure to file a sufficient bond within the prescribed time authorizes the appointment of another to the office. *Ross v. People*, 78 Ill. 375.

Judicial Determination of the Fact of Vacancy Not Necessary. — In *State v. Tucker*, 54 Ala. 205, it was held that failure to qualify within the prescribed time authorized the appointment of another to the office without a judicial

though after the expiration of the prescribed time¹ he will be held to be entitled to the office. The failure to qualify is, in such jurisdictions, regarded merely as a ground for forfeiture which may be waived.² The tendency of the decisions in those jurisdictions holding such statutes directory is to restrict the officer's right to qualify after the expiration of the prescribed time to those instances where his failure to qualify within the prescribed time was due to some good reason beyond his control.³ In an application for mandamus to compel the acceptance and approval of a bond tendered after the expiration of the prescribed time the burden rests on the officer-elect to explain the delay and exculpate himself from blame.⁴

Statute Requiring Qualification Within Prescribed Time Mandatory. — In other jurisdictions such statutes are regarded as mandatory.⁵ Failure to do such acts within the prescribed time *ipso facto* creates a vacancy⁶ and deprives the

determination of the fact of vacancy, *overruling* and *criticising* *Sprowl v. Lawrence*, 33 Ala. 674; *State v. Ely*, 43 Ala. 568, and *Ex p. Candee*, 48 Ala. 386. But see *State v. Towne*, 21 La. Ann. 490; *Shartzler v. School Dist.*, 90 Pa. St. 192.

1. *State v. Ruff*, 4 Wash. 234.

2. **Forfeiture May Be Waived.** — *Launtz v. People*, 113 Ill. 137, 55 Am. Rep. 405. See also *People v. Benfield*, 80 Mich. 265.

Obviously such would be the case where the statutes merely authorize but do not make it obligatory upon designated officers to declare a vacancy and appoint another thereto, in case the appointee or officer-elect fails to qualify within the prescribed time. *State v. Lewis*, 10 Ohio St. 129.

Failure to Take Additional Oath Within Prescribed Time. — Under a statute requiring designated officers to take a designated oath within a specified time after the passage of the act and further providing that a failure to take the oath shall disqualify the officer from holding or from continuing to hold the office, the failure to take the oath within the prescribed time does not create a vacancy in the office, but merely furnishes a cause for forfeiture by direct proceedings. *People v. Mt. Vernon*, 59 Hun (N. Y.) 204, *affirmed* 128 N. Y. 657. See also *State v. Towne*, 21 La. Ann. 490.

A statute providing that on failure to give additional bond "his office shall become immediately vacant" has been held to be directory only. *Knox County v. Johnson*, 124 Ind. 145, 19 Am. St. Rep. 88. See also *Larami County v. Atkinson*, 4 Wyo. 334.

3. **Restriction of Right to Qualify After Prescribed Time.** — *Ross v. Williamson*, 44 Ga. 501, 14 Fla. St. State, 56 Tex. 93. See also *State v. Kraft*, 20 Oregon 28.

In some cases the statutes provided that failure to qualify within the prescribed time shall create a vacancy unless a "sufficient cause be shown" for not doing so within such time. *Carpenter v. Titus*, 33 Kan. 7.

4. **Burden of Showing Excuse.** — *State v. Johnson*, 100 Ind. 489.

5. **Statute Prescribing Time Mandatory** — *California*. — *People v. Perkins*, 85 Cal. 509; *Hull v. Superior Ct.*, 63 Cal. 174; *Payne v. San Francisco*, 3 Cal. 122. See also *People v. Perry*, 79 Cal. 105.

Kansas. — *State v. Conn*, 14 Kan. 217; *State v. Matheny*, 7 Kan. 327.

Louisiana. — *State v. Beard*, 34 La. Ann. 273,

distinguishing *State v. Peck*, 30 La. Ann. 280.

Maryland. — *Archer v. State*, 74 Md. 443, 28 Am. St. Rep. 261.

Mississippi. — *Bennett v. State*, 58 Miss. 556, *distinguishing* *State v. Cooper*, 53 Miss. 615.

Nebraska. — *State v. Lansing*, 46 Neb. 514. Compare *Duffy v. State*, 60 Neb. 812.

Virginia. — *Johnson v. Mann*, 77 Va. 265. See also *Montieth v. Com.*, 15 Gratt. (Va.) 172.

See also *Kelly v. State*, 25 Ohio St. 567; *State v. McCollister*, 11 Ohio 46.

Failure of Officer Holding Over to Requalify. — Under a statute providing that an officer holding over shall qualify anew within a specified time, the failure of the officer holding over to requalify within the prescribed time creates a vacancy to which the appointing power has authority to appoint another. *State v. Cosgrove*, 34 Neb. 386. See also *State v. Boyd*, 31 Neb. 682.

Taking Wrong Oath Within Prescribed Time. — Under Const. Neb., art. 14, § 1, providing that all judicial officers before entering on their official duties shall take an oath therein designated and further providing that an officer refusing to take such oath shall forfeit his office, a judicial officer who before the commencement of his term takes an oath but not the one prescribed, and on discovery of his mistake after the commencement of his term takes the proper oath before proceedings against him or an appointment of another to the office, will in quo warranto be held entitled to the office. *Duffy v. State*, 60 Neb. 812.

Statute Constitutional. — *State v. Beard*, 34 La. Ann. 273.

6. **Failure to Qualify in Prescribed Time Ipso Facto Vacates Office.** — *Lorbeer v. Hutchinson*, 111 Cal. 272; *Hull v. Superior Ct.*, 63 Cal. 176; *People v. Taylor*, 57 Cal. 620.

Refusal to Accept Creates Vacancy. — Under a statute providing that an office shall become vacant upon the refusal or neglect of the incumbent to take his oath of office or to give or renew his official bond, or to deposit such oath or bond within the time prescribed by law, an officer who has been elected to succeed himself, who during the continuance of the first term resigns the office to take effect on the first day of the succeeding term, will be deemed to have refused to qualify under the second election so as to create a vacancy in the office authorizing an appointment thereto by the appointing power, though at the time of such appointment

officer-elect of his right to the office, though he thereafter qualifies.¹

c. OATH OF OFFICE — (1) *Power of Legislature to Prescribe Official Oaths.* — A constitutional provision requiring officers to take an oath to support the constitution of the United States and of the state does not preclude the legislature from requiring an additional oath,² but it has no power to require as a condition precedent to the right to hold office that the person seeking to enjoy the office should take an oath that he has not done any act which at the time of the doing of it was not lawful, since such a statute is in contravention of the constitutional provision that no state shall pass any bill of attainder.³ The Federal Constitution prohibits the requirement of any oath which imposes a religious test.⁴

Where Constitution Prescribes Form of Oath. — Where the constitution prescribes the form of oath which shall be taken by all officers,⁵ and further provides that "no other oath, declaration, or test shall be required as a qualification for any office," a statute requiring a successful candidate to file a sworn statement of his election expenses as a prerequisite to his right to the office is unconstitutional,⁶ as is a statute requiring an oath of an excise officer to the effect that he is not interested in the sale or manufacture of intoxicating liquors.⁷

(2) *False Swearing as Affecting Right to Office.* — When the statutes require that an officer-elect shall take a prescribed oath, and further provide that if he shall fail to take it within a specified time the office shall become vacant, but do not declare that there shall be a vacancy in case the officer swears falsely in taking the oath, or that he shall in that case be disqualified from holding the office, the fact that he swore falsely in taking the prescribed oath does not constitute a ground of forfeiture, though he may be punishable for perjury.⁸

(3) *Who May Administer.* — Statutes providing that the official oaths of designated officers shall be taken before other designated officers are generally regarded as directory only, and the taking before some other officer

the time within which the re-elected officer might file his oath and bond had not elapsed. *State v. Washburn*, 17 Wis. 658.

Under such statute the failure of the officer-elect to file his official oath in the proper office within the prescribed time creates a vacancy authorizing the election of another thereto. *State v. Goetze*, 22 Wis. 364. Compare *State v. Dahl*, 65 Wis. 510.

Failure to Give Bond as to Office Held Ex Officio. — Under a statute providing that failure to take the oath of office or neglect to give a bond within the time prescribed by law shall work a vacation of the office, the refusal of a person who holds an office *ex officio* to give a bond required of him as to such *ex officio* office does not vacate the major office, but it does vacate the office held *ex officio*. *State v. Laughton*, 19 Nev. 202.

1. Qualification After Prescribed Time of No Effect. — *Falconer v. Shores*, 37 Ark. 386; *State v. Johnson*, 26 Ark. 281; *Matter of Executive Communication*, 14 Fla. 277; *State v. Conn*, 14 Kan. 217; *State v. Matheny*, 7 Kan. 327; *State v. Lansing*, 46 Neb. 514; *Johnson v. Mann*, 77 Va. 265; *Montieth v. Com.*, 15 Gratt. (Va.) 172. See also *People v. Percells*, 8 Ill. 59.

Validity of Curative Act Authorizing Qualification After Prescribed Time. — *State v. Goetze*, 22 Wis. 364.

2. Power of Legislature to Prescribe Official Oath. — *Ex p. Stratton*, 1 W. Va. 305.

3. Cummings v. State, 4 Wall. (U. S.) 277.

4. Const. U. S., art. 6, § 3.

5. What Officers Within Purview of Constitutional Requirement of Oath. — A constitutional requirement that "every person elected or appointed to any office under the constitution shall before entering upon the duties thereof, take an oath * * * of office," requires an oath of office only from persons seeking to enjoy an office created or provided for by that instrument and does not require an oath of officers created and charged by the legislature with the performance of ministerial duties. *David v. Portland Water Committee*, 14 Oregon 98.

Under a constitutional provision "that all civil officers, except * * * such inferior officers as may be by law exempted shall before they enter on the duties of their office" take a prescribed oath, the manifest intention on the part of the legislature that an inferior officer should not be required to take an oath of office is, without any express statutory exemption, an exemption of such officer from the constitutional requirement. *School Directors v. People*, 79 Ill. 511.

6. Requirement of Sworn Statement of Election Expenses Unconstitutional. — *Bradley v. Clark*, 133 Cal. 196.

7. People v. Palen, 74 Hun (N. Y.) 289.

8. Perjury in Taking Oath Not Ground of Forfeiture. — *People v. Thornton*, 25 Hun (N. Y.) 456, in which the officer untruthfully took oath that he had not offered bribes to voters at the election at which he was elected. See also the title PERJURY, vol. 22, pp. 684-690.

authorized to administer oaths is sufficient to entitle the person to the office.¹

(4) *Duty to Administer.* — Where the statutes merely provide that the official oath of designated officers shall be taken before a specified officer, it is the duty of the latter to administer the oath on the production of *prima facie* evidence that the applicant is entitled to the office. Such officer is not authorized to determine whether or not the applicant is entitled to the office.² The performance of such duty may be coerced by mandamus.³

(5) *Form of Oath and Manner of Taking* — (a) *Form.* — Substantial compliance with the form prescribed is essential to the validity of the oath.⁴ But if a material part of the oath be omitted it is as though no oath had been taken.⁵

(b) *Manner of Taking.* — The inauguration ceremonies usually observed on the occasion of the taking of the oath of office by officers holding high offices in the state governments are not essential to the validity of the qualification.⁶ In most, if not all, of the states an affirmation may be made in lieu of an oath.⁷

(c) *Necessity of Oath Being in Writing and Recorded.* — In the absence of statutory requirement it is not necessary that the official oath should be recorded.⁸ It has been held that a statute requiring the official oath to be in writing, subscribed, and filed was mandatory and compliance essential to an investiture with the powers of the office.⁹ On the other hand, such a statute has been held to be directory only.¹⁰ In either case, if the officer assumes to act without complying with the statute, his acts are valid as to the public and third persons,¹¹ and the sureties on the official bond of the officer are liable for his defaults.¹²

(d) *Evidence that Oath Was Taken.* — A record reciting that one purporting to be the incumbent of an office "took the oath of office" is sufficient evidence that he took the oath prescribed by law;¹³ though a recital that he was

1. *Canniff v. New York*, 4 E. D. Smith (N. Y.) 430. See also *Hardesty v. Taft*, 23 Md. 512; *McKinnon v. McCollum*, 6 Fla. 376; *Ex p. Heath*, 3 Hill (N. Y.) 49; *People v. Stowell*, (Supm. Ct.) 9 Abb. N. Cas. (N. Y.) 456. But see *State v. Perkins*, 24 N. J. L. 409, holding under a statute requiring certain officers to be sworn before a justice of the peace, that the taking of the oath before an officer who was not a justice but was vested with all the powers and authority of a justice, did not make the person taking the oath a *de jure* officer, though his acts as to the public and third persons were valid as those of a *de facto* officer. See also title OATHS AND AFFIRMATIONS, vol. 21, p. 747.

2. *Duty to Administer Oath.* — *Fox v. McDonald*, 101 Ala. 51; *People v. Straight*, 128 N. Y. 545; *People v. Dean*, 3 Wend. (N. Y.) 438.

3. *Fox v. McDonald*, 101 Ala. 51.

4. See title OATHS AND AFFIRMATIONS, vol. 21, p. 751.

Misspelling Officer's Name. — If the oath is in writing the mere misspelling of the officer's name in the body of the oath, it being properly signed, will not affect its validity. *Hoagland v. Culvert*, 20 N. J. L. 387.

5. *Matter of Executive Communication*, 14 Fla. 277. See *supra*, this section, *Effect of Failure to Qualify*; *Effect of Failure to Qualify Within Prescribed Time*.

6. *Ex p. Smith*, 8 S. Car. 495.

7. See title OATHS AND AFFIRMATIONS, vol. 21, p. 744.

8. *Howard v. Proctor*, 7 Gray (Mass.) 128.

9. *School Dist. v. Bennett*, 52 Ark. 511; *Harwood v. Marshall*, 9 Md. 83.

Where the statute prescribes the form of oath which shall be taken and that it shall be deposited in a designated office, a certificate by an officer authorized to administer the oath, to the effect that the officer was sworn, is an insufficient compliance with the statute, and the officer is not entitled to the emoluments of the office. *Halbeck v. New York*, (C. Pl. Gen. T.) 10 Abb. Pr. (N. Y.) 439.

10. *Brunott v. M'Kee*, 6 W. & S. (Pa.) 513.

Indorsement of Oath on Certificate of Appointment. — Where the statutes provide that the oath shall be indorsed on the back of the officer's certificate of appointment, the fact that it is on a separate paper attached to the certificate or indorsed on the face thereof does not affect the validity of the qualification. *State v. Horton*, 19 Nev. 199. See also *Brown v. Foster*, 2 Met. (Mass.) 155.

11. *Com. v. Valsalka*, 181 Pa. St. 17; *State v. Horton*, 19 Nev. 199.

12. *Brunott v. M'Kee*, 6 W. & S. (Pa.) 513.

13. *Recital that Officer "Took the Oath of Office."* — *Scammon v. Scammon*, 28 N. H. 419.

A certificate that M. "took the oaths of office as prescribed by the constitution and laws for" the office which he claimed, was held to be sufficient evidence that the proper oath had been taken, but, the certificate not reciting such fact, it could not be presumed that the oath was subscribed as required by law. *Harwood v. Marshall*, 9 Md. 83.

"sworn into office" has been held insufficient,¹ as has a recital that the officer "qualified."²

d. **OFFICIAL BONDS** — (1) *Power of Legislature to Require Bond.* — In the absence of constitutional provision it is exclusively within the power of the legislature to determine from what officers official bonds shall be required, the penalty, condition, and obligation of such bonds, and the qualifications of the sureties thereon.³ While the legislature has no power to deprive individuals of accrued causes of action arising from the breach of existing bonds, it has plenary power to exact from a public officer as a condition precedent to his right to continue in the office, a new or additional bond, variant in penalty, condition, and obligation from that required from him at the time he entered into the office.⁴

(2) *Necessity of Giving Bond.* — The necessity of giving a bond in accordance with the requirements of the statutes,⁵ as a condition precedent to the enjoyment of the office, has been hereinbefore treated.⁶

(3) *Form of Bond as Affecting Right to Office.* — When a statute requiring a bond prescribes its form, the terms in which it shall be conditioned, or the amount for which it shall be given, a substantial variance from the prescribed form involves the same consequences, so far as the right to the office is concerned, as though no bond were given.⁷ Nor does the fact that the officer charged with the approval of the bond has approved it avoid the effect of failure to condition it as required by statute, since such officer has no power to waive the requirements of the statute.⁸

(4) *Approval* — (a) **Necessity of Approval.** — Where the statutes in regard to the qualification of appointees or officers-elect provide that they shall, before they enter on the duties of their office, give a bond to be approved by a designated officer, the approval is regarded as a condition precedent to the right to exercise the functions of the office.⁹ And if he seeks to justify the doing of any act as having been done by virtue of his office, he must show that his bond was approved by the proper authorities before the doing of

1. *Cardigan v. Page*, 6 N. H. 182.

Statutory Declaration of Sufficiency of "Duly Sworn" or "Sworn According to Law." — *Bennett v. Treat*, 41 Me. 226.

2. **Recital that Officer Qualified Insufficient.** — *Ainsworth v. Dean*, 21 N. H. 400; *Gibson v. Bailey*, 9 N. H. 170. See also title OATHS AND AFFIRMATIONS, vol. 21, p. 722.

3. **Power of Legislature to Require Official Bonds.** — *Ex p. Buckley*, 53 Ala. 42.

Power to Prescribe Qualifications of Sureties. — A statute requiring that sureties on official bonds of county officers should have unexempt property in the county exceeding in amount the penalty of the bond over and above debts and liabilities is not unconstitutional, though the constitution provides that "the sureties on official bonds shall have sufficient property within the state not exempt from sale * * * to make good their bonds," since under such section no officer has a vested right to have a person so qualified, approved of as a surety. *Oliver v. Martin*, 36 Ark. 134.

Power of Legislature to Provide for Forfeiture on Failure to Give. — *Schuff v. Pfanz*, 99 Ky. 97.

Power of Municipality to Prescribe Conditions of Bond. — *Detroit v. Weber*, 26 Mich. 284.

4. **Power to Require Additional Bonds.** — *Ex p. Buckley*, 53 Ala. 42; *Ketler v. Thompson*, 13 Bush (Ky.) 287; *Hyde v. State*, 52 Miss. 665.

5. **Bond Not Necessary in Absence of Statutory Requirement.** — The failure of an officer who

holds over under the constitutional provision until his successor is elected and qualified does not forfeit his office for failure to file a bond for such time as he shall hold over where there is no statute requiring the giving of such a bond. *State v. Compson*, 34 Oregon 25.

Under a statute providing that a certain officer shall give a bond for the faithful performance of the duties of his office, and another statute charging in certain cases another officer with the duties and powers of the former, the latter is not required to give bond, it not being otherwise required, since the duties and powers referred to do not relate to the election and qualification of the latter officer, but to those things which he is required by law to do subsequently. *Quimby v. Wood*, 19 R. I. 571.

6. See *supra*, this section, *Qualification*.

7. **Failure to Give Bond Conditioned as Required Creates Vacancy.** — *People v. Percells*, 8 Ill. 59.

Bond for Insufficient Amount Ground for Forfeiture. — *Brooks v. Watts*, 73 Hun (N. Y.) 404. See also *supra*, this section, *Effect of Failure to Qualify; Effect of Failure to Qualify Within Prescribed Time*.

8. *People v. Percells*, 8 Ill. 59.

9. **Approval Condition Precedent.** — *U. S. v. Le Baron*, 19 How. (U. S.) 73; *McMillin v. Richards*, 45 Neb. 786; *North v. Cary*, 4 Thomp. & C. (N. Y.) 357; *De Lacey v. Brooklyn*, (Brooklyn City Ct. Gen. T.) 36 N. Y. St. Rep. 95; *State v. Lewis*, 10 Ohio St. 129.

such act.¹ The tender of a bond which is, as a matter of fact, sufficient, is not a compliance with the condition, where it is not approved by the officer charged with that duty.² If, however, an officer proceeds to act without having his bond approved, he is a *de facto* officer, and his acts are valid as to the public and third persons.³

(b) **Formal Approval Not Necessary.** — When an officer files a bond with the officers charged with the approval thereof, and such officer retains such bond and thereafter recognizes the officer filing it as the incumbent of the office, an approval of the bond will be implied and a formal approval is not necessary.⁴

(c) **Presumption of Approval.** — In an action on an official bond, if the bond, regular in every way, is produced from the proper depository, it will be presumed, in the absence of evidence that it was rejected, that it was approved and accepted by the officer charged with that duty.⁵

(d) **Indorsement of Approval by Approving Officer.** — Statutes requiring the approving officer to indorse his approval on the bond are regarded as directory only, and the officer-elect having filed a good and satisfactory bond is entitled to the office though the approving officer omit to indorse his approval thereon.⁶ Nor can the principal and sureties set up the want of such indorsement as a defense to an action on the bond.⁷

(e) **Effect of Failure to Secure Approval Within Prescribed Time.** — Where an officer-elect files a bond within the time limited, the fact that it was not approved by the board charged with that duty until after the lapse of the prescribed time will not operate to vacate the office, though the statute provides that failure to have the bond approved and filed within the time limited shall vacate the office. The subsequent approval will be deemed to relate back to the time the bond was delivered for approval.⁸ In some jurisdictions such statutes are regarded as directory only, and mandamus will lie to compel the approval of a bond presented after the expiration of the prescribed time, when no vacancy has been declared and no other person has been appointed to the office.⁹ In other jurisdictions the right to have a bond which was not seasonably filed approved is denied.¹⁰

(f) **Powers and Duties of Officer Charged with Approval.** — Where the statute merely provides that an appointee or officer-elect shall, before he enters on the duties of his office, give a bond to be approved by a designated officer,¹¹ the latter

1. *Rounds v. Mansfield*, 38 Me. 586.

2. **Tender of Good Bond Not Alone Sufficient.** — *Andrews v. Covington*, 69 Miss. 746. See also *State v. Lewis*, 10 Ohio St. 129.

3. **Officer Acting Without Approval a De Facto Officer.** — *Cronin v. Gundy*, 16 Hun (N. Y.) 520; *State v. Bokien*, 14 Wash. 403. See also title DE FACTO OFFICERS, vol. 8, p. 787.

4. **Formal Approval Not Necessary.** — *People v. Breyfogle*, 17 Cal. 504; *People v. Blair*, 82 Ill. App. 570, *affirmed* 181 Ill. 460; *Ramsay v. People*, 197 Ill. 572.

Effect of Subsequent Formal Approval on Intermediate Acts. — In an action on a bond, if the bond has been delivered to the officers charged with its approval within the time limited and no objection is made thereto, it will be presumed to have been approved, and a subsequent formal approval will not affect intermediate acts. *Rogers v. Pugh*, 1 Disney (Ohio) 443.

5. **Presumption of Approval.** — *McClure v. Colclough*, 5 Ala. 65; *State v. Fredericks*, 8 Iowa 553; *Apthorp v. North*, 14 Mass. 167.

6. **Indorsement of Approval.** — *Eustis v. Kidder*, 26 Me. 97; *Fournier v. Cyr*, 64 Me. 32. See also *Stacey v. Graves*, 74 Me. 368.

7. *Boone County v. Jones*, 54 Iowa 699, 37 Am. Rep. 229.

8. **Effect of Failure to Secure Approval Within Prescribed Time.** — *State v. Barnes*, 51 Kan. 688; *Duffy v. State*, 60 Neb. 812. See also *Drew v. Morrill*, 62 N. H. 23; *State v. Dahl*, 65 Wis. 510.

Failure to Secure Approval on Additional Bond Within Time. — Under a statute providing that sureties on an official bond may be relieved of liability thereon by giving notice to the officer charged with the duty of approving such officer's bond and further providing that if the officer shall fail within a specified time to file a bond to be approved by such officer the office shall be declared vacant, an officer who has, pursuant to the requirements of a new bond, filed a sufficient bond is entitled to his office, though the officer or board charged with the duty of approving the bond refused to act thereon within the prescribed time. *People v. Scannell*, 7 Cal. 432. See also *supra*, *Qualification — Effect of Failure to Qualify Within Prescribed Time*.

9. *Bosely v. Woodruff County Ct.*, 28 Ark. 306.

10. *Ex p. Harris*, 52 Ala. 87; *State v. Adams*, 19 Nev. 370. See also title MANDAMUS, vol. 19, p. 824.

11. **Capacity in Which Proper Officer Acts Held Immaterial.** — Where the statute provides for

is only authorized to pass on the sufficiency of the bond as to form and sufficiency; he has no jurisdiction to determine which of several claimants is entitled to the office.¹ It is his duty to pass on a bond presented by a person having *prima facie* right to the office.²

Compelling Officer to Act by Mandamus. — In some jurisdictions it is held that the rejection or approval of an official bond is a ministerial function,³ and mandamus will lie to compel the officer charged with the duty of approving the bond to exercise his discretion as to its approval in a lawful manner.⁴ If the bond is admitted to be correct as to form and sufficiency, the writ will issue to compel its approval.⁵ While the title to the office cannot be litigated on an application for mandamus to compel the approval of a bond admitted to be sufficient, still sufficient inquiry may be made to ascertain whether the applicant has a *prima facie* right to the office.⁶ In other jurisdictions the approval of official bonds is held to be a judicial function⁷ the exercise of which will not be controlled by mandamus.⁸

(5) *Requirement of New or Additional Bond.* — The effect of the failure of an officer who has, subsequent to his due qualification, been required to give a new or additional bond, to comply with such requisition, is treated elsewhere in this title.⁹

(6) *Liability on Bond.* — Questions concerning the liability of the officer and his sureties on official bonds are treated elsewhere in this work under titles referred to in the notes.¹⁰

IX. AUTHORITY, POWERS, RIGHTS, AND DUTIES OF PUBLIC OFFICERS — 1. In General. — The authority and powers of public officers with their corresponding rights and duties are generally conferred and prescribed by constitutional or statutory provisions, and their powers must be exercised, and their duties performed, in accordance therewith.¹¹

the approval of official bonds by the officers of a certain board, the fact that such officers in approving a bond purported to act in a capacity other than that designated, does not invalidate their approval, since done by the persons designated by the statute. *Com. v. Laub*, 1 W. & S. (Pa.) 261.

1. Approving Officer Cannot Decide Conflicting Claims to Office. — *Bosely v. Woodruff County Ct.*, 28 Ark. 306; *State v. Plambeck*, 36 Neb. 401. See also title MANDAMUS, vol. 19, p. 824.

2. Duty to Pass on Bond. — *Beck v. Jackson*, 43 Mo. 117; *State v. Howard County Ct.*, 41 Mo. 247, *State v. Plambeck*, 36 Neb. 401.

3. Approval of Bonds Not a Judicial Function. — The mere fact that the legislature confers upon a judicial officer the duty of approving official bonds does not render the performance of such duty a judicial function which is subject to review by appeal. *Matter of Knight*, 3 Lea (Tenn.) 401.

4. State v. Howard County Ct., 41 Mo. 247.

5. Mandamus Will Lie to Compel Approval. — *Bosely v. Woodruff County Ct.*, 28 Ark. 306; *Speed v. Detroit*, 97 Mich. 198; *McMillin v. Richards*, 45 Neb. 786; *Houseman v. Com.*, 100 Pa. St. 229. See also title MANDAMUS, vol. 19, p. 823.

Condition Precedent to Approval and Burden of Proof. — *Woodward v. State*, 58 Neb. 598.

Bond Signed by Foreign Surety Company. — Under a statute authorizing a foreign surety company to become surety on public bonds, an application for mandamus to compel the approval of a bond signed by a foreign surety company must show that such surety company was authorized to do business in the state. *Woodward v. State*, 58 Neb. 598.

6. McMillin v. Richards, 45 Neb. 786.

7. Approval of Bond a Judicial Function. — *Ex p. Harris*, 52 Ala. 87, *overruling State v. Ely*, 43 Ala. 568, and *Ex p. Candee*, 48 Ala. 386; *Miller v. Sacramento County*, 25 Cal. 94; *People v. Marin County*, 10 Cal. 344; *Swan v. Gray*, 44 Miss. 393. See also title COUNTY COMMISSIONERS, vol. 7, p. 1002.

8. Mandamus Will Not Lie to Control Approval. — *Ex p. Harris*, 52 Ala. 87; *Swan v. Gray*, 44 Miss. 393. See also title MANDAMUS, vol. 19, p. 732.

9. See infra, this title, *Termination of Authority — Abandonment and Forfeiture — Failure to Qualify or to Maintain Qualifications.*

10. Liability on Bond. — See the titles BONDS, vol. 4, p. 618; DE FACTO OFFICERS, vol. 8, p. 807; DEPUTY, vol. 9, pp. 384-395; SURETYSHIP. See also specific titles, such as CONSULS, vol. 7, p. 7; CLERKS OF COURTS, vol. 6, p. 141; JUSTICE OF THE PEACE, vol. 18, p. 48; NOTARY PUBLIC, vol. 21, p. 572; SHERIFFS, MARSHALS AND CONSTABLES. See also ENCYC. OF PL. AND PR., title OFFICIAL BONDS, vol. 15, p. 83.

11. Powers and Duties Prescribed by Law. — *Arkansas*. — *Ex p. Danley*, 24 Ark. 1.

California. — *People v. Whipple*, 47 Cal. 592.

Georgia. — *Penitentiary Co. No. 2 v. Gordon*, 85 Ga. 160.

Illinois. — *Adams v. Slater*, 8 Ill. App. 72.

Indiana. — *Collins v. State*, 8 Ind. 344; *Green v. Beeson*, 31 Ind. 7.

Michigan. — *Sibley v. Smith*, 2 Mich. 486; *James v. Howard*, 4 Mich. 446.

Missouri. — *Browne's Appeal*, 69 Mo. App. 159.

Nevada. — *State v. Central Pac. R. Co.*, 9

2. Presumption as to Possession of Authority and Performance of Duty. — As has been stated elsewhere in this work, the presumption is that one presuming to act as a public officer is properly authorized to do so; that an officer has properly performed his official duties, and that his official acts are regular.¹

3. Implied Powers. — Public officers have not only the powers expressly conferred upon them by law, but they also possess by necessary implication

Nev. 79; *State v. Washoe County*, 14 Nev. 66; *Godchaux v. Carpenter*, 19 Nev. 415.

New Jersey. — *Osborne v. Tunis*, 25 N. J. L. 633.

New York. — *Rowland v. Miln*, 2 Hilt. (N. Y.) 150; Metropolitan Board of Health v. Schmades, (C. Pl. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 205; *People v. Peck*, 138 N. Y. 386.

Oregon. — *Brown v. Fleishner*, 4 Oregon 132.

Tennessee. — *Gaines v. Galbreath*, 14 Lea (Tenn.) 359.

Virginia. — *Yancey v. Hopkins*, 1 Munf. (Va.) 419; *Nalle v. Fenwick*, 4 Rand. (Va.) 585.

West Virginia. — *Bridges v. Shallcross*, 6 W. Va. 562.

And see generally the constitutional and statutory enactments of the several states.

Duties Implied from Nature of Office. — *State v. Walbridge*, 69 Mo. App. 657.

Rights and Duties Are Reciprocal. — *Hinze v. People*, 92 Ill. 406; *State v. Friedley*, 135 Ind. 119.

Protection of Rights Lost by Neglect or Misconduct of Public Officer. — *Parker v. Kuhn*, 19 Neb. 304; *Continental Bldg., etc., Assoc. v. Mills*, 44 Neb. 141; *Duffy v. State*, 60 Neb. 812.

Duties Which Legislature May Prescribe. — *Love v. Baehr*, 47 Cal. 364.

Right of Legislature to Increase Duties. — *Shoemaker v. U. S.*, 147 U. S. 282; *Lane v. Coos County*, 10 Oregon 123.

Transfer of Duties of One Officer to Another After Election Illegal. — *People v. Kelsey*, 34 Cal. 470; *Mills v. Sargent*, 36 Cal. 379.

Custom Cannot Change Prescribed Duties. — *Cole v. State*, 131 Ind. 591.

Cannot Be Deprived of Power by Implication. — *Anderson v. Van Tassel*, 53 N. Y. 631.

Officer Must Know Law Prescribing Duty. — *Bohler v. Verdery*, 92 Ga. 715.

Intent Cannot Control Act Performed in Course of Duty. — *Dayton v. Rutland*, 84 Ill. 279, 25 Am. Rep. 457.

Exercise of Duties by Another Forbidden by Implication. — *Atchison, etc., R. Co. v. People*, 5 Colo. 60.

Act Not Invalidated by Misrecital of Source of Power. — *Matter of Rockaway Park Imp. Co.*, 83 Hun (N. Y.) 263; *Pope v. Davenport*, 52 Tex. 206.

Time Must Be Devoted to Performance of Duties — *Const. of Miss.*, § 267; *Fairley v. Western Union Tel. Co.*, 73 Miss. 6.

Right to Regulate Duties of Clerks. — *Throop v. Langdon*, 40 Mich. 674.

Exemption from Liability for Assault, Homicide, Etc. — *State v. Clayton*, 100 Mo. 516, 18 Am. St. Rep. 565. And see the titles ASSAULT AND BATTERY, vol. 2, p. 961; MURDER AND MANSLAUGHTER, vol. 21, p. 202.

Right to Carry Arms. — *State v. Wisdom*, 84 Mo. 177. And see the title CARRYING WEAPONS, vol. 5, p. 729.

Act Prohibiting Political Activity Unconstitutional. — *Louthan v. Com.*, 79 Va. 196, 52 Am. Rep. 626. See also *Exp. Curtis*, 106 U. S. 371.

Authority and Duties of Comptrollers and Auditors — *Alabama.* — *Smith v. Jones*, 50 Ala. 465. *California.* — *Stratton v. Green*, 45 Cal. 149; *Springer v. Green*, 46 Cal. 73.

Illinois. — *People v. Swigert*, 107 Ill. 494.

Louisiana. — *State v. Clinton*, 28 La. Ann. 47; *State v. Clinton*, 28 La. Ann. 72; *Buffington v. Clinton*, 28 La. Ann. 132.

Missouri. — *State v. Hinkson*, 7 Mo. 353; *Morgan v. Buffington*, 21 Mo. 550; *State v. St. Louis County Ct.*, 42 Mo. 496; *State v. Clark*, 61 Mo. 263.

Montana. — *Fisk v. Cuthbert*, 2 Mont. 593.

Nevada. — *State v. Doron*, 5 Nev. 399; *State v. Hobart*, 12 Nev. 408; *State v. Hallock*, 16 Nev. 373.

New Jersey. — *Angle v. Runyon*, 38 N. J. L. 403.

New York. — *People v. New York County*, (Supm. Ct. Gen. T.) 22 How. Pr. (N. Y.) 71, 21 How. Pr. (N. Y.) 322; *People v. St. Lawrence County*, (Supm. Ct. Spec. T.) 30 How. Pr. (N. Y.) 173.

North Carolina. — *Commercial, etc., Bank v. Worth*, 117 N. Car. 152.

Oklahoma. — *Johnson v. Cameron*, 2 Okla. 266.

Tennessee. — *Reeves v. State*, 7 Coldw. (Tenn.) 96; *Smith v. Hacker*, 1 Shannon Tenn. Cas. 416; *State v. Dickson*, 2 Shannon Tenn. Cas. 486; *State v. Murphy*, 101 Tenn. 516.

Wisconsin. — *State v. Hastings*, 10 Wis. 525.

Authority and Duties of Mayor and Other Municipal Officers — *Arkansas.* — *Halbut v. Forrest City*, 34 Ark. 246.

California. — *Greathouse v. Dunn*, 60 Cal. 311.

Illinois. — *Sherlock v. Winnetka*, 68 Ill. 530.

Iowa. — *Cochran v. McCleary*, 22 Iowa 75.

Louisiana. — *Wilson v. Shreveport*, 29 La. Ann. 673.

Maryland. — *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *Hagerstown v. Dechert*, 32 Md. 369.

Mississippi. — *Jane v. Alley*, 64 Miss. 446.

Missouri. — *Geary v. Kansas City*, 61 Mo. 378.

New Hampshire. — *Labrie v. Manchester*, 59 N. H. 120, 47 Am. Rep. 179.

New Jersey. — *Keeler v. Milledge*, 24 N. J. L. 142.

New York. — *Briggs v. New York*, 2 Daly (N. Y.) 304; *Naylor v. Glasier*, 5 Duer (N. Y.) 161; *Nelson v. New York*, 63 N. Y. 535, reversing 5 Hun (N. Y.) 190.

Ohio. — *State v. Hudson*, 44 Ohio St. 137.

And see the title MUNICIPAL CORPORATIONS, vol. 20, p. 1217.

Duties of Secretary of State. — *Brown v. Fleishner*, 4 Oregon 132.

1. See title PRESUMPTIONS, vol. 22, p. 1266.

such powers as are requisite to enable them to discharge the official duties devolved upon them.¹

4. Actions by Public Officers. — Questions concerning the right of public officers to bring actions, and the name in which such actions should be brought, are discussed elsewhere.²

5. When Performance of Duties Mandatory. — Whenever an act to be done under a statute is to be done by a public officer and concerns the public interest, or the rights of third persons which require the performance of it, then it becomes a duty in the officer to do it.³

6. Time and Manner of Performing Duties. — When a statute specifies the time or manner of performing an official act it will be considered as directory merely, unless the nature of the act to be performed, or the language used by the legislature, shows that the designation of the time or manner was intended as a limitation of the power of the officer.⁴

7. Territorial Jurisdiction. — As a general rule, an officer can perform no official act outside of and beyond the territorial limits in which he is authorized and required to act. His powers are limited to the territory of which he is an officer.⁵

8. Delegation of Authority. — It is a well-settled rule that a public officer or

1. Necessary Incidental Powers Implied — *Alabama*. — Harbin *v.* Stewart, 4 Port. (Ala.) 370.

Arkansas. — Haynes *v.* Butler, 30 Ark. 69.

California. — Bateman *v.* Colgan, 111 Cal. 587; Harris *v.* Gibbins, 114 Cal. 418; Lewis *v.* Colgan, 115 Cal. 529.

Delaware. — Huey *v.* Richardson, 2 Harr. (Del.) 206.

Indiana. — State *v.* Haworth, 122 Ind. 462.
Massachusetts. — Vose *v.* Deane, 7 Mass. 280.

Missouri. — State *v.* Gates, 67 Mo. 139; Nichols *v.* Reyburn, 55 Mo. App. 1.

Nebraska. — Lancaster County *v.* Green, 54 Neb. 101.

New Hampshire. — Backman *v.* Charlestown, 42 N. H. 125.

New Jersey. — See Green *v.* Cape May, 41 N. J. L. 45.

New York. — New York *v.* Sands, 105 N. Y. 210; People *v.* Chapin, 105 N. Y. 309; People *v.* Columbia County, 134 N. Y. 1; Armstrong *v.* Ft. Edward, 159 N. Y. 315; Jackson *v.* Brown, 5 Wend. (N. Y.) 590. See also Little *v.* Banks, 85 N. Y. 258; State *v.* Delafield, 8 Paige (N. Y.) 527.

Ohio. — Burrows *v.* Cosler, 33 Ohio St. 567. See also Musgrave *v.* Pulido, 5 App. Cas. 102; Floyd Acceptances, 7 Wall. (U. S.) 666.

Compare Wright *v.* Nagle, 48 Ga. 367.
And see the title AGENCY, vol. 1, p. 997.

2. See the title PUBLIC OFFICERS, 17 ENCYC. OF PL. AND PR. 145.

3. "May" Construed "Must." — Newburgh, etc., Turnpike Road Co. *v.* Miller, 5 Johns Ch. (N. Y.) 113, *per* Kent, Ch. To the same effect are Mason *v.* Fearson, 9 How. (U. S.) 248; Rock Island County *v.* U. S., 4 Wall. (U. S.) 435; Harrison County *v.* Benson, 83 Ind. 469; Logansport *v.* Wright, 25 Ind. 512; Indianapolis *v.* McAvoy, 86 Ind. 590; Smith *v.* State, 1 Kan. 365; Kansas Pac. R. Co. *v.* Reynolds, 8 Kan. 628; State *v.* King, 136 Mo. 309; Springfield Milling Co. *v.* Lane County, 5 Oregon 265; Rankin *v.* Buckman, 9 Oregon 253. See also State *v.* Haworth, 122 Ind. 462; Carr *v.* Northern Liberties, 35 Pa. St. 324, 78 Am. Dec. 342. And see the title STATUTES.

4. Statutes Prescribing Time and Manner Directory. — Gallup *v.* Smith, 59 Conn. 357; Whalin *v.* Macomb, 76 Ill. 49; Kinney *v.* People, 52 Ill. App. 359; Standard *v.* Industry, 55 Ill. App. 523; Abney *v.* Clark, 87 Iowa 727; People *v.* Allen, 6 Wend. (N. Y.) 486; Looney *v.* Hughes, 26 N. Y. 514. And see the title STATUTES.

Limitation of Powers by Statute Prescribing Mode. — Hudson *v.* Jefferson County Ct., 28 Ark. 359; Cowell *v.* Martin, 43 Cal. 605; Illinois, etc., Canal *v.* Calhoun, 2 Ill. 521; National Cigar Co. *v.* Dulaney, 96 Ill. 503; State *v.* Washoe County, 6 Nev. 104; Sadler *v.* Eureka County, 15 Nev. 39.

5. Territorial Limits of Officer's Authority — *England*. — Stuart *v.* Bute, 9 H. L. Cas. 440, 7 Jur. N. S. 1129.

United States. — Lynde *v.* Winnebago County, 16 Wall. (U. S.) 6.

Alabama. — See Collier *v.* State, 2 Stew. (Ala.) 388.

Georgia. — Fain *v.* Garthright, 5 Ga. 12; Buchanan *v.* Jones, 12 Ga. 612; Hammond *v.* Wilcher, 79 Ga. 424. See also Mitchell *v.* Malone, 77 Ga. 301.

Illinois. — Van Dusen *v.* People, 78 Ill. 645. See also Durfee *v.* Grinnell, 69 Ill. 371.

Kansas. — Morrell *v.* Ingle, 23 Kan. 32; Phillips *v.* Thralls, 26 Kan. 780.

Michigan. — Carr *v.* Phillips, 39 Mich. 319; Allor *v.* Wayne County, 43 Mich. 76; People *v.* Burt, 51 Mich. 199; Robertson *v.* Baxter, 57 Mich. 127. See also Brown *v.* McCormick, 28 Mich. 215.

Mississippi. — Riley *v.* James, 73 Miss. 1. See also Saunders *v.* Erwin, 2 How. (Miss.) 732.
New York. — Jackson *v.* Humphrey, 1 Johns. (N. Y.) 498; Dooley's Case, (Supm. Ct. Gen. T.) 8 Abb. Pr. (N. Y.) 188.

Pennsylvania. — Black *v.* Rempubliam, 1 Yeates (Pa.) 140; Avery *v.* Seely, 3 W. & S. (Pa.) 494; Share *v.* Anderson, 7 S. & R. (Pa.) 43, 10 Am. Dec. 421.

And see the titles ACKNOWLEDGMENTS, vol. 1, p. 489; JUSTICES OF THE PEACE, vol. 18, p. 10; NOTARIES PUBLIC, vol. 21, p. 558; SHERIFFS, MARSHALS, AND CONSTABLES.

public body cannot delegate powers which require the exercise of judgment and discretion, but authority to do acts merely ministerial or mechanical may be delegated.¹ The delegation of authority by legislative² and judicial³ officers, and by officers and agents of municipal corporations⁴ and counties⁵ is discussed elsewhere. The exercise of official authority by deputy is also discussed in another title in this work.⁶

9. Exercise of Authority by Official Body — a. IN GENERAL. — When authority to do an act of a public nature is conferred by law upon a body or board of officers, one of such body or board cannot, independently of the others, and without the concurrence of them, or some of them, exercise such authority.⁷

b. MAJORITY ACTION. — When it is not otherwise provided by law it is not, however, necessary that all the members of such body or board should concur in the exercise of such authority. If all meet and consult and a majority agree to an act, such act is valid, even although the minority expressly dissent.⁸ Or if all have due notice of the time and place of meeting,

1. What Powers May Be Delegated — United States. — *Miller v. New York*, 109 U. S. 385.

Arkansas. — *Cheatham v. Phillips*, 23 Ark. 80.

California. — *Jobson v. Fennell*, 35 Cal. 711; *Holley v. Orange County*, 106 Cal. 420.

Iowa. — *Ring v. Johnson County*, 6 Iowa 265.

Illinois. — *Mann v. Richardson*, 66 Ill. 481.

Maryland. — *Watson v. Watson*, 58 Md. 442.

Massachusetts. — *Day v. Green*, 4 Cush. (Mass.) 433.

Michigan. — *Hulin v. People*, 31 Mich. 323; *Atty.-Gen. v. Board of Councilmen*, 58 Mich. 213, 55 Am. Rep. 675; *Hall v. Collins*, 117 Mich. 617.

Missouri. — *Neill v. Gates*, 152 Mo. 588; *Browne's Appeal*, 69 Mo. App. 159.

New York. — *Powell v. Tuttle*, 3 N. Y. 396; *Delaware County v. Sackrider*, 35 N. Y. 154; *Birdsall v. Clarke*, 73 N. Y. 73, 29 Am. Rep. 105; *People v. Bank of North America*, 75 N. Y. 547; *Gibson v. National Park Bank*, 49 N. Y. Super. Ct. 429, *affirmed* 98 N. Y. 87; *People v. Davis*, 15 Hun (N. Y.) 209; *Matter of Emigrant Industrial Sav. Bank*, 75 N. Y. 388.

Tennessee. — *Coffee v. Tucker*, 7 Humph. (Tenn.) 49.

Wisconsin. — *State v. Hastings*, 10 Wis. 529. And see the title AGENCY, vol. 1, p. 974.

Official Signature. — A public officer cannot authorize another person to put his (the officer's) name to an official document which the law requires should be signed by the officer himself. *Chapman v. Limerick*, 56 Me. 390.

2. See the title CONSTITUTIONAL LAW, vol. 6, p. 1021; MUNICIPAL CORPORATIONS, vol. 20, p. 1139.

3. See the title JUDGE, vol. 17, p. 717.

4. See the title AGENCY, vol. 1, p. 975.

5. See the title COUNTIES, vol. 7, p. 940.

6. See the title DEPUTY, vol. 9, p. 368.

7. Independent Action Invalid. — *Merrill v. Berkshire*, 11 Pick. (Mass.) 269; *Parsons v. Pettingell*, 11 Alen (Mass.) 507; *Newcomb v. Chesebrough*, 33 Mich. 321; *Petrie v. Doe*, 30 Miss. 698; *People v. Chenango County*, 11 N. Y. 563; *Easthampton v. Bowman*, 136 N. Y. 521; *Schuyler v. Marsh*, 37 Barb. (N. Y.) 350; *Burke v. Burpo*, 75 Hun (N. Y.) 568; *Geter v. Tobacco Inspection Com'rs*, 1 Bay. (S. Car.) 354. And see the titles COUNTY COMMISSIONERS, vol. 7, p. 979; QUORUM, *post*.

8. Right of Majority to Act — England. — *Grindley v. Barker*, 1 B. & P. 229; *Billings v. Prinn*, 2 W. Bl. 1017; *Rex v. Forrest*, 3 T. R. 38; *Rex v. Beeston*, 3 T. R. 592; *Atty.-Gen. v. Davy*, 2 Atk. 212.

United States. — *Cooley v. O'Connor*, 12 Wall. (U. S.) 391; *Schenck v. Peay*, Woolw. (U. S.) 175.

Alabama. — *Caldwell v. Harrison*, 11 Ala. 755.

California. — *People v. Coghill*, 47 Cal. 361.

Colorado. — *People v. Lothrop*, 3 Colo. 428.

Georgia. — *Beall v. State*, 9 Ga. 367.

Illinois. — *Louk v. Woods*, 15 Ill. 256.

Iowa. — *Sioux City v. Weare*, 59 Iowa 95.

Massachusetts. — *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99; *Plymouth v. Plymouth County*, 16 Gray (Mass.) 341.

Michigan. — *Scott v. Detroit Young Men's Soc.*, 1 Dougl. (Mich.) 119.

New Hampshire. — *Jewett v. Alton*, 7 N. H. 253. See also *Strafford v. Welch*, 59 N. H. 46.

New York. — *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *Babcock v. Lamb*, 1 Cow. (N. Y.) 238; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Harris v. Whitney*, (Supm. Ct. Gen. T.) 6 How. Pr. (N. Y.) 175; *Matter of Beekman*, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 16, 1 Abb. Pr. N. S. (N. Y.) 449; *Matter of Palmer*, (Supm. Ct. Gen. T.) 31 How. Pr. (N. Y.) 43; *McCoy v. Curtice*, 9 Wend. (N. Y.) 17, 24 Am. Dec. 113; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *Woolsey v. Tompkins*, 23 Wend. (N. Y.) 324; *Perry v. Tynen*, 22 Barb. (N. Y.) 137.

North Carolina. — *State v. King*, 4 Dev. & B. L. (20 N. Car.) 521; *North Carolina R. Co. v. Swepson*, 71 N. Car. 350.

North Dakota. — *State v. Archibald*, 5 N. Dak. 359.

Ohio. — *Merchant v. North*, 10 Ohio St. 252; *State v. Wilkesville Tp.*, 20 Ohio St. 294.

Pennsylvania. — *Turnpike Road Co.'s Case*, 5 Binn. (Pa.) 481; *Com. v. Canal Com'rs*, 9 Watts (Pa.) 466; *Allegheny County v. Lecky*, 6 S. & R. (Pa.) 166, 9 Am. Dec. 418.

Vermont. — *North Bennington First Nat. Bank v. Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

Ratification of Acts of Minority. — *Hanson v. Dexter*, 36 Me. 516.

Confirmation of Acts of Part of Board. — *Matter*

it is no objection to the validity of the action taken that all the members do not attend, if there is a quorum.¹ It seems that the action of a majority of a quorum, assembled after due notice, will bind the whole body.² When action has been taken by such board or body, the presumption is that all the members thereof were present and participated in the deliberations, unless the contrary expressly appears.³

c. WHEN ONLY TWO PERSONS CONSTITUTE BODY. — When the performance of a power or duty is confined to only two persons, nothing can be done without the consent of both.⁴

d. TWO OR MORE BODIES. — When authority is conferred on two or more bodies, they must all come together for consultation and deliberation; but when they do, the vote of the majority of the persons present controls, even though one of the bodies should leave before the vote is taken.⁵

of Pearsall, (Supm. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 203, *distinguishing* Palmer's Petition, (Supm. Ct. Spec. T.) 1 Abb. Pr. N. S. (N. Y.) 30.

Absence Waived by Parties in Interest. — Smith v. New Haven, 59 Conn. 203.

Written Contract Must Be Signed by Majority. — Curtis v. Portland, 59 Me. 483.

Act of Quorum of Council or Collective Body Is the Act of the Body. — State v. Porter, 113 Ind. 79.

Action of Majority of Municipal Committee Valid. — State v. Jersey City 27 N. J. L. 493.

Whether Rule Applicable to Courts. — See Oakley v. Aspinwall, 3 N. Y. 547; Parrott v. Knickerbocker Ice Co., (N. Y. Super. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 234, 38 How. Pr. (N. Y.) 508; Rogan v. Walker, 1 Wis. 587.

Death, Disqualification, or Failure to Qualify of One of Three Prevents Action. — Doe v. Middleton, 3 Brod. & B. 214, 7 E. C. L. 416; Williamsburg v. Lord, 51 Me. 600; Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201. And this is true under the *Kansas* statute. Leavenworth, etc., R. Co. v. Meyer, 58 Kan. 305.

Under the *California* statute it was decided that the ineligibility of two out of fifteen would not prevent action. People v. Hecht, 105 Cal. 621, 45 Am. St. Rep. 96.

1. Notice to All Sufficient. — *United States.* — Schenck v. Peay, Woolw. (U. S.) 175.

Colorado. — People v. Lothrop, 3 Colo. 428.

Connecticut. — Groton v. Hurlburt, 22 Conn. 178; Martin v. Lemon, 26 Conn. 192; Wilson v. Waltersville School Dist., 46 Conn. 400. See also Middletown v. Berlin, 18 Conn. 189; Gallup v. Tracy, 25 Conn. 10; Guyer v. Stratton, 29 Conn. 421.

Massachusetts. — Clark v. Cushman, 5 Mass. 505; Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

Nebraska. — State v. Bemis, 45 Neb. 724; *In re* State Treasurer, 51 Neb. 116. See also People v. Peters, 4 Neb. 254; Hopkins v. Scott, 38 Neb. 661.

Ohio. — See Merchant v. North, 10 Ohio St. 252.

Pennsylvania. — McCready v. Guardians of Poor, 9 S. & R. (Pa.) 94, 11 Am. Dec. 667.

New York. — Horton v. Garrison, 23 Barb. (N. Y.) 176; People v. Batchelor, 28 Barb. (N. Y.) 310; Lamoreaux v. O'Rourke, 3 Abb. App. Dec. (N. Y.) 15; Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201.

See also the title AGENCY, vol. 1, p. 1057.

What Constitutes Notice. — Mitchell County v. Horton, 75 Iowa 271. See also Boots v. Washburn, 79 N. Y. 207.

Notice to All Held Unnecessary. — Beall v. State, 9 Ga. 367.

2. Majority of Quorum May Act. — Martin v. Lemon, 26 Conn. 192; Damon v. Granby, 2 Pick. (Mass.) 345; People v. Batchelor, 28 Barb. (N. Y.) 310. See also Williams v. School Dist. No. 1, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; George v. Second School Dist., 6 Met. (Mass.) 497; Jones v. Andover, 9 Pick. (Mass.) 146.

3. Presumption of Presence. — Scott v. Detroit Young Men's Soc., 1 Dougl. (Mich.) 119; Yates v. Russell, 17 Johns. (N. Y.) 468; Cole v. Hall, 2 Hill (N. Y.) 625; Doughty v. Hope, 3 Den. (N. Y.) 249; Miller v. Garlock, 8 Barb. (N. Y.) 153; Doolittle v. Doolittle, 31 Barb. (N. Y.) 312; Woolsey v. Tompkins, 23 Wend. (N. Y.) 324.

Under a New York Statute Authorizing Two Highway Commissioners to act, the presence of, or notice to, the third commissioner must appear on the face of the order. People v. Williams, 36 N. Y. 411, *overruling* Tucker v. Rankin, 15 Barb. (N. Y.) 471. See also Marble v. Whitney, 28 N. Y. 297; People v. Hynds, 30 N. Y. 470.

4. One of Two Cannot Act. — State v. Prall, 10 N. J. L. 161; Powell v. Tuttle, 3 N. Y. 396, *overruling* King v. Stow, 6 Johns. Ch. (N. Y.) 323; Olmsted v. Elder, 5 N. Y. 144; New York L. Ins., etc., Co. v. Staats, 21 Barb. (N. Y.) 570; Downing v. Rugar, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201; Cooper v. Lampeter Tp., 8 Watts (Pa.) 125. See also Hancock County v. Eastern River Lock, etc., Co., 20 Me. 72.

Death or Disability of One Prevents Action. — Pell v. Ulmar, 21 Barb. (N. Y.) 500; Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201.

One May Act to Prevent Failure of Justice. — Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 210.

Entry of Sale by one of two land commissioners not a fatal irregularity if both present. White v. Lester, 1 Keyes (N. Y.) 316.

5. How Authority Exercised by Two Bodies. — Gildersleeve v. Board of Education, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201; Whiteside v. People, 26 Wend. (N. Y.) 634. See also *Ex p.* Humphreys, 10 Wend. (N. Y.) 612. Compare Rex v. Bower, 1 B. & C. 492, 8 E. C. L. 209.

When Body Consists of Two Integral Parts,

e. **DISTINCTION AS TO EXERCISE OF MINISTERIAL AND JUDICIAL AUTHORITY.** — If the act is merely ministerial in its character, a majority at least must concur and unite in the performance of it; but they may act separately and need not be convened in a body, or notified so as to convene for that purpose. But if the act is one that requires the exercise of discretion and judgment, in which case it is usually termed a judicial act, unless special provision is otherwise made, the persons to whom the authority is given must meet and confer together, and be present when the act is performed.¹

f. **STATUTORY REGULATION.** — In some instances the exercise of authority by a board or body of public officers has been expressly regulated by statute.²

10. Official Good Faith. — A public officer is prohibited by public policy from performing acts and making contracts which would result in placing him in such a position that his individual interest would be in opposition to his official duty.³

11. Right to Possession of Official Property. — *Prima facie*, title to an office gives the right to the possession of the insignia and furniture thereof, and the records and other books and papers appertaining thereto.⁴ In some jurisdictions a statutory proceeding has been provided to enable a public officer to obtain possession of official books and papers and other property pertaining to his office.⁵

authority judicial in its character cannot be exercised by either in the absence of the other. *Charles v. Hoboken*, 27 N. J. L. 203.

1. Martin v. Lemon, 26 Conn. 192; *Perry v. Tynen*, 22 Barb. (N. Y.) 137.

2. Statutory Provisions — *United States*. — *Curtis v. Butler County*, 24 How. (U. S.) 435. *Arkansas*. — *Pulaski County v. Lincoln*, 9 Ark. 320; *Crain v. State*, 45 Ark. 450.

Arizona. — *Schuerman v. Territory*, (Ariz. 1900) 60 Pac. Rep. 895.

California. — *Jacobs v. San Francisco*, 100 Cal. 121; *People v. Hecht*, 105 Cal. 621, 45 Am. St. Rep. 96.

Kansas. — *Leavenworth, etc., R. Co. v. Meyer*, 58 Kan. 305. See also *Paola, etc., R. Co. v. Anderson County*, 16 Kan. 302, 20 Kan. 535; *Aikman v. School Dist. No. 16*, 27 Kan. 129; *Ft. Scott First Nat. Bank v. Drake*, 35 Kan. 564, 57 Am. Rep. 193.

Kentucky. — *McLaughlin v. Wheeler*, (Ky. 1897) 38 S. W. Rep. 493; *Lyon v. Mason*, 102 Ky. 594.

Michigan. — *Serrell v. Patterson*, 107 Mich. 234.

New Hampshire. — *Andover v. Grafton*, 7 N. H. 298.

New York. — *People v. Williams*, 36 N. Y. 441; *People v. Nostrand*, 46 N. Y. 375; *People v. Nichols*, 52 N. Y. 478, 11 Am. Rep. 734; *Johnson v. Dodd*, 56 N. Y. 76; *Whitford v. Scott*, (Supm. Ct. Gen. T.) 14 How. Pr. (N. Y.) 302; *Perry v. Tynen*, 22 Barb. (N. Y.) 137; *Keeler v. Frost*, 22 Barb. (N. Y.) 407; *People v. Bradley*, 64 Barb. (N. Y.) 228, *affirmed* *People v. Palmer*, 52 N. Y. 83; *Lee v. Parry*, 4 Den (N. Y.) 125; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *Parrott v. Knickerbocker Ice Co.*, (N. Y. Super. Ct. Gen. T.) 8 Abb. Pr. N. S. (N. Y.) 234, 38 How. Pr. (N. Y.) 508; *Schoepflin v. Calkins*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 159; *People v. Walker*, (Supm. Ct. Spec. T.) 2 Abb. Pr. (N. Y.) 421; *Gildersleeve v. Board of Education*, (C. Pl. Gen. T.) 17 Afb. Pr. (N. Y.) 201.

North Carolina. — *Austin v. Helms*, 65 N. Car. 560.

Ohio. — *State v. Wilkesville Tp.*, 20 Ohio St. 288.

Pennsylvania. — *Jefferson County v. Slagle*, 66 Pa. St. 202.

Vermont. — *North Bennington First Nat. Bank v. Mt. Tabor*, 52 Vt. 87, 36 Am. Rep. 734.

And see the statutory enactments of the several states.

Adjournment by Minority. — *New York Laws* 1892, c. 677, § 19; *Matter of Light*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 737.

3. Requirement of Good Faith. — *Kerakoose v. Serle*, 4 Moo. P. C. 459; *Edwards v. Estell*, 48 Cal. 194; *Frier v. State*, 11 Fla. 300; *Chatham v. Pointer*, 1 Bush (Ky.) 423; *Clute v. Barron*, 2 Mich. 192; *People v. Overysse Tp. Board*, 11 Mich. 222; *Stevenson v. Bay City*, 26 Mich. 44; *Roosevelt v. Draper*, 23 N. Y. 318. See also *Tipppecanoe County v. Mitchell*, 131 Ind. 370. And see the titles AGENCY, vol. 1, p. 1071; ILLEGAL CONTRACTS, vol. 15, p. 975; JUDICIAL SALES, vol. 17, p. 962; TAX SALES.

Right of Auditor's Clerk to Purchase Land Sold for State Taxes. — *Browne v. Carlisle*, 62 Miss. 595.

Sale of Canal Land by Canal Commissioner to Himself Voidable Only. — *People v. Force*, 100 Ill. 549.

4. Possession of Official Property. — *Crowell v. Lambert*, 10 Minn. 369; *State v. Sherwood*, 15 Minn. 221, 2 Am. Rep. 116; *Conklin v. Cunningham*, 7 N. Mex. 445; *Eldodt v. Territory*, 10 N. Mex. 141; *Ewing v. Turner*, 2 Okla. 94; *Cameron v. Parker*, 2 Okla. 277. See also *Boyd v. Chambers*, 78 Ky. 140. And see the titles DE FACTO OFFICERS, vol. 8, p. 802; MANDAMUS, vol. 19, p. 777.

Right to Records of Official Surveyor. — *State v. Patton*, 62 Minn. 388.

Indictment for Refusal to Turn Over Public Property. — *Bartholomew v. State*, (N. J. 1902) 51 Atl. Rep. 455.

5. Statutory Proceedings to Obtain Official Property — *Alabama*. — *Ex p. Scott*, 47 Ala. 609; *Thompson v. Holt*, 52 Ala. 491; *Beebe v. Robinson*, 64 Ala. 171.

12. Exemption from Arrest and Service of Process. — The Constitution of the United States provides for the exemption from arrest of members of Congress during their attendance at the sessions of their respective houses, and in going to and returning from the same.¹ And under the constitutions of many of the states members of state legislatures are privileged from arrest and from service of process under the same circumstances.²

13. Exemption from Actions for Libel and Slander. — The exemption of public officers from actions for libel and slander is discussed elsewhere in this work.³

14. Invalidity of Statute Prescribing Duty. — The decisions are far from harmonious as to the duty of an officer to act under a statute the validity of which he considers doubtful, and as to the protection afforded him if he does act under such a statute.

a. RIGHT TO QUESTION VALIDITY. — In some cases it has been held that the validity of a statute requiring the performance of a purely ministerial duty cannot be called in question by an officer, and that obedience to the law is required until its constitutionality is passed upon by the judiciary.⁴ Again it has been said that in advance of a determination by a court of competent jurisdiction, a ministerial or executive officer cannot, for himself, pass upon the constitutionality of a statute except in so far as it directly prescribes his official duties, or confers some power or imposes some liability upon him, or prescribes the range of his official conduct.⁵ The right to raise the question of the unconstitutionality of a statute as a defense to a proceeding by mandamus to compel an officer to perform a duty prescribed thereby is discussed elsewhere.⁶

b. WHETHER OFFICER PROTECTED. — According to the weight of authority it seems that an officer is not protected by an invalid statute;⁷ but

California. — *Hull v. Superior Ct.*, 63 Cal. 174.

Michigan. — *Schneider v. McIvor*, 58 Mich. 511; *Curran v. Norris*, 58 Mich. 512.

Missouri. — *Fleutge v. Priest*, 53 Mo. 540.

New York. — *Matter of Bradley*, 141 N. Y. 527; *Matter of Hodgkinson*, 5 Hill (N. Y.) 631, note; *Conover v. New York*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 393; *Welch v. Cook*, (Supm. Ct.) 7 How. Pr. (N. Y.) 282; *Cobee v. Davis*, (Supm. Ct.) 8 How. Pr. (N. Y.) 567; *Matter of Baker*, (Supm. Ct.) 11 How. Pr. (N. Y.) 418; *Matter of Bartlett*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 414; *Matter of Davis*, (Supm. Ct.) 19 How. Pr. (N. Y.) 323; *People v. Allen*, 42 Barb. (N. Y.) 203; *Matter of Bagley*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 151; *Bridgman v. Hall*, (Supm. Ct. Spec. T.) 16 Abb. N. Cas. (N. Y.) 272; *Matter of Whiting*, 2 Barb. (N. Y.) 513; *Matter of Welch*, 14 Barb. (N. Y.) 396; *Conover v. New York*, 25 Barb. (N. Y.) 513; *Matter of McGroory*, 43 Hun (N. Y.) 438; *People v. Holcomb*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 459. *People v. Barrett*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 159; *Matter of Foley*, (Supm. Ct. Spec. T.) 8 Misc. (N. Y.) 196; *Matter of Freeman*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 752; *In re Sells*, 15 N. Y. App. Div. 571; *Matter of Brenner*, 170 N. Y. 185.

South Carolina. — *Ex p. Whipper*, 32 S. Car. 5; *McMillan v. Bullock*, 53 S. Car. 161; *Verner v. Seibels*, 60 S. Car. 572.

1. Exemption of Members of Congress from Arrest. — U. S. Const., art. I, § 6; *Kilbourn v. Thompson*, 103 U. S. 168.

2. Exemption of State Legislators. — *Gyer v. Irwin*, 4 Dall. (U. S.) 107; *Chase v. Fish*, 16 Me. 136; *Washburn v. Phelps*, 24 Vt. 506;

Prentis v. Com., 5 Rand. (Va.) 697, 16 Am. Dec. 782. And see generally the constitutions of the several states. See also the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS, vol. 16, p. 39.

Exemption May Be Waived. — *Chase v. Fish*, 16 Me. 136; *Prentis v. Com.*, 5 Rand. (Va.) 697, 16 Am. Dec. 782.

3. See the title LIBEL AND SLANDER, vol. 18, p. 1023.

4. Duty to Obey Statute. — U. S. *v. Marble*, 3 Mackey (D. C.) 32; *People v. Salomon*, 54 Ill. 39; *State v. Shakespeare*, 41 La. Ann. 156; *State v. Heard*, 47 La. Ann. 1679; *State v. Bell*, 49 La. Ann. 676.

Disobedience Is at Officer's Peril. — *Clark v. Miller*, 54 N. Y. 528; *Dexter v. Alfred*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 789. See also *Little Rock, etc., R. Co. v. Worthen*, 46 Ark. 312.

5. When Officer May Question Constitutionality. — *Newman v. People*, 23 Colo. 300.

6. See the titles CONSTITUTIONAL LAW, vol. 6, p. 1090; **MANDAMUS**, vol. 19, p. 764.

7. View that Invalid Statute Does Not Protect. — *Cooley's Const. Lim.* (6th ed.) 222; *Norton v. Shelby County*, 118 U. S. 425; *Astrom v. Hammond*, 3 McLean (U. S.) 107; *Woolsey v. Dodge*, 6 McLean (U. S.) 142; *Yale College v. Sanger*, 62 Fed. Rep. 179; *Little Rock, etc., R. Co. v. Worthen*, 46 Ark. 312; *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Lynn v. Polk*, 8 Lea (Tenn.) 121; *Barling v. West*, 29 Wis. 307, 9 Am. Rep. 576. And see the title **CONSTITUTIONAL LAW**, vol. 6, p. 1091.

A Justice of the Peace, who issues a warrant under an unconstitutional statute, is liable in damages to the person arrested. *Kelly v. Bemis*, 4 Gray (Mass.) 83, 64 Am. Dec. 50.

there are decisions to the contrary.¹

15. Ratification — *a. IN GENERAL.* — A general discussion of the doctrine of ratification will be found elsewhere in this work, and the principles there stated are generally applicable in the case of public officers.² Questions concerning the ratification of the acts of municipal officers are also treated elsewhere.³

b. BY GOVERNMENT. — The unauthorized acts of public officers, done in the public service, can only be ratified by the legislative branch of the government, or by some person or body duly authorized thereby.⁴ One not possessing the power to do the act in question⁵ or to confer on the officer power to do such act⁶ cannot ratify it. While the general rule that consent or ratification of the doings of the agent may be presumed from the acts or omissions of the principal is applicable in the case of public officers, yet, where a state is the principal, acts and omissions which, in the case of an individual, would be deemed sufficient to authorize the presumption will not be held so.⁷

c. BY PERSON BENEFITED. — The acts of a public officer done in his official capacity, but in excess of the authority conferred on him by law, may be adopted and ratified by the person for whose benefit they were done.⁸

16. Disqualification — *a. IN GENERAL.* — Disqualification in the case of judicial officers is fully treated elsewhere.⁹ Discussions as to the disqualification of particular officers to perform certain acts are also to be found in other titles.¹⁰

b. MINISTERIAL OFFICERS. — It has been said that ministerial officers are incapable of acting officially when, by reason of certain relations to one of the parties to an action or a proceeding, an undue partiality or interest may be apprehended;¹¹ and also that an officer should not be permitted to perform either a ministerial or a judicial act in his own behalf.¹² In accordance with this rule, it has been decided that an officer cannot serve his own writ.¹³

1. View that Invalid Statute Protects. — *State v. Shakespeare* 41 La. Ann. 156.

Invalid Law Justifies Acts Done Before Invalidity Adjudged. — *Sessums v. Bolts*, 34 Tex. 335.

2. See the titles AGENCY, vol. 1, p. 1181; ULTRA VIRES.

3. See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1180.

4. Legislative Ratification. — *Campbell v. Kenosha*, 5 Wall. (U. S.) 194; *McMillen v. Boyles*, 6 Iowa 304; *State v. Torinus*, 28 Minn. 175, 26 Minn. 1, 37 Am. Rep. 395; *State v. Hays*, 52 Mo. 578; *State v. Keim*, 8 Neb. 63; *State v. Hill*, 47 Neb. 456; *Day Land, etc., Co. v. State*, 68 Tex. 526; *Shipman v. State*, 42 Wis. 377. See also *Hasbrouck v. Milwaukee*, 21 Wis. 219. And see the title STATES.

Limit of Curative Power of Legislature. — *Shawnee County v. Carter*, 2 Kan. 115; *Atchison, etc., R. Co. v. Maquilkin*, 12 Kan. 301; *Horton v. Thompson*, 71 N. Y. 513; *Richards v. Rote*, 68 Pa. St. 255; *Seibert v. Linton*, 5 W. Va. 57; *Kimball v. Rosendale*, 42 Wis. 407, 24 Am. Rep. 421. And see the title STATUTES.

5. Person Without Power to Do Act Cannot Ratify. — *Marsh v. Fulton County*, 10 Wall. (U. S.) 676; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Jefferson County v. Arrighi*, 54 Miss. 668; *State v. Hays*, 52 Mo. 578; *Brady v. New York*, 20 N. Y. 312; *Hague v. Philadelphia*, 48 Pa. St. 528.

6. *Richardson v. Crandall*, 47 Barb. (N. Y.) 335.

7. Presumption of Ratification. — *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *State v. State Bank*, 45 Mo. 528; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192, 2 Hill (N. Y.) 159. See also *Wilhelm v. Cedar County*, 50 Iowa 254.

8. Person Benefited May Ratify. — *Farmers' L. & T. Co. v. Walworth*, 1 N. Y. 435, distinguishing *Wilson v. Tummam*, 6 M. & G. 236, 46 E. C. L. 236. See also *Pilkington v. Green*, 2 B. & P. 151; *Armstrong v. Garrow*, 6 Cow. (N. Y.) 465; *Corning v. Southland*, 3 Hill (N. Y.) 552.

9. See the titles JUDGE, vol. 17, p. 732; JUSTICE OF THE PEACE, vol. 18, p. 40.

10. See such titles as ACKNOWLEDGMENTS, vol. 1, p. 493; CLERKS OF COURTS, vol. 6, p. 145; HIGHWAYS, vol. 15, p. 374; ILLEGAL CONTRACTS, vol. 15, p. 975; PROSECUTING AND DISTRICT ATTORNEYS, *ante*; SHERIFFS, MARSHALS, AND CONSTABLES.

Statutory Disqualification of Municipal Officer. — *Woolley v. Kay*, 1 H. & N. 307, 25 L. J. Exch. 351.

Statutory Penalty for Acting as Officer After Disqualification. — *Nicholson v. Fields*, 7 H. & N. 810, 31 L. J. Exch. 233.

11. Disqualification of Ministerial Officer for Interest. — *Gage v. Graftam*, 11 Mass. 181.

12. Incompetent to Act in His Own Behalf. — *Hammers v. Dole*, 61 Ill. 307. Compare *Evans v. Etheridge*, 96 N. Car. 42; *Trimmer v. WinSmith*, 23 S. Car. 449.

13. Incompetent to Serve His Own Process. — *Boykin v. Edwards*, 21 Ala. 261; *Filkins v.*

c. **LEGISLATIVE OFFICERS.** — Members of a legislative body or municipal board are disqualified to vote on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent.¹

17. Expiration of Power. — The general rule is that the power of an officer ceases with his office.² Those acts which in some cases an officer may do after he is discharged from office are recognized as lawful from the necessity of the case or from the great inconvenience which would otherwise arise.³

18. Power to Fix Successor with Liability. — Unless such acts as borrowing money or giving promissory notes are within the official power of the officer, his successors are not bound thereby.⁴ It has been held, however, that an officer acting on behalf of a municipal corporation may make a contract which is to run beyond the probable limitation of his official tenure, provided such contract does not attempt to bind the corporation to the exclusion of the right of succeeding officers to deal with the affairs of the public, or to deprive the corporation of the right to take advantage of the varying circumstances and situations of the public good.⁵ Where the responsibility results from the office, and not from any individual responsibility of the person who occupies it, a suit may be brought against a public officer which is based upon the acts of his predecessors.⁶ A public officer is not liable individually for the acts or omissions of his predecessors.⁷

19. Control by Courts. — The general doctrine is that an officer to whom public duties are confided is not subject to the control of the courts in the exercise of the judgment and discretion which the law reposes in him as a part of his official functions, unless such judgment or discretion is abused and exercised in an arbitrary or capricious manner.⁸ The courts, however, are not bound by the interpretation put by an officer upon the law defining his powers, and if he has acted without authority, or in excess thereof, may

O'Sullivan, 79 Ill. 524. And see the title **SHERIFFS, MARSHALS, AND CONSTABLES.**

1. *Oconto County v. Hall*, 47 Wis. 208.

2. Power Ceases with Office. — *People v. Reid*, 11 Colo. 141; *Com. v. Clark*, 1 Bibb. (Ky.) 533; *Gaillard v. Aneline*, 10 Mart. (La.) 479. 13 Am. Dec. 338; *State v. Clinton*, 28 La. Ann. 52; *People v. Highway Com'rs*, 16 Mich. 63; *Holley v. New York*, 59 N. Y. 166; *State v. Donnewirth*, 21 Ohio St. 216; *Tennessee Bank v. Beatty*, 3 Sneed (Tenn.) 305, 65 Am. Dec. 58.

3. Exceptions to Rule. — *Com. v. Clark*, 1 Bibb (Ky.) 533. See also *Doolittle v. Bryan*, 14 How. (U. S.) 563; *Elkin v. People*, 4 Ill. 207, 36 Am. Dec. 541; *Clark v. Pratt*, 55 Me. 546; *Purl v. Devall*, 5 Har. & J. (Md.) 69, 9 Am. Dec. 490; *Welsh v. Joy*, 13 Pick. (Mass.) 477; *Lawrence v. Rice*, 12 Met. (Mass.) 527; *State v. Roberts*, 12 N. J. L. 114, 21 Am. Dec. 62; *American Exch. Bank v. Morris Canal*, etc., Co., 6 Hill (N. Y.) 362; *Miner v. Cassat*, 2 Ohio St. 199.

Amendments in the Proceedings of Town Officers. — *Kiley v. Cranor*, 51 Mo. 541.

Formalities in Tax Bills Cured. — *Kiley v. Oppenheimer*, 55 Mo. 374.

Completion of Sheriff's Sale. — *Union Dime Sav. Inst. v. Andariese*, 83 N. Y. 174.

4. Successor Not Bound by Unauthorized Act. — *Van Alstyne v. Friday*, 41 N. Y. 174.

5. *Starin v. U. S.*, 31 Ct. Cl. 65, *distinguishing* *Stone v. Mississippi*, 101 U. S. 814.

6. *Hardee v. Gibbs*, 50 Miss. 802; *Grant v. Fancher*, 5 Cow. (N. Y.) 309.

7. *Vose v. Reed*, 54 N. Y. 657.

8. Courts Cannot Control Discretion — *United*

States. — *U. S. v. General Land Office Comr.*, 5 Wall. (U. S.) 563; *Gaines v. Thompson*, 7 Wall. (U. S.) 347; *Cox v. McGarrahan*, 9 Wall. (U. S.) 298; *Litchfield v. Richards*, 9 Wall. (U. S.) 575; *Decatur v. Paulding*, 14 Pet. (U. S.) 497; *U. S. v. Guthrie*, 17 How. (U. S.) 284; *U. S. v. Lamar*, 116 U. S. 423; *Allen v. Blunt*, 3 Story (U. S.) 742.

Colorado. — *Smith v. Jefferson County*, 10 Colo. 20.

Florida. — *Towle v. State*, 3 Fla. 202; *McWhorter v. Pensacola*, etc., R. Co., 24 Fla. 417, 12 Am. St. Rep. 220.

Kansas. — *State v. Robinson*, 1 Kan. 188.

Louisiana. — *State v. Board of Liquidation*, 42 La. Ann. 647.

Michigan. — *Detroit Free Press Co. v. State Auditors*, 47 Mich. 135.

Missouri. — *State v. Lafayette County Ct.*, 41 Mo. 221.

New York. — *People v. Dutchess County*, 9 Wend. (N. Y.) 508; *People v. Collins*, 19 Wend. (N. Y.) 56; *Erving v. New York*, 131 N. Y. 133. See also *Sheehy v. Clausen*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 269.

Ohio. — *Alter v. Cincinnati*, 7 Ohio Dec. 368, 4 Ohio N. P. 427.

Oklahoma. — *School Dist. No. 17 v. Zediker*, 4 Okla. 599.

Utah. — *Eureka City v. Wilson*, 15 Utah 53. *Washington*. — *Goss v. State Capitol Commission*, 11 Wash. 474; *State v. Forrest*, 13 Wash. 268, 8 Wash. 610.

And see the titles **CONSTITUTIONAL LAW**, vol. 6, p. 1013; **MANDAMUS**, vol. 19, p. 732; **PROHIBITION**, *ante*.

declare his action illegal.¹ It is also well settled that when a plain official duty requiring no exercise of discretion is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance,² and when violation of such duty by some positive official act is threatened, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.³

20. Review of Official Action. — The general rule applicable to the decisions of courts or of special officers to whom the determination of any particular matter is committed by law is that such determinations, when regularly made, are conclusive, and cannot be questioned or set aside, except in some mode specially provided by law.⁴ There is, however, one fundamental exception to this rule. Not only must an officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred on him by statute.⁵ It is also a general rule that officers of special and limited jurisdiction cannot sit in review of their own orders, or vacate or annul them.⁶

X. LIABILITIES OF PUBLIC OFFICERS — 1. Civil Liability — a. To GOVERNMENT OR PUBLIC BODY — (1) In General. — Public officers are generally required to give bonds, and their liability to the government or other public body depends on the condition of such bonds.⁷ It seems that a public officer is not a mere agent or servant who is responsible as such to the government or other public body for damages arising from his neglect of duty, unless it is so provided by statute.⁸

(2) *Liability as to Public Money* — (a) *In General.* — It is the duty of a public officer charged with the custody and expenditure of public money to keep it safely, and disburse and account for it in accordance with law, and to turn over to the proper authority any sum remaining in his hands at the expiration of his term. For any failure to do so he and the sureties upon his official bond are liable.⁹

1. Law Prescribing Authority Construed by Courts. — *Eastin v. Ferguson*, 4 Tex. Civ. App. 645; *State v. Hastings*, 10 Wis. 518.

2. When Mandamus Will Lie. — Board of Liquidation *v. McComb*, 92 U. S. 531; *State v. Rotwitt*, 17 Mont. 537; *State v. Cromer*, 35 S. Car. 213. And see the title MANDAMUS, vol. 19, p. 778.

3. When Injunction Will Lie. — *Johnson v. Towsley*, 13 Wall. (U. S.) 72; Board of Liquidation *v. McComb*, 92 U. S. 531; *Crampton v. Zabriskie*, 101 U. S. 601; *Walton v. Develing*, 61 Ill. 201; *Brown v. Gardner, Harr. (Mich.)* 291; *Lane v. Schomp*, 20 N. J. Eq. 82; *People v. Canal Board*, 55 N. Y. 390; *Davis v. American Soc., etc.*, 75 N. Y. 369; *People v. Dwyer*, 90 N. Y. 402; *Green v. Mumford*, 5 R. I. 472, 73 Am. Dec. 79. And see the title INJUNCTIONS, vol. 16, p. 352.

Method of Proceeding When No Special Damage to Individual. — *Highway Com'rs v. Deboe*, 43 Ill. App. 25.

4. Right to Review Acts of Officers. — *Belcher v. Linn*, 24 How. (U. S.) 522; *Clinkenbeard v. U. S.*, 21 Wall. (U. S.) 65; *U. S. v. Leng*, 18 Fed. Rep. 15; *U. S. v. McDowell*, 21 Fed. Rep. 563; *U. S. v. Doherty*, 27 Fed. Rep. 730. And see the titles JUDGMENTS AND DECREES, vol. 17, p. 756; APPEALS, 2 ENCYC. OF PL. AND PR. 1; ERROR, WRIT OF, 7 ENCYC. OF PL. AND PR. 817.

Right to Review Decision of Officer as to Claims Against United States. — *Rollins v. U. S.*, 23 Ct. Cl. 123; *Cotton v. U. S.*, 29 Ct. Cl. 207.

5. *U. S. v. Thurber*, 28 Fed. Rep. 56.

6. Right of Officer to Review His Own Order. — *People v. Wemple*, 144 N. Y. 478, *distinguishing* *People v. Broome County*, 65 N. Y. 225; *Miller v. Wayne County*, 41 Mich. 4. See also *Stephens v. Santee*, 49 N. Y. 39; *State v. King*, 4 Dev. & B. L. (20 N. Car.) 521; *Northampton County v. Yohe*, 24 Pa. St. 305.

7. See the titles BONDS, vol. 4, p. 618; CLERKS OF COURTS, vol. 6, p. 141; POSTAL LAWS, vol. 22, p. 1048; SHERIFFS, MARSHALS, AND CONSTABLES; SURETYSHIP.

8. Not Liable as Agent or Servant. — *White v. Phillipston*, 10 Met. (Mass.) 108; *First Parish v. Fiske*, 8 Cush. (Mass.) 264, 54 Am. Dec. 755; *Barney v. Lowell*, 98 Mass. 570.

9. Liability for Public Money — England. — *Atty.-Gen. v. Edmunds*, L. R. 6 Eq. 381, 37 L. J. Ch. 706.

United States. — *Morgan v. Van Dyck*, 7 Blatchf. (U. S.) 147; *U. S. v. Ripley*, 7 Pet. (U. S.) 18. See also *U. S. v. Lee*, 2 Cranch (C. C.) 462.

Alabama. — *Bullock v. Governor*, 2 Port. (Ala.) 484; *Barnes v. Hudman*, 57 Ala. 504.

California. — *McKee v. Monterey County*, 51 Cal. 275.

Georgia. — *Tift v. Griffin*, 5 Ga. 185.

Illinois. — *People v. Smith*, 12 Ill. 281; *Warren County v. Jeffrey*, 18 Ill. 329.

Indiana. — *Taggart v. State*, 49 Ind. 42.

Iowa. — *Sac County v. Hobbs*, 72 Iowa 69.

Kansas. — *Snyder v. Board of Education*, 16 Kan. 542.

Kentucky. — *Com. v. Jackson*, 10 Bush (Ky.) 424.

Recovery by Government of Money Paid Illegally. — The government or other public authority may recover money obtained from a public officer by fraud or paid by him under mistake of fact or without authority.¹

(b) Liability for Interest. — When a public officer has money committed to his charge with the duty of disbursing or paying it out as occasion may arise, he is chargeable with interest on such money when it is shown that he has failed to pay when such occasion required him to do so, or has failed to account when required by the government, or to pay over or transfer the money on some lawful order.² A public officer is also chargeable with any interest received for the use or loan of public funds.³

Louisiana. — *Jones v. Currie*, 34 La. Ann. 1093.

Michigan. — *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

Minnesota. — *Gerken v. Sibley County*, 39 Minn. 433.

Montana. — *White Sulphur Springs v. Pierce*, 21 Mont. 130.

New Jersey. — *Mott v. Pettit*, 1 N. J. L. 344.

New York. — *People v. Tweed*, (Supm. Ct. Gen. T.) 13 Abb. Pr. N. S. (N. Y.) 25.

North Carolina. — *Iredell County v. Wasson*, 82 N. Car. 308.

Ohio. — *Slaughter v. Hamm*, 2 Ohio 271.

Tennessee. — *State v. Allen*, (Tenn. Ch. 1898) 46 S. W. Rep. 303.

Virginia. — *Baker v. Preston*, Gilmer (Va.) 235.

Presumption that Amount Due Shown by Officer's Books. — *State Bank v. Chapelle*, 40 Mich. 447.

Presumption of Proper Settlement. — *Viola Dist. Tp. v. Bickelhaupt*, 99 Iowa 659.

Presumption of Proper Disbursement. — *U. S. v. Laub*, 12 Pet. (U. S.) 1, 4 Cranch (C. C.) 703.

Liability for Funds Diverted by Employee. — *Board of Control v. Royes*, 48 La. Ann. 1061.

United States Officers Not Liable to Suits by Individuals. — *Vasse v. Comegyss*, 2 Cranch (C. C.) 564.

Liable for Value of Trust Funds at Time of Conversion. — *Touchstone v. Whittington*, 2 Baxt. (Tenn.) 68.

Medium of Payment to Officer Collecting Public Money. — *Frier v. State*, 11 Fla. 300; *Board of Justices v. Fennimore*, 1 N. J. L. 242; *Peck v. James*, 3 Head (Tenn.) 75. And see the title PAYMENT, vol. 22, p. 538.

Duty to Apply Money to Purpose Specified by Law. — *Priddy v. Rose*, 3 Meriv. 102; *People v. Gillespie*, 47 Ill. App. 522; *Ealer v. Mills-paugh*, 32 La. Ann. 901; *Hoboken v. Ivison*, 29 N. J. L. 65.

Cannot Detain to Satisfy Private Indebtedness. — *Prewett v. Marsh*, 1 Stew. & P. (Ala.) 17, 21 Am. Dec. 645; *Bemis v. State*, 3 Fla. 12; *Clark v. Miller*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 345; *Tobin v. Kage*, 64 Hun (N. Y.) 531.

Private Speculation with Public Funds Illegal. — *In re Breene*, 14 Colo. 401.

Unauthorized Possession of Money No Defense. — *Perry v. Otay Irrigation Dist.*, 127 Cal. 565; *Mason v. Fractional School Dist. No. 1*, 34 Mich. 228; *People v. Swineford*, 77 Mich. 573; *People v. Gallup*, (Supm. Ct. Spec. T.) 12 Abb. N. Cas. (N. Y.) 64. See also *Placer County v. Astin*, 8 Cal. 303.

No Defense to Action by Individual. — *Randell*

v. Austin, 46 Cal. 54; *Com. v. Carter*, (Ky. 1900) 55 S. W. Rep. 701.

Right to Set-Off Between Government and Public Officers. — *U. S. v. MacDaniel*, 7 Pet. (U. S.) 1; *U. S. v. Robeson*, 9 Pet. (U. S.) 319; *Gratiot v. U. S.*, 15 Pet. (U. S.) 336; *U. S. v. Kuhn*, 4 Cranch (C. C.) 401. And see the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM.

Loans of Public Money Forbidden by Statute. — *People v. Wilson*, 117 Cal. 242; *Moulton v. McLean*, 5 Colo. App. 455; *Davis v. Dunlevy*, 11 Colo. App. 344; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506; *Bardsley v. Sternberg*, 18 Wash. 612.

Summary Proceedings Against Delinquent Officers. — *Rev. Stat. Mo.*, §§ 5380, 5383; *Cole County v. Dallmeyer*, 101 Mo. 57.

Penalty for Failure to Pay Over Public Money. — *People v. Dolan*, 5 Wyo. 245.

1. Right of Government to Recover Public Money. — *Wolffe v. State*, 79 Ala. 201, 58 Am. Rep. 590; *Taylor County v. Standley*, 79 Iowa 666; *Com. v. Haupt*, 10 Allen (Mass.) 38; *Demarest v. New Barbadoes Tp.*, 40 N. J. L. 604; *Michigan v. Phoenix Bank*, 33 N. Y. 9; *People v. Fields*, 58 N. Y. 401; *Richmond County v. Ellis*, 59 N. Y. 620; *People v. Denison*, 80 N. Y. 656; *Belden v. State*, 103 N. Y. 1, *affirming* 31 Hun (N. Y.) 409; *Com. v. Field*, 84 Va. 26. And see the titles AGENCY, vol. 1, p. 1176; PAYMENT, vol. 22, p. 609.

No Recovery When Officer Not a Mere Bailee or Trustee. — It has been held that the rule that whenever a trustee has been guilty of a breach of trust and has transferred property by sale or otherwise to any third person, 'he *cestui que trust* has a full right to follow such property into the hands of such third person, is not applicable to public officers who give bonds to secure a just and full accounting for the moneys which come into their management and control, and who thereby become the owners thereof and not mere bailees or trustees. *Linville v. Leininger*, 72 Ind. 401. See also *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

2. Liable for Interest on Money Improperly Retained. — *U. S. v. Denvir*, 106 U. S. 536; *Sheridan v. Van Winkle*, 43 N. J. L. 125; *People v. Gasherie*, 9 Johns. (N. Y.) 71, 6 Am. Dec. 263; *Chenango County v. Birdsall*, 4 Wend. (N. Y.) 453; *Monroe County v. Clarke*, 25 Hun (N. Y.) 282; *Clark v. Sheldon*, 134 N. Y. 333; *State v. Ruth*, 9 S. Dak. 84. See also *Bullock v. Governor*, 2 Port. (Ala.) 484; *Board of Justices v. Fennimore*, 1 N. J. L. 281. And see the title INTEREST, vol. 16, p. 1012.

3. Liable for Interest on Loan. — *Craufurd v. Atty.-Gen.*, 7 Price 2; *Lonsdale v. Church*, 3

(c) **Liability for Loss of Public Money.** — Where loss of public money could have been avoided by the exercise of due care and diligence, there is no doubt that public officers are liable.¹ There is, however, some conflict in the decisions as to the responsibility of public officers and their sureties for the loss of public money without negligence or fault on the part of the officers. While in some cases officers who have been found guiltless of negligence have been exonerated,² the weight of authority is in favor of holding officials, having the custody of public money, liable for its loss, although occurring without their fault or negligence, the decisions in many of these cases turning upon the construction of the provisions of local statutes and the conditions of the official bonds given by the officers.³ It has, however, been expressly decided

Bro. C. C. 41; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182; *Baltimore, etc., R. Co. v. Gault*, 165 Ill. 233. See also *St. Louis County v. Security Bank*, 75 Minn. 174; *Mott v. Pettit*, 1 N. J. L. 344; *Board of Education v. Eshelby*, 9 Ohio Dec. 214, 6 Ohio N. P. 117; *State v. Allen*, (Tenn. Ch. 1898) 46 S. W. Rep. 303; *State v. McFetridge*, 84 Wis. 473.

1. **Liable When Negligent.** — *State v. Lanier*, 31 La. Ann. 423. See also *Bevans v. U. S.*, 13 Wall. (U. S.) 56.

Extent of Liability for Property Not Committed by Law to His Custody. — *Phelps v. People*, 72 N. Y. 334.

2. **Not Liable for Loss Without Negligence** — *California*. — *Healdsburg v. Mulligan*, 113 Cal. 205.

Colorado. — *Wilson v. People*, 19 Colo. 199, 41 Am. St. Rep. 243.

Maine. — *Cumberland County v. Pennell*, 69 Me. 370.

Montana. — *Livingston v. Woods*, 20 Mont. 91, *overruling* *Jefferson County v. Lineberger*, 3 Mont. 231, 35 Am. Rep. 462. See also *Great Falls v. Hanks*, 21 Mont. 91.

South Carolina. — *York County v. Watson*, 15 S. Car. 1, 40 Am. Rep. 675.

Tennessee. — *State v. Copeland*, 96 Tenn. 296, 54 Am. St. Rep. 840. See also *Governor v. McEwen*, 5 Humph. (Tenn.) 241; *Peck v. James*, 3 Head (Tenn.) 75.

Wyoming. — *State v. Gramm*, 7 Wyo. 329; *Roberts v. Laramie County*, 8 Wyo. 177.

Highest Care, Vigilance, and Diligence to Prevent Loss Required. — *State v. Houston*, 78 Ala. 576, 56 Am. Rep. 59, 83 Ala. 361.

3. **Liable Though Not Negligent** — *United States*. — *U. S. v. Prescott*, 3 How. (U. S.) 578; *U. S. v. Morgan*, 11 How. (U. S.) 154; *U. S. v. Dashiell*, 4 Wall. (U. S.) 182; *U. S. v. Keebler*, 9 Wall. (U. S.) 83; *Boyden v. U. S.*, 13 Wall. (U. S.) 17; *Bosbyshell v. U. S.*, 73 Fed. Rep. 616, (C. C. A.) 77 Fed. Rep. 944; *U. S. v. Bryan*, 82 Fed. Rep. 290, (C. C. A.) 90 Fed. Rep. 473; *Smythe v. U. S.*, (C. C. A.) 107 Fed. Rep. 376.

Arkansas. — *State v. Croft*, 24 Ark. 550; *State v. Wood*, 51 Ark. 205.

Illinois. — *Thompson v. Township Sixteen North, etc.*, 30 Ill. 99.

Indiana. — *Halbert v. State*, 22 Ind. 125; *Morbeck v. State*, 28 Ind. 86; *Steinback v. State*, 38 Ind. 483; *Winchester Electric Light Co. v. Veal*, 145 Ind. 506.

Iowa. — *Taylor Dist. Tp. v. Morton*, 37 Iowa 550; *Union Dist. Tp. v. Smith*, 39 Iowa 10, 18 Am. Rep. 39; *Bluff Creek Dist. Tp. v. Hard-*

inbrook, 40 Iowa 130; *Independent Dist. v. King*, 80 Iowa 497.

Kansas. — *Rose v. Douglass Tp.*, 52 Kan. 452.

Massachusetts. — *Hancock v. Hazzard*, 12 Cush. (Mass.) 112, 59 Am. Dec. 171.

Michigan. — *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

Minnesota. — *Redwood County v. Tower*, 28 Minn. 45; *Board of Education v. Jewell*, 44 Minn. 427, 20 Am. St. Rep. 586.

Mississippi. — *Griffin v. Mississippi Levee Com'rs*, 71 Miss. 767; *Adams v. Lee*, 72 Miss. 281.

Missouri. — *State v. Gatzweiler*, 49 Mo. 17, 8 Am. Rep. 119; *State v. Powell*, 67 Mo. 395, 29 Am. Rep. 512; *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322. See also *State v. Wagers*, 47 Mo. App. 431.

Nebraska. — *Ward v. School Dist. No. 15*, 10 Neb. 293, 35 Am. Rep. 477; *Bush v. Johnson County*, 48 Neb. 1, 58 Am. St. Rep. 673.

Nevada. — *State v. Nevin*, 19 Nev. 162, 3 Am. St. Rep. 873.

New Jersey. — *New Providence Tp. v. McEachron*, 33 N. J. L. 339, 35 N. J. L. 528.

New Mexico. — *U. S. v. Watts*, 1 N. Mex. 562.

New York. — *Muzzy v. Shattuck*, 1 Den. (N. Y.) 233; *Tillinghast v. Merrill*, 151 N. Y. 135, 56 Am. St. Rep. 612, *affirming* 77 Hun (N. Y.) 481, *overruling* *Albany County v. Dorr*, 25 Wend. (N. Y.) 440; *Oneida v. Thompson*, 92 Hun (N. Y.) 16; *People v. Treanor*, 15 N. Y. App. Div. 508; *Johnstown v. Rodgers*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 262; *Kilby v. Carthage First Nat. Bank*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 370. *Compare* *People v. Faulkner*, 107 N. Y. 477.

North Carolina. — *Bladen County v. Clarke*, 73 N. Car. 255; *Havens v. Lathene*, 75 N. Car. 505; *Cox v. Blair*, 76 N. Car. 78. See also *Atkinson v. Whitehead*, 66 N. Car. 296.

Ohio. — *State v. Harper*, 6 Ohio St. 607, 67 Am. Dec. 363; *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582.

Oklahoma. — *Van Trees v. Territory*, 7 Okla. 353.

Pennsylvania. — *Com. v. Comly*, 3 Pa. St. 372; *Nason v. Directors of Poor*, 126 Pa. St. 445; *Com. v. Baily*, 129 Pa. St. 480.

Texas. — *Boggs v. State*, 46 Tex. 10; *Wilson v. Wichita County*, 67 Tex. 647.

Washington. — *Fairchild v. Hedges*, 14 Wash. 117; *Kittitas County v. Travers*, 16 Wash. 528. See also *Matter of Kohler*, 15 Wash. 616, 55 Am. St. Rep. 904.

that a public officer is not liable for a loss occasioned by the act of the public enemy, occurring without negligence on his part.¹

b. TO PRIVATE PERSONS — (1) *Liability of Legislative Officers.* — For acts done in their legislative capacity it seems that legislative officers are not personally liable.²

(2) *Liability of Executive Officers.* — In the *United States* it seems that the President of the *United States*, the governor of a state, and other high government and state officials are not personally liable in a civil action for their official acts.³ In *England*, however, it seems that an action for damages will lie against all public officials, including the highest officers of the crown.⁴ In *Canada* the like rule seems to obtain.⁵

(3) *Liability of Judicial and Quasi-Judicial Officers* — (a) *In General.* — The liability of judicial officers is fully discussed in other articles in this work.⁶ Public officers who are intrusted by law with the exercise of judgment and discretion, and who are for this reason sometimes denominated *quasi-judicial* officers, are certainly not liable to a person injured as the result of the exercise of their judicial or discretionary powers, if the acts complained of are done within the scope of their jurisdiction and authority, and without wilfulness, malice, or corruption.⁷ In some cases the rule has been laid down much more broadly, and it is said that no public officer is responsible in a civil suit

Wisconsin. — *Omro v. Kaime*, 39 Wis. 468. See also *State v. McFetridge*, 84 Wis. 473.

And see the title *BONDS*, vol. 4, p. 680.

Relief by Legislative Act. — *Mount v. State*, 90 Ind. 29, 46 Am. Rep. 192; *Board of Education v. McLandsborough*, 36 Ohio St. 227, 38 Am. Rep. 582.

United States Statute for Relief of Disbursing Officers. — Act May 9, 1866, U. S. Rev. Stat., §§ 1059, 1062, construed in *U. S. v. Clark*, 96 U. S. 37; *Prime's Case*, 3 Ct. Cl. 209; *Murphy's Case*, 3 Ct. Cl. 212; *Pattee's Case*, 3 Ct. Cl. 397; *Stapp's Case*, 4 Ct. Cl. 219; *Whitelsey's Case*, 5 Ct. Cl. 452; *Malone's Case*, 5 Ct. Cl. 486; *Christian's Case*, 7 Ct. Cl. 431; *Howell's Case*, 7 Ct. Cl. 512; *Hall's Case*, 9 Ct. Cl. 270; *Holman's Case*, 11 Ct. Cl. 642; *Smith's Case*, 14 Ct. Cl. 114.

Not Liable as Insurer for Money Paid into Court and Lost by Investment. — *Chesterman v. Eyland*, (Ct. App.) 8 Abb. N. Cas. (N. Y.) 92.

Protected by Law Authorizing Deposit. — *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

Authority to Deposit Not Subject to Collateral Attack. — *Western Wheeled Scraper Co. v. Sadilek*, 50 Neb. 105, 61 Am. St. Rep. 550.

1. *Act of the Public Enemy Excuses.* — *U. S. v. Thomas*, 15 Wall. (U. S.) 337. See also *Bevans v. U. S.*, 13 Wall. (U. S.) 56; *Halliburton v. U. S.*, 13 Wall. (U. S.) 63. *Contra*, *Bladen County v. Clarke*, 73 N. Car. 255.

Tramps, Thieves, and Robbers Are Not Public Enemies. — *State v. Moore*, 74 Mo. 413, 41 Am. Rep. 322.

2. *Nonliability of Legislative Officers.* — *King v. Chapin*, 23 N. Y. Wkly. Dig. 528. See also *Kilbourn v. Thompson*, 103 U. S. 168.

Municipal Officers, when vested with legislative powers, are clothed with all the immunities of the government, and are exempt from all liability for the mistaken use of such powers. *Jones v. Loving*, 55 Miss. 109, 30 Am. Rep. 508. See also *Anne Arundel County v. Duckett*, 20 Md. 469, 83 Am. Dec. 557; *Freeport v. Marks*, 59 Pa. St. 253.

3. *Nonliability of Executive Officers in the United States.* — *Brown's Case*, 6 Ct. Cl. 171. See also *Marbury v. Madison*, 1 Cranch (U. S.) 137; *Durand v. Hollins*, 4 Blatchf. (U. S.) 451.

A Cabinet Officer Is Not liable to a civil suit for damages on account of official communications made by him pursuant to an act of Congress. *Spalding v. Vilas*, 161 U. S. 483.

4. *Crown Officers Liable in England.* — *Rogers v. Dutt*, 13 Moo. P. C. 236; *Feather v. Reg.*, 6 B. & S. 257, 118 E. C. L. 257, 12 L. T. N. S. 114; *Mostyn v. Fabrigas*, 1 Cowp. 161. See also *Buron v. Denman*, 2 Exch. 167; *Glynn v. Houston*, 2 M. & G. 337, 40 E. C. L. 400; *Irwin v. Grey*, 3 F. & F. 635; *Cobbett v. Gray*, 4 Ex. 729. *Quære*, in *Musgrave v. Pulido*, 5 App. Cas. 102.

5. *Liable in Canada.* — *Baker v. Ranney*, 12 Grant Ch. (U. C.) 228.

6. See the titles *CORONERS*, vol. 7, p. 614; *JUDGE*, vol. 17, p. 725; *JUSTICES OF THE PEACE*, vol. 18, p. 46; *MILITARY LAW*, vol. 20, p. 664.

7. *When Quasi-Judicial Officers Not Liable — England.* — *Harman v. Tappenden*, 1 East 555; *Cullen v. Morris*, 2 Stark. 577, 3 E. C. L. 536; *Gidley v. Palmerston*, 7 Moo. 91, 3 Brod. & B. 275, 7 E. C. L. 434.

United States. — *Gould v. Hammond*, McAll. (U. S.) 235; *Kendall v. Stokes*, 3 How. (U. S.) 87; *Wilkes v. Dinsman*, 7 How. (U. S.) 89; *Bailey v. Berkey*, 81 Fed. Rep. 737. See also *Otis v. Watkins*, 9 Cranch (U. S.) 339; *Williams v. Weaver*, 100 U. S. 547; *Otis v. Walter*, 2 Wheat. (U. S.) 18; *Crowell v. M'Fadon*, 8 Cranch (U. S.) 94; *South v. Maryland*, 18 How. (U. S.) 396.

Arkansas. — *Lee v. Huff*, 61 Ark. 494.

California. — *Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489; *Porter v. Haight*, 45 Cal. 631; *Green v. Swift*, 47 Cal. 536; *Ballerino v. Mason*, 83 Cal. 447.

Connecticut. — *Parmalee v. Baldwin*, 1 Conn. 317; *Raymond v. Fish*, 51 Conn. 80, 50 Am. Rep. 3.

Illinois. — *Gilbert v. Bone*, 64 Ill. 518; *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163;

for a judicial determination, however erroneous it may be, and however malicious or corrupt the motives which produced it, so long as he does not transcend the limits of his authority.¹ The majority of the cases upon the subject do not, however, seem to carry the rule of exemption from liability to this extent.²

(b) *Distinction Between Judicial and Ministerial Acts.* — Official action is judicial where it is the result of judgment or discretion. When an officer has the authority to hear and determine the rights of persons or property, or the propriety of doing an act, he is vested with judicial power. Official action is ministerial when it is the result of performing a duty imposed by law, and as to which the time, mode, and occasion of its performance are prescribed and

People v. Bartels, 138 Ill. 322; *Churchill v. Fewkes*, 13 Ill. App. 520.

Indiana. — *Walker v. Hallock*, 32 Ind. 239; *McOsker v. Barrell*, 55 Ind. 425; *Spitznogle v. Ward*, 64 Ind. 30.

Iowa. — *Howe v. Mason*, 12 Iowa 202; *Muscatine Western R. Co. v. Horton*, 33 Iowa 33; *Parkinson v. Parker*, 48 Iowa 667; *Chamberlain v. Clayton*, 56 Iowa 331, 41 Am. Rep. 101; *Tiedt v. Carstensen*, 64 Iowa 131; *Wood v. Farmer*, 69 Iowa 533; *Willett v. Young*, 82 Iowa 292. See also *Cole v. Kegler*, 64 Iowa 59.

Maine. — *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256.

Massachusetts. — *Dillingham v. Snow*, 5 Mass. 547.

Michigan. — *Wall v. Trumbull*, 16 Mich. 223; *Van Deusen v. Newcomer*, 40 Mich. 90; *Bay County v. Brock*, 44 Mich. 45; *Highway Com'rs v. Ely*, 54 Mich. 173; *Ampersse v. Winslow*, 75 Mich. 234; *Pawlowski v. Jenks*, 115 Mich. 275; *Meale v. Haines*, 81 Mich. 261. See also *Sage v. Laurain*, 19 Mich. 137.

Missouri. — *Reed v. Conway*, 20 Mo. 23; *Schoettgen v. Wilson*, 48 Mo. 253; *McCutchen v. Windsor*, 55 Mo. 149; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Edwards v. Ferguson*, 73 Mo. 636; *Knox County v. Hunolt*, 110 Mo. 67; *St. Joseph v. McCabe*, 58 Mo. App. 542; *Cook v. Hecht*, 64 Mo. App. 273; *Williams v. Elliott*, 76 Mo. App. 8. See also *Albers v. Merchants' Exch.*, 138 Mo. 140.

Nebraska. — *State v. Hastings*, 37 Neb. 96.

New Hampshire. — *McDaniel v. Tebbetts*, 60 N. H. 497. See also *Edes v. Boardman*, 58 N. H. 580; *Odiorne v. Rand*, 59 N. H. 504.

New York. — *Harman v. Brotherson*, 1 Den. (N. Y.) 537; *Seaman v. Patten*, 2 Cai. (N. Y.) 312; *Easton v. Calendar*, 11 Wend. (N. Y.) 90; *Vail v. Owen*, 19 Barb. (N. Y.) 22; *Brown v. Smith*, 24 Barb. (N. Y.) 419; *Hill v. Sellick*, 21 Barb. (N. Y.) 207; *People v. Stocking*, 50 Barb. (N. Y.) 573; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *Garlinghouse v. Jacobs*, 29 N. Y. 207; *Hines v. Lockport*, 50 N. Y. 236; *People v. Goff*, 52 N. Y. 434; *Williams v. Weaver*, 75 N. Y. 30; *New York v. Sands*, 105 N. Y. 210. Compare *Imlay v. Sands*, 1 Cai. (N. Y.) 566.

North Carolina. — See *Board of Education v. Bladen County*, 113 N. Car. 379.

Ohio. — *Ramsey v. Riley*, 13 Ohio 157; *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463; *Thomas v. Wilton*, 40 Ohio St. 516. See also *Jeffries v. Ankeny*, 11 Ohio St. 372.

Pennsylvania. — *Burton v. Fulton*, 49 Pa. St. 151. See also *Com. v. Haines*, 97 Pa. St. 228,

39 Am. Rep. 805; *American Pavement Co. v. Wagner*, 139 Pa. St. 623.

South Carolina. — *Fenwicke v. Gibbes*, 2 Desaus. (S. Car.) 629. See also *Chalk v. Patterson*, 5 S. Car. 290.

Texas. — *Roan v. Raymond*, 15 Tex. 78.

Vermont. — *Fuller v. Gould*, 20 Vt. 643; *Stearns v. Miller*, 25 Vt. 20; *Davis v. Strong*, 31 Vt. 332; *First Universalist Soc. v. Leach*, 25 Vt. 108.

West Virginia. — *Henderson v. Smith*, 26 W. Va. 829, 53 Am. Rep. 139.

Wisconsin. — *Druecker v. Solomon*, 21 Wis. 621, 94 Am. Dec. 571.

For a further discussion on this subject see such titles as *COUNTY COMMISSIONERS*, vol. 7, p. 996; *ELECTIONS*, vol. 10, p. 673; *HIGHWAYS*, vol. 15, p. 412; *JUDGE*, vol. 7, p. 726; *SCHOOLS*; *TAXATION*.

Liability for Acts Beyond Jurisdiction. — *Gage v. Currier*, 4 Pick. (Mass.) 399; *Wall v. Trumbull*, 16 Mich. 228; *McCutchen v. Windsor*, 55 Mo. 149; *Prosser v. Secor*, 5 Barb. (N. Y.) 607; *Wade v. Matheson*, 4 Lans. (N. Y.) 158; *Palmer v. Lawrence*, 6 Lans. (N. Y.) 282; *People v. Chenango County*, 11 N. Y. 563; *Mygatt v. Washburn*, 15 N. Y. 316; *Goettehus v. Matthewson*, 61 N. Y. 420; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7; *Milwaukee Iron Co. v. Schubel*, 20 Wis. 444, 9 Am. Rep. 591.

1. *Not Liable for Malice or Corruption.* — *Wilson v. New York*, 1 Den. (N. Y.) 595, 43 Am. Dec. 719; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Kavanagh v. Booklyn*, 38 Barb. (N. Y.) 232; *Barhyte v. Shepherd*, 35 N. Y. 238; *East River Gaslight Co. v. Donnelly*, 93 N. Y. 557; *Morris Tp. v. Carey*, 27 N. J. L. 377; *Steele v. Dunham*, 26 Wis. 393; *Fath v. Koepfel*, 72 Wis. 289, 7 Am. St. Rep. 867. See also *West Jersey Traction Co. v. Board of Public Works*, 57 N. J. L. 313; *Land, etc., Co. v. McIntyre*, 100 Wis. 258, 69 Am. St. Rep. 925.

Grand Jurors Acting Maliciously, Not Liable. — *Hunter v. Mathis*, 40 Ind. 356; *Turpen v. Booth*, 56 Cal. 65, 38 Am. Rep. 48. And see the title *JURY AND JURY TRIAL*, vol. 17, p. 1302.

2. *Liable for Malicious or Corrupt Acts.* — *Johnson v. Stanley*, 1 Root (Conn.) 246; *Waters v. Waterman*, 2 Root (Conn.) 214; *Pike v. Megoun*, 44 Mo. 491; *Third Turnpike Road v. Champney*, 2 N. H. 199; *Rowe v. Addison*, 34 N. H. 306; *Waldron v. Berry*, 51 N. H. 136; *Hannon v. Grizzard*, 66 N. Car. 293; *Yealy v. Fink*, 43 Pa. St. 212, 82 Am. Dec. 556. See also *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189. And see *supra*, p. 375, note 7.

defined with such certainty that nothing remains for judgment or discretion.¹ Merely because a ministerial officer has a discretion to exercise as to the methods and instrumentalities to be employed in the discharge of a duty imperatively imposed upon him by law, he is not possessed of the immunity of a judicial officer.²

(c) *Illustrations of Quasi-Judicial Officers.*—The exemption of *quasi-judicial* officers from liability has been applied in favor of such officers as township trustees,³ selectmen,⁴ school directors or trustees,⁵ highway commissioners,⁶ county commissioners,⁷ food inspectors,⁸ and municipal councilmen.⁹

(4) *Liability of Ministerial Officers.*—(a) *In General.*—A ministerial officer is not liable for doing an act which is either directed or authorized by a valid statute, if performed with due care and skill.¹⁰ A ministerial officer is, however, answerable in damages for nonfeasance, misfeasance, or malfeasance; that is to say, he is liable in a civil action for a failure or refusal to perform the duties of his office, or for their negligent or illegal performance.¹¹ A

1. Judicial and Ministerial Acts Distinguished.—*People v. Bartels*, 138 Ill. 322. To the same effect are *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Pennington v. Streight*, 54 Ind. 376; *Hatcher v. Dunn*, 102 Iowa 411; *Wall v. Trumbull*, 16 Mich. 235; *Amperse v. Winslow*, 75 Mich. 234; *Arberry v. Beavers*, 6 Tex. 466. See also *Casby v. Thompson*, 42 Mo. 133; *Teall v. Felton*, 1 N. Y. 537, 49 Am. Dec. 352; *State v. Sneed*, 84 N. Car. 816. And see the titles JUDGE, vol. 17, p. 728; MAN-DAMUS, vol. 19, p. 732.

Entering Order by Clerk Is a Ministerial Act.—*State v. Hixon*, 41 Mo. 210; *State v. Bowen*, 41 Mo. 217.

Opening and Casting Up Votes Is a Ministerial Act.—*State v. Rodman*, 43 Mo. 256.

Awarding or Refusing a Patent Is a Quasi-Judicial Act.—*Butterworth v. U. S.*, 112 U. S. 50.

Registering Bonds Is Not a Judicial Act.—*Hoff v. Jasper County*, 110 U. S. 53.

Selecting Jurors Is Not a Judicial Act.—*Ex p. Virginia*, 100 U. S. 339.

2. McCord v. High, 24 Iowa 336; *Hicks v. Dorn*, 42 N. Y. 47, *affirming* 54 Barb. (N. Y.) 172. See also *Owen v. Hill*, 67 Mich. 43.

3. Township Trustees.—*Muscatine Western R. Co. v. Horton*, 38 Iowa 33.

4. Selectmen.—*Johnson v. Stanley*, 1 Root (Conn.) 246; *Waters v. Waterman*, 2 Root (Conn.) 214; *Parmalee v. Baldwin*, 1 Conn. 317; *Third Turnpike Road v. Champney*, 2 N. H. 199.

5. School Officials.—*Chamberlain v. Clayton*, 56 Iowa 331, 41 Am. Rep. 101; *Wood v. Farmer*, 69 Iowa 533; *Dritt v. Snodgrass*, 66 Mo. 286, 27 Am. Rep. 343; *Edwards v. Ferguson*, 73 Mo. 686; *Stewart v. Southard*, 17 Ohio 402, 49 Am. Dec. 463.

6. Highway Commissioners.—*Sage v. Laurain*, 19 Mich. 137; *Waldron v. Berry*, 51 N. H. 136; *Smith v. Gould*, 61 Wis. 31.

7. County Commissioners.—*Hannon v. Grizard*, 96 N. Car. 293.

8. Food Inspectors.—*Fath v. Koeppel*, 72 Wis. 289, 7 Am. St. Rep. 867.

9. Members of Municipal Council.—*Amperse v. Winslow*, 75 Mich. 234; *Pawlowski v. Jenks*, 115 Mich. 275.

10. When Ministerial Officer Not Liable.—*Thames Mfg. Co. v. Lathrop*, 7 Conn. 557;

McCarty v. Bauer, 3 Kan. 237; *Thibodaux v. Thibodaux*, 46 La. Ann. 1528; *Weston v. Dane*, 53 Me. 372; *Highway Com'rs v. Ely*, 54 Mich. 173; *American Print Works v. Lawrence*, 21 N. J. L. 248; *Burton v. Fulton*, 40 Pa. St. 151; *Alvord v. Barrett*, 16 Wis. 175. See also *Huey v. Richardson*, 2 Harr. (Del.) 206; *Orr v. Quimby*, 54 N. H. 590; *Ramsey v. Riley*, 13 Ohio 157.

Officers Making Public Improvements.—Public officers lawfully employed in making public improvements are not liable for consequential damages occasioned to others unless caused by misconduct, negligence, or unskillfulness. *Atwater v. Canandaigua*, 124 N. Y. 602.

Public officers or a municipality charged with the conduct of a public improvement are not responsible to a property owner because such work has not resulted in such benefits and advantages to him as were anticipated, or because it does not answer all the purposes for which it was originally projected, when the authorities have acted in good faith, and are not chargeable with any neglect, default, or unlawful act on their part. *Garratt v. Canandaigua*, 135 N. Y. 436.

Not Liable for Refusing to Do an Unauthorized Act.—*Street v. Bezoni*, 51 Mo. 254.

Canada Statute Protecting Public Officers.—*Rev. Stat. Ont.*, c. 13; *Stalker v. Dunwich Tp.*, 15 Ont. 342.

11. When Ministerial Officer Liable—England.—*Ferguson v. Kinnoull*, 9 Cl. & F. 251; *Green v. Hundred of Bucle-churche*, Leon. (pt. i.) 323; *Rowning v. Goodchild*, 2 W. Bl. 906; *Brasyer v. MacLean*, L. R. 6 P. C. 398.

United States.—*Boyden v. Burke*, 14 How. (U. S.) 575; *Dow v. Humbert*, 91 U. S. 294.

Alabama.—*Eslava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699.

Illinois.—*Strickfaden v. Zipprick*, 49 Ill. 286; *Governor v. Dodd*, 81 Ill. 162; *Harris v. Carson*, 40 Ill. App. 147.

Iowa.—*Wasson v. Mitchell*, 18 Iowa 153; *McCord v. High*, 24 Iowa 336; *Haverly v. McClelland*, 57 Iowa 182.

Kentucky.—*Prather v. Louisville*, 13 B. Mon. (Ky.) 559.

Louisiana.—*Tardos v. Bozant*, 1 La. Ann. 199; *Bright v. Murphy*, 105 La. 795.

Maine.—*Maxwell v. Pike*, 2 Me. 8; *Stone v. Augusta*, 46 Me. 127.

Maryland.—*Thomas v. Owens*, 4 Md. 189;

mistake as to his duty and honest intentions will not excuse a public officer who neglects or refuses to do a ministerial act which the law requires absolutely to be done by him.¹ Nor is he released from liability for a refusal to perform a duty required by statute, because his refusal is based upon an honest belief that such statute is unconstitutional.²

(b) **Nature of Duty.** — In order to make a public officer liable for neglect of duty, it must be shown that he omitted to discharge a plain duty which the law devolved upon him absolutely and imperatively.³ Such duty should also

Anne Arundel County v. Duckett, 20 Md. 469, 83 Am. Dec. 557.

Massachusetts. — *Holder v. Eaton*, 7 Pick. (Mass.) 15; *Smith v. Gates*, 21 Pick. (Mass.) 55; *Gates v. Neal*, 23 Pick. (Mass.) 308; *Keith v. Howard*, 24 Pick. (Mass.) 292.

Michigan. — *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189; *Owen v. Hill*, 67 Mich. 43; *Wells v. Board of Education*, 78 Mich. 260; *Weinberg v. State University*, 97 Mich. 246. See also *Avery v. Ionia County*, 71 Mich. 538; *Plummer v. Kennedy*, 72 Mich. 295.

Mississippi. — *McNutt v. Livingston*, 7 Smed. & M. (Miss.) 641; *Brown v. Lester*, 13 Smed. & M. (Miss.) 392; *Levee Com'rs v. Hemingway*, 66 Miss. 289.

Missouri. — *St. Joseph F. & M. Ins. Co. v. Leland*, 90 Mo. 177, 59 Am. Rep. 9.

Montana. — *Merritt v. McNally*, 14 Mont. 228.

New Hampshire. — *Blake v. Johnson*, 1 N. H. 91.

New York. — *Robinson v. Chamberlain*, 34 N. Y. 389, 90 Am. Dec. 713; *Hover v. Barkhoof*, 44 N. Y. 113; *McCarthy v. Syracuse*, 46 N. Y. 194; *Clark v. Miller*, 54 N. Y. 528; *Bassett v. Fish*, 75 N. Y. 303; *People v. Town Auditors*, 75 N. Y. 316; *Bennett v. Whitney*, 94 N. Y. 302; *Beardslee v. Dolge*, 143 N. Y. 160, 42 Am. St. Rep. 707; *Wright v. Shanahan*, 149 N. Y. 495; *Jenner v. Joliffe*, 9 Johns. (N. Y.) 381; *Adsit v. Brady*, 4 Hill (N. Y.) 632, 40 Am. Dec. 305; *Bailey v. New York*, 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Connors v. Adams*, 13 Hun (N. Y.) 427; *Piercy v. Averill*, 37 Hun (N. Y.) 360; *Allen v. Sisson*, 66 Hun (N. Y.) 140, affirming 148 N. Y. 728; *Griffith v. Follett*, 20 Barb. (N. Y.) 620; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250; *Hannon v. Agnew*, (City Ct. Tr. T.) 1 City Ct. Supp. (N. Y.) 64.

North Carolina. — *Holt v. McLean*, 75 N. Car. 347.

Pennsylvania. — *Work v. Hoofnagle*, 1 Yeates (Pa.) 506.

South Dakota. — *State v. Ruth*, 9 S. Dak. 84. *Virginia.* — *Sawyer v. Corse*, 7 Gratt. (Va.) 230, 94 Am. Dec. 445.

Wisconsin. — *Robinson v. Rohr*, 73 Wis. 436, 9 Am. St. Rep. 810.

For a further discussion of this subject see such titles as *CLERKS OF COURTS*, vol. 6, p. 138; *DE FACTO OFFICERS*, vol. 8, p. 806; *DEPUTY*, vol. 9, p. 338; *FALSE IMPRISONMENT*, vol. 12, p. 762; *JUDGES*, vol. 17, p. 731; *JUSTICES OF THE PEACE*, vol. 18, p. 44; *NOTARY PUBLIC*, vol. 21, p. 572; *SHERIFFS, MARSHALS, AND CONSTABLES*.

Reasonable Skill in Discharge of Duties Required. — *Olmsted v. Dennis*, 77 N. Y. 378.

Neither Wilfulness nor Malice Need Be Shown. — *Olmsted v. Dennis*, 77 N. Y. 378.

Motive Immaterial if Act Authorized by Statute. — *Anderson v. Park*, 57 Iowa 69; *Moran v.*

McClearans, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 289.

Liability for Interest on Claims Collected and Not Accounted For. — *State v. Allen*, 5 Ired. L. (27 N. Car.) 36.

Liability for Failure to Notify Execution Debtor of His Exemption Rights. — *State v. O'Neill*, 78 Mo. App. 20; *State v. Lindsay*, 73 Mo. App. 473.

Immaterial that Officer Is Subjected by Statute to a Penalty. — *Hayes v. Porter*, 22 Me. 371; *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189.

Want of Knowledge of Duty Not a Defense. — *State v. Kruttschnitt*, 4 Nev. 178.

Liability for Failure to Index Records. — *Temple v. People*, 6 Ill. App. 378; *Bishop v. Schneider*, 46 Mo. 472, 2 Am. Rep. 533.

Liability for Failure to Levy Tax. — *Oswald v. Thedinga*, 17 Iowa 13; *Porter v. Thomson*, 22 Iowa 391. And see the title *TAXATION*.

Liability to Principal for Deceiving Agent. — *Perkins v. Evans*, 61 Iowa 35.

Liability of Assignee in Bankruptcy for Failure to Give Notice of Meetings. — *Russell v. Phelps*, 42 Mich. 377.

Liability to Contribution for Neglect of Co-officer. — *Thweatt v. Jones*, 1 Rand. (Va.) 328, 10 Am. Dec. 538.

In Missouri Liable by Statute for Neglect or Misfeasance. — 1 Wag. Stat., § 66, p. 615 (Rev. Stat., § 3222); *Lusk v. Briscoe*, 65 Mo. 555.

Highway Commissioners Relieved from Liability by Statute. — N. Y. Acts of 1881, c. 700; *Bryant v. Randolph*, 133 N. Y. 70.

Statutory Liability of Oil Inspector. — *Hatcher v. Dunn*, 102 Iowa 411.

Statutory Liability for Errors in Searching Records. — N. Y. Laws 1853, p. 265; *Kimball v. Connolly*, 2 Abb. App. Dec. (N. Y.) 504; *Van Schaick v. Sigel*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 122.

No Liability Where Services Gratuitous. — It has been said that the right of action is confined to cases where the services are not gratuitous or coerced, but voluntary, and attended with compensation. *Bartlett v. Crozier*, 17 Johns. (N. Y.) 440, 8 Am. Dec. 428. See also *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Wood v. Ruland*, 10 Mo. 143. But in a large majority of cases the rule of liability is stated without this limitation. See *supra*, this note.

1. Mistake and Honest Intentions No Excuse. — *Amy v. Supervisors*, 11 Wall. (U. S.) 136; *Farr v. Thomson*, 11 Wall. (U. S.) 139; *Porter v. Thomson*, 22 Iowa 391; *St. Joseph School Board v. Hull*, 72 Mo. App. 403. See also *Beckham v. Nacke*, 56 Mo. 546. Compare *Lecourt v. Gaster*, 50 La. Ann. 521.

2. Clark v. Miller, 54 N. Y. 528.

3. Absolute Duty. — *Weise v. Tate*, 45 Ill.

be a personal one, and one which he is not only under obligation to discharge, but clothed with the ability to perform.¹

(c) **Lack of Funds.** — When a duty is imposed upon a public officer which requires funds for its performance, the absence of the necessary funds, and of the legal means of procuring them, will excuse the nonperformance of this duty. But it seems that such absence of means should be shown as a defense.²

(d) **Contributory Negligence.** — It has been said that if the result complained of would have followed notwithstanding the misconduct of the officer, or if the injured party himself contributed to the result in any degree by his own fault or neglect, the officer cannot be held responsible.³

(e) **Liability of Member of Corporate Body.** — A public officer who is a member of a corporate body upon which a duty rests cannot be held liable individually for the neglect of its duty by that body. If there is any neglect to exercise the powers or means of such body, it is the neglect of the body, and not of the individuals composing it.⁴

(f) **Extent of Protection Afforded by Process or Order.** — As to the extent of protection afforded to ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon, it is well settled now that if the officer or tribunal possesses jurisdiction over the subject-matter upon which judgment is passed, with power to issue an order or process for the enforcement of such judgment, and the order or process issued thereon to the ministerial officer is regular on its face, showing no departure from the law or defect of jurisdiction over the person or property affected, then, and in such cases, the order or process will give full and entire protection to the ministerial officer in its regular enforcement, against any prosecution which the party aggrieved thereby may institute against him, although serious errors may have been committed by the officer or tribunal in reaching the conclusion or judgment upon which the order or process is issued.⁵

(g) **Special Duty and Injury to Individual Necessary.** — The rule seems to be that a private individual may maintain an action for damages against a public officer

App. 626; *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 440, 8 Am. Dec. 428; *Fitzpatrick v. Slocum*, 89 N. Y. 358; *Woolley v. Baldwin*, 101 N. Y. 688, 5 N. E. Rep. 573.

1. **Personal Duty.** — *Nowell v. Wright*, 3 Allen (Mass.) 166, 80 Am. Dec. 62.

2. **No Liability When Necessary Funds Wanting.** — *Studley v. Geyer*, 72 Me. 286; *Garlinghouse v. Jacobs*, 29 N. Y. 297; *Hover v. Barkhoof*, 44 N. Y. 113; *Hines v. Lockport*, 50 N. Y. 236; *People v. Ulster County*, 93 N. Y. 397; *Clapper v. Waterford*, 131 N. Y. 382; *Smith v. Wright*, 24 Barb. (N. Y.) 170, 12 How. Pr. (N. Y.) 555; 27 Barb. (N. Y.) 621; *Hyatt v. Rondout*, 44 Barb. (N. Y.) 385; *Eveleigh v. Hounsfield*, 34 Hun (N. Y.) 140. See also *Weed v. Ballston Spa*, 76 N. Y. 329; *Barker v. Loomis*, 6 Hill (N. Y.) 463; *People v. Highway Com'rs*, 7 Wend. (N. Y.) 474; *Miller v. New York*, 76 N. Y. 151. And see the title *HIGHWAYS*, vol. 15, p. 412.

3. **Contributory Negligence a Defense.** — *Lick v. Madden*, 36 Cal. 208, 95 Am. Dec. 175. See also *Boardman v. Hayne*, 29 Iowa 339; *District Tp. v. Bowman*, 55 Iowa 129; *Natcher v. Dunn*, 102 Iowa 411.

4. **Member of Corporate Body Not Individually Liable.** — *Hydraulic Press Brick Co. v. School Dist.*, 79 Mo. App. 665; *Bassett v. Fish*, 75 N. Y. 303.

5. **Officer Protected by Process or Order.** — *Ers- kine v. Hohnbach*, 14 Wall. (U. S.) 613, *per* Field, J. To the same effect are *Belk v. Broad- bent*, 3 T. R. 185; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Duncan v. Darst*, 1 How. (U. S.) 301; *Haffin v. Mason*, 15 Wall. (U. S.) 671; *Harding v. Woodcock*, 137 U. S. 43; *Suitsman County v. Wallace*, 142 U. S. 293; *State v. Bell*, 9 Ga. 334; *Sample v. Broadwell*, 87 Ill. 617; *Partlow v. Moore*, 184 Ill. 119; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Jefferson v. Opel*, 49 Mo. 190; *Brown v. Harris*, 52 Mo. 306; *Lusk v. Briscoe*, 65 Mo. 555; *Bennett v. Burch*, 1 Den. (N. Y.) 141; *Simmons v. Simmons*, Harp. Eq. (S. Car.) 256; *Brown v. Mason*, 40 Vt. 157. See also *Duckworth v. Johnston*, 7 Ala. 578; *Leachman v. Dougherty*, 81 Ill. 324. And see the titles *ARREST*, vol. 2, p. 899; *SHERIFFS*, *MARSHALS*, and *CONSTABLES*.

Not Protected by Process Void on Face. — *Van Rensselaer v. Witbeck*, 7 N. Y. 517; *United Lines Tel. Co. v. Grant*, 137 N. Y. 7. See also *First Nat. Bank v. Watkins*, 21 Mich. 483.

Unauthorized Order no Protection. — *McKinney v. Robinson*, 84 Tex. 489.

Duty to Obey Order Regular upon Face. — *Newman v. Elam*, 30 Miss. 507.

Rule Applicable to Internal Revenue Collectors. — *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Haffin v. Mason*, 15 Wall. (U. S.) 671; *Harding v. Woodcock*, 137 U. S. 43.

only when he can show that in the public duty was involved also a duty to himself as an individual, and that he has suffered a special and peculiar injury by reason of its nonperformance or its improper performance.¹

(h) **Amount of Damages.** — When a ministerial officer acts in good faith, without malice, he is not liable for exemplary damages. He is liable only for compensatory damages.²

(5) **Liability upon Official Contracts** — (a) **Generally Not Liable.** — A public officer acting for his government is not individually responsible on any contract he may make in that capacity, although executed in a manner which would have made him personally liable had he been acting for an individual. And wherever his contract or engagement is connected with a subject fairly within the scope of his authority, it is presumed to have been made officially and in his public character, unless it clearly appears from the facts and circumstances of the transaction that it was intended by the parties thereto that he should be personally liable.³

1. When Individual May Sue. — *Hartford County Bank v. Waterman*, 26 Conn. 324; *State v. Harris*, 89 Ind. 363, 46 Am. Rep. 169; *Louden v. Ball*, 93 Ind. 232; *Lane v. Boone County*, 7 Ind. App. 625; *Harrington v. Ward*, 9 Mass. 251; *Learock v. Putnam*, 111 Mass. 499; *Raynsford v. Phelps*, 43 Mich. 342, 38 Am. Rep. 189; *Moss v. Cummings*, 44 Mich. 359; *Baugh v. Lamb*, 40 Miss. 493; *School Dist. No. 80 v. Burress*, (Neb. 1902) 89 N. W. Rep. 603. See also *Rowning v. Goodchild*, 2 W. Bl. 906; *Eslava v. Jones*, 83 Ala. 139, 3 Am. St. Rep. 699.

No Liability for Breach of Public Duty. — *Van Nuis v. M'Collister*, 3 N. J. L. 371; *Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428; *Young v. Road Com'rs*, 2 Nott & M. (S. Car.) 537; *McConnell v. Dewey*, 5 Neb. 385, *explaining* *Henly v. Lyme*, 5 Bing. 91, 15 E. C. L. 376. See also *Weet v. Brockport*, 16 N. Y. 168, note.

Breach of Duty Imposed by Statute. — Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created and imposed for the benefit of another, and the advantage to be derived by the party prosecuting, from its performance, is merely incidental, and no part of the design of the statute, no such right is created as forms the subject of an action. *Colorado Paving Co. v. Murphy*, (C. C. A.) 78 Fed. Rep. 28; *Strong v. Campbell*, 11 Barb. (N. Y.) 135.

"Merely Being a Resident, a Citizen, an Elector, or a Taxpayer, or all combined, does not authorize a private individual to summon the public officers into the courts of justice to answer for their official conduct." *McMillen v. Butler*, 15 Kan. 65.

An Individual Need Have No Personal Interest under the California statute "to prevent extortion in office and to enforce official duty." *Matter of Marks*, 45 Cal. 199.

In New York, the rule now is that when an individual sustains special damages by misfeasance or nonfeasance of a public officer who acts contrary to, or omits to act in accordance with, his duty, an action lies against such officer by the party injured. *New York v. Furze*, 3 Hill (N. Y.) 612; *Adsit v. Brady*, 4 Hill (N. Y.) 630, 40 Am. Dec. 305; *Hover v.*

Barkhoff, 44 N. Y. 113; *Clark v. Miller*, 54 N. Y. 528; *Bennett v. Whitney*, 94 N. Y. 302; *Bryant v. Randolph*, 133 N. Y. 70; *Beardslee v. Dolge*, 143 N. Y. 160, 42 Am. St. Rep. 707. *Compare Bartlett v. Crozier*, 17 Johns. (N. Y.) 439, 8 Am. Dec. 428; *Weet v. Brockport*, 16 N. Y. 168, note.

2. Compensatory Damages. — *Tracy v. Swartwout*, 10 Pet. (U. S.) 80; *Swan v. Bridgeport*, 70 Conn. 143; *Thompson v. Evans*, 49 Ill. App. 289; *Plummer v. Harbut*, 5 Iowa 308.

3. Not Personally Liable — *England.* — *Dunn v. Macdonald*, (1897) 1 Q. B. 555, 66 L. J. Q. B. D. 420, 76 L. T. N. S. 441, 45 W. R. 355; *O'Grady v. Cardwell*, 21 W. R. 340; *Graham v. Stamper*, 2 Vern. 146. See also *Palmer v. Hutchinson*, 6 App. Cas. 619, 50 L. J. P. C. 62, 45 L. T. N. S. 180; *Gidley v. Palmerston*, 7 Moo. 91, 3 B. & B. 275; *Macbeath v. Haldimund*, 1 T. R. 180.

Canada. — *Goodenough v. D'Estimaufville*, 2 Rev. Lég. 124; *Scott v. Lindsay*, 2 Rev. Lég. 208; *Peck v. Robinson*, 4 N. Bruns. 687. See also *Wheeler v. Hayward*, 3 N. Bruns. 657.

United States. — *Huthsing v. Bosquet*, 3 McCrary (U. S.) 569; *New York, etc., Steam-Ship Co. v. Harbison*, 16 Fed. Rep. 688. See also *Davis v. Garland*, 5 Cranch (C. C.) 570.

Alabama. — *Comer v. Bankhead*, 70 Ala. 493.

California. — *Dwinville v. Henriquez*, 1 Cal. 387.

Delaware. — *Samuel v. M'Dowell*, 1 Harr. (Del.) 108.

Georgia. — *Tucker v. Shorter*, 17 Ga. 621.

Hawaii. — *Richardson v. Harding*, 2 Hawaii 433.

Illinois. — *Mann v. Richardson*, 66 Ill. 481.

Indiana. — *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Mackenzie v. School Trustees*, 72 Ind. 189; *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121. See also *McClure v. Secrist*, 5 Ind. 31; *Morrison v. McFarland*, 51 Ind. 206.

Kentucky. — *Murray v. Carothers*, 1 Met. (Ky.) 71.

Massachusetts. — *Bainbridge v. Downie*, 6 Mass. 253; *Cutler v. Ashland*, 121 Mass. 588.

Minnesota. — See *Fowler v. Atkinson*, 6 Minn. 578.

Mississippi. — *Copes v. Matthews*, 10 Smed. & M. (Miss.) 398.

Missouri. — *Tutt v. Hobbs*, 17 Mo. 486; *Hodges v. Runyan*, 30 Mo. 491.

(b) **When Liable.** — A public officer may waive his official immunity, and expressly assume a personal liability.¹ If a public officer should deny to the government that he entered into a contract on behalf of the government, and by such interference prevent the other party to the contract from his remedy as against the government, he must be personally liable; as he has by his conduct, in effect, disavowed his acting in the character of a public agent.² If a public officer receives money from the government to enable him to fulfil a contract made by him for the government, and refuses to pay it over, he is liable to the other party to the contract in an action for money had and received to his use.³

(c) **Effect of Want of Authority.** — When public officers in good faith contract with parties having full knowledge of the extent of their authority, or who have equal means of knowledge with themselves, they do not become personally liable unless the intent to incur personal responsibility is clearly expressed, although it should be found that they have exceeded their authority.⁴

New Hampshire. — See *Delano v. Goodwin*, 48 N. H. 203.

New York. — *Gill v. Brown*, 12 Johns. (N. Y.) 385; *Nichols v. Moody*, 22 Barb. (N. Y.) 611; *Crowell v. Crispin*, 4 Daly (N. Y.) 100; *Miller v. Board*, (County Ct.) 15 Misc. (N. Y.) 322.

North Carolina. — *Robinson v. Howard*, 84 N. Car. 151.

Ohio. — *Williams v. Harbaugh*, Tappan (Ohio) 56.

Pennsylvania. — *West v. Jones*, 9 Watts (Pa.) 27; *Paving Co. v. Patterson*, 38 Leg. Int. (Pa.) 303.

South Carolina. — *Miller v. Ford*, 4 Rich. L. (S. Car.) 376, 55 Am. Dec. 687.

Tennessee. — *Enloe v. Hall*, 1 Humph. (Tenn.) 303.

Virginia. — *Syme v. Butler*, 1 Call (Va.) 105. And see the titles AGENCY, vol. 1, p. 1056; MILITARY LAW, vol. 20, p. 666.

Liability Determined by Intention. — *Ghent v. Adams*, 2 Ga. 214; *Nichols v. Moody*, 22 Barb. (N. Y.) 611. See also *New York*, etc., *Steam-Ship Co. v. Harbison*, 16 Fed. Rep. 688.

Intention Ascertained from Surrounding Circumstances. — *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502.

Action on Should Be Brought in Name of Government. — *Irish v. Webster*, 5 Me. 171; *Bainbridge v. Downie*, 6 Mass. 253; *Hunter v. Field*, 20 Ohio 340. And see the title AGENCY, vol. 1, p. 1056.

Rule Seems Inapplicable to Municipal Officers. — *Ross v. Brown*, 74 Me. 352; *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41; *Providence v. Miller*, 11 R. I. 272, 23 Am. Rep. 453.

Rule Applicable to Contracts under Seal. — *Hodgson v. Dexter*, 1 Cranch (U. S.) 345, *affirming* 1 Cranch (C. C.) 109; *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139. See also *Heidelberg School Dist. v. Horst*, 62 Pa. St. 301. And see the title AGENCY, vol. 1, p. 1057.

Rule Applicable to Negotiable Instruments. — *Jones v. La Tombe*, 3 Dall. (U. S.) 384; *Monticello v. Kendall*, 72 Ind. 91, 37 Am. Rep. 139; *Fox v. Drake*, 8 Cow. (N. Y.) 191. *Compare* *Anderson v. Pearce*, 36 Ark. 293, 38 Am. Rep. 39; *Blakely v. Bennecke*, 59 Mo. 193; *Forcey*

v. Caldwell, (Pa. 1887) 9 Atl. Rep. 466. And see the title AGENCY, vol. 1, p. 1056.

In Iowa, the question of the liability of school officers upon notes signed by them has arisen several times, and in some cases it has been held that such officers were not liable. *Lyon v. Adamson*, 7 Iowa 509; *Harvey v. Irvine*, 11 Iowa 82; *Armstrong v. Borland*, 35 Iowa 537; *Independent Dist. v. Reichard*, 50 Iowa 98. While in other cases the right to sue them individually has been sustained. *Bayliss v. Pearson*, 15 Iowa 279; *Wing v. Glick*, 56 Iowa 473, 41 Am. Rep. 118; *American Ins. Co. v. Stratton*, 59 Iowa 696. And see the title SCHOOLS.

Negligence on the part of a public officer in making or collecting an assessment to pay a note executed by him renders him personally liable. *Allen v. Sisson*, 66 Hun (N. Y.) 140, *affirmed* 148 N. Y. 728.

1. Express Assumption of Liability. — *Samuel v. McDowell*, 1 Harr. (Del.) 108; *Murray v. Carothers*, 1 Met. (Ky.) 71; *Tutt v. Hobbs*, 17 Mo. 486. See also *Cunningham v. Collier*, 4 Dougl. 233, 26 E. C. L. 333. And see the title AGENCY, vol. 1, p. 1057.

2. Disavowal of Official Action. — *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66.

3. Liable to Action for Money Had and Received. — *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66. See also *Chapman v. Williams*, 7 Har. & J. (Md.) 158; *Paulding v. Cooper*, 10 Hun (N. Y.) 20, *affirmed* 74 N. Y. 619; *Williams v. Harbaugh*, Tappan (Ohio) 56.

4. Not Liable Because Authority Exceeded. — *New York*, etc., *Steam-Ship Co. v. Harbison*, 16 Fed. Rep. 688; *Mann v. Richardson*, 66 Ill. 481; *Newman v. Sylvesta*, 42 Ind. 106; *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Detroit First Nat. Bank v. Becker County*, 81 Minn. 95; *Humphrey v. Jones*, 71 Mo. 62; *Olifiers v. Belmont*, (C. Fl. Spec. T.) 12 Misc. (N. Y.) 160, (C. Pl. Gen. T.) 15 Misc. (N. Y.) 120, *affirmed* 159 N. Y. 550. *Compare* *Yulee v. Canova*, 11 Fla. 9; *McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310; *McDonald v. Franklin County*, 2 Mo. 217; *Ruggles v. Washington County*, 3 Mo. 496; *Richardson v. Crandall*, 47 Barb. (N. Y.) 335, *affirmed* 48 N. Y. 348; *Paulding v. Cooper*, 10 Hun (N. Y.) 20, 74 N. Y. 619; *Hammarskold v. Bull*, 11

(6) *Liability for Acts or Omissions of Subordinates.* — It is a well-settled rule that a public officer is not responsible for the acts or omissions of subordinates properly employed by or under him, if such subordinates are not in his private service, but are themselves servants of the government,¹ unless he has directed such acts to be done, or has personally co-operated in the negligence.² Such an officer is, however, liable for the misconduct or negligence, in the scope of their employment, of those employed by or under him, voluntarily or privately, or paid by or responsible to him.³ He is also responsible for failing to exercise proper and reasonable care in the choice of his subordinates, or for not properly superintending them in the discharge of their allotted duties.⁴ The liability of public officers for the acts and omissions of their deputies is fully discussed elsewhere in this work.⁵

(7) *Limitation of Actions Against Public Officers.* — The time within which actions must be brought against public officers is a matter which depends upon the statutory provisions in the various jurisdictions.⁶

2. Criminal Liability — *a. IN GENERAL.* — As a general rule, a public officer is liable criminally for malfeasance, misfeasance, or nonfeasance in his office. It is unimportant whether the office was created by common law or by statute. Every culpable neglect of duty enjoined on such officer, either by common law or by statute, is an indictable offense.⁷ Where, however, a

Rich. L. (S. Car.) 493. And see the titles AGENCY, vol. 1, p. 1128; COUNTY COMMISSIONERS, vol. 7, p. 988.

Liability for False Representation of Authority. — The remedy against one who fraudulently represents himself as a public officer, and in that capacity undertakes to make a contract binding upon the public, is an action on the case for deceit, and not an action for assumpsit upon the contract. *Duncan v. Niles*, 32 Ill. 532, 83 Am. Dec. 293; *Noyes v. Loring*, 55 Me. 408. And see the titles AGENCY, vol. 1, p. 1135; FRAUD AND DECEIT, vol. 14, p. 29.

1. Not Liable for Acts of Official Subordinates — *England.* — *Hall v. Smith*, 2 Bing. 156, 9 E. C. L. 357, 9 Moo. 226; *Raleigh v. Goschen*, (1898) 1 Ch. 73.

United States. — *Robertson v. Sichel*, 127 U. S. 516; *Brissac v. Lawrence*, 2 Blatchf. (U. S.) 121; *Mister v. Brown*, 59 Fed. Rep. 909.

Connecticut. — *Ely v. Parsons*, 55 Conn. 100. *Delaware.* — *Huey v. Richardson*, 2 Harr. (Del.) 206.

Iowa. — *Scott County v. Fluke*, 34 Iowa 317. *Massachusetts.* — *McKenna v. Kimball*, 145 Mass. 555.

New York. — *Murphy v. Emigration Com'rs*, 28 N. Y. 134; *Donovan v. McAlpin*, 85 N. Y. 185, 39 Am. Rep. 649; *Bailey v. New York*, 3 Hill (N. Y.) 538, 38 Am. Dec. 669. See also *Cordot v. Barney*, 63 N. Y. 281, 20 Am. Rep. 533; *Piercy v. Averill*, 37 Hun (N. Y.) 360.

Virginia. — *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445; *Richmond v. Long*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461.

West Virginia. — *Tracy v. Cloyd*, 10 W. Va. 19.

And see the titles AGENCY, vol. 1, p. 982; DE FACTO OFFICERS, vol. 8, p. 807; POSTAL LAWS, vol. 22, p. 1046; SHERIFFS, MARSHALS, AND CONSTABLES.

Naval Officers Not Liable. — *Nicholson v. Mounsey*, 15 East 384; *The Eleanor*, 2 Wheat. (U. S.) 345.

Liability of Public Bodies for Acts of Agents and Servants. — *Allen v. Hayward*, 7 Q. B. 960, 53

E. C. L. 960; *Mersey Docks, etc., Board v. Penhallow*, 7 H. & N. 329; *Duncan v. Findlater*, 6 Cl. & F. 894; *Holliday v. St. Leonard*, 11 C. B. N. S. 192, 103 E. C. L. 192; *Coe v. Wise*, L. R. 1 Q. B. 711, *overruling* 5 B. & S. 440, 117 E. C. L. 440. See also *Gilbert v. Trinity House Corp.*, 17 Q. B. D. 795.

Heads of Municipal Departments Exempted by Statute. — *N. Y. Laws* (1881), c. 457, § 1; *Bieling v. Brooklyn*, 120 N. Y. 98.

Liability of Superior Military Officer for Contract of Inferior Officer. — *Morris v. De Mars*, 1 Dall. (Pa.) 140.

2. Raleigh v. Goschen, (1898) 1 Ch. 73; *Ely v. Parsons*, 55 Conn. 100; *Tracy v. Cloyd*, 10 W. Va. 19. See also *The Eleanor*, 2 Wheat. (U. S.) 345.

3. Liable for Acts of Private Servants. — *Ely v. Parsons*, 55 Conn. 100; *Anne Arundel County v. Duvall*, 54 Md. 350, 39 Am. Rep. 393; *Bassett v. Fish*, 75 N. Y. 303; *Shepherd v. Lincoln*, 17 Wend. (N. Y.) 250; *Van Schaick v. Sigel*, (C. Pl. Gen. T.) 60 How. Pr. (N. Y.) 122; *Sawyer v. Corse*, 17 Gratt. (Va.) 230, 94 Am. Dec. 445.

4. Responsible for Selection and Superintendence. — *Richmond v. Long*, 17 Gratt. (Va.) 375, 94 Am. Dec. 461. See also *People v. Campbell*, 82 N. Y. 247.

5. See the title DEPUTY, vol. 9, p. 390.

6. When Actions to Be Brought. — *Posey County v. Saunders*, 17 Ind. 437; *Prescott v. Gonser*, 34 Iowa 175; *Lasnier v. Dozois*, 15 Quebec Super. Ct. 604. And see the title LIMITATION OF ACTIONS, vol. 19, p. 268.

7. When Public Officer Liable — *England.* — *Crouther's Case*, Cro. Eliz. 654; *Rex v. Webb*, 1 W. Bl. 19; *Rex v. Osborn*, 1 Comyns 240; *Rex v. Hemmings*, 3 Salk. 187; *Rex v. Commings*, 5 Mod. 179; *Anonymous*, 6 Mod. 96; *Rex v. Bootie*, 2 Burr. 864; *Reg. v. Buck*, 6 Mod. 306; *Rex v. Bembridge*, 3 Dougl. 327, 26 E. C. L. 125.

United States. — *Bottomley v. U. S.*, 1 Story (U. S.) 135. See also *South v. Maryland*, 18 How. (U. S.) 396.

public officer acts judicially, or in the exercise of a discretion intrusted to him by law, he cannot be held liable criminally, unless it is shown that he acted from some motive of malice, partiality, or corruption.¹

b. STATUTORY LIABILITY. — The criminal liability of public officers is, in most jurisdictions, expressly provided for by statute.²

Alabama. — See *Tucker v. State*, 16 Ala. 670.
Indiana. — *Hopewell v. State*, 22 Ind. App.

489.

Iowa. — See *State v. Conlee*, 25 Iowa 237.
Kentucky. — See *Com. v. Kinnaird*, (Ky. 1896) 37 S. W. Rep. 840.

Maine. — *State v. Darling*, 89 Me. 400.
Minnesota. — *State v. Wedge*, 24 Minn. 150, distinguished *State v. Coon*, 14 Minn. 459.

Missouri. — *State v. Bowen*, 41 Mo. 217.
New Jersey. — *State v. Startup*, 39 N. J. L. 423; *State v. Kern*, 51 N. J. L. 259.

New York. — *People v. Norton*, 7 Barb. (N. Y.) 477; *People v. Herlihy*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 711.

North Carolina. — *State v. Leigh*, 3 Dev. & B. L. (20 N. Car.) 127; *State v. Haywood*, 3 Jones L. (48 N. Car.) 399; *State v. Powers*, 75 N. Car. 281; *State v. Hawkins*, 77 N. Car. 494; *Holt v. McLean*, 75 N. Car. 347.

Pennsylvania. — *Respublica v. Montgomery*, 1 Yeates (Pa.) 419; *Com. v. Genther*, 17 S. & R. (Pa.) 135; *Edge v. Com.*, 7 Pa. St. 275.

Tennessee. — *State v. Buxton*, 2 Swan (Tenn.) 57; *State v. West*, 14 Lea (Tenn.) 38; *Hill v. State*, 4 Sneed (Tenn.) 443; *Robinson v. State*, 2 Coldw. (Tenn.) 181.

Wisconsin. — *Tibbals v. State*, 5 Wis. 596.
Liable though No Individual Injured. — *State v. Glasgow*, Conf. Rep. (1 N. Car.) 38.

Not Liable for Acting under Unconstitutional Statute. — *State v. Godwin*, 123 N. Car. 697.

May Be Prosecuted After Expiration of Term. — *Com. v. Coyle*, 160 Pa. St. 36, 40 Am. St. Rep. 708.

Not a Misdemeanor to Receive Pay for Services Not Required by Law. — *Dutton v. Philadelphia*, 9 Phila. (Pa.) 597, 29 Leg. Int. (Pa.) 364.

Liability of Municipal Officers. — "It is not to be understood, however, that if the mayor and board of commissioners of a town or city acting within the line of their duty and in reference to matters clearly within their power, should make an honest mistake without negligence as to the law governing their action, they would be liable therefor either criminally or civilly. Within their jurisdiction they would be a part of the law-making power and not responsible for mistakes unattended with negligence or bad faith." *State v. McLean*, 121 N. Car. 589.

Failure to Take Oath No Defense. — *Com. v. Pate*, (Ky. 1901) 61 S. W. Rep. 1009, 22 Ky. L. Rep. 1890; *State v. Cansler*, 75 N. Car. 442; *State v. Long*, 76 N. Car. 254.

Lending Public Moneys for private gain while occupying a public office is not an offense at common law. *In re Breene*, 14 Colo. 401.

1. Liability When Acting Judicially. — *Eyman v. People*, 6 Ill. 4; *State v. Hixon*, 41 Mo. 210; *People v. Stocking*, 50 Barb. (N. Y.) 573, 32 How. Pr. (N. Y.) 48, 6 Park. Crim. (N. Y.) 263; *State v. Williams*, 12 Ired. L. (34 N. Car.) 172; *State v. Powers*, 75 N. Car. 281; *State v. Coit*, 8 Ohio Dec. 62; *Jacobs v. Com.*, 2 Leigh (Va.) 709. See also *Rex v. Halford*, 7 Mod.

193; *Matter of East Syracuse*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 131.

2. Criminal Liability under Statute — *United States.* — *U. S. v. Scott*, 74 Fed. Rep. 213. See also *U. S. v. Strobach*, 4 Woods (U. S.) 592.

Alabama. — *Scruggs v. State*, 111 Ala. 60.

California. — *Ex p. Harrold*, 47 Cal. 129.

Idaho. — *State v. Browne*, (Idaho 1896) 44 Pac. Rep. 552.

Illinois. — *Johnson v. People*, 123 Ill. 624; *Dreyer v. People*, 176 Ill. 590, 188 Ill. 40; *Ferkel v. People*, 16 Ill. App. 310.

Indiana. — *State v. Hunter*, 8 Blackf. (Ind.) 212; *State v. Shields*, 8 Blackf. (Ind.) 151; *Hopewell v. State*, 22 Ind. App. 489.

Kentucky. — *Com. v. Dockery*, (Ky. 1901) 64 S. W. Rep. 460, 23 Ky. L. Rep. 777; *Johnson v. Com.*, (Ky. 1901) 64 S. W. Rep. 467, 23 Ky. L. Rep. 856. See *McBride v. Com.*, 4 Bush (Ky.) 331, reversing *Com. v. Mitchell*, 3 Bush (Ky.) 39.

Louisiana. — *State v. Strong*, 59 La. Ann. 1081.

Maine. — *State v. Small*, 10 Me. 109.

Mississippi. — *Shanks v. State*, 51 Miss. 464; *Stubbs v. State*, 53 Miss. 437; *Howze v. State*, 59 Miss. 230.

Missouri. — *State v. Latshaw*, 2 Mo. App. Rep. 947; *State v. Grassle*, 74 Mo. App. 313; *State v. Ragsdale*, 59 Mo. App. 590; *State v. Taylor*, (Mo. App. 1902) 67 S. W. Rep. 672. See also *State v. Hein*, 50 Mo. 362.

New Hampshire. — See *State v. Fitts*, 44 N. H. 621.

New Jersey. — *State v. Crowley*, 39 N. J. L. 265.

New York. — *People v. Brooks*, 1 Den. (N. Y.) 457, 43 Am. Dec. 704; *People v. Bedell*, 2 Hill (N. Y.) 196; *People v. Taylor*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 158; *Williams v. People*, 15 N. Y. Wkly. Dig. 371; *People v. Ryall*, 58 Hun (N. Y.) 235; *People v. Coombs*, 36 N. Y. App. Div. 284, affirmed 158 N. Y. 532; *People v. Klipfel*, 37 N. Y. App. Div. 224, affirmed 160 N. Y. 371; *People v. Fielding*, 158 N. Y. 542, 70 Am. St. Rep. 495, reversing 36 N. Y. App. Div. 401; *People v. Meakim*, 133 N. Y. 214; *People v. Herlihy*, (Ct. Gen. Sess.) 35 Misc. (N. Y.) 711; *In re Vanderhoof*, 36 N. Y. Supp. 833, 15 Misc. (N. Y.) 434. See also *People v. Peck*, 138 N. Y. 386.

North Carolina. — *State v. Hatch*, 116 N. Car. 1003; *State v. Snuggs*, 85 N. Car. 541; *State v. Norris*, 111 N. Car. 652; *State v. Wynne*, 118 N. Car. 1206.

Ohio. — *Stahl v. State*, 5 Ohio Cir. Dec. 29, 11 Ohio Cir. Ct. 23; *Doll v. State*, 45 Ohio St. 445.

Pennsylvania. — See *Pittsburg v. Moreland*, 30 Pittsb. Leg. J. N. S. (Pa.) 195; *Irons v. Allen*, 169 Pa. St. 633.

South Carolina. — *State v. Solomons*, 3 Hill L. (S. Car.) 96; *State v. Sellers*, 7 Rich. L. (S. Car.) 368; *State v. Assmann*, 46 S. Car. 554; *State v. Green*, 52 S. Car. 520; *State v. Neal*, 59 S. Car. 259.

c. PARTICULAR OFFICERS AND OFFENSES. — Questions concerning the criminal liability of particular officers,¹ and the liability of public officers generally for particular offenses, are discussed elsewhere under appropriate titles.²

d. OFFICERS EXEMPT FROM CRIMINAL LIABILITY. — It seems that legislators³ and judges of courts of record⁴ are not usually criminally liable for official acts. These and other high public officers are generally to be proceeded against by impeachment.⁵ Grand jurors, while perhaps not strictly speaking public officers, are, it seems, also exempt from indictment for official acts and omissions.⁶

3. Liability to Penalty. — Public officers are sometimes by statute made liable to penalties for certain acts or omissions.⁷

XI. LIABILITY OF PUBLIC FOR ACTS OF OFFICERS—1. In General. — The general rule is that the government or other public authority is not bound by the acts, contracts, or representations of public officers unless such acts, contracts, or representations are within the scope of such officers' authority.⁸

Tennessee. — *State v. Jones*, 2 Lea (Tenn.) 716.

Texas. — *State v. Kingsbury*, 37 Tex. 159; *Edwards v. State*, 2 Tex. App. 525; *Craig v. State*, 31 Tex. Crim. 29.

Virginia. — *Boyd v. Com.*, 77 Va. 52.

Washington. — *State v. Krug*, 12 Wash. 288; *State v. Boggs*, 16 Wash. 143; *State v. McCauley*, 17 Wash. 88.

See the title MARRIAGE, vol. 19, p. 1222; and see the statutory enactments of the several jurisdictions.

1. See such titles as ELECTIONS, vol. 10, p. 677; PROSECUTING AND DISTRICT ATTORNEYS, *ante*; SHERIFFS, MARSHALS, AND CONSTABLES.

Criminal Liability of Justices of the Peace. — See the title BAIL AND RECOGNIZANCE (IN CRIMINAL CASES), vol. 3, p. 664; and JUSTICES OF THE PEACE, vol. 18, p. 50. See also the following cases: *Rex v. Angell*, Lee L. Hardw. 124; *Rex v. Cozens*, 2 Dougl. 426; *Reg. v. Neale*, 9 C. & P. 431, 38 E. C. L. 176; *Rex v. Seaford*, 1 W. Bl. 432; *Rex v. Phelps*, 2 Ken. K. B. (pt. i.) 570; *Rex v. Lediard*, Say. 242; *Rex v. Howard*, 7 Mod. 307; *Rex v. Okey*, 8 Mod. 45; *Rex v. Smith*, 7 T. R. 76; *Rex v. Baylis*, 3 Burr. 1318; *Rex v. Williams*, 3 Burr. 1317; *Rex v. Harries*, 13 East 270; *Rex v. Bishop*, 5 B. & Ald. 612, 7 E. C. L. 208; *State v. Coon*, 14 Minn. 456.

2. See such titles as ASSAULT AND BATTERY, vol. 2, p. 961; BRIBERY, vol. 4, p. 910; CARRYING WEAPONS, vol. 5, p. 738; COMPOUNDING OFFENSES, vol. 6, p. 405; ELECTIONS, vol. 10, p. 850; EMBEZZLEMENT, vol. 10, p. 1016; ESCAPE, vol. 11, p. 297; EXTORTION, vol. 12, p. 576; FALSE IMPRISONMENT, vol. 12, p. 785; MURDER AND MANSLAUGHTER, vol. 21, p. 202.

3. Legislators Exempt. — Story's Const., § 795; 1 Kent's Com. 235.

Punishment and Expulsion by Legislative Body. — *Anderson v. Dunn*, 6 Wheat. (U. S.) 204; *Kilbourn v. Thompson*, 103 U. S. 168; *Hiss v. Bartlett*, 3 Gray (Mass.) 468, 63 Am. Dec. 768.

4. Judges Exempt. — See *Yates v. Lansing*, 5 Johns. (N. Y.) 282, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432.

5. Impeachment. — See the title IMPEACHMENT, vol. 15, p. 1062.

6. Grand Jurors Exempt. — See *Black v. Sugg*, Hard. (Ky.) 566; *Yates v. Lansing*, 5 Johns.

(N. Y.) 282, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290.

Grand Juror Indicted for Intoxication. — *Pennsylvania v. Keffer*, Add. (Pa.) 290.

7. Penalties for Acts or Omissions of Officers — *Alabama.* — *Lee v. Lide*, 111 Ala. 126.

California. — *Fraser v. Alexander*, 75 Cal. 147; *Hastings v. Young*, (Cal. 1888) 17 Pac. Rep. 530.

Georgia. — *Renfroe v. Colquitt*, 74 Ga. 619.

Indiana. — *Coleman v. Gobin*, 16 Ind. App. 346.

Maine. — *Hayes v. Porter*, 22 Me. 371; *Berry v. Stinson*, 23 Me. 140.

Michigan. — *Dunn v. Gilman*, 34 Mich. 256.

Mississippi. — *Detterly v. Yeamans*, 39 Miss. 475; *Bates v. Stokes*, 40 Miss. 56.

Missouri. — *Pope v. Hays*, 1 Mo. 450; *Jackman v. Bentley*, 10 Mo. 293; *Conway v. Campbell*, 11 Mo. 71; *State v. Sherwood*, 42 Mo. 179; *Switzler v. Rodman*, 48 Mo. 197; *Beckham v. Macke*, 56 Mo. 546; *State v. Cayce*, 85 Mo. 456; *State v. Peterson*, 142 Mo. 526; *State v. Mahacy*, 19 Mo. App. 210; *Barker v. Phelps*, 39 Mo. App. 288; *State v. Chaney*, 49 Mo. App. 511; *Randol v. Garoutte*, 78 Mo. App. 609.

Nebraska. — *Graham v. Kibble*, 9 Neb. 182; *Phoenix Ins. Co. v. Bohman*, 28 Neb. 251.

New York. — *Sherman v. Spencer*, 1 N. Y. Leg. Obs. 172.

North Carolina. — *State v. Loftin*, 2 Dev. & B. L. (19 N. Car.) 31.

Pennsylvania. — *Garber v. Conner*, 98 Pa. St. 551.

Texas. — *Underwood v. Russell*, 4 Tex. 175; *Wyoming.* — *People v. Dolan*, 5 Wyo. 245.

Canada. — *Cantin v. Lachance*, 19 Quebec Super. Ct. 144.

And see the titles FINES AND PENALTIES, vol. 13, p. 52; MARRIAGE, vol. 19, p. 1222.

8. Not Liable for Unauthorized Acts — *United States.* — *Lee v. Munroe*, 7 Cranch (U. S.) 366; *Bennett's Case*, 6 Ct. Cl. 103.

California. — *Butler v. Bates*, 7 Cal. 36.

Illinois. — *Marshall County v. Cook*, 38 Ill. 44, 87 Am. Dec. 282; *School Directors v. Fogleman*, 76 Ill. 189.

Indiana. — *McCaslin v. State*, 99 Ind. 428.

Iowa. — *Fries v. Porch*, 49 Iowa 351.

Missouri. — *State v. State Bank*, 45 Mo. 528; *Kiley v. Oppenheimer*, 55 Mo. 374.

The liability of particular public authorities is fully discussed under appropriate titles.¹

2. Ascertainment of Authority by Third Persons. — The rule that persons dealing with an agent must, at their peril, ascertain his authority, and the extent thereof, is applicable to public officers. And for reasons of public policy the law imputes to every person transacting business with public officers, who are acting under a limited statutory authority, full knowledge of their official power and authority.²

XII. LIABILITY OF PRIVATE PERSONS FOR ACTS OF PUBLIC OFFICERS. — A person who, in order to maintain his private rights, or to punish a public wrong, invokes the services of a public officer, is not generally liable for the acts or omissions of such officer.³ The application of this rule in particular cases, and the exceptions thereto, are fully discussed elsewhere in this work.⁴

XIII. COMPENSATION — 1. In General — The term "compensation" as here used includes all forms which the remuneration of public officers may take, whether salary, or fees, or percentage commissions, or mileage, or special appropriations, or allowances for necessary expenses.⁵

New Jersey. — *Sooy v. State*, 39 N. J. L. 135.
New York. — *Palmer v. Ft. Plain, etc.*, Plankroad Co., 11 N. Y. 376; *People v. Brandreth*, 36 N. Y. 191; *Richmond County v. Ellis*, 59 N. Y. 620.

Pennsylvania. — *Snow v. Deerfield Tp.*, 78 Pa. St. 181.

Tennessee. — *State v. Strickland*, 3 Head (Tenn.) 644.

Texas. — *Day Land, etc., Co. v. State*, 68 Tex. 526.

Wisconsin. — *State v. Hastings*, 10 Wis. 525; *Randall v. State*, 16 Wis. 340.

Canada. — *O'Brien v. Reg.*, 4 Can. Sup. Ct. 529.

Liability for Torts of Officers. — *U. S. v. Buchanan*, 8 How. (U. S.) 83.

Authorized Acts Performed Irregularly Are Voidable Only. — *Swearingen v. Howser*, 37 Kan. 128. See also *Hunter v. Hemphill*, 6 Mo. 106.

1. See the titles AGENCY, vol. 1, p. 988; COUNTIES, vol. 7, p. 899; MUNICIPAL CORPORATIONS, vol. 20, pp. 1156, 1199; STATES; UNITED STATES.

2. Presumption of Knowledge of Authority — *United States.* — *Whiteside v. U. S.*, 93 U. S. 247; *Floyd Acceptances*, 7 Wall. (U. S.) 666; *New York, etc., Steam Ship Co. v. Harbison*, 16 Fed. Rep. 688; *Curtis's Case*, 2 Ct. Cl. 144.

California. — *Wallace v. San Jose*, 29 Cal. 181; *Mullan v. State*, 114 Cal. 578.

Colorado. — *Mulnix v. Mutual Ben. L. Ins. Co.*, 23 Colo. 71.

Connecticut. — *Perry v. Hyde*, 10 Conn. 329.

District of Columbia. — *Koones v. District of Columbia*, 4 Mackey (D. C.) 339.

Georgia. — *Penitentiary Co. No. 2 v. Gordon*, 85 Ga. 160.

Illinois. — *Tamm v. Lavalley*, 92 Ill. 263.

Indiana. — *Newman v. Sylvester*, 42 Ind. 106; *Axt v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. Crawfordville First Nat. Bank*, 102 Ind. 464; *Platter v. Elkhart County*, 103 Ind. 360; *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43; *State v. Hawes*, 112 Ind. 323; *Madison Tp. v. Dunkle*, 114 Ind. 262; *Citizens' Gas, etc., Co. v. Elwood*, 114 Ind. 332; *Jefferson School Tp.*

v. Litton, 116 Ind. 469; *Fairplay School Tp. v. O'Neal*, 127 Ind. 95; *Baldwin v. Shill*, 3 Ind. App. 291; *Smith v. Miami County*, 6 Ind. App. 153.

Iowa. — *Hull v. Marshall County*, 12 Iowa 143; *Clark v. Des Moines*, 19 Iowa 199, 87 Am. Dec. 423.

Kentucky. — *Murray v. Carothers*, 1 Met. (Ky.) 71.

Massachusetts. — *Lowell Five Cents Sav. Bank v. Winchester*, 8 Allen (Mass.) 109.

Minnesota. — *Sanborn v. Neal*, 4 Minn. 126, 77 Am. Dec. 502; *Mitchell v. St. Louis County*, 24 Minn. 459.

Missouri. — *State v. State Bank*, 45 Mo. 528; *State v. Hays*, 52 Mo. 578.

Montana. — *Lebcher v. Custer County*, 9 Mont. 315; *Becker v. Yellowstone County*, 11 Mont. 403.

New Hampshire. — *Backman v. Charlestown*, 42 N. H. 125.

New York. — *Denning v. Smith*, 3 Johns. Ch. (N. Y.) 332; *Delafield v. Illinois*, 26 Wend. (N. Y.) 192; *Rensselaer County v. Bates*, 17 N. Y. 242; *McDonald v. New York*, 68 N. Y. 23, 23 Am. Rep. 744.

South Carolina. — *Morton v. Comptroller-Gen.*, 4 S. Car. 430.

Texas. — *Day Land, etc., Co. v. State*, 68 Tex. 526.

Wisconsin. — *McCurdy v. Rogers*, 21 Wis. 197, 91 Am. Dec. 468.

And see the title AGENCY, vol. 1, p. 988.

3. *Cooley on Torts*, p. 180. See also *Taylor v. Moffatt*, 2 Blackf. (Ind.) 305; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Hyde v. Cooper*, 26 Vt. 552.

Liability for Acts Done under Unconstitutional Statute. — *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Barker v. Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457; *Merritt v. St. Paul*, 11 Minn. 223. And see the title CONSTITUTIONAL LAW, vol. 16, p. 1090.

4. See the titles ATTACHMENTS, vol. 3, p. 245; FALSE IMPRISONMENT, vol. 12, p. 719; GARNISHMENT, vol. 14, p. 914; INJUNCTIONS, vol. 16, p. 439; MALICIOUS ABUSE OF PROCESS, vol. 19, p. 630; MALICIOUS PROSECUTION, vol. 19, p. 647; SHERIFFS, MARSHALS, AND CONSTABLES.

5. As to the Meaning of the Words "Salary"

2. Forms — a. SALARY. — Salary has been defined as a fixed annual or periodical payment for services, depending upon the amount of service rendered.¹ The legislature has sometimes provided that, in counties containing a specified number of inhabitants, certain officers shall be paid by salary only.² In other cases fees have been abolished and salaries substituted therefor.³

The Legislature, in Substituting Salary for Fees, may continue the fees and direct them to be paid by the officer into the public treasury. Such a requirement is not unconstitutional on the ground that it imposes a tax without specifying the object to which it shall be applied.⁴

A Year's Salary for Less than a Year's Service. — Where an officer serving for an annual salary performs his duties for the year within less than a year, he is entitled to a year's salary upon the performance of such duties, and this although the office may be abolished before the end of the year.⁵

Interest on Salary. — An officer whose salary is payable out of the state treasury, or whose fees are payable by an attorney or other individual, is entitled to interest on the same from the time he applies to the auditor for a warrant or from the time the fees became due.⁶

and "Compensation," and whether they are distinctive or synonymous terms, see COMPENSATION, vol. 6, p. 369. See also the following cases: *Martin v. Santa Barbara County*, 105 Cal. 208; *San Juan County v. Oliver*, 7 Colo. App. 515; *Windmiller v. People*, 78 Ill. App. 273; *Gobrecht v. Cincinnati*, 51 Ohio St. 68; *Sniffen v. New York*, 4 Sandf. (N. Y.) 193.

1. Definition. — *Benedict v. U. S.*, 176 U. S. 357. See also *Henderson v. Koeing*, 168 Mo. 367; *Montpelier v. Seutir*, 72 Vt. 112. That traveling expenses are not included in salary, see *Houser v. Orangeburg County*, 59 S. Car. 265.

In Its Larger and Nontechnical Sense, salary is equivalent to allowance, hire, pay, stipend, or wages, and salary has been so construed in warrants for an official salary where the officer was entitled merely to fees and commissions. *San Juan County v. Oliver*, 7 Colo. App. 515. See also *Com. v. Butler*, 99 Pa. St. 535, quoted under EXEMPTIONS (FROM EXECUTION), vol. 12, p. 135, note; *Hamberger v. Marcius*, 157 Pa. St. 137.

Salary and Wages Distinguished. — In *People v. Myers*, 25 Abb. N. Cas. 368, 42 Alb. L. J. 332, the term "salary" is shown by universal usage to be confined to the compensation of public officers and the higher officers of corporations, while "wages" is the term used in reference to laborers, servants, and the like. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 135.

Compensation at So Much Per Diem Payable Quarterly not dependent on services performed is "salary." *State v. Barnes*, 24 Fla. 29.

As Applied to a Public Officer salary means the compensation paid him for his personal service in the discharge of the duties of his office, and does not include money necessarily paid to others as expenses in performing those duties, such as deputies' hire. *Windmiller v. People*, 78 Ill. App. 273.

Usually Applied to the Compensation of Public Officers for Official Duties. — *McNulta v. Com. Belt Bank*, 78 Ill. App. 441. See also the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 135.

Salary and Fees Distinguished. — *Landis v.*

Lincoln County, 31 Oregon 426, quoted under FEE, vol. 12, p. 889, note.

Salary and Allowance Distinguished. — *Mangan v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705, quoted under ALLOWANCE, vol. 1, p. 154, note.

2. Salary. — Such a provision is contained in the *Pennsylvania* constitution, art. xiv., § 5. See *Monroe v. Luzerne County*, 103 Pa. St. 278; *Rymer v. Luzerne County*, 142 Pa. St. 108; *Guldin v. Schuylkill County*, 149 Pa. St. 210; *Bell v. Allegheny County*, 149 Pa. St. 381; *McCleary v. Allegheny County*, 163 Pa. St. 578; *Van Boonhorst v. Allegheny County*, 163 Pa. St. 588; *McGunnegle v. Allegheny County*, 163 Pa. St. 589; *Crawford County v. Nash*, 39 Leg. Int. (Pa.) 296; *County v. Griffith*, 1 Kulp (Pa.) 297; *Com. v. Mercer*, 9 Pa. Co. Ct. 461.

Population Estimated by Last United States Census. — *Luzerne County v. Glennon*, 109 Pa. St. 564.

Compensation Dependent on Number of Votes at "Last General Election" Preceding Time for Which Salary in Dispute. — *State v. Storey County*, 16 Nev. 92.

3. Salary Instead of Fees. — *Curtis v. Sacramento County*, 13 Cal. 290; *Los Angeles County v. Lamb*, 61 Cal. 196; *San Luis Obispo County v. Darke*, 76 Cal. 92; *People v. Butler*, 147 N. Y. 164.

Where a special law increased the fees of the officers in certain counties, the repeal of the law left the officers in such counties entitled to the general law regulating fees, in existence when the act repealed was passed. *Jefferson County v. Jones*, 63 Ill. 531.

4. Such Change Not Unconstitutional. — *State v. Judges*, 21 Ohio St. 1; *Conner v. New York*, 5 N. Y. 285, affirming 2 Sandf. (N. Y.) 353.

5. A Year's Salary for Less than a Year's Service. — *U. S. v. McCarthy*, 1 McLean (U. S.) 306; *U. S. v. Dickson*, 15 Pet. (U. S.) 141; *U. S. v. Edwards*, 1 McLean (U. S.) 467; *Ex p. Lawrence*, 1 Ohio St. 431; *U. S. v. Pearce*, 2 Sumn. (U. S.) 575. *Contra*, *Picking v. State*, 26 Md. 499, construing the *Maryland* statute, as allowing a ratable part of salary only.

6. Interest on Salary. — *Swann v. Turner*, 23 Miss. 565; *Cone v. Donaldson*, 47 Pa. St. 363.

b. FEES. — Fees are compensation allowed by law for specific services by an officer.¹ Where remuneration for services is by fees, it is ordinarily provided that the compensation shall not exceed a specified maximum amount, and when such a limit is specified, the officer is usually regarded as a salaried one.² And where the constitution allows a maximum compensation, no act of assembly can validly prescribe a lower sum.³

How Deficit Is Paid. — An officer whose compensation is paid by fees is entitled to credit for fees earned and chargeable to the county as well as for those received and paid over, and when the fees of any one year do not aggregate his salary, he is entitled to receive an excess standing to his credit from a preceding year.⁴

Where Payment Is by Fees and Not Salary, an agreement by the officer to accept a fixed sum in lieu of the fees is against public policy and void.⁵

Where an Officer Performs Services for Which No Fee Is Specially Allowed, it has been held under a *Vermont* statute that he is entitled to charge therefor a sum in proportion to the fee established by law.⁶

To Pay Fees into the Treasury. — An officer is usually required to keep an account of fees as received and to render an account thereof at stated periods to the auditor-general or other officer and to pay them or the surplus over and above his salary into the state treasury.⁷

c. PER DIEM. — Officers paid by a *per diem* compensation have been held not to be entitled to compensation during a period of adjournment for the purpose of visiting their homes.⁸ But they are entitled to the *per diem* fee for each day on which they perform substantial official service, whether or not it consumes the entire day.⁹

d. APPROPRIATIONS. — Where the law fixes the compensation of a public officer and designates the time for payment, this is sometimes regarded as tantamount to an appropriation of the necessary amount of money to that purpose, and no special act of the legislature is necessary.¹⁰

Likewise, where an officer is compelled to repay an excess of fees which he should have paid into the treasury without demand, interest may be recovered on the amount thereof. *Hazelet v. Holt County*, 51 Neb. 716.

1. Fees Defined. — *Williams v. State*, 2 Sneed (Tenn.) 162. See also *FEE*, vol. 12, p. 889.

2. Fees Regarded as Salary. — *Washington County v. Jones*, 45 Iowa 260; *Poweshiek County v. Patten*, 89 Iowa 308; *Pitzer v. Territory*, 4 Okla. 86.

3. Goldsborough v. Lloyd, 86 Md. 374.

Fees Held to Include Commissions. — See *FEE*, vol. 12, pp. 889, 890, note.

4. How Deficit Is Paid. — *Wiegand v. Luzerne County*, 7 Kulp (Pa.) 183; *Russell v. Luzerne County*, 7 Kulp (Pa.) 425.

5. Fees Not Changeable into Salary by Agreement. — *Gilman v. Des Moines Valley R. Co.*, 40 Iowa 200; *Tappan v. Brown*, 9 Wend. (N. Y.) 175.

6. Where No Fee Is Specified. — *Henry v. Tilson*, 17 Vt. 479, construing Rev. Stat. Vt., c. 107, § 8, on the ground that a literal construction would lead to gross absurdity.

7. To Pay Fees into the Treasury. — *San Luis Obispo County v. King*, 69 Cal. 531; *Delaware County v. Griffin*, 17 Iowa 166; *State v. Dent*, 121 Mo. 162; *Gerken v. Sibley County*, 39 Minn. 433; *Stuart v. Walker*, 10 Minn. 296; *State v. Allen*, 23 Neb. 451; *New York v. Kent*, 21 Hun (N. Y.) 483; *Matter of Fees, etc.*, 25 Hun (N. Y.) 593; *Poughkeepsie v. Wiltsie*, 36 Hun (N. Y.) 270; *Matter of New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 7 Abb. N.

Cas. (N. Y.) 408; *Fees of County Officers*, 13 Pa. Co. Ct. 59; *Com. v. Mann*, 168 Pa. St. 290. But see *Philadelphia v. Martin*, 125 Pa. St. 583.

Auditing Claim for Fees. — *State v. Thompson*, 41 Mo. 13.

Bill of Particulars Required Before Action for Fees. — *Riddle v. Bedford County*, 7 S. & R. (Pa.) 386. See also *State v. Dent*, 121 Mo. 162.

Where an Officer Holding Two Offices is required to pay the surplus of fees over his salary into the treasury, he has been held entitled to deduct only one salary before making the payment. *Com. v. Anderson*, 178 Pa. St. 171.

Fees for Collecting Back Taxes — Officer Entitled though Fees Collected Before His Term of Office. — *Watson v. Schnecko*, 13 Mo. App. 208.

Delay to Pay Over Forfeiting Commissions. — *State v. Bloxham*, 33 Fla. 482.

8. During Adjournment. — *Moren v. Blue*, 47 Ala. 709; *Reynolds v. Blue*, 47 Ala. 711; *Morgan v. Buffington*, 21 Mo. 549.

Per Diem Pay Usually in Full of All Compensation. — *Massing v. State*, 14 Wis. 502.

9. For Actual Services. — *Smith v. Jefferson County*, 10 Colo. 17; *Ryninger v. Keating*, 60 Md. 334.

For Time Necessarily Consumed in Travel. — *State v. Briggs*, 5 N. Dak. 69.

Double Per Diem Where Two Statutory Days' Work Completed in One. — *Garlinger v. U. S.*, 30 Ct. Cl. 208, 473.

10. Appropriations. — *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154; *Reynolds v. Taylor*, 43 Ala. 420; *State v. Hickman*, 9 Mont. 370;

No Payment Without an Appropriation. — But in view of a constitutional prohibition against paying money out of the treasury except in pursuance of an appropriation by law, it has been held that in all other cases an officer is not entitled to recover for services unless he can show an act appropriating money for the purpose.¹

Where It Is Uncertain Whether the Legislature Intended to Devote a Larger or Smaller Sum to the payment of a salary, it has been held that the doubt should be resolved by adopting the smaller amount, since the interest of the public, other things being equal, is superior to that of an individual.²

Where for Any Reasons a Regular Salary Has Not Been Fixed by the legislature, it has been held that that body may provide for the payment of one by temporary appropriations.³

e. COMMISSIONS. — It is often provided that the whole or a portion of the compensation of public officers shall be paid in the way of commissions⁴ on collections or disbursements. Where moneys are collected by two successive incumbents during one fiscal year, it has been held that the rate at which commissions are to be calculated must be based upon the collections made by both incumbents, and not by each separately.⁵

f. EXPENSES. — Where the law requires an officer to do what necessitates

State v. Kenney, 10 Mont. 485, 11 Mont. 555.
Contra, *Myers v. English*, 9 Cal. 341.

In *Nebraska* this is true of salaries provided for by the constitution, but not of those fixed by the legislature. *State v. Weston*, 6 Neb. 16.

1. No Payment Without an Appropriation. — *Ex p. Carroll*, 10 Ark. 38; *Myers v. English*, 9 Cal. 341; *Baggett v. Dunn*, 60 Cal. 75; *State v. Holladay*, 64 Mo. 526; *People v. Tremain*, 29 Barb. (N. Y.) 96; *Hartman v. New York*, 23 Hun (N. Y.) 587; *Com. v. Lemon*, 2 Chest. Co. Rep. (Pa.) 167; *Gamble v. Philadelphia*, 14 Phila. (Pa.) 223, 37 Leg. Int. (Pa.) 377.

Appropriation of More than Necessary — Officer Held Entitled to Salary Only. — *State v. Bloxham*, 26 Fla. 407.

Appropriation of Less than Necessary — Officer Held Entitled to Full Pay. — *Com. v. Lemon*, 2 Chest. Co. Rep. (Pa.) 167.

And he may recover the full amount by action. *French's Case*, 16 Ct. Cl. 419; *Mitchell v. U. S.*, 18 Ct. Cl. 281.

Board of Health — No Appropriation When Office Accepted. — *People v. Haverstraw*, 11 N. Y. App. Div. 108.

2. Construing Ambiguous Appropriations. — *Tyrrell v. New York*, 159 N. Y. 239; *U. S. v. Clough* (C. C. A.) 55 Fed. Rep. 373.

Appropriations Without More Apply Only to Current Year. — *Kinney v. U. S.*, 60 Fed. Rep. 883.

Office Expiring with Appropriation. — *Beaman v. U. S.*, 19 Ct. Cl. 5.

3. Temporary Appropriation. — *Chancellor's Case*, 1 Bland (Md.) 595.

4. Commissions. — See COMMISSION, vol. 6, p. 228.

For illustrations of statutes authorizing this mode of payment, see:

United States. — *U. S. v. Wendell*, 2 Cliff. (U. S.) 340; *Randall's Case*, 8 Ct. Cl. 539; *Titus's Case*, 16 Ct. Cl. 276; *U. S. v. McCarty*, 1 McLean (U. S.) 306.

Alabama. — *Saffold v. Powell*, 59 Ala. 377.

Arkansas. — *Woodruff v. State*, 3 Ark. 285; *Zerger v. Quilling*, 48 Ark. 157.

California. — *Smith v. Dunn*, 68 Cal. 54.

Georgia. — *Stamper v. State*, 11 Ga. 643.

Illinois. — *Sidway v. South Park Com'rs*, 120 Ill. 496; *People v. Long*, 13 Ill. 629.

Indiana. — *LaGrange County v. Cutler*, 6 Ind. 354; *Grant County v. Miles*, 21 Ind. 438; *Harrison County v. Benson*, 83 Ind. 469.

Iowa. — *Merrill v. Marshall County*, 74 Iowa 24; *Purdy v. Independence*, 75 Iowa 356.

Kentucky. — *Wheatly v. Covington*, 11 Bush (Ky.) 18.

Louisiana. — *Gaillard v. His Creditors*, 19 La. Ann. 87.

Maryland. — *Banks v. State*, 60 Md. 305.

Michigan. — *Texas Tp. v. Wager*, 12 Mich. 39.

Minnesota. — *Doe v. Washington County*, 30 Minn. 392.

Mississippi. — *Stone v. Casper*, (Miss. 1887) 2 So. Rep. 74.

Missouri. — *State v. Alsup*, 91 Mo. 172.

Nebraska. — *Stoner v. Keith County*, 48 Neb. 279.

Nevada. — *State v. Boyd*, 19 Nev. 356.

New Jersey. — *Morris v. Ocean Tp.*, 61 N. J. L. 12.

New York. — *Maher v. O'Conner*, (Supm. Ct. Spec. T.) 61 How. Pr. (N. Y.) 103.

Oregon. — *Chatfield v. Washington County*, 3 Oregon 318.

Pennsylvania. — *Hemingway's Appeal*, 4 Northam. Co. Rep. (Pa.) 403; *Scranton School Dist. v. Simpson*, 133 Pa. St. 202; *Centre County v. Gramley*, 155 Pa. St. 325.

Tennessee. — *State v. Harkreader*, 12 Lea (Tenn.) 456.

Texas. — *Beavens v. Houston*, 54 Tex. 277; *Llano County v. Moore*, 77 Tex. 515.

Virginia. — *Allen v. Com.*, 83 Va. 94.

Washington. — *School Dist. No. 81 v. Cole*, 4 Wash. 395.

How Calculated — Year May Begin from Date of Appointment. — *U. S. v. Dickson*, 15 Pet. (U. S.) 141.

Dividing Commissions Equally though Labor Unequally Divided. — *White v. Bullock*, 4 Abb. App. Dec. (N. Y.) 578.

5. Lemoine v. St. Louis, 72 Mo. 404.

an expenditure of money for which no provision is made, he may pay therefor and have the amount allowed him. Prohibitions against increasing the compensation of officers do not apply to such cases. Thus, it is customary to allow officers expenses of fuel, clerk hire, stationery, lights, and other office accessories.¹

Where an Officer Is Required to Keep and Transmit Yearly Accounts, if he does not do so, he does not forfeit his right to be reimbursed for expenditures, but only subjects himself to the payment of the penalty.²

Expenses in Defending Suits. — Officers cannot recover for expenses incurred in defending suits brought against them while in office, unless the acts complained of were done by them as the agents or servants of the government, and under its control and responsible thereto,³ nor in defending criminal prosecutions brought against them for misfeasance in office;⁴ but a municipal corporation may assume the expenses of such suit where the interests of the town are directly involved,⁵ and may reimburse its agents for the expenses of an investigation of their official conduct made by order of the city government.⁶

g. MILEAGE. — Mileage is often provided as a means of paying a part of the compensation of a public officer.⁷

Only One Mileage Fee Is Chargeable where only one trip is made, although the matters attended to might have been the subject of two or more trips.⁸

The Travel Must Be Necessary and not done for the sake of the fee,⁹ and the charge must be based upon the actual distance traversed.¹⁰

1. Expenses — United States. — Burr's Case, 2 Ct. Cl. 217; Glenn's Case, 4 Ct. Cl. 501; U. S. v. Reed, 13 C. C. A. 682, 14 U. S. App. 711; U. S. v. Flanders, 112 U. S. 88; U. S. v. Stowe, 19 Fed. Rep. 807; Dunwoody v. U. S., 22 Ct. Cl. 270; Wentworth v. U. S., 2 Story (U. S.) 452.

Alabama. — Commissioner's Ct. v. Goldthwaite, 35 Ala. 704; White v. Williams, 49 Ala. 130.

California. — Kirkwood v. Soto, 87 Cal. 394.

Colorado. — Roberts v. People, 9 Colo. 458.

Illinois — DeKalb County v. Beveridge, 16 Ill. 312; Knox County v. Arms, 22 Ill. 175; McClaughry v. Hancock County, 46 Ill. 356; Cullom v. Dolloff, 94 Ill. 330.

Iowa. — Washington County v. Jones, 45 Iowa 260; Harris v. Chickasaw County, 77 Iowa 345; Gamble v. Marion County, 85 Iowa 675.

Louisiana. — State v. Burke, 34 La. Ann. 548.

Michigan. — Gardner v. Newaygo County, 110 Mich. 94.

Missouri. — State v. Thompson, 41 Mo. 240; St. Louis County Ct. v. Ruland, 5 Mo. 268.

New Jersey. — Barnert v. Paterson, 48 N. J. L. 395.

Ohio. — State v. McConnell, 28 Ohio St. 589. But see Marshall v. Dunn, 69 Cal. 223; Benton v. Decatur County, 36 Iowa 504; Matter of Labrake, (Supm. Ct. Spec. T.) 29 Misc. (N. Y.) 87; People v. Wemple, 115 N. Y. 302; Cohen v. Com., 6 Pa. St. 111; Gilchrist v. Wilkes-Barre, 142 Pa. St. 114; Daggett v. Ford County, 99 Ill. 334.

Money Paid to Deputy. — Where by statute the county is directly responsible to deputies for compensation, an officer cannot make the county his involuntary debtor by himself paying the deputy. Mahaska County v. Ingalls, 14 Iowa 170.

2. Andrews v. U. S., 2 Story (U. S.) 203.

3. Expenses of Suits Against Officers. — Gregory v. Bridgeport, 41 Conn. 76, 19 Am. Rep. 485; Powell v. Newburgh, 19 Johns. (N. Y.) 284.

4. Gove v. Epping, 41 N. H. 539; Merrill v. Plainfield, 45 N. H. 126.

5. Babbitt v. Selectmen, 3 Cush. (Mass.) 530.

6. Reimbursement of Expenses of Investigation. — Lawrence v. McAlvin, 109 Mass. 311. See also Bancroft v. Lynnfield, 18 Pick. (Mass.) 566, 29 Am. Dec. 623; Stilwell v. New York, (C. Pl. Gen. T.) 19 Abb. Pr. (N. Y.) 376.

7. Mileage. — See MILEAGE, vol. 20, p. 613.

For cases construing special provisions upon the subject, see the following: Simonton v. El Dorado County, 22 Cal. 554; Smith v. Dunn, 68 Cal. 54; Harding v. Montgomery County, 55 Iowa 41; State v. Cook, 17 Mont. 529; State v. Trousdale, 16 Nev. 357; Taylor v. Umatilla County, 6 Oregon 401; Brownfield v. Houser, 30 Oregon 535; Ritter v. Northampton County, 2 Northam. Co. Rep. (Pa.) 363.

Includes All Traveling Expenses — Hotel Bills, Car Fare, etc., Not Allowable in Addition. — Harding v. Montgomery County, 55 Iowa 41; Wheeler v. Clinton County, 92 Iowa 44.

8. Only One Mileage Fee. — Barnes v. Marion County, 64 Iowa 482 (several prisoners conveyed); Redfield v. Shelby County, 64 Iowa 11 (subpoenas served on several witnesses); Logan County v. Doan, 34 Neb. 104 (two election notices posted). But see Vannatta v. Brewer, 85 Ill. 114.

9. Troutman v. Chambers, 9 Pa. Dist. 533. Mileage is not payable for conveying prisoners to jail unless it is shown that the jail and court room are in different places, Bringolf v. Polk County, 41 Iowa 554; nor for conveying to an insane asylum a person not adjudged insane under statutory provisions, Harding v. Montgomery County, 55 Iowa 41.

10. Weightman v. Jones, 73 Vt. 353.

The officer may employ the usual and speediest route of travel, although not the shortest. Maynard v. Cedar County, 51 Iowa 430.

3. Amount — a. WHERE NO REMUNERATION IS PROVIDED. — A public officer whose salary is specified by statute is entitled to his salary for services actually performed according to the statute, which in this respect is a contract.¹ On the other hand, his claims are limited by the statute, and however meritorious his services, if no compensation for them is provided by statute, none can be recovered.²

If a Public Office Is Created but No Compensation Is Fixed by the creating act, it is to be inferred that no compensation is intended and that the officer undertakes to serve in such office gratis.³ The court has no power in such cases to extend the statute so as to allow compensation,⁴ even though the failure to provide compensation is clearly an oversight,⁵ unless special power to do so has been conferred upon it. Such an act on its part is judicial and not clerical.⁶ A public officer may make a reasonable charge for services performed in his private capacity for a private person.⁷

Exceptions. — It has been held in several cases that, even in the absence of special provision for payment and where the services had been performed, a reasonable compensation should be allowed therefor.⁸

b. WHERE NO EXTRA REMUNERATION IS PROVIDED — In General. — From the general principle that a public officer can claim only the compensation fixed by law, it is a corollary that he is not entitled to increased remuneration for increased services, unless such is expressly allowed by law or sanctioned by ancient usage which presupposes legislative authority. In such case the officer is said to take the office *cum onere* and cannot be heard to complain if the compensation provided by law is insufficient for the duties performed.⁹

1. See the title IMPAIRMENT OF OBLIGATIONS OF CONTRACTS, vol. 15, p. 1037.

2. Only the Compensation Fixed by Law — *England*. — *Crawford v. Atty. Gen.*, 7 Price 1.

United States. — *Brown v. U. S.*, 9 How. (U. S.) 487.

Arkansas. — *Cole v. White County*, 32 Ark. 45.

Illinois. — *Carlyle v. Sharp*, 51 Ill. 71; *Kreitz v. Behrensmeyer*, 149 Ill. 496; *Carlyle v. Sharp*, 51 Ill. 71.

Iowa. — *Moore v. Independent Dist.*, 55 Iowa 654.

Maine. — *White v. Levant*, 78 Me. 568.

Massachusetts. — *Rogers v. Simmons*, 155 Mass. 259.

Mississippi. — *Myers v. Marshall County*, 55 Miss. 344; *Patty v. Sparkman*, 58 Miss. 76.

Nebraska. — *State v. Meserve*, 58 Neb. 451.

New York. — *Gibson v. Roach*, 2 N. Y. App. Div. 86; *Haswell v. New York*, 81 N. Y. 255; *Erie County v. Jones*, 119 N. Y. 339; *Mallory v. Cortland County*, 2 Cow. (N. Y.) 531.

Ohio. — *Clark v. Lucas County*, 58 Ohio St. 107.

Oregon. — *Jackson v. Siglin*, 10 Oregon 93.

Pennsylvania. — *Will v. Eberly*, 8 Lanc. Bar (Pa.) 105; *Com. v. Evans*, 74 Pa. St. 124.

3. Where No Remuneration Is Provided — *Alabama*. — *State v. Brewer*, 59 Ala. 130.

Colorado. — *Garfield County v. Leonard*, 26 Colo. 145.

Illinois. — *Dougherty v. People*, 42 Ill. App. 494.

Indiana. — *Nowles v. Jasper County*, 86 Ind. 179; *Donaldson v. Wabash County*, 92 Ind. 81; *Moon v. Howard County*, 97 Ind. 177; *Wright v. Hancock County*, 98 Ind. 89; *Bynum v. Greene County*, 100 Ind. 91; *Noble v. Wayne County*, 101 Ind. 128; *Benton County v. Harman*, 101 Ind. 552; *Severin v. Dearborn County*, 105 Ind. 265; *Waymire v. Powell*, 105 Ind.

330; *Montgomery County v. Bromley*, 108 Ind. 162; *Taylor v. Washington County*, 110 Ind. 463; *Montgomery County v. Fullen*, 118 Ind. 158; *State v. Roach*, 123 Ind. 171; *Tippecanoe County v. Barnes*, 123 Ind. 407; *Wood v. Madison County*, 125 Ind. 272; *Marshall County v. Johnson*, 127 Ind. 239.

Iowa. — *Jefferson County v. Wollard*, 1 Greene (Iowa) 430; *Twinam v. Lucas County*, 104 Iowa 231.

Maine. — *White v. Levant*, 78 Me. 568; *Talbot v. East Machias*, 76 Me. 416.

Missouri. — *State v. McCracken*, 60 Mo. App. 650; *Gammon v. Lafayette County*, 76 Mo. 675; *State v. Brown*, 146 Mo. 401.

Nebraska. — *State v. Meserve*, 58 Neb. 451.

New Hampshire. — *Sampson v. Rochester*, 60 N. H. 477.

Vermont. — *Barnes v. Bakersfield*, 57 Vt. 375. *Wisconsin*. — *Crocker v. Brown County*, 35 Wis. 284.

If the Statute Provides a Fixed Salary, the officer's right thereto is not affected by the legislature's failure to appropriate money therefor. *Byrd v. Conway*, 5 Ark. 436.

4. *Guanella v. Pottawattamie County*, 84 Iowa 36.

5. *Howland v. Wright County*, 82 Iowa 164.

6. *Baltimore v. Baltimore County*, 19 Md. 554; *Hahn v. Derr*, 1 Woodw. (Pa.) 178.

7. *Carroll v. Tyler*, 2 Har. & G. (Md.) 54.

8. **Exceptions.** — *Bradley v. Jefferson County*, 4 Greene (Iowa) 300; *Matter of Public Parks*, 27 Hun (N. Y.) 305; *Kip v. Buffalo*, 123 N. Y. 152.

9. **No Right to Extra Compensation** — *United States*. — *Jackson v. U. S.*, 8 Ct. Cl. 354; *Folger v. U. S.*, 103 U. S. 30; *Mullett v. U. S.*, 150 U. S. 566; *Bartlett v. U. S.*, 25 Ct. Cl. 389; *U. S. v. White*, Taney (U. S.) 152; *Andrews v. U.*

Cannot Be Increased. — And here, likewise, although the statutory compensation be clearly inadequate, it cannot be increased either by the court in its discretion¹ or by private agreement. A contract to pay more than the law allows, no matter how freely and voluntarily entered into, is void as against public policy. This is an ancient common-law doctrine and has often been re-enacted by the state legislatures.²

After Term Expires. — But recovery may be had for services performed by agreement after the expiration of a term of office, based, however, not upon a void contract for such services made during the term, but upon an implied contract.³

Subordinate Governmental Authority. — Neither has a board of commissioners or any other subordinate governmental authority the power to fix the salary of one of its officers at a greater sum than has been fixed by superior authority,⁴ and such a contract is *ultra vires* and incapable of ratification.⁵

General Power to Fix by Agreement. — But where an officer is appointed, not by virtue of an act of Congress regulating compensation, but under a general

S., 2 Story (U. S.) 202; U. S. v. Evans, 4 Mackey (D. C.) 281.

Arkansas. — Crittenden County v. Crump, 25 Ark. 235; Standford v. Wheeler, 28 Ark. 144.

California. — Rowe v. Kern County, 72 Cal. 353; Robinson v. Dunn, 77 Cal. 473, 11 Am. St. Rep. 297; Buck v. Eureka, 109 Cal. 504; Irwin v. Yuba County, 119 Cal. 686.

Colorado. — Stevens v. Sedgwick County, 5 Colo. App. 115.

Georgia. — Decatur County v. Cox, 65 Ga. 80. *Illinois.* — Dougherty v. People, 42 Ill. App. 494; Cook County v. Wren, 43 Ill. App. 388; Irvin v. Alexander County, 63 Ill. 528; Decatur v. Vermillion, 77 Ill. 315; Sidway v. South Park Com'rs, 120 Ill. 496.

Indiana. — Hand v. Tippecanoe County, 26 Ind. 179; Ex p. Harrison, 112 Ind. 329; Turpen v. Tipton County, 7 Ind. 172.

Iowa. — Sprout v. Kelly, 37 Iowa 44; Grubb v. Louisa County, 40 Iowa 314; Upton v. Clinton County, 52 Iowa 311; Moore v. Mahaska County, 61 Iowa 177; Palo Alto County v. Burlingame, 71 Iowa 201; McNider v. Sistine, 84 Iowa 745; Hamil v. Carroll County, 102 Iowa 523; Powieshiek County v. Patten, 89 Iowa 308.

Louisiana. — Kernion v. Hills, 1 La. Ann. 419.

Maryland. — Chandler v. State, 5 Har. & J. (Md.) 284.

Massachusetts. — Briggs v. Taunton, 110 Mass. 423.

Michigan. — People v. Whittemore, 2 Mich. 306; Detroit v. Redfield, 19 Mich. 376; Detroit v. Whittemore, 27 Mich. 281; Lyon v. Grand Rapids, 30 Mich. 253; Stetson v. Calhoun County, 36 Mich. 10; Fletcher v. Aldrich, 81 Mich. 186; Ewing v. Ainger, 96 Mich. 587, 97 Mich. 381; Backus v. Carleton, 99 Mich. 218; Gardner v. Newaygo County, 110 Mich. 94.

Missouri. — State v. Draper, 43 Mo. 220; State v. Holladay, 67 Mo. 64.

Montana. — Platner v. Madison County, 5 Mont. 458; Territory v. Carson, 7 Mont. 417.

Nebraska. — State v. Silver, 9 Neb. 85; Bayha v. Webster County, 18 Neb. 131; Heald v. Polk County, 46 Neb. 28; Stoner v. Keith County, 48 Neb. 279; State v. Meserve, 58 Neb. 451.

New Hampshire. — Healy v. Hillsborough County, 70 N. H. 588.

New Jersey. — Evans v. Trenton, 24 N. J. L. 764.

New York. — Billings v. New York, 68 N. Y. 413; Palmer v. New York, 2 Sandf. (N. Y.) 318; Cowan v. New York, 6 Thomp. & C. (N. Y.) 151; Cronkright v. Brooklyn, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 386; Haswell v. New York, 81 N. Y. 255; Tyrrell v. New York, 159 N. Y. 239; Haich v. Mann, 15 Wend. (N. Y.) 44; Matter of Niagara Bank, 6 Paige (N. Y.) 213; Bruns v. New York, 6 Daly (N. Y.) 156.

Ohio. — Rea v. Smith, 2 Handy (Ohio) 193.

Pennsylvania. — Pierie v. Philadelphia, 1 Pa. Dist. 277; Russell v. Luzerne County, 7 Kulp (Pa.) 279, 5 Del. Co. Rep. (Pa.) 468; Rothrock v. Easton School Dist., 133 Pa. St. 487.

Tennessee. — State v. Allen, (Tenn. Ch. 1898) 46 S. W. Rep. 303.

Wisconsin. — Massing v. State, 14 Wis. 502.

But see State v. Cheetham, 21 Wash. 437.

As to usage, see *infra*, this section, *How and by Whom Fixed*.

1. Cannot Be Increased by the Court. — Harvey v. Harvey, 87 Ill. 54; Ryce v. Osage, 88 Iowa 558; Hahn v. Derr, 1 Woodw. (Pa.) 178; Bona v. Davant, Riley Eq. (S. Car.) 44.

2. See the title **ILLEGAL CONTRACTS**, vol. 15, p. 964.

3. When Recovery upon Contract Is Allowed. — Buck v. Eureka, 109 Cal. 504.

4. Subordinate Governmental Authority No Power to Increase — *California.* — Heslep v. Sacramento, 2 Cal. 580.

Iowa. — Fawcett v. Woodbury County, 55 Iowa 154; Griffin v. Clay County, 63 Iowa 413.

Maine. — Calais v. Whidden, 64 Me. 249.

Michigan. — Lee v. Ionia County, 68 Mich. 330.

Mississippi. — Hendricks v. Lowndes County, 49 Miss. 612.

New Jersey. — Evans v. Trenton, 24 N. J. L. 764.

New York. — Cowan v. New York, 3 Hun (N. Y.) 632; Hanauer v. Utica, 75 Hun (N. Y.) 524.

Utah. — Barch v. Cutler, 6 Utah 409.

Wisconsin. — Kewaunee County v. Knipfer, 37 Wis. 496.

5. Libby v. Anoka County, 38 Minn. 448; Lancaster County v. Fulton, 128 Pa. St. 48.

authority lawfully exercised by some subordinate governmental authority, his compensation must be regulated by the agreement between the officer and his employer.¹

Unauthorized Appointment. — Even the appointment of one to office, made by the proper authority, if in excess of the authorized number of appointees, does not entitle such appointee to draw pay for services rendered.²

Increase of Duties required of the officer is no ground for demanding increased compensation when the act imposing the increase makes no provision therefor,³ nor can the incumbent recover for such extra services on the principle of an implied contract.⁴

Constructive Services. — There is no such thing as constructive services or fees by implication in the case of public officers.⁵

Effect of Repeal of Statute. — Where statutes allowing fees and perquisites are repealed, the officer is thereafter limited to a fixed salary, if there be such provided.⁶

Amount Not Fixed. — Where compensation is allowed, but no amount is fixed, the officer may be allowed a reasonable sum.⁷

Special Enactments. — The general rule forbidding extra compensation must, of course, yield to special enactments giving additional compensation for specific services.⁸

Offices Not Incompatible. — And where the same person lawfully fills two offices, separate and distinct and not incompatible, he may draw the salary or be paid the fees belonging to both.⁹

Technicalities. — While it is true that statutes giving compensation are strictly construed, still, where services have been performed by an officer holding two positions, payment will not be refused on purely technical grounds where the

1. U. S. v. Cadwalader, Gilp. (U. S.) 563.

2. **Unauthorized Appointment to Office.** — Weeks v. U. S., 21 Ct. Cl. 124.

3. **Increase in Duties** — *United States*. — U. S. v. Smith, 1 Bond (U. S.) 68.

Kentucky. — Covington v. Mayberry, 9 Bush (Ky.) 395.

Louisiana. — Mandell v. New Orleans, 21 La. Ann. 9.

Montana. — Territory v. Carson, 7 Mont. 427.

New York. — People v. New York, 1 Hill (N. Y.) 362.

Pennsylvania. — Hays v. City, 35 Pittsb. Leg. J. N. S. (Pa.) 117.

Washington. — Young v. Millett, 19 Wash. 489.

4. **Not Recoverable on Implied Contract** — *California*. — Rowe v. Kern County, 72 Cal. 353.

Colorado. — Locke v. Central, 4 Colo. 65.

Illinois. — Smith v. McLaughlin, 77 Ill. 596; Bruner v. Madison County, 111 Ill. 11; Madison County v. Bruner, 13 Ill. App. 599.

Indiana. — Jay County v. Templar, 34 Ind. 322.

Iowa. — Wapello County v. Monroe County, 39 Iowa 349.

Louisiana. — Mandell v. New Orleans, 21 La. Ann. 9.

Michigan. — Detroit v. Whittemore, 27 Mich. 281; Wilcoxson v. Andrews, 66 Mich. 553.

Nebraska. — Capps v. Adams County, 27 Neb. 361.

5. **No Fees by Implication.** — Troup v. Morgan County, 109 Ala. 162; Torbert v. Hale County, (Ala. 1901) 30 So. Rep. 453; Sprout v. Kelly, 37 Iowa 44; Wortham v. Grayson County Ct., 13 Bush (Ky.) 53; Hickey v. Oakland County, 62 Mich. 94; Williams v. Chariton County, 85

Mo. 645; State v. Wofford, 116 Mo. 220; State v. Brown, 146 Mo. 401; Coleman v. Ross, 14 Oregon 351; Pugh v. Good, 19 Oregon 85.

6. Woodruff v. State, 3 Ark. 285.

7. **No Amount Fixed.** — Ripley v. Gifford, 11 Iowa 367; Garber v. Clayton County, 19 Iowa 29; Territory v. Norris, 1 Oregon 107.

8. **Exceptions to Rule.** — Converse v. U. S., 21 How. (U. S.) 469; Miami County v. Blake, 21 Ind. 32; O'Gorman v. New York, 67 N. Y. 486.

9. **Pay for Two Distinct Offices.** — U. S. v. Fillebrown, 7 Pet. (U. S.) 28; U. S. v. Saunders, 120 U. S. 126; Badeau v. U. S., 130 U. S. 439; Collins's Case, 15 Ct. Cl. 22; Smith v. Waterbury, 54 Conn. 174; State v. Walker, 97 Mo. 162.

As to what offices are incompatible, and what not, see *supra*, this title, *Eligibility*.

Thus, Double Pay Has Been Allowed to one who was at the same time occupying the positions of clerk in the President's office and clerk of a committee of Congress, U. S. v. Saunders, 120 U. S. 126; Treasurer of a city and *ex-officio* treasurer of a school district, McCauley v. Easton School Dist., 133 Pa. St. 493; superintendent of schools and *ex-officio* superintendent of the same schools, when the two sums were payable out of different funds, Territory v. Wingfield, (Ariz. 1887) 15 Pac. Rep. 139; deputy collector of internal revenue and inspector of tobacco, fees for the latter service being paid by private parties, Hartson v. U. S., 21 Ct. Cl. 451; mayor and councilman appearing as attorney for the city, Niles v. Muzzy, 33 Mich. 61, 20 Am. Rep. 670; crier and messenger of the same court, Preston v. U. S., 37 Fed. Rep. 417; deputy collector and distillery surveyor, Landram's Case, 16 Ct. Cl. 74.

principles of justice and equity demand that payment be made.¹

Two Entire Statutory Days' Work. — Where an employee renders two distinct, entire statutory days' work, though within one day of twenty-four hours, he is held entitled to compensation as for two days' work.²

Division of Compensation. — *Per contra*, if two or more persons be necessary to perform the duties annexed to one office and for one salary, the compensation must be divided equally between them.³

Services Outside Official Duties. — Furthermore, where the services were such as could not have been required of the officer because outside of the scope of his employment, he has often been allowed extra compensation therefor.⁴

Must Show Right under the Statute. — Even should there be a statute authorizing additional compensation, the incumbent cannot claim it unless he was employed under the authority conferred by such statute.⁵

Holding Over until Qualification of Successor. — Where there is no express provision

1. *In re Conrad*, 15 Fed. Rep. 641.

2. *Garlinger v. U. S.*, 30 Ct. Cl. 473.

Double Pay Has Been Denied to one who was at the same time performing the duties of clerk in the treasury and in the attorney-general's office, *Talbot's Case*, 10 Ct. Cl. 426; lieutenant-governor and *ex-officio* warden of a state prison, *Denver v. Hobart*, 10 Nev. 28. But see *Crosman v. Nightingill*, 1 Nev. 323; alderman of a city and *ex-officio* supervisor of the county, *Billings v. New York*, 68 N. Y. 413; alderman and mayor, *Allegheny County v. Murray*, 3 Watts (Pa.) 348; township trustee and overseer of the poor, *Montgomery County v. Bromley*, 108 Ind. 155; superintendent of buildings and architect of a city hall, *Chamberlain v. Kansas City*, 125 Mo. 430; Indian agent under the secretary of the interior and member of the board of health for the District of Columbia, *Cox's Case*, 14 Ct. Cl. 512; clerk of a supervisor of internal revenue and gauger in the revenue service, *Hedrick's Case*, 16 Ct. Cl. 88; pound-master and special policeman, *Decatur v. Vermillion*, 77 Ill. 315; recorder of deeds and register of wills, *Com. v. Conway*, 12 Pa. Co. Ct. 630; superintendent of the United States treasury building and chief clerk of the treasury department, *Upton v. U. S.*, 19 Ct. Cl. 46; judge of the court of common pleas and commissioner of revision, *People v. Lippincott*, 67 Ill. 333; infirmary director and clerk of the infirmary board, *State v. Brown*, 11 Ohio Cir. Dec. 163, 20 Ohio Cir. Ct. 57.

3. **Dividing Compensation.** — *Clarke v. Waters*, 35 La. Ann. 451.

4. **Services Outside of Scope of Employment** — *United States*. — *U. S. v. Ripley*, 7 Pet. (U. S.) 18; *U. S. v. Brindle*, 110 U. S. 688; *U. S. v. Duval, Gilp.* (U. S.) 356. But see *Gratiot v. U. S.*, 4 How. (U. S.) 80; *U. S. v. Buchanan*, 8 How. (U. S.) 83.

California. — *Love v. Baehr*, 47 Cal. 364; *Melone v. State*, 51 Cal. 549; *Green v. State*, 51 Cal. 577.

District of Columbia. — *U. S. v. Evans*, 4 Mackey (D. C.) 281.

Kansas. — *Burroughs v. Norton County*, 29 Kan. 106.

Maine. — *Preble v. Bangor*, 64 Me. 115.

Missouri. — *Hesse v. Kimm*, 14 Mo. 395.

Nebraska. — *Cornell v. Irvine*, 56 Neb. 657.

Pennsylvania. — *Jenkins Tp.*, 1 Kulp (Pa.) 111.

Tennessee. — *Garvin v. Glisson*, 90 Tenn. 207.

Washington. — *State v. Cheetham*, 21 Wash. 437.

Illustrations. — Thus, a chemist in the department of agriculture has been paid extra for services as an expert witness, *Collier v. U. S.*, 22 Ct. Cl. 125; a superintendent of public buildings for disbursing public money, *U. S. v. Evans*, 4 Mackey (D. C.) 281; a collector of customs for services performed outside of his own collection district, *U. S. v. Austin*, 2 Cliff. (U. S.) 325; a police justice for revising the city ordinances and for aiding the city to collect fee-moneys from the county, *McBride v. Grand Rapids*, 47 Mich. 236; a city comptroller for negotiating certain bonds and paying out the proceeds to pensioners, *Detroit v. Redfield*, 19 Mich. 376; a representative in the legislature or a city solicitor for aiding in the adjustment of claims of the city, *Calais v. Whidden*, 64 Me. 249; a county commissioner for services as real estate agent, *Dorsett v. Garrard*, 85 Ga. 734; a commissioner of appeals for acting as referee, *Settle v. Van Evrea*, 49 N. Y. 280; a commissioner of the Supreme Court for teaching law in the state university, *Cornell v. Irvine*, 56 Neb. 657; an official stenographer for copies of testimony not required of him, *Langley v. Hill*, 63 Mich. 271; a city surveyor for discovering unrecorded city property, *Filie v. New Orleans*, 19 La. Ann. 274; a justice of the peace for collecting taxes, *Peters v. Davenport*, 104 Iowa 625; a revenue collector for purchasing light-house supplies, *Converse v. U. S.*, 21 How. (U. S.) 463; and a surrogate for auditing and stating the accounts of executors, *Pomeroy v. Mills*, 35 N. J. Eq. 442. But see *Peck v. City Nat. Bank*, 51 Mich. 353, 47 Am. Rep. 577; *Perry v. Cheboygan*, 55 Mich. 250; *Gardner v. Newaygo County*, 110 Mich. 94.

Rule Denied. — *Brown v. U. S.*, 9 How. (U. S.) 487; *Stansbury v. U. S.*, 8 Wall. (U. S.) 33; *Yates v. National Home*, 103 U. S. 674; *Mullett v. U. S.*, 150 U. S. 566.

5. **Claimant Must Show His Right under Statute.** — *Mallory's Case*, 3 Ct. Cl. 257; *Kirby's Case*, 3 Ct. Cl. 265; *Stone's Case*, 3 Ct. Cl. 260; *Ashfield's Case*, 3 Ct. Cl. 263; *Nokes's Case*, 3 Ct. Cl. 267; *Clapp's Case*, 7 Ct. Cl. 351; *Wilson's Case*, 11 Ct. Cl. 565; *Phillip's Case*, 11 Ct. Cl. 570; *Schaeffer's Case*, 11 Ct. Cl. 730; *U. S. v. Allison*, 91 U. S. 303; *Twenty per Cent. Cases*, 20 Wall. (U. S.) 179; *Ex p. Badgett*, 6 Ark. 280; *Mason v. New York*, 28 Hun (N. Y.) 115.

that an officer shall hold over until his successor qualifies, one so holding over is nevertheless entitled to salary for the additional time served.¹

Extra Compensation as "Reward." — It is a general rule that a public officer may not claim an offered reward for services performed in the line of his official duties.² But he may in proper cases recover pay for services as an "informer."³ The right of an officer to extra compensation cannot be adjudicated in a proceeding to determine his title to the office.⁴

c. HOW ASCERTAINED. — The amount of compensation to which an officer is entitled is, of course, to be ascertained primarily by reference to the statutes or contract under which he is employed. Still the courts have been called upon to construe such statutes and contracts in numerous cases, difficult to classify because involving no principle of law.⁵ Although the market rates of pay for a given service are lower than that provided by statute, the latter sum must be paid unless a contract for a smaller amount can be shown.⁶ A county treasurer has no right, without previous audit of his claim, to pay to himself fees out of trust funds in his hands, and thus to determine the amount due from himself as trustee to himself as officer.⁷

4. How and by Whom Fixed — *a. IN GENERAL.* — Sometimes the constitution, when creating an office, fixes the compensation to be paid to the incumbent. More frequently it leaves to the legislature the determination of salaries and fees, and the legislature may in turn cast this duty upon various boards, councils, courts, or other officers.

b. THE CONSTITUTION. — When the constitution prescribes the salary, no legislative appropriation is needed to authorize the officer to receive it, although the constitution may provide that no money shall be drawn from the treasury except in pursuance of a specific appropriation. Officers whose salaries are fixed by the legislature would need the assistance of such a special appropriation.⁸ Where the constitution provides payment by fees, and where the maximum of such compensation is thereby limited to a certain sum, the legislature, although it may not limit a smaller maximum specifically, may prescribe such a schedule of fees as would reduce the compensation of an

1. Where Officer Holds Over. — *Hubbard v. Crawford*, 19 Kan. 570; *Robb v. Carter*, 65 Md. 321; *Chadwick v. Earhart*, 11 Oregon 389.

2. See the title **REWARDS**.

3. Pay for Services as Informer. — Fifty Thousand Cigars, 1 Lowell (U. S.) 22; *U. S. v. 100 Barrels Distilled Spirits*, 1 Lowell (U. S.) 244; *U. S. v. Krum*, 3 McCrary (U. S.) 381; *U. S. v. Chassell*, 6 Blatchf. (U. S.) 421. But see *Steele v. State*, 5 Blackf. (Ind.) 110.

4. *State v. Maloney*, 92 Tenn. 62.

5. The Following Cases Deal with the Amount of Compensation payable to the officers named in each paragraph respectively: —

Appraiser. — *Spiegelberg v. Mink*, 1 N. Mex. 308.

Army Officer as Professor in a College. — *Long's Case*, 8 Ct. Cl. 399.

Or as Official of Freedman's Bureau. — *Brough's Case*, 8 Ct. Cl. 206.

Army Surgeon. — *Williams v. U. S.*, 25 U. S. (L. ed.) 309.

Auditor. — *Miami County v. Jay*, 18 Ind. 423; *Strope v. Greene County*, 84 Ind. 560; *Madison County v. Holliday*, 43 Iowa 251; *Datesman v. County*, 5 Lanc. L. Rev. 165.

Bridge Tender. — *Gilligan v. Waterford*, 91 Hun (N. Y.) 21; *Larkin v. Brockport*, 87 Hun (N. Y.) 573.

Chancellor. — *Bailey v. State*, 56 Miss. 637.

Chief Clerk of the House. — *State v. Draper*, 43 Mo. 220.

City Clerk. — *Shepard v. Lawrence*, 141 Mass. 479.

City Comptroller. — *Detroit v. Redfield*, 19 Mich. 376.

City or County Recorder. — *San Luis Obispo County v. Darke*, 76 Cal. 92; *Auditor v. Kinkaid*, 80 Ky. 596.

City Register. — *Matter of Parsons*, 54 N. Y. Super. Ct. 451.

City Treasurer. — *Moore v. Cincinnati*, 26 Ohio St. 582; *Hobbs v. Yonkers*, 102 N. Y. 13. *Clerk of a Committee.* — *Tenney v. State*, 27 Wis. 387.

Commissioner of Insanity. — *White v. Dallas County*, 87 Iowa 563.

Commissioner of Jurors. — *Taylor v. New York*, 67 N. Y. 87.

Commissioner of Lands and Immigration. — *State v. Duval County*, 23 Fla. 483; *Scharf v. Tasker*, 73 Md. 378.

County Surveyor. — *Pearsons v. Bailey*, 2 Ill. 507.

County Treasurer. — *Monroe County v. Proctor*, 54 Ga. 172; *Wood v. Greene County*, 60 Ga. 556; *Burks v. Dougherty County*, 99 Ga. 181; *Munger v. Bay County*, 38 Mich. 307; *People v. Baldwin*, 19 Hun (N. Y.) 308; *Jones v. Grant County*, 14 Wis. 518.

State Reporter. — *Black v. Merrill*, 51 Ind. 32.

6. *The Antonio Zambrana*, 88 Fed. Rep. 546.

7. *Warrin v. Baldwin*, 105 N. Y. 534.

8. *State v. Hickman*, 9 Mont. 37c; *State v.*

officer below the constitutional maximum.¹ And where such maximum is fixed, each year's aggregate of fees stands by itself, and separate annual accounts must be rendered.²

c. CONGRESS. — The compensation of officers of the United States is fixed by laws made by Congress.³ Still, in some cases other officers, such as the attorney-general, have a general supervisory power of the accounts of inferior officers.⁴

d. STATE LEGISLATURES. — In the absence of constitutional restriction the compensation of all public officers, whether payable by salary or by fees, is subject to legislative control,⁵ and should be fixed by a general law, and not voted as an annual gratuity.⁶ Where the constitution provides that the compensation of all public officers "shall be fixed and provided for by law," an act of the legislature giving the court the power to fix the salary of a deputy clerk is unconstitutional and void.⁷ But an act regulating the subject does not violate a clause of the constitution prohibiting the legislature from passing local or special laws for collecting taxes for "state, county, and township purposes."⁸ And where it requires the compensation to be "in proportion to duties," the construction of this clause rests with the legislature and not with the court.⁹

Appropriation — Ratification of Claim. — An appropriation by the legislature to pay for certain services for which suit had been begun is a mere proposition for a settlement, and is not a ratification of the claim.¹⁰

Imperative Statute. — A statute fixing a salary and requiring the supervisors to audit it is imperative and leaves to the supervisors no discretion.¹¹

e. COURTS. — Under some statutes the court or a judge thereof is authorized to fix certain salaries or fees.¹² But where no fees are allowed an officer, the judge's allowance does not justify paying the claim.¹³ When the authorities charged with fixing compensation fail to do so, an appeal may lie to the court to fix it.¹⁴ And it seems that the court may interfere and fix a reasonable compensation where the legislature has fixed it so low as to be equivalent to abolishing the office.¹⁵

f. BOARD OF SUPERVISORS. — In the absence of any law fixing the compensation of county officers, the board of supervisors, or of commissioners, or of auditors, whatever name the county authorities may bear, is empowered to fix it.¹⁶ But such commissioners have no power to fix a salary upon a *per*

Weston, 4 Neb. 216; *State v. Weston*, 6 Neb. 16.

1. *Goldsborough v. Lloyd*, 86 Md. 374.

2. *Harrington v. St. Louis*, 107 Mo. 327.

3. *Congress.* — *Dobbins v. Erie County*, 16 Pet. (U. S.) 435; *Wood v. U. S.*, 107 U. S. 414; *U. S. v. Mitchell*, 109 U. S. 146.

4. *Schloss v. Hewlett*, 81 Ala. 266.

The salaries of the President and of the judges of the United States courts are not under congressional control. See *Embry v. U. S.*, 100 U. S. 680.

5. *State Legislatures — California.* — *Adams v. San Francisco*, 50 Cal. 117; *Dwyer v. Parker*, 115 Cal. 544; *Tulare County v. Jeffers*, 118 Cal. 361; *Fleckenstein v. Placer County*, (Cal. 1894) 37 Pac. Rep. 931.

Indiana. — *Walker v. Dunham*, 17 Ind. 483. *Maryland.* — *Chancellor's Case*, 1 Bland (Md.) 595.

Michigan. — *Kennedy v. Gies*, 25 Mich. 83; *Wyandotte v. Drennan*, 46 Mich. 478.

Missouri. — *Davis v. Justices*, 1 Mo. 151.

Montana. — *Lloyd v. Silver Bow County*, 11 Mont. 408.

Nevada. — *State v. Trousdale*, 16 Nev. 357.

Oregon. — *Bird v. Wasco County*, 3 Oregon 282; *Portland v. Besser*, 10 Oregon 242.

6. *Smith v. Com.*, 41 Pa. St. 335.

7. *Com. v. Addams*, 95 Ky. 588.

8. *State v. Fogus*, 19 Nev. 247.

9. *Logan v. Solano County*, 65 Cal. 122; *Green v. Fresno County*, 95 Cal. 329.

10. *Tenney v. State*, 27 Wis. 387.

11. *Morris v. People*, 3 Den. (N. Y.) 381.

12. *Courts.* — *Jones v. Kenny*, Hard. (Ky.) 103; *Givens v. Daviess County*, 107 Mo. 603; *In re Rapid Transit Com'rs*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 570, 66 Hun (N. Y.) 634; *Com. v. Pattison*, 12 Phila. (Pa.) 242, 35 Leg. Int. (Pa.) 120.

13. *State v. Brown*, 146 Mo. 401.

14. *Merwine v. Monroe County*, 141 Pa. St. 162.

15. *Bugg v. Sebastian County*, 64 Ark. 515.

16. *Board of County Supervisors or Commissioners — California.* — *Kinsey v. Kellogg*, 65 Cal. 111.

Illinois. — *Hall v. Beveridge*, 81 Ill. 128; *Daggett v. Ford County*, 99 Ill. 334.

Iowa. — *Harvey v. Tama County*, 46 Iowa 522; *Holmes v. Lucas County*, 53 Iowa 211.

diem basis when the statute allows a fair and adequate monthly compensation,¹ nor, conversely, can they vote an officer a lump sum when the statute gives him for extra services "such sums as may be allowed by the board of supervisors."² They cannot reduce the salary of an officer to a merely nominal sum, and thereby nullify the law creating the office.³ When such board has allowed a claim, the auditor must audit it and draw his warrants therefor.⁴

In New York City, under the reorganization act of 1873, a board of apportionment was charged with the duty of fixing the salaries of all city officers. This did not apply to clerks of district courts who were embraced within the judicial system of the state.⁵ And the commissioners of taxes and assessments in New York county were, by the act of 1869, empowered to appoint and fix the compensation of clerks and employees.⁶

g. CITY COUNCIL. — The charters of the larger cities usually authorize the city council or other governing body to fix the salaries of the city officers.⁷ Where the common council continues to pay an officer's salary at a former rate, it cannot be inferred that they intended to fix his salary at a smaller sum from the mere fact that they appropriated for that purpose a smaller amount than had previously been paid.⁸

h. USAGE. — Usage has sometimes been resorted to to fix the compensation of officers for extra services not within the line of their duty.⁹ But a custom of charging for work by estimates will not prevail against an actual count.¹⁰

i. MISCELLANEOUS. — In other cases various officers, such as the comptroller,¹¹ or the clerk of court, sheriff, and prosecuting attorney,¹² or the superintendent of public works,¹³ have been empowered to fix the compensation of certain other officers. No officer is allowed to fix his own compensation.¹⁴

5. Right to Compensation — *a.* FOLLOWS TITLE TO THE OFFICE. — It is a principle of general application that the right of a public officer to the compensation of his office is incident to and dependent upon his right and title to the office.¹⁵ Hence, if constitutionally ineligible at the time of assuming

Michigan. — Chapman *v.* Berrien County, 50 Mich. 311; Pistorius *v.* Saginaw County, 51 Mich. 125; Cicotte *v.* Wayne County, 59 Mich. 509. But see People *v.* Board of Auditors, 13 Mich. 233.

New York. — Devoy *v.* New York, 39 Barb. (N. Y.) 169, 36 N. Y. 449.

Pennsylvania. — Hemingway's Appeal, 4 Northam. Co. Rep. (Pa.) 403.

1. Randall *v.* Lyon County, 20 Nev. 35.

2. Plummer *v.* Edwards Tp., 87 Mich. 621.

3. De Soto County *v.* Westbrook, 64 Miss. 312.

4. State *v.* Mason, 153 Mo. 23.

5. Whitmore *v.* New York, 67 N. Y. 21.

6. Gillespie *v.* New York, 6 Daly (N. Y.) 286.

7. City Council. — Reg. *v.* Sandwich, 2 Gale & D. 28, 2 Q. B. 895, 42 E. C. L. 965, 6 Jur. 684; Brazil *v.* McBride, 60 Ind. 245; Coleman *v.* Cadillac, 49 Mich. 322; Rightmire *v.* Duffield, 50 N. J. L. 43; Com. *v.* Morrow, 40 Pittsb. Leg. J. N. S. (Pa.) 327; Mathewson *v.* Tripp, 14 R. I. 587; Doolan *v.* Manitowoc, 48 Wis. 312.

8. Fountain *v.* Jackson, 50 Mich. 260.

9. Usage. — Shephard *v.* Payne, 16 C. B. N. S. 132, 111 E. C. L. 132, 10 Jur. N. S. 540, 33 L. J. C. Pl. 158, 12 W. R. 581, 10 L. T. N. S. 193; Price *v.* Perceval, Stuart K. B. (L. C.) 179; U. S. *v.* McDaniel, 7 Pet. (U. S.) 1; U. S. *v.*

Fillebrown, 7 Pet. (U. S.) 28; U. S. *v.* Ripley, 7 Pet. (U. S.) 18; McCalmont *v.* Allegheny County, 29 Pa. St. 417. But see Ogden *v.* Maxwell, 3 Blatchf. (U. S.) 320; New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569.

10. Maltby *v.* Plummer, 73 Mich. 539.

11. Miscellaneous. — Poole *v.* State, 105 N. Y. 22.

12. Jones *v.* Benton, 4 Greene (Iowa) 40.

13. Matter of Agar, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 145; Failing *v.* Syracuse, (County Ct.) 4 Misc. (N. Y.) 50. But see Gilligan *v.* Waterford, 91 Hun (N. Y.) 21.

14. New Orleans *v.* Finnerty, 27 La. Ann. 681, 21 Am. Rep. 569; *In re Holiday*, 6 Ohio Cir. Dec. 751, 13 Ohio Cir. Ct. 672.

15. Right to Compensation — Arkansas. — Baxter *v.* Brooks, 29 Ark. 173.

California. — Stratton *v.* Oulton, 28 Cal. 44.

Hawaii. — Macfarlane *v.* Damon, 8 Hawaii 19.

Illinois. — Mayfield *v.* Moore, 53 Ill. 428, 5 Am. Rep. 52; Kreitz *v.* Behrensmeyer, 149 Ill. 496.

Maine. — Andrews *v.* Portland, 79 Me. 484, 10 Am. St. Rep. 280.

Nevada. — Meagher *v.* Storey County, 5 Nev. 244.

New York. — Nichols *v.* MacLean, 101 N. Y. 526, 54 Am. Rep. 730.

See the title DE FACTO OFFICERS, vol. 8, p. 808.

office, and therefore without title thereto, he is a volunteer and cannot recover for services.¹ But an officer elected under an unconstitutional law is entitled to his salary if the election be validated by another law,² or he may recover under a prior constitutional act.³ The possession of a certificate of election entitles the holder thereof to the compensation of the office, notwithstanding a contest is pending to determine his right to the office;⁴ but not unless he has qualified by giving bond.⁵ The right of one legally entitled to an office is not affected by the illegal intrusion of another thereinto and his performance of part of the duties thereof.⁶

b. RIGHT TO PERFORM SERVICES. — On the other hand, the right to perform the services and to receive the compensation is one of which the officer cannot be deprived by the appointment of another person to do the work.⁷ Thus, if money is disbursed by any other agency than by the treasurer, a right of action exists in his favor for the amount of the commissions he would have received if he had disbursed it.⁸

c. IN DISPUTED CASES. — Where the right to the office is in dispute, a court cannot, before this is determined, render judgment for the incumbent's salary.⁹ And an appropriation to pay a salary cannot be paid to one of two appointees until it is judicially decided that one of them is alone entitled thereto;¹⁰ but the court having rendered such judgment, the incumbent is entitled to the emoluments from that date, notwithstanding the pendency of an appeal.¹¹ Where the substantial duties are performed by one officer, payment therefor should not be made to his successor.¹² Until collected, fees to which a clerk is entitled remain a charge in favor of the clerk and are his whenever collected.¹³

d. RIGHT TO UNEARNED COMPENSATION. — A public officer has no estate in his office, and, therefore, the unearned fees and emoluments thereof are not property,¹⁴ and requiring them to be paid into the treasury and a salary paid in lieu thereof is not taking private property for public use without compensation.¹⁵ Nor is his official position a contract within the clause of the various constitutions prohibiting the states from passing laws impairing the obligation of contracts.¹⁶

e. RIGHT TO COMPENSATION ALREADY EARNED. — The right to fees

1. *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715; *Darby v. Wilmington*, 76 N. Car. 133.

2. *Melick v. Williamsport*, 162 Pa. St. 408.

3. *Skinner v. Franklin County*, 3 Pa. Co. Ct. 424.

4. *Henderson v. Glynn*, 2 Colo. App. 303.

5. *Philadelphia v. Given*, 60 Pa. St. 136.

6. *State v. Carr*, 129 Ind. 44, 28 Am. St. Rep. 163.

7. *Right to Perform Services.* — *Bastrop County v. Hearn*, 70 Tex. 563.

8. *Beard v. Decatur*, 64 Tex. 8, 53 Am. Rep. 735.

9. *In Disputed Cases.* — *Baxter v. Brooks*, 29 Ark. 173; *Meredith v. Sacramento County*, 50 Cal. 433; *State v. Kansas City Police Com'rs*, 80 Mo. App. 206; *Hagan v. Brooklyn*, 126 N. Y. 643, 36 N. Y. St. Rep. 944.

This rule does not apply, however, where no one has held the office in the plaintiff's stead. In such case he may recover without first establishing his title. *Gorley v. Louisville*, (Ky. 1900) 55 S. W. Rep. 886.

10. *Kennedy v. New York*, 79 N. Y. 361.

11. *Appeal.* — *Luzerne County v. Trimmer*, 95 Pa. St. 97; *Fylpaa v. Brown County*, 6 S. Dak. 634.

12. *Watson v. Schnecko*, 13 Mo. App. 208.

13. *Peet v. White*, 43 Iowa 400.

14. *Right to Unearned Compensation.* — *Pennie v. Reis*, 80 Cal. 266; *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *Coffin v. State*, 7 Ind. 157; *Farwell v. Rockland*, 62 Me. 296; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325; *Swann v. Buck*, 40 Miss. 268; *Hvde v. State*, 52 Miss. 665; *State v. Davis*, 44 Mo. 129; *Love v. Jersey City*, 40 N. J. L. 456; *Conner v. New York*, 5 N. Y. 294; *Smith v. New York*, 37 N. Y. 519; *Frazier v. Virginia Military Institute*, 81 Va. 59.

In *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677, it was held that a clerk had an estate in his office which could only be destroyed by the abolition of the office, and that an act of the legislature which continued the office and transferred the estate to another was unconstitutional and void. See also *State v. Vincent*, 46 Neb. 408; *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777. And see *supra*, this title, *Nature and Incidents of Public Offices — Legislative Control*.

15. *Conner v. New York*, 5 N. Y. 285.

Nor will a police judge be allowed an action against a mayor and common council for passing an ordinance substituting salary for fees and requiring the latter to be paid into the treasury. *McHenry v. Snee*, 56 Iowa 649.

16. See *supra*, this title, *Nature and Incidents of Public Offices — Legislative Control*.

already earned is property which the legislature cannot destroy by enacting that such fees shall be turned into the treasury. The right of the legislature to change the amount of compensation to be paid gives it no right, under pretense of such change, to confiscate fees previously earned.¹ And where the right to the office is certain the officer is entitled to the salary even if he neglects his duties or performs them in an unsatisfactory manner,² or is prevented from performing them by sickness³ or by imprisonment on a charge of which he is subsequently acquitted,⁴ or though the duties are diminished or abolished, the office still remaining.⁵ But an officer is not entitled to pay for merely colorable attendance in court,⁶ and has no claim for salary or perquisites for a period during which he was not the actual incumbent.⁷ And generally where specific compensation is given for the performance of specific duties, the officer is not entitled to pay unless he performs the duties.⁸ By the *Colorado* constitution no right to compensation arises from a resolution providing therefor after the services have been rendered.⁹

f. WHEN OFFICE IS ABOLISHED. — Where an office is abolished the right to the salary ceases to exist,¹⁰ and the former incumbent cannot demand compensation for an unexpired term.¹¹ There is, moreover, no right to the salary of an office abolished before the claimant was commissioned thereto.¹² Where an office is abolished and the duties thereof thrown upon another officer, an incumbent at the time of such abolition is not entitled to salary between the time the office is abolished and the time the other officer assumes the duties thereof,¹³ but a successful contestant for a public office is entitled to the salary from the time that his right thereto accrues until the trial of the actions contesting the right.¹⁴

g. DURING SUSPENSION. — From the general rule that the right to receive the compensation of an office attaches itself to the legal title to the office, it is an obvious inference that one wrongly suspended from office is still entitled to the salary pending a trial of the question of right, or pending an appeal

1. Compensation Already Earned. — *In re Harvard*, 2 Idaho 652; *State v. Vincent*, 46 Neb. 408.

2. Neglect of Duty. — *Bryan v. Cattell*, 15 Iowa 538; *Bates v. St. Louis*, 153 Mo. 18, 77 Am. St. Rep. 701; *State v. Walbridge*, 153 Mo. 194.

But it has been held in some jurisdictions that an officer is not entitled to compensation unless he performs the duties of his office. *Farrell v. Bridgeport*, 45 Conn. 191.

The right of a *de jure* officer to the emoluments of an office while filled by a *de facto* officer is discussed in the title DE FACTO OFFICERS, vol. 8, p. 771.

3. Illness. — *Sleigh's Case*, 9 Ct. Cl. 369; *Devlin v. New York*, 41 Hun (N. Y.) 281; *O'Leary v. Board of Education*, 93 N. Y. 1, 45 Am. Rep. 156; *People v. Police Com'rs*, Daily Reg. (N. Y.) Aug. 2, 1883. But see *Wilkes-Barre v. Meyers*, 113 Pa. St. 395; *Cox v. Oil City*, 157 Pa. St. 613.

While a collector would be entitled, it seems, to the emoluments of his office during an illness where his deputy continues to perform the duties, his estate is not entitled to such emoluments after his death. In the former case he is answerable for the acts of his deputy, and through him still exercises the functions of his office; in the latter he ceases by his death to hold the office. *Merriam v. Clinch*, 6 Blatchf. (U. S.) 5.

4. People v. Board of Police, 27 Hun (N. Y.) 261.

5. Where Duties Are Abolished. — *Marquis v. Santa Ana*, 103 Cal. 661.

6. Merely Colorable Performance. — *Vincent v. Mecosta County*, 52 Mich. 340.

7. Board of Auditors v. Benoit, 20 Mich. 176, 4 Am. Rep. 382.

8. For Specific Duties. — *Wheatly v. Covington*, 11 Bush (Ky.) 22.

Where an act provides certain compensation for services required to be performed within one year, the officer is not entitled to the compensation unless the work is completed within a year. *Warfield v. Baltimore County*, 28 Md. 76.

9. People v. Spruance, 8 Colo. 307.

10. When Office Is Abolished. — *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Van Buren County v. Mattox*, 30 Ark. 566; *Williams v. Newport*, 12 Bush (Ky.) 439. But see *State v. Jumel*, 30 La. Ann. 861.

11. Jones v. Shaw, 15 Tex. 577. See *supra*, this title, *Nature and Incidents of Public Offices — Legislative Control*.

Temporary Injunction. — In *Tennessee* it is held that the salaries of railroad commissioners are not affected by temporary injunctions restraining them from performing their duties in regard to certain of the railroads of the state. *Savage v. Pickard*, 14 Lea (Tenn.) 46.

12. Bryon v. Jumel, 32 La. Ann. 442.

13. Stanfield v. Bexar County, (Tex. Civ. App. 1894) 28 S. W. Rep. 114.

14. State v. McAllister, (Tex. Civ. App. 1895) 31 S. W. Rep. 679.

from the judgment of removal,¹ or until the order of removal is revoked by the executive,² and whether he renders any service or not,³ and regardless of any sums earned otherwise while suspended.⁴ But the right to the salary is sometimes held to depend upon the performance of the services. In such jurisdictions a suspended officer would not be entitled to pay during the period of suspension,⁵ and he is not entitled to pay for the time between the preferring of charges and the making of the order of removal, where he does not attend to his duties during such time.⁶ An agreement by the officer to serve gratis during his suspension bars a subsequent claim for compensation for such services.⁷ Where the suspended officer does not complain for a year, he can recover for a wrongful suspension only the amount that would probably have been due upon a prompt settlement of his claim.⁸

h. AFTER RESIGNATION. — Where an officer resigns one office by the acceptance of another, the salary of the first office ceases when he qualifies for the second office, and he should receive the compensation attached to the first until he qualifies for the second.⁹

i. AFTER DISMISSAL. — Upon removal for cause the right of an officer to compensation ceases at once.¹⁰

j. RETAINING SALARY FROM MONEY COLLECTED. — Where a statute provides that a public officer shall receive as compensation a certain sum payable out of funds collected, and another act requires him to pay all money collected into the treasury, he is not entitled to retain his salary out of money collected by him, but is entitled to a warrant from the auditor on the treasurer therefor.¹¹ An officer who has paid over to his successor all money in his hands, including a sum that he was entitled to as commission, cannot, when he is again elected to the same office, retain from the money then coming into his hands the commissions so paid over by him.¹²

k. FRAUD. — The right to compensation is barred by fraud in procuring the office.¹³ But in an action for salary or fees the title of the claimant to the office cannot be collaterally attacked.¹⁴

6. When Compensation Becomes Due. — Salary fixed at so much a month is payable monthly, unless otherwise provided.¹⁵ An officer is usually required to qualify before entering upon the duties of his office, and is entitled to draw pay only from the time of qualifying.¹⁶ The holder of a contested seat in Congress is entitled to pay from the time the compensation of his predecessor

1. During Suspension. — *Ward v. Marshall*, 96 Cal. 155, 31 Am. St. Rep. 198; *State v. Carr*, 3 Mo. App. 6; *Emmitt v. New York*, 128 N. Y. 117. Compare *Howard v. St. Louis*, 88 Mo. 656; *Lewis v. St. Louis*, 12 Mo. App. 570.

2. Smith's Case, 2 Ct. Cl. 206; *Winter's Case*, 3 Ct. Cl. 136. But see *Reynolds's Case*, 3 Ct. Cl. 197.

3. Smith v. Brooklyn, 6 N. Y. App. Div. 134. Where a charter authorizes the mayor to suspend, and with the consent of the council to remove, an officer so suspended is not entitled to compensation from the time of such suspension until removal. *Westberg v. Kansas City*, 54 Mo. 493.

4. Fitzsimmons v. Brooklyn, 102 N. Y. 536, 55 Am. Rep. 835.

5. Embry v. U. S., 100 U. S. 680; *Barbour's Case*, 17 Ct. Cl. 149; *Fassey v. New Orleans*, 17 La. Ann. 299; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417.

6. State v. Slover, 113 Mo. 211. See the title *DE FACTO OFFICERS*, vol. 8, p. 813.

7. Agreeing to Serve Gratis. — *Emmitt v. New York*, 128 N. Y. 117.

8. Effect of Laches. — *Gorley v. Louisville*, (Ky. 1900) 55 S. W. Rep. 886.

9. After Resignation. — *State v. Draper*, 45 Mo. 355.

10. After Dismissal. — *U. S. v. Smith*, 1 Bond (U. S.) 68; *Queen v. Atlanta*, 59 Ga. 319; *Brunswick v. Fahm*, 60 Ga. 109; *Fassey v. New Orleans*, 17 La. Ann. 299; *Mandell v. New Orleans*, 21 La. Ann. 9; *Smith v. Philadelphia County*, 2 Pars. Eq. Cas. (Pa.) 293; *State v. Comptroller-Gen.*, 9 S. Car. 259.

11. Retaining Salary from Money Collected. — *Swann v. Josselyn*, 14 Smed. & M. (Miss.) 106.

12. Bunn v. People, 32 Ill. App. 410.

13. Fraud. — *Power v. May*, 123 Cal. 147; *Conroy v. New York*, 6 Daly (N. Y.) 490.

14. Title Cannot Be Collaterally Attacked. — *Burgess v. Davis*, 37 Ill. App. 353; *People v. Lane*, 55 N. Y. 217; *People v. Sutphin*, 53 N. Y. App. Div. 613.

15. When Compensation Becomes Due. — *Carroll v. Siebenthaler*, 37 Cal. 193; *Dillon v. Bicknell*, 116 Cal. 111. See also *Enkle v. Edgar*, 63 Cal. 188; *Welch v. Strother*, 74 Cal. 413; *Lewis v. Widber*, 99 Cal. 412.

16. Payable After Officer Qualifies. — *Hempstead v. Auditor*, 16 Ark. 57; *Thomas v. Owens*, 4 Md. 189; *Wiley v. Worth*, Phil. L. (61 N. Car.) 171. But see *U. S. v. Flanders*, 112 U. S. 88;

ceased.¹ Where by mistake an officer takes possession and begins to discharge the duties of his office six months after he should have done so, he is not entitled to pay for the six months.²

7. Who Liable For. — The acts which create a public office and provide the compensation of the officer usually determine what department of the government shall pay it. In construing these statutes it has sometimes been held that particular obligations to public officers were or were not payable by the state,³ or by the county,⁴ or by a municipal corporation,⁵ or by the officer authorizing the services,⁶ or by a private individual for whom they are performed.⁷

8. From What Fund Payable. — Constitutional officers with fixed salaries may be paid by warrants out of the general fund of the state. In *Louisiana* such warrants have priority over all other warrants against such funds.⁸ Sometimes the duty of auditing the accounts of all officers is imposed upon the comptroller, without whose order no funds can be disbursed by the treasurer.⁹ Where an officer is appointed to be paid from a particular fund, he cannot claim payment after such fund is exhausted.¹⁰

9. Increasing and Decreasing Compensation — *a. IN GENERAL.* — The state constitutions have often provided that the compensation of certain enumerated officers shall not be increased or decreased during their term of office.¹¹ The charter of a municipal corporation is the fundamental law of such corporation,

Ball v. Kenfield, 55 Cal. 320; *Swann v. Turner*, 23 Miss. 565.

1. When Pay of Predecessor Ceases. — *Shelley v. U. S.*, 19 Ct. Cl. 653.

2. For Services Before Term Begins. — *Albaugh v. State*, 145 Ind. 356.

3. The State. — *Ex p. Carroll*, 10 Ark. 38; *Hulsizer v. Northampton County*, 19 Pa. Co. Ct. 385. But see *Buck v. Vasser*, 47 Miss. 551.

4. The County — *Arizona.* — *Heney v. Pima County*, (Ariz. 1887) 14 Pac. Rep. 299; *Bicknell v. Amador County*, 30 Cal. 237.

California. — *Tulare County v. May*, 118 Cal. 303.

Illinois. — *Crawford County v. Spennay*, 21 Ill. 288.

Indiana. — *Morgan County v. Johnson*, 31 Ind. 463.

Iowa. — *Harvey v. Tama County*, 46 Iowa 522; *Lockart v. Montgomery County*, 76 Iowa 79; *Byram v. Polk County*, 76 Iowa 75; *Garratt v. Polk County*, 78 Iowa 108; *Guanella v. Pottawattamie County*, 84 Iowa 36.

Louisiana. — *Babbington v. St. Charles*, 27 La. Ann. 321.

Michigan. — *Mixer v. Manistee County*, 26 Mich. 422; *Goodale v. Marquette County*, 45 Mich. 47.

Pennsylvania. — *Com. v. Philadelphia County*, 9 S. & R. (Pa.) 250.

5. The Municipal Corporation. — *Garnier v. St. Louis*, 37 Mo. 554; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600.

6. The Officer Authorizing the Services. — *Heath v. Bates*, 49 Conn. 342; *Doughty v. Paige*, 48 Iowa 483; *Beale v. Com.*, 7 Watts (Pa.) 183; *Com. v. McCoy*, 8 Watts (Pa.) 153, 34 Am. Dec. 445; *Pontius v. Com.*, 4 W. & S. (Pa.) 52; *Dillon v. Whatcom County*, 12 Wash. 391.

7. Private Person. — *Baldwin v. Kouns*, 81 Ala. 272; *Bransom v. Larimer County*, 5 Colo. App. 231; *Bartholomew County v. Bryan*, 22 Ind. 397; *Davis v. Thompson*, 1 Nev. 17; *Lyon v. M'Manus*, 4 Binn. (Pa.) 167; *Moore v. Por-*

ter, 13 S. & R. (Pa.) 100; *Carren v. Breed*, 2 Coldw. (Tenn.) 465.

8. From What Funds Payable. — *State v. Burke*, 32 La. Ann. 1213. But see *State v. Burke*, 34 La. Ann. 404.

9. State v. Barnes, 25 Fla. 75, *distinguishing* *Franklin County v. State*, 24 Fla. 55, 12 Am. St. Rep. 183.

10. Lethbridge v. New York, 133 N. Y. 232.

11. Increasing and Decreasing Compensation — *Arkansas.* — *Weeks v. Texarkana*, 50 Ark. 81. *California.* — *Cross v. Kenfield*, 57 Cal. 626. *Colorado.* — *Carlile v. Henderson*, 17 Colo. 536.

Illinois. — *Wheelock v. People*, 84 Ill. 551; *Cullom v. Dolloff*, 94 Ill. 330.

Iowa. — *Cox v. Burlington*, 43 Iowa 612; *Ryce v. Osage*, 88 Iowa 558.

Kentucky. — *Perkins v. Auditor*, 79 Ky. 306; *Com. v. Addams*, 95 Ky. 588.

Maine. — *Farwell v. Rockland*, 62 Me. 296; *State v. Goss*, 69 Me. 22.

Nebraska. — *Douglas County v. Timme*, 32 Neb. 272.

Nevada. — *State v. Hallock*, 16 Nev. 152.

New Jersey. — *State v. Kelsey*, 44 N. J. L. 1.

New York. — *People v. Edmonds*, 19 Barb. (N. Y.) 468; *Ricketts v. New York*, 12 Daly (N. Y.) 504; *People v. Board of Police*, 75 N. Y. 38.

Ohio. — *State v. Raine*, 49 Ohio St. 580.

Oregon. — *Territory v. King*, 1 Oregon 106.

Pennsylvania. — *Levan v. Carbon County*, 11 Pa. Co. Ct. 315; *Rupert v. Chester County*, 13 Pa. Co. Ct. 342, 2 Pa. Dist. 688; *Com. v. Mann*, 5 W. & S. (Pa.) 403.

Washington. — *Mudgett v. Liebes*, 14 Wash. 482.

In *Pennsylvania* it has been held that the prohibition against a law increasing or diminishing salaries applies to laws passed by the legislature, but not to city ordinances. *Baldwin v. Philadelphia*, 99 Pa. St. 164.

And in *Nebraska* it is held that such a pro-

and is its constitution; hence, a by-law reducing the fees of an officer is void.¹

Such Change Unconstitutional. — A law which attempts to increase or decrease the salary of a public officer contrary to a constitutional prohibition is unconstitutional and void;² and any attempt on the part of the court or of a superior officer or of a board to alter the compensation of employees during their term is likewise void.³ The rule applies as well to offices created by statute as to those created by the constitution.⁴ The prohibition may not be evaded by a resignation and re-appointment.⁵

But in the Absence of Such Constitutional Prohibition the legislature may change both the term of office and the compensation of those then in office, as well as of future incumbents,⁶ and may confer upon a common council or other inferior governmental authority the same power.⁷ It has in fact been laid down as a general rule that the authority which establishes the compensation may

hibition applies only to offices created by the constitution itself. *Douglas County v. Timme*, 32 Neb. 272.

In California such clause has been held not to apply to traveling and incidental expenses. *Kirkwood v. Soto*, 87 Cal. 394.

1. *Carr v. St. Louis*, 19 Mo. 191.

It has been held that the compensation, which under the constitution cannot be increased or diminished, was that of officers drawing salaries, and not of those paid by fees. *Milwaukee County v. Hackett*, 21 Wis. 613.

2. Such Change Unconstitutional — *Kentucky*. — *Com. v. Carter*, (Ky. 1900) 55 S. W. Rep. 701.

Maryland. — *Goldsborough v. Lloyd*, 86 Md. 374.

New Mexico. — *Torrez v. Socorro County*, 10 N. Mex. 670.

New York. — *Rowland v. New York*, 83 N. Y. 375.

Pennsylvania. — *Shiffert v. Montgomery County*, (Com. Pl.) 17 Pa. Co. Ct. 241, 12 Montg. Co. Rep. (Pa.) 21; *Cornell v. Beaver County*, 42 Pittsb. Leg. J. N. S. (Pa.) 262; *Strock v. Cumberland County*, 4 Pa. Dist. 321; *Wren v. Luzerne County*, 6 Kulp (Pa.) 37.

Wisconsin. — *Rooney v. Milwaukee County*, 40 Wis. 23.

3. *Buck v. Eureka*, 109 Cal. 504; *Power v. May*, 114 Cal. 207; *People v. Board of Police*, 75 N. Y. 38; *Poole v. State*, 105 N. Y. 22; *Apple v. Crawford County*, 105 Pa. St. 300; *State v. Cheetham*, 21 Wash. 437.

4. *Cook County v. Sennott*, 136 Ill. 314.

5. *Larew v. Newman*, 81 Cal. 588; *Greene v. Chosen Freeholders*, 44 N. J. L. 388.

6. Power of Legislature to Change — *United States*. — *Butler v. Pennsylvania*, 10 How. (U. S.) 402.

Alabama. — *Benford v. Gibson*, 15 Ala. 521; *Ex p. Lambert*, 52 Ala. 79.

Arkansas. — *Humphry v. Sadler*, 40 Ark. 100.

Indiana. — *Walker v. Dunham*, 17 Ind. 483; *Gilbert v. Grant County*, 8 Blackf. (Ind.) 81.

Iowa. — *Iowa City v. Foster*, 10 Iowa 189.

Kentucky. — *Com v. Bailey*, 81 Ky. 395.

Maine. — *Farwell v. Rockland*, 62 Me. 296.

Michigan. — *Knappen v. Barry County*, 46 Mich. 22; *Wyandotte v. Drennan*, 46 Mich. 478.

Minnesota. — *Hennepin County v. Jones*, 18 Minn. 199.

Missouri. — *Wilcox v. Rodman*, 46 Mo. 322; *Givens v. Daviess County*, 107 Mo. 603.

Montana. — *Lloyd v. Silver Bow County*, 11 Mont. 408.

Nebraska. — *Douglas County v. Timme*, 32 Neb. 272; *State v. Vincent*, 46 Neb. 408; *State v. Stewart*, 52 Neb. 243.

Nevada. — *Denver v. Hobart*, 10 Nev. 28.

New York. — *Taylor v. New York*, 67 N. Y. 88; *Phillips v. New York*, 1 Hilt. (N. Y.) 483; *Conner v. New York*, 2 Sandf. (N. Y.) 355.

North Carolina. — *Bunting v. Gales*, 77 N. Car. 283; *White v. Auditor*, 126 N. Car. 570.

Ohio. — *Crocket v. State*, 18 Ohio St. 9.

Pennsylvania. — *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Barker v. Pittsburgh*, 4 Pa. St. 51; *McCormick v. Fayette County*, 150 Pa. St. 190; *South Carolina*. — *Alexander v. McKenzie*, 2 S. Car. 81.

Tennessee. — *Haynes v. State*, 3 Humph. (Tenn.) 480, 39 Am. Dec. 187.

Virginia. — *Loving v. Auditor*, 76 Va. 942.

West Virginia. — *Rucker v. Pocahontas County*, 7 W. Va. 661.

Wisconsin. — *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87; *State v. Kalb*, 50 Wis. 178.

Wyoming. — *Castle v. Uinta County*, 2 Wyo. 126.

The legislature has the power to terminate at pleasure the incumbency of a statutory office, either by an abolition of the office or by a change in the tenure or mode of appointment; and no contract made by the mayor and aldermen with the incumbent for a certain term can destroy or suspend that power. *Kendall v. Canton*, 53 Miss. 526.

7. Power Conferred upon Other Bodies. — *Coyne v. Rennie*, 97 Cal. 590; *Chapoton v. Detroit*, 38 Mich. 636; *Taylor v. New York*, 67 N. Y. 88; *People v. Kings County*, 105 N. Y. 180; *Com. v. Pattison*, 12 Phila. (Pa.) 242, 35 Leg. Int. (Pa.) 120; *Crawford County v. Nash*, 99 Pa. St. 253; *Barker v. Pittsburgh*, 4 Pa. St. 49; *Com. v. Bacon*, 6 S. & R. (Pa.) 322; *Fellows v. Scranton*, 2 Lack. Jur. (Pa.) 211; *Ferber v. City*, 5 L. T. N. S. (Pa.) 121; *Gift v. Allentown*, 37 Leg. Int. (Pa.) 332; *Baldwin v. Philadelphia*, 99 Pa. St. 170. But see *Goetzman v. Whitaker*, 81 Iowa 527.

Power Exhausted by One Exercise of It. — Where the power of the board was to "fix and determine" a certain salary, the power was considered expended by being once exercised. *Douvielle v. Manistee County*, 40 Mich. 585. And see *Cox v. New York*, 103 N. Y. 519.

change it unless there be constitutional prohibition to the contrary.¹ But the power of such governmental body to fix or change salaries rests solely upon statute, and is subject to all the limitations contained therein;² and a board cannot, after fixing a salary, change it except by further action spread upon the record,³ nor without notice to the incumbent.⁴ Where a salary of a public officer is fixed at a certain sum without any limitation as to time, it is not changed by an act which merely appropriates a less amount for the services of that officer, but which contains no express or implied repeal or modification of the previous law.⁵

Officer Designated by Name — Right of Successor. — A resolution of a board, subsequently ratified by an act of the legislature, fixing the salary of an incumbent by name, does not inure to the benefit of his successor in office.⁶ Where salaries are fixed for a year based upon population or assessed valuation, or other figures liable to change, the amount must remain fixed for an official year; although it may be shown that during such year the basis of computation has changed.⁷

b. ESTOPPEL BY ACCEPTING LESS THAN AMOUNT DUE. — An officer is not debarred from recovering the legal salary or fees by an agreement to perform the service for less than the legal allowance,⁸ and one who accepts reduced pay is not thereby estopped to claim the statutory allowance,⁹ especially if accepted under protest.¹⁰ But an officer may, by the voluntary acceptance of a reduction and long acquiescence therein be estopped to claim more.¹¹

c. DISTINCTION BETWEEN RIGHT TO APPOINT AND TO FIX SALARY. — A distinction is made between the right of one to appoint an incumbent to an office whose salary is beyond his control, and the right of one to appoint and likewise to fix the salary. In the latter case an employee may be shifted from one occupation to another and his salary changed each time.¹²

d. REDUCTION AMOUNTING TO ABOLITION OF OFFICE. — While such a reduction in the duties or the compensation of an office as amounts virtually

1. Power to Fix Involves Power to Change. — *Farwell v. Rockland*, 62 Me. 296; *People v. Lippincott*, 67 Ill. 333.

2. Subject to Statutory Limitation. — *Marquis v. Santa Anna*, 103 Cal. 661; *Douvielle v. Manistee County*, 40 Mich. 585.

3. Record. — *Miller v. Board of Auditors*, 41 Mich. 4.

4. Notice. — *Givens v. Daviess County*, 107 Mo. 603.

5. U. S. v. Langston, 118 U. S. 389.

6. Rosenthal v. New York, 6 Daly (N. Y.) 167.

7. When Fixed Must Remain So. — *Turner v. Neosho County*, 27 Kan. 639; *Devers v. York*, 150 Pa. St. 208; *Converse County v. Burns*, 3 Wyo. 691; *Davis v. Sweetwater County*, 4 Wyo. 477; *Guthrie v. Converse County*, 7 Wyo. 95.

8. Estoppel by Accepting Less than Amount Due. — *Settle v. Sterling*, 1 Idaho 259.

9. Adams v. U. S., 20 Ct. Cl. 115; *Dyer v. U. S.*, 20 Ct. Cl. 166; *Whiting v. U. S.*, 35 Ct. Cl. 291; *University v. Walden*, 15 Ala. 655; *Fulton v. Monona County*, 47 Iowa 622; *Bowe v. St. Paul*, 70 Minn. 341; *People v. Board of Police*, 75 N. Y. 38; *Kehn v. State*, 93 N. Y. 291; *State v. Nashville*, 15 Lea (Tenn.) 697, 54 Am. Rep. 427; *State v. Steele*, 57 Tex. 200.

10. State v. Ferriss, (Tenn. Ch. 1899) 56 S. W. Rep. 1039.

A protest against the payment of insufficient salary should be made to the body having

power to act in the matter, and not to the disbursing officer. *Thomas v. St. Clair County*, 45 Mich. 479.

11. Estoppel by Long Acquiescence — *United States*, — *Glavey v. U. S.*, 35 Ct. Cl. 242; *Pray v. U. S.*, 106 U. S. 594.

California, — *Coyne v. Rennie*, 97 Cal. 590. *Illinois*, — *McHaney v. Marion County*, 77 Ill. 488.

Iowa, — *Harding v. Montgomery County*, 55 Iowa 41.

Louisiana, — *Barrett v. New Orleans*, 32 La. Ann. 101.

Michigan, — *Thomas v. St. Clair County*, 45 Mich. 479; *Perry v. Cheboygan*, 55 Mich. 250.

Mississippi, — *Wesson v. Collins*, 72 Miss. 844.

Missouri, — *Galbreath v. Moberly*, 80 Mo. 484. *New York*, — *People v. Board of Police*, 12 Hun (N. Y.) 653; *Hobbs v. Yonkers*, 32 Hun (N. Y.) 454; *People v. White*, 54 Barb. (N. Y.) 622; *People v. Kings County*, 105 N. Y. 180; *Gillespie v. New York*, 6 Daly (N. Y.) 287.

Ohio, — *Woehler v. Toledo*, 8 Ohio Dec. (Reprint) 206, 6 Cinc. L. Bul. 282.

An officer cannot receive compensation for two offices at the same time; and his acceptance of the one precludes him from seeking a recovery for the other. *Jackson v. U. S.*, 8 Ct. Cl. 354.

12. Distinction Between Appointing and Fixing Salary. — *Riley v. New York*, 96 N. Y. 331.

to an abolition of the office is forbidden by the constitutional prohibition against change in compensation,¹ there is nothing therein which prohibits the total abolition of the office.²

c. **REDUCTION BY CONSTITUTIONAL AMENDMENT.** — Moreover, the official term of an officer may be shortened by a constitutional amendment, and the salary will then cease with the shortened term.³

10. Recovery of Compensation. — Where the right to the compensation of an office has been established, mandamus will lie to compel payment thereof,⁴ or the amount due may be recovered in an ordinary action.⁵ But an officer in default in excess of the value of his services cannot enforce a claim for salary.⁶ And one refused admission to his office on the ground of disqualification, by commissioners acting in good faith, cannot recover of the latter damages for the profits of the office withheld; it would be otherwise if the action of the commissioners was prompted by malice or to accomplish some unlawful end.⁷ Where an act attempts to reduce the salary of an officer, but fails to repeal a prior act, the officer may recover under the prior act the amount allowed thereby.⁸ Fees paid to an officer for services to be performed by his successor may be recovered by the latter in an action of *assumpsit* against the former.⁹ Where an officer sues for salary he is not liable to have deducted therefrom a sum earned by outside work.¹⁰

11. Recovering Back Money Illegally Paid. — Salary, fees, and emoluments of an office illegally paid to the incumbent, or any excess so paid, may be recovered back in an action at law as money had and received,¹¹ and this, it has been held, although not paid under a misapprehension of the facts, where paid by order of the council of which the official was a member.¹² But the defendant will be allowed to retain the reasonable expenses of earning such salary and fees, in cases where he assumed to act upon an apparent right to the office.¹³ The right to recover back extends to fees, etc., paid to the offi-

1. Reduction Amounting to Abolition of Office. — *McDaniel v. Yuba County*, 14 Cal. 444; *Marquis v. Santa Anna*, 103 Cal. 661; *De Soto County v. Westbrook*, 64 Miss. 312; *People v. Howland*, 17 N. Y. App. Div. 165; *Bunting v. Gales*, 77 N. Car. 283; *White v. Auditor*, 126 N. Car. 570; *Reid v. Smoulder*, 128 Pa. St. 312. But see *Wesch v. Detroit*, 107 Mich. 149.

Requiring the officer to pay clerk hire is not such a reduction as amounts to such abolition. *Bugg v. Sebastian County*, 64 Ark. 515.

2. Ware v. U. S., 4 Wall. (U. S.) 617; *Heilig v. Puyallup*, 7 Wash. 29; *Bogue v. Seattle*, 19 Wash. 396; *Hall v. State*, 39 Wis. 79.

3. Reduction by Constitutional Amendment. — *State v. Frizzell*, 31 Minn. 460.

4. Recovery by Mandamus Proceedings. — See the title *MANDAMUS*, vol. 19, p. 782.

Where mandamus is asked for against a city to compel payment of salary to a public officer, the city may not set up invalidity in the contract of employment or insufficiency in the amount of money available to pay him. *Com. v. Hinkson*, 161 Pa. St. 266.

5. By Action at Law. — *Mitchell v. U. S.*, 18 Ct. Cl. 281; *Marquis v. Santa Ana*, 103 Cal. 661.

6. Officer in Default. — *Heth Tp. v. Lewis*, 114 Ind. 508.

7. Hannon v. Grizzard, 96 N. Car. 293.

8. Recovering under Prior Unrepealed Act. — *French's Case*, 16 Ct. Cl. 419.

9. Recovery by Successor from Incumbent. — *Hoopes v. Stott*, 2 Chest. Co. Rep. (Pa.) 40.

10. No Deduction on Account of Outside Work. — *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280.

11. Recovering Money Illegally Paid — *United States*. — *Ogden v. Maxwell*, 3 Blatchf. (U. S.) 319.

Arkansas. — *Weeks v. Texarkana*, 50 Ark. 81. *California*. — *Los Angeles County v. Lamb*, 61 Cal. 196.

Iowa. — *Holmes v. Lucas County*, 53 Iowa 211; *Palo Alto County v. Burlingame*, 71 Iowa 201.

Maine. — *Marcotte v. Allen*, 91 Me. 74.

Michigan. — *Texas Tp. v. Wager*, 12 Mich. 39.

Montana. — *Ming v. Truett*, 1 Mont. 322.

Nebraska. — *Cobbey v. Burks*, 11 Neb. 157, 38 Am. Rep. 364; *Hazelet v. Holt County*, 51 Neb. 716.

New York. — *American Exch. F. Ins. Co. v. Britton*, 8 Bosw. (N. Y.) 148; *Townshend v. Dyckman*, 2 E. D. Smith (N. Y.) 224.

New Hampshire. — *Walker v. Ham*, 2 N. H. 238.

Ohio. — *State v. Brown*, 11 Ohio Cir. Dec. 163, 20 Ohio Cir. Ct. 57.

Oregon. — *Grant County v. Sels*, 5 Oregon 243; *Union County v. Hyde*, 26 Oregon 24.

Pennsylvania. — *American Steamship Co. v. Young*, 89 Pa. St. 186, 33 Am. Rep. 748; *Reed v. Cist*, 7 S. & R. (Pa.) 182.

Wisconsin. — *St. Croix County v. Webster*, 111 Wis. 270.

Canada. — *Price v. Percival*, Stuart K. B. (L. C.) 189.

12. Weeks v. Texarkana, 50 Ark. 81. And see the title *PAYMENT*, vol. 22, p. 609.

13. Mayfield v. Moore, 53 Ill. 428, 5 Am. Rep. 52.

cer before the judicial determination of the right.¹ But where the government voluntarily or under a mistake of law pays disputed fees prior to a decision upon the merits, it cannot recover them back or counterclaim them in an action by the officer for other fees.²

Right to Set-off. — A disbursing officer, when sued for a balance in his hands, may set off a claim for extra services unless the government can show some law establishing the illegality of the claim.³ But when the government pleads set-off in an action for salary, the burden is on it to prove the set-off, and not on the petitioner to disprove it.⁴ The right of a *de jure* officer to recover from a *de facto* officer a sum paid to the latter while in office is elsewhere discussed.⁵

XIV. DURATION OF THE OFFICER'S AUTHORITY — 1. "Term" Defined. — As the word "term" used with reference to the tenure of office will be frequently used in this section, a clear definition of the word is essential to an understanding of what is said. Used in this sense the word designates a fixed and definite period of time.⁶ It does not, therefore, apply to the period of service of an officer who is removable at the pleasure of some other officer, and who must be removed on the occurrence of an uncertain event;⁷ nor does it apply to the duration of service of an officer who resigns or vacates his office before the expiration of the fixed period for which he is entitled to serve.⁸

2. Duration of Authority in General — a. ANCIENT USAGE. — In *England* the tenure of ancient common-law offices depends, in a great measure, upon ancient usage.⁹ But in the *United States* there is no ancient usage which can apply to and govern the tenure of offices created by the Federal Constitution and statutes, or by the constitutions and statutes of the several states. The tenure of such offices depends upon a just construction of the constitution and laws under which they exist.¹⁰ The like doctrine is held in *England* where the office is not an ancient common-law office, but of modern origin, under some act of Parliament.¹¹

b. POWER TO FIX OR CHANGE DURATION — AUTHORITY OF LEGISLATURE — (1) In General. — Acting within constitutional limitations the legislature of a state has power to fix, limit, or alter the term of a public office,¹² or

1. *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52.

2. **Recovering Back Disputed Fees.** — *Hedrick's Case*, 16 Ct. Cl. 88; *Painter v. Polk County*, 81 Iowa 242, 25 Am. St. Rep. 489; *Philadelphia v. Gilbert*, 14 Phila. (Pa.) 212, 37 Leg. Int. (Pa.) 376.

3. **Right to Set-off.** — *U. S. v. Fillebrown*, 7 Pet. (U. S.) 28.

4. *Jones v. U. S.*, 39 Fed. Rep. 410.

5. See the title *DE FACTO OFFICERS*, vol. 8, p. 771.

6. **"Term" Defined.** — *State v. Breidenthal*, 55 Kan. 308; *Speed v. Crawford*, 3 Met. (Ky.) 207; *State v. Stonestreet*, 99 Mo. 361; *State v. Page*, 20 Mont. 246; *People v. Brundage*, 78 N. Y. 403; *State v. Tallman*, 24 Wash. 426. See also *Gibbs v. Morgan*, 39 N. J. Eq. 126; *People v. McClave*, 99 N. Y. 83; *People v. Leask*, 67 N. Y. 521; *State v. Bryson*, 44 Ohio St. 457.

7. *Speed v. Crawford*, 3 Met. (Ky.) 207. See also *Smalley v. Snell*, 6 Wash. 161.

8. *Baker v. Kirk*, 33 Ind. 517.

9. **Ancient Usage.** — *Smyth v. Latham*, 9 Bing. 692, 23 E. C. L. 424; *Robarts v. London*, 49 L. T. N. S. 455, 31 W. R. 529. See also the opinion of *Sandford, J.*, in *Conner v. New York*, 2 Sandf. (N. Y.) 368.

10. **United States — Duration Depends on Construction.** — *Ex p. Hennen*, 13 Pet. (U. S.) 260; *Conner v. New York*, 2 Sandf. (N. Y.) 355.

11. **English Offices under Act of Parliament.** — *Smyth v. Latham*, 9 Bing. 692, 23 E. C. L. 424.

12. **Power of Legislature — California.** — *People v. Haskell*, 5 Cal. 357 [cited in *Cohen v. Wright*, 22 Cal. 319; *Pennie v. Reis*, 80 Cal. 269; *People v. Van Gaskin*, 5 Mont. 367]; *People v. Squires*, 14 Cal. 12; *Wetherbee v. Cazneau*, 20 Cal. 504; *In re Bulger*, 45 Cal. 553.

Colorado. — *People v. Osborne*, 7 Colo. 605.

Delaware. — *State v. Burris*, (Del. 1901) 49 Atl. Rep. 930.

Illinois. — *People v. Lippincott*, 67 Ill. 333; *People v. La Salle County*, 100 Ill. 495; *People v. Kingsbury*, 100 Ill. 509.

Indiana. — *Walker v. Peele*, 18 Ind. 264; *Baker v. Kirk*, 33 Ind. 517; *State v. Menaugh*, 151 Ind. 260.

Kentucky. — *Standeford v. Wingate*, 2 Duv. (Ky.) 440.

Massachusetts. — *Taft v. Adams*, 3 Gray (Mass.) 126.

Minnesota. — *Jordan v. Bailey*, 37 Minn. 174.

Missouri. — *State v. Davis*, 44 Mo. 129; *Wilcox v. Rodman*, 46 Mo. 322; *State v. Matthews*, 94 Mo. 117.

Montana. — *People v. Van Gaskin*, 5 Mont. 352.

Nebraska. — *State v. Stewart*, 52 Neb. 243.

New York. — *People v. McKinney*, 52 N. Y. 374; *People v. Foley*, 148 N. Y. 677, affirming 86 Hun (N. Y.) 621; *Conner v. New York*, 2

to delegate this power to executive or judicial officers,¹ or to inferior municipal bodies.²

The Delegation of Authority to Appoint a subordinate officer, if the duration of his term is not fixed, confers upon the appointing power the authority to fix such term.³

(2) *Power to Abridge the Term of an Incumbent.* — It is within the power of the legislature, in the absence of constitutional restriction, to shorten the term of a public office, even though the term of the person in office is thereby shortened, or to abolish the office during the term of an incumbent, or to declare the same vacant.⁴ The exercise of such power by the legislature does not violate the constitutional inhibitions against passing any law impairing the obligation of a contract,⁵ or depriving any person of property without due process of law,⁶ for a public office is not the property of the incumbent, nor does the incumbent hold by grant or contract.⁷

(3) *Conclusiveness of Statutory Term.* — Where the term of a public office is fixed by statute, the appointing power cannot, in making the appointment, abridge the term so fixed.⁸ If a person is appointed for a shorter period than

Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; People v. Fitchie, 76 Hun (N. Y.) 80; People v. Morrell, 21 Wend. (N. Y.) 563.

Ohio. — State v. Howe, 25 Ohio St. 588, 18 Am. Rep. 321.

Oregon. — Territory v. Pyle, 1 Oregon 149; State v. Simon, 20 Oregon 372.

Pennsylvania. — Com. v. Benfield, 5 Pa. Dist. 382.

Tennessee. — State v. Wilson, 12 Lea (Tenn.) 246.

Virginia. — Branham v. Long, 78 Va. 352.

Washington. — Davidson v. Carson, 1 Wash. Ter. 307.

Wisconsin. — State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87.

The legislature may abridge the term of an office created by it, by express words, or specify an event upon the happening of which it shall end. People v. Whitlock, 92 N. Y. 192.

Territorial Officers. — In the *United States* the legislative assembly of a territory has the power to shorten or lengthen the terms of officers elected solely under the laws of the territory, and Congress possesses the same power. Davidson v. Carson, 1 Wash. Ter. 307.

Sometimes the Legislature Is Expressly Sanctioned or Required by Constitutional Provision to fix the terms of public officers. Christy v. Sacramento County, 39 Cal. 3; *In re* Stuart, 53 Cal. 745; Speed v. Crawford, 3 Met. (Ky.) 207; People v. Sturges, 27 N. Y. App. Div. 387.

1. **Delegation of Power.** — State v. Williford, 104 Tenn. 694.

Appointing Power Cannot Evade Statutory Provision by Omitting to Fix Term. — State v. Police Com'rs, 88 Mo. 144, *affirming* 14 Mo. App. 297.

2. Chandler v. Lawrence, 128 Mass. 213.

3. **Power to Appoint Confers Authority to Fix Term.** — State v. Williford, 104 Tenn. 695; State v. Manlove, 33 Tex. 798. See also Williams v. Newport, 12 Bush (Ky.) 438.

4. **Power of Legislature to Abridge Incumbent's Term.** — *United States.* — Butler v. Pennsylvania, 10 How. (U. S.) 402.

Arkansas. — Robinson v. White, 26 Ark. 139.

California. — People v. Squires, 14 Cal. 17, *overruling* Smith v. Stillman (not reported); People v. Banvard, 27 Cal. 470.

Colorado. — *In re* Senate Bill No. 45, 12 Colo. 339.

Delaware. — State v. Burris, (Del. 1901) 49 Atl. Rep. 930.

Illinois. — People v. Auditor, 2 Ill. 537.

Indiana. — Walker v. Peelle, 18 Ind. 264.

Kentucky. — Standeford v. Wingate, 2 Duv. (Ky.) 440.

Massachusetts. — Taft v. Adams, 3 Gray (Mass.) 126.

Missouri. — State v. Davis, 44 Mo. 129.

Montana. — People v. Van Gaskin, 5 Mont. 352.

Nebraska. — State v. Stewart, 52 Neb. 243.

New York. — Koch v. New York, 152 N. Y. 72; Conner v. New York, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; People v. Morrell, 21 Wend. (N. Y.) 563.

Oregon. — Territory v. Pyle, 1 Oregon 149.

Pennsylvania. — Com. v. Benfield, 5 Pa. Dist. 382.

Wisconsin. — State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87.

5. **Does Not Impair Obligation of Contract.** — *United States.* — Butler v. Pennsylvania, 10 How. (U. S.) 402.

Arkansas. — Robinson v. White, 26 Ark. 139.

Kentucky. — Standeford v. Wingate, 2 Duv. (Ky.) 440. See also Williams v. Newport, 12 Bush (Ky.) 439.

Missouri. — State v. Davis, 44 Mo. 129.

Montana. — People v. Van Gaskin, 5 Mont. 352.

New York. — Conner v. New York, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285.

Oregon. — Territory v. Pyle, 1 Oregon 149.

Wisconsin. — State v. Douglas, 26 Wis. 428, 7 Am. Rep. 87.

6. **Depriving of Property Without Due Process of Law.** — People v. Squires, 14 Cal. 12; People v. Van Gaskin, 5 Mont. 352; Conner v. New York, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285. See also People v. Sturges, 156 N. Y. 580, *affirming* 27 N. Y. App. Div. 387, 21 Misc. (N. Y.) 605.

7. See *supra*, this title, *Nature and Incidents of Public Offices — Legislative Control*. And see the title IMPAIRMENT OF OBLIGATION OF CONTRACTS, vol. 15, p. 1037.

8. **Appointing Power Cannot Abridge Statutory Term.** — Matter of Executive Communication, 14 Fla. 277; People v. Lord, 9 Mich. 227;

that prescribed, the appointment is valid for the full statutory period.¹ So where the term of an elective office is fixed by statute, neither the occupant of the office, except by death or resignation, the election officers, nor the electors can shorten or lengthen such term.²

(4) *Constitutional Limitations* — (a) *Term Fixed by Constitution* — *aa. RULE STATED.* — In the *United States* the terms of certain state officers are not infrequently fixed by the state constitutions. Where this is the case the legislature cannot extend or abridge the term so fixed, either directly or indirectly.³

bb. ABOLITION OF OFFICES IN CREATION OF NEW POLITICAL ORGANIZATIONS. — But the legislature when authorized to create new political organizations as counties, cities, and incorporated villages, may abolish old organizations, as by the creation of two counties out of an existing county, or by the creation of a city from territory previously existing under some other form of government, although the effect is to abolish offices existing under the old political organizations whose terms were fixed by the constitution, and this is so though such offices are abolished during the terms of the existing incumbents thereof.⁴

cc. ABRIDGMENT OF TERM BY CONSTITUTIONAL AMENDMENT OR BY NEW CONSTITUTION. — But though a term of office fixed by the constitution cannot be changed by the legislature it may be abridged by an amendment to the constitution or by a new constitution.⁵

(b) *Term Limited by Constitution* — *aa. TERM LIMITED TO DEFINITE PERIOD OF TIME.* — Where the constitution, without expressly fixing a term, limits it to a certain

Stadler v. Detroit, 13 Mich. 346. See also *State v. Brady*, 42 Ohio St. 504.

1. *Matter of Executive Communication*, 14 Fla. 277; *Hale v. Bischoff*, 53 Kan. 301; *People v. Lord*, 9 Mich. 227.

2. *Conclusiveness of Statutory Term of Elective Office.* — *People v. Case*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 219, 64 Hun (N. Y.) 636.

So where the term of an elective officer is fixed by statute, his commission, issued by the governor of the state, cannot extend that term. *Hench v. State*, 72 Ind. 297; *State v. Chapin*, 110 Ind. 272; *State v. Lylies*, 1 McCord L. (S. Car.) 238. Such commission is merely *prima facie* evidence of the facts recited therein. *State v. Chapin*, 110 Ind. 272; *State v. Lylies*, 1 McCord L. (S. Car.) 238. See also *Macey v. Curtis*, 14 S. Car. 367.

3. *Legislature Cannot Alter Term Fixed by Constitution* — *Arkansas.* — *Smith v. Askew*, 48 Ark. 82.

California. — *Westbrook v. Rosborough*, 14 Cal. 181; *People v. Perry*, 79 Cal. 105.

Indiana. — *Deweese v. State*, 10 Ind. 343; *Markle v. Wright*, 13 Ind. 548; *Douglass v. State*, 31 Ind. 429; *Hench v. State*, 72 Ind. 297; *Griebel v. State*, 111 Ind. 369; *Pursel v. State*, 111 Ind. 519; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 662.

Kansas. — *Hagerly v. Arnold*, 13 Kan. 367; *Peters v. State Canvassers*, 17 Kan. 365; *Smith v. Holt*, 24 Kan. 771; *State v. Foster*, 36 Kan. 504; *Wilson v. Clark*, 63 Kan. 505.

Kentucky. — *Standeford v. Wingate*, 2 Duv. (Ky.) 440.

Maryland. — *Marshall v. Harwood*, 5 Md. 423.

Mississippi. — *Brady v. West*, 50 Miss. 68; *Fant v. Gibbs*, 54 Miss. 396.

Missouri. — *State v. Police Com'rs*, 14 Mo. App. 297, affirmed 88 Mo. 144.

Montana. — *People v. Van Gaskin*, 5 Mont. 352.

Nebraska. — *State v. Stewart*, 52 Neb. 243.

New York. — *Gertum v. King's County*, 109 N. Y. 170; *Ex p. M'Collum*, 1 Cow. (N. Y.) 550; *Garey v. People*, 9 Cow. (N. Y.) 640, affirming 6 Cow. (N. Y.) 642; *Conner v. New York*, 2 Sandf. (N. Y.) 355; *Matter of Burger*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 370.

Ohio. — *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Harvey*, 4 Ohio Cir. Dec. 227, 8 Ohio Cir. Ct. 599.

Oregon. — *Territory v. Pyle*, 1 Oregon 149.

South Carolina. — *State v. Lylies*, 1 McCord L. (S. Car.) 238.

Tennessee. — *State v. Maloney*, 92 Tenn. 62.

Wisconsin. — *Atty.-Gen. v. Brunst*, 3 Wis. 787; *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87.

See also the title *CONSTITUTIONAL LAW*, vol. 6, p. 929.

Where the Term for an Office Fixed by a New Constitution or by a Constitutional Amendment is different from that fixed by statute at the time the new provision goes into effect, the statutory term is abrogated. *People v. Palmer*, 154 N. Y. 133, affirming 21 N. Y. App. Div. 101.

4. *Creating New Political Organizations.* — *People v. Morrell*, 21 Wend. (N. Y.) 563; *Gertum v. Kings County*, 109 N. Y. 170.

Rule Where the Existing Political Organizations Are Not Abolished or Changed. — But where a town is transferred from one county to another, or a new county created from definite subsisting towns in an existing county, without in either case changing the names or territorial limits of the towns, the legislature cannot abridge the term of office for which officers of such towns had been appointed, where such terms had been fixed by the constitution. *People v. Garey*, 6 Cow. (N. Y.) 642. See also *Ex p. M'Collum*, 1 Cow. (N. Y.) 550.

5. *Abridgment by New Constitution or Amendment.* — *Bailey v. State*, 56 Miss. 637; *State v. Ewing*, 17 Mo. 515; *Conner v. New York*, 2 Sandf. (N. Y.) 355, affirmed 5 N. Y. 285.

definite period of time, the legislature cannot fix a term extending over a longer period.¹ But a constitutional provision declaring that no term of office shall exceed a certain prescribed time does not apply to an office the term of which continues during the pleasure of the appointing power.²

bb. TERM LIMITED TO PERIOD FOR WHICH OFFICER WAS ELECTED OR APPOINTED. — The constitutions of some of the states provide that the terms of officers, or of certain officers, shall not be extended for a longer period than that for which they were elected or appointed.³ Such a provision is not violated by a statute making such reasonable changes in the times for electing such officers as the public interest may require, although an incidental result thereof is to extend the time of the present incumbents of the offices,⁴ nor is it violated by a statute the object of which is not to extend but to fix the commencement of a term of office,⁵ nor by an act abolishing an office of legislative creation before the end of the term of the present incumbent thereof.⁶

(c) *Legislature Cannot Extend Term of Officer Elected under Constitution* — *aa. RULE STATED.* Where the constitution directs that certain officers shall be elected by the people, and authorizes the legislature to fix the term of office and the time and manner of election, and the legislature has exercised the authority conferred, and in pursuance of its enactment an officer has been elected, a subsequent act extending his term beyond the period fixed is unconstitutional.⁷

bb. REASONABLE CHANGES IN TIMES FOR HOLDING ELECTIONS PERMISSIBLE. — But it has been held that a statute making reasonable changes in the times for holding elections to fill certain offices, though incidentally it results in extending the terms of the present incumbents of such offices, does not violate a constitutional provision making the offices elective, provided the terms of the present incumbents are not extended for so long a period as to raise the presumption of a design substantially to deprive the offices of their elective character.⁸

(d) *Abolition of Office Not Precluded by Constitutional Inhibition Against Diminution of Emoluments.* — A constitutional provision declaring that no law shall diminish the salary or emoluments of any public officer after his election or appoint-

1. *Constitutional Limitation of Term to a Definite Period of Time* — *California.* — *Christy v. Sacramento County*, 39 Cal. 3; *People v. Perry*, 79 Cal. 105; *People v. Clinton*, (Cal. 1889) 21 Pac. Rep. 426.

Indiana. — *Indianapolis Brewing Co. v. Claypool*, 149 Ind. 193.

Kansas. — *Lewis v. Lewelling*, 53 Kan. 201; *State v. Breidenthal*, 55 Kan. 308.

Kentucky. — *Sinling Fund Com'rs v. George*, 104 Ky. 260.

Louisiana. — *State v. Crozat*, 8 La. Ann. 295.

Michigan. — *People v. Burch*, 84 Mich. 408.

Ohio. — *State v. Alter*, 3 Ohio Cir. Dec. 127.

Oregon. — *David v. Portland Water Committee*, 14 Oregon 98.

Texas. — *State v. Catlin*, 84 Tex. 48.

Creation of Vacancy and Extension of Incumbent's Term Beyond Constitutional Limit Prohibited. — *State v. Harvey*, 8 Ohio Cir. Ct. 599, 4 Ohio Cir. Dec. 227.

2. *State v. Johnson*, 123 Mo. 43.

3. See the constitutions of the several states.

For the Provisions of a Statute Held Not to Extend the Term of the incumbent of an office beyond the period for which he was elected, see *State v. Tallman*, 24 Wash. 428.

4. *Statute Changing Time of Election.* — *State v. Ranson*, 73 Mo. 78. See also *State v. McGovney*, 92 Mo. 428.

5. *Statute Fixing Commencement of Term.* —

Matter of House Bill No. 38, 9 Colo. 631; *Sipe v. People*, 26 Colo. 127. See also *State v. Menaugh*, 151 Ind. 260. See *State v. Tallman*, 24 Wash. 428.

6. *Statute Abolishing Office Before Completion of Incumbent's Term.* — *Bogue v. Seattle*, 19 Wash. 396.

7. *Unconstitutionality of Statute Extending Term of Elective Officer.* — *State v. Arrington*, 18 Nev. 412; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302; *People v. McKinney*, 52 N. Y. 374, *disapproving* *People v. Batchelor*, 22 N. Y. 128; *People v. Foley*, 148 N. Y. 677, *affirming* 86 Hun (N. Y.) 621; *People v. Randall*, 151 N. Y. 497, *affirming* 91 Hun (N. Y.) 266; *Matter of Burger*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 370; *State v. Tallman*, 24 Wash. 426. See also *People v. Palmer*, 154 N. Y. 133, *affirming* 21 N. Y. App. Div. 101. But see *State v. Johnson*, 59 N. J. L. 59; *Com. v. Drewry*, 15 Gratt. (Va.) 1.

But in *California* it has been decided otherwise. *Christy v. Sacramento County*, 39 Cal. 3.

8. *Jordan v. Bailey*, 37 Minn. 174. See also *State v. Benedict*, 15 Minn. 198; *State v. Wilson*, 12 Lea (Tenn.) 246.

Statute Postponing Elections and Providing for Filling Vacancies Caused Thereby Not Unconstitutional. — *Wilson v. Clark*, 63 Kan. 505; *State v. Andrews*, 64 Kan. 474.

ment, or during his term of office, does not preclude the legislature from abolishing an office before the end of the term of the present incumbent thereof.¹

(e) **Extent of Invalidity of Statutes Attempting to Alter Constitutional Term.** — Where the term of an office is definitely fixed by the constitution, a statute which attempts to enlarge or abridge the term so fixed is not necessarily wholly void, but only so in so far as it attempts to change the constitutional term, and officers elected or appointed under its provisions will be entitled to serve for the period fixed by the constitution.² But where the constitution does not fix but merely limits the term, there is some conflict of authority upon the question whether a statute which attempts to extend it beyond the period limited is wholly or only partially void.³

(f) **Peculiar Provisions of Constitutional Limitations Construed.** — Certain peculiar provisions found in the constitutions of some of the states, limiting the power of the legislature to fix or change the terms of the public officers, have received the interpretation of the courts.⁴

c. **INTERPRETATION OF LAWS FIXING OR REGULATING DURATION OF AUTHORITY** — (1) *In General.* — Where the tenure of an office is regulated by constitutional or statutory provision the duration of the authority of an incumbent thereof is to be determined by the meaning and intention of the enactment.⁵ Generally public officers are authorized to serve for a fixed and definite period of time, as for a year,⁶ or a certain number of years,⁷ or during the term of the officer by whom they are appointed.⁸ Sometimes the term of an office is for life⁹ or during good behavior.¹⁰ But not infrequently,

1. *State v. Burris*, (Del. 1901) 49 Atl. Rep. 930; *Bogue v. Seattle*, 19 Wash. 396.

2. **Where Constitution Definitely Fixes Term.** — *Westbrook v. Rosborough*, 14 Cal. 181; *State v. Maloney*, 92 Tenn. 62. See also *State v. Alter*, 3 Ohio Cir. Dec. 127.

3. **Where Constitution Merely Limits Term.** — In *Ohio* it has been held that such a statute is wholly void and that persons elected or appointed under its provisions are not entitled to serve for the period limited by the constitution. *State v. Alter*, 3 Ohio Cir. Dec. 127. See also, as to *Indiana*, *Indianapolis Brewing Co. v. Claypool*, 149 Ind. 193.

But in *Kentucky* it has been held that a person elected under such a statute is entitled to hold for such limited period. *Sinking Fund Com'rs v. George*, 104 Ky. 260.

This seems also to be the rule in *Montana*. *Harrigan v. Lynch*, 21 Mont. 36.

And as to *Kansas*, see *Lewis v. Lewelling*, 53 Kan. 207.

As to *California*, see *People v. Perry*, 79 Cal. 105; *People v. Clinton*, (Cal. 1889) 21 Pac. Rep. 426.

4. **"Officers Shall Hold Their Offices for the Term for Which They Were Elected"** — *Legislature May Abolish Office.* — *State v. Harris*, 1 N. Dak. 190. See also *State v. Tilford*, 1 Nev. 240.

For the construction of certain peculiar constitutional provisions limiting the power of the legislature to fix or change the terms of public officers, see also *Bryant v. State*, 1 How. (Miss.) 351; *People v. Comstock*, 78 N. Y. 356, *reversing* 18 Hun (N. Y.) 311; *People v. Palmer*, 154 N. Y. 133, *affirming* 21 N. Y. App. Div. 101; *Matter of Burger*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 370; *Powers v. Hurst*, 2 Humph. (Tenn.) 24.

5. **Duration Determined by Meaning and Intention of Enactment.** — *Smyth v. Latham*, 9 Ping. 692; *Ex p. Hennen*, 13 Pet. (U. S.) 260.

6. **Terms of a Year.** — *State v. Wayman*, 2 Gill & J. (Md.) 254; *People v. McKinney*, 52 N. Y. 374; *Greer v. Asheville*, 114 N. Car. 678.

7. **Terms of a Certain Number of Years** — *California.* — *Hale v. McGettigan*, 114 Cal. 112.

Illinois. — *Ladd v. Board of Trustees*, 80 Ill. 233.

Indiana. — *Walker v. Peelle*, 18 Ind. 264; *Manson v. State*, 66 Ind. 78.

Kansas. — *State v. Foster*, 36 Kan. 504; *Killion v. Herman*, 43 Kan. 37.

Louisiana. — *Kelly v. Gilly*, 5 La. Ann. 534.

Michigan. — *Stadler v. Detroit*, 13 Mich. 346.

Mississippi. — *Smith v. Halfacre*, 6 How. (Miss.) 582; *State v. Williams*, 49 Miss. 640;

Andrews v. State, 69 Miss. 740.

Missouri. — *State v. Percy*, 44 Mo. 159;

State v. Kurtzeborn, 78 Mo. 98, *affirming* 9

Mo. App. 245.

New York. — *People v. Leask*, 67 N. Y. 521, *affirming* 6 Daly (N. Y.) 517; *People v. Randall*,

151 N. Y. 497; *People v. Green*, 2 Wend. (N. Y.) 266; *People v. Waite*, 9 Wend. (N. Y.) 58.

North Carolina. — *Bryan v. Patrick*, 124 N. Car. 651.

Ohio. — *State v. Squire*, 39 Ohio St. 197; *State v. Brady*, 42 Ohio St. 504; *State v. Connor*, 3 Ohio Cir. Dec. 151, 5 Ohio Cir. Ct. 305.

Pennsylvania. — *Com. v. Kingsbury*, 5 L. T. N. S. (Pa.) 51; *Kuhlman v. Smeltz*, 171 Pa. St. 440, 37 W. N. C. (Pa.) 127.

Wisconsin. — *Atty.-Gen. v. Brunst*, 3 Wis. 787.

8. **Term Limited to Term of Appointing Officer.** — *Silver v. Magruder*, 32 Md. 387.

Office Limited to Time Allowed for Completion of Work — No Extension. — *Nichols v. Comptroller*, 4 Stew. & P. (Ala.) 154.

9. **Life Tenure.** — *Reg. v. Durham*, 10 Mod. 146; *M'Mahon v. Lennard*, 6 H. L. Cas. 970; *Jarvis v. Waterbury*, 84 Hun (N. Y.) 462.

10. **Tenure During Good Behavior.** — *Bruce v.*

especially in the case of ministerial offices, it is provided that the incumbent shall hold at the pleasure of the appointing power, or of some superior officer or official body.¹ The power of removal is sometimes, however, expressly limited to a removal for cause.² Many of the peculiar provisions of constitutional and statutory enactments relating to the terms of public officers have received the interpretation of the courts.³

(2) *Interpretation Followed That Limits Term to Shortest Time.* — If a statute or constitutional provision fixing or limiting the duration of an official term is ambiguous, that interpretation should be followed which limits the term to the shortest time.⁴

(3) *Presumption Is that Term Fixed for First Incumbent Governs Generally.* — When the law which creates an office fixes the duration of the term of the

Fox, 1 Dana (Ky.) 447; State v. Schumaker, 27 La. Ann. 332; Greer v. Asheville, 114 N. Car. 679; Hays v. Harley, Mill (S. Car.) 267; State v. Lyles, 1 McCord L. (S. Car.) 238.

Officer Holding under Constitution "During Good Behavior" May Hold Only During Life of Statute Creating Office. — Bruce v. Fox, 1 Dana (Ky.) 447.

1. **Holding at Pleasure of Superior Officer or Official Body** — *England.* — Dighton's Case, 1 Vent. 82; Delea v. Cork, Ir. R. 5 C. L. 37, 19 W. R. 471; *Ex p.* Robertson, 11 Moo. P. C. 288; Smyth v. Latham, 9 Bing. 692, 23 E. C. L. 424, 3 Moo. & S. 251, 1 Cromp. & M. 547, 3 Tyrw. 509.

Arkansas. — Kaufman v. Stone, 25 Ark. 336.

Mississippi. — State v. Cooper, 53 Miss. 615.

Montana. — State v. Page, 20 Mont. 238.

Nebraska. — State v. Board of Public Lands,

etc., 7 Neb. 42; State v. Somers, 35 Neb. 325.

New Jersey. — Townsend v. Boughner, 55 N. J. L. 380.

New York. — People v. Fire Com'rs, 73 N. Y. 437; People v. Whitlock, 92 N. Y. 191;

Langdon v. New York, 92 N. Y. 427.

Pennsylvania. — Field v. Girard College, 54 Pa. St. 233.

West Virginia. — Hunter v. Berkeley

Springs, 47 W. Va. 343.

2. See *infra*, this title, *Termination of Authority* — *Removal, Suspension, and Reinstatement.*

3. **Meaning of "Year" in Constitution or Statute Defining Term.** — See Thornton v. Boyd, 25

Miss. 598 (not necessarily a calendar year),

and see YEAR.

Meaning of "Biennially." — See People v. Kil-

bourn, 68 N. Y. 479, *affirming* 9 Hun (N. Y.)

573 (stated under BIENNIAL, vol. 4, p. 33). See

also Hunter v. Berkeley Springs, 47 W. Va.

343. But see Bryan v. Patrick, 124 N. Car.

651.

Term Equal to the Period Between General Elections. — See Smith v. Halfacre, 6 How. (Miss.)

582.

Officers to Hold by Same "Tenure" as Certain

Other Officers. — See People v. Waite, 9 Wend.

(N. Y.) 58, and see TENURE OF OFFICE.

Officers to Serve "for the Same Period" as Cer-

tain Other Officers. — See People v. Leask, 67

N. Y. 521, *affirming* 6 Daly (N. Y.) 517, and

see PERIOD, vol. 22, p. 678.

Power of Legislature under Constitutional

Amendment to Extend Official Terms. — People

v. La Salle County, 100 Ill. 495; People v.

Kingsbury, 100 Ill. 509.

For the Construction of Peculiar Constitutional

and Statutory Provisions relating to the terms of certain public offices, see also the following cases:

California. — Hale v. McGettigan, 114 Cal. 112.

Colorado. — Matter of House Bill No. 38, 9 Colo. 631; Sipe v. People, 26 Colo. 127.

Georgia. — Hegg v. Walters, 46 Ga. 386; Crisp v. Brown, 49 Ga. 190.

Illinois. — People v. Lippincott, 67 Ill. 333; Becker v. People, 156 Ill. 301, *affirming* 55 Ill.

App. 285.

Indiana. — Walker v. Peelle, 18 Ind. 264;

Manson v. State, 66 Ind. 78; Hench v. State,

72 Ind. 297; Parcel v. State, 110 Ind. 122;

Jones v. State, 112 Ind. 193; Barrett v. State,

112 Ind. 322.

Iowa. — State v. Coenzler, 9 Iowa 433; Cliff

v. Parsons, 90 Iowa 665.

Kentucky. — Jackson v. Richmond, (Ky.

1900) 56 S. W. Rep. 501.

Louisiana. — State v. Crozat, 8 La. Ann. 295;

State v. Brittin, 52 La. Ann. 94.

Maryland. — Thomas v. Owens, 4 Md. 189;

Silver v. Magruder, 32 Md. 387.

Michigan. — Stadler v. Detroit, 13 Mich. 346.

Minnesota. — State v. Frizzell, 31 Minn. 460.

Mississippi. — Dennistoun v. Potts, 26 Miss.

113; Cooper v. Moore, 44 Miss. 386; Andrews

v. State, 69 Miss. 740.

Missouri. — State v. Ewing, 17 Mo. 515;

State v. Percy, 44 Mo. 159; State v. Gam-

mon, 73 Mo. 421.

Montana. — State v. Page, 20 Mont. 238.

Nebraska. — State v. Board of Public Lands,

7 Neb. 42; State v. Somers, 35 Neb. 322.

Nevada. — Cordiell v. Frizzell, 1 Nev. 130.

New York. — People v. Palmer, 154 N. Y.

133, *affirming* 21 N. Y. App. Div. 101; People v.

Randall, 91 Hun (N. Y.) 266.

North Carolina. — State v. Wilroy, 10 Ired.

L. (32 N. Car.) 329.

Ohio. — State v. Heffner, 59 Ohio St. 368.

Pennsylvania. — Com. v. Sutherland, 3 S. &

R. (Pa.) 145; Com. v. Kingsbury, 5 L. T. N. S.

(Pa.) 51; Kelly's Case, 25 Pa. L. J. 149; Matter

of Contested Election, 13 Phil. (Pa.) 583, 34

Leg. Int. (Pa.) 259; Koontz v. Franklin

County, 76 Pa. St. 154; Com. v. Kilgore, 82

Pa. St. 396; Kuhlman v. Smeltz, 171 Pa. St.

440, 37 W. N. C. (Pa.) 127.

Tennessee. — Tatum v. Rivers, 7 Baxt.

(Tenn.) 295; State v. Maloney, 92 Tenn. 62.

Texas. — State v. Catlin, 81 Tex. 48.

4. **Ambiguous Provision — Term Limited to**

Shortest Time. — People v. Brenham, 3 Cal.

477; Judicial Term of Office, 114 N. Car. 923;

first incumbent thereof, it will be presumed to be the intention of the law-making power that the period so fixed shall be the term of the office generally.¹

(4) *Provision for Annual Appointment.* — Generally, where a statute provides that an officer shall be appointed annually, an appointment made in pursuance thereof will entitle the appointee to hold for one year.²

(5) *Reference to Former Statute in Creation of Office.* — Where an office is created and its term fixed by statute, and subsequently the legislature abolishes the office and creates an office of a similar character, without making provision as to its term, and refers to the former act for the ascertainment of the duties and emoluments of the incumbent, the former statute will govern also as to the term of the office.³

(6) *Statute Altering Term Presumed to Be Prospective.* — A statute enlarging or abridging the term of an existing office is presumed to be purely prospective and does not apply to the term of the present incumbent of the office unless the intention to extend or abridge his term is clearly made manifest by the language used.⁴

d. DURATION OF AUTHORITY WHEN TENURE IS NOT FIXED. — All offices, the tenure of which is not fixed by constitutional or statutory provision, are held at the will and discretion of some department of the government, usually the appointing power, and the incumbents are subject to removal at pleasure, unless a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage.⁵

Under Express Constitutional Provisions in Some States, if the term of any officer is not fixed by law, such officer is entitled to hold his position during the pleasure of the authority making the appointment.⁶ Such a provision has been held to apply only when the power of appointment is continuous.⁷

3. When Authority Commences — *a. WHEN DATE IS FIXED BY LAW.* — The date upon which a public officer shall commence his term of office is generally fixed by statute or constitutional provision, such a period of time being usually allowed to intervene between the date of election or appointment and the commencement of the term as will permit the officer to qualify in the required manner.⁸ Sometimes, however, it is provided that the term

Smith *v.* Bryan, 4 Va. Sup. Ct. 121; Wright *v.* Adams, 45 Tex. 134. See also People *v.* Palmer, 154 N. Y. 133, affirming 21 N. Y. App. Div. 101.

1. State *v.* Percy, 44 Mo. 159. And see People *v.* Colton, 6 Cal. 84; Hale *v.* Bischoff, 53 Kan. 301; Hoke *v.* Richie, 100 Ky. 66; State *v.* Stonestreet, 99 Mo. 361. But see People *v.* Woodruff, 32 N. Y. 357.

2. **Appointment Annually.** — Buffalo *v.* Mackay, 15 Hun (N. Y.) 201. But see Hunter *v.* Berkeley Springs, 47 W. Va. 343 (holding provision for annual election directory).

3. **Reference to Former Statute.** — State *v.* Hyde, 121 Ind. 20.

4. **Statute Changing Term of Existing Office Presumed to Be Prospective.** — State *v.* Johnson, 59 N. J. L. 59; Greer *v.* Asheville, 114 N. Car. 678; Farrel *v.* Pingree, 5 Utah 443. See also People *v.* McKinney, 52 N. Y. 374.

5. **Duration of Authority When Tenure Is Not Fixed** — United States, — Exp. Hennen, 13 Pet. (U. S.) 230.

Iowa. — Cliff *v.* Parsons, 90 Iowa 665.

Kansas. — Lewis *v.* Lewelling, 53 Kan. 201.

Massachusetts. — Avery *v.* Lyringham, 3 Mass. 160, 3 Am. Dec. 105.

Minnesota. — Parish *v.* St. Paul, 84 Minn. 426.

New York. — Kip *v.* Buffalo, 123 N. Y. 152; Conner *v.* New York, 2 Sandf. (N. Y.) 368.

See also Abrams *v.* Horton, 18 N. Y. App. Div. 208.

Texas. — Keenan *v.* Perry, 24 Tex. 253; State *v.* Manlove, 33 Tex. 798.

But see People *v.* Mobley, 2 Ill. 215; Field *v.* People, 3 Ill. 79.

And see *infra*, this title, *Termination of Authority — Removal, Suspension, and Reinstatement.*

The Tenure of Ministerial Offices, in general, is, unless otherwise provided by law, during the pleasure of the appointing power. Com. *v.* Bussier, 5 S. & R. (Pa.) 451.

6. **Constitutional Provision for Terms Not Fixed by Law.** — Christy *v.* Sacramento County, 39 Cal. 3; Hubert *v.* Mendheim, 64 Cal. 213; People *v.* Perry, 79 Cal. 105; State *v.* Breidenthal, 55 Kan. 308; Bergen *v.* Powell, 94 N. Y. 591; Jarvis *v.* Waterbury, 84 Hun (N. Y.) 462; People *v.* Comptroller, 20 Wend. (N. Y.) 595; Abrams *v.* Horton, 18 N. Y. App. Div. 208.

7. **Provision Applies Only When Power of Appointment Is Continuous.** — Jarvis *v.* Waterbury, 84 Hun (N. Y.) 462; Bergen *v.* Powell, 94 N. Y. 591.

8. **Date Fixed by Law** — Alabama. — Beebe *v.* Robinson, 64 Ala. 171.

California. — People *v.* Colton, 6 Cal. 84.

Indiana. — Griebel *v.* State, 111 Ind. 369.

Iowa. — State *v.* Coenzler, 9 Iowa 433.

Kansas. — State *v.* Thoman, 10 Kan. 191;

shall commence from the time of election or appointment.¹ It is within the power of the legislature so to fix the commencement of the term in the absence of a constitutional provision to the contrary.² But where the constitution fixes a certain time for the commencement of a term, the legislature cannot fix a different time for its commencement.³ Nor, where the constitution has limited the length of the term, can the legislature fix a date for its commencement that will have the effect of making it longer or shorter than the period prescribed.⁴

Time of Taking Possession Does Not Affect Date of Commencement. — Where the date upon which a term of office shall commence is fixed by constitution or statute, the term of a person elected thereto will commence on that date, although he does not take possession of the office until a time subsequent thereto.⁵

Where It Is Provided that the Term Shall Run from a Certain Date the day of date is excluded.⁶

b. WHEN NO DATE IS FIXED BY LAW — (1) *In General.* — Where no time is fixed for the commencement of an official term, it begins to run either from the date of election⁷ or appointment,⁸ or from the time the person chosen is authorized by his own act to assume the duties of his office.⁹

Hagerty v. Arnold, 13 Kan. 367; Peters v. State Canvassers, 17 Kan. 365; Van Wye v. Clark, 41 Kan. 744; Killion v. Herman, 43 Kan. 37.

Kentucky. — McGee v. Gill, 79 Ky. 106; Jackson v. Richmond, (Ky. 1900) 56 S. W. Rep. 501.

Minnesota. — State v. Frizzell, 31 Minn. 460.

Nebraska. — State v. Weatherby, 17 Neb. 553.

Nevada. — Cordiell v. Frizell, 1 Nev. 130.

New Jersey. — Rightmire v. Duffield, 50 N. J. 43.

New York. — People v. Bull, 46 N. Y. 57, 7 Am. Rep. 302.

Ohio. — State v. Thompson, 6 Ohio Cir. Dec. 106, 9 Ohio Cir. Ct. 161.

Tennessee. — State v. Maloney, 92 Tenn. 62.

1. Term to Begin from Election or Appointment. — Silver v. Magruder, 32 Md. 387; McAfee v. Russell, 29 Miss. 84; People v. Leask, 67 N. Y. 521, affirming 6 Daly (N. Y.) 517.

2. Authority of Legislature to Fix Date. — Scott v. State, 151 Ind. 556; State v. Thoman, 10 Kan. 191; Hagerty v. Arnold, 13 Kan. 367; Wilson v. Clark, 63 Kan. 505; State v. Andrews, 64 Kan. 474; State v. Harvey, 4 Ohio Cir. Dec. 227, 8 Ohio Cir. Ct. 599; State v. McCracken, 51 Ohio St. 123. And see *supra*, this section, *Duration of Authority in General* — *Power to Fix or Change Duration*.

3. In re Stuart, 53 Cal. 745; State v. Hastings, 10 Wis. 525.

4. Howard v. State, 10 Ind. 99; Deweese v. State, 10 Ind. 343; Markle v. Wright, 13 Ind. 548. See *supra*, this section, *Duration of Authority in General* — *Power to Fix or Change Duration* — *Authority of Legislature; Constitutional Limitations*.

5. State v. Williams, 49 Miss. 640. See also Vogel v. State, 107 Ind. 374.

6. Day of Date Excluded. — Best v. Polk, 18 Wall. (U. S.) 112. See also Vogel v. State, 107 Ind. 374, and the title *TIME (COMPUTATION OF)*.

Effect of Custom Fixing Hour of Day When Term Expires. — State v. Byrne, 98 Wis. 16.

Peculiar Provisions Construed. — As to the

date on which the terms of certain public officers commence under peculiar constitutional and statutory provisions, see the following cases:

Alabama. — Beebe v. Robinson, 64 Ala. 171.

Maryland. — Thomas v. Owens, 4 Md. 189.

Minnesota. — State v. Frizzell, 31 Minn. 460.

Mississippi. — Smith v. Halfacre, 6 How. (Miss.) 582.

New York. — Gilroy v. Smith, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 784; People v. Leask, 67 N. Y. 521, affirming 6 Daly (N. Y.) 517.

Pennsylvania. — Com. v. Kingsbury, 5 L. T. N. S. (Pa.) 51.

Tennessee. — Brinkley v. Bedford, 9 Heisk. (Tenn.) 799.

Virginia. — *In re Broadus*, 32 Gratt. (Va.) 779.

Washington. — McMurray v. Hollis, 5 Wash. 458.

7. Term Runs from Date of Election. — Marshall v. Harwood, 5 Md. 423; State v. Ewing, 17 Mo. 515; State v. Pollner, 10 Ohio Cir. Dec. 141; State v. Constable, 7 Ohio (pt. i.) 7; Macoy v. Curtis, 14 S. Car. 367.

8. Term Runs from Date of Appointment. — State v. Breidenthal, 55 Kan. 308; Hale v. Bischoff, 53 Kan. 301; Hughes v. Buckingham, 5 Smed. & M. (Miss.) 632; State v. Stonestreet, 99 Mo. 361; Haight v. Love, 39 N. J. L. 476, 23 Am. Rep. 234; Verner v. Seibels, 60 S. Car. 572.

Term Commencing from Passage of Act. — State v. Parker, 30 La. Ann. 1182.

9. Time Authorized for Assuming Duties of Office. — Haight v. Love, 39 N. J. L. 476, 23 Am. Rep. 234, affirming 39 N. J. L. 14; Rightmire v. Duffield, 50 N. J. L. 43.

Officer's Term Held Not to Commence until Result of Election Known and Commission Issued. — Brodie v. Campbell, 17 Cal. 11; People v. Garlock, 5 Mich. 284. See also Killion v. Herman, 43 Kan. 37; McGee v. Gill, 79 Ky. 106. *Contra*, Macoy v. Curtis, 14 S. Car. 367.

Commencement of Term Cannot Be Deferred by Voluntarily Postponing Qualification. — Haight v. Love, 39 N. J. L. 476, 23 Am. Rep. 234, affirm-

(2) *When Officer Authorized to Appoint Incumbent with Consent of Another Officer or Official Body.* — Where it is provided that one officer may, with the consent or approval of another officer or official body, fill an office by appointment, the concurrent action of both is essential to a regular appointment.¹ Therefore, if in such a case no time is fixed for the commencement of the term of the office, it will begin to run only after an appointment by the one officer and its sanction by the other officer or official body.²

4. When Authority Ends — *a. WHEN TERM IS DEFINITELY FIXED OR LIMITED BY LAW* — (1) *General Rule.* — Where the term of an office has been definitely fixed or limited by law, the official authority of a person elected or appointed for such term ceases upon the expiration thereof,³ and this no matter at what time in such term he commenced service,⁴ and he is entitled to hold until the end of the term although he took possession of the office, and discharged its duties, before the commencement thereof.⁵

(2) *Right to Hold Over* — (a) *In Absence of Any Express Provision* — *aa. IN GENERAL.* — In some jurisdictions this rule has been held to apply even where the proper authorities have failed to appoint or elect a successor to the incumbent before the expiration of his term, it being held that in such case he cannot hold over, unless expressly authorized to do so.⁶ But the better doctrine, and the one supported by a preponderance of authority, is that officers are entitled under such circumstances to hold over until their successors are elected or appointed and have qualified, unless some restrictive words are

ing 39 N. J. L. 14; *Rightmire v. Duffield*, 50 N. J. L. 43. See also *People v. Garlock*, 5 Mich. 284; *Macoy v. Curtis*, 14 S. Car. 367.

Provision as to Oath and Bond Held Not Mandatory — Term Begins from Election. — *State v. Pollner*, 10 Ohio Cir. Dec. 141.

1. See *supra*, this title, *Methods of Conferring Office — By Appointment.*

2. *Term Commences After Appointment and Confirmation.* — *Wetherbee v. Cazneau*, 20 Cal. 503; *People v. Freese*, 76 Cal. 633; *State v. Breidenthal*, 55 Kan. 308; *Parish v. St. Paul*, 84 Minn. 426. See also *Tenure of Appointments Made During Recess of Senate*, 4 Op. Atty.-Gen. 30; *State v. Bryson*, 44 Ohio St. 457. See *People v. Mizner*, 7 Cal. 519.

Although a New Office Has Been Temporarily Filled by appointment during a recess of the senate, the term of the office begins only with the appointment and confirmation of the first regular incumbent. *State v. Breidenthal*, 55 Kan. 308. Compare *Kelly v. Gilly*, 5 La. Ann. 534; *Shepherd v. Haralson*, 16 La. Ann. 134.

3. *Termination of Authority Where Term Fixed by Law* — *United States.* — *Badger v. U. S.*, 93 U. S. 599.

California. — *Hale v. McGettigan*, 114 Cal. 112.

Illinois. — *Ladd v. Board of Trustees*, 80 Ill. 233.

Indiana. — *Tuley v. State*, 1 Ind. 500; *Manson v. State*, 66 Ind. 78; *Jones v. State*, 112 Ind. 193; *Barrett v. State*, 112 Ind. 322.

Missouri. — *State v. Perkins*, 139 Mo. 106.

Nebraska. — *Carter v. Board of Public Lands, etc.*, 7 Neb. 42.

New York. — *People v. Tieman*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 359, 30 Barb. (N. Y.) 193.

Ohio. — *State v. Thompson*, 6 Ohio Cir. Dec. 106, 9 Ohio Cir. Ct. 161.

South Dakota. — *State v. Sheldon*, 8 S. Dak. 525.

4. *Jones v. State*, 112 Ind. 193; *Barrett v. State*, 112 Ind. 322.

5. *Van Wye v. Clark*, 41 Kan. 744.

Statute Changing Appointing Power Without Affecting Term of Office. — *State v. Connor*, 3 Ohio Cir. Dec. 151, 5 Ohio Cir. Ct. 305. See *Ladd v. Board of Trustees*, 80 Ill. 233.

Authority to Hold until Next General Election. — See *Killion v. Herman*, 43 Kan. 37.

Judges "In Office" at "Adoption" of Constitutional Provision "Continued until the Expiration of Their Terms." — *People v. Gardner*, 45 N. Y. 812, affirming 59 Barb. (N. Y.) 198, 5 Lans. (N. Y.) 1.

Appointment as Custodian of Records "until Such Time as the Records Are by Law Directed to Be Transferred." — *People v. Palmer*, 150 N. Y. 570, reversing 6 N. Y. App. Div. 19.

For the Construction of Certain Peculiar Constitutional and Statutory Provisions relating to the time when the authority of certain public officers shall cease, see the following cases:

Alabama. — *Beebe v. Robinson*, 64 Ala. 171.

Iowa. — *State v. Coenzler*, 9 Iowa 433.

Louisiana. — *State v. Dubuc*, 9 La. Ann. 237; *Sigur v. Crenshaw*, 8 La. Ann. 401.

Minnesota. — *State v. Frizzell*, 31 Minn. 460.

Missouri. — *State v. Ewing*, 17 Mo. 515.

New York. — *Gilroy v. Smith*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 784.

Ohio. — *State v. Cook*, 20 Ohio St. 252.

Tennessee. — *Brinkley v. Bedford*, 9 Heisk. (Tenn.) 799; *Tatum v. Rivers*, 7 Baxt. (Tenn.) 295.

Utah. — *State v. Beardsley*, 13 Utah 502.

6. *Incumbent Cannot Hold Over.* — *People v. Tieman*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 359, 30 Barb. (N. Y.) 193; *State v. Sheldon*, 8 S. Dak. 525. See also *Badger v. U. S.*, 93 U. S. 599; *Carter v. Board of Public Lands, etc.*, 7 Neb. 42; *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 402; *Philips v. Wickham*, 1 Paige (N. Y.) 590; *King v. McLure*, 84 N. Car. 153.

used expressly or impliedly prohibiting such holding over.¹ In some jurisdictions, however, this doctrine would seem to apply only to officers of municipalities or other public corporations² or to officers whose duties consist in the safekeeping and current management of public property.³ In some states it does not apply to judges.⁴

bb. WHERE OFFICE IS TO BE FILLED ANNUALLY OR AT STATED PERIODS. — The authorities are almost unanimous in holding that if a constitution or statute, without expressly fixing the term of an office, merely provides that an election shall be had or an appointment made annually or at stated periods, a person so elected or appointed is entitled to hold until his successor is elected or appointed and qualified.⁵ But where it is provided that officers shall be elected "for one year only," they cannot hold over beyond the end of the year,⁶ and it has been held that where the charter of a public corporation provides that its officers shall be elected annually on a particular day, officers so elected cannot hold over beyond the next election day thereafter.⁷

(b) **Under Constitutional and Statutory Provisions** — *aa.* IN GENERAL. — The question of the right to hold over in the absence of any provision of the law on the subject is not of much practical importance, as constitutional provisions and statutes relating to public offices almost universally provide that the incumbents shall hold over until their successors are elected or appointed and qualified. Under such a provision, the office does not become vacant upon the expiration of the term, if there is then no successor elected or appointed and qualified to assume it, but the rights and duties of the incumbent continue until his successor has been elected or appointed and has properly qualified,⁸ and this is so even where the commencement of such successor's

1. Officers Entitled to Hold Over in Absence of Restrictive Words. — *Tuley v. State*, 1 Ind. 500; *Oppenheim v. Pittsburgh, etc.*, R. Co., 85 Ind. 471; *State v. Menaugh*, 151 Ind. 260; *Thomas v. Owens*, 4 Md. 221; *Sappington v. Scott*, 14 Md. 40; *Robb v. Carter*, 65 Md. 321; *Ash v. McVey*, 85 Md. 119; *Messenger v. Teagan*, 106 Mich. 654; *State v. Perkins*, 139 Mo. 106. See also Anonymous, 12 Mod. 256; U. S. v. Justices, 10 Fed. Rep. 460; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; and the title *DE FACTO OFFICERS*, vol. 8, p. 796. But see *Saunders v. Grand Rapids*, 46 Mich. 467.

Where Legislature Abolishes Term and Mode of Electing Successor. — *State v. Simon*, 20 Oregon 365.

2. Municipal Officers hold over until their successor are elected and qualified unless the legislative intent to the contrary be manifested. *Central v. Sears*, 2 Colo. 588; *Bath v. Reed*, 78 Me. 276; *Bunker v. Gouldsboro*, 81 Me. 188.

Whether, upon the Division of a Town, the old officers hold over until new ones are chosen and qualified, *quære*. *Bodge v. Foss*, 39 N. H. 406.

3. Officers Having Custody of Public Property. — *Stratton v. Oulton*, 28 Cal. 44; *People v. Stratton*, 28 Cal. 382.

In the opinion of the court in *People v. Edwards*, 93 Cal. 153, there is an *obiter dictum* that seems to assume that the doctrine extends to all public officers. But see *People v. Addison*, 10 Cal. 1.

4. Doctrine Not Applicable to Judges. — *Christian v. Gibbs*, 53 Miss. 320. See also *Stratton v. Oulton*, 28 Cal. 45.

5. Officers Elected or Appointed Annually or at Stated Periods. — *Foot v. Prowse*, 1 Stra. 625, 3 Bro. P. C. 167; *Sparks v. Farmers' Bank*, 3

Del. Ch. 296; *State v. Perkins*, 139 Mo. 106; *Cordell v. Frizell*, 1 Nev. 130. See also *Vernon Soc. v. Hills*, 6 Cow. (N. Y.) 25, 16 Am. Dec. 429; *People v. Runkle*, 9 Johns. (N. Y.) 147. But see *Territory v. Hauxhurst*, 3 Dak. 216; *Philips v. Wickham*, 1 Paige (N. Y.) 594.

Annual Officers of Public Corporations. — *Kelsy v. Wright*, 1 Root (Conn.) 83; *McCall v. Byram Mfg. Co.*, 6 Conn. 428; *Spencer v. Champion*, 9 Conn. 543; *Pickett v. Allen*, 10 Conn. 153; *Congregational Soc. v. Sperry*, 10 Conn. 207.

Town Officers. — *Reg. v. Durham*, 10 Mod. 147; *Overseers of Poor v. Sears*, 2 Pick. (Mass.) 130; *State v. Wilson*, 12 Lea (Tenn.) 247.

6. Officers to be Elected "for One Year Only." — *Reg. v. Durham*, 10 Mod. 147; *State v. Perkins*, 139 Mo. 106. See also *Tuley v. State*, 1 Ind. 500.

7. Election Annually on a Particular Day. — *Banbury's Case*, 10 Mod. 346; *Rex v. Pasmore*, 3 T. R. 199. See also *Rex v. Tregenny*, 6 Vin. Abr. 296; *Sparks v. Farmers' Bank*, 3 Del. Ch. 296; *Tuley v. State*, 1 Ind. 500.

8. Holding Over under Express Provisions of Law — *England*. — *Rex v. Thornton*, 4 East 294; *Rex v. Tregenny*, 6 Vin. Abr. 296; *Rex v. Tregenny*, 8 Mod. 127.

United States. — *Badger v. U. S.*, 93 U. S. 599, *affirming* 6 Biss (U. S.) 308; *Salamanca Tp. v. Wilson*, 100 U. S. 627; *U. S. v. Justices*, 10 Fed. Rep. 460.

Arizona. — *Meyer v. Culver*, (Ariz. 1894) 35 Pac. Rep. 984.

Arkansas. — *Haley v. Petty*, 42 Ark. 392.

California. — *People v. Colton*, 6 Cal. 84; *People v. Whitman*, 10 Cal. 38; *People v. Bissell*, 49 Cal. 407; *Treadwell v. Yolo County*, 62 Cal. 563; *French v. Santa Clara County*, 69 Cal. 519; *People v. Tyrrell*, 87 Cal. 479; *People v. Edwards*, 93 Cal. 153.

term, and consequently his right to qualify, have, by law, been put off until a date later than the end of the incumbent's regular term.¹

Where a Successor Cannot Be Elected or Appointed. — But an incumbent cannot hold over under such a provision if his successor cannot be elected or appointed. Thus, the incumbent of a municipal office cannot hold over where the municipal corporation to which the office pertains has been abolished.²

Colorado. — *People v. Osborne*, 7 Colo. 605; *Carlile v. Henderson*, 17 Colo. 532.

Connecticut. — *Welch v. Seymour*, 28 Conn. 387.

Florida. — *State v. Saxon*, 25 Fla. 792, 30 Fla. 668, 32 Am. St. Rep. 46.

Georgia. — *Bonner v. State*, 7 Ga. 473; *Aycock v. Aven*, 25 Ga. 694; *Wells v. Atlanta*, 43 Ga. 67; *Walker v. Ferrill*, 58 Ga. 512.

Illinois. — *People v. Barnett Twp.*, 100 Ill. 332; *Soucy v. People*, 113 Ill. 109; *Becker v. People*, 156 Ill. 301.

Indiana. — *Tuley v. State*, 1 Ind. 500; *Miller v. Burger*, 2 Ind. 337; *Baker v. Kirk*, 33 Ind. 517; *State v. Berg*, 50 Ind. 496; *Manson v. State*, 66 Ind. 78; *Elam v. State*, 75 Ind. 518; *Oppenheim v. Pittsburgh*, etc., R. Co., 85 Ind. 471; *Gosman v. State*, 106 Ind. 203; *Jones v. State*, 112 Ind. 193; *Barrett v. State*, 112 Ind. 322; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; *Milford v. Powner*, 126 Ind. 528; *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208 (see *ELECT — ELECTION*, vol. 10, p. 550, note); *Koerner v. State*, 148 Ind. 158; *State v. Menaugh*, 151 Ind. 260.

Iowa. — *State v. Smith*, 94 Iowa 616. *Kansas.* — *Riddel v. School Dist. No. 72*, 15 Kan. 168; *Hubbard v. Crawford*, 19 Kan. 570; *State v. Foster*, 36 Kan. 504; *Killion v. Herman*, 43 Kan. 37; *Vam Wye v. Clark*, 41 Kan. 744; *State v. Bleidenthal*, 55 Kan. 308.

Kentucky. — *Lafferty v. Huffman*, 99 Ky. 80; *Sinking Fund Com'rs v. George*, 104 Ky. 260.

Louisiana. — *State v. Parker*, 30 La. Ann. 1182.

Maine. — *Bath v. Reed*, 78 Me. 276.

Maryland. — *Watkins v. Watkins*, 2 Md. 341; *Silver v. Magruder*, 32 Md. 387; *Harwood v. Marshall*, 10 Md. 451; *Sappington v. Scott*, 14 Md. 40; *Smoot v. Somerville*, 59 Md. 84; *Archer v. State*, 74 Md. 410; *Lynn v. Cumberland*, 77 Md. 449; *Ash v. McVey*, 85 Md. 119.

Michigan. — *People v. Lord*, 9 Mich. 227; *Lawrence v. Hanley*, 84 Mich. 399; *Messenger v. Teagan*, 106 Mich. 654. See also *Saunders v. Grand Rapids*, 46 Mich. 467.

Minnesota. — *State v. Marr*, 65 Minn. 243.

Mississippi. — *State v. Williams*, 49 Miss. 640; *Koskins v. Brantley*, 57 Miss. 814.

Missouri. — *State v. Ewing*, 17 Mo. 515; *State v. Lusk*, 18 Mo. 333; *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206; *Schaeffer v. Bernero*, 11 Mo. App. 562; *Knight v. Mersman*, 66 Mo. App. 219; *State v. Kurtzborn*, 78 Mo. 98, *affirming* 9 Mo. App. 245; *State v. Smith*, 87 Mo. 158, *reversing* 14 Mo. App. 589; *State v. Stonestreet*, 99 Mo. 361; *State v. Spitz*, 127 Mo. 248; *State v. Perkins*, 139 Mo. 106; *State v. Smith*, 152 Mo. 512.

Nebraska. — *Richards v. McMillin*, 36 Neb. 352.

Nevada. — *Cordiell v. Frizell*, 1 Nev. 130.

New Hampshire. — *Johnston v. Wilson*, 2 N. H. 202, 9 Am. Dec. 50; *Sprague v. Cornish*, 59 N. H. 161.

New Jersey. — *Stilting v. Davis*, 45 N. J. L. 390.

New York. — *People v. Batchelor*, 22 N. Y. 137; *People v. McKinney*, 52 N. Y. 375; *People v. Van Horne*, 18 Wend. (N. Y.) 515.

North Carolina. — *People v. McIver*, 68 N. Car. 467; *King v. McLure*, 84 N. Car. 153; *Cherry v. Burns*, 124 N. Car. 761.

Ohio. — *State v. Taylor*, 15 Ohio St. 137; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Bryson*, 44 Ohio St. 466; *State v. McCracken*, 51 Ohio St. 123; *State v. Killits*, 4 Ohio Cir. Dec. 509, 8 Ohio Cir. Ct. 30. See also *State v. Brewster*, 44 Ohio St. 589.

Oregon. — *State v. Simon*, 20 Oregon 365; *Stevens v. Carter*, 27 Oregon 553; *Eddy v. Kincaid*, 28 Oregon 537; *Baker City v. Murphy*, 30 Oregon 405; *State v. Compson*, 34 Oregon 25.

Pennsylvania. — *Com. v. Hanley*, 9 Pa. St. 513; *Com. v. Kilgore*, 82 Pa. St. 398.

South Carolina. — *Macoy v. Curtis*, 14 S. Car. 367.

Tennessee. — *Matter of Baldwin*, 7 Heisk. (Tenn.) 414.

Texas. — *Jones v. Jefferson*, 66 Tex. 576.

Utah. — *People v. Hardy*, 8 Utah 68.

Virginia. — *Com. v. Drewry*, 15 Gratt. (Va.) 1; *Ex p. Lawhorne*, 18 Gratt. (Va.) 85; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 704; *In re Broadus*, 32 Gratt. (Va.) 779; *Branham v. Long*, 78 Va. 352.

West Virginia. — *Hunter v. Berkeley Springs*, 47 W. Va. 343.

Wisconsin. — *State v. Meilike*, 81 Wis. 574.

Wyoming. — *State v. Henderson*, 4 Wyo. 535.

As to What Constitutes Qualification for public office, see *supra*, this title, *Acceptance and Qualification*.

Officer May Hold Indefinitely in Absence of Qualified Successor. — *State v. Spears*, 1 Ind. 515; *People v. Hardy*, 8 Utah 68. See also *People v. Woodruff*, 32 N. Y. 357; *State v. McCracken*, 51 Ohio St. 123.

"**Elected or Appointed and Qualified**" means legally chosen and qualified. *State v. Connor*, 3 Ohio Cir. Dec. 151, 5 Ohio Cir. Ct. 395.

"**Duly Qualified.**" — *People v. Woodruff*, 32 N. Y. 357. See also *DULY*, vol. 10, p. 316, note.

By a "Successor," in provisions of this character, is meant one who performs duties of the same nature as those which were performed by his predecessor. *Dennistoun v. Potts*, 26 Miss. 13. See also *People v. Bissell*, 49 Cal. 407 (holding confirmation by senate essential under the facts).

Single Vacancy in Township Committee with Two Entitled to Hold Over — Neither Can Fill Vacancy. — *Kilburn v. Conlan*, 56 N. J. L. 349. See also *People v. Jones*, 17 Wend. (N. Y.) 81.

1. *State v. Killits*, 4 Ohio Cir. Dec. 509, 8 Ohio Cir. Ct. 30.

2. **Where Successor Cannot Be Elected or Appointed.** — *Beckwith v. Racine*, 7 Biss. (U. S.) 142. But see *State v. Simon*, 20 Oregon 365.

The Policy of Provisions of This Character is to prevent the happening of vacancies in office, except by death, resignation, removal, and the like.¹

The Holding Over Is Not a New Term, but simply a prolongation of the old term.² Therefore an officer is entitled to hold over, although he is ineligible, under the constitution, for a second term.³

The Word "Elected," as used in provisions of this nature, signifies an election of a qualified successor to the incumbent by the same electoral body as that to which the incumbent owes his election, or which by law is entitled to elect his successor;⁴ and this whether such body be the electoral body at large, or the legislature, or some other organized body.⁵

Some of the Peculiar Provisions of laws authorizing incumbents of offices to hold over until their successors are elected or appointed and qualified have received the interpretation of the courts.⁶

§6. AUTHORITY OF LEGISLATURE — CONSTITUTIONAL LIMITATIONS. — It is entirely competent for the legislature of a state to authorize public officers to hold over in the absence of any constitutional provision to the contrary.⁷ But it is the better opinion, and the one supported by the greater weight of authority, that when the constitution fixes the term of an office or limits it to a prescribed period of time, the legislature cannot, by authorizing the incumbent to hold until his successor is elected or appointed and qualified, extend his authority over a longer period than that prescribed.⁸

1. Policy of Provisions. — *People v. Osborne*, 7 Colo. 605; *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; *Koerner v. State*, 148 Ind. 158; *Riddel v. School Dist. No. 72*, 15 Kan. 168; *Rightmire v. Duffield*, 50 N. J. L. 48; *People v. Woodruff*, 32 N. Y. 355; *People v. Hardy*, 8 Utah 68.

Authority to Exercise Power until Other Officers Are "Elected" means elected and qualified. Where a statute provides that certain officers shall exercise certain powers until certain other officers are "elected," the former officers are entitled to exercise such powers until the latter are elected and qualified, since until then the latter are not authorized to act, and the legislature will not be deemed to have intended an hiatus in the exercise of the powers granted. *Wells v. Atlanta*, 43 Ga. 77.

2. Holding Over a Prolongation of Old Term — California. — *People v. Edwards*, 93 Cal. 153.

Indiana. — *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208.

Missouri. — *State v. Smith*, 87 Mo. 158, reversing 14 Mo. App. 589. But see *State v. Thomas*, 102 Mo. 85.

Oregon. — *Baker City v. Murphy*, 30 Oregon 405.

Washington. — *State v. Tallman*, 24 Wash. 428.

West Virginia. — *Carr v. Wilson*, 32 W. Va. 419.

See also *People v. Hardy*, 8 Utah 68.

In *Kansas* it has been held that an officer holding over under such a provision is simply filling a part of his successor's term. *Riddel v. School Dist. No. 72*, 15 Kan. 168. See also *Monger v. Harvey County*, 22 Kan. 318. For a similar holding in *Florida*, see *State v. Murphv*, 32 Fla. 138.

3. Officer May Hold Over though Ineligible for a Second Term. — *People v. Edwards*, 93 Cal. 153; *Carr v. Wilson*, 32 W. Va. 419.

4. The Word "Elected" Defined. — *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663;

Kimberlin v. State, 130 Ind. 120, 30 Am. St. Rep. 208 (see ELECT — ELECTION, vol. 10, p. 550, note). See also *People v. Whitman*, 10 Cal. 38; *People v. Bissell*, 49 Cal. 407.

5. State v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663; *State v. Compson*, 34 Oregon 25.

"Elected" Used in Reference to an Appointive Officer. — *People v. Knight*, 116 Cal. 108.

6. Provision that Term Shall Terminate upon Qualification of Successor Elected at That Session of Legislature. — *Sinclair v. Young*, (Va. 1902) 40 S. E. Rep. 907, 4 Va. Sup. Ct. 176.

Old Board Abolished and New Board Provided For with Proviso that Old Board Hold Over. — *State v. Bailey*, 37 Ohio St. 98.

Qualification of Provision in West Virginia Constitution (art. 4, § 6; art. 7, § 16) construed. *Carr v. Wilson*, 32 W. Va. 419.

For the Construction of Peculiar Provisions of constitutions and statutes authorizing incumbents of offices to hold over until their successors are elected or appointed and qualified, see also *Denninstoun v. Potts*, 26 Miss. 13; *Andrews v. State*, 69 Miss. 740.

Laws Held Not to Authorize a Holding Over. — *State v. Beardisley*, 13 Utah 502; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673.

7. See supra, this section, *Duration of Authority in General — Power to Fix or Change Duration — Authority of Legislature — In General*.

8. Effect of Constitutional Provision Fixing or Limiting Term. — *Burnham v. Sumner*, 50 Miss. 517; *State v. Brewster*, 44 Ohio St. 589. See also *State v. Harrison*, 113 Ind. 446, 3 Am. St. Rep. 663; *State v. Killits*, 4 Ohio Cir. Dec. 509; *State v. Howe*, 25 Ohio St. 588, 18 Am. Rep. 321; *State v. Compson*, 34 Oregon 25. But see *People v. Stratton*, 28 Cal. 382; *People v. Tilton*, 37 Cal. 614; *People v. Edwards*, 93 Cal. 153.

A Constitutional Requirement that Officers Shall Be Elected for a Limited Period of Time was held to prevent an officer's holding over after the next general election for a further period

cc. EFFECT OF DEATH OF PERSON ELECTED AS SUCCESSOR — (aa) Before Qualification. —

Where the law provides that the incumbent of an office shall hold over until his successor is elected and qualified, and a person duly elected as such successor dies before he has qualified, the office does not become vacant, but the incumbent is entitled to hold over, as one of the contingencies upon which his term is to expire has not taken place, namely, the qualification of a successor.¹

(bb) After Qualification but Before Commencement of Term. — But the incumbent's right to hold over ceases upon the election and qualification of his successor, and it is not revived by the subsequent death of such successor before the commencement of his term.²

dd. EFFECT OF JUDGMENT DECLARING OFFICE FORFEITED. — Hold-over provisions apply only to such officers as have filled out the full term. They do not apply to an officer who has been adjudged to have forfeited his office by the judgment of a court of competent jurisdiction.³

ee. EFFECT OF RESIGNATION OF INCUMBENT. — But where the constitution or statutes provide that officers shall hold their offices until others are elected or appointed in their places and are qualified, it has been held that they continue in office, notwithstanding the tender to and acceptance by the proper authority of their resignations, until the election or appointment and qualification of their successors.⁴ The rule is otherwise, however, where it is expressly provided that an officer's resignation shall take effect from the time of filing the same.⁵ And in some jurisdictions it has been held that where the law declares an office vacant on the resignation of the incumbent, the authority and duties of an incumbent cease upon his resignation, notwithstanding a statute providing that the officer shall continue to discharge the duties of his office until a successor has qualified.⁶

ff. PRECLUSION OF VACANCY BY A HOLDING OVER. — As there is no vacancy in an office where the incumbent is holding over beyond the usual time under a constitutional or statutory provision authorizing him to do so, in the absence of a provision creating a vacancy in such case,⁷ it follows that in such case the office cannot be filled by election or appointment under an authority so to fill a vacancy occurring therein.⁸ But it would seem that where the law

"until his successor was qualified." *Houston v. Rovston*, 7 How. (Miss.) 543.

But a constitutional provision that the legislature may not create an office the tenure of which shall be longer than a specified number of years, has been held not to prevent the incumbent of an office at the expiration of such period from holding over in accordance with another constitutional provision until he is superseded by a qualified successor. *State v. Harrison*, 113 Ind. 434, 3 Am. St. Rep. 663; *State v. Compson*, 34 Oregon 25. See *State v. Catlin*, 84 Tex. 48. But see *Gosman v. State*, 106 Ind. 203.

Change in Time of Election Resulting in Extension of Incumbent's Term Not Unconstitutional. — *State v. Menaugh*, 151 Ind. 260; *Larned v. Elliott*, 155 Ind. 702.

1. Effect of Death Before Qualification of Person Elected as Successor. — *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208; *People v. Lord*, 9 Mich. 227; *Lawrence v. Hanley*, 84 Mich. 399; *State v. Benedict*, 15 Minn. 108; *People v. McIver*, 68 N. Car. 467; *Com v. Hanley*, 9 Pa. St. 513. See also *State v. Albert*, 55 Kan. 154; *Gosman v. State*, 106 Ind. 206.

2. Right to Hold Over Not Revived by Death of Successor After Qualification. — *People v. Ward*, 107 Cal. 236; *State v. Bemenderfer*, 96 Ind.

374; *Gosman v. State*, 106 Ind. 203; *State v. Albert*, 55 Kan. 154; *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206; *State v. Manning*, 84 Mo. 661.

3. Hold-over Provision Not Applicable Where Office Has Been Forfeited. — *Hyde v. State*, 52 Miss. 665.

4. Effect of Incumbent's Resignation. — *Badger v. U. S.*, 93 U. S. 599, *affirming* 6 Biss. (U. S.) 308; *U. S. v. Justices*, 10 Fed. Rep. 460; *Jones v. Jefferson*, 66 Tex. 576.

5. Amy v. Watertown, 130 U. S. 301.

6. State v. Page, 20 Mont. 238; *Olmstad v. Dennis*, 77 N. Y. 378.

7. See supra, this section, *Right to Hold Over — Under Constitutional and Statutory Provisions — In General*. And generally as to when a vacancy occurs, see *supra*, this title, *Methods of Conferring Office*.

8. Authority to Fill Vacancy Does Not Authorize Election or Appointment During Holding Over — California. — *People v. Whitman*, 10 Cal. 38; *People v. Tilton*, 37 Cal. 614 [*overruling* *People v. Reid*, 6 Cal. 288, and *explaining* *People v. Mizner*, 7 Cal. 519, and *People v. Addison*, 10 Cal. 11]; *People v. Bissell*, 49 Cal. 407; *People v. Hammond*, 66 Cal. 654; *People v. Tyrrell*, 87 Cal. 479; *People v. Edwards*, 93 Cal. 153.

Colorado. — People v. Osborne, 7 Colo. 605.

expressly or impliedly creates a vacancy in an office at the expiration of the regular term, the office may be filled by election or appointment under an authority so to fill a vacancy therein, although the incumbent is authorized to hold over.¹

Effect of Surrender of Office by Incumbent. — Where an incumbent authorized to hold over surrenders the office upon the apparent election and qualification of a successor a subsequent judgment declaring such election void, on the ground of the candidate's ineligibility, creates a vacancy in the office which may be filled by appointment under an authority so to fill such a vacancy. The hold-over provision has no application in such a case.²

gg. INCUMBENT CANNOT BENEFIT BY HIS OWN WRONG OR NEGLECT. — As the purpose of a hold-over provision is to conserve the public interests by preventing vacancies in office,³ and as it is never designed to extend the tenure of office of an incumbent for his own benefit beyond the specified term, it follows that a person re-elected to an office as his own successor cannot, by his neglect to qualify, prolong his prior term, and so, to his own advantage, postpone the beginning of the term for which he was re-elected.⁴ Nor can the incumbent prolong his term by preventing the person legally entitled to the office from qualifying, as by unlawfully detaining his certificate and commission.⁵ Nor can the incumbent hold over if the failure to elect his successor results from his, the incumbent's, own inadvertence in not giving notice of the election as he is required to do.⁶

(3) **Estoppel to Deny that Term Has Expired.** — A person who has taken possession of an office in pursuance of his election thereto, and has served for the full period fixed by law as the term of such office, is, as against his regularly elected and properly qualified successor, estopped from denying that his term of office has expired.⁷ So, if an officer elected for a second term executes and delivers his bond for such term, he thereby relinquishes all right

Indiana. — State *v.* Harrison, 113 Ind. 434, 3 Am. St. Rep. 663; Kimberlin *v.* State, 130 Ind. 120, 30 Am. St. Rep. 208; Koerner *v.* State, 148 Ind. 158.

Maryland. — Watkins *v.* Watkins, 2 Md. 341; Smoot *v.* Somerville, 59 Md. 84; Ash *v.* McVey, 85 Md. 119.

Minnesota. — State *v.* Benedict, 15 Minn. 198; State *v.* Marr, 65 Minn. 243.

Missouri. — State *v.* Lusk, 18 Mo. 333; State *v.* Smith, 152 Mo. 512. See also State *v.* Seay, 64 Mo. 80, 27 Am. Rep. 206. But see State *v.* Stonestreet, 99 Mo. 361; State *v.* Thomas, 102 Mo. 85.

New York. — People *v.* Woodruff, 32 N. Y. 357; People *v.* Van Horne, 18 Wend. (N. Y.) 515.

Oregon. — State *v.* Compson, 34 Oregon 25.

Pennsylvania. — Com. *v.* Hanley, 9 Pa. St. 513.

Utah. — People *v.* Hardy, 8 Utah 68.

Washington. — State *v.* Tallman, 24 Wash. 428.

See also State *v.* Brewster, 44 Ohio St. 589.

Appointment by Governor with Consent of Senate — Governor Authorized to Fill Vacancy. — See State *v.* Murphy, 32 Fla. 138. But see Smoot *v.* Somerville, 59 Md. 84.

1. People *v.* Randall, 151 N. Y. 497, affirming 91 Hun (N. Y.) 266 (law especially providing that after the expiration of the term the office should be deemed vacant for the purpose of choosing a successor).

Failure of Person Chosen to Qualify — Vacancy. — People *v.* Taylor, 57 Cal. 620; Matter of

Executive Communication, 25 Fla. 426; State *v.* Saxon, 25 Fla. 792, 30 Fla. 668, 32 Am. St. Rep. 46; State *v.* Murphy, 32 Fla. 138; State *v.* Cocke, 54 Tex. 482; Johnson *v.* Mann, 77 Va. 265; Vaughan *v.* Johnson, 77 Va. 300; Kilpatrick *v.* Smith, 77 Va. 347; State *v.* Washburn, 17 Wis. 658. See also Atty.-Gen. *v.* Burnham, 61 N. H. 594.

Statute Requiring Requalification in Order to Hold Over. — Dyer *v.* Bagwell, 54 Iowa 487; Boone County *v.* Jones, 58 Iowa 373; Richards *v.* McMillin, 36 Neb. 352. See also Wapello County *v.* Bigham, 10 Iowa 39, 74 Am. Dec. 370.

2. People *v.* Rodgers, 118 Cal. 393. See People *v.* Jones, 17 Wend. (N. Y.) 81. But see Stevens *v.* Carter, 27 Oregon 553.

3. See *supra*, this section, *Right to Hold Over — Under Constitutional and Statutory Provisions — In General.*

4. **Officer Re-elected Cannot Prolong Term by Neglecting to Qualify.** — Parcel *v.* State, 110 Ind. 122; Rightmire *v.* Duffield, 50 N. J. L. 48. And see *supra*, this section, *When Authority Commences — When No Date Is Fixed by Law — In General.*

5. **Incumbent Cannot Prolong Term by Preventing Successor from Qualifying.** — State *v.* Steers, 44 Mo. 223.

6. **Failure to Elect Successor Resulting from Incumbent's Negligence.** — People *v.* Bartlett, 6 Wend. (N. Y.) 422.

7. **Estoppel to Deny that Term Has Expired.** — Griebel *v.* State, 111 Ind. 369; Pursel *v.* State, 111 Ind. 519; Boyles *v.* State, 112 Ind. 147.

or claim to hold the office, after the expiration of the first term, by virtue of his first election.¹

b. WHEN TENURE IS AT PLEASURE OF SUPERIOR OFFICER OR OFFICIAL BODY. — Where an officer holds at the pleasure of some superior officer or official body his holding is, of course, terminable at the will of that officer or body.² So the authority of an officer who holds at the pleasure of the appointing power ceases when the office held by the appointing power is abolished or ceases to exist,³ or when the law vesting the power of appointment is repealed, and such power is conferred upon another officer or body.⁴ But where a board of officers has the power of appointing certain officers to hold office during the pleasure of the board, the tenure of an appointee is unaffected by changes in the personnel of the board.⁵

c. TENURE OF PERSONS ELECTED OR APPOINTED TO FILL VACANCIES —
(i) *In Absence of Express Provision* — (a) **Where Term of Office and Its Commencement and Termination Are Fixed.** — Where the time of the commencement and termination of the term of an office, as well as its duration, are definitely fixed by constitutional or statutory enactment, and provision is made for filling vacancies therein by appointment or election, but without any provision as to the duration of authority of a person so appointed or elected, such person is entitled to serve for the remainder of the unexpired term.⁶

(b) **Where Term Is Fixed but Not Its Commencement or Termination.** — But where the term of an elective office is fixed by constitution or statute, but without any time being established for its beginning or ending, a person elected to the office will be entitled to hold for the period established as the full term thereof, whether he was elected upon the happening of a casual vacancy or at the expiration of a complete term.⁷ The same rule applies where the office is an appointive one and no express provision is made for filling vacancies,⁸ or where provision is made for filling vacancies by appointment, but without fixing the duration of authority of persons so appointed.⁹

1. *People v. Hammond*, 109 Cal. 384.

2. See *supra*, this section, *Duration of Authority When Tenure Is Not Fixed*. See also *infra*, this title, *Termination of Authority — Removal, Suspension, and Reinstatement*.

3. **Office Abolished or Ceasing to Exist.** — *Carter v. Board of Public Lands*, etc., 7 Neb. 42; *Richmond Mayoralty Case*, 19 Gratt. (Va.) 673.

4. *Sinking Fund Com'rs v. George*, 104 Ky. 260.

5. *Carter v. Board of Public Lands*, etc., 7 Neb. 42.

Officer to Continue in Office During Pleasure of "Governor for the Time Being." — The authority of a commissioner of deeds, appointed as such "to continue in office during the pleasure of the governor for the time being," does not terminate within the term of office of the governor making the appointment. *Kaufman v. Stone*, 25 Ark. 336.

Compensation to Be Paid from Specific Appropriation — Office Ceases When Fund Exhausted. — *Lethbridge v. New York*, 133 N. Y. 232. See also *Phillips v. New York*, 88 N. Y. 245; *Langdon v. New York*, 92 N. Y. 427.

6. **Where Duration of Term and Its Beginning and End Are Fixed.** — *Monash v. Rhodes*, 11 Colo. App. 404; *Ladd v. Township* 41, 80 Ill. 233; *Jackson v. Richmond*, (Ky. 1900) 56 S. W. Rep. 501; *Opinion of Justices*, 64 Me. 596; *People v. McClave*, 99 N. Y. 83. See also *Hughes v. Buckingham*, 5 Smed. & M. (Miss.) 632; *Smith v. Halfacre*, 6 How. (Miss.) 582.

Provision for Periodical Vacation of Office — Person Appointed or Elected Entitled to Serve Only

for Remainder of Term. — *Opinion of Justices*, 50 Me. 607; *People v. McClave*, 99 N. Y. 83; *People v. Dempsey*, 19 Hun (N. Y.) 322; *Simpson v. Willard*, 14 S. Car. 191. See also *Sheen v. Hughes*, (Ariz. 1895) 40 Pac. Rep. 679; *People v. Le Fevre*, 21 Colo. 218; *In re Election of Dist. Judges*, 11 Colo. 373; *State v. La Porte*, 28 Ind. 248; *Smith v. Halfacre*, 6 How. (Miss.) 582; *People v. Potter*, 47 N. Y. 375; *People v. Green*, 2 Wend. (N. Y.) 266; *Bradley v. McCrabb*, Dall. (Tex.) 504.

7. **Where Term Is Fixed, but Not Its Beginning or End.** — *Governor v. Nelson*, 6 Ind. 496; *Opinion of Justices*, 61 Me. 601; *Sansbury v. Middleton*, 11 Md. 296; *People v. Green*, 2 Wend. (N. Y.) 274; *People v. Townsend*, 102 N. Y. 420, *reversing* 40 Hun (N. Y.) 360; *State v. Johns*, 3 Oregon 533; *Banton v. Wilson*, 4 Tex. 400; *Bradley v. McCrabb*, Dall. (Tex.) 504; *Roman v. Moody*, Dall. (Tex.) 512; *Atty.-Gen. v. Brunst*, 3 Wis. 790. See also *State v. Long*, 91 Ind. 351; *State v. Spitz*, 127 Mo. 252.

8. *Matter of Judges*, 16 Fla. 841; *State v. Wentworth*, 55 Kan. 298; *Marshall v. Harwood*, 5 Md. 423; *Shelby v. Johnson*, Dall. (Tex.) 597; *Smith v. Cosgrove*, 71 Vt. 196.

Contra in Louisiana and Pennsylvania. *State v. Parker*, 30 La. Ann. 1182; *Philadelphia Mercantile Appraisers*, 1 Pa. Dist. 64.

9. *Hughes v. Buckingham*, 5 Smed. & M. (Miss.) 632; *McAffee v. Russell*, 29 Miss. 84.

Kentucky — Appointee Held Entitled Only to His Predecessor's Unexpired Term. — *Hoke v. Richie*, 100 Ky. 66.

(2) *Under Express Constitutional and Statutory Provisions* — (a) *In General.* — Usually constitutional and statutory provisions, relating to the filling of vacancies in public offices, fix by express terms the duration of authority of persons elected or appointed to fill such vacancies.

(b) *Power of Legislature* — *aa. IN ABSENCE OF CONSTITUTIONAL RESTRICTION.* — In the absence of constitutional restriction it is entirely competent for the legislature of a state to make provision as to when the term of an incumbent, elected or appointed to fill a vacancy, shall expire.¹

bb. WHEN TERM OF ELECTIVE OFFICE IS FIXED BY CONSTITUTION. — Where the term of an elective office is fixed by the constitution at a certain definite period of time, without any provision being made thereby as to when such term shall begin or end, it has been held that the legislature cannot authorize a person elected to fill a casual vacancy in the office to hold for a period less than that prescribed.² But upon this point the authorities are not entirely harmonious, for there is strong authority for the proposition that the legislature may, notwithstanding the term of an office is thus fixed by the constitution, in the case of a vacancy or in an exceptional case, such as the organization of a new county, provide for the election or appointment of a person to fill the office until the time when the next regular term, as established by the legislature, commences.³ But whatever the right doctrine on this point may be, it seems to be well settled that the legislature may in such a case authorize the appointment of a person to fill the vacancy until the next election at which the office may be filled.⁴

(c) *Construction of Provisions.* — The provisions of law relating to the duration of authority of persons elected or appointed to fill vacancies are as varied as they are numerous. Many of the cases are collected and indicated in the notes.⁵

1. *Power of Legislature in Absence of Legislative Restriction.* — *People v. Osborne*, 7 Colo. 605.

2. *Term of Elective Office Fixed by Constitution.* — *Governor v. Nelson*, 6 Ind. 496; *People v. Townsend*, 102 N. Y. 430, *reversing* 40 Hun (N. Y.) 360; *Banton v. Wilson*, 4 Tex. 400. See also *Baker v. Kirk*, 33 Ind. 517; *State v. Chapin*, 110 Ind. 272.

This rule has been applied to an office which is required to be filled by the legislature. *Shelby v. Johnson*, Dall. (Tex.) 597.

3. *Hagerty v. Arnold*, 13 Kan. 367; *State v. Foster*, 36 Kan. 504.

4. *State v. Long*, 91 Ind. 351; *Bond v. White*, 8 Kan. 333.

5. *Authority to Succeed to the Rights and Liabilities of His Predecessor* entitles the appointee to hold for unexpired term. *Sheen v. Hughes*, (Ariz. 1895) 40 Pac. Rep. 679.

Authority to Hold for Residue of Unexpired Term — *California.* — *People v. Langdon*, 8 Cal. 1; *People v. Wells*, 11 Cal. 329; *Tillson v. Ford*, 53 Cal. 701.

Colorado. — *People v. Osborne*, 7 Colo. 605; *In re Election of Dist. Judges*, 11 Colo. 373; *People v. Le Fevre*, 21 Colo. 218; *Church v. Mullins*, 10 Colo. App. 318.

Florida. — *State v. Murphy*, 32 Fla. 138. *Indiana.* — *State v. La Porte*, 28 Ind. 250; *Baker v. Kirk*, 33 Ind. 528; *Parmater v. State*, 102 Ind. 90; *Parcel v. State*, 110 Ind. 122; *State v. Chapin*, 110 Ind. 277; *Carson v. State*, 145 Ind. 348.

Iowa. — *Dyer v. Bagwell*, 54 Iowa 487. *Kansas.* — *Bond v. White*, 8 Kan. 333; *State v. Mechem*, 31 Kan. 435; *Hale v. Bischoff*, 53 Kan. 306.

Kentucky. — *Shelley v. McCullough*, 97 Ky. 164.

Maryland. — *Ash v. McVey*, 85 Md. 119.

Michigan. — *Edison v. Almy*, 66 Mich. 329.

Missouri. — *State v. Stonestreet*, 99 Mo. 370.

New Jersey. — *State v. Davis*, 57 N. J. L. 80.

New York. — *People v. Woodruff*, 32 N. Y. 357; *People v. McClave*, 99 N. Y. 83; *People v. Randall*, 91 Hun (N. Y.) 266.

Oregon. — *State v. Compton*, 34 Oregon 25.

Tennessee. — *State v. Maloney*, 92 Tenn. 62.

Authority to Hold until "Next Election." —

Tillson v. Ford, 53 Cal. 701; *State v. Gamble*, 13 Fla. 9. See also *People v. Harvey*, 58 Cal. 337 ("until the next municipal election"); *People v. Scheu*, 167 N. Y. 292, *affirming* 60 N. Y. App. Div. 592 (until first of January, after next municipal election).

Until Next Election by People. — *People v. Mott*, 3 Cal. 502; *People v. Langdon*, 8 Cal. 1; *People v. Mathewson*, 47 Cal. 442; *People v. Budd*, 114 Cal. 168. See also *NEXT*, vol. 21, p. 534, note.

Until the Next General Election — *Alabama.* — *Falconer v. Robinson*, 46 Ala. 340.

Colorado. — *People v. Le Fevre*, 21 Colo. 234.

Florida. — *Opinion of Justices*, 25 Fla. 426; *State v. Murphy*, 32 Fla. 138.

Indiana. — *State v. Long*, 91 Ind. 351.

Iowa. — *Dyer v. Bagwell*, 54 Iowa 487; *State v. Chatburn*, 63 Iowa 659, 50 Am. Rep. 760.

Kansas. — *State v. Mechem*, 31 Kan. 435; *State v. Foster*, 36 Kan. 504; *Van Wye v. Clark*, 41 Kan. 744.

Kentucky. — *Toney v. Harris*, 85 Ky. 453.

Missouri. — *State v. Perkins*, 139 Mo. 106.

XV. TERMINATION OF AUTHORITY — 1. Abolition of Office. — The nature of an office and the rights of the incumbent thereof have been already considered.¹ It follows, from what is there said, that constitutional offices cannot be abolished by the legislature, but can be abolished only by a constitutional amendment.² In the absence of any fundamental restriction the legislature may abolish any office of its own creation,³ without regard to the

South Dakota. — *State v. Gardner*, 3 S. Dak. 553.

See also the paragraph *General Election*, under GENERAL, vol. 14, p. 949.

Until the Next Regular Election. — This has been held to mean until the next regular election for the office in question. *State v. Phillips*, 30 Fla. 591; *Cloud v. Wilson*, 72 N. Car. 155. But see *State v. Conrades*, 45 Mo. 45.

A similar interpretation has been given to the words "first proper election." *State v. Barbee*, 45 Ohio St. 347; *Harte v. Bode*, 7 Ohio Dec. 74, 4 Ohio N. P. 421.

Until "Vacancy Is Regularly Filled." — *State v. Lovell*, 70 Miss. 309.

Until the Next Annual Election. — *Parmater v. State*, 102 Ind. 90; *Shelley v. McCullough*, 97 Ky. 164; *Hawkins v. Cook*, 62 N. J. L. 84; *Rudy's Case*, 9 Pa. Co. Ct. 467. See also *People v. Fitchie*, 76 Hun (N. Y.) 80 (until beginning of political year next succeeding next annual election). See also *People v. Scheu*, 167 N. Y. 292, *affirming* 60 N. Y. App. Div. 592.

Until a Certain Date. — *Saunders v. Grand Rapids*, 46 Mich. 467; *Edison v. Almy*, 66 Mich. 320.

Appointment "until the Meeting of the Legislature." — *McAffee v. Russell*, 29 Miss. 84 (either in regular or extraordinary session). See also *Monash v. Rhodes*, 11 Colo. App. 404 (until next meeting of senate).

Until the End of Next Legislative Session. — *People v. Mott*, 3 Cal. 502; *People v. Langdon*, 8 Cal. 1; *People v. Tyrrell*, 87 Cal. 475. See also *Kroh v. Smoot*, 62 Md. 172; *Ash v. McVey*, 85 Md. 119.

Until the End of Next Session of Senate. — 4 Op. Atty.-Gen. 31; U. S. v. Kirkpatrick, 9 Wheat. (U. S.) 733; *Com. v. Waller*, 145 Pa. 235.

Appointment by Governor — Commission to Expire When Governor and Senate Appoint. — *People v. Cazneau*, 20 Cal. 507.

Holding Over under a General Provision — Entitled until Successor Chosen and Qualified. — *People v. Tyrrell*, 87 Cal. 475; *Ash v. McVey*, 85 Md. 119; *People v. Fitchie*, 76 Hun (N. Y.) 80; *People v. McIver*, 68 N. Car. 467; *People v. Hardy*, 8 Utah 68.

Holding Over under Express Provision until Successors Chosen and Qualified — California. — *Tillson v. Ford*, 53 Cal. 701; *People v. Harvey*, 58 Cal. 337.

Florida. — *Matter of Executive Communication*, 25 Fla. 426; *State v. Murphy*, 32 Fla. 138.

Iowa. — *Dyer v. Bagwell*, 54 Iowa 487; *State v. Chatburn*, 63 Iowa 659, 50 Am. Rep. 760.

Indiana. — *State v. Linkhauer*, 142 Ind. 94.

Kansas. — *Bond v. White*, 8 Kan. 333; *State v. Mechem*, 31 Kan. 435; *State v. Foster*, 36 Kan. 504; *Van Wye v. Clark*, 41 Kan. 744.

Michigan. — *People v. Lord*, 9 Mich. 227; *Fuller v. Palmer*, 91 Mich. 283.

Missouri. — *State v. Thompson*, 38 Mo. 192.

New Hampshire. — *Atty.-Gen. v. Burnham*, 61 N. H. 594.

Ohio. — *State v. Speidel*, 62 Ohio St. 156; *State v. Barbee*, 45 Ohio St. 347; *Harte v. Bode*, 7 Ohio Dec. 74, 4 Ohio N. P. 421.

Oregon. — *State v. Johns*, 3 Oregon 533.
1. See *supra*, this title, *Nature and Incidents of Public Offices*.

2. Legislature May Not Abolish Constitutional Offices — Georgia. — *Massenburg v. Bibb County*, 96 Ga. 614.

Indiana. — *Moser v. Long*, 64 Ind. 189; *State v. Johnston*, 101 Ind. 223.

Kentucky. — *Lowe v. Com.*, 3 Met. (Ky.) 237.

Louisiana. — *State v. Towne*, 21 La. Ann. 490.

Missouri. — *State v. Draper*, 50 Mo. 353; *State v. Douglass*, 50 Mo. 596; *State v. Hermann*, 11 Mo. App. 43.

Nevada. — *State v. Tilford*, 1 Nev. 240.

New York. — *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; *Ex p. M'Colum*, 1 Cow. (N. Y.) 550; *People v. Foot*, 19 Johns. (N. Y.) 58; *People v. Rochester*, 11 Hun (N. Y.) 241.

Pennsylvania. — *Com. v. Gamble*, 62 Pa. St. 343, 1 Am. Rep. 422.

Virginia. — *Foster v. Jones*, 79 Va. 642, 52 Am. Rep. 637; *Judges' Case*, 4 Call (Va.) 135.

Constitutional Convention May — Georgia. — *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172.

Missouri. — *State v. Bernoudy*, 40 Mo. 192.

New York. — *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285.

Pennsylvania. — *French v. Com.*, 78 Pa. St. 339.

Tennessee. — *State v. Leonard*, 86 Tenn. 485.

3. Right to Abolish Office Created by Legislature — United States. — *Newton v. Mahoning County*, 100 U. S. 548; *Head v. Missouri University*, 19 Wall. (U. S.) 526.

Alabama. — *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698.

Colorado. — *In re Senate Bill No. 31*, 12 Colo. 340.

California. — *Atty.-Gen. v. Squires*, 14 Cal. 13, *overruling* *People v. Banvard*, 27 Cal. 470; *In re Bulger*, 45 Cal. 553; *Ford v. State Harbor Com'rs*, 81 Cal. 19.

Connecticut. — *State v. Baldwin*, 45 Conn. 134.

Georgia. — *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172; *State v. Gilbert*, 51 Ga. 227; *State v. Dews*, R. M. Chait. (Ga.) 397.

Illinois. — *People v. Auditor*, 2 Ill. 537; *Donahue v. Will County*, 100 Ill. 94; *People v. Brown*, 83 Ill. 95.

Indiana. — *Coffin v. State*, 7 Ind. 157; *Mullen v. State*, 34 Ind. 540; *Blakemore v. Dolan*, 50 Ind. 194; *Jeffries v. Rowe*, 63 Ind. 592; *State v. Hyde*, 129 Ind. 296; *Goodwin v. State*, 142 Ind. 117; *Walker v. Peele*, 18 Ind. 264.

Iowa. — *Bryan v. Cattell*, 15 Iowa 538.

Kansas. — *Borton v. Buck*, 8 Kan. 302.

term,¹ and even though the constitution provides that such officers shall hold their offices for the term for which they were elected.² Likewise a municipality, having the power to create an office, in the absence of legislative restraint, may abolish it.³ Though the tenure and compensation are fixed by statute, the legislature cannot abolish an office of constitutional origin by a colorable reduction of the compensation or by taking it away altogether.⁴

2. Resignation and Surrender — *a. RIGHT TO RESIGN.* — The resignation of an office is the act of giving it up, and is synonymous with surrender, relinquishment, abandonment, renunciation.⁵ A consent to be turned out is not a resignation.⁶ Independently of any statutory or constitutional provision, a resignation may be effected by the concurrence of the incumbent and the appointing power.⁷ The officer has the right to resign pending proceedings for his removal,⁸ and even after suspension,⁹ but before a person can resign an office to which he has been elected he must qualify and take possession of it.¹⁰ A resignation obtained by coercion may be dis-

Kentucky. — *Smith v. Com.*, 8 Bush (Ky.) 108.

Maine. — *Farwell v. Rockland*, 62 Me. 296; *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

Massachusetts. — *Opinion of Justices*, 117 Mass. 603; *Taft v. Adams*, 3 Gray (Mass.) 126.

Mississippi. — *Hyde v. State*, 52 Miss. 665; *Fant v. Gibbs*, 54 Miss. 396.

Missouri. — *State v. Davis*, 44 Mo. 129; *Wilcox v. Rodman*, 46 Mo. 322; *Head v. State University*, 47 Mo. 220; *State v. Hermann*, 11 Mo. App. 43.

Montana. — *Territory v. Rodgers*, 1 Mont. 252; *People v. Van Gaskin*, 5 Mont. 352.

Nevada. — *Denver v. Hobart*, 10 Nev. 28.

New Jersey. — *Hoboken v. Gear*, 27 N. J. L. 265; *Green v. Chosen Freeholders*, 44 N. J. L. 388.

New York. — *People v. Dunlap*, 66 N. Y. 162; *People v. Eddy*, 57 Barb. (N. Y.) 593; *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285; *Coulter v. Murray*, 4 Daly (N. Y.) 506; *Demarest v. Wickham*, 4 Hun (N. Y.) 627, 63 N. Y. 320.

North Carolina. — *Ward v. Elizabeth City*, 121 N. Car. 1; *White v. Ayer*, 126 N. Car. 570; *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677; *Brown v. Turner*, 70 N. Car. 93.

Ohio. — *McHugh v. Cincinnati*, 1 Cinc. Super. Ct. 145; *State v. Covington*, 29 Ohio St. 102.

Oregon. — *Territory v. Pyle*, 1 Oregon 149.

Pennsylvania. — *Com. v. McCombs*, 56 Pa. St. 436; *Com. v. Weir*, 165 Pa. St. 284; *Donohugh v. Roberts*, 11 W. N. C. (Pa.) 186.

South Carolina. — *Alexander v. McKenzie*, 2 S. Car. 81.

Tennessee. — *Jones v. Hobbs*, 4 Baxt. (Tenn.) 113.

Utah. — *Silvey v. Boyle*, 20 Utah 205.

Wisconsin. — *State v. Douglas*, 26 Wis. 428, 7 Am. Rep. 87; *Hall v. State*, 39 Wis. 79.

Effect of "Discontinuing" an Office. — *Beaman v. U. S.*, 19 Ct. Cl. 5.

Alternative Offices. — If the constitution provides for the performance of certain functions by "auditors and comptrollers," the legislature may lawfully abolish either of such offices if the alternative office is left in existence. *Lloyd v. Smith*, 176 Pa. St. 213.

1. Term Immaterial. — *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285.

2. State v. Hermann, 11 Mo. App. 43; *State v. Harris*, 1 N. Dak. 190.

3. Abolition of Municipal Office — *Georgia.* — *Augusta v. Sweeney*, 44 Ga. 463, 9 Am. Rep. 172.

Kentucky. — *Frankfort v. Brawner*, 100 Ky. 166.

Massachusetts. — *Chandler v. Lawrence*, 128 Mass. 213; *Cambridge v. Fifield*, 126 Mass. 428; *Donaghy v. Macy*, 167 Mass. 178.

Missouri. — *Primm v. Carondelet*, 23 Mo. 22.

New Jersey. — *Uffert v. Vogt*, 65 N. J. L. 377, *affirmed* 65 N. J. L. 621.

Ohio. — *State v. Jennings*, 57 Ohio St. 415, 63 Am. St. Rep. 723.

Texas. — *Palestine v. West*, (Tex. Civ. App. 1896) 37 S. W. Rep. 783.

Utah. — *McAllister v. Swan*, 16 Utah 1; *Meissner v. Boyle*, 20 Utah 316.

And see *Rhodes v. Hampton*, 101 N. Car. 629.

Violation of Statute. — *De Sota County v. Westbrook*, 64 Miss. 312.

A Municipal Office Created by the Legislature cannot be directly or indirectly abolished by the city. *Marquis v. Santa Ana*, 103 Cal. 661; *People v. Ham*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 517.

4. Reduction of Compensation. — *Conner v. New York*, 2 Sandf. (N. Y.) 355, *affirmed* 5 N. Y. 285. See *supra*, this title, *Compensation*.

5. Resignation Defined. — *Reg. v. Gloucester*, Holt K. B. 450; *Barbour's Case*, 17 Ct. Cl. 149.

6. Reg. v. Lane, 11 Mod. 270.

7. How Resignation Effected. — *Taylor's Case*, Popham 133; *Ex p. Gray*, Bailey Eq. (S. Car.) 77; *Cloutman v. Pike*, 7 N. H. 209; *State v. Newark*, 27 N. J. L. 185; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243; *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677; *Farwell v. Rockland*, 62 Me. 206.

An Agreement to Resign in consideration of certain annual payments may be enforced. *Taylor's Case*, Popham 134, *commented upon* in *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243.

8. Resignation Pending Removal Proceedings. — *State v. Dart*, 57 Minn. 261; *Roberts v. Paul*, 50 W. Va. 528.

9. After Suspension. — *State v. Blakemore*, 40 Mo. App. 406.

10. Cannot Resign Before Qualifying. — *Reg. v. Blizard*, L. R. 2 Q. B. 55; *Miller v. Sacramento County*, 25 Cal. 93. And see *In re Corliss*, 11 R. I. 639, 23 Am. Rep. 538.

affirmed.¹ The acceptance of a resignation so obtained cannot be justified on the ground that the officer would in any event have been removed for neglect of duty.²

b. FORM AND REQUISITES OF RESIGNATION. — In the absence of statute no particular form is required to effect a resignation,³ and it may be either express or by implication.⁴ It may be made to take effect at a future day.⁵ When a statute prescribes the steps to be taken they must be followed in all respects.⁶ Unless required by statute, neither writing⁷ nor seal is essential to a resignation in the *United States*.⁸ In *England* it is held that when an officer is appointed by an instrument under seal a similar instrument is necessary to effect a sufficient resignation.⁹ If the office is elective, no writing is necessary.¹⁰ To constitute a complete and operative resignation there must be an intention to relinquish the office,¹¹ but the intention alone is ineffective unless manifested by the conveyance of the resignation to the person authorized to receive it and who has power to fill the vacancy.¹²

c. PERSONS AND BODIES AUTHORIZED TO ACT UPON RESIGNATION. — A general right to accept a resignation passes incidentally with the right to appoint or elect;¹³ and every municipal corporation has an incidental power of accepting the resignation of its officers.¹⁴ The general rule is that in the absence of an express statutory enactment as to the matter, a resignation should be tendered to the appointing power¹⁵ or to the power having authority to call the election necessitated by the resignation.¹⁶ And the fact that the resignation is placed in the hands of another person or body, and is accepted by him or them, has no more effect than if it were retained in the hands of the officer himself.¹⁷

d. ACCEPTANCE — Necessity. — In *England* it is the invariable rule that

1. *Effect of Coercion.* — *People v. Voorhis*, 66 Hun (N. Y.) 88.

2. *People v. Martin*, 82 Hun (N. Y.) 1, 66 Hun (N. Y.) 88. See also *People v. MacLean*, 62 Hun (N. Y.) 42.

Evidence as to Fraud and Insanity. — *People v. Levy*, 71 Cal. 618.

3. *No Particular Form Necessary.* — *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 696.

4. *Express or Implied Resignation.* — *Barbour's Case*, 17 Ct. Cl. 149; *People v. Hanifan*, 96 Ill. 420, *affirming* 6 Ill. App. 158.

5. *Smith v. Dyer*, 1 Call (Va.) 562.

6. *Duty to Comply with Statute.* — *Lewis v. Oliver*, (Brooklyn City Ct.) 4 Abb. Pr. (N. Y.) 121.

7. *Need Not Be in Writing.* — *Barbour's Case*, 17 Ct. Cl. 149; *People v. Albany*, 19 Wend. (N. Y.) 29; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243.

Written Resignation Required by Statute. — *Davis v. Connor*, (Ky. 1899) 52 S. W. Rep. 945.

8. *Seal Unnecessary.* — *Gilbert v. Luce*, 11 Barb. (N. Y.) 91.

9. *English Rule as to Seal.* — *Rex v. Chalke*, 1 Ld. Raym. 226; Wilck. on Mun. Corp. 238. But see *Rex v. Rippon*, 2 Salk. 433, 4 Com. Did. 267.

10. *Parol Resignation of Elective Office.* — *Rex v. Rippon*, 1 Ld. Raym. 563; *Reg. v. Lane*, 2 Ld. Raym. 1304; *Reg. v. Lane*, 11 Mod. 270, 2 Ld. Raym. 1304, Fortescue 275; *Jenning's Case*, 12 Mod. 402; *Reg. v. Gloucester*, Holt K. B. 450; Wilck. on Mun. Corp. 238.

11. *Intent to Resign Necessary.* — *Biddle v. Willard*, 10 Ind. 62; *State v. Boecker*, 56 Mo. 17.

12. *State v. Pollner*, 10 Ohio Cir. Dec. 141.

Transmission with Intent that Proper Officer Receive It Sufficient. — *State v. Fitts*, 49 Ala. 402.

What Constitutes Delivery. — *State v. Clarke*, 3 Nev. 566.

Conditional Delivery to Third Person. — *Mim-mack v. U. S.*, 97 U. S. 426.

13. *Right to Accept.* — *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 696; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243.

14. *Right of Municipal Corporation.* — *Le Roy v. Tidderley*, Sid. (pt. i.) 14; *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243, 4 Com. Dig. 267.

15. *To Whom Made — Idaho.* — *People v. Gillespie*, 1 Idaho 52.

Indiana. — *Leech v. State*, 78 Ind. 570.

Missouri. — *State v. Boecker*, 56 Mo. 17; *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 696.

New Jersey. — *Fryer v. Norton*, (N. J. 1902) 52 Atl. Rep. 476. Compare *State v. Ferguson*, 31 N. J. L. 107.

New York. — *Olmsted v. Dennis*, 77 N. Y. 378.

Ohio. — *State v. Pollner*, 10 Ohio Cir. Dec. 141, 18 Ohio Cir. Ct. 304.

Oregon. — *Vaughn v. School Dist. No. Thirty-one*, 27 Oregon 57. And see *State v. Brown*, 12 Ohio St. 614.

Pennsylvania. — *State v. Norton*, (N. J. 1901) 50 Atl. Rep. 661.

Express Statutory Provision to Be Followed. — *State v. Kovolosky*, 92 Iowa 498.

16. *Vaughn v. School Dist. No. Thirty-one*, 27 Oregon 57.

17. *Not Effective unless Made to Proper Person.* — *State v. Boecker*, 56 Mo. 17; *State v. Pollner*, 10 Ohio Cir. Dec. 141.

without the consent of competent authority no officer can divest himself of the performance of the duties of the office to which he was elected or appointed,¹ and in the *United States* this doctrine has been adopted in some jurisdictions,² but in other jurisdictions the common law on this subject has been held inapplicable to the incumbents of offices under the American form of government.³

Revocation. — The revocation, by the President, of the acceptance of an army officer's resignation, after due notice to the officer of such acceptance, does not restore the officer to the army.⁴

How Manifested. — A resignation may be accepted either in express words,⁵ or by the election or appointment of a successor,⁶ or the resignation may be impliedly accepted by receiving it without objection and filing or causing it to be filed.⁷ It follows from what has been said that the acceptance may be by parol.⁸

e. WHEN EFFECTIVE. — Where the resignation is worded to take effect at a future day it does not take effect until such day, no matter when it is accepted,⁹ but it has been held that this does not prevent the election of a successor before the day fixed for the taking effect of the resignation.¹⁰

Acceptance Conditioned on Qualification of Successor. — Where an unconditional resignation is accepted and acknowledged, the acceptance to take effect upon

1. **Acceptance Necessary — English Rule.** — *Rex v. Rippon*, 1 *Ld. Raym.* 563; *Reg. v. Lane*, 2 *Ld. Raym.* 1304; *Rex v. Patteson*, 4 *B. & Ad. g.* 24 *E. C. L.* 11.

2. *United States.* — *Edwards v. U. S.*, 103 *U. S.* 471; *Thompson v. U. S.*, 103 *U. S.* 480; *U. S. v. Justices*, 10 *Fed. Rep.* 460; *Badger v. U. S.*, 93 *U. S.* 599. *Compare U. S. v. Wright*, 1 *McLean (U. S.)* 509.

Illinois. — *People v. Williams*, 145 *Ill.* 573, 36 *Am. St. Rep.* 514.

Kansas. — *State v. Clayton*, 27 *Kan.* 442, 41 *Am. Rep.* 478; *Rogers v. Slonaker*, 32 *Kan.* 191.

Michigan. — *Ellis v. Lennon*, 86 *Mich.* 468; *Clark v. Board of Education*, 112 *Mich.* 656.

New Jersey. — *State v. Newark*, 27 *N. J. L.* 185; *State v. Ferguson*, 31 *N. J. L.* 107; *Fryer v. Norton*, (N. J. 1902) 52 *Atl. Rep.* 476, *affirmed* (N. J. 1901) 50 *Atl. Rep.* 661.

North Carolina. — *Hoke v. Henderson*, 4 *Dev. L.* (15 *N. Car.*) 1, 25 *Am. Dec.* 677.

Pennsylvania. — *Steel v. Com.*, 18 *Pa. St.* 451.

Virginia. — *Coleman v. Sands*, 87 *Va.* 689, *criticising Bunting v. Willis*, 27 *Gratt. (Va.)* 144, 21 *Am. Rep.* 338.

Texas. — *Byars v. Crisp*, 2 *Tex. App. Civ. Cas.*, § 708.

3. **Acceptance Unnecessary — Alabama.** — *State v. Fitts*, 49 *Ala.* 402.

California. — *People v. Porter*, 6 *Cal.* 26.

Indiana. — *Leech v. State*, 78 *Ind.* 570.

Iowa. — *Gates v. Delaware County*, 12 *Iowa* 405.

Nebraska. — *State v. Lincoln*, 4 *Neb.* 260.

Nevada. — *State v. Clarke*, 3 *Nev.* 566; *State v. Beck*, 24 *Nev.* 92.

New York. — *Olmsted v. Dennis*, 77 *N. Y.* 378; *Conner v. New York*, 2 *Sandf. (N. Y.)* 355, *affirmed* 5 *N. Y.* 285.

Prior to 1870 all officers in *Tennessee* had an unrestricted right of resignation. *U. S. v. Justices*, 10 *Fed. Rep.* 460.

In *Ohio* it is held that acceptance is not necessary to the validity of a resignation, in so far

at least as to authorize the filling of the vacancy. *Reiter v. State*, 51 *Ohio St.* 74.

Imposition of Penalty — Effect. — The fact that a penalty is imposed by statute for refusing to serve in an office does not prevent the incumbent from resigning, but he incurs the penalty by such resignation. *Conner v. New York*, 2 *Sandf. (N. Y.)* 355.

Statutory Right of Resignation. — Under a statute providing that resignations may be made "by all officers" to the body that appointed them, a deputy sheriff may resign his office, which becomes *ipso facto* vacant by such resignation. *Gilbert v. Luce*, 11 *Barb. (N. Y.)* 91.

The *Missouri* Constitution recognizes the absolute right of resignation. *State v. Bus*, 135 *Mo.* 325; but *compare State v. Blakemore*, 40 *Mo. App.* 406, 104 *Mo.* 340.

4. **Effect of Revocation.** — *Mimmack v. U. S.*, 97 *U. S.* 426.

5. **Formal Acceptance.** — *Edwards v. U. S.*, 103 *U. S.* 471.

The Acknowledgment of a Clerk of a Board Insufficient. — *Coleman v. Sands*, 87 *Va.* 689.

Not Necessary to Enter upon Records. — It is not necessary to enter upon the records an order accepting the resignation. *Pace v. People*, 50 *Ill.* 432.

6. **Election of Successor.** — *McGee v. State*, 103 *Ind.* 444; *Cloutman v. Pike*, 7 *N. H.* 209; *Van Orsdall v. Hazard*, 3 *Hill (N. Y.)* 243. See also *Pariseau v. Board of Education*, 96 *Mich.* 302.

7. **Receiving and Filing.** — *U. S. v. Justices*, 10 *Fed. Rep.* 460; *Pace v. People*, 50 *Ill.* 432; *Gates v. Delaware County*, 12 *Iowa* 405.

8. **Parol Acceptance.** — *Van Orsdall v. Hazard*, 3 *Hill (N. Y.)* 243.

9. **Effective According to Its Terms.** — *Bashford v. People*, 24 *Mich.* 244; *State v. McGrath*, 64 *Mo.* 139; *State v. Van Buskirk*, 40 *N. J. L.* 463.

10. **Election of Successor before Resignation Effective.** — *Leech v. State*, 78 *Ind.* 570. See also *Reiter v. State*, 51 *Ohio St.* 74.

the appointment of a successor, the resignation is not complete until such appointment.¹

f. **WITHDRAWAL OF RESIGNATION.** — An unconditional resignation to take effect immediately cannot be withdrawn even with the consent of the power authorized to accept it,² and it does not seem to be material that the resignation had not been accepted.³ A contingent⁴ or a prospective resignation, however, can be withdrawn at any time before it is accepted,⁵ and after it is accepted it seems that it may be withdrawn with the consent of the authority accepting where no rights have intervened.⁶

g. **EFFECT AND INCIDENTS OF RESIGNATION.** — A decree signed,⁷ or a finding of facts made in an appealed case, after the judge's resignation, is valid,⁸ but a judge has no power to allow a motion for a new trial after a resignation of his office has taken effect.⁹ It has been held that a resignation will not deprive the municipality¹⁰ or any other person of any right which the law may have conferred upon them in respect of such office or the political division represented by such officer.¹¹

h. **SURRENDER.** — The incumbency may be terminated also by the surrender of the office to the person appointed or elected successor to the incumbent, as by delivering the records of the office and permitting the office to be taken by the incumbent without objection.¹²

Office Not Abandoned. — Though the officer voluntarily surrender possession of the office before the expiration of his term to one who has been elected under a statute which is acted upon as valid, but which is afterwards declared unconstitutional and void, there is no such abandonment as will create a vacancy.¹³

3. Abandonment and Forfeiture — *a.* **FAILURE TO QUALIFY OR TO MAINTAIN QUALIFICATIONS.** — One of the modes of losing an office to which one has been appointed or elected is the failure to qualify therefor by giving the bond or taking the oath of office within the time and in the manner prescribed by law. But the decisions are not in accord as to when such forfeiture takes effect. In some jurisdictions statutes providing that a vacancy shall occur in the office when the officer-elect fails to comply with the requirements relative

1. *State v. Clayton*, 27 Kan. 442, 41 Am. Rep. 418. Compare *Olmsted v. Dennis*, 77 N. Y. 378.

2. *Pace v. People*, 50 Ill. 432; *State v. Hauss*, 43 Ind. 105, 13 Am. Rep. 384; *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 606. And see *Le Roy v. Tidderley*, 1 Sid. 14; *McGhee v. Dickey*, 4 Tex. Civ. App. 104.

Resignation Provided for on Payment of Fine. — *Reg. v. Wigan*, 14 Q. B. D. 908.

Resignation Tendered to Wrong Person and Accepted by the Right Person Irrevocable. — *State v. Augustine*, 113 Mo. 21, 35 Am. St. Rep. 606, distinguished *State v. Boecker*, 56 Mo. 17. See also *Pariseau v. Board of Education*, 96 Mich. 302.

3. *State v. Hauss*, 43 Ind. 105, 13 Am. Rep. 384.

Refusal to Accept a resignation tendered, but afterwards returned without having been acted upon, does not create a vacancy. *Kearney v. Flannery*, 8 Kulp (Pa.) 219. See also *McGhee v. Dickey*, 4 Tex. Civ. App. 104.

After Tender of an Unconditional Resignation Not Accepted the officer's acts, as against collateral attack, are valid as those of a *de facto* officer at least. *McGhee v. Dickey*, 4 Tex. Civ. App. 104.

4. **Contingent Resignation.** — *State v. Beck*, 24 Nev. 92.

5. **Prospective Resignation.** — *Clark v. Board of Education*, 112 Mich. 656; *State v. Boecker*,

56 Mo. 17; *State v. Clarke*, 3 Nev. 566; *Lewis v. Oliver*, (Brooklyn City Ct.) 4 Abb. Pr. (N. Y.) 121.

6. *Biddle v. Willard*, 10 Ind. 62; *Bunting v. Willis*, 27 Gratt. (Va.) 144, 21 Am. Rep. 338.

7. **Validity of Judge's Acts After Resignation.** — *Northrop v. Gregory*, 2 Abb. (U. S.) 503.

8. *Johnson v. Higgins*, 53 Conn. 239.

9. *Griffing v. Danbury*, 41 Conn. 96.

Justice Who Has Resigned Cannot Participate in Selection of Officer. — *Oregon v. Jennings*, 119 U. S. 74.

10. *Philadelphia v. Mercer*, 1 Leg. Gaz. (Pa.) 355.

11. *State v. Blakemore*, 104 Mo. 340.

Official Duties Not Avoided by Resignation. — *Gorgas v. Blackburn*, 14 Ohio 252. See also *Edwards v. U. S.*, 103 U. S. 471.

Evidence of Intent of Officer in Resigning. — *Thompson v. U. S.*, 103 U. S. 480.

Resignation to Defeat Collection of Debt. — *Amy v. Watertown*, 130 U. S. 301.

12. **Surrender of Office.** — *Williams v. Somers*, 1 Dev. & B. L. (18 N. Car.) 61; *Dickens v. Justices*, 1 Dev. & B. L. (18 N. Car.) 406. See also *State v. Boyd*, 34 Neb. 435; *Bland*, etc., County Judge Case, 33 Gratt. (Va.) 443; *McGraw v. Williams*, 33 Gratt. (Va.) 510.

13. *Turnipseed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15. See also *Hampton v. Dilley*, 2 Idaho 1157.

to the filing of the bond and the taking of the oath are construed as directory merely, and that therefore such failure does not of itself effect a forfeiture, but is only cause of forfeiture¹ requiring a judicial declaration of a vacancy because of such omission.² In other jurisdictions such statutes are held to be mandatory so that the failure to strictly observe their requirements, of itself, works a forfeiture.³ A distinction has been made between a wilful refusal to qualify, and an omission due to no fault or negligence on the part of the officer; in the latter case the failure has been held not to work a forfeiture.⁴ The proposition last stated has been applied to renewal and additional bonds required to be filed by the officer.⁵ Refusal to give a bond required of an *ex officio* officer does not create a vacancy in the principal office.⁶

b. NONRESIDENCE. — In general a vacancy in office will also occur when the incumbent before the expiration of his term removes with the intention of permanently remaining away from the political division in and for which he was elected or appointed to perform the duties of the office;⁷ and a

1. Failure to Qualify Not Forfeiture but Cause of Forfeiture — *Georgia*. — *Ross v. Williamson*, 44 Ga. 501.

Illinois. — *Cawley v. People*, 95 Ill. 249; *Chicago v. Gage*, 95 Ill. 593, 35 Am. Rep. 182.

Indiana. — *State v. Porter*, 7 Ind. 204.

Louisiana. — *State v. Dranguet*, 23 La. Ann. 784; *State v. Peck*, 30 La. Ann. 280. The statute in Louisiana has since been amended. See *State v. Beard*, 34 La. Ann. 273.

Michigan. — *People v. Benfield*, 80 Mich. 265.

Missouri. — *State v. Texas County Ct.*, 44 Mo. 230.

New Jersey. — *Kearney v. Andrews*, 10 N. J. Eq. 70.

New York. — *Foot v. Stiles*, 57 N. Y. 399; *Cronin v. Stoddard*, 97 N. Y. 271; *Croning v. Gundy*, 16 Hun (N. Y.) 520.

Oregon. — *State v. Colvig*, 15 Oregon 57.

Pennsylvania. — *Com. v. Read*, 2 Ashm. (Pa.) 261. See *supra*, this title, *Acceptance and Qualification*.

Executing and Filing — Distinction. — Failure to execute the bond within the time required by law is immaterial if it is filed in time. *People v. Holley*, 12 Wend. (N. Y.) 481.

Failure of Sureties to Justify. — *People v. Benfield*, 80 Mich. 265.

2. Judicial Declaration of Vacancy Required. — *State v. Towne*, 21 La. Ann. 490; *Vann v. Pipkin*, 77 N. Car. 408; *Hunter v. Rutledge*, 6 Jones L. (51 N. Car.) 216; *Coleman v. Sands*, 87 Va. 689; *Bland, etc., County Judge Case*, 33 Gratt. (Va.) 443.

Council or Other Body. — *Kriseler v. Le Valley*, 122 Mich. 576; *Carland v. Custer County*, 5 Mont. 579.

Notification of Failure to Give Bond Required from Person Authorized to Accept Such Bond. — *Buckman v. Beaufort County*, 80 N. Car. 121. And see *Kilburn v. Latham*, 81 N. Car. 312.

Appointment of Successor Before Declaration of Vacancy. — *State v. Jones*, 19 Ind. 356, 81 Am. Dec. 403.

No Formality of Trial is necessary before a tribunal which must approve an officer's official bond, to ascertain whether the office has become vacant by reason of a failure to give bond. *Flatlan v. State*, 56 Tex. 93.

3. Failure to Qualify Per Se Forfeiture of Office. — *Payne v. San Francisco*, 3 Cal. 122; *People v. Taylor*, 57 Cal. 620; *Matter of Executive Communication*, 14 Fla. 277; *State v. Matheny*,

7 Kan. 327; *Jenkintown Councilmen*, 16 Montg. Co. Rep. (Pa.) 73; *Branham v. Long*, 78 Va. 352. And see *State v. Washburn*, 17 Wis. 658. See also *State v. Tucker*, 54 Ala. 205 (*disapproving* *Sprol v. Lawrence*, 33 Ala. 691; *State v. Ely*, 43 Ala. 568); *Thompson v. Holt*, 52 Ala. 491; *Howell v. Com.*, 97 Pa. St. 332; *Johnson v. Mann*, 77 Va. 265.

Interpretation of Particular Statute. — See *State v. Beard*, 34 La. Ann. 273.

Holding Over. — The election of a person to the office of justice of the peace and his refusal to qualify will not create a vacancy in the office, but the person filling the office at the time of the election will continue to hold the same. *Borton v. Buck*, 8 Kan. 302.

4. Omission Not Due to Officer's Fault. — *Ross v. Williamson*, 44 Ga. 501; *State v. Dahl*, 65 Wis. 510. See also *Flatlan v. State*, 56 Tex. 93.

Refusing to Approve a Bond on the ground that the appointment was invalid or on account of insufficiency, the time being given to file the bond and qualify, is not such a failure to qualify as will work a forfeiture. *Buckman v. Beaufort County*, 80 N. Car. 121; *State v. Dahl*, 65 Wis. 510. But see *Bosworth v. Walters*, 46 Ga. 635.

Necessity of Notice to Give Bond. — *People v. McKinney*, 52 N. Y. 374. See also *Atty.-Gen. v. Elderkin*, 5 Wis. 300. And as to the sufficiency of notice, see *Ross v. People*, 78 Ill. 375.

Kansas — Failure to Qualify Within Certain Time Creates Vacancy, but Officer May Show Cause of Failure. — *Carpenter v. Titus*, 33 Kan. 7, *distinguishing* *State v. Matheny*, 7 Kan. 330.

5. Renewal and Additional Bonds. — *Beebe v. Robinson*, 52 Ala. 66; *Thompson v. Holt*, 52 Ala. 491; *McGregor v. Gladwin County*, 37 Mich. 388; *State v. Sanderson*, 26 Minn. 333; *State v. Laughton*, 19 Nev. 202; *Eddy v. Kincaid*, 28 Oregon 537. See also *Evans v. Justices*, 3 Hayw. (Tenn.) 26.

Constable Elected to Succeed Himself Holds Over until He Qualifies under Such Election. — *Miller v. Burger*, 2 Ind. 337.

Retaining Qualifications for Officer During Term. — See *Kean v. Rizer*, 90 Md. 507.

6. State v. Laughton, 19 Nev. 202.

7. Nonresidence — *California*. — *People v. Britte*, 55 Cal. 79.

Georgia. — *Hinton v. Lindsay*, 20 Ga. 746.

Indiana. — *State v. Allen*, 21 Ind. 516, 83

judicial determination is not necessary to establish the fact of such vacancy.¹ But the authorities are not uniform as to the effect of a removal from a part or district of a political division into another part of the same division where the officer was appointed or elected to represent the interests of the former part in the whole division.² Neither are they in accord as to the effect of a nonresidence created by a division of the district in such manner that the residence of the officer is located outside of the place where the official duties are to be performed.³ But where a nonresidence so caused would create a vacancy, the officer is entitled to a reasonable time for removal.⁴ The cause of an absence exceeding the statutory limit is immaterial.⁵ There must be an absolute intent to change one's residence.⁶ An officer's authority will not be terminated by his going away for a limited period of time without intending to give up his office or to cease to discharge the duties thereof.⁷ After one has abandoned his residence and has forfeited his office therefor, a subsequent return will not purge the forfeiture.⁸

Am. Dec. 367; *Yonkey v. State*, 27 Ind. 236; *Relender v. State*, 149 Ind. 283.

Kentucky. — *Curry v. Stewart*, 8 Bush (Ky.) 560; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Lexington, etc., Turnpike Road Co. v. McMurry*, 6 B. Mon. (Ky.) 217.

Louisiana. — *State v. McNeely*, 24 La. Ann. 19.

Nebraska. — *Prather v. Hart*, 17 Neb. 598.

New Hampshire. — *Giles v. School Dist. No. 14*, 31 N. H. 304; *Cloutman v. Pike*, 7 N. H. 209.

New York. — *Gildersleeve v. Board of Education*, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201.

Pennsylvania. — *Respublica v. M'Clean*, 4 Yeates (Pa.) 399; *Clinton Tp. Road*, 3 Pa. Co. Ct. 170; *Com. v. Lally*, 10 Phila. (Pa.) 507, 30 Leg. Int. (Pa.) 296; 1 Leg. Chron. (Pa.) 273.

Texas. — *Ehlinger v. Rankin*, 9 Tex. Civ. App. 424.

Virginia. — *Chew v. Justices*, 2 Va. Cas. 208.

At Common Law an alderman was not bound to reside within the borough, unless that was necessary to the discharge of the duties of his office, or he was required to do so by the charter. *Rex v. Portsmouth*, 3 B. & C. 152, 10 E. C. L. 40; *Reg. v. Pomfret*, 10 Mod. 108. But see *Rex v. Exeter*, Comb. 197.

Where the Clerk of a School District removed into an adjoining district, but within the same town, and another was chosen in his stead, but not sworn, it was held that the first continued competent to act as clerk. *Williams v. School Dist. No. 1*, 21 Pick (Mass.) 75, 32 Am. Dec. 243.

Absconding. — Where an officer becomes a defaulter, flees the state, leaves no one to care for the public affairs, and indicates a settled purpose to abandon the office, it may be deemed vacant without a judicial determination, and the vacancy may be filled by appointment. *Osborne v. State*, 128 Ind. 129; *Washington County v. Semler*, 41 Wis. 374; *Erie County Coroner*, 11 Pa. Co. Ct. 136.

1. *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310; *Curry v. Stewart*, 8 Bush (Ky.) 560; *Lexington, etc., Turnpike Road Co. v. McMurry*, 6 B. Mon. (Ky.) 217; *Page v. Hardin*, 8 B. Mon. (Ky.) 667; *Prather v. Hart*, 17 Neb. 598; *People v. Glass*, 19 N. Y. App. Div. 454.

2. **A County Commissioner** must reside in the district in and from which he was elected, and his removal from the district, although he remains in the country, vacates the office. *State v. Skirving*, 19 Neb. 497. *Contra*, see *Smith v. State*, 24 Ind. 101.

Councilman. — Where a councilman is elected from a certain ward in a city, and after his election he moves into and becomes a resident of another ward, he does not by such action vacate his office. *State v. Craig*, 132 Ind. 54, 32 Am. St. Rep. 237. *Contra*, see *Com. v. Yeakel*, 13 Pa. Co. Ct. 615.

3. See *State v. Hixon*, 27 Ark. 398; *Mauck v. Lock*, 70 Iowa 266. *Contra*, see *State v. Nelson*, 7 Wash. 114; *Com. v. Northumberland County*, 4 S. & R. (Pa.) 275; *Respublica v. M'Clean*, 4 Yeates (Pa.) 399; *State v. Messmore*, 14 Wis. 163; *State v. Milwaukee County*, 21 Wis. 443.

4. *State v. Choate*, 11 Ohio 511; *State v. Messmore*, 14 Wis. 163.

5. *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310.

But it has been held that absence of a public officer from the place where he holds his office, caused by sickness and medical treatment, does not amount to a change of residence. *McGregor v. Allen*, 33 La. Ann. 870.

6. *Lexington, etc., Turnpike Road Co. v. McMurry*, 6 B. Mon. (Ky.) 214.

Changing Intent. — If one leaves the state intending to return, but subsequently determines not to, the office will become vacant upon the cessation of the intention to make his absence but temporary. *Prather v. Hart*, 17 Neb. 598.

7. **Temporary Absence**. — *Rex v. Leicester*, 4 Com. Dig. 268; *De Canio v. New York*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 38; *State v. Springfield*, 97 Tenn. 302; *Yonkey v. State*, 27 Ind. 236; *Bryan v. Cattell*, 15 Iowa 538; *Curry v. Stewart*, 8 Bush (Ky.) 560; *Lyon v. Com.*, 3 Bibb (Ky.) 430; *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551; *Relender v. State*, 149 Ind. 283; *Tennant v. Parker*, 3 Neb. 409, 19 Am. Rep. 634.

8. *Rex v. Exeter*, Comb. 197; *Yonkey v. State*, 27 Ind. 236; *Relender v. State*, 149 Ind. 283; *Matter of Bagley*, (Supm. Ct. Spec. T.) 27 How. Pr. (N. Y.) 151.

c. **NEGLECT AND REFUSAL TO PERFORM OFFICIAL DUTIES.** — Abandoning the office or persistently neglecting to attend to the duties thereof is another method of effecting a vacancy in office.¹ But in general, mere absence must be unreasonably prolonged to destroy the right to the office;² and the nonuser must be of such a character and for so long a time as to show plainly a complete abandonment.³

d. **ACCEPTANCE OF INCOMPATIBLE OFFICE.** — It is an unquestioned rule that an officer vacates his office by the acceptance of another place in the public service, the functions and duties of which are incompatible with those incident to the office first held;⁴ and this even though the second office is of an inferior grade.⁵ But the rule does not apply, of course, when the officer is made ineligible to hold the second office.⁶ And it would be an anomaly in the law if a public officer who could not directly resign or who could not be removed without the concurrence or privity of a superior authority should be able to accomplish the same object indirectly by an acceptance of an incompatible office.⁷ The resignation of the second office will not effect a restoration to the first office.⁸

e. **COMMISSION OF CRIMINAL ACTS.** — In some jurisdictions the conviction of a public officer of felony creates a vacancy in the office.⁹ So the failure to

1. **Neglect — Refusal to Attend to Duties.** — *People v. Hartwell*, 67 Cal. 11; *Harrison v. People*, 36 Ill. App. 319; *People v. Spencer*, 101 Ill. App. 61; *State v. Allen*, 21 Ind. 516, 83 Am. Dec. 367; *People v. Hanifan*, 96 Ill. 420; *Turnipseed v. Hudson*, 50 Miss. 429, 19 Am. Rep. 15; *De Canio v. New York*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 38.

Committing Office to Deputies. — *Yonkey v. State*, 27 Ind. 236; *State v. Peck*, 30 La. Ann. 280.

Motive. — *People v. Bardy*, 58 N. Y. App. Div. 219.

Illness. — *State v. Baird*, 47 Mo. 301.

The Refusal of a Highway Surveyor to Execute a Receipt for a tax bill does not vacate his office. — *Cummings v. Clark*, 15 Vt. 653.

2. *Harrison v. People*, 36 Ill. App. 319; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *State v. Baird*, 47 Mo. 301; *Crawford v. Saunders*, 9 Tex. Civ. App. 225; *State v. Graham*, 26 La. Ann. 568, 21 Am. Rep. 551.

3. *Barbour's Case*, 17 Ct. Cl. 149.

4. **Accepting Incompatible Office — England.** — *Rex v. Patteson*, 4 B. & Ad. 9, 24 E. C. L. 11; *Rex v. Trelawney*, 4 Com. Dig. 267; *Rex v. Hughes*, 5 B. & C. 886.

Illinois. — *Packingham v. Harper*, 66 Ill. App. 96; *People v. Hanifan*, 96 Ill. 420, *affirming* 6 Ill. App. 158; *Burgess v. Davis*, 37 Ill. App. 353.

Indiana. — *Kerr v. Jones*, 19 Ind. 351; *State v. Jones*, 19 Ind. 356, 81 Am. Dec. 403; *Dailey v. State*, 8 Blackf. (Ind.) 329.

Iowa. — *Bryan v. Cattell*, 15 Iowa 538.

Kentucky. — *Wilson v. King*, 3 Litt. (Ky.) 457, 14 Am. Dec. 84; *Goodloe v. Fox*, 96 Ky. 627; *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 226.

Louisiana. — *State v. Newhouse*, 29 La. Ann. 824; *State v. Arata*, 32 La. Ann. 193; *State v. Dellwood*, 33 La. Ann. 1229; *State v. West*, 33 La. Ann. 1261.

Maine. — *Stubbs v. Lee*, 64 Me. 195, 18 Am. Rep. 251.

Michigan. — *Northway v. Sheridan*, 111

Mich. 18; *Atty.-Gen. v. Detroit*, 112 Mich. 145.

Missouri. — *State v. Lusk*, 48 Mo. 242; *State v. Bus*, 135 Mo. 325.

New Jersey. — *State v. Parkhurst*, 9 N. J. L. 427.

New York. — *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243; *People v. Green*, 5 Daly (N. Y.) 254; *People v. Nostrand*, 46 N. Y. 375; *People v. Carrique*, 2 Hill (N. Y.) 93; *People v. Fire Com'rs*, 76 Hun (N. Y.) 146.

North Carolina. — *State v. Thompson*, 122 N. Car. 493.

Pennsylvania. — *Com. v. Northumberland County*, 4 S. & R. (Pa.) 275.

Rhode Island. — *State v. Goff*, 15 R. I. 505, 2 Am. St. Rep. 921.

South Carolina. — *State v. Buttz*, 9 S. Car. 156.

Tennessee. — *Calloway v. Sturm*, 1 Heisk. (Tenn.) 764.

Texas. — *Biencourt v. Parker*, 27 Tex. 558; *Ex p. Call*, 2 Tex. App. 497; *State v. Brinkerhoff*, 66 Tex. 45; *Beazely v. Stinson*, Dall. (Tex.) 537.

5. *Rex v. Trelawney*, 3 Burr. 1615; *Milward v. Thatcher*, 2 T. R. 81; *Wilck. on Mun. Corp.* 240-241.

6. *State v. Taylor*, 12 Ohio St. 130; *State v. Newark*, 8 Ohio Dec. 344, 6 Ohio N. P. 523; *In re Corliss*, 11 R. I. 639, 23 Am. Rep. 538.

7. *Rex v. Patteson*, 4 B. & Ad. 9, 24 E. C. L. 11; *Worth v. Newton*, 10 Exch. 247.

The election of an officer to an incompatible office does not vacate the former before acceptance by the officer. *Wilck. on Mun. Corp.* 243, *citing* *Awdeley v. Joyce*, Popham 176; *Milward v. Thatcher*, 2 T. R. 88; *Rex v. Pate-man*, 2 T. R. 779.

8. *State v. Bus*, 135 Mo. 325; *Ex p. Carey*, 3 Leg. Gaz. (Pa.) 78; *Shell v. Cousins*, 77 Va. 328.

9. **Felony.** — *Ex p. Diggs*, 50 Ala. 78; *Com. v. Fugate*, 2 Leigh (Va.) 724.

Reversal of Judgment. — If a judgment of conviction of felony is reversed the officer removed in consequence thereof is entitled to be

observe laws enacted upon the ground of public policy, such as one requiring a statement of election expenses to be filed,¹ or forbidding self-interest in public contracts,² has been given the same effect.

4. Death or Insanity. — A vacancy in office may also happen through the insanity³ or death⁴ of the incumbent. And the prevailing rule is that where death occurs after election or appointment, but before qualification, a vacancy exists in the office.⁵

5. Removal, Suspension, and Reinstatement — *a. CONSTITUTIONAL PHASES OF POWER OF REMOVAL* — (1) *Nature of Power as Executive, Legislative, or Judicial.* — While the decisions are not in accord as to the nature of the power of removal, considered as an abstract question, the consensus of opinion is that it is not judicial, in the absence of fundamental restrictions, in the sense that its exercise may not be vested in the executive branch of the government,⁶ or in municipal boards and bodies,⁷ or even be retained by the legislature itself without violating the constitutional distribution of powers.⁸ The cases usually cited to the contrary hold that where the office is of constitutional creation the power to remove for cause must be considered as of a judicial nature, not to be exercised by the executive branch of the government

restored to his office immediately. *Ex p. Diggs*, 50 Ala. 78.

Pardon. — See the title REPRIEVE, PARDON, AND AMNESTY.

Entering the Military Service of a Government at War with the United States forfeits a state office held at the time, and there is no necessity of a judicial proceeding to determine the fact of forfeiture. *Chisholm v. Coleman*, 43 Ala. 204, 94 Am. Dec. 678.

1. *Gillett v. People*, 13 Colo. App. 553. The provision for filing within a given time, however, is directory merely.

2. *Com. v. McAvoy*, 9 Kulp (Pa.) 168.

3. Insanity. — *Long v. Bowen*, 94 Ky. 540, (Ky. 1898) 44 S. W. Rep. 647. And see *State v. Baird*, 47 Mo. 301.

Temporary Insanity. — The insanity of an officer not shown to be incurable will not authorize the permanent appointment of another in his place. *State v. Pidgeon*, 8 Blackf. (Ind.) 132.

4. *People v. Cowles*, 13 N. Y. 350.

5. Death — *Indiana*. — *Gosman v. State*, 106 Ind. 203.

Missouri. — *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206.

New Hampshire. — *State v. Hunt*, 54 N. H. 431.

New York. — *People v. Cowles*, 13 N. Y. 350.

Ohio. — *State v. Hopkins*, 10 Ohio St. 509.

Tennessee. — *Gold v. Fite*, 2 Baxt. (Tenn.) 237.

Texas. — *Maddox v. York*, 21 Tex. Civ. App. 622.

Contra. — See *State v. Benedict*, 15 Minn. 198; *Com. v. Hanley*, 9 Pa. St. 513.

Before Election. — No vacancy is created by the death of a successful candidate after closing of the polls, but before the result was announced, within the meaning of the statute providing that if an officer fail to qualify by giving bond within a certain time after the receipt of his commission, the office shall be vacated. *Kimberlin v. State*, 130 Ind. 120, 30 Am. St. Rep. 208.

After Qualifying but Before Commencement of Term. — Where one elected county commissioner qualifies by taking the oath required by law, and dies before his term begins, his

predecessor cannot hold over. *State v. Bemenderfer*, 96 Ind. 374.

6. Vesting Power in Executive Branch — *Dakota.* — *Territory v. Cox*, 6 Dak. 501.

Illinois. — *Wilcox v. People*, 90 Ill. 186; *Donahue v. Will County*, 100 Ill. 94.

Kansas. — *Lynch v. Chase*, 55 Kan. 367; *McMaster v. Herald*, 56 Kan. 231.

Kentucky. — *South v. Sinking Fund Com'rs*, 86 Ky. 186; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401.

Massachusetts. — *Murphy v. Webster*, 131 Mass. 482.

Michigan. — *Clay v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644; *Atty.-Gen. v. Detroit*, 112 Mich. 145.

Minnesota. — *State v. Peterson*, 50 Minn. 239.

New York. — *Matter of Guden*, 171 N. Y. 529, affirming 71 N. Y. App. Div. 422.

Ohio. — *State v. Hawkins*, 44 Ohio St. 98.

Oklahoma. — *Cameron v. Parker*, 2 Okla. 277. See also *infra*, this section, *Power of President*.

7. Powers of Municipal Bodies to Remove — *California.* — *Croly v. Sacramento*, 119 Cal. 229.

Colorado. — *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294.

Louisiana. — *State v. Ramos*, 10 La. Ann. 420; *State v. Judges*, 35 La. Ann. 1075.

Michigan. — *Fuller v. Ellis*, 98 Mich. 96; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606.

Nebraska. — *State v. Oleson*, 15 Neb. 247.

New York. — *People v. Police Com'rs*, 93 N. Y. 97.

Utah. — *Gilbert v. Board of Police*, 11 Utah 378.

Virginia. — *Burch v. Hardwicke*, 23 Gratt. (Va.) 51.

Wisconsin. — *State v. Superior*, 90 Wis. 612.

8. Retention of Power by Legislature. — *Caldwell v. Wilson*, 121 N. Car. 425. And see *State v. Richmond*, 29 La. Ann. 705; *State v. McClinton*, 5 Nev. 329. See also *infra*, this title, *Removal by Legislature Otherwise than by Impeachment*.

A Constitutional Officer Cannot Be Removed by the Legislature. — *State v. Towne*, 21 La. Ann. 490.

in the absence of a constitutional grant of power to do so.¹

For Purpose of Review. — A greater diversity of opinion exists as to the nature of the power considered with respect to the authority of the courts to interfere with or to review, in any of its phases, the action of the person or body vested with the power of removal, but it is generally held that if the removal is authorized to be made only for cause, either general or specific, the courts may inquire into the existence of the jurisdictional facts,² whether the charges upon which the removing power acted were legal cause for removal,³ or whether the cause was sufficiently specified.⁴ There is no authority to review the action of an executive officer vested with the power of removing a subordinate under a constitutional provision which is silent as to grounds of removal,⁵ and where the power is conferred to remove at pleasure,⁶ or for reasons satisfactory to the removing power,⁷ or where the only requirement is that there be credible information of neglect of duty, the courts cannot interfere.⁸ The judgment of the removing power on the evidence cannot be departed from,⁹ nor can its discretion, exercised in a legal manner, be

1. Power Judicial When Office Constitutional. — *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128; *State v. Pritchard*, 36 N. J. L. 101; *Honey v. Graham*, 39 Tex. 1.

In *Field v. People*, 3 Ill. 79, it was determined that the governor had no power to remove from office a constitutional officer whose term of office was limited neither by the constitution nor by statute, although it was said that such power might be vested in the governor by the legislature.

2. Right of Review — *Alabama*. — *Callahan v. State*, 2 Stew. & P. (Ala.) 379.

Georgia. — *Macon v. Shaw*, 16 Ga. 172.

Indiana. — *Knox County v. Johnson*, 124 Ind. 152.

Kentucky. — *Page v. Hardin*, 8 B. Mon. (Ky.) 672.

Louisiana. — *State v. Shakespeare*, 43 La. Ann. 92.

Maryland. — *Miles v. Stevenson*, 80 Md. 358.

Michigan. — *People v. Therrien*, 80 Mich. 187.

Minnesota. — *State v. Duluth*, 53 Minn. 238, 39 Am. St. Rep. 595.

New York. — *People v. Board of Police*, 3 Abb. App. Dec. (N. Y.) 488; *People v. Cooper*, (Supm. Ct.) 57 How. Pr. (N. Y.) 416; *People v. Nichols*, 79 N. Y. 582, 58 How. Pr. (N. Y.) 200, reversing 18 Hun (N. Y.) 530, affirming 57 How. Pr. (N. Y.) 395; *People v. Starks*, 33 Hun (N. Y.) 384; *People v. Fire Com'rs*, 43 Hun (N. Y.) 554, appeal dismissed 106 N. Y. 257.

North Carolina. — *Caldwell v. Wilson*, 121 N. Car. 425.

Tennessee. — *Sevier v. Justices*, Peck (Tenn.) 334.

Wisconsin. — *State v. Watertown*, 9 Wis. 254; *State v. McGarry*, 21 Wis. 496.

And see *Philips v. Bury*, 2 T. R. 346; *State v. Smith*, 35 Neb. 13.

Interpretation of English Statutes relative to power of review, see *Reg. v. Warwick*, 3 Per. & Dav. 429, 10 Ad. & El. 386, 37 E. C. L. 121.

Conclusiveness of Resolution of Council. — *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215.

Injunction Will Not Lie. — *Weber v. Bishop*, 7 Ohio Dec. (Reprint) 661, 4 Cinc. L. Bul. 775.

3. Existence of Cause. — *State v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663; *People v.*

Grant, 12 Daly (N. Y.) 294; *State v. McGarry*, 21 Wis. 496.

"Due Cause" Dependent upon Character of Office. — *State v. Watertown*, 9 Wis. 254.

The Action of the President in removing an officer for cause will not be reviewed for the purpose of determining the sufficiency of the cause which induced him to make such removal, nor will it be presumed that he acted without cause simply because none is specified in the order of removal. *U. S. v. Oliver*, 6 Mackey (D. C.) 47.

4. Wellman v. Metropolitan Police, 84 Mich. 558.

5. Silence of Constitution as to Grounds. — *Clay v. Stuart*, 74 Mich. 411, 16 Am. St. Rep. 644; *Atty.-Gen. v. Detroit*, 112 Mich. 145; *State v. Peterson*, 50 Minn. 239; *Matter of Guden*, 171 N. Y. 529, affirming 71 N. Y. App. Div. 422; *People v. Stout*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 171.

6. Power to Remove at Pleasure. — *Lawrence v. Cincinnati*, 5 Ohio Dec. (Reprint) 228, 3 Am. L. Rec. 597.

In *Georgia* it is held that a judicial removal after trial and hearing cannot be questioned in a collateral action for compensation. *Queen v. Atlanta*, 59 Ga. 318, *Brunswick v. Fahm*, 60 Ga. 109; *Oliver v. Americus*, 69 Ga. 165. It would be otherwise, however, if the removal was arbitrary, though it could have been made after trial and hearing. *Oliver v. Americus*, 69 Ga. 165.

7. Power to Remove for Satisfactory Reasons. — *People v. Carver*, 5 Colo. App. 156; *Keenan v. Perry*, 24 Tex. 253; *State v. Burke*, 8 Wash. 472. And see *State v. Register*, 59 Md. 283; *People v. Whitlock*, 92 N. Y. 191; *Atty.-Gen. v. Brown*, 1 Wis. 513.

The Same Rule Applies where the only restrictions on the exercise of the power of removal are that it must not be for political reasons, and that the cause must be stated in writing. *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236; *People v. Martin*, 19 Colo. 565; *In re Fire*, etc., Com'rs, 19 Colo. 482.

8. Removal upon Credible Information. — *People v. Bearfield*, 35 Barb. (N. Y.) 254.

9. Cannot Review Questions of Fact — *England v. Osgood v. Nelson*, L. R. 5 H. L. 636; *Rex v. Lloyd*, 2 Stra. 996.

controlled.¹ In *New York* the finding of fact is entitled to the same consideration as the verdict of a jury, and will be disturbed only when a verdict under similar circumstances would be set aside,² but the sufficiency of the excuse or explanation given³ and the degree of punishment inflicted are addressed wholly to the discretion of the removing power.⁴ Where a legislative body is made the sole judge of the qualifications, election, and returns of its own members, this does not divest the courts of their correctional power to review the regularity of the proceedings of such body in ousting a member.⁵ The cases adhering to the proposition that the action of the removing power, although exercised for cause, cannot be reviewed elsewhere proceed upon the ground that it will be incontrovertibly presumed that the removing officer or body was satisfied as to the existence and the sufficiency of the cause for removal,⁶ or that, if no right of appeal or review is expressly given by law, the courts have no power to inquire into the exercise of the right of removal.⁷

Georgia. — *Queen v. Atlanta*, 59 Ga. 318.

Maine. — *Andrews v. King*, 77 Me. 224.

Michigan. — *Fuller v. Ellis*, 98 Mich. 96.

Minnesota. — *State v. Dart*, 57 Minn. 261;

State v. Duluth, 53 Minn. 238.

New Jersey. — *State v. Police Com'rs*, 49 N. J. L. 170.

1. Discretion Not Subject to Control — *England*.

— *Osgood v. Nelson*, L. R. 5 H. L. 636.

Colorado. — *People v. District Ct.*, 6 Colo. 534.

Florida. — *State v. Johnson*, 30 Fla. 499.

Kansas. — *State v. Mitchell*, 50 Kan. 289.

Michigan. — *Gager v. Chippewa County*, 47 Mich. 168.

New York. — *People v. Purroy*, (Supm. Ct. Gen. T.) 49 N. Y. St. Rep. 606; *People v. Ham*, 59 N. Y. App. Div. 314; *People v. Stout*, (Supm. Ct. Gen. T.) 19 How. Pr. (N. Y.) 171.

North Carolina. — *Caldwell v. Wilson*, 121 N. Car. 425.

Ohio. — *State v. Fire Com'rs*, 26 Ohio St. 24.

Oklahoma. — *Cameron v. Parker*, 2 Okla. 277.

Wisconsin. — *State v. Prince*, 45 Wis. 610.

Motives Actuating Removals Not Ordinarily Subject to Judicial Inquiry. — *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294.

2. Findings of Fact Equivalent to Verdict. —

People v. Roosevelt, 168 N. Y. 488, *affirming* 4 N. Y. App. Div. 611, 40 N. Y. Supp. 1147; *People v. New York*, 82 N. Y. 491; *People v. Brady*, 48 N. Y. App. Div. 128; *People v. Grant*, *Daily Reg.* (N. Y.) Jan. 22, 1884; *People v. Jourdan*, 90 N. Y. 53; *People v. Board of Police*, 39 N. Y. 506; *People v. French*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 377; *People v. French*, (Supm. Ct. Gen. T.) 31 N. Y. St. Rep. 87; *People v. McClave*, (Supm. Ct. Gen. T.) 31 N. Y. St. Rep. 246; *People v. Robb*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 59, 31 N. Y. St. Rep. 640; *People v. French*, 110 N. Y. 494; *People v. Martin*, 142 N. Y. 353, *reversing* 3 Misc. (N. Y.) 619; *People v. Board of Police*, 13 N. Y. App. Div. 69; *People v. Martin*, 28 N. Y. App. Div. 73; *People v. Roosevelt*, 17 N. Y. App. Div. 301; *People v. MacLean*, (Supm. Ct. Gen. T.) 38 N. Y. St. Rep. 896; *People v. MacLean*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 883; *People v. French*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 304, *affirmed* 123 N. Y. 636; *People v. McClave*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 366, *affirmed* without opinion 121 N. Y. 677; *People v. Board of Police*, 121 N. Y. 716, *reversing* 55

Hun (N. Y.) 445; *People v. French*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 108; *People v. Roosevelt*, 16 N. Y. App. Div. 331.

Duty to Scrutinize Evidence. — *People v. MacLean*, 57 Hun (N. Y.) 141.

Rule with Respect to Admissibility of Evidence. — *People v. Police Com'rs*, 11 Hun (N. Y.) 513; *State v. Police Com'rs*, 14 Mo. App. 302; *People v. Board of Police*, 72 N. Y. 415 [*reversing* *People v. Police Dep.*, 5 Hun (N. Y.) 457]; *People v. Campbell*, 82 N. Y. 247; *People v. Doolittle*, 44 Hun (N. Y.) 293.

3. Sufficiency of Excuse. — *People v. French*, 110 N. Y. 494; *People v. La Grange*, 2 N. Y. App. Div. 444, *affirmed* 151 N. Y. 664; *People v. Scannell*, 62 N. Y. App. Div. 249; *People v. French*, 53 Hun (N. Y.) 635, 6 N. Y. Supp. 213; *People v. York*, 35 N. Y. App. Div. 430; *People v. Brady*, 50 N. Y. App. Div. 372.

4. Punishment. — *People v. Tappen*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 20, *affirmed* 151 N. Y. 620; *People v. Bell*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 551; *People v. Board of Police*, 121 N. Y. 716, 31 N. Y. St. Rep. 900; *People v. Grant*, 12 Daly (N. Y.) 294; *People v. Martin*, 9 N. Y. App. Div. 531; *People v. French*, (Supm. Ct. Gen. T.) 23 N. Y. St. Rep. 384.

5. Review of Removal of Member of Legislative Body. — *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *State v. De Gress*, 53 Tex. 387.

6. Action of Executive Conclusive — *Arkansas*. — *Patton v. Vaughan*, 39 Ark. 211.

Florida. — *State v. Johnson*, 30 Fla. 433.

Louisiana. — *State v. Barrow*, 29 La. Ann. 243; *State v. Yoist*, 25 La. Ann. 396; *State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131; *Evans v. Populus*, 22 La. Ann. 121; *State v. Abbott*, 41 La. Ann. 1096; *State v. Fisher*, 26 La. Ann. 537; *State v. Cahen*, 28 La. Ann. 645; *State v. Graham*, 25 La. Ann. 73; *State v. Lamantia*, 33 La. Ann. 446; *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526; *State v. Ramos*, 10 La. Ann. 420; *State v. Rareshide*, 32 La. Ann. 934.

New York. — *People v. Morton*, 148 N. Y. 156.

North Carolina. — *State v. Wilson*, 121 N. Car. 425, 480, 61 Am. St. Rep. 672.

Wisconsin. — *State v. McGarry*, 21 Wis. 496.

7. No Right of Appeal Provided by Law. — *People v. Welyt*, 75 Ill. App. 514; *Keenan v. Perry*, 24 Tex. 253.

Yet it has been held that this presumption applies only to the heads of co-ordinate departments of the government, and not to the action of municipal boards and inferior judicatories and depositories of specially delegated and limited powers; as to the latter, "nothing shall be intended to be within the jurisdiction that is not expressly averred so to be."¹ While all reasonable presumptions must be made in favor of the regularity and validity of the action of tribunals exercising the power of removal,² yet it will not be presumed from a record which shows merely the removal of an officer that such removal was for cause shown.³ The power of removal for cause, when conferred upon a court, is a judicial and not an executive power, and is subject to review by an appellate tribunal.⁴

(2) *Departure from Constitutional and Statutory Requirements.* — When the constitution has declared the grounds or mode of removal of an incumbent before the expiration of his term, the legislature has no power to authorize the removal or suspension of the officer for any other reason or in any other mode,⁵ nor can the statute⁶ or charter declaring the mode and ground of removal be departed from by the body vested with the power of removal.⁷ On the other hand, the constitutional right of the appointing power to remove at pleasure cannot be abridged by an act providing for removal in a certain way or for a certain cause. A provision that certain incumbents shall hold their offices or positions during good behavior⁸ or at pleasure cannot be thwarted by the appointing power by making the appointment for a specified period.⁹ The tenure of ancient common-law officers and the rules

1. **Limitation of Rule.** — *State v. Police Com'rs*, 14 Mo. App. 297.

2. *State v. Prince*, 45 Wis. 610.

3. **No Presumption of Cause from Record Alone.** — *State v. Police Com'rs*, 88 Mo. 144; *People v. Board of Police*, 35 Barb. (N. Y.) 535; *Welchans v. Shirk*, 98 Pa. St. 17.

4. **Nature of Court's Power of Removal.** — *Ex p. Ramshay*, 18 Q. B. 173, 83 E. C. L. 173; *Lowe v. Com.*, 3 Met. (Ky.) 237.

5. **Departure from Constitutional Requirements** — *California*. — *People v. Wells*, 2 Cal. 198.

Colorado. — *Lamb v. People*, 3 Colo. App. 106.

Illinois. — *Wilcox v. People*, 90 Ill. 186.

Kentucky. — *Brown v. Grover*, 6 Bush (Ky.)

2; *Com. v. Williams*, 79 Ky. 42; *Lowe v. Com.*, 3 Met. (Ky.) 236.

Louisiana. — *State v. McNeely*, 24 La. Ann. 19.

Maine. — *Andrews v. King*, 77 Me. 224.

Michigan. — *People v. Therrien*, 80 Mich.

187; *Dullam v. Willson*, 53 Mich. 392.

Mississippi. — *Runnels v. State*, Walk. (Miss.) 146.

Nevada. — *State v. McClinton*, 5 Nev. 273.

South Dakota. — *State v. Hewitt*, 3 S. Dak. 187.

Texas. — *Trigg v. State*, 49 Tex. 645.

Legislative Power When No Constitutional Provision. — *Rankin v. Jauman*, (Idaho 1894) 36 Pac. Rep. 502; *Hays v. Simmons*, (Idaho 1899) 59 Pac. Rep. 182; *Hoke v. Richie*, (Ky. 1896) 37 S. W. Rep. 83.

Statute Adding Causes Invalid. — *State v. Shannon*, 7 S. Dak. 319. Compare *State v. Frazier*, 48 Ga. 137.

Intoxication Embraced in "Crime, Incapacity, or Negligence." — *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135.

Constitutionality of Statutes Limiting Grounds for Removal. — *People v. Cram*, 164 N. Y. 166,

reversing 50 N. Y. App. Div. 380; *Matter of Stutzbach*, 168 N. Y. 416, affirming 62 N. Y. App. Div. 219.

Not Limited to Constitutional Grounds Except as to Constitutional Officers. — *State v. Smith*, 35 Neb. 13. But see *Wilcox v. People*, 90 Ill. 186.

6. **Removing Power Limited by Statute** —

Georgia. — *Shaw v. Macon*, 19 Ga. 468.

Illinois. — *Clark v. People*, 15 Ill. 213.

Kentucky. — *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146.

Michigan. — *People v. Therrien*, 80 Mich. 187.

Mississippi. — *Ex p. Lehman*, 60 Miss. 967.

Ohio. — *State v. McLain*, 58 Ohio St. 313.

Pennsylvania. — *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

7. **Limited by Charter.** — *People v. Martin*, 19 Colo. 565; *Carter v. Durango*, 16 Colo. 535; *Shaw v. Macon*, 19 Ga. 468; *Trowbridge v. Newark*, 46 N. J. L. 140; *People v. French*, 12 Hun (N. Y.) 254; *People v. Scannell*, 62 N. Y. App. Div. 249; *People v. Kane*, (Supm. Ct. Spec. T.) 70 N. Y. Supp. 982.

Abridgment of Right to Remove. — *People v. Hill*, 7 Cal. 97 [followed in *Smith v. Brown*, 59 Cal. 672]; *People v. Shear*, (Cal. 1887) 15 Pac. Rep. 92; *State v. Archibald*, 5 N. Dak. 359; *Lutz's Case*, 8 Pa. Co. Ct. 153; *Brower v. Kantner*, 190 Pa. St. 182. And see *People v. Cram*, 164 N. Y. 166, reversing 50 N. Y. App. Div. 380, which affirmed 29 Misc. (N. Y.) 359.

Right to Remove Not Taken Away by Omission in Ammendatory Act. — *People v. Robb*, 126 N. Y. 180.

Not Limited by Ordinance as to Hearing Complaints Against Police. — *Williams v. Gloucester*, 148 Mass. 256.

8. *Stewart v. Chosen Freeholders*, 61 N. J. L. 117.

9. *State v. Platner*, 43 Iowa 140; *Connelly v. Almshouse Com'rs*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 489.

and principles by which they are governed generally have no application to offices created by federal or state constitutions,¹ and therefore the legislature, in creating offices, unless otherwise restricted by the constitution, may authorize the removal of the incumbent without notice or hearing,² and for any act not inconsistent with the constitution;³ and if the incumbent holds office under a statute providing that his office shall be held during good behavior, or for a fixed period, or that he shall be removed only for cause, this does not operate to restrict further legislation in making the incumbent removable at will.⁴ And similarly, though statutory officers were originally removable at pleasure, they may be protected against removal except upon notice and hearing.⁵ Providing for the suspension from office until the charges preferred are tried by the proper tribunal does not violate the constitutional right of an officer to hold and exercise his office.⁶ Where the removal from a state office is for cause, a state statute providing for bringing the party against whom the proceeding is had into court and notifying him of the case he has to meet, for giving him an opportunity to be heard in his own defense, and for the deliberation and judgment of the court, is not repugnant to that section of the Constitution of the United States which provides against the taking of property "without due process of law."⁷

Self-operating Provisions. — In several states the mode and grounds of removal are sufficiently prescribed in the constitution without the assistance of legislative action to carry the provision into effect.⁸

b. WHAT IS REMOVAL — (1) *Requisites of Act of Removal.* — No particular form of words is necessary to effect a removal.⁹ The word "suspend" may be taken to mean "remove" where it appears that the parties understood it

1. *Ex p. Hennen*, 13 Pet. (U. S.) 230; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606; *State v. Pritchard*, 36 N. J. L. 101.

2. **Extent of Legislative Authority as to Removals** — *California*. — *People v. Cazneau*, 20 Cal. 504.

Colorado. — *Trimble v. People*, 19 Colo. 189, 41 Am. St. Rep. 236.

Idaho. — *Rankin v. Jauman*, (Idaho 1894) 36 Pac. Rep. 502; *Hays v. Simmons*, (Idaho 1899) 59 Pac. Rep. 182.

Illinois. — *Donahue v. Will County*, 100 Ill. 94.

Kansas. — *Lynch v. Chase*, 55 Kan. 367.

Maryland. — *Townsend v. Kurtz*, 83 Md. 331.

New Jersey. — *Sweeney v. Stevens*, 46 N. J. L. 344.

New York. — *People v. Whitlock*, 92 N. Y. 191.

Ohio. — *Weber v. Bishop*, 7 Ohio Dec. (Report) 661, 4 Cinc. L. Bul. 775.

Oklahoma. — *Cameron v. Parker*, 2 Okla. 277.

The Right to Trial by Jury does not necessarily exist where the constitution provides that certain officers shall be tried for misdemeanors in office in such manner as the legislature may provide. *Woods v. Varnum*, 85 Cal. 639; *Davis v. State*, 35 Tex. 118.

3. *Caldwell v. Wilson*, 121 N. Car. 425, 480.

4. **Making Incumbent Removable at Will.** — *Hines v. District of Columbia*, *MacArthur & M. (D. C.)* 141; *People v. Keller*, 158 N. Y. 187, *affirming* 157 N. Y. 90; *People v. Dalton*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 294; *People v. Whitlock*, 92 N. Y. 191. And see *People v. Judges*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 691. But see *contra*, *Hoke v. Henderson*, 4 Dev. L. (15 N. Car.) 1, 25 Am. Dec. 677.

Constitutional Limitation on Power to Increase Causes. — *State v. Walbridge*, 119 Mo. 383, 41 Am. St. Rep. 663.

5. **Right to Notice and Hearing Conferred.** — *People v. Feitner*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 153, *affirmed* 42 N. Y. App. Div. 622.

6. **Right of Suspension.** — *Wilson v. North Carolina*, 169 U. S. 586, *affirming* 121 N. Car. 425; *Allen v. State*, 32 Ark. 241; *State v. Peterson*, 50 Minn. 239.

7. **"Due Process of Law."** — *Kennard v. Louisiana*, 92 U. S. 480; *Foster v. Kansas*, 112 U. S. 205, *affirming* 32 Kan. 765.

8. **Self-operating Provisions.** — *Lowe v. Com.*, 3 Met. (Ky.) 237. See also *In re Speakership*, 15 Colo. 531; *Trimble v. People*, 19 Colo. 194, 41 Am. St. Rep. 236; *Trigg v. State*, 49 Tex. 645.

9. **Form of Words Immaterial.** — *McNamara v. New York*, 152 N. Y. 228, *affirming* 84 Hun (N. Y.) 611, 32 N. Y. Supp. 1145; *Ryan v. New York*, 154 N. Y. 328, *affirming* 7 N. Y. App. Div. 336; *Jackson v. New York*, 87 Hun (N. Y.) 296; *Wardlaw v. New York*, 137 N. Y. 194. See also *Bernard v. Hoboken*, 27 N. J. L. 412.

The Retirement on a Pension of a member of the uniformed force of the fire department of the city of New York, for disability, is not a removal within the veteran act. *People v. Scannell*, 53 N. Y. App. Div. 161.

Communication of Mayor Indorsed by Council Sufficient. — *Westberg v. Kansas City*, 64 Mo. 493.

Order of Secretary of Navy in Effect President's Order. — *McElrath's Case*, 12 Ct. Cl. 201.

All the Facts Essential to Justify Removal should be put on record. *State v. Prince*, 45 Wis. 610; *McGregor v. Gladwin County*, 37 Mich. 388.

in that sense,¹ and a demand for one's resignation may be the equivalent of a removal.² The revocation of an appointment because of ineligibility is not a removal requiring notice of charges and hearing.³ There must be an intent to remove.⁴ While the abolition of an office is not a technical removal,⁵ the transfer of an officer to another and less lucrative position is,⁶ unless the motive thereof was to accommodate the public service or on the ground of economy.⁷ The performance of the duties and the acceptance in full payment of the compensation incident to the inferior office is a waiver of the right to assert a claim to the difference.⁸

(2) *Appointment of Successor.* — A new appointment to an office held at pleasure necessarily operates as a removal of the then incumbent,⁹ but this rule does not apply to an incumbent who is subject to removal by the executive only upon cause shown.¹⁰

(3) *Revocation of Appointment.* — An appointment to office for a fixed term or to fill a vacancy cannot be revoked,¹¹ although the official bond has not yet

1. "Suspend" Meaning "Remove." — *Westberg v. Kansas City*, 64 Mo. 493; *Wardlaw v. New York*, 137 N. Y. 194; *Jackson v. New York*, 87 Hun (N. Y.) 296; *Fox v. New York*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 304; *Beach v. New York*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 939; *McNamara v. New York*, 152 N. Y. 228, *affirming* 84 Hun (N. Y.) 611, 32 N. Y. Supp. 1145; *Donnell v. New York*, 68 Hun (N. Y.) 55.

Suspension Equivalent to Dismissal. — Notice of suspension by a municipal board of one of its employees on the ground of lack of work is equivalent to a dismissal, although the board subsequently resolved that owing to the near completion of the work the employee's services would be no longer required. *Kelly v. New York*, 70 Hun (N. Y.) 208.

2. *Demand Regarded as Discharge.* — *Ryan v. New York*, 154 N. Y. 328, *affirming* 7 N. Y. App. Div. 336. And see prior report of same case, 86 Hun (N. Y.) 223.

3. *Revocation of Appointment Not Removal.* — *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *People v. French*, 102 N. Y. 583, *affirming* 39 Hun (N. Y.) 507.

4. *Intent to Remove Necessary.* — *Stadler v. Detroit*, 13 Mich. 346.

As to Whether an Appointment to an Incompatible Office Is a Removal, see *Worth v. Newton*, 10 Exch. 247.

5. *Abolition of Office.* — *Ford v. State Harbor Com'rs*, 81 Cal. 19; *Chandler v. Lawrence*, 128 Mass. 213.

Removal by Statute Not Resignation. — *Atty.-Gen. v. Poole*, 8 Beav. 75.

6. *When Transfer Is Removal.* — *Michaelis v. Fire Com'rs*, 49 N. J. L. 154; *Matter of Gleese*, 50 N. Y. Super. Ct. 473.

Transfer from Detective to Patrolman Is Not Removal. — *State v. Police Com'rs*, 49 N. J. L. 175.

The Transfer Back to a position which he formerly held, of one who was promoted to fill a supposed vacancy which was subsequently declared not to exist, is not a removal, such promotion not being intended to create a new office, but merely to fill a supposed vacancy. *People v. Fire Com'rs*, 114 N. Y. 67, *affirming* 47 Hun (N. Y.) 528.

7. *Transfer for Public Good or Economy Is Not Removal.* — *Riley v. New York*, 96 N. Y. 331,

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affirming 49 N. Y. Super. Ct. 537; *Monroe v. New York*, 28 Hun (N. Y.) 258.

8. *Waiver of Claim for Difference in Compensation.* — *Reilly v. New York*, 48 N. Y. Super. Ct. 274.

9. *Removal by Appointment of Another* — *England*, — *Smyth v. Latham*, 9 Bing. 692, 23 E. C. L. 424; *Godby*, 105, par. 123; *Pepis's Case*, 1 Vent. 342; *Rex v. Canterbury*, 1 Stra. 674; *Hill v. Reg.*, 8 Moo. P. C. 138.

United States. — *Blake v. U. S.*, 103 U. S. 227; *McElrath v. U. S.*, 102 U. S. 426; *Ex p. Hennen*, 13 Pet. (U. S.) 230; *Bowerbank v. Morris*, Wall. (C. C.) 119.

Iowa. — *McCue v. Wapello County*, 51 Iowa 60.

Louisiana. — *State v. Abbott*, 41 La. Ann. 1096; *State v. Yoist*, 25 La. Ann. 396.

Maryland. — *McBlair v. Bond*, 41 Md. 137.

Massachusetts. — See *Williams v. Gloucester*, 148 Mass. 256.

Michigan. — *People v. Lord*, 9 Mich. 227.

Minnesota. — *Parish v. St. Paul*, 84 Minn. 426.

New Mexico. — *Conklin v. Cunningham*, 7 N. Mex. 445.

New York. — *White v. New York*, 4 E. D. Smith (N. Y.) 563; *People v. Crissey*, 91 N. Y. 616; *People v. Drake*, 43 N. Y. App. Div. 325, *affirmed* 161 N. Y. 642; *People v. Carrique*, 2 Hill (N. Y.) 93; *Sherry v. Schuyler*, 2 Hill (N. Y.) 204. See also *Holley v. New York*, 59 N. Y. 166.

Pennsylvania. — *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680.

Tennessee. — *Williams v. Boughner*, 6 Coldw. (Tenn.) 486.

Texas. — *Keenan v. Perry*, 24 Tex. 253.

West Virginia. — *Richards v. Clarksburg*, 30 W. Va. 491.

10. *When Rule Inapplicable.* — *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680; *Collins v. Tracy*, 36 Tex. 546.

11. *No Revocation of Appointment for Fixed Term* — *California.* — *People v. Mizner*, 7 Cal. 519; *People v. Cazneau*, 20 Cal. 504.

Colorado. — *People v. Reid*, 11 Colo. 138.

Iowa. — *State v. Chatburn*, 63 Iowa 659, 50 Am. Rep. 760.

Michigan. — *Speed v. Detroit*, 97 Mich. 198.

Mississippi. — *Brady v. Howe*, 50 Miss. 607.

New Jersey. — *Haight v. Love*, 39 N. J. L. 14.

been given nor the official oath taken,¹ but an appointment made by a board may be revoked at any time before the certificate of appointment is issued, and another person may be appointed.²

(4) *Implied Removal of Subordinates.* — The fact that one who holds office under a certificate of election was adjudged in a contest not to be entitled to the office does not operate to remove a person appointed by him while in office pending the contest.³ An appointment of an officer does not operate to remove a clerk appointed by his predecessor.⁴

c. PERSONS AND BOARDS VESTED WITH POWER OF REMOVAL — (1) *General Principles.* — At common law the power of appointment and removal, except where otherwise provided, belonged to the king,⁵ but in the *United States*, there being no offices but those of either constitutional or statutory creation, the power of removal is generally expressly provided for;⁶ and where no provision is made therefor it is generally incident to the power of appointment.⁷ The power of removal may be vested elsewhere than in the appointing power,⁸ and may exist concurrently but independently in two or more bodies, so that the legislature may have sole power to impeach civil officers for corruption or crime, while at the same time they are subject to removal by the governor for gross neglect of duty.⁹ It may be vested in the governor alone, although the appointment is made by the governor by and with the consent and advice of the senate.¹⁰ Generally, if the power of appointment is vested in one officer, the appointee to be approved by another, the concurrent action of both is necessary to effect a removal,¹¹ though it is usually provided that the executive alone may appoint during a recess of the legislative body which otherwise would be required to concur in his action.¹² When the statute confers the power of removal only upon a certain body, if that body

New York. — *Bergen v. Powell*, 94 N. Y. 591; *Matter of New York*, 1 Cai. (N. Y.) 507; *People v. Stowell*, (Supm. Ct.) 9 Abb. N. Cas. (N. Y.) 456. See also *People v. Hyde*, 89 N. Y. 11, and see *Morgan v. Quackenbush*, 22 Barb. (N. Y.) 72.

Pennsylvania. — *Ewing v. Thompson*, 43 Pa. St. 372.

South Carolina. — *Caulfield v. State*, 1 S. Car. 461.

And see *Marbury v. Madison*, 1 Cranch (U. S.) 137.

1. *Speed v. Detroit*, 97 Mich. 198.

2. *Right to Revoke Before Commission Issued.* — *Conger v. Gilmer*, 32 Cal. 76.

3. *Rights of Appointee of De Facto Officer.* — *Sweeney v. Coulter*, (Ky. 1902) 67 S. W. Rep. 264.

4. *Sweeney v. Coulter*, (Ky. 1902) 67 S. W. Rep. 264.

5. *Power of Removal at Common Law.* — *Slingsby's Case*, 3 Swanst. 178.

6. *Express Provisions for Removal.* — *Field v. People*, 3 Ill. 79; *Atty.-Gen. v. Detroit*, 112 Mich. 145; *People v. Welde*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 582; *People v. Plimley*, 1 N. Y. App. Div. 458; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

No Removal of One Appointee by Another. — *Lamb v. People*, 3 Colo. App. 106.

7. See *infra*, this subdivision, *Power of Removal as Incident to Power of Appointment.*

8. *Power of Appointment and of Removal Separated.* — *Reed v. Conway*, 26 Mo. 13; *People v. Roosevelt*, 17 N. Y. App. Div. 301; *People v. McAllister*, 10 Utah 357.

9. *Exercise of Power by Several.* — *Com. v. Hairiman*, 134 Mass. 314; *Atty.-Gen. v.*

Jochim, 99 Mich. 358, 41 Am. St. Rep. 606; *State v. Seavey*, 22 Neb. 454; *State v. Smith*, 35 Neb. 13; *Lawrence v. Cincinnati*, 5 Ohio Dec. (Reprint) 228, 3 Am. L. Rec. 597. See also *Richard v. Rousseau*, 35 La. Ann. 933.

10. *Vested in Executive Alone.* — *Lamb v. People*, 3 Colo. App. 106; *Trimble v. People*, 19 Colo. 187, 41 Am. St. Rep. 236; *Wilcox v. People*, 90 Ill. 106. See also *In re Fire*, etc., *Com'rs*, 19 Colo. 482.

11. *Concurrent Action of Executive and Confirming Body — California.* — *People v. Bulger*, (Cal. 1890) 23 Pac. Rep. 379; *People v. Freese*, 76 Cal. 633; *People v. Freese*, 83 Cal. 453.

Georgia. — *Savannah v. Brown*, 64 Ga. 229.

Illinois. — *People v. Field*, 3 Ill. 79.

Indiana. — *Carr v. State*, 111 Ind. 109.

Maryland. — *McBlair v. Bond*, 41 Md. 137.

Massachusetts. — See *Murphy v. Webster*, 131 Mass. 482.

Minnesota. — *Parish v. St. Paul*, 84 Minn. 426.

New Jersey. — *Charles v. Hoboken*, 27 N. J. L. 203.

New York. — *People v. Hyde*, 89 N. Y. 11; *People v. Henry*, 47 N. Y. App. Div. 133; *Demarest v. New York*, 42 Barb. (N. Y.) 186; *White v. New York*, 4 E. D. Smith (N. Y.) 563.

And see *State v. Johnson*, 30 Fla. 433; *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269; *Lane v. Com.*, 103 Pa. St. 481; *Honey v. Graham*, 39 Tex. 1.

Removal by Mayor Alone of Officers Confirmed by Council. — *State v. Somers*, 35 Neb. 322.

12. *Recess Appointment.* — *Matter of Bartlett*, (Supm. Ct. Spec. T.) 9 How. Pr. (N. Y.) 414.

Recess Removal. — *McBlair v. Bond*, 41 Md. 137.

is itself removed from office,¹ or if the office itself is abolished, the power of removal can be exercised by no other.² A legislative body has power to remove one of its members for cause,³ and its speaker at pleasure.⁴ The removing officer has jurisdiction to hear and determine charges for official misconduct which occurred before the date of the creation of his office, where the acts occurred during the incumbency of the officer whom it is sought to remove.⁵

(2) *Power of President.* — From the earliest times, and until the administration of President Johnson, the power of the President alone to remove officers appointed by him, by and with the advice and consent of the Senate, was recognized in legislation as well as in practice, though the Constitution is silent as to the power of removal.⁶ During this administration a statute called the Tenure of Office Act was passed by Congress, which limited the President's power as to removal.⁷ This statute having been repealed,⁸ the President's power to remove is again unrestricted except as to military officers in times of peace.⁹

(3) *Power of Removal as Incident to Power of Appointment.* — The power to remove is incident to the power to appoint in the absence of some provision of law fixing the duration of the office and the mode of removal.¹⁰ So

1. *State v. Hudson*, 44 Ohio St. 137.

2. *Power Confined to Statutory Right.* — *Fraser v. Alexander*, 75 Cal. 147; *Hastings v. Young*, (Cal. 1888) 17 Pac. Rep. 530; *Riggs v. Poston*, (Cal. 1888) 17 Pac. Rep. 530.

3. *Removal of Member of Legislative Body.* — *Com. v. Sanderson*, 11 Pa. Co. Ct. 593; *Hiss v. Bartlett*, 3 Gray (Mass.) 468, 63 Am. Dec. 768.

4. *Removal of Presiding Officer.* — *In re Speakership*, 15 Colo. 520; *State v. Kiichli*, 53 Minn. 147; *Armatage v. Fisher*, 74 Hun (N. Y.) 167.

5. *People v. Coyle*, 55 N. Y. App. Div. 223.

6. *Power of President.* — *U. S. v. Avery*, *Deady* (U. S.) 204; *McElrath v. U. S.*, 102 U. S. 426. And see 4 Op. Atty.-Gen. 1; 4 Op. Atty.-Gen. 612; 6 Op. Atty.-Gen. 4; 8 Op. Atty.-Gen. 223; *Belger's Case*, 12 Op. Atty.-Gen. 424; 15 Op. Atty. Gen. 421; 1 Kent's Com. 310.

Historical Development of Exercise of Power. — *Parsons v. U. S.*, 167 U. S. 324; *Ex p. Hennen*, 13 Pet. (U. S.) 230.

Adverse Criticism of Doctrine. — *U. S. v. Guthrie*, 17 How. (U. S.) 284; *U. S. v. Wright*, 1 McLean (U. S.) 509; *People v. Jewett*, 6 Cal. 291; *Field v. People*, 3 Ill. 79.

Removal of Justices of the Peace. — *U. S. v. Oliver*, 6 Mackey (D. C.) 47.

7. *Tenure of Office Act.* — *Rev. Stat. U. S.* (1878), §§ 1767-1772.

8. *Repeal of Tenure of Office Act.* — 24 U. S. Stat. at L. 500; *Parsons v. U. S.*, 167 U. S. 324.

9. *Restriction as to Military Officers.* — *Blake v. U. S.*, 103 U. S. 227; *Keyes v. U. S.*, 109 U. S. 336; *U. S. v. Corson*, 114 U. S. 619.

Military Storekeepers are subject to removal at the will of the President. *Lansing's Case*, 6 Op. Atty.-Gen. 4.

10. *General Rule as to Power of Removal*—*England.* — *In re Teather*, etc., Com'rs, 19 L. J. M. C. 70; *Hill v. Reg.*, 8 Moo. P. C. 138; *Rex v. Coventry*, 1 Ld. Raym. 391. See also *Rex v. Cambridge*, 2 Show. 69.

United States. — *Eckloff v. District of Columbia*, 135 U. S. 240; *U. S. v. Avery*, *Deady* (U.

S.) 204; *Taylor v. Kercheval*, 82 Fed. Rep. 497; *Ex p. Hennen*, 13 Pet. (U. S.) 230; *In re Eaves*, 30 Fed. Rep. 21; *U. S. v. Wright*, 1 McLean (U. S.) 509.

Arkansas. — *Patton v. Vaughan*, 39 Ark. 211. *California.* — *Sponogle v. Curnow*, 136 Cal. 580; *People v. Hill*, 7 Cal. 97; *People v. Shear*, (Cal. 1887) 15 Pac. Rep. 92, following *Smith v. Brown*, 59 Cal. 672. And see *People v. Jewett*, 6 Cal. 291.

Colorado. — *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294; *Pueblo County v. Smith*, 22 Colo. 534.

Connecticut. — *Fairfield County Bar v. Taylor*, 60 Conn. 11.

Illinois. — *People v. Higgins*, 15 Ill. 110.

Indiana. — *Carr v. State*, 111 Ind. 109.

Kansas. — *Lease v. Freeborn*, 52 Kan. 750; *Lynch v. Chase*, 55 Kan. 367.

Louisiana. — *Mandell v. New Orleans*, 21 La. Ann. 9; *Hire v. New Orleans*, 21 La. Ann. 428; *Dubuc v. Voss*, 19 La. Ann. 210, 92 Am. Dec. 526. See also *Peters v. Bell*, 51 La. Ann. 1621.

Maine. — *Sanborn v. Kimball*, 64 Me. 140.

Maryland. — *Miles v. Stevenson*, 80 Md. 358; *Townsend v. Kurtz*, 83 Md. 331; *Field v. Malster*, 88 Md. 691.

Massachusetts. — *Avery v. Tyringham*, 3 Mass. 177; *Murphy v. Webster*, 131 Mass. 482.

Michigan. — *Trainor v. Board of Auditors*, 89 Mich. 162.

Minnesota. — *Parish v. St. Paul*, 84 Minn. 426.

Mississippi. — *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686. See also *Peyton v. Cabaniss*, 44 Miss. 808.

Missouri. — *State v. Police Com'rs*, 14 Mo. App. 302. See also *State v. Alt*, 26 Mo. App. 673.

Nebraska. — *State v. Smith*, 35 Neb. 13.

New Hampshire. — *Quinn v. Portsmouth*, 64 N. H. 324.

New York. — *Abrams v. Horton*, 18 N. Y. App. Div. 208; *People v. Scannell*, 62 N. Y. App. Div. 249; *People v. Henry*, 47 N. Y. App. Div. 133; *People v. New York*, 5 Barb. (N. Y.) 43; *Demarest v. New York*, 42 Barb. (N. Y.)

every municipal corporation has, as incident to it, the power to amove its officers for cause, although in the United States the mode and grounds of removal are usually provided for by statute.¹ But the power cannot be exercised by a part of the corporation unless particularly vested therein.²

d. PERSONS SUBJECT TO REMOVAL, INCLUDING RIGHT TO NOTICE —
(1) *In General.* — There are usually constitutional and statutory provisions as to appointment and removal which control in determining what officers may be removed.³

Distinction Between State and Other Officers. — In providing for the method and power of removal, several constitutions and statutes distinguish between state and other officers,⁴ and in the interpretation of statutes relating to removal it is frequently necessary to determine whether the officer is attached to a

186; *People v. Board of Education*, 84 Hun (N. Y.) 417; *People v. Dalton*, (Supm. Ct. Spec. T.) 23 Misc. (N. Y.) 294; *Laimbeer v. New York*, 4 Sandf. (N. Y.) 109; *People v. Fire Com'rs*, 73 N. Y. 437; *People v. Robb*, 126 N. Y. 180; *People v. Lathrop*, 142 N. Y. 113, *affirming* 71 Hun (N. Y.) 202; *People v. Morton*, 148 N. Y. 156; *People v. Brooklyn*, 149 N. Y. 215; *People v. Durston*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 522; *People v. Cram*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 12; *People v. Grace*, 22 N. Y. Wkly. Dig. 150. And see *People v. Dalton*, 158 N. Y. 204.

North Carolina. — *Greene v. Owen*, 125 N. Car. 212.

North Dakota. — *State v. Archibald*, 5 N. Dak. 359.

Oklahoma. — *Cameron v. Parker*, 2 Okla. 277.

Pennsylvania. — *Field v. Com.*, 32 Pa. St. 478; *Houseman v. Com.*, 100 Pa. St. 229; *Brower v. Kantner*, 190 Pa. St. 182; *Com. v. Bussier*, 5 S. & R. (Pa.) 451; *Com. v. Hawthorth*, 3 Brews. (Pa.) 445, 7 Phila. (Pa.) 339; *Roaring Brook Tp. Officers*, 1 Lack. Leg. Rec. (Pa.) 432, 1 L. T. N. S. (Pa.) 163; *Lane v. Com.*, 103 Pa. St. 481; *Thomas v. Poor Dist.*, 4 C. Pl. Rep. (Pa.) 155. *Compare Kelly's Estate*, 8 Pa. Dist. 635, 44 W. N. C. (Pa.) 531.

Tennessee. — *Williams v. Boughner*, 6 Coldw. (Tenn.) 486; *Smith v. State*, 1 Yerg. (Tenn.) 228; *Fields v. State*, Mart. & Y. (Tenn.) 168.

Texas. — *Keenan v. Perry*, 24 Tex. 253; *Collins v. Tracy*, 36 Tex. 546.

Utah. — *People v. McAllister*, 10 Utah 357.

Washington. — *State v. Seavey*, 7 Wash. 564.

West Virginia. — See *Richards v. Clarksburg*, 30 W. Va. 491.

Wisconsin. — *Matter of Janitor of Supreme Ct.*, 35 Wis. 410.

Power of Successor to Remove. — *Bergen v. Powell*, 94 N. Y. 591, 30 Hun (N. Y.) 438. *Compare In re Reindexing Judgment Dockets*, 1 Dauphin Co. Rep. (Pa.) 390.

Not Applicable to Constitutional Officers. — *Field v. People*, 3 Ill. 79. And see *People v. Mobley*, 2 Ill. 215; *Willard's Appeal*, 4 R. I. 595.

Express Reservation in Commission Unnecessary. — *Ex p. Hennen*, 13 Pet. (U. S.) 230.

Exception to Rule. — *Mead v. Ingham County*, 36 Mich. 416.

1. Power of Municipal Corporations — England. — *Rex v. Richardson*, 1 Burr. 517; *Yates's Case*, Style 477; *Rex v. Coventry*, 1 Ld. Raym. 392; *Rex v. Doncaster*, 2 Ld. Raym. 1566; 2

Bacon Abr. (Bouv. ed.) 471; *Warren's Case*, Cro. Jac. 540; *Rex v. Doncaster*, Say, 37; *Le Roy v. Tidderley*, Sid. (pt. i.) 14; *Bruce's Case*, 2 Stra. 819.

California. — See *Croly v. Sacramento*, 119 Cal. 229.

Louisiana. — *State v. Judges*, 35 La. Ann. 1075.

New Jersey. — *State v. Jersey City*, 25 N. J. L. 536.

Pennsylvania. — *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; *Com. v. Sanderson*, 11 Pa. Co. Ct. 593.

West Virginia. — *Richards v. Clarksburg*, 30 W. Va. 491; 2 Kyd on Corp. 58, *Dyer* 333, 28.

And see the title *AMOTION*, vol. 2. p. 310.

2. Power Not to Be Exercised by Part of Corporation. — *Rex v. Doncaster*, Say, 37; *Rex v. Lyme Regis*, 1 Dougl. 149; *Rex v. Free Fishermen Co.*, 8 T. R. 352; *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269; *State v. Kuehn*, 34 Wis. 229; 2 Kyd on Corp. 56.

3. Constitutional Provisions Construed. — *People v. Mizner*, 7 Cal. 519; *Benson v. People*, 10 Colo. App. 175; *Trimble v. People*, 19 Colo. 181, 41 Am. St. Rep. 236; *Wilcox v. People*, 90 Ill. 196; *State v. Smith*, 35 Neb. 13.

Distinction Between Elective and Appointive Office. — *In re Removal of Officers*, 16 Pa. Co. Ct. 305.

Irregular Appointee Not Entitled to Notice. — *State v. Gloucester*, 49 N. J. L. 177.

4. State and Other Officers Distinguished. — *Matter of Marks*, 45 Cal. 199; *Fuller v. Ellis*, 98 Mich. 96.

Who Are State Officers — Alabama. — *Ex p. Wiley*, 54 Ala. 226.

California. — *Kilburn v. Law*, 111 Cal. 237.

Colorado. — *In re Speakership*, 15 Colo. 520.

Illinois. — *Donahue v. Will County*, 100 Ill. 94.

Louisiana. — *State v. Lamantia*, 33 La. Ann. 446.

Kansas. — *State v. Gilmore*, 20 Kan. 551, 27 Am. Rep. 189; *State v. Pomeroy*, 1 Cent. L. J. 414.

Kentucky. — *Lowe v. Com.*, 3 Met. (Ky.) 237.

Maine. — *Andrews v. King*, 77 Me. 224.

Michigan. — *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128; *Fuller v. Ellis*, 98 Mich. 96.

South Dakota. — *State v. Hewitt*, 3 S. Dak. 187, 44 Am. St. Rep. 788.

Virginia. — *Burch v. Hardwiske*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

Washington. — *State v. Smith*, 6 Wash. 496.

county, city, or other political division.¹ A constitutional provision that appointed officers may be removed at the pleasure of the power by which they shall have been appointed applies as well to municipal as to state officers.²

Distinction Between Officers and Employees. — A distinction is also made as between officers and employees.³

Judicial Officers, when subject to removal otherwise than by impeachment, are removable only for cause.⁴

(2) *Before and After Holding Office.* — A summary proceeding against public officers who have charged and collected illegal fees, or have refused or neglected to perform their official duties, cannot be maintained against those who have ceased to hold office.⁵ And a constitutional provision authorizing the removal of officers does not apply to those to whom certificates of election have been issued, but who have neglected to give bond and take the prescribed oath.⁶

(3) *As Affected by Mode of Appointment and Tenure of Office.* — When the office is to be held during good behavior,⁷ or for a period fixed by the constitution or by statute, and in the absence of any provision authorizing a summary removal, such removal may be made only for cause.⁸

1. Necessity of Determining to What Political Division Officer Attached. — *Mobile v. Squires*, 49 Ala. 339; *State v. Friedley*, 135 Ind. 119; *State v. Cannon*, 47 La. Ann. 278; *State v. Kichli*, 58 Minn. 147; *People v. Murray*, 73 N. Y. 535; *People v. Nixon*, 158 N. Y. 221, *affirming* 32 N. Y. App. Div. 513; *State v. Anderson*, 45 Ohio St. 196; *Richards v. Clarksburg*, 30 W. Va. 491; *State v. Superior Council*, 90 Wis. 612.

2. Houseman v. Com., 100 Pa. St. 222; *Com. v. Lynch*, 22 Pa. Co. Ct. 422; *Com. v. Sander-son*, 11 Pa. Co. Ct. 593. See also *Kelly's Estate*, 8 Pa. Dist. 635.

3. Who Are Employees — *California*. — *Patton v. Board of Health*, 127 Cal. 388, 78 Am. St. Rep. 66.

Michigan. — *Throop v. Langdon*, 40 Mich. 673; *Portman v. Fish Com'srs*, 50 Mich. 258; *Trainor v. Board of Auditors*, 89 Mich. 162.

New York. — *People v. Comptroller*, 20 Wend. (N. Y.) 595; *Jackson v. New York*, 87 Hun (N. Y.) 296; *Myers v. New York*, (Supm. Ct. Gen. T.) 53 N. Y. St. Rep. 233; *People v. Murray*, 2 N. Y. App. Div. 359; *Miller v. Warner*, 42 N. Y. App. Div. 208.

Washington. — *State v. Seavey*, 7 Wash. 562.

4. If Clerks of Court were removable by the governor the act would not be judicial, but if justices of the County Court had been made removable by the Court of Appeals it would be a judicial power, and the accused would have a right to know the charge and be heard in their defense. *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146.

Removal of Colonial Judges. — *Montagu v. Van Dieman's Land*, 6 Moo. P. C. 489; *S. P. Willis v. Gipps*, 5 Moo. P. C. 379. And see *Ex p. Ramshay*, 18 Q. B. 173, 83 E. C. L. 173; *Anderson v. Gorrie*, 14 Reports 79, (1895) 1 Q. B. 668, 71 L. T. N. S. 382.

Removal of United States Commissioner. — *In re Eaves*, 30 Fed. Rep. 21.

Recorder of Municipal Court Not Judicial Officer. — *Morrison v. McDonald*, 21 Me. 550.

Railroad Commission Not Judicial Court. — *Caldwell v. Wilson*, 121 N. Car. 425.

5. Ex-officers. — *Smith v. Ling*, 68 Cal. 324; *Thurston v. Clark*, 107 Cal. 285; *Woods v. Varnum*, 85 Cal. 639; *In re Stow*, 98 Cal. 587; *State v. Smith*, 6 Wash. 496. And see *State v. Hill*, 37 Neb. 80. See also IMPEACHMENT, vol. 15, p. 1061.

Application for a Pension does not dissolve the connection with the officer so as to deprive the board of the power to remove. *People v. French*, 108 N. Y. 105, *affirming* 44 Hun (N. Y.) 24.

6. Flatan v. State, 56 Tex. 93.

7. During Good Behavior — *England*. — *Ex p. Ramshay*, 18 Q. B. 173, 83 E. C. L. 173; *Rex v. Gaskin*, 8 T. R. 209; *Rex v. Warren*, 1 Cowp. 370; *Kane v. Stewart*, Sausse & Sc. 84, note, Jones 630; *Westbie's Case*, 3 Coke 71.

United States. — *Ex p. Hennen*, 13 Pet. (U. S.) 230.

Maine. — *Andrews v. King*, 77 Me. 224.

New Jersey. — *State v. Trenton*, 50 N. J. L. 338.

Ohio. — *State v. Bryce*, 7 Ohio (pt. ii.) 82. But see *Rex v. Stratford upon Avon*, 1 Lev. 291.

Pennsylvania. — *Field v. Com.*, 32 Pa. St. 478.

Tennessee. — See *Sevier v. Justices*, Peck. (Tenn.) 334.

8. Fixed Period — *California*. — *People v. Jewett*, 6 Cal. 291.

Colorado. — *Carter v. Durango*, 16 Colo. 534, 25 Am. St. Rep. 294.

Georgia. — *Shaw v. Macon*, 21 Ga. 280.

Kansas. — *Lynch v. Chase*, 55 Kan. 367; *Lease v. Freeborn*, 52 Kan. 750.

Kentucky. — *Com. v. Arnold*, 3 Litt. (Ky.) 309; *Todd v. Dunlap*, 99 Ky. 440.

Maryland. — *Field v. Malster*, 88 Md. 69r.

Michigan. — *Mead v. Ingham County*, 36 Mich. 416; *Hallgren v. Campbell*, 82 Mich. 255, 21 Am. St. Rep. 557.

Missouri. — *State v. Police Com'srs*, 14 Mo. App. 302; *State v. Brown*, 57 Mo. App. 199; *State v. Walker*, 68 Mo. App. 110; *State v. Police Com'srs*, 88 Mo. 144; *State v. St. Louis*, 90 Mo. 19.

Right to Notice. — In either of such cases the person proposed to be removed is entitled to notice of the charges intended to be preferred against him, and to a reasonable opportunity to make defense.¹ The mere silence of the statute with respect to notice and hearing will not justify the removal of the officer whose term or tenure is declared by law, without knowledge of the charges and an opportunity to explain and defend.² The cases are not in accord as to whether or not the grant of a general power to remove officers appointed for a definite time carries with it the right to remove at any time or in any manner deemed best,³ but the prevailing rule is that if the power is conferred to remove for cause, either general⁴ or specific, a judicial investi-

Nebraska. — State *v.* Smith, 35 Neb. 13.

New Jersey. — State *v.* Pritchard, 36 N. J. L. 101; State *v.* Camden, 39 N. J. L. 416.

North Carolina. — Trotter *v.* Mitchell, 115 N. Car. 190.

South Carolina. — Caulfield *v.* State, 1 S. Car. 461.

Tennessee. — Sevier *v.* Justices, Peck (Tenn.) 334.

Texas. — Honey *v.* Graham, 39 Tex. 1.

Wisconsin. — State *v.* Kuehn, 34 Wis. 229.

A Municipality must abide by its return that the officer was removed for cause, though in fact he might have been removed without assigning cause. Reg. *v.* Ipswich, 2 Ld. Raym. 1240.

A Suspension is not a violation of the rule that an officer whose term is fixed cannot be removed except for cause and upon notice. Brown *v.* Duffus, 66 Iowa 193.

Made Removable at Pleasure. — Brackett *v.* Blake, 7 Met. (Mass.) 335, 41 Am. Dec. 442; Knowles *v.* Boston, 12 Gray (Mass.) 339.

1. Entitled to Notice of Charges — *England.* — Reg. *v.* Saddler's Co., 10 H. L. Cas. 404, 32 L. J. Q. B. 337, 9 Jur. N. S. 1081, 9 L. T. N. S. 60, 11 W. R. 1004; Willis *v.* Gipps, 5 Moo. P. C. 379; Reg. *v.* Canterbury, 1 El. & El. 545, 102 E. C. L. 545; Fitz's Case, Cro. Eliz. 12.

Colorado. — Board of Aldermen *v.* Darrow, 13 Colo. 460, 16 Am. St. Rep. 215.

Kansas. — Lynch *v.* Chase, 55 Kan. 367; Lease *v.* Freeborn, 52 Kan. 750; Jacques *v.* Little, 51 Kan. 300; McMaster *v.* Herald, 56 Kan. 231.

Maryland. — Townsend *v.* Kurtz, 83 Md. 331.

Michigan. — Clay *v.* Stuart, 74 Mich. 411, 16 Am. St. Rep. 644.

New York. — See James *v.* New York, 2 N. Y. Leg. Obs. 396.

Tennessee. — Sevier *v.* Justices, Peck (Tenn.) 334.

Texas. — Flatan *v.* State, 56 Tex. 93.

West Virginia. — Richards *v.* Clarksburg, 30 W. Va. 491.

And see *infra*, c. (7) i. *Suspension*.

Inherent Right to Notice. — State *v.* Hixon, 27 Ark. 402, citing 4 Black. Com. 282; 2 Kent's Com. 297.

Notice of Default. — A prior notice of default is not necessary to the removal by the governor of an officer for shortage in his accounts. Conklin *v.* Cunningham, 7 N. Mex. 445.

Officer Illegally Appointed Not Entitled. — People *v.* Board of Health, 153 N. Y. 513, reversing 15 N. Y. App. Div. 272.

2. Express Provision for Notice Unnecessary. — Lease *v.* Freeborn, 52 Kan. 750; Jacques *v.* Little, 51 Kan. 300; State *v.* Brown, 57 Mo.

App. 199. *Contra*, Sweeney *v.* Stevens, 46 N. J. L. 344.

3. Removal under Grant of General Power. — Eckloff *v.* District of Columbia, 135 U. S. 240; Townsend *v.* Kurtz, 83 Md. 331.

Arbitrary Removal Not Authorized. — Gillett *v.* People, 13 Colo. App. 553.

Presumption that Notice Is Necessary. — State *v.* Walbridge, 119 Mo. 383, 41 Am. St. Rep. 663.

Removal at Discretion. — Lawrence *v.* Cincinnati, 5 Ohio Dec. (Reprint) 228, 3 Am. L. Rec. 597.

Removal on Credible Information. — People *v.* Bearfield, 35 Barb. (N. Y.) 254.

Effect of Silence of Statute as to Certain Officers. — Hallgren *v.* Campbell, 82 Mich. 255, 21 Am. St. Rep. 557; People *v.* Fire Com'rs, 73 N. Y. 437.

Removal of Officer Holding During Pleasure. — Hammond *v.* McLay, 28 U. C. Q. B. 463, 26 U. C. Q. B. 434.

Whether Removal Is at Pleasure or for Cause. — People *v.* New York, 82 N. Y. 491, affirming 16 Hun (N. Y.) 309.

4. General Cause — *England.* — Reg. *v.* Canterbury, 1 El. & El. 545, 102 E. C. L. 545.

Arkansas. — State *v.* Carneall, 10 Ark. 156.

California. — Kennedy *v.* Board of Education, 82 Cal. 483; Marion *v.* Board of Education, 97 Cal. 608; Fairchild *v.* Board of Education, 107 Cal. 94; Patton *v.* Board of Health, 127 Cal. 388, 78 Am. St. Rep. 66.

Kentucky. — Com. *v.* Arnold, 3 Litt. (Ky.) 328; Gorham *v.* Luckett, 6 B. Mon. (Ky.) 146. See also Todd *v.* Dunlap, 99 Ky. 449.

Maine. — Andrews *v.* King, 77 Me. 224.

Michigan. — Hallgren *v.* Campbell, 82 Mich. 255, 21 Am. St. Rep. 557.

Missouri. — State *v.* Police Com'rs, 14 Mo. App. 297; State *v.* Alt, 26 Mo. App. 673; State *v.* Brown, 57 Mo. App. 199; State *v.* Walker, 68 Mo. App. 110.

Nebraska. — State *v.* Smith, 35 Neb. 13.

New Jersey. — Haight *v.* Love, 39 N. J. L. 14; State *v.* Cape May Point, 55 N. J. L. 104; State *v.* Cape May, 50 N. J. L. 558. Compare

Hoboken *v.* Gear, 27 N. J. L. 265.

New York. — People *v.* Board of Police, 3 Abb. App. Dec. (N. Y.) 488; People *v.* McGuire, 27 N. Y. App. Div. 593; Matter of Nichols, (Supm. Ct. Spec. T.) 6 Abb. N. Cas. (N. Y.) 474.

Ohio. — State *v.* Sullivan, 8 Ohio Cir. Dec. 294, 15 Ohio Cir. Ct. 333.

Oregon. — Biggs *v.* McBride, 17 Oregon 640.

Texas. — Flatan *v.* State, 56 Tex. 93.

Utah. — People *v.* McAllister, 10 Utah 357.

Wisconsin. — State *v.* Watertown, 9 Wis. 254. Compare State *v.* McGarry, 21 Wis. 496.

gation on specific charges and notice is requisite;¹ but when the tenure is at pleasure, charges, notice, and hearing are unnecessary.² If the removal is authorized when the appointing power is "satisfied" as to the existence of the cause for removal, notice is not necessary.³

(4) *Persons Entitled to Protection under Civil Service and Veteran Acts* —

(a) *In General.* — An act requiring preference in appointment does not of itself annul an existing power of summary removal.⁴ A power given to remove employees at discretion does not authorize the removal of veterans employed in a municipal department before the charter conferring the power took effect, and who were subject to removal only for cause.⁵ The protection of the act applies only to citizens and residents of the state.⁶ The civil service acts apply only to state, county, and city officers.⁷ To be entitled to the protec-

Limiting Grounds for Removal. — State v. Register, 59 Md. 283.

Written Statement of Cause. — Trimble v. People, 19 Colo. 187, 41 Am. St. Rep. 236, *following In re Fire*, etc., Com'rs, 19 Colo. 482.

Effect of Requiring Statement of Grounds. — South v. Sinking Fund Com'rs, 86 Ky. 186; State v. Williams, 6 S. Dak. 119; State v. Burke, 8 Wash. 412. See also Callahan v. State, 2 Stew. & P. (Ala.) 379.

Cause Assigned in Order of Removal. — O'Dowd v. Boston, 149 Mass. 413.

Cause to Be Spread upon Court Minutes. — Gordon v. State, 43 Tex. 338; Trigg v. State, 49 Tex. 643.

Conflict of Statutes. — State v. McQuade, 12 Wash. 554. See also Williams v. Gloucester, 148 Mass. 256.

As to Removal of an Inspector of Election "actually on duty," see Gardner v. People, 62 N. Y. 299.

1. Specific Charges — *Colorado.* — Benson v. People, 10 Colo. App. 175.

Kentucky. — Page v. Hardin, 8 B. Mon. (Ky.) 648.

Maryland. — Miles v. Stevenson, 80 Md. 358.

Missouri. — State v. Lupton, 64 Mo. 415, 27 Am. Rep. 253.

New York. — People v. Fire, etc., Dept. Com'rs, 106 N. Y. 64. *Compare* People v. Morton, 148 N. Y. 156; People v. Brookfield, 2 N. Y. App. Div. 299.

Oregon. — Biggs v. McBride, 17 Oregon 640.

Pennsylvania. — Directors of Jenkins Tp., 1 Kulp (Pa.) 111; Com. v. Slifer, 25 Pa. St. 23, 64 Am. Dec. 680; Field v. Com., 32 Pa. St. 478.

South Dakota. — State v. Hewitt, 3 S. Dak. 187, 44 Am. St. Rep. 788.

Compare Wilcox v. People, 90 Ill. 186; People v. Mays, 117 Ill. 257; People v. Welty, 75 Ill. App. 514; Trainor v. Board of Auditors, 89 Mich. 162; Kennan v. Perry, 24 Tex. 253.

2. No Notice When Tenure at Pleasure — *England.* — *In re Ward*, 7 L. J. Ch. 137; *In re Teather*, etc., Com'rs, 19 L. J. M. C. 70; Dighton v. Stratford on Avon, 2 Keb. 641, T. Raym. 188; Warren's Case, Cro. Jac. 540; Rex v. Andover, 1 Ld. Raym. 710; Rex v. Coventry, 1 Ld. Raym. 391; Rex v. Cambridge, 2 Show. 69; Rex v. Guardians, etc., 1 Stra. 115.

Colorado. — Board of Aldermen v. Darrow, 13 Colo. 460, 16 Am. St. Rep. 215; Carter v. Durango, 16 Colo. 534, 25 Am. St. Rep. 294.

Florida. — State v. Johnson, 30 Fla. 433.

Kansas. — Jacques v. Little, 51 Kan. 300, *following* State v. Mitchell, 50 Kan. 289.

Massachusetts. — Williams v. Gloucester, 148 Mass. 256.

Missouri. — State v. St. Louis, 90 Mo. 19.

Nebraska. — State v. Smith, 35 Neb. 13.

New Jersey. — State v. Jersey City, 25 N. J. L. 536; Sweeney v. Stevens, 46 N. J. L. 344.

New York. — People v. New York, 82 N. Y. 491; People v. Drake, 43 N. Y. App. Div. 325; Weidman v. Board of Education, (Supm. Ct. Gen. T.) 26 N. Y. St. Rep. 765; People v. Purroy, (Supm. Ct. Gen. T.) 31 N. Y. St. Rep. 934; People v. Comptroller, 20 Wend. (N. Y.) 595; People v. Henry, 47 N. Y. App. Div. 133.

Pennsylvania. — Field v. Com., 32 Pa. St. 478.

Texas. — Honey v. Graham, 39 Tex. 1.

West Virginia. — Richards v. Clarksburg, 30 W. Va. 491.

Discretionary Removal for Cause. — Asbell v. Brunswick, 80 Ga. 503.

Appointment for Indefinite Time. — State v. Police Com'rs, 88 Mo. 144. See also Willard's Appeal, 4 R. I. 595.

Successors to Board Having Power to Remove Only for Cause. — Ham v. Board of Police, 142 Mass. 90.

"Full Power" to Remove "for Neglect of Duty." — Gorham v. Lockett, 6 B. Mon. (Ky.) 146.

3. People v. Carver, 5 Colo. App. 156; O'Dowd v. Boston, 149 Mass. 443; State v. Williams, 6 S. Dak. 119; State v. Burke, 8 Wash. 412.

4. Effect of Requiring Preference in Appointment upon Right of Removal. — People v. Lathrop, 142 N. Y. 113, *affirming* 71 Hun (N. Y.) 202; People v. Morton, 148 N. Y. 156; People v. Brookfield, 2 N. Y. App. Div. 299.

5. People v. McCartney, 34 N. Y. App. Div. 19.

6. Only Citizens of State Protected. — People v. Simonson, 64 N. Y. App. Div. 312.

7. County Employees Protected. — Matter of Murray, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 185.

School Employees Not Protected. — People v. Board of Education, 84 Hun (N. Y.) 417; People v. School Board, 43 N. Y. App. Div. 613 [*following* People v. Hayward, 19 N. Y. App. Div. 46]; Ridenour v. Board of Education, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 418.

Clerks of Certain Courts Not Protected. — Pier-son v. O'Connor, 54 N. J. L. 36.

Clerk of Police Court Not Protected. — People v. England, 16 N. Y. App. Div. 97.

Clerk of Commissioner of Jurors of Manhattan and Bronx Protected. — People v. Welde, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 185.

School Employees Not Protected. — People v. Board of Education, 84 Hun (N. Y.) 417; People v. School Board, 43 N. Y. App. Div. 613 [*following* People v. Hayward, 19 N. Y. App. Div. 46]; Ridenour v. Board of Education, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 418.

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Clerks of Certain Courts Not Protected. — Pier-son v. O'Connor, 54 N. J. L. 36.

Clerk of Police Court Not Protected. — People v. England, 16 N. Y. App. Div. 97.

Clerk of Commissioner of Jurors of Manhattan and Bronx Protected. — People v. Welde, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 185.

tion of an act it must clearly appear that the person seeking such protection is of the class contemplated therein, and not expressly excepted by its provisions.¹ The veteran's act does not apply to the more important municipal officers.²

Holding Position. — The duties of an employment must be analogous to the duties of an office, that is, duties that are continuous and permanent and specially pertaining to the position, to bring the employment within the meaning of the statutory words "holding a position."³

For Fixed Term. — The statutes expressly except persons holding for a fixed term.⁴

Ct. Spec. T.) 27 Misc. (N. Y.) 697, *distinguishing* People v. Plimley, 1 N. Y. App. Div. 458.

1. Honorably Discharged Soldier. — State v. Newark, 58 N. J. L. 522.

Public Bath Attendant Protected. — Holt v. New York, (Supm. Ct. Tr. T.) 35 Misc. (N. Y.) 642.

Attendants on Recreation Piers Not Protected. — Vincent v. Cram, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 158.

Day Laborers Not Included. — People v. Brookfield, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 566; Sullivan v. Gilroy, N. Y. L. J. July 3, 1889, *affirmed* 55 Hun (N. Y.) 285; Wagner v. Collis, 7 N. Y. App. Div. 203; People v. Armbruster, 59 Hun (N. Y.) 587; Nuttall v. Simis, 31 N. Y. App. Div. 503, *affirming* 22 Misc. (N. Y.) 19. *Compare* Matter of Murray, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 185.

Distinction Between "Salary" and "Wages." — Meyers v. New York, 69 Hun (N. Y.) 291.

Appointees of Predecessor Protected. — People v. French, 12 Hun (N. Y.) 254.

"Regular Clerks and Heads of Bureaus" Protected. — People v. Fire Com'rs, 73 N. Y. 437; People v. Hertle, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 37, *modifying* and *affirming* 46 N. Y. App. Div. 505.

"Superintendent of Telegraph" Not Protected. — People v. Fire Com'rs, 86 N. Y. 149.

Fire Marshal's Assistant Not Protected. — People v. Fire Com'rs, 73 N. Y. 437.

Roundsman in Dock Department Not Protected. — People v. Cram, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 12.

Sanitary Inspector Not Protected. — People v. Health Dept., 24 N. Y. Wkly. Dig. 197.

Superintendent of Street Improvements Protected. — People v. Brookfield, 1 N. Y. App. Div. 68.

What Members of Fire Department Protected. — People v. Fire, etc., Dept. Com'rs, 103 N. Y. 370; People v. Ennis, (Brooklyn City Ct. Gen. T.) 27 N. Y. St. Rep. 276, *affirmed* without opinion 121 N. Y. 693; People v. Fire Com'rs, 12 N. Y. Wkly. Dig. 281; People v. Fire Com'rs, 28 Hun (N. Y.) 495; People v. Fire Com'rs, Brooklyn Daily Rec., Feb. 20, 1883; People v. Wurster, 89 Hun (N. Y.) 8; People v. Wurster, 89 Hun (N. Y.) 604, 35 N. Y. Supp. 88; People v. Wurster, 89 Hun (N. Y.) 5.

What Members of Police Department Protected. — Chicago v. Edwards, 58 Ill. 252; State v. Millville, 53 N. J. L. 362; People v. Hayden, 133 N. Y. 198, *reversing* (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 1116.

The Department of Street Cleaning of the city of New York is a city department, and the commissioner has power to dismiss at his dis-

cretion, for a violation of duty, a member of the uniformed force employed by the department. People v. Waring, 1 N. Y. App. Div. 594.

2. To Whom Veterans' Act Is Applicable. — People v. Van Wyck, 157 N. Y. 495; People v. Saratoga Springs, 35 N. Y. App. Div. 141, *affirmed* 159 N. Y. 568; People v. Nicoll, (Supm. Ct. Spec. T.) 32 N. Y. Supp. 279; People v. Brady, 49 N. Y. App. Div. 238; People v. Wright, 150 N. Y. 444, *affirming* 7 N. Y. App. Div. 185.

Not to Chief Clerks. — People v. Goetting, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 286, *affirmed* 133 N. Y. 569; Sargent v. Gorman, 131 N. Y. 191, *affirming* (Supm. Ct. Gen. T.) 38 N. Y. St. Rep. 780.

Not to Deputies. — People v. Armbruster, 59 Hun (N. Y.) 586; People v. Scully, (Supm. Ct. Spec. T.) 35 Misc. (N. Y.) 613; People v. Tracy, 35 N. Y. App. Div. 265; People v. Barker, (Supm. Ct. Spec. T.) 14 Misc. (N. Y.) 360.

Not to Persons Holding Confidential Positions. — People v. Scannell, 51 N. Y. App. Div. 360; People v. Lyman, 157 N. Y. 368, *affirming* 30 N. Y. App. Div. 135; People v. Gardiner, 157 N. Y. 520, *reversed* 33 N. Y. App. Div. 204; People v. Baker, (Supm. Ct.) 12 Misc. (N. Y.) 389; People v. Scannell, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 619; People v. Palmer, 152 N. Y. 217; People v. Dalton, 41 N. Y. App. Div. 458; People v. O'Brien, 9 N. Y. App. Div. 428; People v. Coler, 31 N. Y. App. Div. 523 [*reversed* 157 N. Y. 676, *distinguishing* Tillinghast v. Merrill, 151 N. Y. 135, 56 Am. St. Rep. 612]; People v. Dalton, 158 N. Y. 204, *affirming* 34 N. Y. App. Div. 6; People v. Ransom, 59 Hun (N. Y.) 624, 13 N. Y. Supp. 370.

Confidential Character of Position Cannot Be Changed by Civil Service Commission. — People v. Lyman, 157 N. Y. 368, *affirming* 30 N. Y. App. Div. 135.

3. Meaning of "Holding a Position." — Kreigh v. Chosen Freeholders, 62 N. J. L. 178; State v. Board of Public Works, 51 N. J. L. 240; Peterson v. Chosen Freeholders, 63 N. J. L. 57; Daly v. Chosen Freeholders, 58 N. J. L. 319; State v. Chosen Freeholders, 58 N. J. L. 531; State v. Board of Public Works, 51 N. J. L. 240; Stewart v. Chosen Freeholders, 61 N. J. L. 117; People v. England, 16 N. Y. App. Div. 97; People v. Brookfield, (N. Y. Super. Ct. Spec. T.) 13 Misc. (N. Y.) 566.

4. Meaning of "Fixed Term." — State v. Chosen Freeholders, 58 N. J. L. 531; Townsend v. Boughner, 55 N. J. L. 380; Stockton v. Regan, 54 N. J. L. 167; State v. Board of Education, 58 N. J. L. 533; Heaviland v. Chosen Freeholders, 64 N. J. L. 176.

Temporary and Probationary Appointments. — Temporary clerks are not entitled to notice and hearing,¹ but the appointee for a probationary term in the city of New York cannot, during such term, be removed without notice and opportunity to be heard, and a rule permitting a peremptory discharge during that period is unauthorized by the statute.² The probationary period does not necessarily commence to run from the date of appointment, but from the date when the appointment is to take effect.³

Giving Notice of Rights. — The cases are not entirely in accord as to whether it is necessary for one claiming a preference in retention to give notice of his right before dismissal.⁴

De Facto Officers and Employees. — An act restraining the removal of veterans except for cause does not apply to one holding a position by a mere *de facto* title, and whose employment or appointment was for any reason illegal. The incumbent of an office to which he was appointed without the civil-service examination required by law is not protected by said statute from summary removal.⁵ It has been held that an incumbent appointed in violation of the act giving preference to veterans cannot be removed in an action brought by a veteran to which the incumbent is not a party.⁶

Military Officers. — At common law it is not necessary that the removal of a military officer be founded upon an existing cause,⁷ and in *New York* the civil service acts are expressly made inapplicable to the military service.⁸

(b) **Dismissal on Grounds of Economy.** — The acts prohibiting removal unless the incumbent has been informed of the cause of the proposed removal and has been allowed an opportunity to be heard do not apply to a case where the incumbent is removed because the office or position is abrogated in good faith and there is no further need of his services, or because there are no funds provided for his payment.⁹

1. **Temporary Clerks Not Entitled to Notice.** — *People v. Adams*, 133 N. Y. 203, *reversed* 53 Hun (N. Y.) 141; *People v. Lantry*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 80. See also *Fire Com'rs v. Lyon*, 53 N. J. L. 632.

2. **Probationary Appointee Entitled to Notice.** — *People v. Kearny*, 164 N. Y. 64, *affirming* 49 N. Y. App. Div. 125; *People v. Guilfoyle*, 61 N. Y. App. Div. 187; *People v. Lyman*, 157 N. Y. 368, *affirming* 30 N. Y. App. Div. 135.

3. **When Probationary Period Begins.** — *Sheridan v. Willis*, 6 N. Y. App. Div. 132.

4. **Notice of Rights Necessary.** — *People v. Simonson*, 64 N. Y. App. Div. 312; *People v. Porter*, 90 Hun (N. Y.) 401. And see *People v. White*, 59 N. Y. App. Div. 17; *Matter of Shay*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 856. *Compare Stutzbach v. Coler*, 168 N. Y. 416, *affirming* 62 N. Y. App. Div. 219.

5. **De Facto Officers Not Protected.** — *People v. Board of Health*, 153 N. Y. 513, *reversing* 15 N. Y. App. Div. 272.

Failure to Stand Physical Examination Does Not Deprive of Protection. — *Michaelis v. Fire Com'rs*, 49 N. J. L. 154; *People v. Hannan*, 56 Hun (N. Y.) 469, *affirmed* without opinion 125 N. Y. 691.

6. *People v. Wendell*, 57 Hun (N. Y.) 362.

7. **Common-law Rule as to Military Officers.** — *Grant v. Secretary of State*, 2 C. P. D. 445.

8. **New York Statute.** — *People v. Martin*, 53 N. Y. App. Div. 19.

9. **May Remove Without Notice for Economy.** — *People v. Police Com'rs*, 20 N. Y. Wkly. Dig. 552; *People v. Health Dept.*, 24 N. Y. Wkly. Dig. 197; *Lethbridge v. New York*, 133 N. Y. 232, *reversing* 59 N. Y. Super. Ct. 486;

People v. Squier, 10 N. Y. App. Div. 415; *People v. King*, 13 N. Y. App. Div. 400; *People v. Ennis*, 18 N. Y. App. Div. 412; *Matter of Kelly*, 42 N. Y. App. Div. 283; *People v. Shea*, 51 N. Y. App. Div. 227; *People v. Dalton*, 57 N. Y. App. Div. 626, *affirming* (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 109; *Phillips v. New York*, 88 N. Y. 245, *affirming* 13 N. Y. Wkly. Dig. 426; *Langdon v. New York*, 92 N. Y. 427, *affirming* 27 Hun (N. Y.) 288; *People v. Charities, etc.*, Com'rs, 1 N. Y. App. Div. 3; *People v. Hill*, 126 N. Y. 497; *People v. Brooklyn*, 149 N. Y. 215; *Kenny v. Kane*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 680; *People v. Clausen*, (Supm. Ct. Tr. T.) 29 Misc. (N. Y.) 701; *Porter v. Howland*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 434; *People v. Dalton*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 109; *People v. Public Parks Dept.*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 130; *People v. Ewen*, (Supm. Ct. Spec. T.) 17 How. Pr. (N. Y.) 375; *People v. Van Wart*, 36 N. Y. App. Div. 518, 25 Misc. (N. Y.) 215; *People v. Ennis*, 18 N. Y. App. Div. 412; *People v. Waring*, 7 N. Y. App. Div. 204; *People v. Waring*, (Supm. Ct. Spec. T.) 62 N. Y. Supp. 966; *People v. French*, 25 Hun (N. Y.) 111. See also *Hudson v. Denver*, 12 Colo. 157; *Beirne v. Board of Street, etc.*, Com'rs, 60 N. J. L. 109.

Reinstatement When Office Colorably Abolished.

— *Matter of McDonald*, 34 N. Y. App. Div. 512; *People v. Scannell*, 48 N. Y. App. Div. 69. To the same effect see *State v. Schumaker*, 27 La. Ann. 332.

May Transfer Duties to Office Not Filled by Veteran. — *People v. King*, 13 N. Y. App. Div. 400; *People v. Adams*, 51 Hun (N. Y.) 583;

(c) **Removal of Veterans, Retention of Others.** — The purpose of the veteran's act being to give such persons preference both in employment and in retention in office, a veteran cannot be removed while any other person employed for an indefinite time is retained to perform duties of the kind discharged by such veteran,¹ even though the removing officer does not know that such clerk is a veteran and though he is the least efficient man in the bureau in which he is employed.²

e. CAUSES FOR REMOVAL — (1) *Definitions.* — The word "cause" or "sufficient cause" employed in a statute authorizing removal means "legal cause," and not merely any cause which the removing power may think sufficient; it must be one touching the qualifications of the officer or the performance of his duties, showing that he is not a fit or proper person to hold the office.³ An authorization to impose penalties for certain disabilities and offenses does not restrict the power of removal therefor.⁴

Nonfeasance, which was ground for removal at common law, was the nonperformance of some official act which ought to have been performed.⁵

Misfeasance is a default in an officer in not doing a lawful act in a proper manner — omitting to do it as it should be done.⁶

Malfeasance is the doing of an act wholly unlawful and wrongful.⁷

By Official Misconduct is meant any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice or the execution of the laws.⁸

People v. Brooklyn, 149 N. Y. 215; *People v. Scannell*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 619; *People v. Adams*, 51 Hun (N. Y.) 583; *People v. Feitner*, 58 N. Y. App. Div. 594; *People v. Scannell*, 48 N. Y. App. Div. 445, *affirmed* without opinion 163 N. Y. 599; *People v. Waring*, 7 N. Y. App. Div. 204; *People v. French*, 25 Hun (N. Y.) 111; *People v. Simis*, 18 N. Y. App. Div. 199.

1. **Cannot Remove Veterans and Retain Other Persons.** — *People v. Morton*, 24 N. Y. App. Div. 563; *McCloskey v. Willis*, 15 N. Y. App. Div. 594; *People v. Adams*, 53 Hun (N. Y.) 141; *People v. Coler*, (Supm. Ct. Spec. T.) 34 Misc. (N. Y.) 119; *People v. Public Parks*, (C. Pl. Gen. T.) 43 N. Y. St. Rep. 525; *People v. Public Parks*, (C. Pl. Gen. T.) 17 N. Y. Supp. 589, *distinguishing* *People v. Gallup*, (Supm. Ct. Spec. T.) 17 N. Y. Supp. 590, note.

2. **Stutzbach v. Coler**, 168 N. Y. 416, *affirming* 62 N. Y. App. Div. 219.

3. **"Cause" Defined** — *England*. — *Bagg's Case*, 11 Coke 93b; *Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 731.

United States. — See *In re Eaves*, 30 Fed. Rep. 21.

Kentucky. — *Todd v. Dunlap*, 99 Ky. 449.

Maine. — *Andrews v. King*, 77 Me. 224.

Michigan. — *Fuller v. Ellis*, 98 Mich. 96.

Minnesota. — *State v. Duluth*, 53 Minn. 239, 39 Am. St. Rep. 595.

New Jersey. — *Haight v. Love*, 39 N. J. L. 14.

New York. — *People v. Fire Com'rs*, 72 N. Y. 445; *People v. La Grange*, 2 N. Y. App. Div. 444; *People v. Grant*, 12 Daly (N. Y.) 294; *People v. New York*, 19 Hun (N. Y.) 441; *Matter of Guden*, 71 N. Y. App. Div. 422; *People v. Nichols*, 79 N. Y. 582, *reversing* 18 Hun (N. Y.) 530, *affirming* 57 How. Pr. (N. Y.) 395; *People v. Starks*, 33 Hun (N. Y.) 384. See also *People v. Brady*, 53 N. Y. App. Div. 279; *People v. Fire Com'rs*, 43 Hun (N. Y.) 554, *appeal dismissed* 106 N. Y. 257.

Ohio. — *State v. McLain*, 58 Ohio St. 313; *State v. Sullivan*, 8 Ohio Cir. Dec. 294, 15 Ohio Cir. Ct. 333.

Texas. — *Ex p. King*, 35 Tex. 657.

Wisconsin. — *State v. McGarry*, 21 Wis. 406.

4. **Penalty.** — *People v. Robb*, 126 N. Y. 180.

5. **Nonfeasance Defined.** — *Coite v. Lynes*, 33 Conn. 109; *Minkler v. State*, 14 Neb. 181.

Nonfeasance and Not Misfeasance is contemplated by a statute providing for removal if the officer should "refuse or wilfully neglect to perform" the duties of his office. *People v. Burnside*, 3 Lans. (N. Y.) 74.

Liability to Removal for Nonfeasance. — 1 Hawk. P. C. 311; 2 Kyd on Corp. 85; *McClure v. State*, 37 Ark. 433. See also 9 Co. 50, and see Co. Litt. 233.

Nonuser as Cause of Forfeiture. — *Rex v. Ponsoby*, 1 Ves. Jr. 1.

6. **Misfeasance Defined.** — 16 Vin. Abr. 121; *Coite v. Lynes*, 33 Conn. 109; *Com. v. Williams*, 79 Ky. 42, 42 Am. Rep. 204; *Minkler v. State*, 14 Neb. 181; *People v. Auburn*, 85 Hun (N. Y.) 601.

7. **Malfeasance Defined.** — 16 Vin. Abr. 122; *Oliver v. Americus*, 69 Ga. 165; *People v. Auburn*, 85 Hun (N. Y.) 601; *Colburn v. Neufarth*, Ohio Prob. 24.

Maladministration in Office Defined. — *Bradford v. Territory*, 2 Okla. 228.

Maladministration and Misadministration Mean the Same. — *Minkler v. State*, 14 Neb. 181.

Malconduct in Office Defined. — *Johnson v. Galveston*, 11 Tex. Civ. App. 469.

8. **Misconduct Defined.** — *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172; *State v. Slover*, 113 Mo. 202; *State v. Jersey City*, 25 N. J. L. 536; *Craig v. State*, 31 Tex. Crim. 29; *State v. Alcorn*, 78 Tex. 387; *Brackenridge v. State*, 27 Tex. App. 513. See also *State v. Wilson*, 30 Kan. 661.

Disorderly Conduct Defined. — *State v. Teasdale*, 21 Fla. 652.

Incompetency means lack of fitness to discharge the duties of the position.¹

When Wilfulness Is an Ingredient of the Act made ground for removal, the word "wilful" is not used in its most general sense, as in obedience to the will, and an official act done or committed cannot be said to be wilful unless the officer knew or believed that it was his official duty to do or omit the act, and, with such knowledge or belief, perversely acted or failed to act.²

(2) *Criminal Nature of Act.*—While to authorize a removal it is not requisite that the acts be such as would subject the officer to a criminal prosecution, it being sufficient that they were done knowingly in violation of official duties,³ the fact that the acts involve a criminal offense⁴ or a high degree of moral turpitude is immaterial.⁵

(3) *Intent and Motive as Affecting Nature of Act.*—The materiality of the intent or motive depends generally on the character of the particular act charged as ground for removal, but in general, mistakes honestly made and without any lack of diligence on the part of the officer, although they may, under certain circumstances, furnish grounds for a civil action against him, are not causes for removal.⁶

(4) *Necessity of Prior Conviction.*—Lord Mansfield classified removable offenses as follows: First, such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the officer unfit to execute any public franchise; second, such as are only against his oath and the duty of his office and amount to breaches of the tacit condition annexed to his franchise or office; the third sort of offense for which an officer or corporator may be displaced is of a mixed nature, as being an offense not only against the duty of his office, but also a matter indictable at common law.⁷ In the absence of statute this classification is generally adhered to in the *United States* for the purpose of determining the necessity of a prior conviction of the offense before removal.⁸ To authorize a removal for such offenses

1. *Incompetency Defined.*—State *v.* Fire Com'rs, 26 Ohio St. 24. See also People *v.* Fire Com'rs, 43 Hun (N. Y.) 554, *appeal dismissed* 106 N. Y. 257; People *v.* Board of Health, 153 N. Y. 513, *reversing* 15 N. Y. App. Div. 272; Quintanilla *v.* State, 23 Tex. Civ. App. 479.

General Incapacity Not Necessary.—People *v.* Board of Police, 69 N. Y. 408.

Physical Incapacity not in any way interfering with the performance of official duties is not ground for removal. People *v.* Barker, 1 N. Y. App. Div. 532, *affirmed* 149 N. Y. 607.

Want of Skill Ground for Removal.—People *v.* Campbell, 82 N. Y. 247.

2. "Wilful" Defined.—State *v.* Alcorn, 78 Tex. 387.

3. Acts Need Not Be Criminal.—Bradford *v.* Territory, 2 Okla. 228.

4. Criminal Offense Involved.—Wellman *v.* Metropolitan Police, 91 Mich. 427; People *v.* French, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 377, *affirmed* 12 N. Y. Wkly. Dig. 468; People *v.* French, 32 Hun (N. Y.) 112.

5. Moral Turpitude Involved.—Fuller *v.* Ellis, 98 Mich. 96.

6. Materiality of Intent.—Com. *v.* Rodes, 1 Dana (Ky.) 595. See also Com. *v.* Rodes, 6 B. Mon. (Ky.) 171; *In re* Thomas, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 38.

Acts Not Constituting Grounds for Removal—*England.*—Reg. *v.* Ipswich, 2 Ld. Raym. 1232. *California.*—Triplett *v.* Munter, 50 Cal. 644; Matter of Smith, 68 Cal. 324.

Idaho.—Ponting *v.* Isaman, (Idaho 1901) 65 Pac. Rep. 434.

Kansas.—State *v.* Scates, 43 Kan. 330.

Kentucky.—Com. *v.* Arnold, 3 Litt. (Ky.) 310.

Louisiana.—State *v.* Bourgeois, 47 La. Ann. 184; State *v.* Cannon, 47 La. Ann. 278, 15 So. Rep. 626.

New York.—Matter of Gilroy, 11 N. Y. App. Div. 65.

Ohio.—State *v.* Hoglan, 64 Ohio St. 532; State *v.* Roll, 1 Ohio Dec. (Reprint) 284, 7 West L. J. 121.

Texas.—Bland *v.* State, (Tex. Civ. App. 1896) 38 S. W. Rep. 252.

Acts Constituting Grounds for Removal.—Hawley's Case, 1 Vent. 143; McClure *v.* State, 37 Ark. 426; Woods *v.* Varnum, 85 Cal. 639; Com. *v.* Chambers, 1 J. J. Marsh. (Ky.) 160; Com. *v.* Rodes, 6 B. Mon. (Ky.) 171, 1 Dana (Ky.) 595; Com. *v.* Barry, Hard. (Ky.) 237; Minkler *v.* State, 14 Neb. 181.

Right to Negative Wilful Wrong.—Caruthers *v.* State, 67 Tex. 132.

Without Corrupt Motives acts may be done which will amount to misbehavior. Com. *v.* Chambers, 1 J. J. Marsh. (Ky.) 160.

Ignorance of Law Will Not Protect.—Miller *v.* Smith, (Idaho 1900) 61 Pac. Rep. 824.

Advice of Other Officers No Protection.—State *v.* Johnson, 30 Fla. 491.

For a Violation of the Rules of the Police Department a mistake in judgment is no excuse. People *v.* McClave, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 513.

7. Removable Offenses Classified.—Rex *v.* Richardson, 1 Burr. 538.

8. Whether Prior Conviction Necessary.—State *v.* Teasdale, 21 Fla. 652; State *v.* Walker, 68 Mo.

as have no immediate relation to the office, but are in themselves of so infamous a nature as to render the officer unfit to execute any public franchise, there must have been a previous conviction.¹ If a statute provides for removal after conviction of the offense charged, there can be no removal in any other way.² As to such offenses as are against the oath and duty of the officer, there need be no conviction of the offense before initiating the proceeding for removal,³ and constitutional provisions relative to the necessity of an indictment as a condition precedent to a prosecution do not apply.⁴ Although no rule was laid down in the leading case on the subject as to offenses not only against the duty of the office, but matters indictable at common law, these being the third class of offenses constituting grounds for removal,⁵ the practice in the United States is not to await the action of the criminal branch of the administration of justice before commencing the proceeding for removal from office.⁶

(5) *Unofficial Acts in General.* — The misconduct for which an officer may be removed must be found in his acts and conduct in the office from which he is removed, must constitute a legal cause of removal, and must affect the proper administration of his office,⁷ but the line of demarcation between acts official and unofficial is not always apparent.⁸

App. 110; *Matter of Guden*, 71 N. Y. App. Div. 422; *State v. McLain*, 58 Ohio St. 313; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; *State v. Chamber of Commerce*, 20 Wis. 63.

1. *Offenses of First Class.* — *Rex v. Richardson*, 1 Burr. 517; 2 Kyd on Corp. 88.

Bribery. — *State v. Humphries*, 74 Tex. 466. See also *Com. v. Barry*, Hard. (Ky.) 237. *Compare Rex v. Hutchinson*, 8 Mod. 99.

Perjury. — *People v. Police Com'rs*, 20 Hun (N. Y.) 333. And see *State v. Bourgeois*, 45 La. Ann. 1350.

Giving Money to Wager on Election. — *Gillett v. People*, 13 Colo. App. 553.

Writing Libel. — *Reg. v. Lane*, Fortescue 275.

Previous Conviction of Duelling Not Necessary. — *Royall v. Thomas*, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

Removal from Office Part of Sentence. — *Com. v. Harris*, 1 Leg. Gaz. (Pa.) 455. See also *Sevier v. Justices*, Peck (Tenn.) 334.

Meaning of "Infamous Crime." — *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

Although Failure to File Statement of Expenses incurred in canvassing for office is made ground of forfeiture, it is so only after conviction. — *Gillett v. People*, 13 Colo. App. 553.

2. *State v. Wilson*, 30 Kan. 661.

3. *Offenses of Second Class.* — *Rex v. Richardson*, 1 Burr. 517.

Rioting in Council Chamber. — *Yates's Case*, 1 Style 477, citing 2 Kyd on Corp. 89.

When Prior Conviction Is Necessary. — *State v. Carneall*, 10 Ark. 156; *State v. Wilson*, 30 Kan. 661; *Page v. Hardin*, 8 B. Mon. (Ky.) 672.

Finding of Two Indictments Equivalent to Finding of Forfeiture. — *Savage's Case*, 2 Dyer 151b. *Keilw.* 194. See also *Reynel's Case*, 9 Coke 95.

The Failure to Execute the Official Bond is not "wilful neglect of duty" or "misdemeanor in office" within the meaning of a statute requiring a conviction therefor prior to removal. — *Hyde v. State*, 52 Miss. 665.

Effect of Admission of Default. — *Hardin County Ct. v. Hardin*, Peck (Tenn.) 291.

4. *Constitutional Requirement of Indictment Inapplicable.* — *Bland v. State*, (Tex. Civ. App. 1896) 38 S. W. Rep. 252. *Compare Haskins v. State*, 47 Ark. 243.

5. *Rex v. Richardson*, 1 Burr. 517; 2 Kyd on Corp. 93.

6. See *infra*, this section.

7. *Nature of Acts.* — *Reg. v. Newbury*, 1 Q. B. 751, 41 E. C. L. 760, 1 Gale & D. 388, 10 L. J. Q. B. 250, 6 Jur. 365; *State v. Bourgeois*, 45 La. Ann. 1350; *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172; *State v. Walker*, 68 Mo. App. 110; *People v. Mace*, 84 Hun (N. Y.) 344.

Removal for Transaction Distinct from Official Acts. — *In re Grant*, 7 Moo. P. C. 141.

What Are Official Acts. — *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160. See also 2 Kyd on Corp. 64, citing *Rex v. Taylor*, 3 Salk. 231.

Not Removable for Acts Not Legally Required. — *State v. Sullivan*, 8 Ohio Cir. Dec. 294, 15 Ohio Cir. Ct. 333.

Corruptly Acting Beyond Authority. — *State v. Wedge*, 24 Minn. 150; *State v. Leach*, 60 Me. 68, 11 Am. Rep. 172. And see *State v. Coon*, 14 Minn. 456.

8. *Illustrations of Acts Official and Unofficial — England.* — *Rex v. Derby*, Lee t. Hardw. 156 [cited in 2 Kyd on Corp. 50]; *Bagg's Case*, 11 Coke 96.

Georgia. — *Macon v. Shaw*, 16 Ga. 172.

Louisiana. — *State v. Bourgeois*, 45 La. Ann. 1350.

New York. — *People v. Police Com'rs*, 11 Hun (N. Y.) 403; *People v. Police Com'rs*, 20 Hun (N. Y.) 338; *People v. Doolittle*, 44 Hun (N. Y.) 293; *People v. Brady*, 48 N. Y. App. Div. 128.

Texas. — *Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629.

Washington. — *State v. Kirkwood*, 15 Wash. 298.

Seduction under Promise of Marriage as Ground of Removal. — *Queen v. Atlanta*, 59 Ga. 318.

Acts in ex Officio Capacity. — *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606.

Removal for Duelling. — *Royall v. Thomas*, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

(6) *Acts Before Appointment, in Other Offices, and in Prior Terms of Same Office.* — Ground for removal cannot be based upon acts done before election and not affecting eligibility; ¹ nor upon misconduct in another public office, ² even though the misconduct consisted in the failure to account for moneys received when in such other office; ³ nor upon acts committed in a prior term of the same office, ⁴ even though the act was done while the officer was suspended, during his previous term, pending an action to remove him from office at that time. ⁵ But this rule does not apply to an unlawful act committed after re-election and while performing the functions of office, but before qualification. ⁶

(7) *Acts Touching Qualification and Competency* — (a) *In General.* — A defect in the original qualification, ⁷ alienism, ⁸ failure by one in office to give the bond required for the collection and accounting for revenue, ⁹ failure to give a new bond, or refusing to have the sureties qualify in the manner prescribed by a statute passed since the induction into office, may be ground for removal. ¹⁰ But it is otherwise as to the failure to give the official bond before entering upon the performance of the duties of the office. ¹¹ After entering upon the discharge of the functions of the office, one may be rendered incompetent or disqualified to continue in the performance thereof. ¹²

(b) *Bankruptcy and Insolvency.* — Neither bankruptcy, in the absence of criminal default, ¹³ nor pecuniary inability to pay one's debts, where the officer is not imprisoned for debt, is ground for removal. ¹⁴

1. Not Removable for Acts Done Before Taking Office. — *Matter of King*, (Supm. Ct. Gen. T.) 25 N. Y. St. Rep. 792; *State v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; 2 Kyd on Corp. 62.

Removal for Corrupt Agreement to Appoint Subordinate. — In *Matter of Guden*, 71 N. Y. App. Div. 422, *reversing* (Supm. Ct. Spec. T.) 37 Misc. (N. Y.) 390.

Acts of Drunkenness between the election and qualification of an officer should not be allowed in evidence. *Trigg v. State*, 49 Tex. 645.

2. Misconduct in Other Office Not Ground. — *Rex v. Doncaster*, 2 Ld. Raym. 1564; *Thurston v. Clark*, 107 Cal. 285; *Hall v. People*, 21 Mich. 456; *Speed v. Detroit*, 98 Mich. 360, 39 Am. St. Rep. 555. And see *McPherson v. State*, 3 W. Va. 564; *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777.

3. Failure to Account for Public Money. — *People v. Weygant*, 14 Hun (N. Y.) 546.

4. Acts Committed in Prior Term Not Ground. — *Thurston v. Clark*, 107 Cal. 285; *Conant v. Grogan*, (Supm. Ct. Gen. T.) 6 N. Y. St. Rep. 322; *State v. Watertown*, 9 Wis. 254. *Contra*, *State v. Bourgeois*, 45 La. Ann. 1350; *State v. Welsh*, 109 Iowa 19.

Removal for Continuous Act. — *People v. Auburn*, 85 Hun (N. Y.) 601.

Not Twice Removable for Same Act. — *State v. Jersey City*, 25 N. J. L. 536.

5. Acts Done While Suspended. — *State v. Loomis*, (Tex. Civ. App. 1895) 29 S. W. Rep. 415.

6. Brackenridge v. State, 27 Tex. App. 513. **When Offense Was Committed.** — *Woods v. Varnum*, 85 Cal. 639.

7. Defect as to Qualification. — *Rex v. Lyme Regis*, 1 Dougl. 80.

One Acting as Patrolman Without Legal Authority Not Removable. — *People v. Board of Police*, 72 N. Y. 415, *reversing* 5 Hun (N. Y.) 457.

8. Com. v. Barry, Hard. (Ky.) 237.

9. Failure to Give Bond for Public Revenue. — *Brown v. Grover*, 6 Bush (Ky.) 1.

10. Failure to Give New Bond. — *Hyde v. State*, 52 Miss. 665; *Evans v. Justices*, 3 Hayw. (Tenn.) 26. And see *Beebe v. Robinson*, 52 Ala. 66; *Thompson v. Holt*, 52 Ala. 491; *McGregor v. Gladwin County*, 37 Mich. 388; *State v. Shank*, 36 W. Va. 223.

11. Brown v. Grover, 6 Bush (Ky.) 1; *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680.

12. Refusing to Be Examined as to Competency. — *People v. Board of Education*, 84 Hun (N. Y.) 417.

Removal for Insanity. — *Com. v. Cooley*, 1 Allen (Mass.) 358. And see *Long v. Bowen*, 94 Ky. 540; *State v. McClinton*, 5 Nev. 329.

Removal for Physical Disability. — *People v. Robb*, 126 N. Y. 180; *People v. Board of Police*, 121 N. Y. 716, 31 N. Y. St. Rep. 900. But see *People v. Barker*, 1 N. Y. App. Div. 532, *affirmed* without opinion 149 N. Y. 607; *State v. Police Com'rs*, 49 N. J. L. 170.

Removal on Account of Age. — 2 Rolle's Rep. 11, *cited* in 2 Kyd on Corp. 65.

Accepting Incompatible Office. — *Rex v. Patterson*, 1 N. & M. 612, 4 B. & Ad. 9, 24 E. C. L. 11, 2 L. J. K. B. 33, 5 Com. Dig. 153; *People v. Bell*, (Brooklyn City Ct. Gen. T.) 24 N. Y. St. Rep. 114, *affirmed* without opinion 125 N. Y. 722. See also *People v. Murray*, 73 N. Y. 535; *People v. Board of Police*, 35 Barb. (N. Y.) 535.

Inability to Keep Official Accounts. — *People v. Coler*, 40 N. Y. App. Div. 65, *affirmed* 159 N. Y. 569.

Personal Dislike Not Ground. — *People v. Fire Com'rs*, 72 N. Y. 445.

Comparative Inefficiency No Cause. — *People v. Fire Com'rs*, 72 N. Y. 445; *People v. Fire Com'rs*, 12 Hun (N. Y.) 500.

13. Bankruptcy Not Ground. — *Rex v. Liverpool*, 2 Burr. 731; *State v. Reid*, 45 La. Ann. 163.

14. Insolvency Not Ground. — *Reg. v. Owen*, 15 Q. B. 476, 69 E. C. L. 476.

Removal for Inability to Pay Taxes. — *Rex v. Andover*, 3 Salk. 229.

(c) **Nonresidence.** — At common law, wherever nonresidence is assigned as the cause for removal of an alderman or officer of similar denomination, it must appear that residence is required by the constitution of the corporation, or that the business of the corporation has been obstructed by the nonresidence of the party removed.¹ A total desertion of the borough, however, was ground of removal.² In the *United States* the temporary removal of a county officer into another county, though for the purpose of engaging in business therein, is not ground for removal,³ but if the removal of the incumbent from the county is intended to be permanent,⁴ or for an unreasonable time, the office is vacated.⁵

(8) *Acts Affecting Conduct of Office* — (a) **Illegal and Unauthorized Acts.** — Conducting the office for personal gain and to the injury of third persons or the public in general,⁶ and wilful and malicious oppression in office, are grounds for removal.⁷ Officers have been removed for the commission of various unauthorized acts.⁸ Other irregular or unauthorized acts have been held not to constitute sufficient grounds for removal.⁹ One may, in good faith, bring a suit against the city of which he is an officer, for the assertion of a supposed right, without being subject to removal therefor.¹⁰

(b) **Refusal to Perform Official Duties.** — The wilful refusal to perform what one knows to be his official duty is ground for removal.¹¹

(c) **Negligence.** — Gross negligence in the discharge of a fiduciary trust is evidence of fraud and misbehavior in office,¹² but an officer's neglect of duty must be either habitual or wilful in order to justify his removal.¹³

1. **Nonresidence as Ground at Common Law.** — *Rex v. Doncaster*, Say. 37; 2 Kyd on Corp. 73-74.

2. **Desertion of Borough.** — *Rex v. Cambridge*, 4 Burr. 2008; 2 Kyd on Corp. 73, and cases cited in note D; and see *Warwick's Petition*, 3 Atk. 184.

3. **Not Removable for Temporary Removal.** — *Curry v. Stewart*, 8 Bush (Ky.) 560.

4. **Effect of Permanent Removal.** — *Gildersleeve v. Board of Education*, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201. Compare *State v. Hixon*, 27 Ark. 398.

5. **Absence for Unreasonable Time.** — *State v. Hixon*, 27 Ark. 398.

6. **Personal Gain.** — *Matter of Marks*, 45 Cal. 199; *Croly v. Sacramento*, 119 Cal. 229; *Gager v. Chippewa County*, 47 Mich. 167.

7. **Oppression in Office.** — *State v. Ragsdale*, 59 Mo. App. 590; *People v. Police Com'rs*, 15 N. Y. Wkly. Dig. 278. See also *Montagu v. Van Dieman's Land*, 6 Moo. P. C. 489.

8. **Refusing to Recognize Lawful Officers.** — *Gillett v. People*, 13 Colo. App. 553.

9. **Authorizing Alteration of Building by One Without Right.** — *People v. Fire Com'rs*, 96 N. Y. 672, reversing 49 N. Y. Super. Ct. 369.

10. **Agreement Not to Appeal.** — *People v. Auburn*, 85 Hun (N. Y.) 601.

11. **Unauthorized Approval of Bail Bond.** — *State v. Wedge*, 24 Minn. 150.

12. **Issuing License Before Fee Paid.** — *Bradford v. Territory*, 2 Okla. 228.

13. **Modification of Rule.** — *State v. Cannon*, (La. 1894) 15 So. Rep. 626, 47 La. Ann. 278.

14. **Unauthorized Issuance of License to Sell Fireworks.** — *People v. La Grange*, 1 N. Y. App. Div. 338, affirmed 153 N. Y. 685.

15. **Publication of Books of Municipality.** — *Earle's Case*, Carth. 173.

16. **Receiving Mail at Improper Place.** — *People v. Board of Health*, 76 Hun (N. Y.) 5.

17. **Illegal Appointment of Deputy.** — *Com. v. Arnold*, 3 Litt. (Ky.) 309.

18. **Appointment of Improper Person.** — *State v. Teasdale*, 21 Fla. 652.

19. **Failure to Discover Corruption in Subordinate.** — *People v. La Grange*, 2 N. Y. App. Div. 444, affirmed without opinion 151 N. Y. 664.

20. **Right to Sue Municipality.** — *Hawkins v. Kercheval*, 10 Lea (Tenn.) 535.

21. **Wilful Refusal to Perform Duties — When Ground for Removal — England.** — *Reg. v. Treasury Com'rs*, 2 Per. & Dav. 498, 10 Ad. & El. 375, 37 E. C. L. 121.

22. *Florida.* — *State v. Johnson*, 30 Fla. 49.

23. *Georgia.* — *Shaw v. Macon*, 21 Ga. 280; *Maccon v. Hays*, 25 Ga. 590.

24. *Kansas.* — *State v. Allen*, 5 Kan. 213; *State v. Foster*, 32 Kan. 14, affirmed 112 U. S. 201; *McMaster v. Herald*, 56 Kan. 231.

25. *Michigan.* — *Geddes v. Thomastown Township*, 46 Mich. 316.

26. *New York.* — *Van Orsdall v. Hazard*, 3 Hill (N. Y.) 243.

27. *Wisconsin.* — *State v. McCarty*, 65 Wis. 163.

28. **When Not Ground for Removal.** — *Tompert v. Lithgow*, 1 Bush (Ky.) 176; *State v. Bourgeois*, 47 La. Ann. 184. And see *In re Thomas*, (Supm. Ct. Gen. T.) 2 N. Y. Supp. 38.

29. **Granting Prolonged Adjournment.** — *Matter of King*, (Supm. Ct. Gen. T.) 25 N. Y. St. Rep. 792.

30. **Gross Negligence.** — *Com. v. Rodes*, 6 B. Mon. (Ky.) 171. See also *Com. v. Rodes*, 1 Dana (Ky.) 595.

31. **Negligence Must Be Habitual or Wilful.** — *Rex v. Wells*, 4 Burr. 2004; *Miller v. Smith*, (Idaho 1900) 61 Pac. Rep. 824; *State v. Welsh*, 109 Iowa 19; *Com. v. Arnold*, 3 Litt. (Ky.) 309.

32. **Not Removable When No Injury Done.** — *State v. Winthrop*, 2 Mart. N. S. (La.) 530. See also *People v. Fire Com'rs*, 106 N. Y. 257, affirming 43 Hun (N. Y.) 554.

(d) **Nonattendance.** — Nonattendance is ground for removal only according to the circumstances of each particular case.¹

(e) **Disobedience and Contumacy.** — A threat of disobedience of a superior officer's order where the words were spoken under exasperating circumstances,² or the use of abusive language to a superior officer,³ or of scandalous language by a police judge of an attorney and other officers,⁴ or threats expressed in general terms at a meeting of the governing body or municipality, are not grounds for removal.⁵ But it may be otherwise if such misconduct tends to disturb the orderly transaction of public business.⁶ The writing of a libel on the mayor is not ground for removing a municipal officer,⁷ particularly if the libelous letter was never sent,⁸ but the publication by the superintendent of a public institution, for circulation among its inmates, of a defamatory article unjustly criticising the lawful acts of a board of visitors is "cause" within the meaning of the statute.⁹ Noncompliance with a verbal order to commit persons to jail in an adjoining county is not ground for removal.¹⁰

(f) **Escape and Maltreatment of Prisoners.** — The barbarous misuse of prisoners is ground for removal.¹¹ Wilfully permitting the escape of a prisoner is a "wilful neglect of duty or misdemeanor in office" within the meaning of a statute authorizing removal on those grounds;¹² and allowing a condemned prisoner to be free for a limited time is ground for removal.¹³

(g) **Falsification of Records and Issuance of False Certificates.** — In general, the spoliation of the records,¹⁴ or making false entries therein,¹⁵ or issuing false certificates are acts authorizing the dismissal of the officer committing them;¹⁶ but alterations in immaterial respects,¹⁷ and small errors resulting from a mistake,

1. **Removal for Nonattendance.** — *Rex v. Richardson*, 1 Burr. 517, 5 Com. Dig. 151; *Reg. v. Ipswich*, 2 Ld. Raym. 1232; *Rex v. Newcastle*, cited in *Rex v. Doncaster*, Say. 39; *Rex v. Rooks*, Cro. Car. 491, 16 Vin. Abr. 123; *People v. Hartwell*, 67 Cal. 11.

Committing Entire Performance of Duties to Deputy. — *State v. Slover*, 113 Mo. 202.

A Single Instance of Omitting to Attend where no particular business was expected is excusable. *Rex v. Wells*, 4 Burr. 2004; 2 Kyd on Corp. 84. *Contra*, see *People v. Heaton*, 77 N. Car. 18.

Several Excusable Absences Not Ground. — *Com. v. Arnold*, 3 Litt. (Ky.) 310.

Not Bound to Report for Duty After Illegal Removal. — *People v. Board of Police*, 39 N. Y. 506.

2. **Disobedience.** — *People v. Mace*, 84 Hun (N. Y.) 344.

3. **Abuse of Superior.** — *Clerk's Case*, Cro. Jac. 506. And see *Philips v. Bury*, 2 T. R. 346; *Reg. v. Treasury Comr's*, 2 Per. & Dav. 498, 10 Ad. & El. 375, 37 E. C. L. 121.

4. **Scandalous Language from Bench.** — *Matter of King*, (Supm. Ct. Gen. T.) 25 N. Y. St. Rep. 792.

5. **Threats.** — *Earle's Case*, Carth. 173.

6. **Disturbing Transaction of Business.** — *State v. Sutton*, 6 Ohio Dec. (Reprint) 786, 8 Am. L. Rep. 135.

7. **Guilty of Libel.** — *Reg. v. Lane*, Fortescue 275.

8. *Earle's Case*, Carth. 173.

9. **Publication of Defamatory Article.** — *State v. Walbridge*, 69 Mo. App. 657.

10. **Disobedience.** — *Davis v. State*, 35 Tex. 118.

11. 1 Hawk. P. C. 311.

Justifiable Punishment No Ground for Removal. — *People v. Wright*, 7 N. Y. App. Div. 185, affirmed 150 N. Y. 444.

Pennsylvania — Partiality in Treatment of

Prisoners Ground for Removal. — *Lutz's Case*, 8 Pa. Co. Ct. 133.

12. *Shattuck v. State*, 51 Miss. 575.

The Common-law Rule as gathered from *Viner* seems to have been that though a voluntary escape was a cause of forfeiture, a negligent escape was not, unless there were several of the latter. 16 Vin. Abr. 121, 122. See also 1 Hawk P. C. 311; 5 Com. Dig. 151.

13. *State v. Welsh*, 109 Iowa 19.

14. *Wigon v. Pilkington*, 1 Keb. 597.

Permitting a Replevin Bond to Be Altered or erasing the names of grand jurors from the panel as returned is ground for removal. *Com. v. Barry*, Hard. (Ky.) 237.

15. *Com. v. Rodes*, 6 B. Mon. (Ky.) 171. And see *Com. v. Rodes*, 1 Dana (Ky.) 595.

Omission to Make Entries Promptly in a book is not failure to keep the book as prescribed by law. *State v. Cannon*, (La. 1894) 15 So. Rep. 626. And see a subsequent report of the same case, 47 La. Ann. 278.

16. **Particular Instances of Issuing False Certificates.** — See *McClure v. State*, 37 Ark. 426; *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160; *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172; *Atty.-Gen. v. Jochim*, 99 Mich. 358, 41 Am. St. Rep. 606.

Approving Bill. — Approving a bill which ordinary care and diligence would have shown to be not a proper bill is misfeasance in office, while in the performance of duty, approving a bill known by the officer to be fraudulent is malfeasance in office. *Colburn v. Neufarth*, Ohio Prob. 24.

Return and Sheriff's Deed Containing Untrue Recital constitute no ground for removal where they are merely nominal and preliminary. See *State v. Bourgeois*, 47 La. Ann. 184. And see *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172.

17. *Rex v. Chalke*, 1 Ld. Raym. 225.

or from want of skill, or from inadvertence, or from the imperfections and frailties incident to all men, are not to be considered breaches of good behavior.¹

(h) **Keeping Office at Unlawful Place.** — Refusing in good faith to recognize as the county seat a place illegally chosen as such is no ground for removal,² nor is failing to keep one's office at the county seat of his county, unless the failure be wilful and corrupt, where the statute requires wilful misconduct.³

(i) **Defalcation.** — Devoting public funds to personal uses constitutes a "misdemeanor" and establishes "incompetency," as contemplated by a statute authorizing removal on these grounds.⁴

(j) **Exacting Illegal Fees and Compensation.** — While the taking of illegal fees under a *bona fide* claim of right is not of itself cause for removal from office,⁵ yet if the money is taken from corrupt motives it is.⁶ So procuring the allowance to himself of fees to which he knew he was not entitled is corruption in office on the part of the officer, though he makes no false returns.⁷

(g) **Indictment, Conviction of Crime, and Imprisonment.** — Though conviction of particular crimes, by statute, forfeits the right of suffrage and of testifying as a witness, it does not therefore, in the absence of statute, cause a forfeiture of a public office held by the person convicted.⁸

(io) **Bribery and Kindred Offenses.** — The constitutional and statutory denunciation of particular crimes, such as bribery, cannot be extended any further than the imposition of the fixed penalties; therefore bribery or an offer to bribe, prior to election,⁹ or the offense of giving money by candidates to wager on an election, is not ground for removal from office;¹⁰ but it is otherwise as to offering,¹¹ soliciting,¹² or receiving a bribe while in office.¹³ Hiring one's predecessor to resign and procuring one's own appointment can-

1. *Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 160.

Loss of Replevin Bond. — *Com. v. Arnold*, 3 Litt. (Ky.) 309.

2. *Caruthers v. State*, 67 Tex. 132.

3. *State v. Alcorn*, 78 Tex. 387.

4. *Nehrling v. State*, 112 Wis. 637. To the same effect see *Rex v. Rooks*, Cro. Car. 491.

Failure to Enter Taxes and Licenses Collected on the books and to pay over to the treasurer justifies removal. *State v. Cannon*, 47 La. Ann. 278. See also *State v. Hay*, Wright (Ohio) 97.

Habitual Defalcation. — *Com. v. Rodes*, 6 B. Mon. (Ky.) 171. See also *Com. v. Rodes*, 1 Dana (Ky.) 595.

Superintendent of Poor Failing to Refund Money Is Misfeasance. — *Gager v. Chippewa County*, 47 Mich. 167.

Clerk's Failure to Produce Treasurer's Receipt. — *Sevier v. Justices*, Peck (Tenn.) 334.

5. **Exacting Illegal Fees.** — *Ponting v. Isaman*, (Idaho 1901) 65 Pac. Rep. 434; *Com. v. Rodes*, 6 B. Mon. (Ky.) 171, 1 Dana (Ky.) 595; *Com. v. Barry*, Hard. (Ky.) 237.

Excessive Charges. — *Com. v. Arnold*, 3 Litt. (Ky.) 310.

In Texas the demand of illegal fees is "official misconduct." *Brackenridge v. State*, 27 Tex. App. 513.

6. **Corrupt Motives.** — *Com. v. Barry*, Hard. (Ky.) 237; *Com. v. Arnold*, 3 Litt. (Ky.) 310; *Burt v. Iron County*, 108 Mich. 523; *State v. Megaarden*, 85 Minn. 41; *Fields v. State*, Mart. & Y. (Tenn.) 168. See also *Com. v. Rodes*, 6 B. Mon. (Ky.) 171; and see *Com. v. Rodes*, 1 Dana (Ky.) 595.

7. *Smith v. Ellis*, (Idaho 1900) 61 Pac. Rep. 695; *State v. Welsh*, 109 Iowa 19.

8. *State v. Pritchard*, 36 N. J. L. 101. See also *Ex p. Lehman*, 60 Miss. 967.

Statute with Regard to Members of Albany Police. — *People v. Manning*, (Supm. Ct. Gen. T.) 42 N. Y. St. Rep. 81.

Arkansas — Conviction of Felony Forfeits Office. — *State v. Carson*, 27 Ark. 469.

In England confinement in prison forfeits office. *Rex v. Rooks*, Cro. Car. 491; *Ex p. Parnell*, 1 Jac. & W. 431; and see *Conybeare v. London School Board*, (1891) 1 Q. B. 118, 60 L. J. Q. B. D. 44.

But Otherwise in Pennsylvania. — *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

9. **Bribery Before Election.** — *People v. Thornton*, 25 Hun (N. Y.) 456; *Com. v. Shaver*, 3 W. & S. (Pa.) 338. *Contra*, *Matter of Guden*, 71 N. Y. App. Div. 422.

Promise to Accept Less than Full Compensation. — Title to an office obtained by the votes of those who were influenced by a promise to perform the duties of the office for less than the legal fees is invalid. *State v. Collier*, 18 Am. L. Reg. N. S. 768; *State v. Purdy*, 36 Wis. 213, 14 Am. L. Reg. N. S. 90.

10. **Wagering on Election.** — *Gillett v. People*, 13 Colo. App. 553.

11. **Bribery in Office.** — *Rex v. Hutchinson*, 8 Mod. 99.

12. *Com. v. Sanderson*, 11 Pa. Co. Ct. 593.

Soliciting Funds to Reimburse Election Expenses. — See *State v. Superior*, 90 Wis. 612.

Requesting Funds for Legitimate Purpose. — *People v. La Grange*, 2 N. Y. App. Div. 444, affirmed 151 N. Y. 664.

13. *State v. Jersey City*, 25 N. J. L. 536.

not be made the basis of the prosecution for misbehavior in office.¹

(11) *Intoxication*. — In some jurisdictions drunkenness while engaged in the performance of official duties has been held to be misconduct in office,² but the contrary has been maintained in others.³ Habitual intemperance, however, is ground for removal.⁴

(12) *Acts Peculiarly Affecting Police Officers*. — In many jurisdictions, particularly in *New York*, rules and regulations have been made to maintain the discipline and increase the efficiency of the police force, and the infraction of such rules is usually attended with removal, after notice of charges and hearing. Such violations may consist of personal misconduct,⁵ the infringement of the rights of third persons,⁶ conduct towards associates subversive of discipline,⁷ maltreatment of prisoners,⁸ the acceptance of gratuities,⁹ disobedience of orders,¹⁰ neglect of duty,¹¹ and the commission of criminal offenses.¹²

1. *Com. v. Rodes*, 1 Dana (Ky.) 595. And see *Com. v. Rodes*, 6 B. Mon. (Ky.) 171.

Persuading a Jury to Underprice Goods in the execution of scire facias is ground for removal. 1 Hawk. P. C. 311.

2. *Intoxication*. — *Matter of Ward*, 3 De G. F. & J. 700; *Ledbetter v. State*, 10 Ala. 241; *State v. Welsh*, 109 Iowa 19; *People v. Robb*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 915; *People v. MacLean*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 844, *affirmed* without opinion 128 N. Y. 619; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 190; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 444; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 557; *People v. McClave*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 434; *Weber v. Bishop*, 7 Ohio Dec. (Reprint) 661, 4 Cinc. L. Bul. 775. And see *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135; *Matter of Grogan*, (Supm. Ct. Gen. T.) 24 N. Y. St. Rep. 473.

Excessive Use of Intoxicants by Regent of State University. — *Rogers v. Morrill*, 55 Kan. 737.

Repeated Intoxication of School Superintendent. — *People v. Mays*, 117 Ill. 257.

Degree of Intoxication. — *People v. McClave*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 996.

Single Instance of Intoxication. — *People v. Fire Com'rs*, 82 N. Y. 358; *People v. Partridge*, (Brooklyn City Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 410.

Intoxication Is "Conduct Unbecoming an Officer" — "conduct injurious to the public welfare," *People v. Fire Com'rs*, 82 N. Y. 358; and "misconduct or neglect of duty," *People v. Partridge*, (Brooklyn City Ct. Gen. T.) 13 Abb. N. Cas. (N. Y.) 410.

3. *Contra*. — *Com. v. Williams*, 79 Ky. 42, 42 Am. Rep. 204; *Matter of Grogan*, 1 Silv. Sup. (N. Y.) 526; *Craig v. State*, 31 Tex. Crim. 29.

4. **Habitual Intemperance**. — *In re Eaves*, 30 Fed. Rep. 21; *Ledbetter v. State*, 10 Ala. 241; *State v. Savage*, 89 Ala. 1; *People v. French*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 923.

Frequent Intemperance. — *State v. Winthrop*, 2 Mart. N. S. (La.) 530.

5. **Personal Misconduct**. — Smoking and drinking beer while on duty, *People v. Robb*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 59, 31 N. Y. St. Rep. 640, and indecent exposure are causes for removal, *People v. Robb*, (Supm. Ct. Gen. T.) 40 N. Y. St. Rep. 760.

Mere Neglect to Pay a Debt Not Ground for Removal. — *People v. Fire Com'rs*, 14 N. Y. Wkly. Dig. 213.

6. **Rights of Third Persons**. — Removal of an

officer was sustained for intentionally making an improper arrest, *People v. Tappen*, (N. Y. Super. Ct. Gen. T.) 15 Misc. (N. Y.) 23, *judgesmen affirmed* 153 N. Y. 658; for needlessly assaulting a citizen, *People v. French*, (Supm. Ct. Gen. T.) 15 N. Y. St. Rep. 108; though the officer at the time was off duty, *People v. Carroll*, 42 Hun (N. Y.) 438; *Oliver v. Americus*, 69 Ga. 165; and for sending to the house of a sick person officers who insisted upon the invalid accompanying them to the station house, where she was subjected to indignities, *People v. Jourdan*, 90 N. Y. 53.

Accidental Injury. — *People v. MacLean*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 108, *affirmed* without opinion 121 N. Y. 704.

7. **Conduct towards Associates**. — Engaging in a fight on the street, *People v. French*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 960; and quarreling at the station house with another officer, *People v. Martin*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 369, *affirmed* without opinion 121 N. Y. 676; *People v. Police Com'rs*, 32 N. Y. St. Rep. 824, *affirmed* 123 N. Y. 512. See also *People v. Police Com'rs*, 41 Hun (N. Y.) 389; *People v. Moss*, 34 N. Y. App. Div. 475; *People v. Bell*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 314; *People v. Hart*, 25 N. Y. App. Div. 129.

8. **Maltreatment of Prisoners**. — *People v. Roosevelt*, 38 N. Y. App. Div. 635, 57 N. Y. Supp. 11; *People v. Bell*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 914.

9. **Accepting Gratuities**. — *People v. Johnson*, (Supm. Ct. Gen. T.) 10 N. Y. St. Rep. 404. See also *People v. French*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 377, *affirmed* 12 N. Y. Wkly. Dig. 468; *People v. McClave*, (Supm. Ct. Gen. T.) 31 N. Y. St. Rep. 246.

10. **Disobedience**. — *People v. Roosevelt*, 1 N. Y. App. Div. 434; *People v. Roosevelt*, 13 N. Y. App. Div. 404, *affirmed* 153 N. Y. 646.

11. **Absence from Post**. — *People v. Board of Police*, 121 N. Y. 716, 31 N. Y. St. Rep. 900; *People v. MacLean*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 838; *People v. Police Com'rs*, 93 N. Y. 97; *People v. Bell*, (Supm. Ct. Gen. T.) 21 N. Y. St. Rep. 895.

But the absence must be voluntary and intentional; if it is the result of temporary aberration it cannot be deemed voluntary. *People v. Martin*, 143 N. Y. 407, *affirming* 79 Hun (N. Y.) 475. See also *People v. Robb*, 55 Hun (N. Y.) 425.

Neglecting to Arrest and Report. — *People v. Bell*, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 551.

12. **Criminal Offenses**. — *People v. Welles*, 89

(13) *Acts of Subordinates.* — One cannot be removed for the inefficiency or incapacity of an assistant whom he had no power of appointing,¹ or whose misconduct he has not sanctioned.² But it is otherwise where he has sought to benefit himself by converting to his own use the moneys received from the deputy's act, illegally but inadvertently committed.³

(14) *Removal of Subordinates.* — A vacancy in the office of the person appointing him is not cause for removal of a subordinate.⁴

f. NATURE OF PROCEEDING AS AFFECTING SUBSTANTIAL RIGHTS. — The cases are not in accord as to the purposes for which a removal proceeding should, in prosecution and effect, be considered criminal or civil.⁵ It does not preclude the subsequent prosecution for the criminal offense made ground for removal.⁶ In *New York* the proceeding is criminal within the meaning of the rule entitling the accused to the presumption of innocence,⁷ and except in this state the accused is not compelled to be a witness against himself.⁸ The proceeding upon a petition to the governor for the removal of an officer is *quasi-judicial*, and statements made in such petition, if pertinent, are absolutely privileged.⁹

g. CONDITIONS PRECEDENT TO REMOVAL. — Every condition precedent must be fulfilled to give validity to the act of removal.¹⁰

h. EVIDENCE. — Although the proceedings conducted before an executive board are usually held to be of a *quasi-judicial* character, the usual rules pertaining to the admission of evidence in courts of justice are not always strictly adhered to, but they should be as far as possible.¹¹ Except in those cases where

Hun (N. Y.) 96; *People v. Roosevelt*, 7 N. Y. App. Div. 181.

1. *Acts of Subordinates.* — *People v. Campbell*, 82 N. Y. 247.

2. *State v. Budd*, 39 La. Ann. 232.

3. *Woods v. Varnum*, 85 Cal. 639.

4. *Removal of Subordinates.* — *People v. Mo-bley*, 2 Ill. 215.

5. *Character of Statutes Authorizing Removal.* — In *Maine* and *Idaho* statutes authorizing removal of public officers are deemed of a remedial and protective rather than of a criminal character. *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172; *Rankin v. Jauman*, (Idaho 1894) 36 Pac. Rep. 502. In *California* and *Texas* such statutes are construed in the same manner as those defining crime and prescribing its punishment. *Kilburn v. Law*, 111 Cal. 237; *State v. Alcorn*, 78 Tex. 387. And see *Matter of Eglington*, 2 El. & Bl. 717, 75 E. C. L. 717; *Randall v. State*, 16 Wis. 340; 17 ENCVC OF PL. AND PR. 223.

For Purpose of Review. — In *Tennessee* it was held that the proceeding is not criminal in such sense that the state may not bring proceedings for review, *Fields v. State*, Mart. & Y. (Tenn.) 168; but the contrary is maintained in *Georgia*, *Cobb v. Smith*, 102 Ga. 585.

6. Does Not Preclude Subsequent Prosecution. — *People v. Meakim*, 133 N. Y. 214.

7. Entitled to Presumption of Innocence. — *People v. Board of Police*, 13 N. Y. App. Div. 69, appeal dismissed 153 N. Y. 657, citing *People v. Wurster*, 91 Hun (N. Y.) 233.

8. Self-incrimination. — *U. S. v. Collins*, 1 Woods (U. S.) 499; *Thurston v. Clark*, 107 Cal. 285.

In *New York* a police officer can be called to testify before any evidence to sustain the charges has been put in against him. *People v. Bell*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 914; *People v. McClave*, 123 N. Y. 512; *People v.*

French, (Supm. Ct. Gen. T.) 29 N. Y. St. Rep. 305; *People v. McClave*, (Supm. Ct. Gen. T.) 31 N. Y. St. Rep. 246; *People v. Police Com'rs*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 824, affirmed 123 N. Y. 512.

9. *Larkin v. Noonan*, 19 Wis. 82.

10. Complaint. — *Geddes v. Thomastown Tp.*, 46 Mich. 316.

Notice. — *Armijo v. Bernalillo County*, 3 N. Mex. 297.

Application. — *Page v. Hardin*, 8 B. Mon. (Ky.) 648; *Com. v. Sutherland*, 3 S. & R. (Pa.) 145. And see *People v. Roosevelt*, 16 N. Y. App. Div. 364.

Indorsement by Prosecuting Attorney. — *McLaughlin v. Burroughs*, 90 Mich. 311.

Waiver. — *Geddes v. Thomastown Tp.*, 46 Mich. 316.

11. Rule as to Admissibility of Evidence. — *People v. Wright*, 7 N. Y. App. Div. 185; *People v. Roosevelt*, 16 N. Y. App. Div. 364; *People v. Dooling*, 60 N. Y. App. Div. 321. See also *State v. Leach*, 60 Me. 58, 11 Am. Rep. 172.

Character and Reputation. — *Com. v. Rodes*, 1 Dana (Ky.) 595, 6 B. Mon. (Ky.) 171; *People v. Roosevelt*, 168 N. Y. 488, affirming 4 N. Y. App. Div. 611; *People v. York*, 52 N. Y. App. Div. 295; *People v. French*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 1012; *People v. Roosevelt*, 1 N. Y. App. Div. 577; *People v. Roosevelt*, 7 N. Y. App. Div. 181; *People v. Roosevelt*, 13 N. Y. App. Div. 404, affirmed 153 N. Y. 646; *People v. Roosevelt*, 17 N. Y. App. Div. 301.

A Certificate of Conviction of an offense before a court having an unconstitutional organization is no legal evidence of the guilt of the accused. *People v. Board of Police*, 9 Hun (N. Y.) 222.

Necessity of Producing Witnesses and Hearing Testimony in Presence of Accused — *Colorado*, — *Trimble v. People*, 19 Colo. 187, 41 Am. St.

the power of removal is committed wholly to the discretion of the removing body, the charges must be sustained by the *quantum* of legally competent evidence which, at law, is required to support the verdict of a jury in a civil action.¹ The sufficiency of the evidence to sustain the findings has been frequently considered, but as the various cases have nothing more in common than a general resemblance due to the identity of the offense charged, it is not practicable to deduce from them principles of general application, but the cases have been arranged in groups with reference to the specific charge in each.²

2. SUSPENSION. — Though the authorities are meagre and unsatisfactory, the rule in several jurisdictions is that the suspension of an officer from office pending investigation in due form of charges, conviction of which would involve his dismissal, is not an improper exercise of authority,³ and to the

Rep. 236; *In re Fire*, etc., Com'rs, 19 Colo. 482.

Illinois. — *Wilcox v. People*, 90 Ill. 186.

Kansas. — *McMaster v. Herald*, 56 Kan. 231.

New York. — *People v. Campbell*, 50 N. Y. Super. Ct. 82; *People v. Bearfield*, 35 Barb. (N. Y.) 254; *People v. Waring*, 7 N. Y. App. Div. 247; *People v. Waring*, 1 N. Y. App. Div. 594; *People v. MacLean*, 58 Hun (N. Y.) 152; *People v. York*, 49 N. Y. App. Div. 173, *affirmed* without opinion 163 N. Y. 551.

Ohio. — *State v. Heinmiller*, 38 Ohio St. 101.

Utah. — *Gilbert v. Board of Police*, 11 Utah 378.

Wisconsin. — *Larkin v. Noonan*, 19 Wis. 82; *State v. McGarry*, 21 Wis. 496.

And see 17 ENCYC. OF PL. AND PR. 225.

1. Rule as to Quantum of Evidence. — *People v. Roosevelt*, 6 N. Y. App. Div. 382. See also *Rutter v. Territory*, (Okla. 1902) 68 Pac. Rep. 507. *Compare Colburn v. Neufarth*, 1 Ohio Prob. 24.

Preponderance and Degrees of Evidence. — *People v. Dooling*, 60 N. Y. App. Div. 321.

2. Sufficiency of Evidence — Intent. — *State v. Dart*, 57 Minn. 261.

Neglect and Negligence. — *People v. Diehl*, 53 N. Y. App. Div. 645, 65 N. Y. Supp. 801; *People v. Magee*, 55 N. Y. App. Div. 195; *Osgood v. Nelson*, 41 L. J. Q. B. 329, L. R. 5 H. L. 636, *affirming* 10 B. & S. 119, 20 L. T. N. S. 958, 17 W. R. 895; *State v. Cannon*, (La. 1894) 15 So. Rep. 626; *People v. Grant*, 12 Daly (N. Y.) 294; *People v. Police Com'rs*, 67 N. Y. 475; *People v. Dooling*, 60 N. Y. App. Div. 321; *People v. Sanford*, (Supm. Ct. Gen. T.) 35 N. Y. Supp. 29, 89 Hun (N. Y.) 605.

Disobedience. — *People v. Mace*, 84 Hun (N. Y.) 344.

Intoxication. — *People v. Robb*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 945; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 190; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 444; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 557; *People v. McClave*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 434; *Matter of Grogan*, 1 Silv. Sup. (N. Y.) 526; *Trigg v. State*, 49 Tex. 645; *People v. MacLean*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 883; *People v. MacLean*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 965; *People v. French*, (Supm. Ct. Gen. T.) 17 N. Y. St. Rep. 100; *People v. French*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 840; *People v. McClave*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 504; *People v.*

McClave, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 820; *People v. MacLean*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 808; *People v. MacLean*, (Supm. Ct. Gen. T.) 36 N. Y. St. Rep. 998; *People v. MacLean*, (Supm. Ct. Gen. T.) 34 N. Y. St. Rep. 927; *People v. French*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 834; *People v. MacLean*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 861, *People v. Moss*, 38 N. Y. App. Div. 633, 56 N. Y. Supp. 951; *People v. Roosevelt*, 22 N. Y. App. Div. 626, 47 N. Y. Supp. 806; *People v. French*, (Supm. Ct. Gen. T.) 16 N. Y. St. Rep. 102; *People v. French*, (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 887; *People v. Welles*, 88 Hun (N. Y.) 190; *People v. French*, 52 Hun (N. Y.) 90; *People v. French*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 55; *People v. Roosevelt*, 38 N. Y. App. Div. 635, 57 N. Y. Supp. 11; *People v. Roosevelt*, 19 N. Y. App. Div. 253; *People v. MacLean*, 60 N. Y. Super. Ct. 210, *affirmed* without opinion 133 N. Y. 527; *In re Eaves*, 30 Fed. Rep. 21.

Theft. — *People v. Roosevelt*, 7 N. Y. App. Div. 181.

Maltreatment of Prisoners. — *People v. Bell*, (Supm. Ct. Gen. T.) 32 N. Y. St. Rep. 914; *People v. Roosevelt*, 38 N. Y. App. Div. 635, 57 N. Y. Supp. 11.

Riotous Disturbance and Quarrelling. — *People v. Martin*, 10 N. Y. App. Div. 623, 41 N. Y. Supp. 974; *People v. MacLean*, (Supm. Ct. Gen. T.) 39 N. Y. St. Rep. 429; *People v. Martin*, 85 Hun (N. Y.) 617, 32 N. Y. Supp. 971.

Absence from Post. — *People v. McClave*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 833; *People v. Roosevelt*, 38 N. Y. App. Div. 635, 57 N. Y. Supp. 11; *People v. MacLean*, (Supm. Ct. Gen. T.) 44 N. Y. St. Rep. 915; *People v. MacLean*, (Supm. Ct. Gen. T.) 37 N. Y. St. Rep. 944; *People v. Roosevelt*, 19 N. Y. App. Div. 152; *People v. Roosevelt*, 10 N. Y. App. Div. 623, 41 N. Y. Supp. 1127; *People v. Fire Com'rs*, 96 N. Y. 644.

Failure to Arrest. — *People v. MacLean*, (Supm. Ct. Gen. T.) 33 N. Y. St. Rep. 796.

Use of Abusive Language. — *People v. Roosevelt*, 26 N. Y. App. Div. 183; *People v. Roosevelt*, 22 N. Y. App. Div. 627, 47 N. Y. Supp. 776.

Identity. — *People v. Strauss*, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 617, *affirmed* 143 N. Y. 645.

3. Power to Suspend. — *Allen v. State*, 32 Ark. 241; *State v. Peterson*, 50 Minn. 239; *State v. Megaarden*, 85 Minn. 41; *State v. Lingo*, 26

power of removal vested in a particular officer by the constitution the legislature may add the power of suspension pending investigation of charges.¹ An authorization to suspend pending investigation of charges does not confer the power to remove.²

j. NOTICE OF SUSPENSION OR REMOVAL. — To complete a removal it is necessary that a notice thereof should be received by the officer removed, though the office is held during pleasure, and therefore, until such notice is received the officer is not liable as a trespasser, and as to third persons his acts are valid.³ The right of a successor to assume office is not affected by the failure to give notice of removal to the prior incumbent.⁴ Persisting in the performance of the functions incident to the office after authentic information of judicial removal is contempt of court.⁵

k. EFFECT AND INCIDENTS OF REMOVAL — (1) *In General.* — The removal of an officer terminates his right to exercise the duties of an office until the validity of the removal has been decided at law,⁶ and there are no powers left in him as an officer upon which to hold over until his successor is elected and qualified.⁷

(2) *When Effective.* — Though the fact of removal is required to be communicated to a legislative body for their action thereon, such removal takes effect at once and does not operate merely as a suspension pending the action of such body,⁸ but the officer is entitled to resume his office immediately after the adjournment of the legislature if no action has been taken.⁹

(3) *Liability of Successor.* — An officer unlawfully removed may recover from the intruder, upon reinstatement, the damages resulting from the intrusion.¹⁰ An action on the statutory bond, however, given to indemnify the person removed, where the proceeding for removal was dismissed because of

Mo. 496; *State v. Police Com'rs*, 16 Mo. App. 48; *Westberg v. Kansas City*, 64 Mo. 493; *Shannon v. Portsmouth*, 54 N. H. 183. And see *Slingsby's Case*, 3 Swanst. 178; *State v. Bryson*, 44 Ohio St. 457; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417.

Right to Notice Before Suspension. — *State v. Johnson*, 30 Fla. 433.

Distinction Between Removal and Suspension. — *State v. Meeker*, 19 Neb. 444.

No Power to Suspend Without Power to Remove. — *Metsker v. Neally*, 41 Kan. 122, 13 Am. St. Rep. 269.

1. Express Grant of Power of Suspension. — *Poe v. State*, 72 Tex. 625.

Power to Suspend Not Always Included in Power to Remove. — *Gregory v. New York*, 113 N. Y. 416, *affirming* (Supm. Ct. Gen. T.) 11 N. Y. St. Rep. 506, *followed* in *Emmitt v. New York*, 128 N. Y. 117, *affirming* 13 N. Y. Supp. 87; *Morley v. New York*, (Supm. Ct. Gen. T.) 35 N. Y. St. Rep. 262; *Myers v. New York*, (Supm. Ct. Gen. T.) 46 N. Y. St. Rep. 130; *Mullen v. New York*, (Supm. Ct. Gen. T.) 34 N. Y. St. Rep. 913. See also *Lethbridge v. New York*, 133 N. Y. 232, *reversing* 59 N. Y. Super. Ct. 486. And see *People v. Police Com'rs*, 20 N. Y. Wkly. Dig. 552.

Power of Municipal Council. — *State v. Jersey City*, 25 N. J. L. 536.

Power Not to Be Exercised Arbitrarily. — *State v. Megard*, 85 Minn. 41.

2. Power to Suspend Does Not Involve Power to Remove. — *State v. Shannon*, 7 S. Dak. 319; *Poe v. State*, 72 Tex. 625; *Burch v. Hardwicke*, 30 Gratt. (Va.) 24, 32 Am. Rep. 640.

3. Necessity of Notice. — *Fitz's Case*, Cro. Eliz. 12; *Boucher v. Wiseman*, Cro. Eliz. 440;

Bowerbank v. Morris, Wall. (C. C.) 119; *State v. Peterson*, 50 Minn. 239; *People v. Carrique*, 2 Hill (N. Y.) 93; *Holley v. New York*, 59 N. Y. 166; *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680.

Sufficiency of Notice. — *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215.

4. Rights of Successor Not Affected by Failure. — *State v. Rost*, 47 La. Ann. 53.

5. Contempt. — *Morrison v. McDonald*, 21 Me. 550.

6. Authority Terminated. — *People v. Board of Police*, 39 N. Y. 506; *Welchans v. City*, 12 Lanc. Bar. (Pa.) 135.

7. Hyde v. State. 52 Miss. 665; *State v. Hawkins*, 44 Ohio St. 98.

Deputy Cannot Act in Officer's Place During Suspension. — *McCue v. Wapello County*, 51 Iowa 60.

8. Immediately Effective. — *Heffran v. Hutchins*, 160 Ill. 550, 52 Am. St. Rep. 353, *affirming* 56 Ill. App. 581; *South v. Sinking Fund Com'rs*, 86 Ky. 186.

Power of Council to Which Suspension Reported. — A statute requiring the mayor to report suspensions and the cause thereof, and appointments to fill vacancies, to the council for their action at the next regular meeting thereafter, authorizes the council to approve or disapprove the whole or any part of the report, as discretion to approve implies discretion to disapprove. *State v. Heimiller*, 38 Ohio St. 101.

9. Right to Resume. — *State v. Herron*, 24 La. Ann. 594. See also *State v. Johnson*, 30 Fla. 433.

10. Right to Damages. — *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730.

the expiration of the officer's term, cannot be maintained without showing that the alleged causes for removal were untrue.¹

L. REINSTATEMENT — (1) *In General*. — Neither a reappointment² nor legal process is necessary to restore to office a person who has been illegally removed by one who has no authority to do so;³ but the revocation of a legal order of removal will not restore an officer, not, at least, if he is of the military class.⁴ A laborer illegally discharged is not entitled to resume his former work, but only to be restored to the "laborer's" class, and may be called upon to do any work required by the best interests of the department.⁵ One discharged for lack of work must, on seeking reinstatement, show that there is need of his services.⁶ The right to reinstatement in the position from which one was transferred may be waived by acquiescence and the acceptance of the lower compensation.⁷ Delinquent officers will not be restored to office because of irregularities in the proceedings under which they were removed when it would be the duty of those having the authority to do so to remove them immediately on restoration.⁸

(2) *Effect of Reversal of Judgment of Removal*. — It has been held that the reversal of a judgment removing an officer from office restores him thereto without need of any further order.⁹

(3) *Laches*. — Laches in seeking reinstatement is ground for denial of the relief sought. This rule has been frequently applied on application for reinstatement of persons claiming to have been wrongfully removed under the civil service and veteran acts.¹⁰

m. EFFECT OF SUPERSEDEAS. — While a supersedeas in general stays the execution of a judgment of ouster,¹¹ it will not have the effect of restoring to office one who was removed and whose successor was appointed before the supersedeas took effect.¹² Where the suspension is in the discretion of the judge and may continue throughout the whole litigation, the court may refuse to restore the officer removed, pending his appeal, upon his executing a supersedeas bond, though the supersedeas stays judgment of removal;¹³ and where the successor appointed has no knowledge of the execution of the supersedeas, it will not be contempt of court on his part to refuse to surrender the office to the former incumbent.¹⁴

6. Termination of Office of One as Affecting Powers of Co-ordinate Officers. — The policy of the law is to guard against a failure of a public service, and a grant of power in the nature of a public office to several does not in general become void upon the death or disability of one or more,¹⁵ provided there is left a sufficient number to confer together.¹⁶

1. *Action on Bond*. — *Hagans v. McClain*, (Tex. Civ. App. 1896) 36 S. W. Rep. 818.

2. *Reappointment Unnecessary*. — *State v. Wattertown*, 9 Wis. 254.

3. *Legal Process Unnecessary*. — *Morgan v. Denver*, 14 Colo. App. 147; *People v. Dalton*, 158 N. Y. 204, *affirming* 34 N. Y. App. Div. 6.

4. *Effect of Revocation*. — *U. S. v. Corson*, 114 U. S. 619.

5. *Right of Reinstated Laborer*. — *People v. Morton*, 24 N. Y. App. Div. 563, *reversed* 156 N. Y. 136, 66 Am. St. Rep. 547.

6. *Need for Services*. — *People v. Squier*, 10 N. Y. App. Div. 415.

7. *Waiver*. — *In re Gleese*, 50 N. Y. Super. Ct. 473.

8. *No Reinstatement for Irregularities in Proceedings*. — *Rex v. London*, 2 T. R. 177; *Rex v. Axbridge*, 2 Comp. 523; *Ex p. Wiley*, 54 Ala. 226; *People v. Board of Police*, 35 Barb. (N. Y.) 535.

9. *Reversal of Judgment*. — *Phares v. State*, 3 W. Va. 567, 100 Am. Dec. 777. See also *Ward*

v. Marshall, 96 Cal. 155, 31 Am. St. Rep. 198. Compare *State v. Prince*, 45 Wis. 610.

10. *Right Lost by Laches*. — *People v. King*, 13 N. Y. App. Div. 400; *Matter of McDonald*, 34 N. Y. App. Div. 512; *People v. Lantry*, 48 N. Y. App. Div. 131, *reversing* (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 160; *People v. Justices*, 78 Hun (N. Y.) 334; *Matter of Gaffney*, 84 Hun (N. Y.) 503; *Matter of Vanderhoff*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 434; *People v. Guilfoyle*, 61 N. Y. App. Div. 187. See also *Geddes v. Thomastown Tp.*, 46 Mich. 316.

11. *Execution Stayed*. — *Morton v. Broderick*, 118 Cal. 474.

12. *Foster v. Kansas*, 112 U. S. 201, 32 Kan. 14, 765; *U. S. v. Addison*, 22 How. (U. S.) 174.

13. *Poe v. State*, 72 Tex. 625.

14. *Wilson v. North Carolina*, 169 U. S. 586.

15. *Reg. v. Wake*, 4 Jur. N. S. 68, 8 El. & Bl. 384, 92 E. C. L. 384; *People v. Palmer*, 52 N. Y. 83; *Downing v. Rugar*, 21 Wend. (N. Y.) 178.

16. *Matter of Merriam*, 84 N. Y. 596; *Down-*

XVI. TRAFFIC IN PUBLIC OFFICES. — Elsewhere in this work will be found a full discussion of questions concerning the buying and selling of public offices.¹

PUBLIC PARKS. — See the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1065.

PUBLIC PEACE. (See also the title BREACH OF THE PEACE, vol. 4, p. 902.) — Public peace is public tranquillity, that quiet order and freedom from agitation or disturbance which is guaranteed by the law.²

PUBLIC PERFORMANCE. — See PUBLIC AMUSEMENT, EXHIBITION, ETC., ante.

PUBLIC PLACE. — “A public place does not mean a place devoted solely to the uses of the public, but it means a place which is in point of fact public, as distinguished from private, — a place that is visited by many persons, and usually accessible to the neighboring public. * * * A place may be public during some hours of the day, and private during other hours.”³ The term is a relative one. What is a “public place” for one purpose is not for another. A “public place” within the meaning of a statute prescribing the time and place for posting notices of tax sales may not be a “public place” within the common-law definition of an affray; and so a place which is public in one community is not necessarily so in another.⁴ In the notes will be found interpretations of the term as used in various connections.⁵

ing *v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *People v. Palmer*, 52 N. Y. 83; *Gildersleeve v. Board of Education*, (C. Pl. Gen. T.) 17 Abb. Pr. (N. Y.) 201.

1. See the title ILLEGAL CONTRACTS, vol. 15, p. 966.

Criminal Liability for Traffic in Offices. — Com. *v. Callahan*, 2 Va. Cas. 460; Reg. *v. Mercer*, 17 U. C. Q. B. 602. See also Reg. *v. Rollman*, 2 Campb. 229; *Rex v. Vaughn*, 4 Burr. 2494.

2. **Public Peace.** — *Neuendorff v. Duryea*, 6 Daly (N. Y.) 280. In that case it was held that an act prohibiting theatrical and other exhibitions and entertainments on Sunday in the city of New York, entitled “An act to preserve the public peace,” fulfilled the requirements of Const. N. Y., art. 3, § 16, which provides that the subject of any private or local bill shall be expressed in the title. See generally the title STATUTES.

In *State v. Benedict*, 11 Vt. 239, the court, per Redfield, J., said: “What is the public peace? Almost every one has some more or less certain notion of the public peace, and still it may not be very easy to define it in words. It is, so to speak, that invisible sense of security which every man feels so necessary to his comfort, and for which all governments are instituted.”

3. **Public Place.** — *Parker v. State*, 26 Tex. 204. To the same effect see *State v. Tincher*, 21 Ind. App. 144; *Murchison v. State*, 24 Tex. App. 9; *Comer v. State*, 26 Tex. App. 513; *Sisk v. State*, 35 Tex. Crim. 462; *Elsberry v. State*, 41 Tex. 159; *Gomprecht v. State*, 36 Tex. Crim. 434.

4. **Relative Term.** — *Republic v. Ben*, 10 Hawaii 280; *Wilson v. Ford*, 190 Ill. 614; *State v. Tincher*, 21 Ind. App. 145; *Territory v. Lannon*, 9 Mont. 1; *Russell v. Dyer*, 40 N. H. 173, 43 N. H. 397; *Cummins v. Little*, 16 N. J. Eq. 48; *Hilgers v. Quinney*, 51 Wis. 71; *Ramsay v. Hommel*, 68 Wis. 14.

“The term public place, as used in the statute, is relative. What might be a public place

in a crowded and populous city, and what would be a public place in a small town, sparsely inhabited, are entirely different questions.” *Cahoon v. Coe*, 57 N. H. 572.

Mixed Question of Law and Fact. — Whether a place is a public place is a mixed question of law and fact. *Sisk v. State*, 35 Tex. Crim. 462; *Parker v. State*, 26 Tex. 204.

5. **Term “Public Place” as Used in Gaming Laws.** — See the titles GAMING, vol. 14, p. 678; GAMING HOUSES, vol. 14, p. 699.

Within Meaning of Law of Indecent Exposure. — See the title EXPOSURE OF PERSON, vol. 12, p. 538.

Within Meaning of Law of Affray. — See the title AFFRAY, vol. 1, p. 917.

Within Meaning of Statutes Requiring Notices to be Posted in Public Places. — See the titles ELECTIONS, vol. 10, p. 632; SHERIFFS’ SALES; TAX TITLES.

Barber’s Shop. — A barber’s shop is a public place within a gaming statute. *Cochran v. State*, 30 Ala. 542.

Blacksmith’s Shop. — A blacksmith’s shop is not necessarily a public place. *Lorimer v. State*, 76 Ind. 496.

Bulletin Board. — In *Roach v. Eugene*, 23 Oregon 376, it was held that bulletin boards in the court house and city hall and at the corner of two public streets were public places within a statute requiring certain notices to be posted at such places.

Booth on Racecourse. — In *Reg. v. Saunders*, 1 Q. B. D. 15, 13 Cox C. C. 116, it was held that a booth on a racecourse, into which persons were admitted upon payment only, was a public place so as to support an indictment for an indecent exhibition therein at common law.

Church. — In *Scammon v. Scammon*, 28 N. H. 428, it was held that houses of public worship are ordinarily and *prima facie* to be regarded as public places. To the same effect see *Tidd v. Smith*, 3 N. H. 181.

Court House. — In *King v. Stow*, 6 Johns. Ch. (N. Y.) 332, a court house was held to be a

PUBLIC POLICY. (See also the titles **ILLEGAL CONTRACTS**, vol. 15, p. 927; **RESTRAINT OF TRADE**.)—I. That principle of the law which holds that no one can lawfully do that which has a tendency to be injurious to the public, or

public place within a statute requiring an advertisement to be posted in a *public place*.

Depot.—A *Montana* statute provided that notice of the presentation of a petition for laying out a county road should be posted in four *public places* in the vicinity of the proposed road. It was held that posting at a railroad depot about six or seven hundred feet from the proposed road was a posting in a *public place* in compliance with the statute. *Territory v. Lannon*, 9 Mont. 1.

Grand-jury Room.—A grand-jury room has been held to be a *public place* within a statute against intoxication. *Murchison v. State*, 24 Tex. App. 8.

Highway.—In *In re Timson*, L. R. 5 Exch. 257, it was held that a public highway was not necessarily a *place* of *public resort* within the meaning of an act against vagrancy. See also *In re Davis*, 2 H. & N. 149.

So in *Williams v. State*, 64 Ind. 553, 31 Am. Rep. 135, it was held that the words "on a public highway," in an indictment, were not equivalent to the words "in any *public place*" in a statute against lewdness. See also *State v. Weekly*, 29 Ind. 206.

But in *State v. Moriarty*, 74 Ind. 103, it was held that an indictment alleging that the defendant was found intoxicated "in a public street, highway, and sidewalk" charged that the offense was committed in a *public place*. *Overruling Williams v. State*, 64 Ind. 553. And see *State v. Welch*, 88 Ind. 308.

And that a public highway is *prima facie* a *public place*, see *State v. Wabash Paper Co.*, 21 Ind. App. 167; *State v. Berdetta*, 73 Ind. 185; *Rosenstein v. State*, 9 Ind. App. 290.

A corresponding *New Hampshire* statute was as follows: "If any person shall be found drunk in any street, alley, or other *public place*, he shall be punished," etc. In *State v. Stevens*, 36 N. H. 59, it was held that the use of the words "street" and "alley" excluding the more general term "highway," indicated that public roads throughout the country were not intended to be embraced within the term *public place*. See also *State v. Hall*, 22 N. H. 384.

Inn.—In *King v. Stow*, 6 Johns. Ch. (N. Y.) 323, an inn was held to be a *public place* within a statute requiring an advertisement to be published in a *public place*.

Same—Office of Hotel.—A city ordinance forbade wrangling or quarreling in any *public place*. It was held that the office of a hotel was a *public place* within the ordinance. *Howard v. Stroud*, 63 Kan. 883, 65 Pac. Rep. 249.

Same—Room in Hotel.—In *Bordeaux v. State*, 31 Tex. Crim. 37, it was held that proof that the defendant was intoxicated in his room in a hotel did not constitute proof of drunkenness in a *public place*.

Cock Fighting—Field Near Highway.—In *Finnem v. State*, 115 Ala. 106, the appellant was indicted for cock fighting. It was shown that the cock fighting took place in an old field grown up with bushes, about one-fourth or

one-half mile from the public road. The appellant requested the court to charge that this was not a *public place*. The appellate court sustained the trial court in refusing to give such charge, saying: "The *place*, however secluded in and of itself, is made *public* by the assemblage there of people in such numbers, and the right of the public generally to assemble there on the occasion for the purpose of engaging in or witnessing cock fighting; and it is wholly immaterial whether there has ever before been any assemblage of people at that place for any purpose." But see *State v. Tinch*, 21 Ind. App. 145, where the court said that the above construction of the term *public place* is strained.

A corporation by-law provided that any person who should frequent or use any street or other *place* of *public resort* for the purpose of bookmaking or betting should be liable to a penalty. The appellant used for the purpose of bookmaking an uninclosed piece of private ground within the borough, bounded by streets; bookmakers and other persons habitually used the ground for betting, but without permission from the owners. It was held that the ground was a *place* of *public resort* within the meaning of the ordinance. *Kitson v. Ashe*, (1899) 1 Q. B. 425.

Same—As Used in City Ordinance Providing for Impounding of Cattle Running at Large upon Public Places.—The ordinance in question provided that it should be the duty of the police to take up any cattle running at large upon any "*public street, alley, parks, or places*." Cattle were taken on a parcel of land known as the "Methodist camp ground," which was within the city limits, and open to the public, and unoccupied. It was held that though the camp ground was private property, yet as it was open to the common, it was in a certain sense a *public place*, and it was therefore competent to the officer finding the cattle loose and at large upon the common, immediately after having been at large in public streets, to seize them. *O'Mally v. McGinn*, 53 Wis. 353.

Place Below Surface of Street.—Where a local act authorized the urban authority to erect and maintain "in any street or *public place*, or on land belonging to them" or under their control, lavatories for the use of the public, it was held that the urban authority had no power to excavate the soil and erect lavatories below the surface of a street. *Tunbridge Wells v. Baird*, (1896) A. C. 434, (1894) 2 Q. B. 867.

Presumption.—In *Drake v. Mooney*, 31 Vt. 617, it was held that there was no presumption without proof that the places described in an officer's return of a levy of an execution on personal property as the places where the sale was advertised and held were not *public places*.

Private Dwelling.—In *State v. Pratt*, 34 Vt. 323, it was held that evidence that for a considerable period of time a very large number of persons had been in the habit of going to the defendant's house, many more than went

against the public good, may be termed the policy of the law, or public policy in relation to the administration of the law.¹ Public policy is in its nature so uncertain and fluctuating, varying with the habits and fashions of the day, with the growth of commerce, and the usages of trade, that it is difficult to determine its limits with any degree of exactness.² If a contract binds the maker

to the houses of other persons in the same neighborhood, and many more than any business in which he was openly and honestly engaged furnished any occasion for, and that many of these persons came from other towns, at unusual hours, and under suspicious circumstances, was competent to be left to the jury to prove that the defendant's house had become a *place of public resort*; and if the defendant would avoid the effect of the presumption raised by such evidence, he must show some other reason for it, that being peculiarly within his knowledge.

Same — Drunkenness. — In *State v. Waggoner*, 52 Ind. 481, it was held that *public place*, as the term was used in a statute against intoxication in a *public place*, meant a place where all persons were entitled to be, and that a private residence where a party was given by a private citizen, to which the guests were invited, was not a *public place*. See also *State v. Tincher*, 21 Ind. App. 142; *State v. Sowers*, 52 Ind. 311; *State v. Welch*, 88 Ind. 308.

So in *State v. Sowers*, 52 Ind. 311, cited in *Lorimer v. State*, 76 Ind. 496, it was held that a private house was not a *public place* within a statute against intoxication in a *public place*.

Same — Veranda of Private House. — A statute made punishable the use of vulgar, profane, or obscene language in any street, highway, store, shop, or other *public place*, or *place of public resort*. It was held that a veranda of a person's own house, close to a public street, within the hearing of persons passing on such street, was a *public place*. *Republic v. Ben*, 10 Hawaii 279. And see the title OBSCENITY, vol. 21, p. 760.

Same — Posting Notice. — In *Cahoon v. Coe*, 57 N. H. 572, it was held that in the absence of any place more public, a dwelling house must be regarded as a *public place* for the purpose of posting a notice of a sale of land for taxes.

Public Place and Public House Distinguished. — See PUBLIC HOUSE, *ante*.

Public Square. — In *Carter v. Abshire*, 48 Mo. 300, it was held that the setting up of notice of sale on the sides of a public square in a town or city satisfied the requirement contained in a deed of trust that the notice should be put up in a *public place* in such town or city.

Schoolhouse May Be Public Place. — *Russell v. Dyer*, 40 N. H. 187; *Wilson v. Bucknam*, 71 Me. 547.

Shoemaker's Shop Held Not a Public Place. — *Tidd v. Smith*, 3 N. H. 181. But see the title GAMING, vol. 14, p. 679, where the contrary was held in a gaming case.

Village or Town. — A statute required an advertisement to be posted in three of the most *public places* of the county. It was held that it was a sufficient compliance with this statute to post the advertisement in three *public places* in one village, and that it would be "rather a forced construction of the words

'three of the most *public places*' to insist that they must be either so enlarged as to embrace three distinct villages or towns, or so confined as to admit notices to be affixed up in three different parts of one and the same building." *King v. Stow*, 6 Johns. Ch. (N. Y.) 332.

1. Public Policy. — *Egerton v. Brownlow*, 4 H. L. Cas. 1; *Edwards v. Randle*, 63 Ark. 318; *Fearnley v. De Mainville*, 5 Colo. App. 441; *Consumers' Oil Co. v. Nunnemaker*, 142 Ind. 564, 51 Am. St. Rep. 193; *American Casualty Ins. Co.'s Case*, 82 Md. 574; *Dean v. Clark*, 80 Hun (N. Y.) 86; *Union Cent. L. Ins. Co. v. Champlin*, (Okla., 1901) 65 Pac. Rep. 836; *People's Bank v. Dalton*, 2 Okla. 476; *Williams v. Board of Education*, 45 W. Va. 199; *Kellogg v. Larkin*, 3 Pin. (Wis.) 136.

Other Definitions. — "*Public policy* means the public good. Anything that tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel, is against *public policy*." *Goodyear v. Brown*, 155 Pa. St. 514.

In *Magee v. O'Neill*, 19 S. Car. 185, it was said: "It cannot be the mere opinion of the judge upon any general question of *public policy*, or, in other words, whether the judges think that the interests of the public would be better advanced by tolerating or refusing to tolerate such provisos, but whether they are in contravention of any established law, or in contravention of the spirit though not against the letter of the law."

Story's Definition. — In *Spence v. Harvey*, 22 Cal. 340, quoting *Story on Contracts*, § 546, it was said: "It [the expression *public policy*] has never been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule may, however, be safely laid down, that wherever any contract conflicts with the morals of the time and contravenes any established interest of society, it is void, as being against *public policy*." See also *Kitchen v. Greenabaum*, 61 Mo. 115.

Public Policy in Sense of Law. — "The term *public policy* is frequently used in a very vague, loose, or inaccurate sense. The courts have often found it necessary to define its juridical meaning, and have held that a state can have no *public policy* except what is to be found in its constitution and laws. * * * Therefore, when we speak of the *public policy* of the state, we mean the law of the state, whether found in the constitution, the statutes, or judicial records." *People v. Hawkins*, 157 N. Y. 12. See also *Vidal v. Philadelphia*, 2 How. (U. S.) 127; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Cross v. U. S. Trust Co.*, 131 N. Y. 343; *Dammert v. Osborn*, 140 N. Y. 40.

2. Vagueness of Term. — *Story on Contracts*
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to do something opposed to the public policy of the state or nation, it is void, however solemnly made. For references to other doctrines, arising from the principle of public policy, see note 1.

II. Public policy is also defined as the policy upon which governmental affairs are conducted for the time being.²

PUBLIC PROSECUTOR. (See also the title PROSECUTING AND DISTRICT ATTORNEYS, *ante.*)—A public prosecutor is a *quasi*-judicial officer, retained by the public for the prosecution of persons accused of crime, in the exercise of a sound discretion to distinguish between the guilty and the innocent, between the certainly and the doubtfully guilty; never voluntarily to acquiesce in an acquittal upon certain presumption of guilt, or in conviction upon doubtful presumption of guilt.³

PUBLIC PURPOSE. (See also the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893; DEDICATION, vol. 9, p. 20; EMINENT DOMAIN, vol. 10, p. 1061; MUNICIPAL AID, vol. 20, p. 1084; MUNICIPAL SECURITIES, vol. 21, p. 38; TAXATION.)—See note 4.

PUBLIC RECORDS. (See also the titles RECORD; RECORDING ACTS.)—A public record is a written memorial made by a public officer authorized by

(5th ed.), § 675. See to the same effect *Egerling v. Brownlow*, 4 H. L. Cas. 123; *Davies v. Davies*, 36 Ch. D. 364; *Richardson v. Mellish*, 2 Bing. 229, 9 E. C. L. 391; *Spence v. Harvey*, 22 Cal. 340; *Smith v. San Francisco, etc., R. Co.*, 115 Cal. 600; *American Casualty Ins. Co.'s Case*, 82 Md. 574; *Kitchen v. Greenabaum*, 61 Mo. 115; *People v. Hawkins*, 157 N. Y. 1; *Hurd v. Robinson*, 11 Ohio St. 237; *Union Cent. L. Ins. Co. v. Champlin*, (Okla. 1901) 65 Pac. Rep. 836; *Magee v. O'Neill*, 19 S. Car. 188; *Kellogg v. Larkin*, 3 Pin. (Wis.) 136.

In *Besant v. Wood*, 12 Ch. D. 620, *Jessel, M. R.*, said that *public policy* is to a great extent a matter of individual opinion, because what one man or one judge might think against *public policy* another might think altogether excellent *public policy*.

1. In General.—See the title ILLEGAL CONTRACTS, vol. 15, p. 927, which treats concisely the whole subject of contracts which are illegal as being against *public policy*, and should be consulted in every instance although another and more specific reference may be found.

Waiver of Equity of Redemption.—See the title EQUITY OF REDEMPTION, vol. 11, p. 243.

Agreements to Waive Statute of Limitations.—See the title LIMITATION OF ACTIONS, vol. 19, p. 285.

Contracts Limiting Liability of Common Carriers.—See the titles CARRIERS OF GOODS, vol. 5, p. 154 *et seq.*; CARRIERS OF LIVE STOCK, vol. 5, p. 427.

Sunday Contracts.—See the title SUNDAY AND HOLIDAYS.

Contracts Affecting Rights Acquired under Pre-emption, Homestead, etc., Laws.—See the title PUBLIC LANDS, *ante.*

Gambling Contracts.—See the title GAMBLING CONTRACTS, vol. 14, p. 576.

Insurable Interest—Insurance by Alien Enemy.—See the title MARINE INSURANCE, vol. 19, p. 955.

As Affecting Aliens.—See the title ALIENS, vol. 2, p. 64.

Champerty and Maintenance.—See the title CHAMPERTY AND MAINTENANCE, vol. 5, p. 815.

Assignment of Choses in Action.—See the title ASSIGNMENTS, vol. 2, p. 1007.

Contracts Made in Consideration of Compounding Offenses.—See the title COMPOUNDING OFFENSES, vol. 6, p. 399.

Contracts Not to Resort to Judicial Forum.—See the title JURISDICTION, vol. 17, pp. 1060, 1063.

Restraints on Alienation.—See the title RESTRAINTS ON ALIENATION.

Restraint of Trade.—See the title RESTRAINT OF TRADE.

Combinations and Pools.—See the title MONOPOLIES AND CORPORATE TRUSTS, vol. 20, p. 844.

Public Officers.—See the title PUBLIC OFFICERS.

2. **Public Policy.**—*Stockton, etc., R. Co. v. Stockton*, 41 Cal. 168.

3. **Public Prosecutor.**—*Wight v. Rindskopf*, 43 Wis. 354.

4. **Universal Public.**—A charter of a water company was granted in consideration of water to be supplied by the company for *public purposes*. It was held that water supplied for the mayor's office, city hall, etc., was not water supplied for a *public purpose*. The court held that by the term *public purpose*, as thus used, was meant for the universal public and not for only a portion of it. *Commercial Bank v. New Orleans*, 17 La. Ann. 190.

Corporate Purpose.—In *Chicago, etc., R. Co. v. Smith*, 62 Ill. 276, it was said: "It is contended that the appropriation was not for a 'corporate purpose.' If it was for a *public purpose*—for the benefit of the inhabitants of the municipality—then it would be for a corporate purpose. The latter cannot be distinguished from the former; and all that we have said in relation to the *public purpose* of the tax will apply with equal force to a corporate purpose." See also *Livingston County v. Darlington*, 101 U. S. 413; *Taylor v. Thompson*, 42 Ill. 9.

Public or Objectionable Purpose. (See also the title BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2.)—A lease provided that the leased premises should be occupied as a residence and not for any *public* or objectionable *purpose*. It was held that the use of the house as a boarding house was a violation

law to perform that function, and intended to serve as evidence of something written, said, or done.¹

PUBLIC RESORT. — See PUBLIC PLACE, *ante*.

PUBLIC ROADS. (See also the titles HIGHWAYS, vol. 15, p. 343; STREETS AND SIDEWALKS; and see PRIVATE ROADS, *ante*; ROADS.) — A public road is defined to be a road dedicated to and kept up by the public, as contradistinguished from private ways which are not so kept up.² It is also defined as a way established and adopted by proper authority for the use of the public, over which every person has a right to pass, and which every person may use for all purposes of travel or transportation to which it is adapted and devoted.³

PUBLIC SQUARES. — See the title PARKS AND PUBLIC SQUARES, vol. 21, p. 1065.

PUBLIC STATUTES. — See the title STATUTES.

PUBLIC TRUST OR CHARITY. (See also the titles CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 895; EXEMPTIONS (FROM TAXATION), vol. 12, pp. 328-343; PERPETUITIES AND TRUSTS FOR ACCUMULATION, vol. 22, p. 701.) — See note 4.

PUBLIC USE. (See also the titles EMINENT DOMAIN, vol. 10, pp. 1043, 1061; PATENTS, vol. 22, p. 336; TAXATION.) — A public use is one which concerns the whole community in which it exists, as contradistinguished from a particular individual or number of individuals.⁵

of the terms of the lease. *Gannett v. Albree*, 103 Mass. 372.

1. **Public Records.** — *State v. Anderson*, 30 La. Ann. 567; *Coleman v. Com.*, 25 Gratt. (Va.) 881, *quoting* Bouv. L. Dict.

2. **Public Roads.** — *Mills v. State*, 20 Ala. 88, *quoted in* *McDade v. State*, 95 Ala. 28. See also *Griffin v. Williamstown*, 6 W. Va. 314.

3. **Public Roads.** — *Cincinnati R. Co. v. Com.*, 80 Ky. 138.

Highways. — In *State v. Bassett*, 33 N. J. L. 27, it was said: "Nothing is more common than to speak of any part of a highway as the public highway, or the *public road*."

Paper Street. — A deed described one of the boundaries of the land conveyed as a *public road*. The question arose whether the boundary intended was a mere paper street, as laid down on a plat, or an actual highway, known as such, and not by any name appearing on the plat. It was held that the actual highway was intended. *Purkiss v. Benson*, 28 Mich. 541.

Railroad. — In *Comer v. State*, 62 Ala. 321, it was held that though the track of a railroad company was a *public road*, it was not a public highway within the meaning of a statute against the use of vulgar and abusive language upon a public highway.

A statute authorized telegraph companies to erect the necessary fixtures for their lines upon any of the *public roads*, streets, and highways within the state. It was held that this did not authorize such a company to erect its poles and fixtures upon and along the right of way of a railroad company. *New York City, etc., R. Co. v. Central Union Tel. Co.*, 21 Hun (N. Y.) 264. See generally the titles RAILROADS; TELEGRAPHS AND TELEPHONES.

Streets. — In the charter of a railroad company the corporation was empowered to construct its road across or along any *public road*. It was held that, as used in this connection, the term *public roads* did not include a street

or alley in a city. *Tennessee, etc., R. Co. v. Adams*, 3 Head (Tenn.) 596.

Public Roads Distinguished from Turnpikes. — In distinguishing between a *public road* and a turnpike, in *Bradshaw v. Rodgers*, 20 Johns. (N. Y.) 105, the court said: "The former is open and public for the passage of every person, without any toll or other imposition; whereas the latter is private property, subject to be traveled over on first paying an equivalent for its use, prescribed by the legislature." See also the title TURNPIKES.

4. See these recent cases: *Eliot's Appeal*, (Conn. 1902) 51 Atl. Rep. 564; *White v. Smith*, 189 Pa. St. 222.

Insurance Patrol — Respondeat Superior. — In *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 647, it was held that a corporation acting in aid of the city of Philadelphia in the preservation of life and property at fires, without gain or profit to itself, was a *public charity* and not subject to the doctrine of *respondeat superior*, notwithstanding the fact that among its acknowledged objects was that of lessening the losses of fire insurance companies.

Orphanage. — In *Hall v. Urban Sanitary Authority*, 16 Q. B. D. 163, it was held that an orphanage founded and used for the purpose of boarding, lodging, clothing, and educating the children of deceased railway servants, and supported partly by subscriptions from railway servants but mainly by donations from the public, was open to such an extensive class of the community of the kingdom that the premises were used and occupied exclusively for the purposes of *public charity*.

Office of Public Trust. — See TRUST.

5. **Public Use.** — *Keller v. Corpus Christi*, 50 Tex. 629, *quoting* *Gilmer v. Lime Point*, 18 Cal. 251.

Dedication to Public Use. — See the title DEDICATION, vol. 9, p. 20.

Destruction of Property to Prevent Spread of Fire. — In *Keller v. Corpus Christi*, 50 Tex.

PUBLIC WAYS. — Public ways, as the term is applied to ways by land, are usually termed highways or public roads, and are such as every citizen has the right to use.¹

PUBLIC WORKS. — This term includes all fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc.²

PUBLIC WORSHIP. (See also the title RELIGIOUS SOCIETIES.) — See note 3.

PUBLISH. (See also the titles NEWSPAPERS, vol. 21, p. 533; PUBLICATION, *ante*.) — To publish is to send forth, as a book, newspaper, musical piece, or

629, it was held that the destruction of property by a hook and ladder company, part of the fire department of the city, for the purpose of preventing the spreading of fire, was for a *public use*, and not for such private corporate use as would authorize a suit at common law. See also the title FIRE DEPARTMENT, vol. 13, p. 80.

Purchase of Real Estate by County. — By statute a county had no authority to become the purchaser of real estate sold on execution in its favor, where the purchase was not made for the *public use* of the county. In construing this statute in *Williams v. Lash*, 8 Minn. 496, the court said: "The *public use* by the county, mentioned in the statute, must mean that actual use, occupation, and possession of real estate rendered necessary for the proper discharge of the administrative or other functions of the county, through its appropriate officers." See also *James v. Wilder*, 25 Minn. 305.

Indictment for Arson. — In *Com. v. Horrigan*, 2 Allen (Mass.) 159, it was held that an indictment for burning in the nighttime a building erected for *public use* was sustained by proof of burning in the nighttime a building removed by the city and afterwards fitted up as a school house and engine house.

1. **Public Ways.** — *Kripp v. Curtis*, 71 Cal. 64, citing 3 Kent's Com. 432. See also *Danville v. Fiscal Ct.*, (Ky. 1899) 51 S. W. Rep. 158. And see the titles HIGHWAYS, vol. 15, p. 343; PRIVATE WAYS, *ante*.

2. **Cent. Dict.**, followed in *Ellis v. Grand Rapids*, 123 Mich. 567; *Winters v. Duluth*, 82 Minn. 130.

Streets. — In *Lark v. State*, 55 Ga. 437, it was held that the streets of a city were *public works* within a statute providing that convicts might be placed at work upon the *public works*.

But in *McHugh v. Boston*, 173 Mass. 408, it was held that a public highway was not a *public work* "owned by a city or town," within a statute which provided that a person to whom a debt was due "for labor performed in constructing any building, sewer, drain, waterworks, or other *public works* owned by a city" should have a right of action against the city.

Pumping Station. — A statute provided that before any city should be liable for any injury to any person by reason of any defect in any public ground or *public works* of any kind of the city, a notice therein required should be given. It was held that a pumping station was included in the term *public works*. *Winters v. Duluth*, 82 Minn. 130.

Channel of River. — See *Hamburg American Packet Co. v. Rex*, 7 Can. Exch. 143.

Rifle Range. — In *Larose v. Rex*, 31 Can. Sup. Ct. 206, affirming 6 Can. Exch. 425, it was held that a rifle range under the control of the department of militia and defense was not a *public work*.

Public Department Distinguished from Public Works — **Employment of Veterans.** — A statute provided that veterans employed in the *public works* of any city should not be removed. Counsel contended that the term *public works* included public departments. The court said: "We cannot concur in this view. A 'public department' is defined as 'a division of official duties or functions; a branch of government; a distinct part of a governmental organization; as the legislative, executive, and judicial departments; the department of state, of the treasury, etc.' The term *public works* is defined as 'all fixed works constructed for public use, as railways, docks, canals, waterworks, roads, etc.' " *Ellis v. Grand Rapids*, 123 Mich. 567.

3. "Public Worship may mean the worship of God conducted and observed under public authority; or it may mean worship in an open or public place, without privacy or concealment; or it may mean the performance of religious exercises under a provision for an equal right in the whole public to participate in its benefits; or it may be used in contradistinction to worship in the family or the closet. In this country, what is called *public worship* is commonly conducted by voluntary societies, constituted according to their own notions of ecclesiastical authority and ritual propriety, opening their places of worship, and admitting to their religious services such persons, and upon such terms, and subject to such regulations, as they may choose to designate and establish. A church absolutely belonging to the public, and in which all persons without restriction have equal rights, such as the public enjoy in highways or public landings, is certainly a very rare institution, if such a thing can be found." *Atty.-Gen. v. Merrimack Mfg. Co.*, 14 Gray (Mass.) 602.

Y. M. C. A. — In *Young Men's Christian Assoc. v. New York*, 113 N. Y. 190, it was said: "There is no ambiguity in the phrase *public worship*. It refers to the usual church services upon the Sabbath, open freely to the public, and in which any one may join." And in that case it was held that a building of the Young Men's Christian Association was not a place of *public worship*. See also *Association, etc. v. New York*, 104 N. Y. 581; *People v. Neff*, 34 N. Y. App. Div. 86.

other printed work, either for sale or for general distribution; ¹ to proclaim, to make known generally.² A publication is a something, as a book or print, which has been published — made public or known to the world.³

PUBLISHER. (See also the title COPYRIGHT, vol. 7, p. 508.)—A publisher is one who by himself or his agent makes a thing publicly known; one engaged in the circulation of books, pamphlets, and other papers.⁴

PUDDING.—Pudding is defined as flour or meal mixed with a variety of ingredients, and usually sweetened.⁵

PUEBLO. (See also the title SPANISH AND MEXICAN LAND GRANTS.)—The term *pueblo* in its original signification means people or population, but is used in the sense of the English word "town." It has the indefiniteness of that term, and, like it, is sometimes applied to a mere collection of individuals residing at a particular place, a settlement or village, as well as to a regularly organized municipality.⁶

PUFFER. (See also the titles AUCTIONS AND AUCTIONEERS, vol. 3, p. 487; JUDICIAL SALES, vol. 17, p. 948; SHERIFFS' SALES.)—A "puffer," in the strictest meaning of the word, is a person who, without having any intention to purchase, is employed by the vendor at an auction to raise the price by fictitious bids, thereby increasing competition among the bidders, while he himself is secured from risk by a secret understanding with the vendor that he shall not be bound by his bids.⁷

PUIS DARREIN CONTINUANCE. (See also the title PUIS DARREIN CONTINUANCE, 17 ENCYC. OF PL. AND PR. 262.)—A pleading "puis darrein continuance," is one which sets up some matter or defense that has arisen after plea and before replication or after issue joined.⁸

PULL.—See note 9.

1. *McFarlane v. Hulton*, (1899) 1 Ch. 889, quoting *Webst. Dict.*

2. *Watts v. Greenlee*, 2 Dev. L. (13 N. Car.) 119.

"The primary meaning of the word *publish* is to make known." North Baptist Church v. Orange, 54 N. J. L. 116.

Form of Publication.—The schedule to the *Illinois Constitution* of 1870, § 18, provides: "All laws of the state of Illinois, and all official writings and the executive, legislative, and judicial proceedings, shall be conducted, preserved, and *published* in no other than the English language." In *Chicago v. McCoy*, 136 Ill. 352, the court, *per Baker, J.*, said: "It is insisted that the word *published*, as used in said section of the constitution, is restricted in its application to *publications* in book or pamphlet form. The word *published* is broad enough to include, and in its ordinary and usual acceptance does include, *publications* in newspapers. * * * The constitutional provision in question contemplates *publications* in newspapers as well as *publications* in books and pamphlets."

Forgery. (See also the title FORGERY, vol. 13, p. 1081.)—In *People v. Tomlinson*, 35 Cal. 509, it was said: "The words 'utter' and *publish*, in the law of forgery, are synonymous, for the meaning of both is 'to declare or assert, directly or indirectly, by words or actions,' that the forged instrument is genuine."

3. **Publication.**—U. S. v. Loftis, 12 Fed. Rep. 671. See also U. S. v. Williams, 3 Fed. Rep. 486.

Same.—A Sealed Letter is a "writing," but it is not a *publication* within the statute afore-

said. U. S. v. Loftis, 12 Fed. Rep. 671; U. S. v. Mathias, 36 Fed. Rep. 896.

4. **Publisher.**—Bouv. L. Dict.

As to Whether a Publisher Is a Manufacturer, see MANUFACTURE, MANUFACTURER, MANUFACTURING, ETC., vol. 19, p. 925.

Publisher and Printer Synonymous.—See PRINT—PRINTER, ETC., vol. 22, p. 1297.

5. **Pudding.**—*Clotworthy v. Schepp*, 42 Fed. Rep. 63. In that case it was held, where a manufacturer of *pudding* used the trademark name of "puddine," that he could not enjoin another manufacturer of *pudding* from calling his goods *pudding*. See generally the title TRADEMARKS.

6. *Trenouth v. San Francisco*, 100 U. S. 251.

7. **Puffer.**—*Peck v. List*, 23 W. Va. 375, quoted in *McMillan v. Harris*, 110 Ga. 81. In the latter case the court said (p. 75): "A person of the character referred to is usually denominated a *puffer*, but he is sometimes referred to as a 'bybidder,' 'capper,' 'decoy duck,' 'white bonnet,' or 'sham bidder.'" It was held that where a bidder can be compelled to keep and pay for the property he is no *puffer*, although his bid was merely for the purpose of running up the price.

8. **Puis Darrein Continuance.**—1 Chitty on Pleadings (16th Am. ed.) 688; *Chattanooga v. Neely*, 97 Tenn. 529.

"A plea *puis darrein continuance* sets up some matter arising after plea pleaded." *Towns v. Wilcox*, 12 Wend. (N. Y.) 504.

9. **Possessed of Pull.**—In *Percival v. State*, 45 Neb. 746, it was said: "The phrase 'possessed of a *pull*' is, to speak strictly, without an intelligible meaning, and is, in any event, so doubtful and uncertain that it cannot be ap-

PULSATORY. — See note 1.

PUNCTUAL — PUNCTUALLY. — See note 2.

PUNCTUATION. — See the titles INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1; STATUTES; WILLS.

PUNISH. (See also the title SENTENCE AND PUNISHMENT.) — The word “punish” is defined as to impose a penalty upon; to afflict with pain, loss, or suffering for a crime or fault; to inflict a penalty for an offense, upon the offender.³

PUNISHABLE. — If an offense may be punishable by a certain penalty it is punishable by such penalty, although, at the discretion of the court or under different circumstances, other penalties may be imposed. Its meaning is not restricted to such an offense as must be so punished.⁴

PUNISHMENT. — See the title SENTENCE AND PUNISHMENT.

PUNITIVE DAMAGES. (See also the title EXEMPLARY DAMAGES, vol. 12, p. 2.) — The terms “exemplary,” “punitive,” or “vindictive” damages are synonymous in their legal signification.⁵

PUPIL. — See the titles SCHOOLS; UNIVERSITIES AND COLLEGES.

PURCHASE — PURCHASER. (See also the titles FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210; PURCHASERS FOR VALUE AND WITHOUT

plied as imputing that the court was corrupt, as is claimed in the complaint, with any greater certainty than it may be said to refer to some other person or persons, or to actions or motives erroneous and improper, but not corrupt.”

1. **Pulsatory Currents.** — See Telephone Cases, 126 U. S. 531.

2. **Payment.** — In *Norris v. Beaty*, 6 W. Va. 480, it was said: “The meaning of the word *punctual* is ‘exact,’ and, as applied to payment, means the exact time at which the payment is to be made.”

A mortgage deed contained an agreement that the payment of the principal should not be required until the expiration of three years, if in the meantime every half-yearly payment of interest should be *punctually* paid. It was held that payment *punctually* meant payment on the day fixed for payment, and that payment nine days after such fixed day was not sufficient. *Leeds, etc., Theatre v. Broadbent*, (1898) 1 Ch. 346, 77 L. T. N. S. 665.

3. **Punish.** — *Bradley v. State*, 111 Ga. 172, quoting *Webst. Dict.*

“Punished” Distinguished from “Convicted.” — A *California* statute declared that a defendant guilty of certain acts outside of the state should “be convicted and *punished* in the same manner as if such larceny or receiving had been committed in this state.” In construing this statute the court said: “The word *punished*, as used in the section, refers plainly to the penalty to be affixed to the crime, but the word ‘convicted’ is much broader in meaning. And when the statute says ‘convicted as if such larceny * * * had been committed in this state,’ the word ‘convicted’ includes the accusation and the trial.” *People v. Black*, 122 Cal. 73.

4. **Liable to Punishment.** — *U. S. v. Watkins*, 7 Sawy. (U. S.) 94; *State v. Neuner*, 49 Conn. 233; *Miller v. State*, 58 Ga. 200; *People v. Murphy*, 185 Ill. 626; *McLaughlin’s Case*, 107 Mass. 225; *Com. v. Pemberton*, 118 Mass. 36; *State v. Shattuck*, 45 N. H. 210; *People v. Keating*, 61 Hun (N. Y.) 263; *Dall v. People*, 4 Den. (N. Y.) 91; *People v. Hughes*, 137 N.

Y. 29; *Benton v. Com.*, 89 Va. 570; *Aldridge v. Com.*, 2 Va. Cas. 452.

In *In re Mills*, 135 U. S. 263, the words “*punishable* by imprisonment at hard labor” employed in Act Cong. March 1, 1889, defining the criminal jurisdiction of a United States court in the Indian Territory, were interpreted to embrace offenses which, although not imperatively required by statute to be so *punished*, might be *punished* in that manner.

In *U. S. v. Watkins*, 7 Sawy. (U. S.) 85, 6 Fed. Rep. 152, the court, by Deady, J., said: “It [a crime] is *punished* by the *punishment* actually imposed, but it is *punishable* by any *punishment* that the law authorizes the court to impose. The phrase ‘is *punishable*’ cannot be construed to mean more or less than ‘may be *punished*’ or ‘liable to be *punished*.’”

But in *Hicks v. State*, 150 Ind. 293, it was held that the word *punishable*, in an act relating to felonies *punishable* by confinement in the state prison, applied only to such crimes as were actually so *punishable*, and not to such as might be *punishable* by such confinement.

5. **Punitive Damages.** — *Brown v. Evans*, 17 Fed. Rep. 913; *Louisville, etc., R. Co. v. Kelly*, 100 Ky. 421; *Hamilton v. Third Ave. R. Co.*, 53 N. Y. 28; *Moore v. Ohio River R. Co.*, 41 W. Va. 160.

In *Kadgin v. Miller*, 13 Ill. App. 476, it was said: “It will be noticed that the instruction makes use of the words *punitive damages*, while the words of the statute are ‘exemplary damages,’ but they are convertible terms and mean the same thing.”

Punitive Damages Equivalent to Smart Money. — *Vinson v. Flynn*, 64 Ark. 453; *Titus v. Corkins*, 21 Kan. 723.

Compensation. — *Punitive damages* are damages beyond mere compensation. *Holmes v. Jones*, 147 N. Y. 59.

In *Chiles v. Drake*, 2 Met. (Ky.) 147, it was held that the term *punitive damages*, in a statute allowing a civil action by the personal representative of one killed by the wilful neglect of another, did not exclude the idea of damages by way of compensation.

NOTICE, *post*; RECORDING ACTS. And see ASSIGNS, vol. 3, p. 156; PURCHASE MONEY, *post*.) — A purchase, in the ordinary and popular acceptation of the term, is the transmission of property from one person to another by their voluntary act and agreement, founded on a valuable consideration.¹ In its

1. **Popular Sense.** — 4 Kent's Com. 441; Martin v. Strachan, 1 Wils. C. Pl. 2, 66; *Ex p.* Hillman, 10 Ch. D. 622; Kohl v. U. S., 91 U. S. 367; Enterprise v. Smith, 62 Kan. 815; Downing v. Marshall, 23 N. Y. 389; Fullenwider v. Roberts, 4 Dev. & B. L. (20 N. Car.) 283; Maydwell v. Maydwell, 9 Heisk. (Tenn.) 577; Norfolk, etc., R. Co. v. Prindle, 82 Va. 129.

The word *purchase* applies only to such grants of real estate as are obtained for money or some other valuable consideration. Ten Eyck v. Witbeck, 135 N. Y. 44.

A statute provided that it should be lawful for any trade union registered under the act to *purchase* or take upon lease any land not exceeding one acre. It was held that the word *purchase* was used in its ordinary sense of "buy for money," and not in its technical sense of "acquire otherwise than by descent or escheat." *In re* Amos, (1891) 3 Ch. 159.

Consideration. — In this popular sense the term has been held to import a consideration. Second Ward Sav. Bank v. Huron, 80 Fed. Rep. 660; Varwig v. Cleveland, etc., R. Co., 54 Ohio St. 455; and see the cases cited throughout this note.

But that where used technically the term does not import a consideration, see Hastings v. Kellogg, (Tex. Civ. App. 1896) 36 S. W. Rep. 824; Roberts v. Shroyer, 68 Ind. 68; and the cases in the succeeding note.

Bona Fide Purchaser. — In Cummings v. Coleman, 7 Rich. Eq. (S. Car.) 509, 62 Am. Dec. 402, it was held that the term *purchaser*, in a statute making parol gifts void as to creditors, *purchasers*, and mortgagees, without sufficient change of possession, meant a *purchaser* for money or other valuable consideration.

Declaration — Payment of the Price. — A declaration alleged that the plaintiff bargained with the defendants to buy of them certain pieces of land; that the said land was described in a deed from the defendants to the plaintiff, and that the plaintiff *purchased* of the defendants the land described in the said deed. It was held, on motion in arrest, that the presumption was that these allegations were proved on the trial, and that the word *purchase*, as used in the declaration, implied a payment of the price. Curtis v. Burdick, 48 Vt. 166.

Dower. — A New York statute of March 26, 1802, enacted that "all *purchases* of land made or to be made by any alien or aliens who have come to this state and become inhabitants thereof shall be deemed valid to vest the estates to them granted," etc. And a later statute (April 8, 1808) enacted that all persons authorized by it or by the statute first cited to acquire real estate by *purchase* might also take and acquire by devise or descent. In Priest v. Cummings, 20 Wend. (N. Y.) 356, Verplank, Senator, said: "It seems to me evident that the manner in which the word *purchase* is used in the Act of 1802 shows that it is not used in its peculiar real-estate sense,

but in its ordinary and habitual one. 'All *purchases* of land made' can only mean all lands bought. This use of the word is not colloquial or vulgar (as it has been called by Jacobs and other compilers), but may be found in the written opinions of Hardwicke and Kent, and might well be used in legislative enactments." Accordingly it was held that title by dower does not come within the meaning of the phrase "*purchases* of land," as used in the statute, and that an alien could not hold lands thus acquired. And see the same opinion for authorities in support of the view that title by dower does not come within the technical meaning of the word *purchase*.

Homestead. — A homestead statute provided that the homestead exemption should not apply if the debt or liability in suit existed prior to the *purchase* of the land. In construing this statute in Moseley v. Bevins, 91 Ky. 261, the court said: "The word [*purchase*] was intended to be understood and applied in the sense of acquisition of a homestead by fully paying for it." See also Morehead v. Morehead, (Ky. 1894) 25 S. W. Rep. 750.

Indian Lands. — A Wisconsin statute (now Stat. Wis. 1898, § 1038, subdiv. 7) exempts from taxation "the property of Indians who are not citizens, except lands held by them by *purchase*." In Farrington v. Wilson, 29 Wis. 383, the plaintiff claimed through a half-breed who had received a patent of the lands from the United States. The defendant set up a tax deed. It was held that the word *purchase*, as used in the exemption, is to be taken to mean an acquisition of land for a valuable consideration; and that land patented by the United States to an Indian was not held by *purchase* within the meaning of the provision.

Purchaser Distinguished from Bona Fide Purchaser. — See Hastings v. Kellogg, (Tex. Civ. App. 1896) 36 S. W. Rep. 824.

Purchase by Discount. — See Nicholson v. National Bank, 92 Ky. 255, and the title NATIONAL BANKS, vol. 21, p. 319. And see DISCOUNT, vol. 9, p. 468.

Distinguished from Barter. — To *purchase* means "to buy; to obtain property by paying an equivalent in money; it differs from barter only in the circumstance that in *purchasing* the price or equivalent given or secured is money." Webst. Dict., followed in Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 572.

Factor. — In Armstrong v. Walker, 9 Lea (Tenn.) 156, it was held that a factor who sold cotton for a tenant and appropriated the proceeds to a debt due to him, by consent or direction of the tenant, and with knowledge that his debtor was a tenant, was not liable to the landlord who had a lien for rent upon the cotton. The factor is not a *purchaser*, but a seller, and was not liable to the landlord under the statute as a *purchaser*.

Subpurchaser. — An Alabama statute provided that after confirmation of a sale made under authority of the Probate Court, "when the *purchaser* has paid the whole of the *purchase*-

strictly technical sense, "purchase" is the acquisition of land by any lawful act of the party in contradistinction to acquisition by operation of law, and it includes title by deed, title by matter of record, and title by devise.¹ In other words, the term includes every mode of taking title except by descent or inheritance.²

money, on his application, or that of his executor or administrator, the court must order a conveyance to be made to such *purchaser*." It was held that the word *purchaser* must be construed to mean the original vendee or buyer, who acquired by bid, at an authorized sale, an estate in the lands sold, and that it did not include a subpurchaser or one who held under him by transfer, sale, or release. *Anderson v. Bradley*, 66 Ala. 265.

Trust. — A *United States* statute (Rev. Stat. U. S., § 3736) provides that "no land shall be *purchased* on account of the United States, except under a law authorizing such *purchase*." A conveyance of land to trustees to sell as much thereof as might be necessary to raise sufficient money to pay a debt due to the United States was held not to be a *purchase* by the United States within the meaning of the statute. *Neilson v. Lagow*, 12 How. (U. S.) 98.

Retirement of Stock. — Where a building association authorized the *purchase*, so called, but in fact the cancellation and retirement, of such shares of stock as could be had at a premium of twenty per cent. on the amount paid in, it was held that the transaction was not a *purchase* in the correct sense of that term. *Wangerien v. Aspell*, 47 Ohio St. 258.

Consolidation. — In *Continental Trust Co. v. Toledo*, etc., R. Co., 82 Fed. Rep. 652, where a statute authorized certain railroad companies to *purchase* the franchises of other railroad companies, the court said: "Although this act uses the word *purchase*, it plainly contemplates consolidation." See also *Chicago*, etc., R. Co. v. *Ashling*, 56 Ill. App. 327.

Choses in Action. — The acquisition of choses in action for a valuable consideration is a *purchase*. *Norfolk*, etc., R. Co. v. *Prindle*, 82 Va. 129; *Williams v. Lord*, 75 Va. 390.

Purchase and Sale. (See also the title *SALES*.) — In *Coles v. Perry*, 7 Tex. 135, it was said: "The words '*purchase* and *sale*' are correlative and denote a contract in which two individuals agree the one to give to the other a certain thing for a determinate price."

Executory or Executed Contract. — The words "sale and *purchase*" imply an executed sale. *Hessel v. Johnson*, 70 Wis. 539.

In *Stevens Point First Nat. Bank v. Chafee*, 98 Wis. 42, it was held that an executory contract for the sale of land was not a *purchase*.

In *Gilpin v. Davis*, 2 Bibb (Ky.) 416, 5 Am. Dec. 622, it was held that a *purchaser* meant one who had acquired a legal title and not merely one who held a bond for a conveyance.

Real-estate Brokers. (See also the title *REAL-ESTATE BROKERS*, *post*.) — In *Mattingly v. Pennie*, 105 Cal. 519, it was said: "The readiness and willingness of a person to *purchase* the property can be shown only by an offer on his part to *purchase*; and unless he has actually entered into a contract binding him to *purchase*, or has offered to the vendor, and not merely to the broker, to enter into such a contract, he cannot be considered a

purchaser." See also *Viaux v. Old South Soc.*, 133 Mass. 1.

Purchase in Sense of Acquiring by Contract or Consent of Another. — See *Montgomery*, etc., R. Co. v. *Branch*, 59 Ala. 152.

Play. — In *Sanger v. French*, 157 N. Y. 213, it was said: "It seems that the word *purchase*, when applied to a play, means that a party has acquired from the author or owner the right to use it, upon payment of a stipulated royalty."

Credit. — A statute empowered married women to acquire personal property by grant or *purchase*. It was held that this *purchase* might be made by any of the ordinary modes known to the law or to the course of business; that it might be made by the payment of cash for the property *purchased*, or the sale might be on the married woman's credit. *Abbey v. Deyo*, 44 Barb. (N. Y.) 374, affirmed 44 N. Y. 343. To the same effect see *Dayton v. Walsh*, 47 Wis. 113, and see generally the title *SEPARATE PROPERTY OF MARRIED WOMEN*.

Power to Purchase — Liquidated Damages. — In *Half v. O'Connor*, 14 Tex. Civ. App. 197, it was held that where an agent was authorized to *purchase* certain property he was empowered to stipulate for liquidated damages in the event of the breach of the contract on the part of the vendee. The court said: "We insist that this stipulation for liquidated damages is a mere term of the *purchase* which was authorized." See also the title *AGENCY*, vol. 1, p. 1020.

Creditors Held Not to Be Purchasers. — See *Hutchinson v. Michigan City First Nat. Bank*, 133 Ind. 271.

Judgment Creditor. — Nor is a judgment creditor a *purchaser*. *Den v. Richman*, 13 N. J. L. 55; *Heister v. Fortner*, 2 Binn. (Pa.) 46; *Kaufelt v. Bower*, 7 S. & R. (Pa.) 83; *Cover v. Black*, 1 Pa. St. 493; *Gillespie v. Van Egmond*, 6 Grant Ch. (U. C.) 533.

In *Brace v. Marlborough*, 2 P. Wms. 491, the master of the rolls said: "One cannot call a judgment, etc., creditor a *purchaser*."

1. Technical Sense. — 4 Kent's Com. 441; *Martin v. Strachan*, 1 Wils. C. Pl. 2, 66; *Purcell v. Smidt*, 21 Iowa 546; *Bennett v. Hibbert*, 88 Iowa 154; *Burt v. Merchants' Ins. Co.*, 106 Mass. 364; *Daly v. Beer*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 895; *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 577.

Purchase in Sense of Acquisition — Homestead Statute. — In *In re Duerson*, 13 Nat. Bankr. Reg. 188, 7 Fed. Cas. No. 4,117, it was said: "The statute disallows the exemption of a homestead against debts contracted before the *purchase* of the land or the erection of the improvements thereon. I think the word *purchase*, as used in the context, is synonymous with the word 'acquisition.' In this case the land was not *purchased*, but acquired by descent."

2. Every Mode of Taking Title Except by Descent or Inheritance. — 2 Black. Com. 241.

California. — *Greer v. Blanchard*, 40 Cal. 194.

Methods of Acquiring Title by Purchase. — There are six ways of acquiring a title by purchase, namely: by deed; by devise; by execution; by prescription; by possession or occupancy; by escheat.¹ There is yet another sense in which

Georgia. — *O'Byrne v. Feeley*, 61 Ga. 82.

Indiana. — *Roberts v. Shroyer*, 68 Ind. 68; *Falley v. Gribbling*, 128 Ind. 115; *Allen v. Bland*, 134 Ind. 78.

Iowa. — *Porter v. Greene*, 4 Iowa 575; *In re Gill*, 79 Iowa 296.

Nevada. — *State v. Glenn*, 18 Nev. 47.

New Jersey. — *Spielmann v. Kliest*, 36 N. J. Eq. 199.

New York. — *Watson v. Donnelly*, 28 Barb. (N. Y.) 658; *Rogers v. Rogers*, 3 Wend. (N. Y.) 508; *Stamm v. Bostwick*, 40 Hun (N. Y.) 35, *affirmed* 122 N. Y. 48; *McCauley v. Palmer*, 40 Hun (N. Y.) 38; *Marsden v. Cornell*, 62 N. Y. 220; *Hall v. Hall*, 81 N. Y. 134; *Strough v. Wilder*, 119 N. Y. 535.

Virginia. — *Norfolk, etc., R. Co. v. Prindle*, 82 Va. 129.

"Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by way of bargain and sale for money or some other valuable consideration; but this falls far short of the legal idea of *purchase*." 2 Black. Com. 241, *quoted in* *Grant v. Bennett*, 96 Ill. 535, *per* Dickey, C. J., *dissenting*.

Purchase or Otherwise. — A provision in the charter of a corporation enabled it to take land "by direct *purchase* or otherwise." In construing this charter in *Downing v. Marshall*, 23 N. Y. 388, the court said: "When the legislature, in granting this charter, said that real estate might be acquired by *purchase* or otherwise, I see no reason to doubt that all the modes known to the law were intended."

Proceeds of Property Obtained by Descent. — In *Orr v. White*, 106 Ind. 341, it was held that where real estate inherited from an ancestor is sold, and with the proceeds and accumulated interest other property is *purchased*, the latter is acquired by *purchase* and not by descent. *Compare* *Gregory v. Van Voorst*, 85 Ind. 108.

Leasehold. — In *Hackett v. Emporium School Dist.*, 150 Pa. St. 226, it was said: "A lessee is a *purchaser* as truly as he who becomes grantee in fee. The difference is in the estate acquired." And in that case it was held that an authority to *purchase* ground for a school building authorized the leasing of ground for such a purpose.

And that the term *purchase* is appropriate to a lease, see *Smoot v. Lecatt*, 1 Stew. (Ala.) 598; *Spielmann v. Kliest*, 36 N. J. Eq. 199.

Voluntary Conveyance to Son. — In *Clay v. Wyatt*, 6 J. J. Marsh. (Ky.) 583, the plaintiffs brought ejectment against the defendant for various tracts of land in his possession which had been deeded to the plaintiffs by their father in consideration of one hundred dollars and natural love and affection. The only question presented to the court was whether the deed from the plaintiffs' father was void under the *Kentucky Act of 1824*, "to revive and amend the law relative to champerty and maintenance, and more effectually to secure the *bona fide* occupants of land." It was contended on the part of the plaintiffs that the legislature used the word *purchase* in its

popular and not in its technical sense. The court, *per* Underwood, J., said: "The policy of the act requires that we should give to the word *purchase*, as used in the act, its technical meaning. Besides, the exception in favor of devisees shows that the legislature so intended. That exception excludes all other exceptions, and hence a voluntary conveyance to a son cannot be admitted as an exception."

Widow. — In *McMakin v. Michaels*, 23 Ind. 462, it was held that where a widow *purchased* land of which her husband died seized, at a commissioner's sale, under proceedings instituted for partition, she stands in the same condition with respect to the sale as a stranger, and takes the land by *purchase* and not by descent.

Foreclosure of Mortgage — Quitclaim. — In *Cornett v. Hough*, 136 Ind. 389, it was held, where a widow obtained land by the foreclosure of a mortgage which came to her by will from her husband or by a quitclaim deed in satisfaction of such mortgage, that she obtained the land by *purchase* and not by gift, devise, or descent.

Holder of Quitclaim Deed. — A *Nebraska* statute defined the term *purchaser* as embracing "every person to whom any real estate or interest therein shall be conveyed for a valuable consideration." It was held that a grantee under a quitclaim deed was a *purchaser*. *Schott v. Dosh*, 49 Neb. 195.

1. Methods of Acquiring Title by Purchase. — *Bouv. L. Dict.* And see *Spielmann v. Kliest*, 36 N. J. Eq. 203.

Sheriff's Sale. — *Purchaser* held to include a *purchaser* at a sheriff's sale, see *Burt v. Merchants' Ins. Co.*, 106 Mass. 364; *Draper v. Bryson*, 26 Mo. 108; *Kauffelt v. Bower*, 7 S. & R. (Pa.) 82.

Devise. — In its broad and technical sense the term *purchase* includes a devise. *Bennett v. Hibbett*, 88 Iowa 156; *Stamm v. Bostwick*, 40 Hun (N. Y.) 35, *affirmed* 122 N. Y. 48. These cases arose upon the construction of a statute forbidding aliens to acquire land by *purchase*. See also *Allen v. Bland*, 134 Ind. 78.

But where an act incorporating a corporation authorized it to take by *purchase*, it was held that the term *purchase* should be taken in its popular sense, and not in its broadest legal sense so as to include a devise. *McCartee v. Orphan Asylum Soc.*, 9 Cow. (N. Y.) 507, 18 Am. Dec. 516. See the dissenting opinions in this case for an exhaustive citation of authorities in support of the technical meaning of the word *purchase*.

A statute provided that it should be lawful for any widow entitled to dower in any lands of which her husband died seized, or for any heir or heirs, or guardian of any minor child or children entitled to any estate in the said lands, or for any *purchaser* thereof, to apply to the Orphans' Court for the appointment of commissioners to assign dower. In construing this provision the court said: "The omission of devisees in this act shows, as we

the word is used, viz., procuring; suing out; as the purchase of a writ of error.¹

PURCHASE MONEY. (See also the titles HOMESTEAD, vol. 15, p. 516; PURCHASE-MONEY MORTGAGES, *post*; VENDOR AND PURCHASER. And see PURCHASE — PURCHASER, *ante*.) — Purchase money is the money agreed to be paid by the purchaser for property;² the consideration money paid or agreed to be paid to the vendor by the vendee of realty.³

must infer, that the legislature were aware of the embarrassments which would be produced by extending that act to devisees. They are many, and would be very perplexing, and in view of them I cannot suppose that the word *purchaser*, in the late act, was intended to include devisees." Matter of Hopper, 6 N. J. Eq. 327. See also Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co., 4 Gill & J. (Md.) 153.

Rev. Stat. Iowa (1860), § 2488, provided that aliens having certain qualifications should have the right to acquire "real estate by descent or by *purchase*." The next section conferred upon every alien the right to acquire real estate by devise or descent, but not by *purchase*. In view of these provisions and that in the following section providing for more limited rights for aliens acquiring real estate by *purchase*, and in order to give every section of the statute some practical effect, it was held, in Purcell v. Smidt, 21 Iowa 546, that the word *purchase*, as used in section 2488, must receive its "more limited or common signification, to wit, that of acquisition by bargain and sale for a consideration."

Eminent Domain. — In Kohl v. U. S., 91 U. S. 374, the meaning of the word *purchase*, as used in a statute providing for the condemnation of property, was considered. The court said: "It is true, the words 'to *purchase*' might be construed as including the power to acquire by condemnation; for, technically, *purchase* includes all modes of acquisition other than that of descent. But generally, in statutes as in common use, the word is employed in a sense not technical, only as meaning acquisition by contract between the parties

without governmental interference." To the same effect see Enterprise v. Smith, 62 Kan. 815.

In Burt v. Merchants' Ins. Co., 106 Mass. 364, it was said: "And it includes titles obtained by exercise of the right of eminent domain. If a statute authorizes the appraisal by a jury, and vests the title upon payment or tender of the amount of the verdict, with costs, the property is held under a statute conveyance, and the title is, in legal phrase, by *purchase*."

1. And. L. Dict.

2. **Purchase-money.** — Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 568.

Purchase money is defined as meaning "money paid for land or the debt created by the purchase." Austin v. Underwood, 37 Ill. 439, *quoted* in Kneen v. Halin, (Idaho 1899) 59 Pac. Rep. 14.

Purchase money means money or anything that is money's worth. Artcher v. Zeh, 5 Hill (N. Y.) 205, *quoted* in Brabin v. Hyde, 32 N. Y. 523.

Exemptions from Execution. — See the title EXEMPTIONS (FROM EXECUTION), vol. 12, p. 174 *et seq.*

Homestead Exemptions. — See the title HOMESTEAD, vol. 15, p. 626.

3. **Purchase Money.** — And. L. Dict., *citing* Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Heusler v. Nickum, 38 Md. 270; Hoyt v. Van Alstyne, 15 Barb. (N. Y.) 568.

Property or Labor. — "The term *purchase money* means the consideration paid, and may be property or labor performed." Harlan v. Harlan, 102 Iowa 703, *citing* Devin v. Himer, 29 Iowa 297; Stem v. Nysonger, 69 Iowa 512.

PURCHASE-MONEY MORTGAGES.

BY HERBERT WHARTON BEALL.

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CROSS-REFERENCES.

See the title MORTGAGES, vol. 20, p. 897, and the references there given.

I. DEFINITION AND SCOPE OF TITLE. — A purchase-money mortgage is one given to secure unpaid purchase money. While in most respects it is like other mortgages, it differs from them in a few particulars, and it is only such distinctive characteristics that are discussed in this title.¹ It is not necessary that a purchase-money mortgage should show upon its face that it was given to secure purchase money if proof *aliter* that it was so given or understood by the parties can be adduced.² A false recital in a mortgage that it was given for purchase money does not estop the assignee of a judgment entered on the same day from proving that it was not a purchase-money mortgage.³

Purchase-money Chattel Mortgages. — While a purchase-money mortgage is ordinarily a mortgage of real estate, the term has occasionally been extended to chattel mortgages.⁴

Mortgage to Lender of Purchase Money. — As a general rule, a mortgage given to secure purchase money is none the less a purchase-money mortgage because executed to one who lends the purchase money rather than to the vendor of the property.⁵ This rule, however, is not of universal acceptance. In

1. **Definition and Scope of Title.** — For a discussion of mortgages generally, see the title *MORTGAGES*, vol. 20, p. 888. See also *PURCHASE MONEY*, *ante*.

2. **Character Need Not Appear on Face of Instrument.** — *City Nat. Bank's Appeal*, 91 Pa. St. 163; *Albright v. Lafayette Bldg.*, etc., Assoc., 102 Pa. St. 411; *Commonwealth Title Ins.*, etc., Co. v. *Ellis*, 192 Pa. St. 321, 73 Am. St. Rep. 816.

Where B, a vendee, assigns his contract to C, and the vendor makes title to C, taking from him a mortgage for the whole of the purchase money due from B, and at the same time another mortgage, recited to be for purchase money, which he assigns to B, the latter, as between C and the vendor, is not a purchase-money mortgage. *Dungan v. American L. Ins.*, etc., Co., 52 Pa. St. 253.

3. **False Recital as to Character.** — *Jones v. Tainter*, 15 Minn. 512; *Hendrickson's Appeal*, 24 Pa. St. 363.

4. **Chattel Mortgages.** — *H. A. Pitt's Sons Mfg. Co. v. Poor*, 7 Ill. App. 24; *Blatchford v. Boyden*, 122 Ill. 657; *Barker v. Kelderhouse*, 8 Minn. 207.

5. **Mortgage to Lender of Purchase Money** — *Arkansas*. — *Blevins v. Rogers*, 32 Ark. 258.

California. — *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322.

Illinois. — *Curtis v. Root*, 20 Ill. 54; *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571.

Iowa. — *Kaiser v. Lembeck*, 55 Iowa 244; *Laidley v. Aikin*, 80 Iowa 112, 20 Am. St. Rep. 408.

Kansas. — *Plumb v. Bay*, 18 Kan. 415; *Nichols v. Overacker*, 16 Kan. 54.

Minnesota. — *Jones v. Tainter*, 15 Minn. 512;

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Pennsylvania it is held that a purchase-money mortgage can be given to another than the vendor only by the vendor's agreement and authority, for the reason that only the vendor and those representing him have any title to the purchase money.¹ However, in this state the vendee's mortgagee is entitled to the proceeds of a sale of mortgaged premises in preference to lien creditors whose contracts were made on the security of an equitable interest only.² In *Maryland* and *Ohio* a contrary rule is also adopted, but the decisions in those states are based upon statutes which limit the preference of purchase-money mortgages to those executed to the vendor.³

Mortgage Substituted for Purchase-money Mortgage. — Where one indebted by bond and mortgage for purchase money borrows money and pays the debt, a mortgage to the lender is not a substitute for the first or discharged mortgage, and does not rank as a purchase-money mortgage.⁴

II. PRIORITY OVER OTHER LIENS — 1. In General. — The distinctive and important characteristic of a purchase-money mortgage is the precedence allowed to it, both at common law and by statute, over other mortgages, judgments, mechanics' liens, and other claims to which ordinary mortgages would usually be postponed. In the *United States* the priority of mortgages is determined by the recording acts, whose effect is to give precedence to the instrument first recorded. To this rule purchase-money mortgages constitute, to a certain extent, an exception, as they do also to the general rule that gives precedence to judgments, mechanics' liens, and homestead and dower rights.⁵

2. Over Other Mortgages. — A purchase-money mortgage executed at the same time with the deed of purchase takes precedence over any other mortgage by the same mortgagor, and the second mortgagee cannot, by having his mortgage recorded first, acquire a priority over the purchase-money mortgage.⁶

Laird v. Moonan, 32 Minn. 358; *Jacoby v. Crowe*, 36 Minn. 93; *Wheadon v. Mead*, 72 Minn. 372; *Strickland v. Minnesota Type-Foundry Co.*, 77 Minn. 210.

New Jersey. — *New Jersey Bldg., etc., Co. v. Bachelor*, 54 N. J. Eq. 600; *Bradley v. Byran*, 43 N. J. Eq. 396.

New York. — *Cunningham v. Knight*, 1 Barb. (N. Y.) 399; *Haywood v. Nooney*, 3 Barb. (N. Y.) 643; *Kittle v. Van Dyck*, 1 Sandf. Ch. (N. Y.) 76; *Jackson v. Austin*, 15 Johns. (N. Y.) 477.

North Carolina. — *Moring v. Dickerson*, 85 N. Car. 466.

Wisconsin. — *Jones v. Parker*, 51 Wis. 218.

When a purchaser promises to execute a mortgage to the lender of the purchase money, but subsequently refuses to do so, the loan constitutes a lien in favor of the lender against which the borrower cannot assert a homestead exemption. *Magee v. Magee*, 51 Ill. 500, 99 Am. Dec. 571. See generally the title HOMESTEAD, vol. 15, pp. 617 *et seq.*, 623 *et seq.*

1. Pennsylvania Rule. — *Nottes's Appeal*, 45 Pa. St. 361; *Albright v. Lafayette Bldg., etc., Assoc.*, 102 Pa. St. 411; *Lynch v. Dearth*, 2 P. & W. (Pa.) 101.

2. Mortgage of Equitable Interest. — *Weldon v. Gibbon*, 2 Phila. (Pa.) 176, 13 Leg. Int. (Pa.) 340.

3. Maryland and Ohio. — *Heuisler v. Nickum*, 38 Md. 270; *Stansell v. Roberts*, 13 Ohio 148, 42 Am. Dec. 193.

4. Calmes v. McCracken, 8 S. Car. 87.

5. See the titles DOWER, vol. 10, p. 137 *et seq.*; HOMESTEAD, vol. 15, pp. 617 *et seq.*, 623 *et*

seq.; JUDGMENTS AND DECREES, vol. 17, p. 798; MECHANICS' LIENS, vol. 20, p. 484.

6. Priority over Other Mortgages — Alabama. — *Center v. Planters', etc., Bank*, 22 Ala. 743; *Bell v. Tyson*, 74 Ala. 353.

Kansas. — *Ogden v. Walters*, 12 Kan. 282.

Massachusetts. — *Clark v. Brown*, 3 Allen (Mass.) 509.

Michigan. — *Heffron v. Flanigan*, 37 Mich. 274.

Minnesota. — *Bolles v. Carli*, 12 Minn. 113.

Missouri. — *Turk v. Funk*, 68 Mo. 18, 30

Am. Rep. 771.

New Jersey. — *Brasted v. Sutton*, 29 N. J. Eq. 513; *Boyd v. Mundorf*, 30 N. J. Eq. 545; *Semon v. Terhune*, 40 N. J. Eq. 364.

New York. — *Ellis v. Horrman*, 90 N. Y. 466; *Boies v. Gardner*, 53 Hun (N. Y.) 236.

Pennsylvania. — *City Nat. Bank's Appeal*, 91 Pa. St. 163; *Albright v. Lafayette Bldg., etc., Assoc.*, 102 Pa. St. 411; *Jeanes v. Hizer*, 186 Pa. St. 523; *LaFayette Bldg., etc., Assoc. v. Erb*, (Pa. 1887) 8 Atl. Rep. 62.

Tennessee. — *Cox v. Carson*, 3 Head (Tenn.) 607.

But as Between a Mortgage to the Vendor and One to a Lender of a part of the purchase money, it has been held that no priority can be given to either. *Higgins v. Dennis*, 104 Iowa 605. Nor does the fact that two such mortgages become due at different times give priority to that first maturing. *Collerd v. Huson*, 34 N. J. Eq. 38.

Where two mortgages were given at the same time for purchase money, and the mortgagor attempted to effect a secret intention of

Title of Purchaser at Foreclosure Sale. — As a consequence, a purchaser at a foreclosure sale under a purchase-money mortgage takes title free from the lien of another mortgage given to secure borrowed purchase money.¹

Mortgage by Mortgagor with Bond for Title. — Precedence is likewise given to a purchase-money mortgage executed after a mortgage from a person having no other title than that implied in a bond for title from his vendor.²

Mortgage to Cover After-acquired Property. — A railroad mortgage given to cover after-acquired property is subordinate to a junior mortgage given to secure purchase money, whether such junior mortgage is or is not registered.³

Mortgage for Roadbed Prior to One to Secure Bonds. — Likewise, a mortgage given by a railroad corporation for land purchased for its roadbed takes precedence over a prior general mortgage to trustees to secure corporate bonds.⁴

Rights of Assignee of Junior Mortgage. — A mortgage made by the purchase-money mortgagor subsequently to an unrecorded purchase-money mortgage does not take precedence of the latter although transferred to one who is ignorant of the existence of the purchase-money mortgage.⁵

3. Over Prior Judgments. — A mortgage given for the purchase money of land and executed at the same time when the deed is executed to the mortgagor takes precedence of a prior judgment against the mortgagor.⁶

Knowledge of Existence of Mortgage. — In at least one state the priority of a purchase-money mortgage executed before but not recorded until after the entry of a judgment against the mortgagor depends upon the actual knowledge of such mortgage on the part of the judgment creditor before the debt was contracted for which the judgment was obtained.⁷

In Kansas the fact that a mortgage is given for purchase money does not place it outside the provisions of the registry act or give to it a priority to which it would not be entitled under such act.⁸

A Deed to Secure Borrowed Money Paid for Land is but a parol mortgage, and as such is inferior to a judgment against the purchaser, and a sheriff's sale under the judgment will pass a clear title. The money having been lent to the purchaser, any surplus left after satisfying the judgment belongs to him, and not to the lender.⁹

giving priority to one of them by delivering it first to be recorded, it was held that such delivery would not have the desired effect, and that the two should be paid *pro rata*. *Koevenig v. Schmitz*, 71 Iowa 175.

But as between two purchase-money mortgages, priority is sometimes given to that one first placed on record. *Corning v. Murray*, 3 Barb. (N. Y.) 652.

1. Title of Purchaser at Foreclosure Sale. — *Jacoby v. Crowe*, 36 Minn. 93.

2. Mortgage by Mortgagor with Bond for Title. — *Alderson v. Ames*, 6 Md. 52; *Morris v. Pate*, 31 Mo. 315.

3. U. S. v. New Orleans, etc., R. Co., 12 Wall. (U. S.) 362.

4. Hand v. Savannah, etc., R. Co., 12 S. Car. 314.

5. Rights of Assignee of Junior Mortgage. — *Flynt v. Arnold*, 2 Met. (Mass.) 619.

But where one purchase-money mortgage was surrendered and marked satisfied, and one taken in place of it was, through the neglect of the mortgagee's agent, not placed on record, it was held that a second mortgage of the same mortgagor, duly recorded, although given without consideration, took priority in the hands of a *bona fide* purchaser for value and without notice over the unrecorded purchase-money mortgage, the purchase-money

mortgagee being estopped by the satisfaction of record of the first mortgage. *Ramsey v. Jones*, 41 Ohio St. 685.

Purchase-money Mortgages and Recording Acts. — The relation of purchase-money mortgages to the recording acts of the various states will be discussed elsewhere. See the title RECORDING ACTS.

6. Over Prior Judgments — Illinois. — *Curtis v. Root*, 20 Ill. 53; *Fitts v. Davis*, 42 Ill. 391; *Christie v. Hale*, 46 Ill. 117; *Roane v. Baker*, 120 Ill. 308.

Indiana. — *Houston v. Houston*, 67 Ind. 276.

Iowa. — *Kaiser v. Lembeck*, 75 Iowa 244; *Laidley v. Aikin*, 80 Iowa 112, 20 Am. St. Rep. 408.

Kansas. — *Plumb v. Bay*, 18 Kan. 415.

Minnesota. — *Banning v. Edes*, 6 Minn. 402.

New York. — *Spring v. Short*, 90 N. Y. 538; *Ray v. Adams*, 4 Hun (N. Y.) 332; *Jackson v. Austin*, 15 Johns. (N. Y.) 477.

Pennsylvania. — *Devor's Appeal*, 13 Pa. St. 412; *Cake's Appeal*, 23 Pa. St. 186, 62 Am. Dec. 328.

Virginia. — *Summers v. Darne*, 31 Gratt. (Va.) 791.

7. Britton's Appeal, 45 Pa. St. 172; *Nice's Appeal*, 54 Pa. St. 200.

8. Jackson v. Reid, 30 Kan. 10.

9. Fredericks v. Corcoran, 100 Pa. St. 413.

Mortgage in Part for Purchase Money. — A mortgage given partly to secure purchase money and partly as security for a prior debt may be superior to a prior judgment as to the former portion and inferior as to the latter.¹

Statute Strictly Construed. — A statute giving priority to purchase-money mortgages over prior judgments does not include by implication other liens than judgments.²

Mortgage for Borrowed Money. — Where the money paid for land is a simple loan and there is no obligation on the part of the mortgagee to pay the debt, and no arrangement by which the lender should be subrogated to the rights of the vendor, a mortgage given by the vendee to the lender to secure the loan does not rank superior to a judgment rendered against the vendee prior to the purchase.³

Mortgage by One Codefendant to Another. — When property is bound by a judgment against two codefendants, and one codefendant sells to the other, taking back a purchase-money mortgage, such mortgage will not rank prior to the judgment. The property is bound by the judgment in the hands of the purchasing codefendant after as well as before such sale.⁴

4. Over Mechanics' Liens. — A purchase-money mortgage given by a vendee to a vendor simultaneously with the delivery of the deed will take precedence of a mechanics' lien claim for work done for the vendee before he acquired legal title.⁵

Claim to Insurance Money. — Likewise, a purchase-money mortgage on property destroyed will give a claim to insurance money prior to that of a mechanics' lien.⁶

5. Over Homestead Exemptions. — The subordination of homestead exemptions to purchase-money mortgages is fully discussed elsewhere.⁷

6. Over Dower. — The superiority of purchase-money mortgages to the widow's dower is discussed in another title.⁸

7. Priority by Agreement. — If Two Purchase-money Mortgages Be Taken for the same property, one of them may be assigned under an agreement that it shall take precedence over the other, and to such agreement effect will be given by the courts.⁹

A New Mortgage May, by Mutual Agreement, Be Substituted for the purchase-money mortgage, in which case equity will treat the substituted mortgage as continuing to the mortgagee all the rights enjoyed under the original mortgage.¹⁰

But the Intention to Waive the Lien Must Be Clearly Evident, and will not be pre-

1. *Ray v. Adams*, 4 Hun (N. Y.) 332.

2. *Houston v. Houston*, 67 Ind. 276.

3. *Cohn v. Hoffman*, 50 Ark. 108.

4. **Mortgage Between Codefendants.** — *Simmons v. Vandegrift*, 1 N. J. Eq. 55, the court saying: "It would be strange indeed if a debtor by a simple conveyance of his real estate and taking a mortgage for the consideration money should be able to gain a priority over a prior *bona fide* judgment creditor and utterly destroy his lien."

5. **Over Mechanics' Liens.** — See the title **MECHANICS' LIENS**, vol. 20, p. 484; and see *Guy v. Carriere*, 5 Cal. 511; *Huber v. Diebold*, 25 N. J. Eq. 170; *Paul v. Hoeft*, 28 N. J. Eq. 11; *Albright v. Lafayette Bldg., etc., Assoc.*, 102 Pa. St. 411.

In *Georgia*, under the mechanics' lien law (now 2 Code 1895, §§ 2801, 2804), such liens have precedence over a purchase-money mortgage. The act gives priority to bonds for titles, but not to purchase-money mortgages. *Tanner v. Bell*, 61 Ga. 584.

6. **Claim to Insurance Money.** — *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250.

7. See the title **HOMESTEAD**, vol. 15, p. 626 *et seq.*; and see *Allen v. Hawley*, 66 Ill. 164; *Amphlett v. Hibbard*, 29 Mich. 298; *Smith v. Lackor*, 23 Minn. 454.

8. **Over Dower.** — See the title **DOWER**, vol. 10, p. 137 *et seq.*; also the following cases: *Wilson v. Peebles*, 61 Ga. 218; *May v. Fletcher*, 40 Ind. 575; *Baker v. McCune*, 82 Ind. 339; *Butler v. Thornburgh*, 141 Ind. 152, *affirming* 131 Ind. 237; *Bunting v. Jones*, 78 N. Car. 242; *Childs v. Alexander*, 22 S. Car. 169.

9. **Priority by Agreement.** — *Houston v. Houston*, 67 Ind. 276; *Mutual Loan, etc., Assoc. v. Elwell*, 38 N. J. Eq. 18; *Lovett v. Demarest*, 5 N. J. Eq. 113; *Stafford v. Van Rensselaer*, 9 Cow. (N. Y.) 316; *Barber v. Cary*, 11 Barb. (N. Y.) 549; *Lane v. Nickerson*, 17 Hun (N. Y.) 148.

10. **Substitute of New Mortgage.** — *Carr v. Caldwell*, 10 Cal. 380, 70 Am. Dec. 740; *Kimble v. Esworthy*, 6 Ill. App. 517; *Linville v. Savage*, 58 Mo. 248; *Jones v. Parker*, 51 Wis. 218.

sumed when the second mortgage is drawn merely for the purpose of giving a more accurate description of the property mortgaged.¹

Evidence of Waiver. — It seems that in some jurisdictions the waiver must be incorporated in the mortgage.²

III. DOCTRINE OF INSTANTANEOUS SEIZIN. — The priority of the purchase-money mortgage to other liens created before the execution of the mortgage rests upon the doctrine that the deed from the vendor and the mortgage by the vendee are parts of one single and entire transaction. Because the seizin of the vendee is thus instantaneous, the title to the land does not for a single moment rest in him, but merely passes through him and vests in the mortgagee without stopping beneficially in the purchaser, and during such instantaneous passage the prior lien cannot attach to the title.³

Recital as to Date. — A recital in the mortgage as to the date of delivery is not conclusive, but parol evidence is admissible to show that deed and mortgage were delivered on the same day.⁴

Inference from Time of Making Mortgage. — The fact that the purchaser mortgaged the land on the same day upon which he received the conveyance is not alone enough to show that the two acts were parts of one and the same transaction, making the seizin instantaneous.⁵

Meaning of Doctrine. — Although the doctrine has been at times laid down in somewhat narrow terms, it has received in practice quite a liberal interpretation. Time is less an element than intention. It has been remarked that it is really impossible to execute the two instruments contemporaneously, and that all that is necessary is that the two transactions shall be intended to operate as parts of a single act.⁶

Vendor's Lien as Basis of Rule. — The rule has also been based upon other principles. It has been argued that the vendor's lien for unpaid purchase money would be good against prior creditors of the vendee, and that the taking of a mortgage subsequently to the conveyance should not place the vendor in a worse condition than he would be in if he had relied upon his implied lien.⁷

IV. EFFECT OF PURCHASE-MONEY MORTGAGE ON VENDOR'S LIEN. — A vendor

1. *Walters v. Walters*, 73 Ind. 425.

2. **Evidence of Waiver.** — *Foxwell v. Slaughter*, 5 Del. Ch. 396.

3. **Doctrine of Instantaneous Seizin** — *California*. — *Lassen v. Vance*, 8 Cal. 271, 68 Am. Dec. 322.

Illinois. — *Curtis v. Root*, 20 Ill. 53; *Christie v. Hale*, 46 Ill. 117; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *H. A. Pitt's Sons Mfg. Co. v. Poor*, 7 Ill. App. 24.

Iowa. — *Laidley v. Aikin*, 60 Iowa 112, 20 Am. St. Rep. 408.

Kansas. — *Nichols v. Overacker*, 16 Kan. 54.

Maine. — *Moore v. Rollins*, 45 Me. 493.

Massachusetts. — *New England Jewelry Co. v. Merriam*, 2 Allen (Mass.) 390; *King v. Stetson*, 11 Allen (Mass.) 407; *Flynt v. Arnold*, 2 Met. (Mass.) 619.

New Jersey. — *Clark v. Butler*, 32 N. J. Eq. 564; *New Jersey Bldg., etc., Co. v. Bachelor*, 54 N. J. Eq. 600.

North Carolina. — *Moring v. Dickerson*, 85 N. Car. 466.

Pennsylvania. — *Albright v. Lafayette Bldg., etc., Assoc.*, 102 Pa. St. 411; *Commonwealth Title Ins., etc., Co. v. Ellis*, 192 Pa. St. 321, 73 Am. St. Rep. 816.

Wisconsin. — *Jones v. Parker*, 51 Wis. 218.

A debtor who owned property subject to a mortgage and to a life interest had the life

interest conveyed to him in order to permit him to make another mortgage to secure money borrowed to pay off the first. All these acts were done as parts of one transaction. It was held that the debtor's seizin of the life interest was instantaneous and that an attaching creditor had no claim against it. *Hazleton v. Lesure*, 9 Allen (Mass.) 24.

4. **Recital as to Date.** — *Pascault v. Cochran*, 34 Fed. Rep. 358.

5. **Inference from Time of Making Mortgage.** — *Elgin Lumber Co. v. Langman*, 23 Ill. App. 250; *Smith v. McCarty*, 119 Mass. 519.

6. **Meaning of Doctrine** — *Arkansas*. — *Cohn v. Hoffman*, 50 Ark. 108.

Illinois. — *Roane v. Baker*, 120 Ill. 308.

Massachusetts. — *Stevens v. Stevens*, 10 Allen (Mass.) 146, 87 Am. Dec. 630; *Pendleton v. Pomeroy*, 4 Allen (Mass.) 510.

Minnesota. — *Laird v. Moonan*, 32 Minn. 358.

New Jersey. — *Paul v. Hoeft*, 28 N. J. Eq. 11.

New York. — *Spring v. Short*, 90 N. Y. 538; *South Baptist Soc. v. Clapp*, 18 Barb. (N. Y.) 35; *Ray v. Adams*, 4 Hun (N. Y.) 332.

Pennsylvania. — *Fredericks v. Corcoran*, 100 Pa. St. 413.

Virginia. — *Wheatley v. Calhoun*, 12 Leigh (Va.) 264, 37 Am. Dec. 654.

7. **Vendor's Lien as Basis of Rule.** — *Ray v. Adams*, 4 Hun (N. Y.) 332.

of land does not lose his vendor's lien by taking a purchase-money mortgage,¹ and hence if the mortgage be void the vendor may still rely upon his equitable lien for the purchase money.²

And One Who Advances Purchase Money may not be subrogated to the rights of the vendor when to do so would defeat the latter's equitable lien.³ But a suit to foreclose a purchase-money mortgage and one to enforce a vendor's lien are different proceedings.⁴

V. DEFENSES TO FORECLOSURE. — Purchase-money mortgages are subject to the same defenses, counterclaims, set-offs, etc., as other mortgages. The subject is discussed with sufficient fulness elsewhere.⁵

1. Effect of Purchase-money Mortgage on Vendor's Lien. — *Hannah v. Davis*, 112 Mo. 599; *Neil v. Kinney*, 11 Ohio St. 58; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Boos v. Ewing*, 17 Ohio 500.

2. *Ogle v. Ogle*, 41 Ohio St. 359.

3. Rights of Lender of Purchase Money. — *Brower v. Witmeyer*, 121 Ind. 83.

4. *Hopper v. Parkinson*, 5 Nev. 233.

See further the titles VENDORS AND PURCHASERS; VENDOR'S LIEN.

5. See the titles COVENANTS, vol. 8, p. 217 *et seq.*; FORECLOSURE OF MORTGAGES, vol. 13, p. 776; MORTGAGES, vol. 20, p. 888.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see in this work the following titles: ALTERATION OF INSTRUMENTS, vol. 2, p. 192; ASSIGNMENTS, vol. 2, p. 1081; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, p. 282; BILLS OF LADING,

vol. 4, p. 549; *CHAMPERTY AND MAINTENANCE*, vol. 5, p. 834; *CONDITIONAL SALES*, vol. 6, p. 486; *ESTOPPEL*, vol. 11, pp. 421, 429, 435; *EXECUTIONS*, vol. 11, p. 675; *FRAUD AND DECEIT*, vol. 14, p. 163; *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, pp. 283, 460, 463; *LANDLORD AND TENANT*, vol. 18, pp. 331, 344; *MARITIME LIENS*, vol. 19, p. 1130; *MARSHALING ASSETS*, vol. 19, pp. 1259, 1284 (note); *MORTGAGES*, vol. 20, p. 1050; *NOTICE*, vol. 21, p. 580; *RECORDING ACTS*; *SALES*; *SHERIFF'S SALES*; *STOCK AND STOCKHOLDERS*; *WAREHOUSEMEN*.

I. SCOPE OF TITLE AND METHOD OF TREATMENT. — The object of this title is to give a general treatment of what is known as the doctrine of *bona fide* purchaser. The subject will be considered primarily as a branch of equity jurisprudence, and the discussion will be confined as far as practicable to statements of the principles of equity upon which a purchaser of real property is allowed protection against legal or equitable rights of others prior to his own in point of time, and conversely, of course, of those principles upon which such protection is refused. All matters which from their nature are not of equitable cognizance will be treated here only in so far as necessary to a proper understanding of the topic in hand. Thus, matters involving the construction and effect of the recording or registry acts, although generally these statutes are construed in accordance with the equitable principles applicable to *bona fide* purchasers, will be omitted and relegated to another title where specific treatment of them will be found. Likewise the subject of *bona fide* purchasers of property conveyed by reason of fraud and deceit, and of property conveyed in fraud of creditors or subsequent purchasers, will not be treated here; full discussion of these matters having already appeared elsewhere in this work.¹

II. INTRODUCTORY STATEMENT. — The principle underlying this branch of equity jurisprudence is that in order to deprive a purchaser of any legal estate, right, or advantage, it must appear that his course in obtaining it was unconscientious; and hence, when once a purchaser has established his position as a purchaser for value and without notice of any equitable claim or right affecting the estate, a court of equity can attach no demand upon his conscience, and therefore will not exercise its jurisdiction against him.² And a further reason for the refusal of the court to proceed against him is that he has acquired the legal title; for although the claimant under the prior equity may be rightfully entitled to the relief that he seeks, yet the purchaser, having in all good faith changed his position for the worse in reliance upon the soundness of the title he was purchasing, is equally entitled to the protection of the court, and in such a case the court applies the maxim that "where the equities are equal the law will prevail."³ It has been said of one claiming to be a purchaser for value and without notice that "no party can occupy a higher ground than that in a court of equity; and if he can maintain that position his title is established and his position impregnable."⁴ But the

1. See the table of cross-references, *supra*.

2. **Theory of Protection.** — *Jerrard v. Saunders*, 2 Ves. Jr. 457; *Boone v. Chiles*, 10 Pet. (U. S.) 210; *American Mortg. Co. v. Hopper*, 56 Fed. Rep. 75. And see the cases in the following note.

3. *England*. — *Jerrard v. Saunders*, 2 Ves. Jr. 458; *Pilcher v. Rawlins*, L. R. 7 Ch. 268.

United States. — *Townsend v. Little*, 109 U. S. 511; *German Sav., etc., Soc. v. De Lashmuth*, 67 Fed. Rep. 401.

Alabama. — *Cook v. Parham*, 63 Ala. 460.

Kentucky. — *Wood v. State Bank*, 5 T. B. Mon. (Ky.) 195.

New York. — *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 300.

North Carolina. — *Jones v. Zollicoffer*, Term (4 N. Car.) 212, 7 Am. Dec. 708; *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445.

Tennessee. — *Perkins v. Hays, Cooke* (Tenn.) 163, 5 Am. Dec. 683.

Vermont. — *St. Johnsbury v. Morrill*, 55 Vt. 165.

4. *Briscoe v. Ashby*, 24 Gratt. (Va.) 473, *per* Christian, J., quoted with approval in *Braxton v. Bell*, 92 Va. 236.

The plea of purchase for value and without

doctrine of *bona fide* purchase as applied in courts of equity is not a rule of property; it is used neither to enforce a positive right nor to determine the question of title between the contesting parties; in its most frequent application it is but "a shield in the hands of a defendant" to protect him against his adversary.¹ The few instances in which it is a ground for affirmative relief are discussed in another part of this title.²

III. DEFINITION AND GENERAL CONSIDERATION — 1. Definition. — As the term is used and understood in courts of equity, a purchaser for value and without notice, or, as he is frequently called, a *bona fide* purchaser, may be defined as a purchaser of land who takes a conveyance purporting to pass the entire title, legal and equitable, gives therefor a valuable consideration, and has neither actual nor constructive notice of any equitable rights of other persons in conflict with the title that his deed purports to convey.³

2. Persons Entitled to Protection — a. IN GENERAL. — By the term "purchaser," as used throughout this title, is meant primarily one who acquires by purchase an absolute and entire fee-simple estate in lands, as distinguished from one who takes a mere equitable title or the legal estate by way of security. But, as will presently be shown, others than purchasers of the entire fee may be entitled to protection in equity.

b. MORTGAGEE. — It is well settled that a mortgagee who takes his mortgage for value and without notice of prior equities occupies the position of a *bona fide* purchaser and is entitled to the protection afforded to such a purchaser by a court of equity; a mortgage being deemed a purchase to the extent of the debt secured thereby.⁴

c. ASSIGNEE OF MORTGAGE. — One who takes an assignment of a mortgage for value and without notice of outstanding equities is entitled to protection as a *bona fide* purchaser.⁵

notice "is an absolute, unqualified, unanswerable defense, and an unanswerable plea to the jurisdiction of this court." *Pilcher v. Rawlins*, L. R. 7 Ch. 268, *per* Sir W. M. James, L. J.

Though expressions of judicial opinion may be found to the effect that as against a purchaser for value and without notice a court of equity has no jurisdiction, the true theory is not that the court lacks jurisdiction in the premises, but simply that it will not exercise the jurisdiction which it undoubtedly possesses. *Jones v. Zollicoffer*, Term (4 N. Car.) 212.

1. *German Sav., etc., Soc. v. De Lashmuth*, 67 Fed. Rep. 400.

2. See *infra*, this title, *Protection and Mode of Relief*.

3. **Term Defined.** — See *Fargason v. Edrington*, 49 Ark. 214; *Alden v. Trubee*, 44 Conn. 459; *Bowman v. Griffith*, 35 Neb. 366; *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605. See also *Hayden v. Charter Oak Driving Park*, 63 Conn. 142.

4. **Mortgagee as a Purchaser — England.** — *Wallwyn v. Lee*, 9 Ves. Jr. 24.

Alabama. — *Wells v. Morrow*, 38 Ala. 125; *Coleman v. Smith*, 55 Ala. 369; *Cook v. Parham*, 63 Ala. 460; *Whelan v. McCreary*, 64 Ala. 320; *Rogers v. Adams*, 66 Ala. 602; *McCall v. Rogers*, 77 Ala. 349; *Whitfield v. Riddle*, 75 Ala. 99; *Alston v. Marshall*, 112 Ala. 638.

Florida. — *Broward v. Hoeg*, 15 Fla. 372.

Georgia. — *Parker v. Bainesville Sav. Bank*, 107 Ga. 650.

Indiana. — *Michener v. Bengel*, 135 Ind. 188.

Iowa. — *Port v. Embree*, 54 Iowa 14; *Koon v. Tramel*, 71 Iowa 137.

Kentucky. — *Wood v. State Bank*, 5 T. B. Mon. (Ky.) 194; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285.

New York. — *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605.

North Carolina. — *Branch v. Griffin*, 99 N. Car. 184.

Ohio. — *Farmers', etc., Nat. Bank v. Wallace*, 45 Ohio St. 166.

Oregon. — *Landigan v. Mayer*, 32 Oregon 245, 67 Am. St. Rep. 521.

Tennessee. — *Bass v. Wheless*, 2 Tenn. Ch. 531. See also *Yates v. Yates*, (Tenn. Ch. 1899) 54 S. W. Rep. 1002.

Texas. — *Simmons Hardware Co. v. Kaufman*, 77 Tex. 136; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 252.

5. **Assignee of Mortgage as a Purchaser — Maine.** — *Pierce v. Faunce*, 47 Me. 507.

Maryland. — *Economy Sav. Bank v. Gordon*, 90 Md. 486.

Minnesota. — *Moffett v. Parker*, 71 Minn. 139.

New Jersey. — *McCurdy v. Agnew*, 8 N. J. Eq. 733, reversing 8 N. J. Eq. 9; *Jacobsen v. Dodd*, 32 N. J. Eq. 403; *Ferdon v. Miller*, 34 N. J. Eq. 10.

New York. — *Simpson v. Del Hoyo*, 94 N. Y. 189; *Marden v. Dorthy*, 12 N. Y. App. Div. 176; *Gearon v. Kearney*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 285. Compare *Willis v. Albertson*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 263.

North Carolina. — *Dixon v. Wilmington Sav., etc., Co.*, 115 N. Car. 274.

Oregon. — *Landigan v. Mayer*, 32 Oregon 245, 67 Am. St. Rep. 521.

d. TRUSTEE AND CESTUI QUE TRUST IN TRUST DEED. — The grantee and the *cestui que trust* under a trust deed of land, if the conveyance is based upon a valuable consideration and is taken without notice, are recognized in equity as purchasers entitled to protection against prior equitable rights.¹

e. ASSIGNEE AND CREDITORS UNDER GENERAL ASSIGNMENT. — It is generally held that the assignee and creditors under a general assignment for the benefit of creditors do not occupy the position of purchasers for value and without notice, but take subject to equities that would have been enforceable against the land while owned by the debtor.²

f. LESSEE OR PURCHASER OF LEASEHOLD ESTATE. — A lessee or a purchaser of a leasehold estate who takes for value and without notice of prior equities is entitled to protection as a *bona fide* purchaser.³

g. PURCHASER UNDER QUITCLAIM DEED. — As a general rule, the grantee in a quitclaim deed is not accorded the favored position of a *bona fide* purchaser, for the reason that the deed purports to convey only whatever title the grantor may have, and thus the terms of the deed itself afford constructive notice of any defects or equities by which the title may be impaired.⁴

h. PURCHASER WITH NOTICE FROM BONA FIDE PURCHASER — (1) *General Rule.* — It is well settled that where an estate has once come into the ownership of a purchaser for value and without notice, it is thereupon discharged from prior equities, and the purchaser may transfer the property free therefrom, even to one who has notice of them, and they do not revive or re-attach themselves to the estate in his hands. In other words, a *bona fide* purchaser of a title affected by equities may give a clear and perfect title to a purchaser with notice; the reasons being that otherwise there would be great difficulty in alienating the property for a fair value, and that the capacity to hold and enjoy must give rise to a capacity to convey.⁵

For a Full Discussion of the law relating to assignments of mortgages, see the title MORTGAGES, vol. 20, pp. 1024, 1040 *et seq.*

1. *Trustee and Creditors under Deed of Trust.* — *Kesner v. Trigg*, 98 U. S. 50; *Gerson v. Pool*, 31 Ark. 85; *Fargason v. Edrington*, 49 Ark. 207. And see the title TRUST DEEDS AND POWER OF SALE MORTGAGES.

2. See *infra*, this title, *Essential Elements of Bona Fide Purchase — Consideration or Value — Antecedent Debt — General Assignment for Benefit of Creditors.*

3. *Lessees and Purchasers of Leaseholds.* — *Harding v. Hardrett*, Finch 9; *Carter v. Williams*, L. R. 9 Eq. 678; *Patman v. Harland*, 17 Ch. D. 355; *Nugent v. Gifford*, 1 Atk. 463; *Atty.-Gen. v. Backhouse*, 17 Ves. Jr. 283; *McDaid v. Call*, 111 Ill. 298; *Ludlow v. Kidd*, 3 Ohio 541. See also *Sorrel v. Carpenter*, 2 P. Wms. 482; *Jolland v. Stainbridge*, 3 Ves. Jr. 478.

4. *Grantee in Quitclaim Deed Not Protected.* — This rule and its qualifications will be fully discussed in another part of this title; see *infra*, this title, *Notice — Its Sufficiency and Effect — Constructive Notice — By Instruments Relating to Title — By Quitclaim Deed.*

5. *Bona Fide Purchaser May Convey Perfect Title to Grantee with Notice — England.* — *Mertins v. Jolliffe*, Amb. 313; *Andrew v. Wrigley*, 4 Bro. C. C. 136; *Sweet v. Southcote*, 2 Dick. 671; *Harrison v. Forth*, Prec. Ch. 51; *Lowther v. Carleton*, 18 Vin. Abr. 119, Cas. t. Talb. 187, 2 Atk. 242; *M'Queen v. Farquhar*, 11 Ves. Jr. 478, 8 Rev. Rep. 212.

Canada. — *Rogers v. Shortis*, 10 Grant Ch. (U. C.) 243.

United States. — *Alexander v. Pendleton*, 8 Cranch (U. S.) 462; *Ryan v. Staples*, 78 Fed. Rep. 563, 40 U. S. App. 748.

Alabama. — *Whitfield v. Riddle*, 78 Ala. 100.

Arkansas. — *Scott v. Orbison*, 21 Ark. 202;

Fargason v. Edrington, 49 Ark. 207.

Colorado. — *Moore v. Allen*, 26 Colo. 197, 77 Am. St. Rep. 255.

Georgia. — *Truluck v. Peeples*, 3 Ga. 446; *Collins v. Heath*, 34 Ga. 454.

Illinois. — *Peck v. Arehart*, 95 Ill. 113; *Burton v. Perry*, 146 Ill. 76.

Indiana. — *McShirley v. Birt*, 44 Ind. 382; *Hampsan v. Fall*, 64 Ind. 387; *Klinger v. Lemler*, 135 Ind. 77; *Buck v. Foster*, 147 Ind. 530, 62 Am. St. Rep. 427.

Iowa. — *Rogers v. Hussey*, 36 Iowa 664; *Chambers v. Hubbard*, 40 Iowa 432; *Ashcraft v. De Armond*, 44 Iowa 229; *East v. Pugh*, 71 Iowa 163.

Kentucky. — *Moore v. Dodd*, 1 A. K. Marsh. (Ky.) 143; *Lindsey v. Rankin*, 4 Bibb (Ky.) 482.

Maine. — *Pierce v. Faunce*, 47 Me. 513.

Michigan. — *Godfroy v. Disbrow*, Walk. (Mich.) 260.

Mississippi. — *Equitable Securities Co. v. Sheppard*, 78 Miss. 217; *Price v. Martin*, 46 Miss. 489. See also *Lusk v. McNamer*, 24 Miss. 58.

Missouri. — *Lemay v. Poupenez*, 35 Mo. 71; *Bray v. Campbell*, 28 Mo. App. 516; *Stevens v. Hampton*, 46 Mo. 404; *Funkhouser v. Lay*, 78 Mo. 459; *Campbell v. Laclede Gas Light Co.*, 84 Mo. 352; *Anderson v. McPike*, 86 Mo. 293; *Craig v. Zimmerman*, 87 Mo. 475, 56 Am. Rep. 466; *Drey v. Doyle*, 99 Mo. 459; *Van Syckel v. Beam*, 110 Mo. 589.

(2) *Exceptions and Limitations — Purchase by Former Owner.* — The foregoing rule, however, is not without qualifications. The estate in the hands of a *bona fide* purchaser is freed from equities so far as concerns him and subsequent grantees who previous to his purchase have not had any interest in the affected property; but when by mesne conveyances the title becomes vested in a former owner in whose hands it was originally subject to the equities, they revive and re-attach to the estate.¹

Immediate Grantor Not a Bona Fide Purchaser. — In order that a purchaser with notice from a *bona fide* purchaser may be entitled to protection, his grantor must in all particulars have occupied the position of a purchaser for value and without notice.² So, if the grantor paid no value, but was a mere volunteer,³ or had nothing more than an equitable title to pass by the sale,⁴ his purchaser with notice will not be protected.

i. **BONA FIDE PURCHASER FROM PURCHASER WITH NOTICE.** — Inasmuch as a purchaser for value is protected from prior equities of which he had no notice, it is a settled rule that he takes the estate free from such equities, even though his grantor was fixed with notice. In other words, a purchaser for value and without notice is not affected by notice in his grantor.⁵

Nevada. — Allison *v.* Hagan, 12 Nev. 38.

New Jersey. — Holmes *v.* Stout, 10 N. J. Eq. 419.

New York. — Sweet *v.* Green, 1 Paige (N. Y.) 473; Griffith *v.* Griffith, 9 Paige (N. Y.) 315; Gallatin *v.* Cunningham, 8 Cow. (N. Y.) 361; Galatian *v.* Erwin, Hopk. (N. Y.) 48; Simpson *v.* Del Hoyo, 94 N. Y. 189. See also Bumpus *v.* Platner, 1 Johns. Ch. (N. Y.) 213.

North Carolina. — Taylor *v.* Kelly, 3 Jones Eq. (56 N. Car.) 246.

Ohio. — Card *v.* Patterson, 5 Ohio St. 319.

Oregon. — Landigan *v.* Mayer, 32 Oregon 245, 67 Am. St. Rep. 521.

Texas. — Gulf, etc., R. Co. *v.* Gill, 5 Tex. Civ. App. 496; Peterson *v.* McCauley, (Tex. Civ. App. 1894) 25 S. W. Rep. 826; Goddard *v.* Reagan, 8 Tex. Civ. App. 272. See also Brown *v.* Elmendorf, (Tex. Civ. App. 1894) 25 S. W. Rep. 145.

Vermont. — Conner *v.* Chase, 15 Vt. 776.

Virginia. — Curtis *v.* Lunn, 6 Munf. (Va.) 42; Williams *v.* Lord, 75 Va. 404.

Wisconsin. — Pringle *v.* Dunn, 37 Wis. 449, 19 Am. Rep. 772.

The same rule applies under the recording acts. See the title RECORDING ACTS.

Rule Applied to Assignee of Mortgage. — Sweet *v.* Southcote, 2 Bro. C. C. 66.

Parol Contract Between Original Parties. — A purchaser with notice from a *bona fide* purchaser of a title absolute on its face, is protected against a parol contract between the original parties that the deed should stand as a mortgage. Conner *v.* Chase, 15 Vt. 776.

Collateral Security. — Such a purchaser is protected although he may have taken collateral security from his vendor for the better security of the title. Lowther *v.* Carleton, 18 Vin. Abr. 119, Cas. t. Talb. 187.

Quitclaim Deed. — And since the land is free from equities in the hands of the immediate grantor, the purchaser with notice, though taking title by a quitclaim deed, will be protected, since such a deed passes all the title the grantor has. Craig *v.* Zimmerman, 87 Mo. 475, 56 Am. Rep. 466.

1. Purchase by Prior Grantor. — *In re* Stapleford Colliery Co., 14 Ch. D. 445; Talbert *v.*

Singleton, 42 Cal. 390; Trentman *v.* Eldridge, 98 Ind. 525; Allison *v.* Hagan, 12 Nev. 38; Brophy Min. Co. *v.* Brophy, etc., Gold, etc., Min. Co., 15 Nev. 101; Church *v.* Church, 25 Pa. St. 278. See also Price *v.* Martin, 46 Miss. 489.

2. Immediate Grantor Must Have Been Bona Fide Purchaser. — Halsa *v.* Halsa, 8 Mo. 303.

3. Immediate Grantor a Volunteer. — Gerson *v.* Pool, 31 Ark. 85; Johns *v.* Sewell, 33 Ind. 1.

4. Immediate Grantor Without Legal Title. — Boone *v.* Chiles, 10 Pet. (U. S.) 178. But see Moore *v.* Dodd, 1 A. K. Marsh. (Ky.) 143. See *infra*, this title, *Essential Elements of Bona Fide Purchase — Acquisition of Legal Title.*

5. Notice in Grantor Inoperative — England. — Ferrars *v.* Cherry, 2 Vern. 384, 18 Vin. Abr. 117; Mertins *v.* Jolliffe, Ambli. 313; Carter *v.* Williams, L. R. 9 Eq. 678.

Alabama. — Hoots *v.* Williams, 116 Ala. 372.

Georgia. — Truluck *v.* Peeples, 3 Ga. 446; Collins *v.* Heath, 34 Ga. 443; Latham *v.* Inman, 88 Ga. 505.

Illinois. — See Paris *v.* Lewis, 85 Ill. 597.

Indiana. — Brown *v.* Budd, 2 Ind. 442; Goodtitle *v.* Cummins, 8 Blackf. (Ind.) 179; Lewis *v.* Phillips, 17 Ind. 108, 79 Am. Dec. 457.

Kentucky. — Willis *v.* Vallette, 4 Met. (Ky.) 187; Hardin *v.* Harrington, 11 Bush (Ky.) 367; Arnett's Committee *v.* Owens, (Ky. 1901) 65 S. W. Rep. 151, 23 Ky. L. Rep. 1409.

Michigan. — Holcomb *v.* Mosher, 50 Mich. 252.

Mississippi. — Price *v.* Martin, 46 Miss. 489.

Missouri. — Bartlett *v.* Glasscock, 4 Mo. 62; Thompson *v.* Wooldridge, 102 Mo. 505.

Montana. — Mullins *v.* Butte Hardware Co., 25 Mont. 525.

New York. — Anderson *v.* Roberts, 18 Johns. (N. Y.) 515, 9 Am. Dec. 235; Jackson *v.* Given, 8 Johns. (N. Y.) 141; Demarest *v.* Wynkoop, 3 Johns. Ch. (N. Y.) 147. See also Bebee *v.* State Bank, 1 Johns. (N. Y.) 573.

Texas. — Tate *v.* Kramer, 1 Tex. Civ. App. 427; Cantrell *v.* Dyer, 6 Tex. Civ. App. 551.

Virginia. — Tompkins *v.* Powell, 6 Leigh (Va.) 576.

j. PURCHASER OF EQUITABLE TITLE. — As a general rule, the purchaser of an equitable, as distinguished from a legal, title will not be afforded protection as a *bona fide* purchaser, as against the holder of a prior equity; the rule between holders of equitable rights in land being that the prior in point of time will prevail.¹

IV. ESSENTIAL ELEMENTS OF BONA FIDE PURCHASE — 1. General Principle. — It may be stated as a general rule that in order to entitle a person to protection on the ground that he is a purchaser for value and without notice, he must have acquired title to the subject-matter of his purchase, and have given a valuable consideration therefor in good faith and before receiving actual or constructive notice of any adverse claim or interest.² These elements must concur or the defense will be unavailing.³

2. Good Faith — In General. — For the purposes of this discussion the question of a purchaser's good faith is mainly a matter incident to the larger question of notice, the underlying principle of which is that where a purchaser before the completion of the purchase has actual or constructive notice of rights of other persons adverse to the title he is about to acquire, his conduct in completing the transaction is so unconscientious or even fraudulent that it will not be tolerated in a court of equity, and that consequently as against the rights of such persons he will not be permitted to retain the legal rights acquired under his purchase.⁴

Mere Relationship Between Vendor and Purchaser, without more, is not sufficient to impeach the *bona fides* of the latter, or to give rise to any inference of knowledge of adverse rights.⁵

3. Acquisition of Legal Title — a. GENERAL RULE. — It is well settled as a general proposition that in order for a person to occupy in equity the favored position of a purchaser for value and without notice, it is essential that he should have actually acquired the legal title to the property in controversy, and that the only instance in which a court of equity will afford protection to a purchaser on the ground that he has bought for value and without notice is where he has taken a conveyance of the legal estate and claims immunity from a purely equitable right or title prior in point of time.⁶ This principle, how-

Wisconsin. — *Pringle v. Dunn*, 37 Wis. 449. 19 Am. Rep. 772.

Rule Applied to Assignee of Mortgage. — *Simpson v. Del Hoyo*, 94 N. Y. 194.

Recording Acts. — The same rule prevails under the recording acts. *Mullins v. Butte Hardware Co.*, 25 Mont. 525. And see the title **RECORDING ACTS**.

Conveyance of Part of Land to Bona Fide Purchaser. — Where only a part of the land in controversy has been sold to a *bona fide* purchaser, the part remaining in the hands of the grantor with notice may properly be charged with the whole amount of the complainant's lien. *Holcomb v. Mosher*, 50 Mich. 252.

Death of Grantee with Notice and Sale by Heirs. — Where a grantee was charged with notice, the grantees of his heirs will not be chargeable with the notice that affected him unless it was also brought home to them. *Phillips v. Sherman*, (Tex. Civ. App. 1897) 39 S. W. Rep. 187.

Purchaser Must Have Legal Title. — Generally the purchaser from a grantor who had notice will not be protected unless he has acquired the legal title. Thus where he has taken no deed but claims under a bond for title, he will not be afforded protection unless his equity is in some way superior to that of the prior claimant. *Pillow v. Shannon*, 3 Yerg. (Tenn.) 508. See also *infra*, this title, *Essential Ele-*

ments of Bona Fide Purchase — Acquisition of Legal Title.

1. See *infra*, this title, *Essential Elements of Bona Fide Purchase — Acquisition of Legal Title.*

2. This principle is clearly brought out in the following subdivisions of this section, and separate citations of the authorities are deemed unnecessary.

3. *Young v. Schofield*, 132 Mo. 660. And see the cases *infra*, throughout this section.

4. **Want of Good Faith an Incident of Notice.** — See 2 Pomeroy's Eq. Jur., § 745; *Hall v. Livingston*, 3 Del. Ch. 348; *Reynolds v. Carlisle*, 99 Ga. 730; *Hardin v. Harrington*, 11 Bush (Ky.) 367; *Sheldon v. Holmes*, 58 Mich. 143. *per Cooley, C. J.*; *Patten v. Moore*, 32 N. H. 382; *Harris v. Norton*, 16 Barb. (N. Y.) 264; *Baker v. Bliss*, 39 N. Y. 75; *Raymond v. Flavel*, 27 Oregon 246; *Hoppin v. Doty*, 25 Wis. 592. And see *infra*, this title, *Notice — Its Sufficiency and Effect*. See also **BONA FIDE**, vol. 4, p. 615, and the titles **FRAUD AND DECEIT**, vol. 14, p. 12; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210.

5. *Slattery v. Rafferty*, 93 Ill. 286 (brothers); *Sheldon v. Holmes*, 58 Mich. 138 (father and son).

6. **Purchaser Must Have Acquired Legal Title.** — This principle is enunciated in the cases

ever, is subject to several qualifications, discussions of which will appear in their proper places.¹

b. APPLICATIONS OF RULE — (1) Conflicting Rights or Titles Both Equitable — (a) General Rule. — Since it is necessary for the purchaser to have acquired the legal title to the property forming the subject-matter of his purchase, it follows that as between equitable incumbrancers or purchasers of merely equitable titles, if the equities of the parties are otherwise equal, the prior in point of time prevails.²

cited throughout the following subdivision, *Application of Rule.*

The defense is not available in a case where either one or the other of the contesting parties has both the legal and equitable title, and the dispute is as to which has it. Generally the defense can prevail only in a contest between the holder of the legal title and the holder of a prior equity. *Wells v. Walker*, 29 Ga. 450.

1. See *infra*, this section, *c. Qualifications of Rule.*

2. *Qui Prior in Tempore Potior Est in Jure — England.* — *Clarke v. Abbot*, 3 Eq. Cas. Abr. 606, par. 41; *Tourville v. Naish*, 3 P. Wms. 307; *Brandlyn v. Ord*, 1 Atk. 571; *Pomfret v. Windsor*, 2 Ves. 472; *Phillips v. Phillips*, 4 De G. F. & J. 208; *Cave v. Cave*, 15 Ch. D. 639; *Flinn v. Pountain*, 58 L. J. Ch. 389, 60 L. T. N. S. 484.

Canada. — *Utterson Lumber Co. v. Rennie*, 21 Can. Sup. Ct. 218, *per Strong, J.* Compare *Davison v. Wells*, 15 Grant Ch. (U. C.) 89; *Moore v. Kane*, 24 Ont. 546.

United States. — *Shirras v. Caig*, 7 Cranch (U. S.) 48; *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 18; *Vattier v. Hinde*, 7 Pet. (U. S.) 252; *Caldwell v. Carrington*, 9 Pet. (U. S.) 105; *Boone v. Chiles*, 10 Pet. (U. S.) 178; *Hallett v. Collins*, 10 How (U. S.) 185; *Butler v. Douglass*, 1 McCrary (U. S.) 630; *Williams v. Jackson*, 107 U. S. 478; *Curtis v. Cisna*, 7 Biss. (U. S.) 260.

Alabama. — *Fash v. Ravesses*, 32 Ala. 451; *Craft v. Russell*, 67 Ala. 9; *Overall v. Taylor*, 99 Ala. 12. See also *Dudley v. Witter*, 46 Ala. 694.

Arkansas. — *Byers v. Fowler*, 12 Ark. 285.

California. — *Dupont v. Wertheman*, 10 Cal. 354.

Florida. — *Glinski v. Zawadski*, 8 Fla. 412.

Georgia. — *Mounce v. Byars*, 16 Ga. 469.

Indiana. — *Gallion v. M'Caslin*, 1 Blackf. (Ind.) 91, 12 Am. Dec. 208.

Kentucky. — *Clay v. Smith*, 1 Bibb (Ky.) 522; *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 287; *Hardin v. Harrington*, 11 Bush (Ky.) 367; *Carlisle v. Jumper*, 81 Ky. 282. See also *Taylor v. M'Donald*, 2 Bibb (Ky.) 422, *per Logan, J.*; *Seell v. Nelson*, (Ky. 1902) 67 S. W. Rep. 986, *per O'Rear, J.*

Michigan. — *Wing v. McDowell*, Walk. (Mich.) 175.

Mississippi. — *Wailes v. Cooper*, 24 Miss. 208; *Walton v. Hargroves*, 42 Miss. 18, 97 Am. Dec. 429; *Perkins v. Swank*, 43 Miss. 358.

Missouri. — *Broadwell v. Yantis*, 10 Mo. 398.

Nevada. — *Boskowitz v. Davis*, 12 Nev. 466.

New York. — *Berry v. Mutual Ins. Co.*, 2 Johns. Ch. (N. Y.) 603; *Grimstone v. Carter*, 3 Paige (N. Y.) 436, 24 Am. Dec. 230; *Watson v. Le Row*, 6 Barb. (N. Y.) 485; *Newton v. McLean*, 41 Barb. (N. Y.) 285.

North Carolina. — *Jones v. Zollicoffer*, Term (4 N. Car.) 212, 7 Am. Dec. 708; *Polk v. Gal-*

lant, 2 Dev. & B. Eq. (22 N. Car.) 395, 34 Am. Dec. 410; *Winborn v. Gorrell*, 3 Ired. Eq. (38 N. Car.) 117, 40 Am. Dec. 456; *Goldsborough v. Turner*, 67 N. Car. 408; *Durant v. Crowell*, 97 N. Car. 367.

Ohio. — *Woods v. Dille*, 11 Ohio 455 (*reversed* on other grounds 14 Ohio 122); *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Elstner v. Fife*, 32 Ohio St. 358.

South Carolina. — *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 274; *Lynch v. Hancock*, 14 S. Car. 90.

Tennessee. — *Williams v. Love*, 2 Head (Tenn.) 80, 73 Am. Dec. 191; *Young v. Atkins*, 4 Heisk. (Tenn.) 529; *Pinson v. Ivey*, 1 Verg. (Tenn.) 296; *Craig v. Leiper*, 2 Verg. (Tenn.) 193; *North Carolina University v. Cambreling*, 6 Verg. (Tenn.) 79; *High v. Batte*, 10 Verg. (Tenn.) 335. See also *Pillow v. Shannon*, 3 Verg. (Tenn.) 508; *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518; *Reeves v. Hager*, 101 Tenn. 718.

Texas. — *York v. McNutt*, 16 Tex. 16, 67 Am. Dec. 607; *Texas Consol. Compress, etc., Assoc. v. Dublin Compress, etc., Co.*, (Tex. Civ. App. 1896) 38 S. W. Rep. 409. See also *Williams v. Rand*, 9 Tex. Civ. App. 631.

Virginia. — *Briscoe v. Ashby*, 24 Gratt. (Va.) 454; *Walters v. Hill*, 27 Gratt. (Va.) 401; *Stoner v. Harris*, 81 Va. 451; *Evans v. Roanoke Sav. Bank*, 95 Va. 303. See also *Hughes v. Harvey*, 75 Va. 210; *Braxton v. Bell*, 92 Va. 236.

Washington. — *Shoufe v. Griffiths*, 4 Wash. 161, 31 Am. St. Rep. 910; *Wilson v. Morrell*, 5 Wash. 654.

West Virginia. — *Camden v. Harris*, 15 W. Va. 563.

Apparent Equitable Title. — Of course one who acquires only an apparent equitable title will not be protected. *Briscoe v. Ashby*, 24 Gratt. (Va.) 454.

A Person Who Has Taken a Contract in Writing for the purchase of lands, but who has paid nothing thereon, and has taken no deed, is not a *bona fide* purchaser for value. *Schetter v. Southern Oregon Imp. Co.*, 19 Oregon 192.

Registration of Equitable Titles. — In states where equitable titles are subjects of registration, the rules governing priority of equities are materially altered, and a purchaser of a merely equitable interest for value and without notice, may under the statutes be protected as against prior equities, in the same manner as if he had acquired the legal estate. *Batts v. Scott*, 37 Tex. 59.

Thus in *Pennsylvania* the rule of the text was announced in the leading case of *Chew v. Barnet*, 11 S. & R. (Pa.) 389, which was followed in several other cases; *Sergeant v. Ingersoll*, 7 Pa. St. 345; *Reed v. Dickey*, 2 Watts (Pa.) 459. See also *Kramer v. Arthurs*, 7 Pa. St. 165.

(b) **Purchase of Legal Estate by Prior Party.** — In a conflict between equitable incumbrancers, the prior party may clothe himself with the legal title and thus prevail against the subsequent party; the defense of *bona fide* purchase being generally unavailing against the legal estate.¹ And since, as a general rule, the prior equity will prevail without more, it seems clear that the holder of the prior equity may purchase the legal title and gain its additional protection, even after notice of the subsequent equity.²

(c) **Purchase of Legal Estate by Subsequent Party.** — In a case where the conflicting equities are equal so that priority in time would otherwise be controlling, the holder of the later equity may protect himself by subsequently acquiring the legal estate;³ the theory being that where the equities are equal the legal title will prevail.⁴ But whether he may protect himself by acquiring the legal title after notice, has given rise to a conflict in the authorities. This question is discussed in another part of this title.⁵

(2) **Prior Legal Estate** — (a) **In General.** — In *England* the question whether the plea of purchase for value and without notice was available in equity against the legal title, formerly gave rise to considerable diversity in the decisions. In some of the cases where the plaintiff was seeking purely equitable relief in aid of his legal title — that is, where he was invoking the auxiliary jurisdiction of the court — the plea was allowed; no distinction being recognized between the purchase of a legal and of an equitable title.⁶ In other similar cases, however, the plea was not allowed; it being held that the plea was available only as against an equitable title.⁷ Where the cause was one over which a court of equity had exclusive jurisdiction, not only to give relief to the plaintiff, but to enforce the equitable claim of the defendant, the court did not hesitate to deprive the defendant of the advantage which in the exercise of its auxiliary jurisdiction it permitted him to retain, and the plea was not available.⁸ Where the plaintiff pursuing the legal title invoked

But in subsequent decisions the rule was held inapplicable upon the ground that the recording acts in that state applied as well to equitable as to legal titles. *Bellas v. McCarty*, 10 Watts (Pa.) 13; *Rhines v. Baird*, 41 Pa. St. 256. Where the equitable title, however, is not entitled to record, the rule of the text prevails. *Texas Consol. Compress, etc., Assoc. v. Dublin Compress, etc., Co.*, (Tex. Civ. App. 1886) 38 S. W. Rep. 409.

For a Full Discussion, see title RECORDING ACTS.

1. **Prior Incumbrancer May Protect Himself with Legal Estate.** — *Bailey v. Barnes*, (1894) 1 Ch. 36, *per* Lindley, L. J.; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Barry v. Deloach*, 2 Overt. (Tenn.) 395.

2. *Barry v. Deloach*, 2 Overt. (Tenn.) 395, where the holder of the subsequent equity acquired his right with notice of the prior equity, and the holder of the prior equity afterward took a conveyance of the legal estate with notice of the subsequent equity.

3. **Subsequent Incumbrancer May Gain Protection of Legal Estate** — *England*. — *Collet v. De Gols*, Cas. t. Talb. 65; *Bassett v. Nosworthy*, Finch 102, 21 Eng. Rul. Cas. 703; *Bailey v. Barnes*, (1894) 1 Ch. 25.

United States. — *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 2.

Illinois. — *Dodd v. Doty*, 98 Ill. 393.

Kentucky. — See *Taylor v. McDonald*, 2 Bibb (Ky.) 422, *per* Logan, J.; *Carlisle v. Jumper*, 81 Ky. 282; *Sewell v. Nelson*, (Ky. 1902) 67 S. W. Rep. 986, *per* O'Rear, J.

New York. — *Newton v. McLean*, 41 Barb. (N. Y.) 285.

North Carolina. — *Jones v. Zollicoffer*, Term (4 N. Car.) 212, 7 Am. Dec. 708; *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445.

Ohio. — *Gibler v. Trimble*, 14 Ohio 323.

Rhode Island. — *Wilcox v. Daniels*, 15 R. I. 261.

Tennessee. — *Perkins v. Hays*, Cooke (Tenn.) 163, 5 Am. Dec. 680.

Texas. — *Hill v. Moore*, 62 Tex. 610.

West Virginia. — *Hoult v. Donahue*, 21 W. Va. 300.

4. *Bailey v. Barnes*, (1894) 1 Ch. 36; *Jones v. Zollicoffer*, Term (4 N. Car.) 212, 7 Am. Dec. 708; *Perkins v. Hays*, Cooke (Tenn.) 163, 5 Am. Dec. 683; *Hoult v. Donahue*, 21 W. Va. 300.

5. See *infra*, this title, *Notice — Its Sufficiency and Effect — Effect of Notice — Notice Before Completion of Purchase — Acquiring Legal Title After Notice*.

6. **Whether Defense Available Against Legal Title.** — *Bassett v. Nosworthy*, Finch 102; *Wallwyn v. Lee*, 9 Ves. Jr. 24; *Fitzgerald v. Falconbridge*, cited in 18 Vin. Abr. 117; *Jerrard v. Saunders*, 2 Ves. Jr. 457; *Burlace v. Cooke*, Freem. Ch. 24. See also *Parker v. Blythmore*, Prec. Ch. 58, 2 Eq. Cas. Abr. 79, par. 1; *Joyce v. De Moleyns*, 2 J. & La T. 374; *Payne v. Compton*, 2 Y. & C. Exch. 461; *Phillips v. Phillips*, 4 De G. F. & J. 217, *per* Lord Westbury.

7. *Strode v. Blackburne*, 3 Ves. Jr. 222; *Rogers v. Seale*, Freem. Ch. 84.

8. *Colyer v. Finch*, 5 H. L. Cas. 905, *affirming* 19 Beav. 500; *Ind v. Emmerson*, 12 App. Cas. 307, 21 Eng. Rul. Cas. 713, *per* Lord Watson.

the aid of the court in a case where its jurisdiction was concurrent with that of a court of law — no distinctively equitable relief being asked — the plea did not prevail.¹

Under the Modern Practice in England, since the Judicature Act of 1873, the court now having complete jurisdiction over matters over which it had formerly had concurrent jurisdiction with the courts of common law, and being bound in a proper case to administer both legal and equitable relief, it seems that the plea is not available against either discovery or relief sought by the holder of the legal title.²

Rule in United States. — In the United States the rule appears to be settled that in the absence of statute the defense of purchase for value and without notice is not available against the legal title;³ but that where the legal title is outstanding in a prior grantee, the maxim *caveat emptor* applies in full force.⁴ And under these circumstances it has been held that the only ground upon which the subsequent purchaser can obtain any advantage or priority, in the absence of statute, is the theory that the prior party has done or omitted to do something which makes it inequitable for him to interpose his otherwise superior title.⁵

(b) **Title Not in Vendor** — *aa. IN GENERAL.* — Where no title, legal or equitable, passed by the conveyance to the purchaser, for the reason that the title was in another person than the vendor, the fact that the purchaser paid value and had no notice is immaterial, and, of course, he can have no protection as against the real owner or his successors in title unless by force of statute or on the principle of estoppel.⁶ For the same reason the grantees and mortgagees

Thus a bill of foreclosure by the holder of a prior legal mortgage could be maintained against a *bona fide* purchaser of the equity of redemption who had supposed he was purchasing the legal title. *Heath v. Crealock*, L. R. 10 Ch. 22; *Hunt v. Elmes*, 2 De G. F. & J. 578; *Colyer v. Finch*, 5 H. L. Cas. 905. Though in such a suit the purchaser would not be compelled to deliver up the title deeds. *Heath v. Crealock*, L. R. 10 Ch. 22; *Hunt v. Elmes*, 2 De G. F. & J. 578. But see *Newton v. Newton*, L. R. 4 Ch. 143.

1. *Williams v. Lambe*, 3 Bro. C. C. 265 (bill for dower); *Collins v. Archer*, 1 Russ. & M. 284 (bill for tithes). See also *Phillips v. Phillips*, 4 De G. F. & J. 217, *per Lord Westbury*. *Contra*, *Atty.-Gen. v. Wilkins*, 17 Beav. 285 (bill to enforce payment of a rent charge: plea of purchase for value and without notice held good).

2. **Modern Rule in England.** — *Ind v. Emmer-son*, 12 App. Cas. 300, 21 Eng. Rul. Cas. 706; *In re Cooper*, 20 Ch. D. 611; *Manners v. Mew*, 29 Ch. D. 725; *In re Ingham*, (1893) 1 Ch. 352, 62 L. J. Ch. 100.

3. **Rule in United States — Defense Not Available Against Legal Title** — *United States*. — *Hurst v. McNeil*, 1 Wash. (U. S.) 70; *Curts v. Cisna*, 7 Biss. (U. S.) 260; *Gaines v. New Orleans*, 6 Wall. (U. S.) 642.

Arkansas. — *Gerson v. Pool*, 31 Ark. 85; *Haskell v. State*, 31 Ark. 91.

Georgia. — *Whittington v. Doe*, 9 Ga. 23; *Daniel v. Hollingshead*, 16 Ga. 190.

Indiana. — *John v. Hatfield*, 84 Ind. 81.

Kansas. — *Stout v. Hyatt*, 13 Kan. 232; *Wicks v. Smith*, 21 Kan. 415; *Babb v. Lindley*, 23 Kan. 481.

Louisiana. — See *Ripoll v. Morina*, 12 Rob. (La.) 560; *Moore v. Lambeth*, 5 La. Ann. 66.

Mississippi. — *Jenkins v. Bodley*, Smed. & M. Ch. (Miss.) 338.

New York. — *Peabody v. Fenton*, 3 Barb. Ch. (N. Y.) 465.

North Carolina. — *Jones v. Zollicoffer*, Term (4 N. Car.) 212, 7 Am. Dec. 708.

Ohio. — *Larrowe v. Beam*, 10 Ohio 498; *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115; *Elstner v. Fife*, 32 Ohio St. 358.

Pennsylvania. — *Iddings v. Cairns*, 2 Grant Cas. (Pa.) 88; *Kramer v. Arthurs*, 7 Pa. St. 165.

South Carolina. — *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 289; *Blake v. Heyward*, *Bailey Eq. (S. Car.)* 220; *Black v. Childs*, 14 S. Car. 318. See also *Donald v. Mc Cord*, *Rice Eq. (S. Car.)* 330; *Cruger v. Daniel*, 1 McMull. Eq. (S. Car.) 197.

Tennessee. — See *Womack v. Smith*, 11 Humph. (Tenn.) 478, 54 Am. Dec. 51.

Virginia. — See *Hooe v. Pierce*, 1 Wash. (Va.) 212; *Taylor v. Stone*, 2 Munf. (Va.) 314.

Dower. — The defense is not available in equity as against a claim to dower based upon a legal, as distinguished from an equitable, right. *Dick v. Doughten*, 1 Del. Ch. 320; *Ridgeway v. Newbold*, 1 Harr. (Del.) 385; *Blain v. Harrison*, 11 Ill. 384; *Gano v. Gilruth*, 4 Greene (Iowa) 453; *Mitchell v. Farrish*, 69 Md. 241; *Reel v. Elder*, 62 Pa. St. 308, 1 Am. Rep. 414; *Campbell v. Murphy*, 2 Jones Eq. (55 N. Car.) 357.

Legal Lien. — Neither will the defense prevail against a prior legal lien, *Mutual Assur. Soc. v. Stone*, 3 Leigh (Va.) 218; as by a decree, *Blake v. Heyward*, *Bailey Eq. (S. Car.)* 220.

4. *Hurst v. McNeil*, 1 Wash. (U. S.) 70; *Daniel v. Hollingshead*, 76 Ga. 190; *Jenkins v. Bodley*, Smed. & M. Ch. (Miss.) 338. See also *Hooe v. Pierce*, 1 Wash. (Va.) 212.

5. *Williams v. Rand*, 9 Tex. Civ. App. 631. See also *Walters v. Jewett*, 28 Tex. 192.

6. **Where Title Was Not in Vendor** — *United States*. — *U. S. v. Samperyac Hempst.* (U. S.)

of such a purchaser can occupy no better position.¹

bb. DEED TO VENDOR NOT DELIVERED. — Since the delivery of a deed is essential to its effect as a conveyance, and since intention is an essential element of delivery, a deed which comes into the grantee's possession without the grantor's knowledge, consent, or acquiescence is wholly ineffectual to pass title; and therefore a purchaser from the grantee obtains by his purchase no interest which a court of equity can be called upon to protect as against the title remaining in the original grantor, even though the purchaser pays value and has no notice of the want of delivery.²

cc. DEED TO VENDOR DELIVERED IN ESCROW. — The same rule applies where the deed was delivered in escrow, but was obtained by the grantee without performance of the condition.³ And where the legal title that remained in the grantor has passed to his heirs or devisees, the rule is not altered and the purchaser is not protected; the theory being that where the equities are equal the legal title will prevail.⁴

dd. DEED EXECUTED IN BLANK — NAME WRONGFULLY INSERTED. — Where a deed executed and acknowledged by the grantor, with a blank for the grantee's name, is surreptitiously and fraudulently taken from the grantor, and the blank filled up, no title passes thereby, and a *bona fide* purchaser for a valuable consideration from the person whose name is thus inserted stands in no better situation than his vendor, especially if the original grantor remain in possession of the property.⁵ Likewise, where a third person inserts in a deed the name of an additional grantee without the consent of the real grantee, the act is a mere spoliation, which, in the absence of fraud or negligence on the part of the real grantee, does not affect his rights even as against a *bona fide* purchaser from the person whose name was so inserted.⁶

ee. DEED TO VENDOR A FORGERY. — For obvious reasons a *bona fide* purchaser

118, 7 Pet. (U. S.) 222; *Oakley v. Ballard*, Hempst. (U. S.) 475; *Dodge v. Briggs*, 27 Fed. Rep. 160; *Texas Lumber Mfg. Co. v. Branch*, (C. C. A.) 60 Fed. Rep. 201. See also *Polk v. Wendell*, 5 Wheat. (U. S.) 308; *German Sav., etc., Soc. v. De Lashmut*, 67 Fed. Rep. 401.

Colorado. — *Hartssock v. John Wright Hardware Co.*, (Colo. App. 1901) 64 Pac. Rep. 245.

Nebraska. — *Plattsmouth First Nat. Bank v. Gibson*, 60 Neb. 767.

New Jersey. — *Crawford v. Bertholf*, 1 N. J. Eq. 458.

Pennsylvania. — *Arrison v. Harmstead*, 2 Pa. St. 191; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603, 44 Pa. St. 492; *Reck v. Clapp*, 98 Pa. St. 581; *Gaines v. Brockerhoff*, 136 Pa. St. 175.

Tennessee. — *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518; *Jarman v. Farley*, 7 Lea (Tenn.) 141; *Simmons v. Redmond*, (Tenn. Ch. 1901) 62 S. W. Rep. 366.

Texas. — *Clapp v. Branch*, 11 Tex. Civ. App. 204; *Curlin v. Canadian, etc., Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 313. See also *Robson v. Osborn*, 13 Tex. 298.

Payment of Taxes. — And the fact that the purchaser has paid taxes on the land for many years is immaterial. *Texas Lumber Mfg. Co. v. Branch*, (C. C. A.) 60 Fed. Rep. 201.

The Vendor Must Have Been Seized in Fee, or the defense of purchase for value and without notice is not available to the purchaser. *White v. Nashville, etc., R. Co.*, 7 Heisk. (Tenn.) 518; *Jarman v. Farley*, 7 Lea (Tenn.) 141; *Simmons v. Redmond*, (Tenn. Ch. 1901) 62 S. W. Rep. 366.

1. *Curlin v. Canadian, etc., Co.*, (Tex. Civ. App. 1897) 42 S. W. Rep. 313; *Potwin v. Blasher*, 9 Wash. 460. Neither, of course, can the assignee of a mortgage given by such a purchaser. *Potwin v. Blasher*, 9 Wash. 460.

2. **Necessity for Delivery of Deed.** — *Henry v. Carson*, 96 Ind. 412; *Fitzgerald v. Goff*, 99 Ind. 28; *Allen v. Ayer*, 26 Oregon 589; *Van Amringe v. Morton*, 4 Whart. (Pa.) 382, 34 Am. Dec. 517; *Tisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546. See also *Stanley v. Valentine*, 79 Ill. 548; *Steffian v. Milmo Nat. Bank*, 60 Tex. 513; and the title *DEEDS*, vol. 9, p. 150.

Estoppel of Original Grantor. — But the original grantor may be guilty of such negligence in executing the deed and leaving it where the grantee may get possession of it, as to estop him from claiming title as against a *bona fide* purchaser from the grantee. *Tisher v. Beckwith*, 30 Wis. 55, 11 Am. Rep. 546. See also *Allen v. Aver*, 26 Oregon 589.

For a Full Discussion see the title *ESTOPPEL*, vol. 11, p. 385.

3. **Deed in Escrow Wrongfully Obtained.** — *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

For a Full Discussion of this point, see the title *ESCROW*, vol. 11, p. 350 *et seq.*

4. *Harkreader v. Clayton*, 56 Miss. 383, 31 Am. Rep. 369.

5. **Alteration of Deed by Inserting Name.** — *Van Amringe v. Morton*, 4 Whart. (Pa.) 382, 34 Am. Dec. 517.

6. *John v. Hatfield*, 84 Ind. 75. See generally the title *ALTERATION OF INSTRUMENTS*, vol. 2, p. 181.

for value and without notice from a grantee in a forged conveyance obtains no title that a court of equity can protect.¹

(c) **Want of Capacity in Vendor** — *aa. IN GENERAL.* — Though the legal title was in the original grantor, if he had not the capacity to contract or convey, the deed of course passes no title, and a subsequent purchaser, though taking the property for value and without notice of the want of capacity, acquires nothing which a court of equity can protect as against the legal title remaining in the grantor and his successors in title.²

bb. COVERTURE. — Thus where the original grantor was a married woman and could not convey except by deed in which her husband joined, a conveyance by her alone is inoperative to pass title, and the purchaser and his grantees, although paying value and having no notice of the coverture, take nothing; but the title remains in the original grantor and her heirs.³

cc. INSANITY. — Where the grantor was insane, the authorities dealing with the rights of a purchaser without notice of the insanity are not harmonious.

Whether Deed Void or Voidable. — The question whether the deed of an insane grantor is void or merely voidable is fully discussed elsewhere in this work.⁴

Deed Void. — Where the deed of the grantor is void by reason of his insanity and want of capacity to convey, no title passes by the conveyance, and even a *bona fide* purchaser without notice of the insanity can acquire no right or title to the property.⁵ As against him, therefore, the sale may of course be set aside,⁶ and in such a case reimbursing the purchaser for the consideration paid or for the value of improvements he has made on the land is not a condition precedent to relief.⁷

Deed Voidable. — But where the deed of an insane grantor is merely voidable, it has been held in some cases that a *bona fide* purchaser without notice of the insanity may acquire title, and as against him the deed cannot be set aside.⁸ In other cases it has been held that the deed can be set aside, but only upon condition of placing the *bona fide* purchaser *in statu quo*,⁹ as by returning or tendering to him the consideration he has paid,¹⁰ and reimbursing him for sums paid for taxes and expended for permanent improvements.¹¹ On the other

1. **Forgery of Deed.** — U. S. v. Samperey, 118, 7 Pet. (U. S.) 222; Gray v. Jones, 14 Fed. Rep. 83; Reck v. Clapp, 98 Pa. St. 581; Abee v. Bargas, (Tex. Civ. App. 1901) 65 S. W. Rep. 489. See also Arrison v. Harmstead, 2 Pa. St. 191; Wallace v. Harmstead, 15 Pa. St. 462, 53 Am. Dec. 603, 44 Pa. St. 492. And see the titles ALTERATION OF INSTRUMENTS, vol. 2, p. 181; FORGERY, vol. 13, p. 1081.

2. **Original Vendor Without Capacity to Convey.** — Bryan v. Walton, 14 Ga. 185.

3. **Conveyance by Married Woman Without Joinder of Husband.** — Daniel v. Mason, 90 Tex. 240, 59 Am. St. Rep. 815. See generally the title HUSBAND AND WIFE, vol. 15, pp. 801, 803.

4. See the title DEEDS, vol. 9, p. 119 *et seq.*

5. **Deed of Insane Grantor Void — Bona Fide Purchaser Not Protected.** — German Sav., etc., Soc. v. De Lashmutt, 67 Fed. Rep. 399 (holding that payment by the grantee to the insane grantor will give rise to no equity in a *bona fide* mortgagee of the grantee to be subrogated to the grantee's rights as to the purchase money, even though such money was used for the support and maintenance of the insane grantor, *distinguishing*, on this point, Edwards v. Davenport, 20 Fed. Rep. 756); Sullivan v. Flynn, 20 D. C. 396.

6. Somers v. Pumphrey, 24 Ind. 231; Gates v. Carpenter, 43 Iowa 152; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

7. **Placing Purchaser in Statu Quo Not Condition Precedent.** — Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Rogers v. Walker, 6 Pa. St. 371, 47 Am. Dec. 470.

8. **Deed Voidable — Purchaser Protected.** — Greenslade v. Dare, 20 Beav. 284; Arnett v. Owens, (Ky. 1901) 65 S. W. Rep. 151; Baldwin v. Golde, 88 Hun (N. Y.) 115. See also Ashcraft v. De Armond, 44 Iowa 229; Abbott v. Creal, 56 Iowa 175; Copenrath v. Kienby, 83 Ind. 18 (suit to foreclose a mortgage maintained by *bona fide* mortgagee).

9. **Same — Purchaser Must Be Placed in Statu Quo.** — Scanlan v. Cobb, 85 Ill. 296; Ashcraft v. De Armond, 44 Iowa 229; Abbott v. Creal, 56 Iowa 175; Riggan v. Green, 80 N. Car. 236, 30 Am. Rep. 77; Odom v. Riddick, 104 N. Car. 515; Mohr v. Tulip, 40 Wis. 66. See also Wilder v. Weakley, 34 Ind. 181; Thomas v. Hunsucker, 108 N. Car. 720; Chamblee v. Broughton, 120 N. Car. 170.

10. **Same — Repayment of Consideration a Condition of Relief.** — Scanlan v. Cobb, 85 Ill. 296; Boyer v. Berryman, 123 Ind. 451; Gribben v. Maxwell, 34 Kan. 8, 55 Am. Rep. 233; Mohr v. Tulip, 40 Wis. 66. See also Yauger v. Skinner, 14 N. J. Eq. 395. Compare North Western Mut. F. Ins. Co. v. Blankenship, 94 Ind. 535, 48 Am. Rep. 185 (a suit to foreclose a mortgage executed by a husband and his insane wife for a debt of the husband).

11. **Same — Reimbursement for Taxes and Improvements.** — Mohr v. Tulip, 40 Wis. 66.

hand, it has been held that the conveyance could be set aside without placing or offering to place the purchaser *in statu quo* as a condition precedent to the relief asked; ¹ except that where the grantor upon being restored to sanity still retains and uses the consideration, or seeks to enforce the securities he holds for the purchase money, or to avail himself of the contract constituting the consideration, then he must restore or release the same in order to be entitled to relief against the conveyance; the reason being that in such a case his conduct furnishes evidence of ratification.²

Intermediate Conveyance. — And where the grantee of the insane person has in turn conveyed to a purchaser for value and without notice of the insanity, it has been held that whether the original conveyance was void or voidable it will be set aside as against the *bona fide* purchaser, and this without the necessity of requiring restitution to him as a condition of relief. In such a case the right of the innocent purchaser to recover his purchase money rests between him and his immediate grantor, especially where the right can be enforced in the same suit.³

Id. INFANCY. — The rules respecting *bona fide* purchasers of property conveyed by infants are stated elsewhere in this work.⁴

c. QUALIFICATIONS OF RULE — (1) *Better Equity in Subsequent Party.* — The rule that where the equities are equal the elder prevails being founded upon equality of equities in the rival claimants, in all other respects save that of time, falls with the reason upon which it is based; and therefore, if the subsequent party has for any reason the better equity, and has acquired it without notice of the prior claim, his rights will be protected as against the holder of the elder equity.⁵ And in ascertaining which of the conflicting claims carries with it the better equity, no technical rule should be deemed controlling, but all the circumstances of the case should be carefully con-

1. Deed Voidable — Placing Purchaser in Statu Quo Not Condition Precedent. — *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766.

2. Same — Exception where Grantor Holds Consideration after Restoration to Sanity. — *Arnold v. Richmond Iron Works*, 1 Gray (Mass.) 434; *Gibson v. Soper*, 6 Gray (Mass.) 279, 66 Am. Dec. 414. See also *Crawford v. Scovell*, 94 Pa. St. 53, 39 Am. Rep. 766.

3. *Dewey v. Allgire*, 37 Neb. 6, 40 Am. St. Rep. 469; *Hull v. Louth*, 109 Ind. 315, 58 Am. Rep. 405 (where the first conveyance was without consideration and the second was by way of mortgage). See also *German Sav., etc., Soc. v. De Lashmuth*, 67 Fed. Rep. 399. *Contra*, *Arnett v. Owens*, (Ky. 1901) 65 S. W. Rep. 151, holding that the *bona fide* purchaser from a grantee with notice will be protected.

4. See the title INFANTS, vol. 16, p. 288.

5. *Better Equity, Though Subsequent, Prevails* — *England*. — *Mildmay v. Mildmay*, cited in *Bullock v. Sadlier*, Ambl. 767; *Rice v. Rice*, 2 Drew. 73; *Farrand v. Yorkshire Banking Co.*, 40 Ch. D. 182; *Hunter v. Walters*, L. R. 11 Eq. 292, 24 L. T. N. S. 276.

Canada. — *Davidson v. Wells*, 15 Grant Ch. (U. C.) 89.

United States. — *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 57.

California. — *Salter v. Baker*, 54 Cal. 140.

Ohio. — *Hume v. Dixon*, 37 Ohio St. 66; *Wilson v. Hicks*, 40 Ohio St. 418; *Campbell v. Sidwell*, 61 Ohio St. 179; *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589.

Pennsylvania. — *Leach v. Ansbacher*, 55 Pa. St. 85.

Vermont. — *St. Johnsbury v. Morrill*, 55 Vt. 165.

Virginia. — *Moore v. Holcombe*, 3 Leigh (Va.) 597, 24 Am. Dec. 683, *per* Cabell, J.; *Cox v. Romine*, 9 Gratt. (Va.) 27.

Illustrations. — Thus where both claimants stand upon equitable rights merely, yet where the prior party claims under a secret equitable lien while the subsequent party claims under a contract for the conveyance of the legal title, and has paid part of the purchase price without notice, the latter party will be protected in his purchase to the extent of his payments, and the land will be held chargeable in his hands only to the extent of the unpaid balance. *Cox v. Romine*, 9 Gratt. (Va.) 27, *disapproving* *Beirne v. Campbell*, 4 Gratt. (Va.) 125.

Where the holder of the prior equity was a volunteer and the holder of the subsequent equity was a purchaser for value, the court refused to grant relief against the latter even upon the condition of reimbursing him the sum paid as purchase money. *Mildmay v. Mildmay*, cited in *Bullock v. Sadlier*, Ambl. 767.

It has been said that the principle upon which a court of equity protects a *bona fide* purchaser is wholly irrespective of what estate he has acquired by his purchase, but that it depends upon the consideration whether he stands equitably in at least as favorable position as his opponent; and that if he does the court will give no relief against him. *Colyer v. Finch*, 5 H. L. Cas. 920, *per* Lord Ch. Cranworth. See also *Mitchell v. Gorrie*, 6 Grant Ch. (U. C.) 625; *Davidson v. Wells*, 15 Grant Ch. (U. C.) 89.

sidered,¹ especially the conduct of the parties.² It is only when nothing else appears in the case to give one party a better equity than the other that resort is to be had to priority of time.³

Prior Equity Not a Property Right. — But although as a general rule the defense of purchase for value and without notice can apply only in favor of one holding the legal estate and against the holder of a prior equitable title, yet it has been said that where the equity of the prior party does not amount to a property right — a title or estate — but is a mere right “to set aside a deed for fraud or to correct it for mistake,” it is not essential that the subsequent party should have the legal estate.⁴

(2) *Possession of Premises and Improvements Made Thereon.* — Where the conflicting equities are balanced, but the subsequent claimant is in possession of the property and has made valuable improvements thereon, a court of equity will not turn him out of possession in favor of the prior claimant; in such a case the maxim that where the equities are equal, *melior est conditio possidentis* (the condition of the possessor is the better), is applicable.⁵ But the foregoing principle must be taken with this qualification, that the advantage in respect to possession must be based upon a legal right thereto. Possession alone is not a sufficient ground for equity to refrain from giving relief against the purchaser.⁶

(3) *Right to Use Legal Estate in Support of Security.* — If the subsequent equitable incumbrancer has the right to use the legal estate in support of his security, he will be given preference over a prior equitable incumbrancer without such right.⁷

(4) *Best Right to Call for Conveyance of Legal Estate* — (a) **Principle Stated.** — If the subsequent party having purchased his equitable interest for value and without notice has the best right to call for the legal title, he will be protected against the prior equity to the same extent as if he had actually obtained a conveyance of the legal estate; as against him equity will afford no assistance to the holder of the elder equity.⁸

(b) **Subsequent Acquisition of Legal Estate.** — And, *a fortiori*, where the subsequent party has purchased an equitable interest for value and without notice, and has thus acquired the best right to call for the legal estate, he may thereafter clothe himself with the legal title, and thus, as against the prior equity,

1. *Rice v. Rice*, 2 Drew. 73; *Hume v. Dixon*, 37 Ohio St. 66; *St. Johnsbury v. Morrill*, 55 Vt. 165.

In England the Possession of the Title Deeds is a material circumstance in this connection, but is not necessarily one of controlling importance. *Rice v. Rice*, 2 Drew. 73; *Colyer v. Finch*, 5 H. L. Cas. 905; *Farrand v. Yorkshire Banking Co.*, 40 Ch. D. 182.

2. *Rice v. Rice*, 2 Drew. 73.

3. *Rice v. Rice*, 2 Drew. 73; *Farrand v. Yorkshire Banking Co.*, 40 Ch. D. 182.

4. **Prior Equity Not a Property Right.** — *Phillips v. Phillips*, 4 De G. F. & J. 218, *per* Lord Westbury; *Utterson Lumber Co. v. Rennie*, 21 Can. Sup. Ct. 226, *per* Strong, J., *citing* *Bowen v. Evans*, 1 J. & La. T. 178, *affirmed* 2 H. L. Cas. 257. See also *Mitchell v. Gorrie*, 6 Grant (U. C.) 625, where this principle was applied.

5. **Possession and Improvements.** — *St. Johnsbury v. Morrill*, 55 Vt. 165.

6. *Phillips v. Phillips*, 4 De G. F. & J. 218.

Contra. — Mere possession considered sufficient. *Mitchell v. Gorrie*, 6 Grant Ch. (U. C.) 628, *per* Esten, V. C.

7. **Using Legal Estate in Support of Security.** — *Campbell v. Sidwell*, 61 Ohio St. 179 (contest between vendor's lien and subsequent mortgage).

8. **Subsequent Equity Combined with Best Right to Legal Estate.** — *Wilkes v. Bodington*, 2 Vern. 599, 18 Vin. Abr. 117; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 57; *Gibler v. Trimble*, 14 Ohio 323; *Hume v. Dixon*, 37 Ohio St. 66; *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 596; *St. Johnsbury v. Morrill*, 55 Vt. 165; *Williamson v. Gordon*, 5 Munf. (Va.) 257; *Mutual Assur. Soc. v. Stone*, 3 Leigh (Va.) 236; *Preston v. Nash*, 75 Va. 949, 76 Va. 1; *Cox v. Romine*, 9 Gratt. (Va.) 27. See also *Willoughby v. Willoughby*, 1 T. R. 768; *Campbell v. Sidwell*, 61 Ohio St. 179; *Camden v. Harris*, 15 W. Va. 563.

Prior Legal Lien — Subsequent Equitable Title with Best Right to Legal Estate. — It has been held, however, that the protection which equity affords to a subsequent purchaser of an equitable title with the best right to call for the legal estate will not be given as against a prior lien which is in its nature legal rather than equitable; that even a purchaser for value and without notice will be protected only against a merely equitable title. *Mutual Assur. Soc. v. Stone*, 3 Leigh (Va.) 218 (statutory lien given to an insurance company upon property insured, for quotas, additional premiums and contributions).

be entitled to full protection as a *bona fide* purchaser; and this notwithstanding the fact that he has notice at the time he acquired the legal title.¹

(5) *Legal Advantage in Subsequent Party.* — Likewise a court of equity will afford no assistance against the subsequent purchaser or incumbrancer if in addition to his equitable rights he has acquired a legal advantage over the prior purchaser or incumbrancer.² Equity will not take from him any defense or protection which would avail him at law.³

(6) *Acquisition of Legal Title by Subsequent Party.* — It has been stated above that in a case where the equities are balanced so that priority of time would otherwise be controlling, the holder of the junior equity may gain the right to protection by acquiring the legal title.⁴

4. Consideration or Value — *a.* IN GENERAL. — It is an elementary proposition that the purchaser must have given a consideration or have parted with value in order to be entitled to protection in his purchase; otherwise no wrong is done him by depriving him of the property in favor of one meritoriously entitled thereto. A mere volunteer is not entitled to protection as a *bona fide* purchaser.⁵

b. NATURE AND ADEQUACY OF CONSIDERATION — (1) *Sufficiency in General.* — It has been said that the consideration necessary to constitute one who pays it a purchaser for value and without notice "has no relation to the general law of contracts and binding promises;"⁶ and in conformity to this theory it is held that the sufficiency of the consideration is governed not by the technical rules of the common law, but by the principles of equity jurisprudence.⁷

Value Must Be Given. — In the sense in which the word "consideration" is used in courts of equity, it means substantial value, and nothing less will suffice to constitute a grantee of land a purchaser for a valuable consideration.⁸

For a discussion of the distinctions between liens of various kinds, see the title LIENS, vol. 19, p. 3.

1. Purchase of Legal Title After Notice. — *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 494; *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589. See also *Lewis v. Madison*, 1 Munf. (Va.) 316; *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 2; *Gibler v. Trimble*, 14 Ohio 323; *Youst v. Martin*, 3 S. & R. (Pa.) 423. But see *Beirne v. Campbell*, 4 Gratt. (Va.) 125.

2. Legal Advantage. — *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 57; *Campbell v. Sidwell*, 61 Ohio St. 179; *Bell v. Beeman*, 3 Murph. (7 N. Car.) 273, 9 Am. Dec. 604; *St. Johnsbury v. Morrill*, 55 Vt. 165; *Moore v. Holcombe*, 3 Leigh (Va.) 597, 24 Am. Dec. 683; *National Valley Bank v. Harman*, 75 Va. 610.

3. *Bell v. Beeman*, 3 Murph. (7 N. Car.) 273, 9 Am. Dec. 604.

4. See *supra*, this section, *Purchase of Legal Estate by Subsequent Party.*

5. Necessity for Consideration — *England.* — *Harrison v. Southcote*, 1 Atk. 538; *Brereton v. Gamul*, 2 Atk. 241; *Kettlewell v. Watson*, 21 Ch. D. 709.

Alabama. — *Anthe v. Heide*, 85 Ala. 236.
Arkansas. — *Gerson v. Pool*, 31 Ark. 85.
Georgia. — *Carter v. Pinckard*, 68 Ga. 817.
Illinois. — *Brown v. Welch*, 18 Ill. 348; *Keys v. Test*, 33 Ill. 316.

Indiana. — *Holcroft v. Hunter*, 3 Blackf. (Ind.) 151; *Petry v. Ambroscher*, 100 Ind. 510; *Citizens State Bank v. Julian*, 153 Ind. 672.

Mississippi. — *Doss v. Armstrong*, 6 How. (Miss.) 260; *Upshaw v. Hargrove*, 6 Smed. & M. (Miss.) 286.

Missouri. — *Magee v. Burch*, 108 Mo. 336.
Nevada. — *Boskowitz v. Davis*, 12 Nev. 447.
New Jersey. — *Campbell v. Campbell*, 11 N. J. Eq. 268.

North Carolina. — *Howlett v. Thompson*, 1 Ired. Eq. (36 N. Car.) 375.

Oregon. — *Wood v. Rayburn*, 18 Oregon 3; *Schetter v. Southern Oregon Imp. Co.*, 19 Oregon 192.

Texas. — *Watkins v. Edwards*, 23 Tex. 447; *Beaty v. Whitaker*, 23 Tex. 526; *Fraim v. Frederick*, 32 Tex. 294; *Hutchins v. Chapman*, 37 Tex. 615; *Harrison v. Boring*, 44 Tex. 263; *Lindsay v. Freeman*, 83 Tex. 259.

Rule Applied to Assignee of Mortgage. — *Baker v. Lever*, 67 N. Y. 304, 23 Am. Rep. 117.

The Rule of the Text is the foundation of the following rules stated in this subdivision, the cases supporting which do not require repetition here.

6. Nature of Consideration. — 2 Pomeroy Eq. Jur., § 746.

7. Principles of Equity Control. — *Turner v. Howard*, 10 N. Y. App. Div. 559.

8. Consideration Must Be Valuable. — *Sewell v. Nelson*, (Ky. 1902) 67 S. W. Rep. 985; *Doss v. Armstrong*, 6 How. (Miss.) 258; *Wood v. Robinson*, 22 N. Y. 567; *Weaver v. Barden*, 49 N. Y. 286; *Turner v. Howard*, 10 N. Y. App. Div. 555. And see the cases *infra*, throughout this subdivision.

The same rule applies under the recording acts. *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809. And see the title RECORDING ACTS.

Payment of Purchase Price in Confederate Money. — See the title PAYMENT, vol. 22, p. 546.

Merely Nominal Consideration. — The payment of a sum so far below the value of the property as to be a merely nominal consideration is not such a payment of value as will entitle the purchaser to protection in equity.¹

Consideration Need Not Be Full Value of Property. — The consideration, however, while it must be valuable, need not be commensurate with the value of the property.² And the payment of a sum much below the actual value of the land will be held sufficient.³

But Gross Inadequacy of Price may furnish a sufficient ground for charging the purchaser with constructive notice of defects in the title.⁴

(2) *Love and Affection.* — Love and affection as a consideration for a conveyance⁵ or a devise⁶ by a parent to his child is insufficient to constitute the latter a purchaser for value.

(3) *Marriage.* — It has been held that the consideration of marriage will support a plea of purchase for value and without notice, as well as a payment of money.⁷

(4) *Promise to Support Grantor.* — A promise by the grantee to support the grantor, or the grantor and his wife, for life is not a valuable consideration within the rule of equity that protects the purchaser; the reason being that the transaction in effect is but a trust for the benefit of the grantor.⁸

(5) *Becoming Surety for Grantor.* — It has been held that the mere assumption of a liability of the grantor upon a contingency, as becoming surety for him, is not such a consideration as will entitle the purchaser or mortgagee to protection; the reason being that he may never be called upon to pay anything by reason of the suretyship.⁹ But the weight of authority appears to be to the contrary, it being held that the incurring of a liability to part with value *in futuro* is a sufficient consideration to support the purchase; so where land is conveyed or mortgaged to secure the grantee against such liabilities as he may incur as surety for the grantor, the grantee is protected as a purchaser for value.¹⁰

(6) *Release of Claims Against Third Person.* — The release by the purchaser of claims against a third person may be a sufficient consideration.¹¹

The Release of Stale and Worthless Claims against the grantor does not constitute such a consideration as will support the defense of purchase for value. *Perkins v. Wilkinson*, 86 Wis. 538.

1. **Nominal Consideration Insufficient.** — *Mason v. Mullahy*, 145 Ill. 383; *Kitteridge v. Chapman*, 36 Iowa 348; *Turner v. Howard*, 10 N. Y. App. Div. 555; *Ten Eyck v. Witbeck*, 135 N. Y. 40, 31 Am. St. Rep. 809, *overruling Hendy v. Smith*, 49 Hun (N. Y.) 510, and *Webster v. Van Steenberg*, 46 Barb. (N. Y.) 211; *Nichols-Stewart v. Crosby*, 87 Tex. 443, *affirming Stewart v. Crosby*, (Tex. Civ. App. 1894) 26 S. W. Rep. 138 (property worth \$8,000 purchased for \$5); *Richerson v. Moody*, 17 Tex. Civ. App. 67. See also *Kearney v. Vaughan*, 50 Mo. 284.

2. **Payment of Less than Real Value Sufficient.** — *More v. Mayhow*, *Freem. Ch.* 175; *Bullock v. Sadlier*, *Ambl.* 764; *Miller v. Fraley*, 23 Ark. 735; *Dean v. Anderson*, 34 N. J. Eq. 508; *Haywood v. Moore*, 2 Humph. (Tenn.) 587; *Johnson v. Newman*, 43 Tex. 629; *Hume v. Ware*, 87 Tex. 380. See also the title MORTGAGES, vol. 20, p. 921.

3. *Bullock v. Sadlier*, *Ambl.* 764.

It seems that if the consideration is such as would be deemed sufficient within the statutes of Elizabeth, the purchase will not be impeached in equity. *Bassett v. Nosworthy*,

Finch 102; *Bullock v. Sadlier*, *Ambl.* 764. See generally the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 210.

4. See *infra*, this title, *Notice, Its Sufficiency and Effect* — *Constructive Notice* — *By Inadequacy of Consideration*.

5. **Love and Affection Not Sufficient.** — *Salter v. Dunn*, 1 Bush (Ky.) 311.

6. *Jackson v. Lynch*, 129 Ill. 72. See also *Wamburzee v. Kennedy*, 4 Desaus. (S. Car.) 478.

7. **Marriage a Sufficient Consideration.** — *Harding v. Hardrett*, *Finch* 9 (a marriage settlement); *Jackson v. Rowe*, 2 Sim. & St. 472, *per Leach*, V. C. See also *Dick v. Doughten*, 1 Del. Ch. 327.

8. **Promise to Support Grantor Not Sufficient.** — *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371. See also *Sandlin v. Robbins*, 62 Ala. 477; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Smith v. Smith*, 11 N. H. 459.

9. **Grantee Becoming Surety for Grantor.** — *Mounce v. Byars*, 16 Ga. 469 (deposit of title deeds by way of equitable mortgage).

10. *Wailles v. Cooper*, 24 Miss. 229; *Gann v. Chester*, 5 Verg. (Tenn.) 205; *Duval v. Bibb*, 4 Hen. & M. (Va.) 117, 4 Am. Dec. 506. See also *Rogers v. Adams*, 66 Ala. 600.

11. **Release by Grantee of Claim Against Third Person.** — *Halbert v. DeBode*, 15 Tex. Civ. App. 615.

Thus the surrender to the grantor of the promissory note of a third person is sufficient.¹

(7) *Exchange of Property*. — One who conveys real estate² or releases interests therein³ as a consideration for a conveyance of other lands to him is a purchaser for value.

Exchange of Land for Shares of Stock. — Where a corporation takes land in payment of a subscription for capital stock, the subscriber thereupon becoming the owner of the stock, the corporation is a purchaser for value; and this notwithstanding that no stock certificates are issued, for the certificates are merely evidence of ownership.⁴ But payment of the purchase price in worthless mining stock does not constitute the grantee of the land a purchaser for value.⁵

(8) *Giving Security for Payment* — (a) **General Rule**. — The consideration must be actually paid or performed. Giving security for payment of the purchase money or for an unpaid balance thereof is not equivalent to payment, for against the enforcement of the security a court of equity can grant relief.⁶

(b) **Exception**. — But where the circumstances are such that a court of equity cannot afford relief against the enforcement of the security, an exception to the rule is made, and the giving of the security will operate as payment.⁷

1. *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143. See also *Smith v. Westall*, 76 Tex. 509.

2. **Conveyance of Other Land to Vendor**. — *Phoenix Ins. Co. v. Neal*, 23 Tex. Civ. App. 427.

Husband and Wife Conveying Homestead as Consideration for Deed to Wife. — Thus a deed conveying the property in controversy, executed to a married woman by a third party, in consideration of her execution, jointly with her husband, to the third party, of a deed of the homestead of herself and husband and family, is a conveyance upon a valuable consideration received directly by the third party from the married woman. *Rivers v. Rivers*, 38 Fla. 65.

Exchange of Property under Decree by Consent.

— Where a man, his wife and their minor children, the children being represented by next friend, were coplaintiffs in a bill which was disposed of by a consent decree, and that decree declared that certain premises, previously the property of the husband and father, should belong to the wife for her life and to the children in remainder, this was in effect a conveyance by the husband and father; and if the wife and children, in and by the same decree, parted with other premises which previously belonged to them, and these premises thereby became the property of the father and his children by a former marriage, the wife and her children were purchasers for value from the husband and father. *Wallace v. Jones*, 93 Ga. 419.

3. **Relinquishment of Rights in Other Property**.

— *Halbert v. DeBode*, 15 Tex. Civ. App. 615.

Surrender of Undivided Interest by Cotenant —

Partition. — Where one of several cotenants of land surrenders by conveyance to the other cotenants his undivided interest in exchange for a conveyance by them of a particular part of the same lands in severalty, he is a purchaser for value. *Latham v. Inman*, 88 Ga. 515; *Citizens State Bank v. Julian*, 153 Ind. 673. And it makes no difference in the result that the partition and assignment in severalty

are effected by commissioners appointed under order of the court. *Citizens State Bank v. Julian*, 153 Ind. 673. See also the title **PARTITION**, vol. 21, p. 1126.

4. **Giving Stock in Payment**. — *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736. See also the titles **STOCK**; **STOCKHOLDERS**.

5. *Sewell v. Nelson*, (Ky. 1902) 67 S. W. Rep. 985.

6. **Giving Security for Payment Insufficient** — *England*. — *Harrison v. Southcote*, 1 Atk. 538; *Hardingham v. Nicholls*, 3 Atk. 304; *Tourville v. Naish*, 3 P. Wms. 307.

Canada. — *Henderson v. Graves*, 2 U. C. Err. & App. 25.

United States. — *Balfour v. Parkinson*, 84 Fed. Rep. 860, affirmed *sub nom.* *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 564.

Arkansas. — *Marchbanks v. Banks*, 44 Ark. 48.

Iowa. — *Kitteridge v. Chapman*, 36 Iowa 348.

Michigan. — *Warner v. Whittaker*, 6 Mich. 135, 72 Am. Dec. 65; *Matson v. Melchor*, 42 Mich. 480; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57.

Minnesota. — *Minor v. Willoughby*, 3 Minn. 225.

Mississippi. — *Parker v. Foy*, 43 Minn. 265, 5 Am. Rep. 484.

Missouri. — *Wallace v. Wilson*, 30 Mo. 335. See also *Paul v. Fulton*, 25 Mo. 156.

New Jersey. — *Baldwin v. Johnson*, 1 N. J. Eq. 441; *Haughwout v. Murphy*, 21 N. J. Eq. 118; *Dean v. Anderson*, 34 N. J. Eq. 508; *Chancellor v. Bell*, 45 N. J. Eq. 538.

New York. — *Jewett v. Palmer*, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 642.

Oregon. — *Wood v. Rayburn*, 18 Oregon 3.

Pennsylvania. — *Union Canal Co. v. Young*, 1 Whart. (Pa.) 410, 30 Am. Dec. 212.

South Carolina. — *Snelgrove v. Snelgrove*, 4 Desaus. (S. Car.) 287.

Virginia. — *Lamar v. Hale*, 79 Va. 147.

7. **When Enforcement of Security Cannot Be Prevented**. — *Losey v. Simpson*, 11 N. J. Eq.

(c) **Giving Negotiable Promissory Note** — *aa. GENERAL RULE.* — As a general rule the giving of the negotiable promissory notes of the purchaser is not a payment of value, at least in a case so circumstanced that a court of equity can prevent their enforcement.¹

bb. EFFECT OF TRANSFER OF NOTE. — But where the notes have been negotiated by the vendor of the land, and when due are in the hands of *bona fide* holders for value, so that the purchaser is absolutely bound to pay, then the situation of the purchaser is the same as if the purchase money had actually been paid.² And even in a case where the notes have not been negotiated and it is not shown that they have left the hands of the vendor, if it is impracticable for a court of equity to prevent their transfer to an innocent purchaser who could then enforce them against the maker, the latter's situation will be the same as if the notes had been thus negotiated, and the giving of the notes will operate as payment of the purchase money.³

(g) **Antecedent Debt** — (a) **In General.** — The question whether a pre-existing indebtedness of the grantor to the grantee is such a valuable consideration as will constitute the grantee a purchaser for value and so entitle him to protection in equity has been productive of much conflict of authority.

(b) **Rule that Grantee Is Not Protected.** — In a number of jurisdictions the courts have held that the discharge of an existing debt or liability owing from grantor to grantee is not equivalent to a payment of money or a parting with value so as to constitute a sufficient consideration; but that in order for the grantee to be a purchaser for value, entitled to protection in equity, he must advance some new consideration or surrender some additional right at the time of the purchase.⁴

246. In this case the purchaser gave a bond and mortgage to secure payment of the purchase money; but it was a part of the negotiations that the complainants should advance the purchase money to the vendor and take an assignment of the securities, which was done. It was held that the purchaser had paid value and should be protected in his purchase, and that the complainants should also be protected by the preservation of their lien under the bond and mortgage. See also *Thomas v. Stone, Walk.* (Mich.) 119.

1. **Giving Negotiable Note Not Payment.** — *Baldwin v. Sager*, 70 Ill. 508; *Greenlee v. Marquis*, 49 Mo. App. 290; *Chancellor v. Bell*, 45 N. J. Eq. 538 (note given for assignment of a mortgage).

Payment by Note Held Equivalent to Payment in Cash. — It has been held in *Texas*, however, that payment of the purchase price by giving negotiable promissory notes of the purchaser is as much a payment of value as giving cash. *Cameron v. Romeo*, 53 Tex. 238; *Watkins v. Sproull*, 8 Tex. Civ. App. 427. See also *Le Page v. Slade*, 79 Tex. 478; *Dodd v. Gaines*, 82 Tex. 429. *Contra*, *Tate v. Kramer*, 1 Tex. Civ. App. 427.

2. **Effect of Negotiation of Notes.** — *Baldwin v. Sager*, 70 Ill. 507; *Partridge v. Chapman*, 81 Ill. 137; *Pierson v. Slifer*, 52 Mo. App. 273; *Freeman v. Deming*, 3 Sandf. Ch. (N. Y.) 327.

And of course, where the purchaser has by legal process been compelled to pay the notes, he will be protected. *Wetmore v. Woods*, 62 Mo. App. 265.

Failure of Purchaser to Enjoin Negotiation. — But where in a proper case the purchaser can after notice enjoin the negotiation of the notes but fails to do so, and the notes are transferred to a *bona fide* holder for value, the pur-

chaser must pay them, and will be afforded no relief for his loss, since it is the result of his own folly. *Greenlee v. Marquis*, 49 Mo. App. 290.

3. **Where Court Cannot Prevent Negotiation.** — *Digby v. Jones*, 67 Mo. 104. See also *Thomas v. Stone, Walk.* (Mich.) 119.

4. **Discharge of Antecedent Debt Not a Valuable Consideration.** — *United States.* — *Gest v. Packwood*, 34 Fed. Rep. 368.

Illinois. — *Powell v. Jeffries*, 5 Ill. 387; *Furman v. Rapelje*, 67 Ill. App. 31.

Iowa. — *Anderson v. Buck*, 66 Iowa 490; *Lillibridge v. Allen*, 100 Iowa 582.

Minnesota. — *Minor v. Willoughby*, 3 Minn. 225; *Baze v. Arper*, 6 Minn. 220.

New York. — *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232.

Tennessee. — *Mosely v. Wingo*, 7 Lea (Tenn.) 145. See also *Cook v. Cook*, 3 Head (Tenn.) 719; *Anderson v. Douglass*, 1 Tenn. Ch. 442; *Finnegan v. Finnegan*, 3 Tenn. Ch. 515.

Texas. — *Steffan v. Milmo Nat. Bank*, 69 Tex. 513; *Jackson v. Waldstein*, (Tex. Civ. App. 1894) 27 S. W. Rep. 26 (purchase of land certificate); *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143; *Hirsch v. Jones*, (Tex. Civ. App. 1897) 42 S. W. Rep. 604; *Pride v. Whitfield*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1100.

Crediting Agreed Price on Antecedent Debt. — In a jurisdiction where the rule of the text prevails, the crediting of the purchase price upon a pre-existing debt, without more, is not a sufficient consideration to constitute the grantee a purchaser for value. *Bonner v. Grigsby*, 84 Tex. 330, 31 Am. St. Rep. 48; *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 143; *Marshall v. Marshall*, (Tex. Civ. App. 1897) 42 S. W. Rep. 353.

(c) **Exception to Rule — Release of Security.** — The theory upon which the rule is based is that by taking a conveyance the creditor has actually lost nothing, since if the title is defective or if the land is taken by a prior claimant, he still has his remedy against his grantor. But where this result could not be reached the rule fails, and if the creditor in consideration of the conveyance has released his security for the antecedent debt so that it cannot be revived, and he cannot be placed *in statu quo*, or has put himself in such a position that he cannot in any contingency enforce the debt, then it is held that he has parted with a valuable consideration and is entitled to protection as a purchaser for value.¹

(d) **Rule that Grantee Is Protected.** — There are a number of jurisdictions in which it is held that the absolute satisfaction and discharge of an antecedent debt owing by the grantor to the grantee is as effective as a contemporaneous payment of money to constitute the grantee a purchaser for value and entitle him to protection in equity.²

The Reason of This Rule is that the enforcement of the prior equity against the land will not revive the indebtedness for the payment and satisfaction of which the land was conveyed.³

Relation of Debtor and Creditor Essential. — But to bring the rule into operation the relation of debtor and creditor must be shown to exist between grantor and grantee;⁴ and a transaction that may be considered as a gift of money rather than a loan will not be sufficient to establish that relation.⁵

(e) **Rules under the Recording Acts.** — The same diversity of opinion as shown above exists in the law falling within the scope of the recording acts, some courts holding an antecedent debt a sufficient consideration under the statutes, and others holding the contrary. A full discussion of these authorities will be found under their appropriate title elsewhere in this work.⁶

(f) **Conveyance or Mortgage as Security for Antecedent Debt.** — By the prevailing weight of authority a conveyance or mortgage taken from the debtor merely to secure the creditor for an existing debt, no extension of the time of payment being given and no present consideration of any kind being advanced, does not constitute the creditor so secured a purchaser for value.⁷ The

For the rule as to crediting the purchase price upon the existing debt where the creditor purchases at an execution sale under his own judgment, see the title *SHERIFF'S SALES*.

1. Release of Security for Antecedent Debt. — *Dunlap v. Green*, 23 U. S. App. 154, 60 Fed. Rep. 242 (where the note evidencing the debt had been surrendered so long before the assertion of the adverse claim, that the statute of limitations had run); *Bunn v. Schnellbacher*, 163 Ill. 328, *affirming* 59 Ill. App. 222; *McCleery v. Wakefield*, 76 Iowa 529; *Padgett v. Lawrence*, 10 Paige (N. Y.) 170, 40 Am. Dec. 232; *Lane v. Logue*, 12 Lea (Tenn.) 681.

2. Discharge of Antecedent Debt Held a Valuable Consideration — *England*. — *Nugent v. Gifford*, 1 Atk. 463.

Canada. — *Moore v. Kane*, 24 Ont. 545.

Alabama. — *Saffold v. Wade*, 51 Ala. 214; *Pique v. Arendale*, 71 Ala. 91.

Indiana. — *McMahon v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Babcock v. Jordan*, 24 Ind. 14; *Wert v. Naylor*, 93 Ind. 431; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; *Pugh v. Highley*, 152 Ind. 252, 71 Am. St. Rep. 327, *disapproving* *Boling v. Howell*, 93 Ind. 329; *Petry v. Ambrosier*, 100 Ind. 510; *Tarkington v. Purvis*, 128 Ind. 182; *Orb v. Coapstick*, 136 Ind. 313, and *Shirk v. Thomas*, 121 Ind. 147, 16 Am. St. Rep. 381.

Kansas. — See *Ruth v. Ford*, 9 Kan. 17.

Mississippi. — *Soule v. Shotwell*, 52 Miss. 236. See also *Boon v. Barnes*, 23 Miss. 139; *Love v. Taylor*, 26 Miss. 567; *Perkins v. Swank*, 43 Miss. 349. *Contra*, *Rowan v. Adams, Smed. & M. Ch. (Miss.)* 45.

Missouri. — *State Bank v. Frame*, 112 Mo. 502.

New Jersey. — *Uhler v. Semple*, 20 N. J. Eq. 293.

Ohio. — *Clements v. Doerner*, 40 Ohio St. 632.

3. Adams v. Vanderbeck, 148 Ind. 92, 62 Am. St. Rep. 497.

But it is clear upon principle that a mere executory agreement to discharge a pre-existing debt and to surrender security therefor, is not a sufficient consideration, since the purchaser has in no way changed his position for the worse and thus has suffered no detriment. *Hayden v. Charter Oak Driving Park*, 63 Conn. 142.

4. Debt Must Be Proved. — *Williams v. Williams*, 118 Mich. 477; *Duke v. Balme*, 16 Minn. 306. In both these cases the transactions were between husband and wife.

5. Williams v. Williams, 118 Mich. 477.

6. See the title RECORDING ACTS.

7. Conveyance or Mortgage Securing Antecedent Debt — *United States*. — *Morse v. Cohannet Bank*, 3 Story (U. S.) 365; *Hill v. Hite*, 79 Fed. Rep. 826. See also *People's Sav. Bank v. Bates*, 120 U. S. 556.

contrary, however, has been held in some cases.¹

(g) **General Assignment for Benefit of Creditors.** — As a general rule, neither an assignee for the benefit of creditors nor the creditors secured by the assignment occupy the position of purchasers for value, the reason being that no consideration is advanced; hence they stand as mere volunteers and take subject to all equities that could have been enforced against the land while owned by the assignor, and this regardless of notice.² But there is some

Alabama. — *Boyd v. Beck*, 29 Ala. 703; *Alexander v. Caldwell*, 55 Ala. 517; *Cook v. Parham*, 63 Ala. 460; *Craft v. Russell*, 67 Ala. 9; *Anthe v. Heide*, 85 Ala. 236. See also *Sweeney v. Bixler*, 69 Ala. 540.

Arkansas. — *Johnson v. Graves*, 27 Ark. 557. *Colorado.* — *Cassidy v. Harrelson*, 1 Colo. App. 462, *distinguishing* *Knox v. McFarman*, 4 Colo. 586, and *Merchants' Bank v. McClelland*, 9 Colo. 608. An expression of opinion to the contrary is found in *Jerome v. Carbonate Nat. Bank*, 22 Colo. 37; but this was used with reference to the particular facts before the court; the case involving a contest between the holder of a lien under an attachment levy and a grantee under a prior but unrecorded deed, and depending upon the construction of the recording act.

Florida. — *Gilinski v. Zawadski*, 8 Fla. 405.

Georgia. — *Chance v. McWhorter*, 26 Ga. 315.

Indiana. — *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 584, 30 Am. Rep. 250; *Davis v. Newcomb*, 72 Ind. 417; *Adams v. Vanderbeck*, 148 Ind. 92, 62 Am. St. Rep. 497; *Warford v. Hawkins*, 150 Ind. 489. Several early cases held the contrary doctrine. *Work v. Brayton*, 5 Ind. 397; *Nutter v. Harris*, 9 Ind. 88; *Wright v. Bundy*, 11 Ind. 398; *Babcock v. Jordan*, 24 Ind. 14. But these authorities are *overruled* by the subsequent decisions.

Kentucky. — *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 285; *Holmes v. Stix*, 104 Ky. 351.

Mississippi. — *Perkins v. Swank*, 43 Miss. 349; *Schumpert v. Dillard*, 55 Miss. 36.

New York. — *Wood v. Robinson*, 22 N. Y. 564; *Hiscock v. Phelps*, 49 N. Y. 97; *Breed v. National Bank*, 57 N. Y. App. Div. 468, *affirmed* 171 N. Y. 648. See also *Cary v. White*, 52 N. Y. 141; *Weaver v. Barden*, 49 N. Y. 292.

North Carolina. — *Donaldson v. Cape Fear Bank*, 1 Dev. Eq. (16 N. Car.) 103, 18 Am. Dec. 577; *Small v. Small*, 74 N. Car. 16. But see *Potts v. Blackwell*, 4 Jones Eq. (57 N. Car.) 58.

Ohio. — *Lewis v. Anderson*, 20 Ohio St. 281; *McGrath v. Cowen*, 57 Ohio St. 412.

Pennsylvania. — *Ashton's Appeal*, 73 Pa. St. 162.

South Carolina. — *Marsh v. Ramsay*, 57 S. Car. 121.

Tennessee. — *Cook v. Cook*, 3 Head (Tenn.) 722.

Texas. — *Spurlock v. Sullivan*, 36 Tex. 511; *Steffian v. Milmo Nat. Bank*, 69 Tex. 513; *Pride v. Whitfield*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1102; *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248. See also *Watts v. Corner*, 8 Tex. Civ. App. 592.

Rule Applied to Assignment of Mortgage. — *Breed v. National Bank*, 57 N. Y. App. Div.

468, *affirmed* 171 N. Y. 648. But see *Potts v. Blackwell*, 4 Jones Eq. (57 N. Car.) 58.

Debt Contracted on Faith of Promise to Give Mortgage. — But though the indebtedness exist at the time of the mortgage, if the debt was contracted on the faith of the debtor's promise that the mortgage should be made, the mortgagee will be protected. *Coleman v. Smith*, 55 Ala. 369; *Michener v. Bengel*, 135 Ind. 188. But see *Willis v. Albertson*, (Supm. Ct. Spec. T.) 20 Abb. N. Cas. (N. Y.) 263.

Discharge of Old Debt, Creation of New Debt. — Where as a part of the same transaction the old debt is extinguished, a new debt created upon a new consideration, and a mortgage given as security therefor, the mortgagee is a purchaser for value. *Cook v. Parham*, 63 Ala. 456.

1. Contrary Rule. — In *Virginia* and *West Virginia* it is held that the trustee and the creditors in a trust deed given to secure antecedent debts are purchasers for value. *Evans v. Greenhow*, 15 Gratt. (Va.) 153; *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846; *Western Min., etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409; *Crumlish v. Shenandoah Valley R. Co.*, 32 W. Va. 259. See also *Williams v. Lord*, 75 Va. 404; *Witz v. Osburn*, 83 Va. 230; *Exchange Bank v. Knox*, 19 Gratt. (Va.) 739; *Shurtz v. Johnson*, 28 Gratt. (Va.) 667.

And there are several cases holding that a vendor's lien will not prevail over a subsequent mortgage or deed of trust given by the vendee to secure pre-existing debts. *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46 (*disapproved* in *Shirley v. Congress Steam Sugar Refinery*, 2 Edw. (N. Y.) 511, in *Twelves v. Williams*, 3 Whart. (Pa.) 493, 31 Am. Dec. 542, and in *Chance v. McWhorter*, 26 Ga. 318); *Gann v. Chester*, 5 Yerg. (Tenn.) 205; *Sharp v. Fly*, 9 Baxt. (Tenn.) 4, *distinguishing* *Brown v. Vanlier*, 7 Humph. (Tenn.) 239.

For a Full Discussion of this point, see the titles TRUST DEEDS and POWER of SALE MORTGAGES; VENDOR'S LIENS.

2. Assignee and Creditors Not Purchasers for Value. — *Arkansas.* — See *Bridgeford v. Adams*, 45 Ark. 136.

Illinois. — *Willis v. Henderson*, 5 Ill. 13, 38 Am. Dec. 120; *Hardin v. Osborne*, 94 Ill. 571.

Indiana. — *Davis v. Newcomb*, 72 Ind. 413.

Iowa. — *Arnold v. Grimes*, 2 Iowa 1.

Kentucky. — *Corn v. Sims*, 3 Met. (Ky.) 391; *Drake v. Ellman*, 80 Ky. 434; *Exchange, etc., Bank v. Stone*, 80 Ky. 109 (assignee in bankruptcy); *Walker v. Walker*, (Ky. 1897) 41 S. W. Rep. 315.

Massachusetts. — See *Chace v. Chapin*, 130 Mass. 128.

Missouri. — *Hach v. Hill*, (Mo. 1890) 14 S. W. Rep. 739.

authority to the contrary.¹

(h) **Extending Time of Payment of Antecedent Debt.** — It is well settled that an extension of the time of payment of an antecedent debt is a sufficient consideration for a mortgage to secure the debt. So where a debtor executes to his creditor a mortgage to secure a pre-existing debt, if as a part of the consideration there is such a valid, binding, contemporaneous agreement to extend payment of the debt to a future time as will disable the mortgagee to sue before that time, this constitutes such a new, present consideration as will make the mortgagee a purchaser for value within the rule of equity entitling purchasers for value and without notice to protection against prior equitable rights.² It has been considered, however, that the extension of time must constitute a part of the contract by which the mortgage or deed of trust is given, and it is accordingly held that even though the practical result of the transaction may be to extend the time of payment, the person whose debt is thus secured will not be protected unless the extension was contemplated by the parties at the time the security was given, and was intended by them to constitute a part of the consideration for the conveyance.³

(i) **Antecedent Debt as Part Consideration — Absolute Conveyance.** — In a jurisdiction where the discharge of a pre-existing debt does not constitute such a valuable consideration for a conveyance of land as will entitle the grantee to protection as a purchaser for value, it is nevertheless held that where a part of the consideration is the discharge of an antecedent debt, and the rest of it a contemporaneous payment of value or its equivalent, if the latter constitutes a substantial part of the whole consideration the grantee will be accorded the position of a purchaser for value to the same extent as if the entire consideration had been a contemporaneous payment of money.⁴ And even where the greater portion of the consideration was a pre-existing debt and the rest was a contemporaneous payment of value, it has been held that the purchaser was entitled to full protection.⁵ But on the other hand it is held that where the greater part of the consideration is a pre-existing debt, the purchaser will be protected only to the extent of the part advanced at the time of the purchase.⁶

Nebraska. — *Salladin v. Mitchell*, 42 Neb. 859.

New York. — *Matter of Howe*, 1 Paige (N. Y.) 125. *Contra*, *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

See also the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS, vol. 3, pp. 46, 99 *et seq.*

1. **Contra — Assignee and Creditors Held Purchasers for Value.** — *Hollister v. Loud*, 2 Mich. 309; *Douglass Merchandise Co. v. Laird*, 37 W. Va. 687. In both these cases fraud was involved.

2. **Extending Payment of Antecedent Debt a Sufficient Consideration — Alabama.** — *Thurman v. Stoddard*, 63 Ala. 336; *Cook v. Parham*, 63 Ga. 460; *Craft v. Russell*, 67 Ala. 9; *Sweeney v. Bixler*, 69 Ala. 540 (mortgage of chattel); *Mobile L. Ins. Co. v. Randall*, 71 Ala. 222; *Downing v. Blair*, 75 Ala. 216, *overruling* *Pep-per v. George*, 51 Ala. 190; *Jones v. Robinson*, 77 Ala. 499; *Whitfield v. Riddle*, 78 Ala. 100; *Alston v. Marshall*, 112 Ala. 638.

Indiana. — *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250.

Iowa. — *Koon v. Tramel*, 71 Iowa 132.

Michigan. — *De Mey v. Defer*, 103 Mich. 239.

Mississippi. — *Schumpert v. Dillard*, 55 Miss. 361.

North Carolina. — *Branch v. Griffin*, 99 N. Car. 173.

Texas. — *Steffian v. Milmo Nat. Bank*, 69

Tex. 517; *Simmons Hardware Co. v. Kaufman*, 77 Tex. 136; *Watts v. Corner*, 8 Tex. Civ. App. 588; *Farmers' Nat. Bank v. James*, 13 Tex. Civ. App. 550.

Extending time of payment in such a manner that sureties on the debt are released from liability, is such a consideration for a mortgage executed to secure the debt as will constitute the mortgagee a purchaser for value. *Mobile L. Ins. Co. v. Randall*, 71 Ala. 220.

Trust Deed. — The rule of the text is equally applicable to a creditor under a deed of trust. *Randolph v. Webb*, 116 Ala. 135; *Simmons Hardware Co. v. Kaufman*, 77 Tex. 136. And the purchaser at the sale under the deed succeeds to the rights and immunities of the creditor. *Randolph v. Webb*, 116 Ala. 135.

3. *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 248. *Compare* *Mobile L. Ins. Co. v. Randall*, 71 Ala. 223, *per* *Brickell*, C. J.

4. **Part Antecedent Debt, Part Payment of Value.** — *Finnegan v. Finnegan*, 3 Tenn. Ch. 510.

5. *Adler-Goldman Commission Co. v. Clemons*, 64 Ark. 197.

6. *Golson v. Fielder*, 2 Tex. Civ. App. 400. In *Freeman v. Tinsley*, (Tex. Civ. App. 1897) 40 S. W. Rep. 835, where an independent executor made an unauthorized sale of land of the decedent's estate, and the vendee conveyed to his wife in consideration of an antecedent debt and the assumption of a community debt,

Mortgage. — Although, as it has been shown, a mortgagee whose mortgage is given simply to secure a pre-existing debt is not a purchaser for value,¹ yet where there is some additional consideration advanced at the time the mortgage is given, the rule is subject to qualifications. Thus, where besides the antecedent debt there is a release of other security, an extension of the time of payment, a giving of further credit, or a reduction of the rate of interest, or a combination of these matters of new and additional consideration, the mortgagee will be accorded the position of a purchaser for value.² But where the greater part of the consideration for a mortgage is an antecedent debt, and the residue is money or some other property of fixed or easily ascertainable value, given at the time, the mortgagee will be deemed a purchaser for value only to the extent of the new consideration.³

(10) *Partial Failure of Consideration.* — Where a part of the consideration has failed, the purchaser or mortgagee will be protected only as to the part subsisting.⁴

5. Absence of Notice. — An essential element of a *bona fide* purchase is, of course, absence of notice of any adverse interest. But since it is necessary to ascertain what constitutes notice before its presence or absence can be predicated in a given case, a discussion of its absence must necessarily, if illogically, consist in affirmative statements of the circumstances giving rise to its presence and of the consequences flowing therefrom.⁵

V. NOTICE — ITS SUFFICIENCY AND EFFECT — 1. In General. — The general principles of the law of notice have been stated elsewhere in this work.⁶ It remains, therefore, only to apply these principles to the specific matters under discussion, together with such additional rules as may be peculiar to the nature of this subject.

2. Nature and Sufficiency of Notice — a. CONSTRUCTIVE NOTICE — (1) General Rule. — The doctrine of constructive notice, or notice implied from

it was held that the wife was not a *bona fide* purchaser for value.

1. See *supra*, this section, *Conveyance or Mortgage as Security for Antecedent Debt*.

2. Additional, Contemporaneous Consideration. — The fact that a mortgage is taken as security for a pre-existing debt does not prevent the mortgagee from being a purchaser for value where, at the time of taking it, he released other security and extended the time of payment. *Alston v. Marshall*, 112 Ala. 638; *Simmons Hardware Co. v. Kaufman*, 77 Tex. 136.

Where the consideration of a mortgage is a pre-existing debt and also another debt contemporaneously contracted, and an extension of the time of payment of the antecedent debt, the mortgagee occupies the position of a purchaser for value. *Whitfield v. Riddle*, 78 Ala. 100.

Where a mortgage was executed to secure a contemporaneous as well as a pre-existing debt, the greater and substantial part being contemporaneous, and this mortgage was afterward renewed by another and the time of payment extended; it was held, that the mortgagee was a purchaser for value to the extent of the entire amount secured. *Branch v. Griffin*, 99 N. Car. 173.

The surrender and cancellation of old notes, the extension of the time of payment of the debt, and the reduction of the rate of interest, are a sufficient consideration for new notes, to secure which the mortgage is given, to entitle the mortgagee to protection as a purchaser for value. *Farmers', etc., Nat. Bank v. Wallace*, 45 Ohio St. 166.

Where a creditor, as a consideration for a mortgage from his debtor, extended the time of payment of his debt, and purchased a certain mortgage executed by the debtor, it was held that there was a sufficient consideration to support the mortgage to him, and to entitle both mortgages in his hands to priority over another and prior mortgage given by the debtor for the purchase money of the property, but which by mistake did not contain a correct description of the land, and of which the creditor had no notice. *Port v. Embree*, 54 Iowa 14.

Extending Further Credit. — *Ingenhuett v. Hunt*, 15 Tex. Civ. App. 252.

3. Protection Pro Tanto. — *Wells v. Morrow*, 38 Ala. 126; *Merritt v. Northern R. Co.*, 12 Barb. (N. Y.) 605. See also *Gerson v. Pool*, 31 Ark. 88.

4. Partial Failure of Consideration. — *Klaes v. Klaes*, 103 Iowa 689. In this case a client contracted to pay his attorney one-half the alimony which might be recovered in a divorce suit brought by the client. A divorce having been secured, and certain land, title to which was in the wife, having been awarded as alimony, the client gave the attorney a mortgage to secure the contract and the repayment of certain advances. The decree for alimony was thereafter set aside for fraud. It was held that the attorney was not a *bona fide* mortgagee for value beyond the amount of his advances, the rest of the consideration having failed.

5. See the following section of this title.

6. See the title NOTICE, vol. 21, p. 580.

circumstances,¹ finds perhaps its most frequent application in connection with purchases of real property; and it is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.²

1. For a General Treatment of Constructive Notice, see the title NOTICE, vol. 21, pp. 582, 584 et seq.

2. Putting Purchaser on Inquiry, Sufficient Notice — *England*. — *Crofton v. Ormsby*, 2 Sch. & Lef. 583; *Anonymous*, 2 Freem. Ch. 137; *Penny v. Watts*, 1 Macn. & G. 150; *Jackson v. Rowe*, 2 Sim. & St. 472; *Kennedy v. Green*, 3 Myl. & K. 719; *Wilson v. Hart*, L. R. 1 Ch. 403; *Jones v. Williams*, 24 Beav. 47; *Worthington v. Morgan*, 16 Sim. 547.

Canada. — *Prince v. Brady*, 16 Grant Ch. (U. C.) 375.

United States. — *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 2; *Vattier v. Hinde*, 7 Pet. (U. S.) 272; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Brush v. Ware*, 15 Pet. (U. S.) 93; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 554, *affirming* 84 Fed. Rep. 855; *Cuyler v. Ferrill*, 1 Abb. (U. S.) 169.

Alabama. — *Harris v. Carter*, 3 Stew. (Ala.) 233; *Whelan v. McCreary*, 64 Ala. 320; *Webb v. Robbins*, 77 Ala. 176; *Wodall v. Kelly*, 85 Al. 369, 7 Am. St. Rep. 57.

California. — *Bryan v. Tormey*, (Cal. 1889) 21 Pac. Rep. 725; *Raymond v. Glover*, 122 Cal. 471.

Colorado. — *Filmore v. Reithman*, 6 Colo. 120; *Reddin v. Dunn*, 2 Colo. App. 518, *affirmed* 22 Colo. 127.

Connecticut. — *Booth v. Barnum*, 9 Conn. 286, 23 Am. Dec. 339.

District of Columbia. — *Waters v. Williams*, 21 D. C. 24.

Florida. — *McRae v. McMinn*, 17 Fla. 876.

Georgia. — *Poulet v. Johnson*, 25 Ga. 403; *Sharpton v. Johnson*, 86 Ga. 443.

Hawaii. — *Kailaa v. Kaaukai*, 7 Hawaii 653.

Illinois. — *Doyle v. Teas*, 5 Ill. 250; *Cox v. Milner*, 23 Ill. 476; *McLawrie v. Thomas*, 39 Ill. 291; *Chicago, etc., R. Co. v. Kennedy*, 70 Ill. 351; *Shepardson v. Stevens*, 71 Ill. 646; *Russell v. Ranson*, 76 Ill. 167; *Erickson v. Rafferty*, 79 Ill. 209; *Ætna L. Ins. Co. v. Ford*, 89 Ill. 252; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257; *Mason v. Mullahy*, 145 Ill. 383; *Laguer v. Mutual Union Loan, etc., Assoc.*, 146 Ill. 283; *Clark v. Plumstead*, 11 Ill. App. 57.

Indiana. — *Johns v. Sewell*, 33 Ind. 1; *Smith v. Schweigerer*, 129 Ind. 363; *Joseph v. Wild*, 146 Ind. 249. See also *Snowden v. Wilas*, 19 Ind. 10, 81 Am. Dec. 370.

Iowa. — *Hume v. Franzen*, 73 Iowa 25; *Starr v. Stevenson*, 91 Iowa 684.

Kentucky. — *Currens v. Hart*, Hard. (Ky.) 41; *Cotton v. Hart*, 1 A. K. Marsh. (Ky.) 56; *Halstead v. State Bank*, 4 J. J. Marsh. (Ky.) 560; *Nantz v. McPherson*, 7 T. B. Mon. (Ky.) 597, 18 Am. Dec. 216; *Willis v. Vallette*, 4 Met.

(Ky.) 189; *Ormes v. Weller*, (Ky. 1899) 52 S. W. Rep. 937; *Lain v. Morton*, (Ky. 1901) 63 S. W. Rep. 286, 23 Ky. L. Rep. 438.

Louisiana. — *Breaux-Renoudet Cypress Lumber Co. v. Shadel*, 52 La. Ann. 2094.

Maryland. — *Price v. McDonald*, 1 Md. 403, 54 Am. Dec. 657; *Magruder v. Peter*, 11 Gill & J. (Md.) 217; *Ringgold v. Bryan*, 3 Md. Ch. 488; *Stockett v. Taylor*, 3 Md. Ch. 537; *Smoot v. Rea*, 19 Md. 398; *Green v. Early*, 39 Md. 223; *Abell v. Brown*, 55 Md. 222; *Valentine v. Seiss*, 79 Md. 187.

Massachusetts. — *Pingree v. Coffin*, 12 Gray (Mass.) 288; *Atty.-Gen. v. Abbott*, 154 Mass. 323.

Michigan. — *Boxheimer v. Gunn*, 24 Mich. 372; *Gordon v. Constantine Hydraulic Co.*, 117 Mich. 620.

Minnesota. — *Cummings v. Finnegan*, 42 Minn. 524.

Mississippi. — *Rowan v. Adams*, Smed. & M. Ch. (Miss.) 45; *Parker v. Foy*, 43 Miss. 260, 5 Am. Rep. 484; *Buck v. Paine*, 50 Miss. 648.

Missouri. — *Bartlett v. Glasscock*, 4 Mo. 62; *Stephenson v. Smith*, 7 Mo. 610; *Major v. Bukley*, 51 Mo. 227; *Fellows v. Wise*, 55 Mo. 413; *Ridgeway v. Holliday*, 59 Mo. 444; *Eck v. Hatcher*, 58 Mo. 235; *Meier v. Blume*, 80 Mo. 179; *Widdicombe v. Childers*, 84 Mo. 382; *Drey v. Doyle*, 99 Mo. 459; *Barrett v. Davis*, 104 Mo. 549; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656; *Jennings v. Todd*, 118 Mo. 266, 40 Am. St. Rep. 373; *Edwards v. Missouri, etc., R. Co.*, 82 Mo. App. 96.

Nebraska. — *Arlington State Bank v. Paulsen*, 57 Neb. 718 (*reversed* on other grounds, 59 Neb. 94); *Ferking v. Thomas*, (Neb. 1902) 80 N. W. Rep. 1005.

New Jersey. — *Baldwin v. Johnson*, 1 N. J. Eq. 454; *Tantum v. Green*, 21 N. J. Eq. 364; *Dean v. Anderson*, 34 N. J. Eq. 505; *Jackson v. Condict*, 57 N. J. Eq. 522.

New York. — *Jackson v. Cadwell*, 1 Cow. (N. Y.) 622; *Hawley v. Cramer*, 4 Cow. (N. Y.) 717; *Serry v. Arden*, 1 Johns. Ch. (N. Y.) 267; *Pitney v. Leonard*, 1 Paige (N. Y.) 461; *Pendleton v. Fay*, 2 Paige (N. Y.) 202; *Skeel v. Spraker*, 8 Paige (N. Y.) 196; *Williamson v. Brown*, 15 N. Y. 354; *Baker v. Bliss*, 39 N. Y. 70; *Cambridge Valley Bank v. Delano*, 48 N. Y. 326; *Kirsch v. Tozier*, 143 N. Y. 390, 42 Am. St. Rep. 729, *affirming* 63 Hun (N. Y.) 607; *Anderson v. Blood*, 152 N. Y. 293; *Knapp v. Hall*, (Supm. Ct. Spec. T.) 20 N. Y. Supp. 42; *Seymour v. Seymour*, 28 N. Y. App. Div. 495.

North Carolina. — *Webber v. Taylor*, 2 Jones Eq. (55 N. Car.) 9; *Pearson v. Daniel*, 2 Dev. & B. Eq. (22 N. Car.) 360; *Wittkowsky v. Gidney*, 124 N. Car. 437.

(2) *Qualifications of Rule.* — No general statement can be formulated which will govern in all cases the sufficiency of the facts or circumstances that impose upon a purchaser of land the duty of inquiring as to the soundness of his title; but each case must to a great extent be determined according to its peculiar facts.¹ Yet certain limitations and qualifications to the doctrine of constructive notice are well recognized.² Thus, it is generally conceded that in determining whether the purchaser is chargeable with constructive notice, the question is not simply whether he could have discovered the existence of the adverse equity, but whether under the circumstances of the case it was incumbent upon him as an ordinarily prudent man to make inquiry.³ And

Ohio. — *Cunningham v. Buckingham*, 1 Ohio 264.

Oregon. — *Carter v. Portland*, 4 Oregon 339; *Wood v. Rayburn*, 18 Oregon 3.

Pennsylvania. — *Chew v. Barnet*, 11 S. & R. (Pa.) 389; *Parke v. Chadwick*, 8 W. & S. (Pa.) 96; *Sergeant v. Ingersoll*, 7 Pa. St. 340; *Maul v. Rider*, 59 Pa. St. 172; *Eichelberger v. Gitt*, 104 Pa. St. 72; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Schnyder v. Orr*, 149 Pa. St. 321.

South Carolina. — *Maybin v. Kirby*, 4 Rich. Eq. (S. Car.) 105; *Hardin v. Clark*, 32 S. Car. 480.

Tennessee. — *Lowry v. Brown*, 1 Coldw. (Tenn.) 456; *Woodfolk v. Blount*, 3 Hayw. (Tenn.) 147, 9 Am. Dec. 736.

Texas. — *Mayfield v. Averitt*, 11 Tex. 140; *Hines v. Perry*, 25 Tex. 443; *Bacon v. O'Connor*, 25 Tex. 213; *Martel v. Somers*, 26 Tex. 560; *Harrison v. Boring*, 44 Tex. 263; *Richerson v. Moody*, 17 Tex. Civ. App. 67; *Bohny v. Petty*, 81 Tex. 524; *Jackson v. Waldstein*, (Tex. Civ. App. 1894) 27 S. W. Rep. 26; *Brown v. Wilson*, (Tex. Civ. App. 1895) 29 S. W. Rep. 530; *Canadian, etc., Trust Co. v. Edinburgh-American Land Mortg. Co.*, 16 Tex. Civ. App. 520.

Virginia. — *Burwell v. Fauber*, 21 Gratt. (Va.) 463; *Long v. Weller*, 29 Gratt. (Va.) 353; *Wood v. Krebs*, 30 Gratt. (Va.) 715; *Lamar v. Hale*, 79 Va. 147; *Effinger v. Hall*, 81 Va. 106; *Whitlock v. Johnson*, 87 Va. 323.

Washington. — *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320.

West Virginia. — *Cain v. Cox*, 23 W. Va. 594; *Crumlish v. Shenandoah Valley R. Co.*, 32 W. Va. 244; *Farley v. Bateman*, 40 W. Va. 542.

Wisconsin. — *Parker v. Kane*, 4 Wis. 11, 65 Am. Dec. 283; *Hoppin v. Doty*, 25 Wis. 592; *Pringle v. Dunn*, 37 Wis. 449, 19 Am. Rep. 772; *Perkins v. Wilkinson*, 86 Wis. 538.

And see the title NOTICE, vol. 21, p. 584.

Knowledge of an Incumbrance is constructive notice of its extent. *Willink v. Morris Canal, etc., Co.*, 4 N. J. Eq. 377; *Skeel v. Spraker*, 8 Paige (N. Y.) 196.

Rule of Text Applied to Assignee of Mortgage. — *Tantum v. Green*, 21 N. J. Eq. 364.

English Statute — Conveyancing Act, 1882. — In England the rule of the text has in a negative form been embodied in a statute, the Conveyancing Act, 1882, § 3, subsec. 1, which provides that "a purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been

made by him." *Bailey v. Barnes*, (1894) 1 Ch. 35; *Oliver v. Hinton*, (1899) 2 Ch. 269.

Knowledge that Vendor Has Not Paid Purchase Money. — Where the purchaser has knowledge or information that his vendor has not fully paid the purchase money for the land to the prior vendor, he is chargeable with constructive notice of the amount unpaid, and of the existence of a vendor's lien upon the land to secure the payment. *Frail v. Ellis*, 16 Beav. 350; *Cordova v. Hood*, 17 Wall. (U. S.) 1; *Brisco v. Minah Consol. Min. Co.*, 82 Fed. Rep. 952; *Foster v. Stallworth*, 62 Ala. 547; *Edmonds v. Torrence*, 48 Ala. 38; *Woodall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; *Thompson v. Sheppard*, 85 Ala. 612; *Major v. Bukley*, 51 Mo. 227; *Graham v. West*, (Tex. Civ. App. 1894) 26 S. W. Rep. 920; *Manly v. Slason*, 21 Vt. 271, 52 Am. Dec. 60.

He is not entitled to rely upon the statements of his vendor. *Foster v. Stallworth*, 62 Ala. 547.

He is also put upon inquiry as to whether the lien has been waived by taking other security. *Woddall v. Kelly*, 85 Ala. 368, 7 Am. St. Rep. 57; and is chargeable with constructive notice of a purchase-money mortgage given by his vendor, *Foster v. Stallworth*, 62 Ala. 547.

But the fact that a conveyance of land, after the return unsatisfied of a fieri facias against the grantor, bears a recent date, is not evidence that the consideration money is not paid, and so does not afford constructive notice to the subsequent purchaser. *Wood v. State Bank*, 5 T. B. Mon. (Ky.) 196. See generally the title VENDOR'S LIEN.

Purchase from Plaintiff in Ejectment Suit. — Where the vendor is the plaintiff in an ejectment suit for the land in question, and holds the property under a writ of possession, the purchaser who has knowledge of these facts has a sufficient notice of a claim adverse to his vendor to charge him with constructive notice of the nature and extent of that claim. *Ridgeway v. Holliday*, 59 Mo. 444.

1. Sufficiency of Circumstances Dependent upon Facts of Particular Case. — *Jaques v. Weeks*, 7 Watts (Pa.) 271; *Wethered v. Boon*, 17 Tex. 143; *Hines v. Perry*, 25 Tex. 443; *Martel v. Somers*, 26 Tex. 559. And see the title NOTICE, vol. 21, p. 585.

2. A number of these restrictive principles are discussed in the title NOTICE, vol. 21, p. 585 et seq.

3. Duty to Make Inquiry Is Essential. — *Wilson v. Miller*, 16 Iowa 111; *Anderson v. Blood*, 152 N. Y. 285, 57 Am. St. Rep. 515, affirming 86 Hun (N. Y.) 244, which reversed *Anderson v.*

in order to impose this duty upon the purchaser the circumstances relied upon must have been such as clearly to have suggested a path of inquiry that would have led to knowledge of the ultimate fact with notice of which it is sought to charge him.¹ There must be such a connection between the facts discovered and the further facts to be discovered that the former may be said to furnish a reasonable and natural clue to the latter;² for equity will not impute to a purchaser notice of matters which lie beyond the range of the inquiry suggested, and which the purchaser, in the exercise of due diligence, would not have discovered.³ Thus, circumstances that are merely equivocal will not charge the purchaser with the duty of making inquiry.⁴ And vague statements and indefinite rumors,⁵ especially where they proceed from persons having no interest in the property,⁶ are likewise insufficient. The general rule has been further limited in a number of decisions by the doctrine announced in a leading *English* case,⁷ to the effect that if the purchaser had not actual knowledge that the property was in some way affected, so as clearly to be put upon inquiry as to the nature and extent of the defect in title, then it must appear that for the very purpose of avoiding knowledge he knowingly

Ramon, 8 Misc. (N. Y.) 640; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Wethered v. Boon*, 17 Tex. 143; *National Valley Bank v. Harman*, 75 Va. 608; *Connell v. Connell*, 32 W. Va. 319.

As to a Mere Creditor of the Grantor, the purchaser is under no duty to make a critical examination of the title. *Reynolds v. Haskins*, 68 Vt. 426.

Deed in Escrow. — The fact that a purchaser had knowledge that a prior deed had been executed and deposited in escrow, but that for failure to comply with its conditions it had been returned to the grantor, is not sufficient to put him on inquiry as to what became of the deed. *Kenney v. Jaynes*, 26 Colo. 154.

The Fact that the Vendor Was in Indigent Circumstances when the property was conveyed to him is not of itself sufficient to charge the purchaser with constructive notice of a secret trust upon which the deed to the vendor was made. *Cameron v. Romele*, 53 Tex. 238.

1. Path of Inquiry Must Lead to Knowledge. — *Wilson v. Miller*, 16 Iowa 111; *Willis v. Vallette*, 4 Met. (Ky.) 186; *Jaques v. Weeks*, 7 Watts (Pa.) 261; *Wilkins v. Anderson*, 11 Pa. St. 399.

2. Connection between Facts Known and Other Facts. — *Trinidad v. Milwaukee, etc., Smelting, etc., Co.*, (C. C. A.) 63 Fed. Rep. 887; *Wallace v. Jones*, 93 Ga. 420; *Pittman v. Sofley*, 64 Ill. 155; *Slattery v. Rafferty*, 93 Ill. 277; *Birdsall v. Russell*, 29 N. Y. 220; *Gearon v. Kearney*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 285; *Raymond v. Flavel*, 27 Oregon 245; *Black v. Childs*, 14 S. Car. 321.

3. Raymond v. Flavel, 27 Oregon 245; *Black v. Childs*, 14 S. Car. 321.

The facts of which the purchaser is informed must be such as will lead to knowledge of the fact in question. *Wilson v. Miller*, 16 Iowa 111; *Gearon v. Kearney*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 285; *Cornell v. Maltby*, 165 N. Y. 557; *Lewis v. Madison*, 1 Munf. (Va.) 317; *National Valley Bank v. Harman*, 75 Va. 608. And the fact to knowledge of which they will lead must relate to the specific property in controversy. *Lewis v. Madison*, 1 Munf. (Va.) 317.

Notice of an incumbrance puts the purchaser

upon inquiry as to the particulars of the indebtedness, but knowledge of the existence of a debt by bond does not put him upon inquiry to ascertain whether it is secured by lien upon the land. *Johnson v. Valido Marble Co.*, 64 Vt. 348.

Notice of a specific incumbrance upon the land is not constructive notice of other claims or equities between the incumbrancer and the grantor, and the purchaser does not take subject thereto. *Davison v. Waite*, 2 Munf. (Va.) 527.

The purchaser must have some more authentic means of information than can be found in an application to one who is interested in concealing the truth. *Bugbee's Appeal*, 110 Pa. St. 331; *National Valley Bank v. Harman*, 75 Va. 608.

4. Circumstances Merely Equivocal. — *Arnold v. Barnett*, 90 Ga. 334; *Slattery v. Rafferty*, 93 Ill. 277; *Sheldon v. Holmes*, 58 Mich. 138.

5. Vague Statements and Indefinite Rumors Not Sufficient. — *Barnhart v. Greenshields*, 9 Moo. P. C. 18; *Flagg v. Mann*, 2 Sumn. (U. S.) 491; *Parkhurst v. Hosford*, 21 Fed. Rep. 827; *Pittman v. Sofley*, 64 Ill. 155; *Slattery v. Rafferty*, 93 Ill. 277; *Foust v. Moorman*, 2 Ind. 17; *Wilson v. Miller*, 16 Iowa 111; *Loughridge v. Bowland*, 52 Miss. 546; *Woodworth v. Paige*, 5 Ohio St. 76; *Raymond v. Flavel*, 27 Oregon 245; *Jaques v. Weeks*, 7 Watts (Pa.) 267; *Rutherford v. Jenkins*, (Tenn. Ch. App. 1899) 54 S. W. Rep. 1007; *Wethered v. Boon*, 17 Tex. 143; *Bacon v. O'Connor*, 25 Tex. 225; *Connell v. Connell*, 32 W. Va. 319; *Parker v. Kane*, 4 Wis. 11, 65 Am. Dec. 283; *Lamont v. Stimson*, 5 Wis. 443. Compare *Fitzsimmons v. Ogden*, 7 Cranch (U. S.) 2.

6. Flagg v. Mann, 2 Sumn. (U. S.) 491; *Pittman v. Sofley*, 64 Ill. 155; *Slattery v. Rafferty*, 93 Ill. 277; *Woodworth v. Paige*, 5 Ohio St. 76; *Lamont v. Stimson*, 5 Wis. 443.

So a statement by a stranger to the title that the title was void, without more, has been held insufficient to charge the purchaser with notice of matters not stated by the stranger. *Ratteree v. Conley*, 74 Ga. 153.

7. Rule as to Fraudulent Abstaining from Inquiry. — *Jones v. Smith*, 1 Hare 55, *affirmed* 1 Phil. 244.

and designedly abstained from making inquiry; in other words, that if mere want of caution as distinguished from wilful and fraudulent blindness is all that can be imputed to the purchaser, he cannot be held chargeable with notice.¹ In other cases, however, it is held that it is not necessary to show fraud on the part of the purchaser, but that gross negligence is sufficient; that is, that the basis of imputing notice to the purchaser is not merely that he might have acquired the knowledge in question, or, on the other hand, that he was guilty of fraud in not acquiring it, but that he ought to have acquired it and would have done so but for his gross negligence attending the transaction.² But the gross negligence that will be a ground of constructive notice has been said to be simply such negligence as would render it unjust to deprive the prior incumbrancer of his rights in favor of the purchaser.³

(3) *By Possession of Property* — (a) *In General*. — A branch of the doctrine of constructive notice is the notice afforded by possession, and the general rule is well settled that the actual, open, and notorious possession and user of land by a person other than the vendor is of itself sufficient to put a purchaser or mortgagee upon inquiry and to affect him with constructive notice of whatever rights in the property the person in possession may have.⁴

1. *Alabama*. — *Dudley v. Witter*, 46 Ala. 696.
Delaware. — *Hall v. Livingston*, 3 Del. Ch.

348.

Georgia. — *Reynolds v. Carlisle*, 99 Ga. 730.

Illinois. — *Grundies v. Reid*, 107 Ill. 304.

Iowa. — *Wilson v. Miller*, 16 Iowa 111.

Kentucky. — *Willis v. Vallette*, 4 Met. (Ky.)

190; *Briggs v. Rice*, 130 Mass. 50.

Ohio. — *Woodworth v. Paige*, 5 Ohio St. 70.

Oregon. — *Raymond v. Flavel*, 27 Oregon 247.

See also *McClanachan v. Siter*, 2 Gratt. (Va.)

313; *Hewitt v. Loosemore*, 9 Hare 449; *Trinidad*

v. Milwaukee, etc., Smelting, etc., Co.,

(C. C. A.) 63 Fed. Rep. 888.

The fact that the purchaser took security in addition to the covenants in the deed for warranty of title is not alone sufficient proof that he had notice of outstanding adverse equities. *Lamont v. Stimson*, 5 Wis. 443.

Mere negligent omission to make inquiry is not sufficient. *Reynolds v. Carlisle*, 99 Ga. 730.

2. *Rule that Gross Negligence Is Sufficient*. —

Oliver v. Hinton, (1899) 2 Ch. 264 (*limiting*

Ratcliffe v. Barnard, L. R. 6 Ch. 652; *Hunt v.*

Elmes, 2 De G. F. & J. 578, and *Hewitt v.*

Loosemore, 9 Hare 449; *Ware v. Egmont*, 4

De G. M. & G. 460; *Jones v. Williams*, 24

Beav. 59; *Wilson v. Wall*, 6 Wall. (U. S.) 83;

Acer v. Westcott, 46 N. Y. 384, 7 Am. Rep.

355; *National Valley Bank v. Harman*, 75 Va.

608. See also *Trinidad v. Milwaukee, etc.*,

Smelting, etc., Co., (C. C. A.) 63 Fed. Rep. 888.

3. *Oliver v. Hinton*, (1899) 2 Ch. 264.

4. *Possession of Property Is Constructive Notice*

— *England*. — *Taylor v. Stibbert*, 2 Ves. Jr.

437; *Daniels v. Davison*, 16 Ves. Jr. 249; *Barnhart*

v. Greenshields, 9 Moo. P. C. 18; *Allen v.*

Anthony, 1 Meriv. 282; *Bailey v. Richardson*,

9 Hare 734; *Holmes v. Powell*, 8 De G.

M. & G. 572; *Cavander v. Bulteel*, L. R. 9

Ch. 79, 43 L. J. Ch. 370.

Canada. — *Atty.-Gen. v. McNulty*, 11 Grant

Ch (U. C.) 281, *affirmed* 11 Grant Ch. (U. C.)

581; *Gray v. Couch*, 15 Grant Ch. (U. C.) 419.

United States. — *Landes v. Brant*, 10 How.

(U. S.) 348; *Lea v. Polk County Copper Co.*,

21 How. (U. S.) 493; *Hughes v. U. S.*, 4 Wall.

(U. S.) 232; *Noyes v. Hall*, 97 U. S. 34; *Mc-*

Lean v. Clapp, 141 U. S. 436; *Simmons Creek*

Coal Co. v. Doran, 142 U. S. 442; *Horbach v.*

Porter, 154 U. S. 549; *Van Gunden v. Virginia*

Coal etc., Co., (C. C. A.) 52 Fed. Rep. 838, 8

U. S. App. 229.

Alabama. — *Harris v. Carter*, 3 Stew. (Ala.)

233; *Morgan v. Morgan*, 3 Stew. (Ala.) 383, 21

Am. Dec. 638; *Scroggins v. McDougald*, 8 Ala.

382; *McCaskle v. Amarine*, 12 Ala. 17; *Brewer*

v. Brewer, 19 Ala. 481; *Burns v. Taylor*, 23

Ala. 255; *Garrett v. Lyle*, 27 Ala. 586; *Phillips*

v. Costley, 40 Ala. 486; *Brunson v. Brooks*,

68 Ala. 248; *Meyer v. Mitchell*, 75 Ala. 480;

Anthe v. Heide, 85 Ala. 236; *Price v. Bell*, 91

Ala. 180; *Reynolds v. Kirk*, 105 Ala. 446;

Scheuer v. Kelly, 121 Ala. 323.

Arkansas. — *Hardy v. Heard*, 15 Ark. 184;

Hamilton v. Fowlkes, 16 Ark. 340; *Jowers v.*

Phelps, 33 Ark. 465; *Rockafellow v. Oliver*, 41

Ark. 173; *Atkinson v. Ward*, 47 Ark. 533;

Watson v. Murray, 54 Ark. 499; *Kendall v.*

Davis, 55 Ark. 318.

California. — *Partridge v. McKinney*, 10 Cal.

181; *Hunter v. Watson*, 12 Cal. 363, 73 Am.

Dec. 543; *Lestrade v. Barth*, 19 Cal. 660; *Fair*

v. Stevenot, 29 Cal. 486; *Killey v. Wilson*, 33

Cal. 690; *Talbert v. Singleton*, 42 Cal. 390;

Thompson v. Pioche, 44 Cal. 508.

Colorado. — *Yates v. Hurd*, 8 Colo. 343;

Coffee v. Emigh, 15 Colo. 184.

Florida. — *McRae v. McMinn*, 17 Fla. 876.

Georgia. — *Veasey v. Graham*, 17 Ga. 99, 63

Am. Dec. 228; *Helms v. O'Bannon*, 26 Ga. 132;

Jordan v. Rhodes, 24 Ga. 480; *Clarke v. Beck*,

72 Ga. 128; *Neal v. Jones*, 100 Ga. 765; *Burr*

v. Toomer, 103 Ga. 159.

Illinois. — *Williams v. Brown*, 14 Ill. 200;

Morrison v. Kelly, 22 Ill. 610, 74 Am. Dec. 169;

Brown v. Gaffney, 28 Ill. 149; *Keys v. Test*,

33 Ill. 318; *Truesdale v. Ford*, 37 Ill. 210;

Aldrich v. Aldrich, 37 Ill. 39; *Reeves v. Ayers*,

38 Ill. 418; *D'Wolf v. Pratt*, 42 Ill. 108; *Lyman*

v. Russell, 45 Ill. 281; *Warren v. Richmond*,

53 Ill. 52; *Lumbard v. Abbey*, 73 Ill. 177;

Phillips v. Pitts, 78 Ill. 72; *Strong v. Shea*, 83

Ill. 575; *Tunison v. Chamblin*, 88 Ill. 378;

Coari v. Olsen, 91 Ill. 273; *Small v. Stagg*, 95

Ill. 39; *Jefferson v. Jefferson*, 96 Ill. 551; *Bart-*

ling v. Brasuhn, 102 Ill. 441; *Conner v. Good-*

man, 104 Ill. 365; *White v. White*, 105 Ill. 313;

Actual Ignorance of Possession Immaterial. — It is generally held that the possession of itself, operates as constructive notice, and consequently that it is immaterial

Haworth *v.* Taylor, 108 Ill. 275; Clevinger *v.* Ross, 109 Ill. 349; Tillotson *v.* Mitchell, 111 Ill. 518; Farmers' Nat. Bank *v.* Sperling, 113 Ill. 273; Rock Island, etc., R. Co. *v.* Dimick, 144 Ill. 628; Mason *v.* Mullahy, 145 Ill. 383; Prouty *v.* Tilden, 164 Ill. 163; Joiner *v.* Duncan, 174 Ill. 252; Lynn *v.* Sentel, 183 Ill. 382; Staggs *v.* Small, 4 Ill. App. 192; Griffin *v.* Haskins, 22 Ill. App. 264; Porter *v.* Clark, 23 Ill. App. 567.

Indiana. — Holcroft *v.* Hunter, 3 Blackf. (Ind.) 152; Johnston *v.* Glancy, 4 Blackf. (Ind.) 94. 28 Am. Dec. 45; Moreland *v.* Lemasters, 4 Blackf. (Ind.) 383; Campbell *v.* Brackenridge, 8 Blackf. (Ind.) 471; Meni *v.* Rathbone, 21 Ind. 454; Glidewell *v.* Spaugb, 26 Ind. 319; Paul *v.* Connersville, etc., R. Co., 51 Ind. 527; Barnes *v.* Union School Tp., 91 Ind. 301; Robinson *v.* Thrailkill, 110 Ind. 117; Smith *v.* Schweigerer, 129 Ind. 363; Joseph *v.* Wild, 146 Ind. 249.

Iowa. — Moore *v.* Pierson, 6 Iowa 279, 71 Am. Dec. 409; Humphrey *v.* Moore, 17 Iowa 193; Sears *v.* Munson, 23 Iowa 380; Phillips *v.* Blair, 38 Iowa 649; Wrede *v.* Cloud, 52 Iowa 371, *distinguishing* Rogers *v.* Hussey, 36 Iowa 664; Rogers *v.* Turpin, 105 Iowa 183.

Kansas. — Johnson *v.* Clark, 18 Kan. 157; Greer *v.* Higgins, 20 Kan. 420; Kansas City Invest. Co. *v.* Fulton, 4 Kan. App. 115.

Kentucky. — Knox *v.* Thompson, 1 Litt. (Ky.) 351; Brown *v.* Anderson, 1 T. B. Mon. (Ky.) 193; Buck *v.* Holloway, 2 J. J. Marsh. (Ky.) 180; Barbour *v.* Whitlock, 4 T. B. Mon. (Ky.) 196; Goins *v.* Allen, Bush (Ky.) 608; Kamer *v.* Bryant, 103 Ky. 723. See also Lyttle *v.* Fitzpatrick, (Ky. 1902) 67 S. W. Rep. 988.

Maine. — Hull *v.* Noble, 40 Me. 459.

Maryland. — Baynard *v.* Norris, 5 Gill (Md.) 483, 46 Am. Dec. 647; Hardy *v.* Summers, 10 Gill & J. (Md.) 316, 32 Am. Dec. 167; Border State Sav. Institute *v.* Wilcox, 63 Md. 525; Du Val *v.* Wilmer, 88 Md. 66.

Massachusetts. — See M'Mechan *v.* Griffing, 3 Pick. (Mass.) 156; Davis *v.* Blunt, 6 Mass. 487, 4 Am. Dec. 168; Prescott *v.* Heard, 10 Mass. 60.

Michigan. — Rood *v.* Chapin, Walk. (Mich.) 79; Godfroy *v.* Disbrow, Walk. (Mich.) 260; McKee *v.* Wilcox, 11 Mich. 358, 83 Am. Dec. 743; Woodward *v.* Clark, 15 Mich. 104; Van Baalen *v.* Cotnev, 113 Mich. 202; Oconto Co. *v.* Lundquist, 119 Mich. 264; Holmes *v.* Depert, 122 Mich. 275. See also Banks *v.* Allen, 127 Mich. 80, 8 Detroit Leg. N. 221.

Minnesota. — Minor *v.* Willoughby, 3 Minn. 225; Morrison *v.* March, 4 Minn. 422; New *v.* Wheaton, 24 Minn. 406; Siebert *v.* Rosser, 24 Minn. 155; Bolland *v.* O'Neal, 81 Minn. 15.

Mississippi. — Dixon *v.* Doe, 1 Smed. & M. (Miss.) 70; Jenkins *v.* Bodley, Smed. & M. Ch. (Miss.) 343; Jones *v.* Loggins, 37 Miss. 546.

Missouri. — Bartlett *v.* Glasscock, 4 Mo. 62; Halsä *v.* Halsä, 8 Mo. 308, Roberts *v.* Mcseley, 64 Mo. 507; Martin *v.* Jones, 72 Mo. 23; Davis *v.* Briscoe, 81 Mo. 27; Freeman *v.* Moffitt, 119 Mo. 280; Casey *v.* Steinmeyer, 7 Mo. App. 556; Edwards *v.* Missouri, etc., R. Co., 82 Mo. App. 96. See also Thornton *v.* Miskimmon,

48 Mo. 219. But see opinion of Scott, J., in Beatie *v.* Butler, 21 Mo. 313, 64 Am. Dec. 234.

Nebraska. — Uhl *v.* May, 5 Neb. 157; Jones *v.* Johnson Harvester Co., 8 Neb. 446; McHugh *v.* Smiley, 17 Neb. 626; Whitehorn *v.* Cranz, 20 Neb. 398; Lipp *v.* South Omaha Land Syndicate, 24 Neb. 692; Baumann *v.* Franse, 37 Neb. 807; Smith *v.* Myers, 56 Neb. 503; Pleasants *v.* Blodgett, 32 Neb. 427, 39 Neb. 741, 42 Am. St. Rep. 624. See also Izard *v.* Kimmel, 26 Neb. 51.

New Hampshire. — Colby *v.* Kenniston, 4 N. H. 262; Pritchard *v.* Brown, 4 N. H. 397, 17 Am. Dec. 431; Patten *v.* Moore, 32 N. H. 382; Stillings *v.* Stillings, 67 N. H. 584.

New Jersey. — Baldwin *v.* Johnson, 1 N. J. Eq. 441; Diehl *v.* Page, 3 N. J. Eq. 143; McCall *v.* Yard, 11 N. J. Eq. 58; Dean *v.* Anderson, 34 N. J. Eq. 506.

New York. — Tuttle *v.* Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306; Parks *v.* Jackson, 11 Wend. (N. Y.) 412, 25 Am. Dec. 656; Bassett *v.* Wood, 55 Hun (N. Y.) 587; Colvin *v.* Shaw, 79 Hun (N. Y.) 56; Gouverneur *v.* Lynch, 2 Paige (N. Y.) 300; Grimstone *v.* Carter, 3 Paige (N. Y.) 421, 24 Am. Dec. 230; De Ruyter *v.* St. Peter's Church, 2 Barb. Ch. (N. Y.) 555; Seymour *v.* McKinstry, 106 N. Y. 230; Van Epps *v.* Clock, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 21; Gaylord *v.* Howes, (N. Y. City Ct. Gen. T.) 9 N. Y. Supp. 627; Abbey *v.* Taber, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 548; Jt. aff. 134 N. Y. 615; Ward *v.* Metropolitan El. R. Co., 82 Hun (N. Y.) 545, *affirmed* 152 N. Y. 39; Lynch *v.* Sanders, (Supm. Ct. App. Div.) 40 N. Y. Supp. 594, 8 N. Y. App. Div. 613; Smith *v.* Reid, 134 N. Y. 568, *affirming* (Brooklyn City Ct. Gen. T.) 19 Civ. Pro. (N. Y.) 363.

North Carolina. — Webber *v.* Taylor, 2 Jones Eq. (55 N. Car.) 9; Edwards *v.* Thompson, 71 N. Car. 177; Tankard *v.* Tankard, 79 N. Car. 54; Staton *v.* Davenport, 95 N. Car. 11; Avent *v.* Arrington, 105 N. Car. 377; Ross *v.* Hendrix, 110 N. Car. 403.

Ohio. — House *v.* Beatty, 7 Ohio (pt. ii.) 91; Kelley *v.* Stambery, 13 Ohio 408; McKinzie *v.* Perrill, 15 Ohio St. 162; Day *v.* Atlantic, etc., R. Co., 41 Ohio St. 392; Ranney *v.* Hardy, 43 Ohio St. 157; Simmons *v.* Buckeye Supply Co., 11 Ohio Cir. Dec. 600, 21 Ohio Cir. Ct. 455. See also Cunningham *v.* Buckingham, 1 Ohio 264; Norwalk Nat. Bank *v.* Sawyer, 38 Ohio St. 343.

Oregon. — Petrain *v.* Kiernan, 23 Oregon 455.

Pennsylvania. — Jaques *v.* Weeks, 7 Watts (Pa.) 261; Woods *v.* Farmer, 7 Watts (Pa.) 382; Krider *v.* Lafferty, 1 Whart. (Pa.) 303; Sailor *v.* Hertzog, 4 Whart. (Pa.) 259; McCulloch *v.* Cowher, 5 W. & S. (Pa.) 427; Randall *v.* Silverthorn, 4 Pa. St. 175; Kerr *v.* Day, 14 Pa. St. 112, 53 Am. Dec. 526; Jamison *v.* Dimock, 95 Pa. St. 52; Hottenstein *v.* Lerch, 104 Pa. St. 454; Rowe *v.* Ream, 105 Pa. St. 543; Anderson *v.* Brinser, 129 Pa. St. 376; White *v.* Patterson, 139 Pa. St. 429, 27 W. N. C. (Pa.) 527; Bidwell *v.* Evans, 156 Pa. St. 30.

South Carolina. — Biemann *v.* White, 23 S. Car. 490; Graham *v.* Nesmith, 24 S. Car. 285; Rapley *v.* Klugh, 40 S. Car. 134.

that the purchaser was actually ignorant that the land was adversely held,¹ especially where he could easily have acquired knowledge of the fact, but neglected to visit the premises.² But it has been held in *Missouri* under the recording acts that the possession is not of itself sufficient to charge the purchaser with notice, but that there must be some evidence tending to show that he had knowledge of the possession.³

(b) **Applications of Principle** — *aa. POSSESSION BY TENANT OR LESSEE* — (*aa*) *In General*. — Where the land is in possession of persons holding as tenants or lessees, their possession is constructive notice of the nature and extent of their interest; or, as it is sometimes stated, the possession of a tenant is constructive notice of the terms of his lease.⁴

Possession by Tenant Notice of Rights Beyond Tenancy. — As a general rule, the con-

South Dakota. — *Betts v. Letcher*, 1 S. Dak. 182.

Texas. — *Mullins v. Wimberly*, 50 Tex. 457; *Laroe v. Gaunt*, 62 Tex. 481; *Rodriguez v. Haynes*, 76 Tex. 225; *Harold v. Sumner*, 78 Tex. 581; *Hawley v. Geer*, (Tex. 1891) 17 S. W. Rep. 914; *Pride v. Whitfield*, (Tex. Civ. App. 1899) 51 S. W. Rep. 1100; *Smith v. Olsen*, 22 Tex. Civ. App. 458; *Ramirez v. Smith*, 94 Tex. 184, *reversing* (Tex. Civ. App. 1900) 56 S. W. Rep. 254. See also *Compton v. Seley*, (Tex. Civ. App. 1894) 27 S. W. Rep. 1077.

Utah. — *Stahn v. Hall*, 10 Utah 400.

Vermont. — *Orr v. Clark*, 62 Vt. 136; *Sowles v. Butler*, 71 Vt. 271.

Virginia. — *Chapman v. Chapman*, 91 Va. 397, 50 Am. St. Rep. 846.

Washington. — *Dennis v. Northern Pac. R. Co.*, 20 Wash. 320.

West Virginia. — See *Ellison v. Torpin*, 44 W. Va. 414; *Weekly v. Hardesty*, 48 W. Va. 39.

Wisconsin. — *Parker v. Kane*, 4 Wis. 16, 65 Am. Dec. 283; *Stewart v. McSweeney*, 14 Wis. 468; *Gee v. Bolton*, 17 Wis. 604; *Fery v. Pfeiffer*, 18 Wis. 510; *Hoppin v. Doty*, 25 Wis. 592; *Bergeron v. Richardott*, 55 Wis. 129; *Lamoureux v. Huntley*, 68 Wis. 24; *Prickett v. Muck*, 74 Wis. 199.

Original Character of the Possession Immaterial.

— *Allen v. Anthony*, 1 Meriv. 282; *Daniels v. Davison*, 16 Ves. Jr. 249; *Williams v. Brown*, 14 Ill. 200; *Anderson v. Brinser*, 129 Pa. St. 377.

Possession and Use of Water Right. — *Coffman v. Robbins*, 8 Oregon 279.

Rights Acquired by Estoppel. — Possession has been held to afford notice of rights which the occupant has acquired against the grantor by way of estoppel. *Simmons v. Buckeye Supply Co.*, 11 Ohio Cir. Dec. 690, 21 Ohio Cir. Ct. 455.

Possession as Notice under the Recording Acts. — In probably the majority of jurisdictions the rule that possession of land by a person other than the grantor constitutes constructive notice to a purchaser applies under the recording acts; the possession of a person under an unrecorded deed being held equivalent to the notice that would be afforded by the record of that deed. See the title **RECORDING ACTS**.

In *Maine* this rule prevailed prior to the Revised Statutes of 1841, but those statutes have abrogated the rule and require actual notice of the unrecorded deed in order to affect a subsequent purchaser; but the rule applies, however, to deeds made prior to the statutes

mentioned, even as against conveyances made since the statutes. *Hanly v. Morse*, 32 Me. 287; *Clark v. Bosworth*, 51 Me. 528; *Poor v. Larrabee*, 58 Me. 560. And see the title **RECORDING ACTS**.

1. Knowledge of Possession Not Essential — *England*. — *Holmes v. Powell*, 8 De G. M. & G. 572.

Canada. — *Gray v. Couchier*, 15 Grant Ch. (U. C.) 419; *Atty.-Gen. v. McNulty*, 11 Grant Ch. (U. C.) 281, *affirmed* 11 Grant Ch. (U. C.) 581.

Alabama. — *Scroggins v. McDougald*, 8 Ala. 385.

California. — *Scheerer v. Cuddy*, 85 Cal. 270.

Illinois. — *Smith v. Jackson*, 76 Ill. 254.

North Carolina. — *Edwards v. Thompson*, 71 N. Car. 177.

Ohio. — *Ranney v. Hardy*, 43 Ohio St. 157.

South Carolina. — *Sheorn v. Robinson*, 22 S. Car. 32.

Purchaser Living in Another State. — It has been held that possession charges the purchaser with notice, although he lives in another state. *Edwards v. Thompson*, 71 N. Car. 177.

2. Smith v. Jackson, 76 Ill. 254.

3. Missouri Rule. — *Masterson v. West End Narrow Gauge R. Co.*, 5 Mo. App. 64, *affirmed* 72 Mo. 342; *Casey v. Steinmeyer*, 7 Mo. App. 555. And see the title **RECORDING ACTS**.

4. Possession by Tenants or Lessees Notice of Their Rights — *England*. — *Hunt v. Luck*, (1901) 1 Ch. 45; *Daniels v. Davison*, 16 Ves. Jr. 249; *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Hiern v. Mill*, 13 Ves. Jr. 120; *Allen v. Anthony*, 1 Meriv. 282; *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

California. — *Thompson v. Pioche*, 44 Cal. 508; *Scheerer v. Cuddy*, 85 Cal. 270.

Florida. — *McRae v. McMinn*, 17 Fla. 876.

Georgia. — *Maynor v. Lewis*, Ga. Dec. (pt. ii.) 205.

Illinois. — *Coari v. Olsen*, 91 Ill. 273.

Iowa. — *Leebrick v. Stahle*, 68 Iowa 515.

Kentucky. — *Buck v. Holloway*, 2 J. J. Marsh. (Ky.) 180.

Maine. — *Hull v. Noble*, 40 Me. 481.

Michigan. — *Disbrow v. Jones*, Harr. (Mich.) 48 (*distinguishing* *Duval v. Bibb*, 4 Hen. & M. (Va.) 120, 4 Am. Dec. 506); *Norris v. Showerman*, 2 Doug. (Mich.) 16.

New York. — *Chesterman v. Gardner*, 5 Johns. Ch. (N. Y.) 29, 9 Am. Dec. 265.

Pennsylvania. — *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Hottenstein v. Lerch*, 104 Pa. St. 454; *Hood v. Fahnstock*, 1 Pa. St. 474.

structive notice afforded by possession by a tenant extends not only to the terms of the tenancy, but also to the tenant's rights under any collateral agreement or contract respecting the land, such as a contract to purchase or the like.¹ But on the contrary it is held in *Texas* that the possession of land by a tenant will operate to charge a purchaser with notice only of such rights as the nature of the possession would ordinarily suggest or indicate, and not of rights or claims wholly unconnected with the character of the occupancy; and hence that it will not operate as notice of any claim or right by the tenant inconsistent with his tenancy, such as a claim of title to the land² or to fixtures annexed to the freehold.³ As a consequence of this rule, the mere occupancy of the land by a tenant does not impose upon the purchaser the duty of making any further inquiry than to ascertain the existence and terms of the tenancy.⁴ And if the tenant thus in possession claims title to the land, nothing short of a repudiation of the tenancy, brought home to the purchaser before the purchase, can affect him with notice of the claim.⁵

(bb) *Notice of Landlord's Title — Rule in United States.* — In the United States the possession of land by a tenant of a person other than the vendor is not only constructive notice of his own interests, but is also constructive notice of his landlord's title or claim of title to the land; the reason being that the possession of the tenant is the possession of the landlord.⁶

1. Possession of Tenant Notice of Rights Collateral to Tenancy — England. — *Hunt v. Luck*, (1901) 1 Ch. 45; *Daniels v. Davison*, 16 Ves. Jr. 249; *Allen v. Anthony*, 1 Meriv. 282; *Barnhart v. Greenshields*, 9 Moo. P. C. 18.

Illinois. — *Coari v. Olson*, 91 Ill. 273.

Kentucky. — *Buck v. Holloway*, 2 J. J. Marsh. (Ky.) 180.

Maine. — See *Hull v. Noble*, 40 Me. 481.

Pennsylvania. — *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526; *Anderson v. Brinser*, 129 Pa. St. 376.

An expression of opinion to the contrary in *Leach v. Ansbacher*, 55 Pa. St. 85, approved in *Red River Valley Land, etc., Co. v. Smith*, 7 N. Dak. 236, is disapproved in *Anderson v. Brinser*, 129 Pa. St. 376.

"The only sensible rule is that actual residence upon the land is notice to all the world of every claim which the tenant may legally assert in defense of his possession." *Buck v. Holloway*, 2 J. J. Marsh. (Ky.) 180, per Underwood, J., quoted with approval in *Davis v. Briscoe*, 81 Mo. 37.

2. Texas Rule. — *Smith v. Miller*, 63 Tex. 72, affirmed 56 Tex. 74.

3. Brown v. Roland, 11 Tex. Civ. App. 648, holding that this is true though the fixtures were used by the tenant.

4. Smith v. Miller, 63 Tex. 72, affirmed 66 Tex. 74.

5. Smith v. Miller, 63 Tex. 72, affirmed 66 Tex. 74; *Brown v. Roland*, 11 Tex. Civ. App. 648.

6. Tenant's Possession Notice of Landlord's Title — Alabama. — *Headley v. Bell*, 84 Ala. 346; *Price v. Bell*, 91 Ala. 180; *Brunson v. Brooks*, 68 Ala. 248; *Tutwiler v. Montgomery*, 73 Ala. 263.

California. — *Dutton v. Warschauer*, 21 Cal. 628 (overruling *Smith v. Dall*, 13 Cal. 510); *O'Rourke v. O'Connor*, 39 Cal. 442; *Thompson v. Pioche*, 44 Cal. 508; *Peasley v. McFadden*, 68 Cal. 611.

Florida. — *McRae v. McMinn*, 17 Fla. 876.

Georgia. — *Clarke v. Beck*, 72 Ga. 127.

Illinois. — *Pittman v. Gaty*, 10 Ill. 186; *Franz v. Orton*, 75 Ill. 100; *Smith v. Jackson*, 76 Ill. 254; *Whitaker v. Miller*, 83 Ill. 381; *Mallett v. Kaehler*, 141 Ill. 70; *Rea v. Croessman*, 95 Ill. App. 74.

Iowa. — *Dickey v. Lyon*, 19 Iowa 544; *Nelson v. Wade*, 21 Iowa 54; *Rogers v. Turpin*, 105 Iowa 183; *Hannan v. Seidentopf*, 113 Iowa 659; *O'Neill v. Wilcox*, (Iowa 1901) 87 N. W. Rep. 742.

Maine. — *Hull v. Noble*, 40 Me. 481.

Missouri. — *Bartlett v. Glasscock*, 4 Mo. 62.

Nebraska. — *Jones v. Johnson Harvester Co.*, 8 Neb. 446; *Conlee v. McDowell*, 15 Neb. 184.

New Jersey. — *Purcell v. Enright*, 31 N. J. Eq. 74.

New York. — *Orleans Bank v. Flagg*, 3 Barb. Ch. (N. Y.) 316.

North Carolina. — *Edwards v. Thompson*, 71 N. Car. 177.

Pennsylvania. — *Hottenstein v. Lerch*, 104 Pa. St. 454; *Duff v. McDonough*, 155 Pa. St. 10.

Texas. — *Hawley v. Bullock*, 29 Tex. 216; *Glendenning v. Bell*, 70 Tex. 632; *Whitaker v. Allday*, 71 Tex. 623; *McCamant v. Roberts*, 80 Tex. 316; *League v. Snyder*, 5 Tex. Civ. App. 13; *Allison v. Pitkins*, 11 Tex. Civ. App. 655; *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, affirmed (Tex. Civ. App. 1900) 55 S. W. Rep. 361; *Duncan v. Matula*, (Tex. Civ. App. 1894) 26 S. W. Rep. 638.

Wisconsin. — *Wickes v. Lake*, 25 Wis. 71.

The fact that the tenant is generally known to be paying rent to a person other than the vendor is an additional circumstance to put the purchaser on inquiry. *Smith v. Jackson*, 76 Ill. 254. See also *Roberts v. Moseley*, 64 Mo. 507.

Where a tenant is in possession of part of a tract of land, his occupancy may be notice of the title of the landlord in the whole tract. *Allison v. Pitkins*, 11 Tex. Civ. App. 655; *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, affirmed (Tex. Civ. App. 1900) 55 S. W. Rep. 361.

The possession of the tenant is constructive

Rule in England. — In England the rule that the possession of a tenant is notice of his landlord's title is not recognized; the extent to which the possession of a tenant operates as constructive notice being limited to whatever interests the tenant may himself have in the land.¹ But where the purchaser has notice that the estate is in the possession of a certain person by his under-tenants, then, of course, he is put upon inquiry as to the rights of that person, whether the possession is actually held by him or his under-tenants.² And knowledge by the purchaser that the rents are paid by the tenants to some person whose receipt is inconsistent with the vendor's title is constructive notice of that person's rights in the property.³

bb. POSSESSION BY PRIOR GRANTOR AFTER CONVEYANCE. — The possession by a vendor after conveying the land is in some jurisdictions constructive notice to a subsequent purchaser from the grantee of any rights or equities that the vendor may have in the property; the reason being that it is a fact in conflict with the legal effect of his deed and is evidence that he still retains an interest in the premises.⁴ In other jurisdictions, on the contrary, the possession by a

notice of the landlord's title as long as the tenancy continues, though the tenant holds over his term, and though after his death the tenancy is continued by his heirs or for the benefit of his children. *Mattfeld v. Huntington*, 17 Tex. Civ. App. 716, *affirmed* (Tex. Civ. App. 1900) 55 S. W. Rep. 361.

The rule of the text applies although the tenant originally entered as a trespasser, if he afterward attorned to the owner or his grantee. *Mallett v. Kaehler*, 141 Ill. 70.

So, where the tenant originally entered as a trespasser and afterward attorned to the true owner, and paid rent to him under a written lease, it was held that his possession was notice of his landlord's title, although at the time of the purchase the term of the lease had expired; the tenant not having repudiated the tenancy. *League v. Snyder*, 5 Tex. Civ. App. 13.

Possession by Lessee Not Notice that Lessor Has Assigned Lease. — *Steel v. De May*, 102 Mich. 274.

1. Possession of Tenant Not Notice of Landlord's Title. — *Hunt v. Luck*, (1901) 1 Ch. 45, *following* *Barnhart v. Green Shields*, 9 Moo. P. C. 18, and *Knight v. Bowyer*, 23 Beav. 609, 2 De G. & J. 421, and *limiting* *Mumford v. Stohwasser*, L. R. 18 Eq. 556. See also *Oxwith v. Plummer*, 2 Vern. 636.

Payment of Rent. — Hence the mere fact of the tenant's possession does not make it the duty of the purchaser to inquire of the tenant to whom the latter pays his rent; and the fact that the rents are known to be paid to a real estate agent according to the usual practice is of no additional force in charging the purchaser with constructive notice of the landlord's title. *Hunt v. Luck*, (1901) 1 Ch. 45.

2. Notice that Stranger Holds Possession by Tenants. — *Bailey v. Richardson*, 9 Hare 734.

3. Hunt v. Luck, (1901) 1 Ch. 51.

4. Vendor Remaining in Possession, Notice to Subsequent Purchaser — *Arkansas*. — *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35.

California. — *Daubenspeck v. Platt*, 22 Cal. 331; *Pell v. McElroy*, 36 Cal. 268.

Illinois. — *Dyer v. Martin*, 5 Ill. 146; *Illinois Cent. R. Co. v. McCullough*, 59 Ill. 166; *White v. White*, 89 Ill. 460; *Rea v. Croessman*, 95 Ill. App. 70; *Ford v. Marcall*, 107 Ill. 136;

Rock Island, etc., R. Co. v. Dimick, 144 Ill. 639; *Ronan v. Bluhm*, 173 Ill. 277. See also *Stevenson v. Campbell*, 185 Ill. 527.

Kentucky. — *Hopkins v. Garrard*, 7 B. Mon. (Ky.) 313.

Louisiana. — See *Broussard v. Broussard*, 45 La. Ann. 1085.

Minnesota. — *New v. Wheaton*, 24 Minn. 406; *Groff v. State Bank*, 50 Minn. 234, 36 Am. St. Rep. 640.

Nebraska. — *Hansen v. Berthelsen*, 19 Neb. 438; *Lipp v. Hunt*, 25 Neb. 91; *Kahre v. Rundle*, 38 Neb. 315; *Smith v. Myers*, 56 Neb. 503. See also *Scharman v. Scharman*, 38 Neb. 39.

New York. — *Seymour v. McKinstry*, 106 N. Y. 230. See also *Holland v. Brown*, 140 N. Y. 344; *Cornell v. Maltby*, 165 N. Y. 560, *affirming* *Maltby v. Carr*, 35 N. Y. App. Div. 630, 56 N. Y. Supp. 1105. But see *Cook v. Travis*, 20 N. Y. 400 (*affirming* 22 Barb. (N. Y.) 338); *Sornberger v. Webster*, *Clarke* (N. Y.) 188.

North Carolina. — *Tankard v. Tankard*, 84 N. Car. 286. Compare *Holden v. Purefoy*, 108 N. Car. 163.

Pennsylvania. — *Van Amringe v. Morton*, 4 Whart. (Pa.) 382; *Berryhill v. Kirchner*, 96 Pa. St. 489. But see *Scott v. Gallagher*, 14 S. & R. (Pa.) 333.

Vermont. — *Wright v. Bates*, 13 Vt. 341.

Rule Applied to Reservation of Easement. — *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 639.

In *Maine* the rule of the text prevailed prior to the Revised Statutes. *Webster v. Maddox*, 6 Me. 256; *McLaughlin v. Shepherd*, 32 Me. 143, 52 Am. Dec. 646. And see the title RECORDING ACTS.

Fraudulent Conveyance. — In *Hood v. Fahnestock*, 1 Pa. St. 470, 44 Am. Dec. 147, the possession by the grantor was held constructive notice to a subsequent purchaser that the conveyance by the grantor to the grantee was fraudulent under the statutes of 13 Eliz., c. 5, and 27 Eliz., c. 4.

Occupant Without Knowledge of His Rights. — The rule of the text does not apply, however, where the grantor in possession does not know that he has any rights respecting the property he has conveyed; the obvious reason being that by making inquiry of him the subsequent

vendor after he has parted with the legal title is held not sufficient to put a subsequent purchaser from the grantee on inquiry as to any rights or equities that the occupant may have in the land, inconsistent with his conveyance; but the grantor is considered as holding for a mere temporary purpose, without claim of right, and in subordination to his grantee.¹ The fact that the deed from the grantor appears of record furnishes an additional reason for this rule.²

Possession by Both Grantor and Grantee. — In a jurisdiction where the possession of a grantor after conveyance is not notice to a subsequent purchaser, it is held that where both vendor and vendee are in possession of the premises at the same time, since the possession of the former is apparently not inconsistent with that of the latter, a purchaser from the grantee may regard the legal possession as being with the occupant who holds the legal title, *i. e.*, the grantee; and consequently that the occupancy of the grantor does not charge the purchaser with notice of any rights that the grantor may have in the property.³

cc. POSSESSION BY JOINT TENANT OR TENANT IN COMMON. — Upon the question whether or not the possession of one of several cotenants affords constructive notice of the rights of the others, the authorities are few and conflicting. It has been held that while information that a tenant in common of lands is holding under his cotenant might well be constructive notice of the latter's title, yet the possession of a tenant in common is of itself notice only of his own title; the reason being that he is presumed to hold in his own right, and not in the right of his cotenant.⁴ But, on the contrary, the possession of one of several cotenants or joint owners, if not inconsistent with the rights of the others,

purchaser would learn nothing. *Cornell v. Maltby*, 165 N. Y. 557, *affirming* 35 N. Y. App. Div. 630.

Where the Vendor Remaining in Possession Encourages the Subsequent Sale, and assures the purchaser that the vendee has full right to sell, the rule of the text cannot apply and the purchaser will be protected. *Broussard v. Broussard*, 45 La. Ann. 1085.

1. Vendor's Possession Not Notice — *Indiana*. — *Work v. Brayton*, 5 Ind. 396; *Tuttle v. Churchman*, 74 Ind. 311; *Jeffersonville, etc., R. Co. v. Oyler*, 82 Ind. 400.

Iowa. — *Koon v. Tramel*, 71 Iowa 132; *Sprague v. White*, 73 Iowa 670; *May v. Sturdivant*, 75 Iowa 118, 9 Am. St. Rep. 463; *Dodge v. Davis*, 85 Iowa 77. See also *McCleery v. Wakefield*, 76 Iowa 530.

Kansas. — *McNeil v. Jordan*, 28 Kan. 70. *Massachusetts*. — See *Newhall v. Pierce*, 5 Pick. (Mass.) 450.

Michigan. — *Bloomer v. Henderson*, 8 Mich. 395; *Dawson v. Danbury Bank*, 15 Mich. 489; *Abbott v. Gregory*, 39 Mich. 68.

Mississippi. — *Haft v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659.

New Jersey. — *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 133; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Van Keuren v. Central R. Co.*, 38 N. J. L. 165; *Rankin v. Coar*, 46 N. J. Eq. 571.

North Dakota. — *Red River Valley Land, etc., Co. v. Smith*, 7 N. Dak. 236.

Oklahoma. — *Smith v. Phillips*, 9 Okla. 302. *Tennessee*. — See *Curry v. Williams*, (Tenn. Ch. 1806) 38 S. W. Rep. 278.

Texas. — *Eylar v. Eylar*, 60 Tex. 315; *Hoffman v. Blume*, 64 Tex. 334; *Love v. Breedlove*, 57 Tex. 649; *Summers v. Shearn*, (Tex. Civ. App. 1896) 37 S. W. Rep. 246; *Brigham v.*

Thompson, 12 Tex. Civ. App. 562. See also *Hawley v. Geer*, (Tex. 1891) 17 S. W. Rep. 916.

The rule applies where the grantor remains in possession as tenant of his grantee, *Hoffman v. Blume*, 64 Tex. 334; and where the grantor's interest was acquired not at the time of his conveyance to the grantee, but subsequently thereto. *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Rankin v. Coar*, 46 N. J. Eq. 571.

But as Between Grantor and Grantee, the continued possession of the grantor long after the recording of his deed is evidence that he retains some right or interest in the land. *Bennett v. Robinson*, 27 Mich. 26; *Stevens v. Hulín*, 53 Mich. 93. And see the title VENDOR AND PURCHASER.

2. Deed Recorded — *Indiana*. — *Work v. Brayton*, 5 Ind. 396.

Iowa. — *Koon v. Tramel*, 71 Iowa 132. *Massachusetts*. — See also *Newhall v. Pierce*, 5 Pick. (Mass.) 450.

Michigan. — *Bloomer v. Henderson*, 8 Mich. 395.

Mississippi. — *Haft v. Strange*, 65 Miss. 323, 7 Am. St. Rep. 659.

Tennessee. — See *Curry v. Williams*, (Tenn. Ch. 1896) 38 S. W. Rep. 278.

Texas. — *Eylar v. Eylar*, 60 Tex. 315; *Love v. Breedlove*, 57 Tex. 649. See also *Hawley v. Geer*, (Tex. 1891) 17 S. W. Rep. 916.

And see the title RECORDING ACTS.

3. Grantor in Possession with Grantee — Purchaser Not Put on Inquiry. — *Foulks v. Reed*, 89 Ind. 373; *Cameron v. Romele*, 53 Tex. 238.

4. Possession by Cotenant. — *Wilcox v. Leominster Nat. Bank*, 43 Minn. 541, 19 Am. St. Rep. 259. See also *Williams v. Sprigg*, 6 Ohio St. 585.

has been held to operate as constructive notice of the rights of all.¹ So, where the legal title to land was held in trust for several beneficiaries, the occupation and use of the land by one of them was held to be constructive notice of the rights of all; and it was held that in such a case the possession need not be inconsistent with that of the person holding the legal title.²

dd. POSSESSION BY HUSBAND AND WIFE. — It has been held that the possession of land by a husband and wife is regarded as joint by reason of the family relation, and that such possession will operate as notice of the wife's equities in the land as against all persons other than those claiming under the husband.³ So, where the land is in the possession of the husband and the wife, under an equitable title in the wife arising from contract of purchase, payment of the consideration and erection of improvements, a purchaser or mortgagee of the wife's vendor is chargeable with constructive notice of the wife's title, whether the possession is considered as that of the husband, or of the wife, or of both.⁴ But possession by the husband and wife will not impart notice of the wife's equities to persons claiming under the husband,⁵ especially where he apparently holds the legal title and it does not clearly appear that his acts of possession and user are performed on the behalf of the wife.⁶ Neither will it afford notice to a purchaser or mortgagee from another member of the family, as a son who holds the legal title against which the wife's equity is sought to be enforced, but who does not hold the legal possession of the property and is not a joint occupant thereof with his parents.⁷

In Georgia the rule appears to be settled that when husband and wife are living together upon land used and controlled by the husband, the possession is presumptively in him, as the head of the family, and the joint possession will not alone be sufficient to give notice of any claim or interest in the land by the wife, either to a purchaser or mortgagee from the husband⁸ or from a third person.⁹

Possession by Husband After Separation. — Where the wife has separated from her husband and is living apart from him, his possession and use of land as his homestead affords notice of his claim of ownership to a purchaser from the wife.¹⁰

Husband in Possession of Wife's Separate Property. — Where a husband is in possession of lands belonging to his wife's statutory separate estate, his possession is to be referred to his representative capacity as trustee, and constitutes constructive notice of her title.¹¹ And the rule is not affected by the fact that before she acquired title, and before his possession began thereunder, he occupied the land as tenant of her vendor.¹²

ee. POSSESSION BY WOMAN AS HEAD OF FAMILY. — Where the premises in question are occupied by a woman who is the head of the family, and the legal title is held by her minor son who lives with her, the possession of the mother affords constructive notice of her equities in the land, to one who purchases from the son.¹³

(c) *Requisites and Sufficiency of Possession* — *aa. IN GENERAL.* — The possession and

1. *Ramirez v. Smith*, 94 Tex. 184.

Possession by Lessee of Co-tenant After Parol Partition, held notice of the partition. *Whitaker v. Allday*, 71 Tex. 623.

2. *Ramirez v. Smith*, 94 Tex. 184.

3. *Both Husband and Wife in Possession.* — *Iowa L. & T. Co. v. King*, 58 Iowa 598.

4. *Humphrey v. Moore*, 17 Iowa 193.

5. *Neal v. Perkerson*, 61 Ga. 346; *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740. See also *Motley v. Jones*, 98 Ala. 443.

6. *Thomas v. Kennedy*, 24 Iowa 397, 95 Am. Dec. 740.

7. *Iowa L. & T. Co. v. King*, 58 Iowa 598. See also *Lindley v. Martindale*, 78 Iowa 379.

8. *Georgia Rule.* — *Neal v. Perkerson*, 61 Ga. 346. See also *Primrose v. Browning*, 59 Ga. 69.

9. *Garrard v. Hull*, 92 Ga. 787.

10. *Separation—Purchase from Wife with Husband in Possession.* — *Stevens v. Castel*, 63 Mich. 111.

11. *Husband's Possession of Wife's Realty.* — *Brunson v. Brooks*, 68 Ala. 249. See also *Michan v. Wyatt*, 21 Ala. 813. Compare *Fassett v. Smith*, 23 N. Y. 252; and see generally the title *SEPARATE PROPERTY (OF MARRIED WOMEN)*.

12. *Brunson v. Brooks*, 68 Ala. 249.

13. *Possession by Woman as Head of Family.* — *Watson v. Murray*, 54 Ark. 499.

user of land by a person other than the grantor must, in order to afford notice, be open, notorious, and exclusive; it must be unambiguous and unequivocal; it must be under claim of right; in short, like other matters from which constructive notice is sought to be imputed, it must be of such a character as will excite inquiry upon the part of a purchaser and will lead him in the exercise of due diligence to knowledge of the adverse rights in question.¹ Thus, where a particular claim is notorious and sufficient to account for the possession, the purchaser is under no duty to inquire as to the existence of some other claim.² Similarly it has been held that where the inquiry reveals the fact that the parties in possession claim under a lease which was made subsequent to an absolute conveyance to the proposed grantor, the purchaser is not bound to make further inquiry.³ And in any event the possession of land will operate as notice only of the right or title by or under which the possession is held, and will not afford notice of any claims or equities unconnected therewith.⁴ Yet possession sufficient to constitute constructive notice may be evidenced by any facts which clearly show an appropriation of the property to the use of the person claiming it.⁵ The occupancy need not have all the characteristics of adverse possession under the limitation laws.⁶ The extent and character of the property, and the uses to which it may be put, are obviously matters of considerable importance in determining whether or not the occupancy of it is sufficient to put a purchaser upon inquiry,⁷ and it is considered that any acts of possession and user, if they are all that the property,

1. General Requisites of the Possession — *United States*, — *Townsend v. Little*, 109 U. S. 511.

Alabama. — *McCarthy v. Nicrosi*, 72 Ala. 334, 47 Am. Rep. 418.

California. — *Havens v. Dale*, 18 Cal. 359; *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *Taylor v. Central Pac. R. Co.*, 67 Cal. 615; *Calanchini v. Branstetter*, 96 Cal. 612.

Illinois. — *Truesdale v. Ford*, 37 Ill. 210; *Smith v. Jackson*, 76 Ill. 254; *Robertson v. Wheeler*, 162 Ill. 575; *Mack v. McIntosh*, 181 Ill. 633.

Indiana. — *Foulks v. Reed*, 89 Ind. 373.

Iowa. — *Lindley v. Martindale*, 78 Iowa 379.

Kansas. — *Beaubien v. Hindman*, 38 Kan. 471; *Sanford v. Weeks*, 38 Kan. 319, 5 Am. St. Rep. 748.

Massachusetts. — *M'Meachan v. Griffing*, 3 Pick. (Mass.) 150.

Missouri. — *Masterson v. West End Narrow Gauge R. Co.*, 5 Mo. App. 69.

Nebraska. — *Hunt v. Lipp*, 30 Neb. 469.

New Hampshire. — *Bell v. Twilight*, 22 N. H. 500; *Patten v. Moore*, 32 N. H. 382.

New Jersey. — *Coleman v. Barklew*, 27 N. J. L. 357; *Holmes v. Stout*, 10 N. J. Eq. 419; *McCall v. Yard*, 11 N. J. Eq. 58; *Groton Sav. Bank v. Batty*, 30 N. J. Eq. 132; *Hodge v. Amerman*, 40 N. J. Eq. 99; *Rankin v. Coar*, 46 N. J. Eq. 566.

New York. — *Johnson v. Strong*, 65 Hun (N. Y.) 470; *Cook v. Travis*, 22 Barb. (N. Y.) 339, affirmed 20 N. Y. 400; *Brown v. Volkering*, 64 N. Y. 76; *Pope v. Allen*, 90 N. Y. 298; *Holland v. Brown*, 140 N. Y. 344.

North Carolina. — *Taylor v. Kelly*, 3 Jones Eq. (56 N. Car.) 240.

Pennsylvania. — *Billington v. Welsh*, 5 Binn. (Pa.) 132; *Green v. Drinker*, 7 W. & S. (Pa.) 440; *Meehan v. Williams*, 48 Pa. St. 238.

Texas. — *Cameron v. Romele*, 53 Tex. 244; *Gulf, etc., R. Co. v. Gill*, 5 Tex. Civ. App. 496.

Possession alone is not sufficient to give notice of defects existing in the occupant's

title, or in the title paramount to his. *Suiter v. Turner*, 10 Iowa 517.

Keeping an Agent in Charge of an Unoccupied House to which he has the key is not sufficient to put a purchaser on inquiry. *Phoenix Ins. Co. v. Neal*, 23 Tex. Civ. App. 427.

Using Premises as a Yard for Drying Clothes is not sufficient. *Williams v. Sprigg*, 6 Ohio St. 585.

Where the Occupant Delivers Possession to the Purchaser on Demand, the purchaser is not chargeable with notice by reason of the possession. *Pancake v. Cauffman*, 114 Pa. St. 113.

Possession by a Slave Prior to Emancipation was held not to afford notice of any equitable rights in him to ownership of the land, since under the law at that time he could not have had such rights. *Heyer v. Beatty*, 83 N. Car. 285.

Tenant under Derivative Lease. — *Hanbury v. Litchfield*, 2 Myl. & K. 633.

Notoriety of Claim Sufficient to Account for Possession. — *Lincoln v. Thompson*, 75 Mo. 613.

3. Bugbee's Appeal, 110 Pa. St. 331.

4. Rights Foreign to the Possession. — *Hodges v. Winston*, 94 Ala. 576.

Possession of Purchaser under a Contract, Not Notice of Assignment of Contract by Vendor. — *Johnson v. Strong*, 65 Hun (N. Y.) 470.

Possession by Stranger to Title. — *Wright v. Wood*, 23 Pa. St. 120; *Western Min., etc., Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 409. See also *Robertson v. Wheeler*, 162 Ill. 578. But see *Powell v. Allred*, 11 Ala. 318.

Owner of Fee Occupying Part of Land and Buying Lease of Other Part. — *Sweet v. Henry*, 66 N. Y. App. Div. 390.

5. Unequivocal Acts of Dominion Sufficient. — *Mason v. Mullahy*, 145 Ill. 388.

6. Occupancy Need Not Amount to Adverse Possession. — *Smith v. Jackson*, 76 Ill. 254.

7. Character of Property a Material Circumstance. — *Havens v. Dale*, 18 Cal. 359.

by reason of its character, is susceptible of, will, if otherwise sufficient, constitute notice to the purchaser.¹

bb. MUST BE A PRESENT POSSESSION. — In order for possession to constitute notice it must be a present possession, existing at the time of the purchase which is sought to be impeached.² But if the possession existed at the time of the contract of purchase, it is sufficient notice, though it had ceased before the conveyance was made.³

cc. MUST BE A CONTINUOUS POSSESSION. — The occupancy and user must be continuous, or at least as continuous as the nature of the premises and of the right claimed will admit.⁴ But the actual, visible possession need not be absolutely continuous and unbroken; for once having begun it continues, in legal contemplation, until the occupant's conduct affords evidence of intentional abandonment; and if there has been no such abandonment, and if the occupant has continued to exercise unequivocal acts of dominion or ownership over the land and is so doing at the time of the conveyance, the possession is sufficient to constitute notice.⁵

dd. MUST BE INCONSISTENT WITH APPARENT TITLE OF GRANTOR — (*aa*) *Principle Stated.* — The possession must be inconsistent with the apparent or record title of the grantor, else it will not be sufficient to impose upon the purchaser the duty of making further inquiry; the reason being that in such a case the possession is presumed to be under the grantor's title.⁶

1. *User According to Nature of the Property.* — *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417; *Rogers v. Turpin*, 105 Iowa 183.

Occupancy and Cultivation of the land are sufficient. *Lyman v. Russell*, 45 Ill. 281; *Knox v. Thompson*, 1 Litt. (Ky.) 351. See also *Allison v. Pitkins*, 11 Tex. Civ. App. 655.

Planting the Land with Willows and Cutting Them to Make Baskets Held Sufficient. — *Krider v. Lafferty*, 1 Whart. (Pa.) 303.

Pasturage. — *Enclosing Land and Leasing it to one who uses it for a pasture, for which purpose alone it is adapted, constitute sufficient acts of possession to constitute notice.* *Rogers v. Turpin*, 105 Iowa 183. See also *Allison v. Pitkins*, 11 Tex. Civ. App. 655.

Cutting Timber and Paying Taxes have been held sufficient. *Mason v. Mullahy*, 145 Ill. 388.

2. *Possession Must Be in Præsent* — *California.* — *Hunter v. Watson*, 12 Cal. 376, 73 Am. Dec. 543.

Minnesota. — *Roussain v. Norton*, 53 Minn. 560.

New Jersey. — *Coleman v. Barklew*, 27 N. J. L. 357; *Bingham v. Kirkland*, 34 N. J. Eq. 230.

New York. — *New York L. Ins., etc., Co. v. Cutler*, 3 Sandf. Ch. (N. Y.) 176.

3. *Possession at Time of Contract Sufficient.* — *Bergeron v. Richardott*, 55 Wis. 129.

4. *Continuous Possession Essential.* — *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 639; *Roussain v. Norton*, 53 Minn. 560; *Masterson v. West End Narrow-Gauge R. Co.*, 5 Mo. App. 69; *Williams v. Sprigg*, 6 Ohio St. 585; *Meehan v. Williams*, 48 Pa. St. 238.

Rule Applied to Reservation of Easement. — *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 639.

Mere Occasional Entries are not sufficient to put the purchaser on inquiry. *Williams v. Sprigg*, 6 Ohio St. 585.

5. *Rule Qualified.* — *Holmes v. Powell*, 8 De

G. M. & G. 572; *White v. White*, 105 Ill. 314; *Chapman v. Chapman*, 91 Va. 398, 50 Am. St. Rep. 846. See also the foregoing paragraph of text.

The Removal of a House from the land does not afford evidence of an abandonment of the possession, where the premises remain enclosed and the owner gathers the fruit yearly from an orchard on the land. *White v. White*, 105 Ill. 314.

6. *Possession Consistent with Apparent Title in Grantor, Not Notice* — *United States.* — *Townsend v. Little*, 109 U. S. 504.

Alabama. — *McCarthy v. Nicrosi*, 72 Ala. 334, 47 Am. Rep. 418.

California. — *Smith v. Yule*, 31 Cal. 180, 89 Am. Dec. 167; *McNeil v. Polk*, 57 Cal. 323; *Huntley v. San Francisco Sav. Union*, 130 Cal. 46.

Georgia. — *Wallace v. Jones*, 93 Ga. 421; *Hobbs v. Georgia L. & T. Co.*, 96 Ga. 770.

Illinois. — *Harris v. McIntyre*, 118 Ill. 275; *Robertson v. Wheeler*, 162 Ill. 575.

Iowa. — *Rogers v. Hussey*, 36 Iowa 664.

Kentucky. — *Thierman v. Bodley*, (Ky. 1901) 63 S. W. Rep. 737, 23 Ky. L. Rep. 756.

Minnesota. — *Dutton v. McReynolds*, 31 Minn. 66.

Montana. — *Mullins v. Butte Hardware Co.*, 25 Mont. 525.

New Jersey. — *Rankin v. Coar*, 46 N. J. Eq. 566.

New York. — *Baldwin v. Golde*, 88 Hun (N. Y.) 115; *New York L. Ins., etc., Co. v. Cutler*, 3 Sandf. Ch. (N. Y.) 176; *Fassett v. Smith*, 23 N. Y. 259; *Pope v. Allen*, 90 N. Y. 298; *Holland v. Brown*, 140 N. Y. 344.

North Dakota. — *Red River Valley Land, etc., Co. v. Smith*, 7 N. Dak. 241.

Ohio. — *Williams v. Sprigg*, 6 Ohio St. 585.

See also the title RECORDING ACTS

Possession by Life Tenant and Sale by Remainderman. — The rule of the text is applicable to a sale by a remainderman where the life tenant

(bb) *Necessity for Change of Possession at Prior Sale.* — Where it is sought to impute to a purchaser notice of a prior sale or conveyance of the land by the same grantor, and possession by the prior purchaser or his tenant is relied upon to constitute notice, it has been held that in order for the possession to operate as notice there must have been a visible change in the occupancy at the time of the first purchase or conveyance; that otherwise there is nothing in the character of the possession that would suggest to the purchaser's mind the existence of any rights in the land other than those held by the vendor or his tenants. Therefore, where both the vendor and the vendee are in possession of the property at the time of the first purchase, and there is no change in the possession thereafter, both continuing to occupy the land, the possession of the vendee is not notice of his title to a subsequent purchaser from the vendor.¹ Likewise, where a purchaser under a title bond leaves the vendor in possession as his tenant, and the vendor afterwards sells the land to another, the last purchaser is not chargeable with notice of the prior sale by reason of the vendor's continued possession.²

Vendor in Possession by Tenant — Attornment to Vendee Not Sufficient. — Where at the time of the prior sale the vendor was in possession by a tenant, and after the sale the tenant remains in possession as before and merely attorns to the purchaser, it has been held in some jurisdictions that the tenant's possession is not of itself sufficient to affect a subsequent purchaser from the same vendor with notice of the title of the landlord, *i. e.*, the prior purchaser; the possession of the tenant still being, to all appearances, the possession of the vendor.³ The foregoing rule has been briefly stated to be that in order that the possession of a tenant may be notice of his landlord's title, the tenancy must have begun after the title of the landlord was acquired.⁴ But in a number of other jurisdictions where this question has arisen, the foregoing doctrine has not been recognized; but it has been held that where a vendor's tenant in possession merely attorns to the vendee without any apparent change in the occupancy or in its character, the possession is nevertheless sufficient to excite inquiry in the mind of a subsequent purchaser from the vendor, and thus to charge him with constructive notice of the prior vendee's title.⁵

is in possession, since a remainderman is not entitled to possession in his own right until the death of the life tenant. *Wallace v. Jones*, 93 Ga. 421.

Tenants in Common. — So where several tenants in common in possession under title of record purchased the undivided interest of another cotenant not in possession, their continuance in possession of the land without visible change in the character of the occupancy was held not to afford notice of their title to one who claimed under the cotenant who sold. *May v. Sturdivant*, 75 Iowa 116, 9 Am. St. Rep. 463.

1. Vendor and Vendee Remaining in Possession. — *McCarthy v. Nicrosi*, 72 Ala. 332, 47 Am. Rep. 418; *Watt v. Parsons*, 73 Ala. 202.

This rule is applicable to a case where a husband and wife occupied land and the husband conveyed to the wife by a deed that was not recorded. *Motley v. Jones*, 98 Ala. 443.

2. Vendor Remaining in Possession as Vendee's Tenant. — *Arnold v. Barnett*, 90 Ga. 334.

3. Attornment of Vendor's Tenant to Vendee Not a Sufficient Change of Possession — Alabama. — *King v. Paulk*, 85 Ala. 186; *Paulk v. King*, 86 Ala. 332. See also *Fitzgerald v. Williamson*, 85 Ala. 585. But in *Tutwiler v. Montgomery*, 73 Ala. 263, an opposite result was reached.

Maine. — *Veazie v. Parker*, 23 Me. 170.

Mississippi. — *Loughridge v. Bowland*, 52 Miss. 546.

Nebraska. — *Burt v. Baldwin*, 8 Neb. 487, approved in *Conlee v. McDowell*, 15 Neb. 189.

And of course where the first purchaser does not take possession or record his deed, and the tenant of the vendor does not attorn to the vendee but continues to pay rent to the vendor, the subsequent purchaser from the vendor is not chargeable with notice from the fact of the possession. *Troy v. Walter*, 87 Ala. 233, *distinguishing* *Tutwiler v. Montgomery*, 73 Ala. 263.

4. Conlee v. McDowell, 15 Neb. 189.

5. Contrary Rule — Illinois. — *Mallett v. Kaehler*, 141 Ill. 70. See also *Coari v. Olsen*, 91 Ill. 273.

Iowa. — *Hannan v. Seidentopf*, 113 Iowa 659.
Pennsylvania. — *Duff v. McDonough*, 155 Pa. St. 10.

Texas. — *Mainwarring v. Templeman*, 51 Tex. 212; *Mattfeld v. Huntington*, 17 Tex. Civ. App. 720; *Duncan v. Matula*, (Tex. Civ. App. 1894) 26 S. W. Rep. 638. The Texas cases expressly repudiate the rule as laid down by the courts of *Maine* and *Mississippi*.

The rule of the text has been held to apply though the tenant originally entered as a trespasser. *Mallett v. Kaehler*, 141 Ill. 70.

cc. OCCUPANT MUST HAVE STANDING IN EQUITY. — The principle of constructive notice by possession is intended to protect only those persons who in justice ought to be protected in a court of equity; and while it may be applied to protect an occupant with equitable rights, it may not be invoked on behalf of one who has no equity,¹ especially in a case where the occupant seeks the aid of the doctrine to cover his own fraud or misrepresentations.²

(4) *By Instruments Relating to Title* — *aa.* GENERAL RULE. — A purchaser or mortgagee is affected with constructive notice of all facts appearing in the recitals contained in any and all written instruments relating to the title of the property he is about to acquire, and where any instrument in the chain of title refers to any other instrument also in the chain of title or material thereto, he is chargeable with notice of all the facts that it recites, and will not be heard to say that he did not read the writing in question. In other words, a purchaser is fixed with constructive notice of whatever appears in the conveyances constituting his chain of title.³

1. Occupant Without Just Claim Not Protected as Against Purchaser for Value. — Gill *v.* Hardin, 48 Ark. 409; Minton *v.* New York El. R. Co., 130 N. Y. 332 (cases of estoppel).

2. Yates *v.* Hurd, 8 Colo. 343; Losey *v.* Simpson, 11 N. J. Eq. 246; Groton Sav. Bank *v.* Batty, 30 N. J. Eq. 126. See also Broussard *v.* Broussard, 45 La. Ann. 1085; Converse *v.* Blumrich, 14 Mich. 120.

3. General Rule as to Instruments Relating to Title — *England*. — Mertins *v.* Jolliffe, Amb. 313; Patman *v.* Harland, 17 Ch. D. 353; Coppin *v.* Fernyhough, 2 Bro. C. C. 291; Eyre *v.* Dolphin, 12 Rev. Rep. 94, 2 Ball. & B. 290; Bisco *v.* Banbury, 18 Vin. Abr. 123; Ferrars *v.* Cherry, 2 Vern. 383, 18 Vin. Abr. 117; Robinson *v.* Briggs, 1 Smale & G. 188, 1 W. R. 223.

United States. — Wormley *v.* Wormley, 8 Wheat. (U. S.) 447; Brush *v.* Ware, 15 Pet. (U. S.) 114; Cordova *v.* Hood, 17 Wall. (U. S.) 1.

Alabama. — Johnson *v.* Thweatt, 18 Ala. 741; Burch *v.* Carter, 44 Ala. 115; Dudley *v.* Witter, 46 Ala. 666; Corbitt *v.* Clenny, 52 Ala. 480; Whitfield *v.* Riddle, 78 Ala. 100; Thompson *v.* Sheppard, 85 Ala. 611; Edwards *v.* Bender, 121 Ala. 77.

Arkansas. — Sidham *v.* Matthews, 29 Ark. 650; Gaines *v.* Saunders, 50 Ark. 327.

California. — Solari *v.* Snow, 101 Cal. 387.

Connecticut. — Hamilton *v.* Nott, 34 Conn. 501.

Georgia. — Fry *v.* Calder, 74 Ga. 7; Simms *v.* Freiberr, 100 Ga. 607.

Illinois. — White *v.* Kibby, 42 Ill. 510; Chicago, etc., R. Co. *v.* Kennedy, 70 Ill. 350.

Indiana. — Walls *v.* State, 140 Ind. 16.

Kansas. — Knowles *v.* Williams, 58 Kan. 221.

Kentucky. — Hackwith *v.* Damron, 1 T. B. Mon. (Ky.) 235; Tiernan *v.* Thurman, 14 B. Mon. (Ky.) 224; Burrus *v.* Roulhac, 2 Bush (Ky.) 39; Bakewell *v.* Ogden, 2 Bush (Ky.) 265.

Louisiana. — See Dohan *v.* Murdock, 41 La. Ann. 494.

Maryland. — Neale *v.* Hagthorp, 3 Bland (Md.) 551; Green *v.* Early, 39 Md. 223.

Michigan. — Mason *v.* Payne, Walk. (Mich.) 459; Gordon *v.* Constantine Hydraulic Co., 117 Mich. 620.

Minnesota. — Daughaday *v.* Paine, 6 Minn. 443.

Mississippi. — Wailes *v.* Cooper, 24 Miss. 208; Gordon *v.* Sizer, 39 Miss. 805.

Missouri. — Tydings *v.* Pitcher, 82 Mo. 379; Bronson *v.* Wanzer, 86 Mo. 408; Mason *v.* Black, 87 Mo. 329; Hagerman *v.* Sutton, 91 Mo. 519; Keen *v.* Schnedler, 92 Mo. 516; Knox County *v.* Brown, 103 Mo. 223; Patterson *v.* Booth, 103 Mo. 402; Loring *v.* Groomer, 110 Mo. 632; Freeman *v.* Moffitt, 119 Mo. 280; Poage *v.* Wabash, etc., R. Co., 24 Mo. App. 199.

New Hampshire. — Brown *v.* Eastman, 16 N. H. 588.

New Jersey. — Van Doren *v.* Robinson, 16 N. J. Eq. 256; Sea Grove Bldg. Assoc. *v.* Parsons, (N. J. 1889) 17 Atl. Rep. 834.

New York. — Gilbert *v.* Peteler, 38 Barb. (N. Y.) 488, affirmed 38 N. Y. 165; Steere *v.* Childs, 15 Hun (N. Y.) 519; Eyring *v.* Hercules Land Co., 9 N. Y. App. Div. 306. See also Howard Ins. Co. *v.* Halsey, 8 N. Y. 271, 59 Am. Dec. 478.

North Carolina. — Christmas *v.* Mitchell, 3 Ired. Eq. (38 N. Car.) 535; Webber *v.* Taylor, 2 Jones Eq. (55 N. Car.) 9.

Pennsylvania. — Gibson *v.* Winslow, 46 Pa. St. 380, 84 Am. Dec. 552; Jennings *v.* Bloomfield, 199 Pa. St. 638; Hiser *v.* Hiser, 13 Montg. Co. Rep. (Pa.) 49.

South Carolina. — See also Sheorn *v.* Robinson, 22 S. Car. 32.

Tennessee. — Baxter *v.* Knoxville First Nat. Bank, 85 Tenn. 33.

Texas. — McRimmon *v.* Martin, 14 Tex. 318; Golson *v.* Fielder, 2 Tex. Civ. App. 400; Christian *v.* Hughes, 12 Tex. Civ. App. 626; De Bailigethy *v.* Johnson, 23 Tex. Civ. App. 272; Moore *v.* Scott, (Tex. Civ. App. 1896) 38 S. W. Rep. 394; Studebaker Bros. Mfg. Co. *v.* Hunt, (Tex. Civ. App. 1896) 38 S. W. Rep. 1134; O'Connor *v.* Vineyard, (Tex. Civ. App. 1897) 43 S. W. Rep. 55; Stone *v.* Kahle, 22 Tex. Civ. App. 185; Scripture *v.* Copp, (Tex. Civ. App. 1900) 57 S. W. Rep. 603; Texas Tram, etc., Co. *v.* Gwin, (Tex. Civ. App. 1902) 67 S. W. Rep. 892.

Virginia. — Wood *v.* Krebbs, 30 Gratt. (Va.) 708; Whitlock *v.* Johnson, 87 Va. 323; Roanoke Brick, etc., Co. *v.* Simmons, (Va. 1895) 20 S. E. Rep. 955.

West Virginia. — Fouse *v.* Gilfillan, 45 W. Va. 213.

Wisconsin. — Pringle *v.* Dunn, 37 Wis. 466,

Purchaser Not Entitled to Rely on Representations of Vendor. — Where a purchaser has notice of an instrument relating to the property and does not examine its contents, he is chargeable with notice of all matters recited therein, even though the vendor expressly represents that it contains nothing affecting the title.¹

Recital that Purchase Money Is Unpaid. — A recital in any deed in the chain of title to the effect that the purchase money is unpaid is notice to the purchaser that a vendor's lien exists on the land.² And the fact that the time for the payment of the purchase money according to the terms of the deed has elapsed does not relieve the subsequent purchaser of the duty of inquiry; he

19 Am. Rep. 772; *Dailey v. Kastell*, 56 Wis. 444; *Reichert v. Neuser*, 93 Wis. 513; *Town v. Gensch*, 101 Wis. 445.

Rule Applied to Purchaser from One of Two Joint Owners — Conveyance to Vendor Is Notice. — *Campbell v. Roach*, 45 Ala. 667.

Rule Applied to Purchaser from Partner of Lands Bought by Firm and Held in Firm Name — Purchaser Chargeable with Notice of Rights of Other Partners. — *Brewer v. Browne*, 68 Ala. 210. Compare *Reynolds v. Ruckman*, 35 Mich. 80.

Rule Applied to Charge Purchaser with Notice of Reservation of Timber by Prior Deed. — *Wait v. Baldwin*, 60 Mich. 622, 1 Am. St. Rep. 551.

A Deed Executed in a Foreign State and embracing lands situated there is within the rule of the text; and the purchaser from the grantee in such a deed is bound to ascertain the effect which the deed would have under the *lex situs*. *Bernard v. Scott*, 12 La. Ann. 480.

Rule Applied to One Who Purchases from an Heir and Has Notice of the Decedent's Will. — *Smith v. Bonnisteele*, 13 Grant Ch. (U. C.) 29; *McIntosh v. Ontario Bank*, 19 Grant Ch. (U. C.) 155. See also *Bakewell v. Ogden*, 2 Bush (Ky.) 265.

Mortgagor and Mortgagee. — The recitals in the deed under which a mortgagor holds the land are constructive notice to a mortgagee. *Steere v. Childs*, 15 Hun (N. Y.) 511; *Wells v. Houston*, 23 Tex. Civ. App. 620.

Rule Applicable to Lessees and Purchasers of Leasehold Estates. — *Patman v. Harland*, 17 Ch. D. 353.

And such a purchaser is chargeable with notice of the clauses and covenants in the lease. *Walter v. Maunde*, 1 Jac. & W. 181, 21 Rev. Rep. 141; *Vaughan v. Magill*, 12 Ir. Eq. 207; *Smith v. Capron*, 7 Hare 189; *Butler v. Portarlington*, 1 Dr. & War. 20, 4 Ir. Eq. 1. See also *Smith v. Watts*, 4 Drew. 338, 28 L. J. Ch. 220, 7 W. R. 126; *Wilson v. Hart*, L. R. 1 Ch. 463, 35 L. J. Ch. 569.

And the rule applies to charge a purchaser of an underlease with notice of covenants in the original lease. *Cosser v. Collinge*, 3 Myl. & K. 283, 1 L. J. Ch. 130; *Flight v. Barton*, 3 Myl. & K. 282. See also *Camberwell*, etc., Bldg. Soc. v. *Holloway*, 13 Ch. D. 754, 49 L. J. Ch. 361, 41 L. T. N. S. 752, 28 W. R. 222. Compare *Wilbraham v. Livesey*, 18 Beav. 206; *Hanbury v. Litchfield*, 2 Myl. & K. 633.

Likewise a lessee or the purchaser of a leasehold estate is affected with notice by recitals in a deed forming part of the title of his lessor or vendor. *Patman v. Harland*, 17 Ch. D. 353, 50 L. J. Ch. 642.

And in *England* the principle that a lessee under such circumstances has constructive

notice of his lessor's title has not been altered by the Vendor and Purchaser Act of 1874, § 2, subsec. 1; but a lessee is in the same position as regards notice as if before that statute he had stipulated not to inquire into his lessor's title; that is, he is charged with constructive notice. *Patman v. Harland*, 17 Ch. D. 353.

Deed Executed by Attorney or Agent. — Where a deed is executed in the name of the grantor by another person as his attorney or agent, the grantee is chargeable with knowledge that a power of attorney existed, and with constructive notice of the contents of that instrument, and of any limitations therein as to the attorney's authority to convey. *Kingsland v. Chetwood*, 39 Hun (N. Y.) 602; *Morris v. Terrell*, 2 Rand. (Va.) 6. See also *Green v. Hugo*, 81 Tex. 452, 26 Am. St. Rep. 824; *Hagerman v. Sutton*, 91 Mo. 519; *Swarthout v. Curtis*, 5 N. Y. 301, 55 Am. Dec. 345 (unauthorized discharge of mortgage by guardian).

Sale by Trustees under Power in Will. — A like rule applies to a sale by trustees under a power given by a will. *Bakewell v. Ogden*, 2 Bush (Ky.) 265.

1. **Purchaser Relying on Statement of Vendor.** — *Patman v. Harland*, 17 Ch. D. 353.

2. **Recital in Prior Deed that Purchase Money Is Unpaid — Alabama.** — *Whitfield v. Riddle*, 78 Ala. 100.

Georgia. — *Atlanta Land, etc., Co. v. Haile*, 106 Ga. 498.

Indiana. — *Wiseman v. Hutchinson*, 20 Ind. 40; *Croskey v. Chapman*, 26 Ind. 333. See also *Warford v. Hankins*, 150 Ind. 489.

Kentucky. — *Johnston v. Gwathmey*, 4 Litt. (Ky.) 317, 14 Am. Dec. 135; *Honore v. Bakewell*, 6 B. Mon. (Ky.) 67, 43 Am. Dec. 147; *Thornton v. Knox*, 6 B. Mon. (Ky.) 74; *Woodward v. Woodward*, 7 B. Mon. (Ky.) 116. See also *Shuttleworth v. Kentucky Coal, etc., Co.*, (Ky. 1901) 61 S. W. Rep. 1013, 22 Ky. L. Rep. 1806.

Mississippi. — *Hoggatt v. Wade*, 10 Smed. & M. (Miss.) 143; *Deason v. Taylor*, 53 Miss. 697.

Missouri. — *Scott v. McCulloch*, 13 Mo. 13; *Major v. Bukley*, 51 Mo. 227; *Tydings v. Pitcher*, 82 Mo. 379.

Tennessee. — *Simmons v. Redmond*, (Tenn. Ch. 1901) 62 S. W. Rep. 366. But see *Robinson v. Owens*, 103 Tenn. 91.

Texas. — *Willis v. Gay*, 48 Tex. 463, 26 Am. Rep. 328; *Bergman v. Blackwell*, (Tex. Civ. App. 1893) 23 S. W. Rep. 243.

Title Bond of Vendor Notice of Unpaid Consideration. — *Bradford v. Harper*, 25 Ala. 337; *Newsome v. Collins*, 43 Ala. 656; *Edmonds v. Torrence*, 48 Ala. 38.

is, nevertheless, chargeable with the notice that he might have obtained.¹ He is excused from failure to make inquiry only where the claim for the unpaid purchase money has been barred by the statute of limitations.²

bb. QUALIFICATIONS OF RULE — (aa) In General. — In order to impute constructive notice to a purchaser by reason of recitals in instruments affecting his title, the recitals relied upon must be so clear and distinct as to put an ordinarily prudent person upon inquiry, and must be so far correct and intelligible that upon proper inquiry they would lead the purchaser to knowledge of the particular fact or incumbrance with notice of which it is sought to charge him.³

Knowledge of an Intention to Execute an Instrument relating to the property does not constitute notice of the contents of the instrument after it is executed.⁴

(bb) Instrument Must Relate to Chain of Title. — The rule that a purchaser is chargeable with constructive notice of the contents of all instruments appearing in his chain of title does not apply to instruments that do not constitute a part of his chain of title, and do not necessarily relate to it; as to the contents of such instruments the purchaser is not put upon inquiry.⁵

cc. BY QUITCLAIM DEED — (aa) MAJORITY RULE. — By the prevailing weight of authority the grantee in a quitclaim deed cannot be accorded the favored position of a purchaser for value and without notice; the reason being that the instrument purports to convey only such interest as the grantor may then have in the property, and thus by its own terms puts the purchaser upon inquiry as to any and all defects that may exist in the title, by way of outstanding incumbrances, equities, and the like.⁶

1. Fact that Purchase-money Notes Are Overdue Immaterial. — *Deason v. Taylor*, 53 Miss. 697; *Allen v. Poole*, 54 Miss. 323. *Contra*, *Robinson v. Owens*, 103 Tenn. 91.

2. Notes Must Be Barred by Statute of Limitations. — *Allen v. Poole*, 54 Miss. 323.

3. Recitals Must Lead to Knowledge. — *Kentucky*. — *Wood v. Pitman Coal Co.*, 90 Ky. 588.

Louisiana. — *Mendelsohn v. Armstrong*, 52 La. Ann. 1300.

Michigan. — *Jennings v. Dockham*, 99 Mich. 253.

New Hampshire. — *Bell v. Twilight*, 22 N. H. 500.

New Jersey. — See *Harrison v. Johnson*, 18 N. J. Eq. 420.

New York. — See *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355.

Texas. — *McDaniel v. Harley*, (Tex. Civ. App. 1897) 42 S. W. Rep. 323.

Virginia. — *Lewis v. Madison*, 1 Munf. (Va.) 317.

The purchaser must have been guilty of gross negligence in not examining the features of the title in question. *Moore v. Kane*, 24 Ont. 541; *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355. See *supra*, this section, *Constructive Notice — Qualifications of Rule*.

Where Both Instruments Were Executed on the Same Day, and there was no evidence as to which was first executed, a recital in the one taken by the purchaser was held not to charge him with notice of the contents of the other. *Ponder v. Scott*, 41 Ala. 241.

4. Knowledge of Intention to Execute Instrument Not Notice of Its Contents. — *Cothay v. Sydenham*, 2 Bro. C. C. 393; *Ponder v. Scott*, 41 Ala. 241; *Clark v. Paquette*, 66 Vt. 386.

5. Purchases Not Chargeable with Notice of Instruments Beyond Chain of Title — *England*. — *Jones v. Smith*, 1 Hare 43, 1 Phil. 244; *Carter*

v. Williams, L. R. 9 Eq. 678. See also *Patman v. Harland*, 17 Ch. D. 357.

Alabama. — See *Burch v. Carter*, 44 Ala. 115.

Kentucky. — *Mueller v. Engeln*, 12 Bush (Ky.) 441.

Missouri. — *Tydings v. Pitcher*, 82 Mo. 379.

Pennsylvania. — *Boggs v. Varner*, 6 W. & S. (Pa.) 469.

Tennessee. — *Kansas City Land Co. v. Hill*, 87 Tenn. 590.

Texas. — *Ramirez v. Smith*, 94 Tex. 184.

And the fact that the purchaser is informed by a party in interest that an instrument not in the line of the purchaser's title does not relate to the property about to be purchased forms an additional reason for not charging him with notice. *Jones v. Smith*, 1 Hare 43, 1 Phil. 244.

6. Grantee in Quitclaim Deed Purchaser with Notice — *United States*. — *Boone v. Chiles*, 10 Pet. (U. S.) 212; *Runyon v. Smith*, 18 Fed. Rep. 579; *Dodge v. Briggs*, 27 Fed. Rep. 167; *Gest v. Packwood*, 34 Fed. Rep. 368; *May v. Le Claire*, 11 Wall. (U. S.) 217; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323; *Baker v. Humphrey*, 101 U. S. 494.

Alabama. — *Wood v. Holly Mfg. Co.*, 100 Ala. 326, 46 Am. St. Rep. 56; *Clemmons v. Cox*, 114 Ala. 350.

Arkansas. — See *Miller v. Fraley*, 23 Ark. 735.

California. — *Clark v. McElvy*, 11 Cal. 154.

District of Columbia. — *Morris v. Wheat*, 8 App. Cas. (D. C.) 379.

Florida. — *Fries v. Griffin*, 35 Fla. 212.

Idaho. — *Leland v. Isenbeck*, 1 Idaho 469.

Iowa. — *Springer v. Bartle*, 46 Iowa 688; *Davis v. Nolan*, 49 Iowa 683; *Hannan v. Seidentopf*, 113 Iowa 659; *Young v. Charnquist*, 114 Iowa 116; *O'Neill v. Wilcox*, (Iowa 1901) 87 N. W. Rep. 742.

(bb) *Qualifications of Rule — Deed Purporting to Convey Absolute Title.* — The rule that a grantee in a quitclaim deed is chargeable with notice of all defects in the title applies only to such deeds as are clearly intended to convey only "a chance of title," or such right, title, and interest as the grantor may possess; and a deed which is apparently only a quitclaim deed may be shown to have been intended to operate as an absolute conveyance of the full title to the land, the circumstances under which it is made and the purposes for which it is given being considered important elements in determining its true character. If, therefore, it clearly appears that the deed was intended to operate as an absolute conveyance of the property, and the grantee purchased for value and without other notice than that afforded by the character of the instrument, he will be entitled to protection as a *bona fide* purchaser.¹ There appears to be no authority holding that a grantee must take a deed with covenants of general warranty in order to claim protection as a purchaser for value and without notice.²

Ascertaining Purport of Deed. — The mere use of the word "quitclaim" in a deed purporting to convey the land does not restrict its effect, and the grantee therein may be a *bona fide* purchaser.³ And whether the conveyance in question was intended to be a mere quitclaim deed or a conveyance of the land itself is not to be determined merely by an omission of a covenant of general warranty, but the character of the deed may be ascertained not only from its own terms, but from other circumstances attending the transaction

Kansas. — *Goddard v. Donaha*, 42 Kan. 754; *Smith v. Rudd*, 48 Kan. 296; *Kelly v. McBlaine*, 6 Kan. App. 523.

Louisiana. — See *Breaux-Renoudet Cypress Lumber Co. v. Shadel*, 52 La. Ann. 2094.

Michigan. — *Peters v. Cartier*, 80 Mich. 124, 20 Am. St. Rep. 508. See also *Partridge v. Hemenway*, 89 Mich. 454.

Missouri. — *Ridgeway v. Holliday*, 59 Mo. 455; *Stoffel v. Schroeder*, 62 Mo. 147; *Mann v. Best*, 62 Mo. 491; *Mason v. Black*, 87 Mo. 329; *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609; *Condit v. Maxwell*, 142 Mo. 266. See also *Kearney v. Vaughan*, 50 Mo. 284; *Kennedy v. Siemens*, 120 Mo. 73.

Montana. — *McAdow v. Black*, 6 Mont. 601. *Nebraska.* — *Hoyt v. Schuyler*, 19 Neb. 657; *Pleasant v. Blodgett*, 32 Neb. 438, 39 Neb. 741, 42 Am. St. Rep. 624; *Bowman v. Griffith*, 35 Neb. 362.

Oregon. — *Baker v. Woodward*, 12 Oregon 3; *American Mortgage Co. v. Hutchinson*, 19 Oregon 334; *Low v. Shaffer*, 24 Oregon 239.

South Dakota. — *Parker v. Randolph*, 5 S. Dak. 549.

Tennessee. — *Hows v. Butterworth*, (Tenn. Ch. 1899) 62 S. W. Rep. 1114. See also *Lowry v. Brown*, 1 Coldw. (Tenn.) 456.

Texas. — *Rodgers v. Burchard*, 34 Tex. 441, 7 Am. Rep. 283; *Hamman v. Keigwin*, 39 Tex. 42; *Harrison v. Boring*, 44 Tex. 255; *Threadgill v. Bickerstaff*, 87 Tex. 520; *Huff v. Crawford*, 89 Tex. 214; *Tate v. Kramer*, 1 Tex. Civ. App. 427; *Laurens v. Anderson*, (Tex. 1886) 1 S. W. Rep. 379; *Finch v. Trent*, 3 Tex. Civ. App. 568; *Dupree v. Frank*, (Tex. Civ. App. 1897) 39 S. W. Rep. 988. See also *Richerson v. Moody*, 17 Tex. Civ. App. 67; *Hill v. Grant*, (Tex. Civ. App. 1898) 44 S. W. Rep. 1016; *Lumpkin v. Adams*, 74 Tex. 96.

Canada. — *Goff v. Lister*, 14 Grant Ch. (U. C.) 451.

For a general discussion of the nature and effect of quitclaim deeds, see the title *DEEDS*, vol. 9, p. 104 *et seq.*

The Rule of the Text Applies to One Who Agreed to Take a Quitclaim Deed, but by mistake prepared and took a deed with special warranty "by, through, and under the vendor." *Tate v. Kramer*, 1 Tex. Civ. App. 427.

The Tender of a Quitclaim Deed by the apparent owner of the land to one who contemplates purchase is sufficient to put the latter upon inquiry, and he is therefore chargeable with notice of any defect of title that he might readily have ascertained by inquiry. *Dodge v. Briggs*, 27 Fed. Rep. 161.

1. Deed Purporting to Convey the Land as Distinct from Mere Chance of Title — *United States.* — *Flagg v. Mann*, 2 Sumn. (U. S.) 506; *U. S. v. California, etc., Land Co.*, (C. C. A.) 49 Fed. Rep. 496, *affirmed* 148 U. S. 31; *U. S. v. Dalles Military Road Co.*, 51 Fed. Rep. 629, 7 U. S. App. 297, *affirmed* 148 U. S. 49; *Baylor v. Scottish American Mortg. Co.*, 66 Fed. Rep. 631, 30 U. S. App. 761; *Moelle v. Sherwood*, 148 U. S. 21.

Texas. — *Harrison v. Boring*, 44 Tex. 263; *Taylor v. Harrison*, 47 Tex. 461; *Richardson v. Levi*, 67 Tex. 359; *Garrett v. Christopher*, 74 Tex. 453, 15 Am. St. Rep. 850; *Lindsay v. Freeman*, 83 Tex. 259; *Contrell v. Dyer*, 6 Tex. Civ. App. 555; *Swenson v. Seale*, (Tex. Civ. App. 1894) 28 S. W. Rep. 147; *Henrick v. Gurley*, (Tex. Civ. App. 1899) 48 S. W. Rep. 994; *Kempner v. Beaumont Lumber Co.*, 20 Tex. Civ. App. 307; *Moore v. Swift*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1005.

West Virginia. — See *Ellison v. Torpin*, 44 W. Va. 414.

See also the title *DEEDS*, vol. 9, p. 106 *et seq.*

2. See *Flagg v. Mann*, 2 Sumn. (U. S.) 560; *Miller v. Fraley*, 23 Ark. 735.

3. *Richardson v. Levi*, 67 Tex. 360. See also the title *DEEDS*, vol. 9, p. 107, note.

and tending to show the real intent and purpose of the instrument.¹ Although the acceptance of a special warranty deed may be a circumstance from which constructive notice may be imputed to the purchaser, it is open to explanation.² Where a deed contains a clause of warranty and purports, moreover, to make a full and perfect conveyance of the land, the warranty does not strengthen or enlarge the title conveyed, but only evidences a separate contract by which a grantor binds himself to pay damages upon failure of title.³

Where Inquiry Would Be Futile. — The inference of notice arising from the fact that the purchaser acquired title by a quitclaim deed is one that may be rebutted by showing that under the circumstances of the case the inquiry which the character of the deed suggested would not have led the purchaser, in the exercise of due diligence, to the knowledge of any rights adverse to his title.⁴

Purchaser under Warranty Deed from Grantee in Quitclaim Deed. — Although the grantor may have been chargeable with notice and thus affected by prior equities by reason of the fact that the conveyance to him was by quitclaim deed, yet if he sells land to a purchaser for value and conveys to him by a warranty deed, the purchaser, unless otherwise chargeable with notice, is entitled to protection.⁵ And similarly, the fact that in the chain of title a quitclaim deed appears among the mesne conveyances to the grantor is not sufficient to charge the purchaser with constructive notice.⁶

(cc) Rule as Affected by Statutes. — In some jurisdictions the statutes provide that a quitclaim deed, unless limited to a less interest, shall pass the entire estate of the grantor as effectually as a deed of bargain and sale. Under such statutes it has been held that a grantee in a quitclaim deed may be protected as a purchaser for value and without notice.⁷

Recording Acts. — In some jurisdictions the rule that a grantee in a quitclaim deed is not entitled to protection as a *bona fide* purchaser has been materially altered by the recording acts; and it is held that a grantee in such a deed may obtain, as against a prior unrecorded conveyance or incumbrance, the protection afforded by the statute to *bona fide* purchasers.⁸ In other jurisdictions,

1. Taylor v. Harrison, 47 Tex. 461.

2. Miller v. Fraley, 23 Ark. 736.

3. Richardson v. Levi, 67 Tex. 360.

A Deed of Bargain and Sale Containing Covenants against acts of the grantor purports to pass the whole estate; and the fact that it contains only a limited warranty, or indeed no warranty at all, does not of itself impute constructive notice to the purchaser; the reason being that the warranty forms no part of a conveyance, a perfect title passing without it. Raymond v. Flavel, 27 Oregon 219. See also Thompson v. Wooldridge, 102 Mo. 505.

4. **Inference of Notice Rebutted.** — McDonald v. Belding, 145 U. S. 492.

5. **Quitclaim Deed to Grantor Inoperative as Notice to Grantee with Warranty.** — McDaid v. Call, 111 Ill. 298; Winkler v. Miller, 54 Iowa 476; Hannan v. Seidentopf, 113 Iowa 659; Chapman v. Sims, 53 Miss. 154. But see Aultman v. Utsey, 34 S. Car. 559.

6. **Quitclaim Deed Among Mesne Conveyances to Grantor.** — U. S. v. California, etc., Land Co., (C. C. A.) 49 Fed. Rep. 496, *affirmed* 148 U. S. 31; U. S. v. Dalles Military Road Co., 51 Fed. Rep. 629, 7 U. S. App. 297, *affirmed* 148 U. S. 49; Huber v. Bossart, 70 Iowa 718; Snowden v. Tyler, 21 Neb. 199. See also Kesler v. Johnson, 123 Mich. 96 (where the adverse right in question arose out of a parol agreement between a prior grantor in a quitclaim deed and his grantee).

Compare American Mortgage Co. v. Hutchinson, 19 Oregon 334.

7. **Statutes Declaring Effect of Quitclaim Deeds** — *Colorado.* — Bradbury v. Davis, 5 Colo. 265. *Illinois.* — Morgan v. Clayton, 61 Ill. 35. See also McConnel v. Reed, 5 Ill. 117, 38 Am. Dec. 124; Butterfield v. Smith, 11 Ill. 485; Brady v. Spurck, 27 Ill. 482.

Indiana. — Smith v. McClain, 146 Ind. 77.

South Dakota. — See Citizens' Bank v. Shaw, 14 S. Dak. 197.

See also the title DEEDS, vol. 9, p. 104 *et seq.*

In Minnesota a grantee in a quitclaim deed prior to the statute of 1875 was not regarded as a *bona fide* purchaser, but the rule was abrogated by the statute mentioned. Dunn v. Barnum, 51 Fed. Rep. 355, 10 U. S. App. 86; Prentice v. Duluth Storage, etc., Co., 58 Fed. Rep. 437, 19 U. S. App. 100.

8. **Effect of Recording Acts** — *California.* — Graff v. Middleton, 43 Cal. 341; Nidever v. Ayers, 83 Cal. 39.

Indiana. — Smith v. McClain, 146 Ind. 77.

Michigan. — White v. McGarry, 47 Fed. Rep. 420 (construing the Michigan statute).

Missouri. — Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Boogher v. Neece, 75 Mo. 383; Willingham v. Hardin, 75 Mo. 429; Campbell v. Laclede Gas Light Co., 84 Mo. 352, *reversing* 9 Mo. App. 571; Munson v. Ensor, 94 Mo. 504; Ebersole v. Rankin, 102 Mo. 488; Hope v. Blair, 105 Mo. 90, 34 Am. St. Rep. 366; Elliott

however, the rule has not been altered by the recording acts.¹

(*add*) *Minority Rule*. — In some jurisdictions the rule that a grantee in a quitclaim deed is not a *bona fide* purchaser is altogether repudiated, it being held that the character of the deed is of importance only as a circumstance to be taken into consideration with others in ascertaining whether the purchaser was chargeable with notice.²

(5) *By Inadequacy of Consideration*. — Inadequacy of price is material in ascertaining whether the purchaser had notice of any defect in the title, and where the price was grossly inadequate that circumstance alone has been held sufficient to suggest to the mind of the purchaser that the title was defective, and thus to charge him with constructive notice.³ It is clear, also, that gross inadequacy of price may be considered with other circumstances as a ground for imputing to the purchaser notice of adverse rights or defects in the title.⁴

(6) *By Matters of General Repute*. — While it is well settled that vague rumors and indefinite statements are insufficient to put a purchaser upon inquiry,⁵ yet where the existence of adverse equities or other defects in the title is a matter of common repute or the subject of common conversation, this circumstance is admissible in evidence as tending to show that the purchaser had knowledge or the means of acquiring knowledge of the adverse rights in question.⁶

v. Buffington, 149 Mo. 663. See also *Eoff v. Irvine*, 108 Mo. 378, 32 Am. St. Rep. 609.

1. *Steele v. Sioux Valley Bank*, 79 Iowa 339, 18 Am. St. Rep. 370; *Marshall v. Roberts*, 18 Minn. 409, 10 Am. Rep. 201; *Prentice v. Duluth Storage, etc., Co.*, 58 Fed. Rep. 437, 19 U. S. App. 100 (construing the *Minnesota* statute); *American Mortgage Co. v. Hutchinson*, 19 Oregon 334; *Virginia, etc., Coal, etc., Co. v. Fields*, 94 Va. 102.

For a full discussion, see the title RECORDING ACTS.

2. *Grantee in Quitclaim Deed Purchaser Without Notice*. — *Chapman v. Sims*, 53 Miss. 154; *Brophy Min. Co. v. Brophy, etc., Gold, etc., Min. Co.*, 15 Nev. 107; *Robinson v. Clapp*, 65 Conn. 365. See also *Nidever v. Ayers*, 83 Cal. 43; *Wilson v. Western North Carolina Land Co.*, 77 N. Car. 445; *Ellison v. Torpin*, 44 W. Va. 414.

3. *Gross Inadequacy of Price Puts Purchaser on Inquiry*. — *Curtis v. Cisna*, 7 Biss. (U. S.) 267; *Dunn v. Barnum*, (C. C. A.) 51 Fed. Rep. 355; *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295; *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656; *Patten v. Moore*, 32 N. H. 386; *Durant v. Crowell*, 97 N. Car. 367; *Hume v. Ware*, 87 Tex. 380; *Nichols-Stewart v. Crosby*, 87 Tex. 443, *affirming* *Stewart v. Crosby*, (Tex. Civ. App. 1894) 26 S. W. Rep. 138.

The rule of the text applies where the inadequacy of the consideration was in the conveyance to the purchaser's grantor. Knowledge of such a circumstance is sufficient to put the purchaser upon inquiry. *Gaines v. Saunders*, 50 Ark. 322; *Hume v. Franzen*, 73 Iowa 25; *Webber v. Taylor*, 2 Jones Eq. (55 N. Car.) 9.

A wife who took a conveyance of land from her husband, and was conversant with the terms on which he bought the land, was held not to be a *bona fide* purchaser where the conveyance to her was in furtherance of an attempt to procure the property for an inadequate consideration. *Williams v. Hamilton*, 104 Iowa 423, 65 Am. St. Rep. 475.

Gross inadequacy of price may be submitted to a jury as a question of fact from which notice may be inferred. *Hume v. Ware*, 87 Tex. 380.

But where the price paid is a substantial sum, its inadequacy alone is not sufficient to charge the purchaser with notice. *Wallace v. Jones*, 93 Ga. 420; *Sheldon v. Holmes*, 58 Mich. 138; *Stewart's Appeal*, 68 Pa. St. 377.

Thus, nine thousand dollars given for land worth eighteen thousand is not so inadequate a price as to furnish a ground for imputing notice to the purchaser. *Fish v. Benson*, 71 Cal. 428.

4. *Illinois*. — *Masor v. Mullahy*, 145 Ill. 387.

Maine. — *Knapp v. Bailey*, 79 Me. 195, 1 Am. St. Rep. 295.

Massachusetts. — *Atty.-Gen. v. Abbott*, 154 Mass. 323.

Missouri. — *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261, 38 Am. St. Rep. 656.

North Carolina. — *Webber v. Taylor*, 2 Jones Eq. (55 N. Car.) 9.

Oklahoma. — *Smith v. Phillips*, 9 Okla. 297.

South Carolina. — *Cruger v. Daniel*, McMull. Eq. (S. Car.) 197.

Wisconsin. — *Hoppin v. Doty*, 25 Wis. 573.

5. See *supra*, this section, *Constructive Notice — Qualifications of Rule*.

6. *Notoriety of Fact as Finding to Show Knowledge*. — *Benoist v. Darby*, 12 Mo. 196; *Roberts v. Moseley*, 64 Mo. 511; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; *Stephenson v. Kilpatrick*, 166 Mo. 262; *Galbraith v. Howard*, 11 Tex. Civ. App. 231; *Pringle v. Dunn*, 37 Wis. 450, 19 Am. Rep. 772. But see *Conner v. Goodman*, 104 Ill. 368; *King v. Travis*, 4 Hayw. (Tenn.) 280. See also the title NOTICE, vol. 21, p. 586.

Notice by "Common Discourse" which the purchaser has heard is sufficient to deprive him of protection. *Broderick v. Broderick*, 1 P. Wms 239, 4 Vin. Abr. 534.

Notice by Reputation of Ownership — Statute. — An *Oregon* statute (Hill's Code, § 776, subd. 12) provides that a person is presumed to be the owner of property from his exercising acts

(7) *From Whom Information Must Proceed.* — It has been stated broadly that notice, in order to be binding upon the purchaser, must proceed from some one having an interest in the property, and that information imparted by a stranger will not charge the purchaser with notice.¹ But this statement is too broad to be accurate, and the correct principle is that while the information coming from a stranger must be more specific and direct than that coming from a party in interest,² the sole question involved is whether it is so authentic as to charge the purchaser's conscience with the duty of making inquiry, and so definite as to lead him, in the exercise of due diligence, to a knowledge of the adverse rights affecting the property; if the information is sufficient to do this, then it will charge the purchaser with constructive notice, and it is immaterial whether it proceeds from a party in interest or from a total stranger to the title.³

(8) *Discharge of Duty to Make Inquiry* — (a) **Failure to Discover Adverse Rights.** — Where a purchaser, having been put upon inquiry, exercises due diligence by following the line of inquiry suggested, and either fails to discover the existence of any adverse rights, or becomes satisfied that his suspicions were unwarranted, or that some change in the circumstances had obviated the grounds of his apprehension, he will not be chargeable with notice.⁴ Thus, where a purchaser having information that a person other than the vendor is in possession of the land exercises due diligence in investigating the nature of the occupant's possession, and fails to gain knowledge of the possessor's rights, the notice afforded by the possession cannot be asserted against him.⁵ Likewise, where a purchaser is put upon inquiry by the circumstance that a tenant is in possession of the land, and after making due inquiry fails to discover the fact and circumstances of the tenancy, he will not be chargeable with notice of the landlord's title.⁶

(b) **Misrepresentation by Occupant of the Land.** — The law of constructive notice cannot be so applied as to relieve a party from responsibility for his own misstatement, or to protect him where he has wilfully misled the purchaser.⁷

of ownership over it, or from common reputation of his ownership. Whether or not common reputation of ownership under the statute serves the same purpose as possession of the land in giving constructive notice, it is held that such "reputation" as the statute contemplated would not have the effect of affording constructive notice to a person residing outside of the community in which the land is situated, as for instance, at a distance of five or six miles from the land. *Raymond v. Flavel*, 27 Oregon 248.

1. **View that Notice Must Proceed from Party in Interest.** — *Barnhart v. Greenshields*, 9 Moo. P. C. 18. See also *Parkhurst v. Hosford*, 10 Sawy. (U. S.), 401, 21 Fed. Rep. 827.

2. **Information from Stranger Must Be Clear.** — *Wilcox v. Hill*, 11 Mich. 256.

3. **Information from Stranger May Charge Purchaser with Notice.** — *Willcox v. Hill*, 11 Mich. 256; *Butcher v. Yocum*, 61 Pa. St. 168, 100 Am. Dec. 625; *Martel v. Somers*, 26 Tex. 560; *McNames v. Phillips*, 9 Grant Ch. (U. C.) 314.

Notice Given to a Purchaser by the Tenant in Possession under the Claimant is sufficient. *Gallion v. M'Caslin*, 1 Blackf. (Ind.) 90, 12 Am. Dec. 208.

4. See generally the title NOTICE, vol. 21, p. 588.

But a Mortgagee Who Was Informed that There Were "Charges" Affecting the Property, and knew of two only, which he believed to be all that existed, was held bound to inquire

whether there were any other charges than those two; and as a result of his failure to make such further inquiry was held chargeable with notice of other incumbrances. *Jones v. Williams*, 24 Beav. 47.

While a False or a Reasonable Answer Given in Response to an Inquiry by the purchaser may under proper circumstances dispense with the necessity of further inquiry, yet, where no inquiry at all has been made, it is impossible to conclude that a false or misleading answer would have been given, and the purchaser is therefore chargeable with notice by reason of his failure to inquire. *Jones v. Williams*, 24 Beav. 47.

The Deed to Grantor in Which He Was Described as a "Trustee" was held to have put the purchaser on inquiry; but the purchaser having used due diligence in following up the line of inquiry suggested, and having obtained information that allayed his suspicions, it was held that he was entitled to protection. *Mercantile Nat. Bank v. Parsons*, 54 Minn. 56, 40 Am. St. Rep. 299.

5. **Fruitless Inquiry from Occupant of Premises.** — *Fair v. Stevenot*, 29 Cal. 486; *Thompson v. Pioche*, 44 Cal. 508; *Rogers v. Jones*, 8 N. H. 264. See also *Emeric v. Alvarado*, 90 Cal. 447; *Nutting v. Herbert*, 37 N. H. 346; *Cavin v. Middleton*, 63 Iowa 618.

6. *Thompson v. Pioche*, 44 Cal. 508. See also *Cavin v. Middleton*, 63 Iowa 618.

7. See the title NOTICE, vol. 21, p. 588.

Thus, it is the duty of a person in possession of land, when interrogated concerning his rights by one intending to purchase, to disclose the whole truth; and if by misrepresentation or suppression of a material fact he misleads the purchaser, he is thereby estopped from afterwards asserting as against the purchaser's title the claim or equity he ought to have disclosed.¹

Tenant Disclaiming Title. — Similarly, where a tenant in possession, upon being interrogated by the purchaser, disclaims all title or interest in the premises, his possession cannot thereafter operate as notice of a claim by him collateral to the terms of his tenancy.²

Tenant Disclaiming Landlord's Title. — But on the other hand, in a case where notice of the landlord's title was sought to be imputed to a purchaser by reason of a tenant's possession, and the purchaser was told by the tenant that he was holding under another person than the one whose title was sought to be asserted, it was held that the purchaser was, nevertheless, affected with notice of the landlord's title, the reason assigned being that a tenant cannot deny the title of his landlord to the latter's prejudice.³

(c) **Making Inquiry of Vendor.** — A purchaser who is put upon inquiry does not discharge his duty by making inquiry of his vendor alone, but must exhaust all reasonable and available sources of information.⁴

Misstatement by Vendor. — Consequently, the fact that the purchaser has been misled by false statements by his vendor is not sufficient to protect him.⁵

(d) **Relying on Possession by Vendor.** — Whether a purchaser is justified in relying upon the possession of the land by his vendor appears to be unsettled. Probably the better rule is that announced in *England* and *Missouri*, the principle being that since real estate is held by title and not by mere possession, a purchaser is not justified in relying simply upon his vendor's possession of the land without other evidence of title, and if he makes no further inquiry he will be chargeable with gross negligence, and will be deemed to have had notice of defects in the title, or of prior equities affecting the land.⁶ In *Illinois*, however, it is held that where a purchaser finds his vendor in possession either in person or by a tenant, he has the right to assume that such possession was rightfully obtained unless he has knowledge or information to the contrary; and if he has no such knowledge or information he will be protected in his purchase, even though his grantor's possession turns out to be wrongful.⁷

(e) **Where Inquiry Would Be Futile.** — Where, under the circumstances relied upon to charge a purchaser with constructive notice, inquiry by him would have been futile, in that by the exercise of due diligence he would not have discovered the adverse rights in question, the fact that he failed to make any investigation will not operate to his prejudice, and he will be regarded as having purchased without notice.⁸ Thus, although a person other than the vendor is in possession of the land, yet if the circumstances are such that due diligence by the purchaser in making inquiry as to the rights of the occupant would not result in his ascertaining the existence of adverse rights or equities,

1. **Effect of Occupant's Misrepresentation.** — *Yates v. Hurd*, 8 Colo. 343; *Losey v. Simpson*, 11 N. J. Eq. 255.

2. *Trumpower v. Marcey*, 92 Mich. 529.

3. *Clarke v. Beck*, 72 Ga. 127.

4. **Inquiry of Vendor Not Sufficient.** — *Dudley v. Witter*, 46 Ala. 694; *Skeel v. Spraker*, 8 Paige (N. Y.) 196; *Littleton v. Giddings*, 47 Tex. 109.

Were the rule otherwise it would be in the power of any agent, tenant, or mere trespasser to deprive the true owner of his property by selling it. *Dudley v. Witter*, 46 Ala. 694.

5. **Misstatement by Vendor no Defense.** — *Skeel*

v. Spraker, 8 Paige (N. Y.) 196. Compare *Jones v. Powles*, 3 Myl. & K. 581.

6. **Purchaser May Not Rely on Vendor's Possession.** — *Hiern v. Mill*, 13 Ves. Jr. 119; *Wallace v. Wilson*, 30 Mo. 342.

7. **Rule that Purchaser May Rely on Vendor's Possession.** — *Wait v. Smith*, 92 Ill. 385; *Robertson v. Wheeler*, 162 Ill. 578.

8. **Purchaser Not Prejudiced by Failure to Make Futile Inquiry.** — *Cornell v. Maltby*, 165 N. Y. 557, affirming 35 N. Y. App. Div. 630. See also *Hallows v. Lloyd*, 39 Ch. D. 686. For other authorities, see the title NOTICE, vol. 21, p. 588.

he will not be chargeable with constructive notice by reason of his failure to make the inquiry.¹

b. NOTICE TO PERSON IN SPECIAL CAPACITY. — The rules governing notice given to persons acting in a special capacity are applicable to purchasers of real property and are fully discussed elsewhere in this work.²

c. NOTICE IN PARTICULAR TRANSACTION. — The question whether notice received by a person in a particular transaction will affect him in a subsequent and independent transaction in which he becomes a purchaser is fully discussed elsewhere in this work.³

d. NOTICE TO PURCHASERS TAKING PROPERTY IN COMMON. — In the absence of proof of partnership or agency, it appears to be a settled rule that notice to one of several purchasers taking title as joint tenants or tenants in common will not by mere force of their relationship operate as notice to the others.⁴

e. NOTICE TO PARTNER PURCHASING FOR FIRM. — The general rule that notice to one of several copartners is notice to the firm⁵ is peculiarly applicable to purchasers of real property; and in this connection the rule has been so extended that in a case of a purchase of land by a partner for the benefit of the firm, notice imputed to the firm from notice to the partner has been held to operate as notice to another member of the firm who afterwards acquired the land as his individual property.⁶

f. NOTICE OF VOID OR UNENFORCEABLE CLAIMS. — Notice of an incumbrance, claim, or right void or unenforceable in law is, of course, inoperative,⁷ and notice of an invalid conveyance cannot make it good as against a purchaser for value.⁸ Similarly, knowledge of a prior contract of sale, unenforceable under the statute of frauds, and voidable at the option of the vendor therein, can have no effect as against a purchaser of the legal title for value,⁹ the reason being that by subsequently selling the land the grantor elects to treat his former contract as void.¹⁰

3. Effect of Notice — *a.* IN GENERAL. — It is an elementary proposition that a purchaser with notice occupies no higher position than his vendor and takes the property subject to all outstanding rights or equities with notice of which he is chargeable.¹¹

1. *Calanchini v. Branstetter*, 96 Cal. 612; *Steel v. De May*, 102 Mich. 274; *Johnson v. Strong*, 65 Hun (N. Y.) 470. And a purchaser is under no duty to make inquiries of persons merely because they live near the land. *Bounds v. Little*, 75 Tex. 320.

2. See the title NOTICE, vol. 21, p. 587.

3. See the title NOTICE, vol. 21, p. 587.

Notice in a Former Transaction held not notice in subsequent purchase. *Foulks v. Reed*, 89 Ind. 370.

4. Notice to One Joint Purchaser Not Notice to Another. — See the title NOTICE, vol. 21, p. 587. See also *Parker v. Kane*, 4 Wis. 12, 65 Am. Dec. 283.

Notice to One of Several Purchasers Who Take as Trustees is notice to all. *Chapman v. Chapman*, 91 Va. 398, 50 Am. St. Rep. 846. See also *Browne v. Savage*, 4 Drew. 635, 5 Jur. N. S. 1020, 7 W. R. 571; and the title NOTICE, vol. 21, p. 587, where the rule is discussed.

5. See the title PARTNERSHIP, vol. 22, p. 139.

6. *Overall v. Taylor*, 99 Ala. 12.

7. Notice of Unenforceable Rights. — *Wilson v. Mason*, 1 Cranch (U. S.) 45; *Everett v. Todd*, 19 Colo. 322. See also *Healy v. Seward*, 5 Wash. St. 310.

8. Notice of Invalid Conveyance. — *Great Falls Co. v. Worster*, 15 N. H. 412; *McCracken v. Flannagan*, 141 N. Y. 174, holding that notice

of a void judgment and sheriff's sale is inoperative as against a purchaser from the owner in possession.

9. Notice of Prior Parol Contract to Convey. — *Pickerell v. Morss*, 97 Ill. 220; *Van Cloostere v. Logan*, 149 Ill. 588; *Wright v. Raftree*, 181 Ill. 464; *Messmore v. Cunningham*, 78 Mich. 623; *Conner v. Chase*, 15 Vt. 782.

10. *Messmore v. Cunningham*, 78 Mich. 623.

11. General Rule as to Effect of Notice — *England*. — *Taylor v. Stibbert*, 2 Ves. Jr. 437; *Brydges v. Chandos*, 2 Ves. Jr. 437; *Butcher v. Stapely*, 1 Vern. 363, 18 Vin. Abr. 125; *Ferrars v. Cherry*, 2 Vern. 383, 18 Vin. Abr. 117; *Eyre v. Dolphin*, 2 Ball. & B. 290, 12 Rev. Rep. 94; *Chard v. Opie*, 18 Vin. Abr. 118.

United States. — *Wilson v. Mason*, 1 Cranch (U. S.) 100; *Kurtz v. Bogenriff*, 2 Cranch (C. C.) 701; *Caldwell v. Carrington*, 9 Pet. (U. S.) 86; *Smith v. Shane*, 1 McLean (U. S.) 22.

Alabama. — *Nelson v. Dunn*, 15 Ala. 501; *Wimbish v. Montgomery Mut. Bldg., etc., Assoc.*, 69 Ala. 575; *Weaver v. Brown*, 87 Ala. 533.

Arkansas. — *Watkins v. Wassell*, 15 Ark. 73; *Hamilton v. Fowlkes*, 16 Ark. 340.

California. — *Gilbert v. Sleeper*, 71 Cal. 290; *Hilton v. Young*, 73 Cal. 196.

Colorado. — *Ross v. Purse*, 17 Colo. 24.

Connecticut. — *Hartford, etc., Transp. Co. v.*

Grantor a Bona Fide Purchaser. The foregoing proposition must, however, be taken with the qualification that the grantor must not have been a purchaser without notice; for if he was, the grantee, though taking with notice, is entitled to protection.¹

b. NOTICE BEFORE COMPLETION OF PURCHASE — (1) *General Rule.* — It has frequently been stated as a broad and general rule that if at any time before the sale is completed and while the purchaser can without damage abandon his contract and withdraw from the transaction, actual or constructive notice of a prior equity is received by him, and he thereafter completes his purchase, his claim to protection as a *bona fide* purchaser is defeated. In other words, the purchase must be completed by payment and conveyance before notice is received, and notice either before the purchase money is paid

Hartford First Nat. Bank, 46 Conn. 569; Lewis v. Farrell, 51 Conn. 216.

Florida. — Gamble v. Hamilton, 31 Fla. 401.
Georgia. — Jordan v. Rhodes, 24 Ga. 478;
Brown v. Wells, 44 Ga. 573; Cox v. Prater, 67 Ga. 588; Finch v. Beal, 68 Ga. 594; Maynor v. Lewis, Ga. Dec. (pt. ii.) 205.

Hawaii. — Burrows v. Paaluh, 4 Hawaii 464.

Illinois. — Willis v. Henderson, 5 Ill. 13. 38 Am. Dec. 120; Glover v. Fisher, 11 Ill. 666; Frye v. Partridge, 82 Ill. 267; Mason v. Mul-lahy, 145 Ill. 383; Mann v. Elgin, 24 Ill. App. 419; Jummel v. Mann, 80 Ill. App. 288.

Indiana. — Moreland v. Lemasters, 4 Blackf. (Ind.) 383; Walker v. Cox, 25 Ind. 271; Barrett v. Sear, 128 Ind. 261; Warbriest v. Demorett, 129 Ind. 346.

Iowa. — Hall v. Savill, 3 Greene (Iowa) 37. 54 Am. Dec. 485; Pierson v. David, 1 Iowa 23; Mitchell v. Peters, 18 Iowa 110; Baldwin v. Lowe, 22 Iowa 367; Duncan v. Miller, 64 Iowa 223.

Kansas. — Deetjen v. Richter, 33 Kan. 410.

Kentucky. — Cox v. Osburne, 1 A. K. Marsh. (Ky.) 310; Edwards v. Morris, 2 A. K. Marsh. (Ky.) 65; Ligger v. Wall, 2 A. K. Marsh. (Ky.) 149; Barnett v. Morrison, 2 Litt. (Ky.) 73; Simms v. Richardson, 2 Litt. (Ky.) 274; Pugh v. Bell, 1 J. J. Marsh. (Ky.) 399; Tobin v. Helm, 4 J. J. Marsh. (Ky.) 288; Ligon v. Alexander, 7 J. J. Marsh. (Ky.) 288; Clough v. Clough, 3 B. Mon. (Ky.) 64; Corn v. Sims, 3 Met. (Ky.) 391.

Maine. — Linscott v. Buck, 33 Me. 530; Stinchfield v. Emerson, 52 Me. 465, 83 Am. Dec. 524; Cross v. Bean, 83 Me. 61.

Maryland. — Maryland, etc., Coal, etc., Co. v. Wingert, 8 Gill (Md.) 170.

Michigan. — Storrs v. Wallace, 61 Mich. 437.

Mississippi. — Naylor v. Fisk, 27 Miss. 256.

Missouri. — Davis v. Clay, 2 Mo. 161; Farrar v. Patton, 20 Mo. 81; Gibson v. Lair, 37 Mo. 188; Major v. Buckley, 51 Mo. 227; Blackburn v. Tweedie, 60 Mo. 505; Roberts v. Moseley, 64 Mo. 507; Jasper County v. Tavis, 76 Mo. 13; Pike v. Robertson, 79 Mo. 615; Meier v. Blume, 80 Mo. 179; Hagman v. Shaffner, 88 Mo. 24; Maybee v. Moore, 90 Mo. 340; Foote v. Clark, 102 Mo. 394; Ryan v. Dunlap, 111 Mo. 610; Harman v. Blackstone, 1 Mo. App. Rep. 391; Abbe v. Justus, 60 Mo. App. 300.

Nebraska. — Dorsey v. Hall, 7 Neb. 460; Whitehorn v. Cranz, 20 Neb. 392; Veith v. McMurtry, 26 Neb. 341; Adams v. Thompson, 28 Neb. 53.

New Hampshire. — Patten v. Moore, 32 N. H. 382.

New Jersey. — Weller v. Rolason, 17 N. J. Eq. 13; Dean v. Anderson, 34 N. J. Eq. 597; Brinton v. Scull, 55 N. J. Eq. 757.

New York. — Drefs v. Wadsworth, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 465, 63 Hun (N. Y.) 636; Harris v. Norton, 16 Barb. (N. Y.) 264; La Farge F. Ins. Co. v. Bell, 22 Barb. (N. Y.) 54; Morgan v. Chamberlain, 26 Barb. (N. Y.) 163; Ten Eick v. Simpson, 1 Sandf. Ch. (N. Y.) 244.

North Carolina. — Maples v. Medlin, 1 Murph. (5 N. Car.) 219, 3 Am. Dec. 687; Bailey v. Wilson, 1 Dev. & B. Eq. (21 N. Car.) 182; Exum v. Cogdell, 74 N. Car. 139; Mayo v. Leggett, 96 N. Car. 237; Gordon v. Collett, 102 N. Car. 532; Wittkowsky v. Gidney, 124 N. Car. 437.

Ohio. — Hulett v. Fairbanks, 40 Ohio St. 233; Wiggins v. Campbell, 4 Ohio Dec. (Reprint) 410, 2 Cleve. L. Rep. 122.

Pennsylvania. — Brown v. Chambersburg Bank, 3 Pa. St. 187; Duff v. McDonough, 155 Pa. St. 10.

South Carolina. — Bristow v. Rosenberg, 45 S. Car. 614.

Tennessee. — Sautelle v. Carlisle, 13 Lea (Tenn.) 391.

Texas. — McAlpin v. Burnett, 19 Tex. 497; Hollis v. Smith, 64 Tex. 280; Texas Land, etc., Co. v. Blalock, 76 Tex. 85; Caldwell v. Bryan, 20 Tex. Civ. App. 168; Regan v. Milby, 21 Tex. Civ. App. 21.

Utah. — Ayres v. Jack, 7 Utah 249.

Vermont. — Woodbury v. Bruce, 59 Vt. 624;

Gilchrist v. Van Dyke, 63 Vt. 75.

Virginia. — Smith v. Proffitt, 82 Va. 832.

West Virginia. — Cox v. Cox, 5 W. Va. 335; Parker v. Brast, 45 W. Va. 399.

Wisconsin. — Brown v. Peck, 2 Wis. 261; School Dist. No. 3 v. Macloon, 4 Wis. 79; Hoppin v. Doty, 22 Wis. 621, 25 Wis. 592.

This rule is announced or acted upon in all the cases in this section where the existence of notice to the purchaser was established, and further citation of authority is deemed unnecessary.

Actual and Constructive Notice Are the Same in Effect, so it is immaterial what kind of notice is received by the purchaser. Willis v. Vallette, 4 Met. (Ky.) 186; Gilmore v. Cook, 33 Mo. 25; Pitney v. Leonard, 1 Paige (N. Y.) 461; Wood v. Rayburn, 18 Oregon 17. See also the title NOTICE, vol. 21, p. 582.

1. See *supra*, this title, *Definition and General Consideration* — *Persons Entitled to Protection* — *Purchaser with Notice from Bona Fide Purchaser*.

or before title is acquired will deprive the purchaser of protection in equity.¹ The reason assigned for this rule is that after notice of the prior equity the completion of the purchase is in fraud of the prior claimant.²

(2) *Applications of Rule* — (a) *Introductory Statement.* — Generally this rule is applied where the notice has been received at any stage of the transaction before actual completion of the purchase; but there is considerable conflict of authority with respect to the extent of its application, and in some instances, through considerations of natural justice and equity, its rigor is modified to suit the exigencies of the particular state of facts under which its enforcement is sought. These matters are set forth in the following paragraphs of this subdivision.

(b) *Notice Before Conveyance.* — In accordance with the general principle above stated, it is a general rule that notice received before the purchaser has acquired the legal title to the property by conveyance deprives him of any right to protection as a purchaser for value and without notice.³

(c) *Notice Before Conveyance but After Payment.* — As a general rule, the purchaser is not entitled to protection if he receives notice before he acquires title by conveyance, even though before notice he has paid the entire purchase price.⁴ And the same principle applies *a fortiori* to a case where part payment has been made before notice.⁵

1. General Rule as to Completion of Purchase Before Notice — *England.* — Story v. Windsor, 2 Atk 630; More v. Mayhow, Ch. Cas. (pt. i.) 34, 18 Vin. Abr. 115, Freem. Ch. 175; Potter v. Sanders, 6 Harr. 1.

Canada. — See Prince v. Brady, 16 Grant Ch. (U. C.) 375; Henderson v. Graves, 2 U. C. Err. & App. 21.

United States. — Boone v. Chiles, 10 Pet. (U. S.) 211; Balfour v. Hopkins, (C. C. A.) 93 Fed. Rep. 570, affirming 84 Fed. Rep. 855, *sub nom.* Balfour v. Parkinson.

Alabama. — Moore v. Clay, 7 Ala. 742; Wells v. Morrow, 38 Ala. 130.

Arkansas. — Duncan v. Johnson, 13 Ark. 190.

Georgia. — Mackey v. Bowles, 98 Ga. 732. *Illinois.* — Brown v. Welch, 18 Ill. 343, 68 Am. Dec. 549.

Indiana. — Gallion v. M'Caslin, 1 Blackf. (Ind.) 91, 12 Am. Rep. 208; Dugan v. Vattier, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105; Lewis v. Phillips, 17 Ind. 108, 79 Am. Dec. 457; Walker v. Cox, 25 Ind. 271; Rhodes v. Green, 36 Ind. 10; Heck v. Fink, 85 Ind. 9; Anderson v. Hubble, 93 Ind. 579.

Kentucky. — Blight v. Banks, 6 T. B. Mon. (Ky.) 192, 17 Am. Dec. 136; Nantz v. McPherson, 7 T. B. Mon. (Ky.) 597, 18 Am. Dec. 216; Halstead v. State Bank, 4 J. J. Marsh. (Ky.) 560.

Michigan. — Thomas v. Stone, Walk. (Mich.) 117; Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65.

Mississippi. — Kilcrease v. Lum, 36 Miss. 569; Parker v. Foy, 43 Miss. 261, 5 Am. Rep. 484.

Missouri. — Halsa v. Halsa, 8 Mo. 303.

New Hampshire. — Patten v. Moore, 32 N. H. 382.

New Jersey. — Haughwout v. Murphy, 22 N. J. Eq. 548; Brinton v. Scull, 55 N. J. Eq. 757.

New York. — Frost v. Beekman, 1 Johns. Ch. (N. Y.) 301; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401. See also Heatley v. Finster, 2 Johns. Ch. (N. Y.) 158.

North Carolina. — Howlett v. Thompson, 1 Ired. Eq. (36 N. Car.) 369.

South Carolina. — Bush v. Bush, 3 Strobb. Eq. (S. Car.) 131, 51 Am. Dec. 675; Lynch v. Hancock, 14 S. Car. 66; Peay v. Seigler, 48 S. Car. 496, 59 Am. St. Rep. 731.

Tennessee. — Pillow v. Shannon, 3 Yerg. (Tenn.) 508.

Virginia. — Wilcox v. Calloway, 1 Wash. (Va.) 38. See also Doswell v. Buchanan, 3 Leigh (Va.) 365, 23 Am. Dec. 280.

West Virginia. — Currence v. Ward, cited in Webb v. Bailey, 41 W. Va. 469. See also Camden v. Harris, 15 W. Va. 565.

And of course where notice is received by the purchaser before the conveyance and before payment, he is entitled to no protection. Simms v. Richardson, 2 Litt. (Ky.) 274; Dean v. Anderson, 34 N. J. Eq. 509; Schetter v. Southern Oregon Imp. Co., 19 Oregon 192; Moore v. Smith, (Tex. 1892) 19 S. W. Rep. 781. See also Oliver v. Olmstead, 112 Mich. 483.

2. Reason of Rule. — Gallion v. M'Caslin, 1 Blackf. (Ind.) 91, 12 Am. Dec. 208; Curtis v. Lunn, 6 Munf. (Va.) 42; Fraim v. Frederick, 32 Tex. 308.

3. Title Must Have Been Acquired by Deed. — More v. Mayhow, Ch. Cas. (pt. i.) 34, Freem. Ch. 175, 18 Vin. Abr. 115; Mackey v. Bowles, 98 Ga. 733; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 301; Hoover v. Donally, 3 Hen. & M. (Va.) 316; Blair v. Owles, 1 Munf. (Va.) 38. And see the following subdivisions.

4. Payment Without Deed Insufficient — *England.* — Wigg v. Wigg, 1 Atk. 384.

Alabama. — Fash v. Ravesies, 32 Ala. 451.

Indiana. — Gallion v. M'Caslin, 1 Blackf. (Ind.) 93, 12 Am. Dec. 208.

Kentucky. — Corn v. Sims, 3 Met. (Ky.) 401. See also Halley v. Oldham, 5 B. Mon. (Ky.) 237, 41 Am. Dec. 262.

New York. — Peabody v. Fenton, 3 Barb. Ch. (N. Y.) 465.

South Carolina. — See Bush v. Bush, 3 Strobb. Eq. (S. Car.) 131, 51 Am. Dec. 675.

5. Part Payment. — Harrison v. Boring, 44 Tex. 265.

(d) **Acquiring Legal Title After Notice** — *aa. GENERAL RULE.* — As a consequence of the foregoing propositions it has been deduced as a general rule in the *United States* that if the purchaser has not obtained the legal title before notice of the prior equity, even though by contract and payment without notice he has acquired an equitable title, he cannot after notice acquire the legal estate and thereby defeat or postpone the prior equity, unless his own equity is of superior merit; but in order to produce such a result he must acquire not only the equitable but the legal title, without notice.¹

bb. QUALIFICATION OF RULE. — But where the purchaser has acquired an equity superior in merit to the prior claim, he may then gain additional protection to his rights by acquiring the legal title, even after notice, for having the better equity he would be protected irrespective of his ownership of the legal estate.²

cc. MINORITY RULE. — Although by the weight of authority in the *United States* a purchaser of a merely equitable title cannot, after notice of a prior equity, protect himself by acquiring the legal estate, yet it is held in *England* and in some of the *United States*, in analogy to the doctrine of tacking, that when a purchaser has for value and without notice acquired an equitable title he may thereafter, even with notice of the prior equity, acquire the legal estate or an outstanding legal interest, and be entitled to full protection as a *bona fide* purchaser;³ provided, however, that in so doing he does not become a party to a breach of trust.⁴ And in accordance with this doctrine

Same — **Rescission and Recovery of Part Payment.** — Mackey *v.* Bowles, 98 Ga. 730.

1. Purchaser Cannot Gain Protection of Legal Title After Notice — *Alabama.* — Fash *v.* Ravesies, 32 Ala. 451.

Georgia. — See Mackey *v.* Bowles, 98 Ga. 730.

Kentucky. — Corn *v.* Sims, 3 Met. (Ky.) 401. See also Halley *v.* Oldham, 5 B. Mon. (Ky.) 237. 41 Am. Dec. 262

Michigan. — Wing *v.* McDowell, Walk. (Mich.) 175.

Missouri. — Nulsen *v.* Wishon, 68 Mo. 383.

Nevada. — Boskowitz *v.* Davis, 12 Nev. 466.

New York. — Grimstone *v.* Carter, 3 Paige (N. Y.) 421.

North Carolina. — Goldsborough *v.* Turner, 67 N. Car. 403. But see Jones *v.* Zollicoffer, Term (4 N. Car.) 212, 7 Am. Dec. 708; and see *contra*, Carroll *v.* Johnston, 2 Jones Eq. (55 N. Car.) 120.

South Carolina. — See Bush *v.* Bush, 3 Strobb. Eq. (S. Car.) 131, 51 Am. Dec. 675.

Tennessee. — Craig *v.* Leiper, 2 Verg. (Tenn.) 193, 24 Am. Dec. 479.

Purchaser of Equity Must Pay Value for Legal Title. — And he must acquire the legal title not only without notice but for value. Paying value for the equitable title is not sufficient. Goldsborough *v.* Turner, 67 N. Car. 403.

The Burden of Proving Notice in such a case is upon the holder of the prior equity. Dodd *v.* Doty, 98 Ill. 393. And see *infra*, this title, *Evidence and Burden of Proof*.

Character of Notice Required. — In order for the rule of the text to apply the notice must be sufficiently clear and definite to indicate with some degree of certainty the specific property in question; and knowledge of a prior written contract by the vendor to convey to a stranger will not be sufficient where the terms of the contract are so vague and indefinite as not to refer clearly to the particular property to be affected thereby. Lewis *v.* Madison, 1 Munf. (Va.) 303.

Acquiring Legal Title in Right of Another. — The subsequent acquisition of the legal title in the right of another person will not aid the holder of the subsequent equity. Wing *v.* McDowell, Walk. (Mich.) 175.

2. Rule Where Purchaser Has Superior Equity. — See *supra*, this title, *Essential Elements of Bona Fide Purchase* — *Acquisition of Legal Title*.

3. Rule that Purchaser of Equity May Take Legal Title After Notice — *England.* — Culpeper's Case, cited in Sanders *v.* Deligne, 2 Freem. Ch. 124, and in Zollman *v.* Moore, 21 Gratt. (Va.) 321; Sherry *v.* Fagg, Ch. Cas. (pt. i.) 68, cited *sub. nom.* Fagg's Case, in Huntington *v.* Greenville, 1 Vern. 52; Bassett *v.* Nosworthy, Finch 102; Goleborn *v.* Alcock, 2 Sim. 552; Stanhope *v.* Verney, 2 Eden 85; Bailey *v.* Barnes, (1894) 1 Ch. 25; Blackwood *v.* London Chartered Bank, L. R. 5 P. C. 92.

Indiana. — Campbell *v.* Brackenridge, 8 Blackf. (Ind.) 471. *Contra*, Gallion *v.* McCaslin, 1 Blackf. (Ind.) 93, 12 Am. Dec. 208.

Iowa. — Weston *v.* Dunlap, 50 Iowa 185.

Minnesota. — Gjerness *v.* Mathews, 27 Minn. 320.

New Jersey. — See Phelps *v.* Morrison, 24 N. J. Eq. 200.

Ohio. — See Gibley *v.* Trimble, 14 Ohio 323.

Virginia. — Zollman *v.* Moore, 21 Gratt. (Va.) 321. But see Curtis *v.* Lunn, 6 Munf. (Va.) 421; Lewis *v.* Madison, 1 Munf. (Va.) 303.

Some of the early English cases have gone to a greater length in protecting the purchaser under such circumstances than would be justified by the more recent decisions. Carter *v.* Carter, 3 Kay & J. 636, *criticising* Sherry *v.* Fagg, Ch. Cas. (pt. i.) 68, *supra*, and Turner *v.* Buck, 22 Vin. Abr. 21.

For a Full Discussion of the Doctrine of Tacking, see the title MORTGAGES, vol. 20, p. 1050 *et seq.*

4. Purchase of Legal Estate in Breach of Trust. — Saunders *v.* Dehew, 2 Vern. 271; Allen *v.* Knight, 5 Hare 272, 11 Jur. 527; Baillie *v.*

it has been held that where before notice the purchaser has paid part of the price and gone into possession under the contract, he may thereafter complete his purchase by paying the balance and taking a conveyance, and can be deprived of the estate thus acquired only on condition of being reimbursed for the sums paid before notice.¹

(e) **Notice After Conveyance and Before Payment.** — Where the purchaser has taken a conveyance of the legal title before notice, but receives notice before paying any part of the purchase money, his claim to protection is defeated. Notice before payment in such a case is equivalent to notice before the contract.² And the purchaser will not be protected in payments made by him after notice, for in making such payments he acts in his own wrong and in fraud of the prior claimant.³

(f) **Notice After Conveyance and Part Payment** — *aa. GENERAL RULE.* — Where notice is received by the purchaser after he has taken a conveyance of the legal title and has paid or performed part of the consideration, the general rule is that he will be protected to the extent of the consideration advanced before notice, but not as to the rest; in brief, he is entitled to protection *pro tanto*.⁴ And

M'Kewan, 35 Beav. 177; Mumford v. Stohwasser, L. R. 18 Eq. 556; Carter v. Carter, 3 Kay & J. 617. And see the title TRUSTS AND TRUSTEES.

1. Part Payment and Protection Pro Tanto. — Youst v. Martin, 3 S. & R. (Pa.) 423. See also Phelps v. Morrison, 24 N. J. Eq. 200; Union Canal Co. v. Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 224.

2. Conveyance Without Payment Before Notice — *England.* — Hardingham v. Nicholls, 3 Atk. 304; Tildesley v. Lodge, 3 Smale & G. 543. *United States.* — Wormley v. Wormley, 8 Wheat. (U. S.) 421; Garnett v. Macon, 2 Brock. (U. S.) 185, 6 Call (Va.) 308.

Alabama. — See Wells v. Morrow, 38 Ala. 128. *California.* — Everson v. Mayhew, 65 Cal. 163; Combination Land Co. v. Morgan, 95 Cal. 548; Beattie v. Crewdson, 124 Cal. 577.

Connecticut. — See Hayden v. Charter Oak Driving Park, 63 Conn. 142.

Illinois. — Redden v. Miller, 95 Ill. 336.

Indiana. — Holcroft v. Hunter, 3 Blackf. (Ind.) 151; Anderson v. Hubble, 93 Ind. 579; Smith v. Schweigerer, 129 Ind. 363; Citizens State Bank v. Julian, 153 Ind. 671.

Iowa. — Silsman v. King, 36 Iowa 207; Kitteridge v. Chapman, 36 Iowa 348.

Kentucky. — Halstead v. State Bank, 4 J. J. Marsh. (Ky.) 560.

Maryland. — Price v. McDonald, 1 Md. 403, 54 Am. Dec. 657.

Michigan. — Blanchard v. Tyler, 12 Mich. 339, 86 Am. Dec. 57; Palmer v. Williams, 24 Mich. 328; Matson v. Melchor, 42 Mich. 481.

Minnesota. — Minor v. Willoughby, 3 Minn. 225.

Mississippi. — See Walton v. Hargroves, 42 Miss. 27.

Missouri. — Paul v. Fulton, 25 Mo. 156; Bishop v. Schneider, 46 Mo. 482; Cassady v. Wallace, 102 Mo. 575; Greenlee v. Marquis, 49 Mo. App. 290. See also Wallace v. Wilson, 30 Mo. 335; Arnholt v. Hartwig, 73 Mo. 485; Corrigan v. Schmidt, 126 Mo. 304; McNichols v. Richter, 13 Mo. App. 515; Cheek v. Waldron, 39 Mo. App. 21.

Nebraska. — Veith v. McMurtry, 26 Neb. 341.

New Jersey. — Dean v. Anderson, 34 N. J. Eq. 496; Keyser v. Angle, 40 N. J. Eq. 481.

New York. — Frost v. Beekman, 1 Johns. Ch. (N. Y.) 301; Murray v. Finster, 2 Johns. Ch. (N. Y.) 155; Jewett v. Palmer, 7 Johns. Ch. (N. Y.) 65, 11 Am. Dec. 401; Harris v. Norton, 16 Barb. (N. Y.) 264.

North Carolina. — Howlett v. Thompson, 1 Ired. Eq. (36 N. Car.) 375.

Oregon. — Wood v. Rayburn, 18 Oregon 3.

Pennsylvania. — Juvenal v. Jackson, 14 Pa. St. 524.

South Carolina. — Ellis v. Young, 31 S. Car. 322. See also Williams v. Hollingsworth, 1 Strobb. Eq. (S. Car.) 103, 47 Am. Dec. 527; Bush v. Bush, 3 Strobb. Eq. (S. Car.) 131, 51 Am. Dec. 675.

Texas. — Fraim v. Frederick, 32 Tex. 294; Hutchins v. Chapman, 37 Tex. 615.

3. Payments After Notice. — Warner v. Whitaker, 6 Mich. 133, 72 Am. Dec. 65; Palmer v. Williams, 24 Mich. 328; Garmire v. Willy, 36 Neb. 340; Frost v. Beekman, 1 Johns. Ch. (N. Y.) 301; Murray v. Finster, 2 Johns. Ch. (N. Y.) 155. See also Curtis v. Hitchcock, 10 Paige (N. Y.) 399.

4. Conveyance and Part Payment — Protection Pro Tanto — *United States* — Flagg v. Mann, 2 Sumn. (U. S.) 547. See also Wood v. Mann, 1 Sumn. (U. S.) 512.

Alabama. — Dufphey v. Frenaye, 5 Stew. & P. (Ala.) 215; Wells v. Morrow, 38 Ala. 130; Florence Sewing Mach. Co. v. Zeigler, 58 Ala. 221; Craft v. Russell, 67 Ala. 9.

Arkansas. — Marchbanks v. Banks, 44 Ark. 48.

California. — Combination Land Co. v. Morgan, 95 Cal. 548.

Illinois. — Baldwin v. Sager, 70 Ill. 507; Slattery v. Rafferty, 93 Ill. 287; Redden v. Miller, 95 Ill. 336.

Iowa. — Kitteridge v. Chapman, 36 Iowa 348.

Kentucky. — Eubank v. Poston, 5 T. B. Mon. (Ky.) 293; Hardin v. Harrington, 11 Bush (Ky.) 367; Lain v. Morton, (Ky. 1901) 63 S. W. Rep. 286, 23 Ky. L. Rep. 438.

Michigan. — Warner v. Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Sheldon v. Holmes, 58 Mich. 138.

Mississippi. — Servis v. Beatty, 32 Miss. 52; Parker v. Foy, 43 Miss. 261, 5 Am. Rep. 484.

if after notice the purchaser makes further payments, he makes them in his own wrong, and as to the sums thus paid he is not entitled to protection.¹

Method of Protection.—While the purchaser is entitled to protection as to payments made before notice, no very definite rule can be formulated to govern the manner in which he shall be protected. In some cases he has not been permitted to keep the land free and clear of the prior equity, but has been held entitled to have a lien upon it or to hold it as security for reimbursement of the sums that he paid before notice.² In other cases he has been permitted to keep the land, but subject to the lien of the prior equity to the extent of the purchase money unpaid.³ And in a proper case the purchaser may bring the unpaid balance into court and be permitted to hold the land free and clear of the prior equity.⁴ But the mode of protection to which he is entitled largely depends upon the circumstances of the particular case and rests in the sound discretion of the court,⁵ the amount of the payments made before notice, and the nature of the adverse equity being obviously matters of considerable importance.⁶

bb. MINORITY RULE.—Although the weight of authority supports the rule that a purchaser who has made part payment before notice will be protected *pro tanto*, yet in some jurisdictions a more stringent doctrine appears to pre-

Missouri.—See *Paul v. Fulton*, 25 Mo. 162; *Digby v. Jones*, 67 Mo. 104.

New Jersey.—*Haughwout v. Murphy*, 22 N. J. Eq. 531; *Brinton v. Scull*, 55 N. J. Eq. 757. *New York.*—*Pickett v. Barron*, 29 Barb. (N. Y.) 505; *Farmers' L. & T. Co. v. Maltby*, 8 Paige (N. Y.) 361; *Macauley v. Smith*, 132 N. Y. 524, *reversing* (Super. Ct. Gen. T.) 10 N. Y. Supp. 578.

Pennsylvania.—*Beck v. Ulrich*, 13 Pa. St. 636, 53 Am. Dec. 507, 16 Pa. St. 499; *Juvenal v. Jackson*, 14 Pa. St. 524; *Uhrich v. Beck*, 13 Pa. St. 639; *Kunkle v. Wolfersberger*, 6 Watts (Pa.) 126; *Lewis v. Bradford*, 10 Watts (Pa.) 82. See also *Youst v. Martin*, 3 S. & R. (Pa.) 423.

Texas.—*Fraim v. Frederick*, 32 Tex. 294; *Evans v. Templeton*, 69 Tex. 375, 5 Am. St. Rep. 71; *Morris v. Meek*, 57 Tex. 385.

Virginia.—*Duval v. Bibb*, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506. See also *Cox v. Romine*, 9 Gratt. (Va.) 27. *Contra*, *Doswell v. Buchanan*, 3 Leigh (Va.) 365, 23 Am. Dec. 280.

West Virginia.—*Mitchell v. Dawson*, 23 W. Va. 86; *Webb v. Bailey*, 41 W. Va. 469.

Wisconsin.—*Everts v. Agnes*, 4 Wis. 343, 65 Am. Dec. 314.

1. Payments After Notice.—*Wells v. Morrow*, 38 Ala. 130; *Redden v. Miller*, 95 Ill. 336; *Slattery v. Rafferty*, 93 Ill. 287; *Blanchard v. Tyler*, 12 Mich. 339, 86 Am. Dec. 57; *Edwards v. Missouri*, etc., R. Co., 82 Mo. App. 96; *Tate v. Kramer*, 1 Tex. Civ. App. 427; *Bullock v. Sprowls*, (Tex. Civ. App. 1899) 54 S. W. Rep. 657; *Duval v. Bibb*, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506; *Hamlin v. Wright*, 26 Wis. 50. See also *Palmer v. Williams*, 24 Mich. 333.

Seeing to Application of Purchase Money.—It has been held, however, that if the purchaser sees to the application of the payments made after notice he may be protected in full, but that if he fails to do so, his course in paying after notice constitutes an act of bad faith which contaminates the whole transaction from the beginning and is sufficient ground for the refusal of protection even as to such payments as he made before notice. *Fraim v. Frederick*, 32 Tex. 294.

2. How Purchaser Is Protected.—*Marchbanks v. Banks*, 44 Ark. 48; *Kitteridge v. Chapman*, 36 Iowa 348; *Parker v. Foy*, 43 Miss. 261, 5 Am. Rep. 484. See also *Webb v. Bailey*, 41 W. Va. 469.

It has been held that if in a given case rescission can be had and the purchaser can thereby be placed in *statu quo*, he must protect himself by exercising that right or he will not be permitted to hold the land as security for the sum paid before notice. *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 564, *affirming* 84 Fed. Rep. 855.

3. Slattery v. Rafferty, 93 Ill. 287; *Haughwout v. Murphy*, 21 N. J. Eq. 121; *Frost v. Beekman*, 1 Johns. Ch. (N. Y.) 288; *Cox v. Romine*, 9 Gratt. (Va.) 27; *Mitchell v. Dawson*, 23 W. Va. 86. See also *Ferguson v. Kilty*, 10 Grant Ch. (U. C.) 102; *Tate v. Kramer*, 1 Tex. Civ. App. 427.

Where the prior equity consists of a lien sought to be enforced upon the land, and the partial payment made by the purchaser before notice is equal to the value of the estate at the time of the final decree, relief will not be granted as against the purchaser. *Servis v. Beatty*, 32 Miss. 53.

Purchase of Equity of Redemption by Mortgagee — Notice After Part Payment.—A mortgagee of the legal title for value and without notice is protected in his title from the lien of his mortgagor's vendor for unpaid purchase money, and he may purchase the equity of redemption even after notice of the lien if the consideration for such purchase be given before notice; but the lien may be enforced against the land to the extent of any sums which he may have paid as consideration after notice. *Duval v. Bibb*, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506. See also *Eubank v. Poston*, 5 T. B. Mon. (Ky.) 293.

4. Paying Balance into Court.—*Morris v. Meek*, 57 Tex. 385.

5. See *Dufphey v. Frenaye*, 5 Stew. & P. (Ala.) 247.

6. See *Dufphey v. Frenaye*, 5 Stew. & P. (Ala.) 247; *Servis v. Beatty*, 32 Miss. 52.

vail; not only must the purchaser have taken a conveyance, but the whole of the purchase money must have been paid before notice, else the purchaser will be entitled to no protection whatever; and it seems that part payment before notice does not alter the rule.¹

c. NOTICE AFTER COMPLETION OF PURCHASE. — If the purchase has been completed by payment of the purchase money or other consideration, and by transfer of title by conveyance before any notice, actual or constructive, is received by the purchaser, notice thereafter brought home to him is inoperative to affect his right to protection in the estate he has acquired.²

VI. EVIDENCE AND BURDEN OF PROOF — 1. In General. — The general rule is that notice is a fact the existence of which is to be established by evidence, either direct or circumstantial, in the same manner as the existence of any other fact is established.³

2. Burden of Proof. — Where a purchase of land is sought to be impeached by the holder of a prior right or equity, the question of the burden of proof has given rise to much conflict in the authorities.

Rule that Burden of Proof Rests upon Purchaser. — One line of authorities holds that inasmuch as the plea of purchase for value and without notice is an affirmative defense, the person pleading it must sustain his position by requisite proof; in other words, that the *onus probandi* rests upon the purchaser.⁴ But on the other hand it has been decided that in the absence of evidence to the contrary the law will presume a grantee in a deed to be a *bona fide* purchaser, and that the burden of overcoming the presumption rests upon the person seeking to impeach the conveyance or the title.⁵

1. Payment in Full Must Be Made Before Notice. — *Tourville v. Naish*, 3 P. Wms. 306; *Gallion v. McCaslin*, 1 Blackf. (Ind.) 91, 12 Am. Dec. 208; *Dugan v. Vattier*, 3 Blackf. (Ind.) 245, 25 Am. Dec. 105; *Heck v. Fink*, 85 Ind. 9. See also *Lewis v. Phillips*, 17 Ind. 108, 79 Am. Dec. 457; *Anderson v. Hubble*, 93 Ind. 579. Compare *Rhodes v. Green*, 36 Ind. 10.

In Canada the doctrine of the text was recognized in *Henderson v. Graves*, 2 U. C. Err. & App. 21, but as to some of the purchasers involved it was held to be inapplicable by reason of the peculiar facts of the case. As to other purchasers, however, it was applied. See pp. 24, 25.

2. Notice After Completion of Purchase Inoperative — *Alabama*. — *Mundine v. Pitts*, 14 Ala. 84.

Illinois. — *Baldwin v. Sager*, 70 Ill. 507.

Kentucky. — *Owings v. Jouti*, 2 A. K. Marsh. (Ky.) 381.

Louisiana. — *Syer v. Bundy*, 9 La. Ann. 540. *New York*. — *Gouverneur v. Lynch*, 2 Paige (N. Y.) 300.

North Carolina. — *Newlin v. Osborne*, 6 Jones L. (51 N. Car.) 128, 72 Am. Dec. 566.

Pennsylvania. — *Juvenal v. Jackson*, 14 Pa. St. 524. See also *Chew v. Barnet*, 11 S. & R. (Pa.) 392.

West Virginia. — *Hoult v. Donahue*, 21 W. Va. 294.

3. Existence of Notice Question of Fact. — *Helms v. O'Bannon*, 26 Ga. 132; *Reynolds v. Carlisle*, 99 Ga. 730; *Shumate v. Reavis*, 49 Mo. 336; *Raymond v. Flavel*, 27 Oregon 220; *Hines v. Perry*, 25 Tex. 443; *Hume v. Ware*, 87 Tex. 380; *Brown v. Roland*, 11 Tex. Civ. App. 655. For other authorities see the title NOTICE, vol. 21, p. 589. And see generally the title QUESTIONS OF LAW AND FACT, *post*.

The Sufficiency of the Facts relied upon to

constitute notice presents a question which may be submitted to a jury (see the cases in the foregoing note and the cross-reference there given), or may be submitted to the court sitting as a jury *Shumate v. Reavis*, 49 Mo. 336.

The Question Whether There Is Competent Evidence of notice is for the court; and where the facts in evidence are uncontroverted the courts must determine whether they constitute sufficient notice. See the title NOTICE, vol. 21, p. 589.

Where the Existence of Notice Is Apparent on the Pleadings, a finding by the jury that the purchaser bought without notice is a matter of no legal significance, and does not prevent the rendition of such a decree as is authorized by the other facts found and admitted. *Tankard v. Tankard*, 84 N. Car. 286.

4. Purchaser Has Burden of Proof — *United States*. — *Balfour v. Hopkins*, (C. C. A.) 93 Fed. Rep. 570, affirming 84 Fed. Rep. 855, *sub nom.* *Balfour v. Parkinson*.

Delaware. — *Dick v. Doughnten*, 1 Del. Ch. 320.

Iowa. — *Hume v. Franzen*, 73 Iowa 25; *Hannan v. Seidentopf*, 113 Iowa 659.

Missouri. — *Young v. Schofield*, 132 Mo. 663; *Edwards v. Missouri*, etc., R. Co., 82 Mo. App. 06.

Nebraska. — *Bowman v. Griffith*, 35 Neb. 362; *Arlington State Bank v. Paulsen*, 57 Neb. 733, *reversed on other grounds* 59 Neb. 94; *Upton v. Betts*, 59 Neb. 730; *Plattsburgh First Nat. Bank v. Gibson*, 60 Neb. 767; *Pfund v. Valley L. & T. Co.*, 52 Neb. 473.

Ohio. — *Gwynne v. Jones*, 3 Ohio Cir. Dec. 148, 5 Ohio Cir. Ct. 298.

Oregon. — *Weber v. Rothchild*, 15 Oregon 385.

5. Grantee Presumed to Be Bona Fide Purchaser. — *Anthony v. Wheeler*, 130 Ill. 128, 17 Am.

As to Payment of Consideration. — In a number of cases where the question whether a consideration had been paid was the matter in issue, it has been held that the burden of proving payment rested upon the purchaser.¹ But there is authority for the proposition that the holder of the prior equity must prove that no consideration was paid.²

As to Notice. — There is another line of authorities holding that the burden of proving notice to the purchaser rests upon the person asserting its existence.³ But on the contrary there are cases holding that the purchaser must prove want of notice.⁴

"Shifting" of Burden of Proof. — It has been held that the rule as to proof of a *bona fide* purchase is that the party making the defense must first make satisfactory proof of his purchase and of his payment of the consideration, this being an affirmative defensive matter in the nature of confession and avoidance, and the burden of proving it, therefore, resting upon him who asserts it; but that this being done, the purchaser need not go further and prove that he made the purchase and paid the consideration without notice. At this point it is said that the burden of proof shifts to the person seeking to impeach the purchaser's title, and in order that the claimant may prevail he must prove that before the completion of the purchase the purchaser had actual or constructive notice of the complainant's lien or equity.⁵ But on the other hand, where the facts and circumstances are such as to raise an inference of notice in the purchaser, it devolves upon him to prove affirmatively that he did not have notice.⁶

Where Grantor Was Guilty of Fraud. — In cases where the grantor was guilty of fraud, as in fraudulently obtaining title, the rule appears to be settled that the burden rests upon the purchaser to show that he acquired title in good faith, for value and without notice.⁷

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St. Rep. 281; Gould *v.* Wenstrand, 90 Ill. App. 127; Parrish *v.* Mahany, 10 S. Dak. 276, 66 Am. St. Rep. 715.

1. Purchaser Must Prove Payment — *United States*. — Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. Rep. 337.

Illinois. — Roseman *v.* Miller, 84 Ill. 299.

Kentucky. — Halstead *v.* State Bank, 4 J. J. Marsh. (Ky.) 561.

Ohio. — Morris *v.* Daniels, 35 Ohio St. 406; Ranney *v.* Hardy, 43 Ohio St. 161.

Pennsylvania. — Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Lloyd *v.* Lynch, 28 Pa. St. 425.

Virginia. — Lamar *v.* Hale, 79 Va. 147.

2. Holder of Prior Equity Must Prove Want of Consideration. — Johnson *v.* Newman, 43 Tex. 629. See also Stewart *v.* Crosby, (Tex. Civ. App. 1894) 26 S. W. Rep. 140.

But a Purchaser from a Bona Fide Purchaser must prove payment. Jackson *v.* Waldstein, (Tex. 1894) 27 S. W. Rep. 26.

3. Prior Claimant Must Prove Notice — *England*. — See *Ex p.* Hardy, 2 Deac. & C. 393.

Alabama. — Bartlett *v.* Varner, 56 Ala. 580; Alston *v.* Marshall, 112 Ala. 638; Coskrey *v.* Smith, 126 Ala. 120. See also Lambert *v.* Newman, 56 Ala. 623.

Arkansas. — Gerson *v.* Pool, 31 Ark. 88.

Michigan. — Sheldon *v.* Holmes, 58 Mich. 145.

New York. — Newton *v.* McLean, 41 Barb. (N. Y.) 285.

North Carolina. — See McGahee *v.* Sneed, 1 Dev. & B. Eq. (21 N. Car.) 333; Giles *v.* Hunter, 103 N. Car. 194.

Texas. — Smith *v.* Nolen, 21 Tex. 496;

Cameron *v.* Romele, 53 Tex. 242; Lewis *v.* Cole, 60 Tex. 343; Hill *v.* Moore, 62 Tex. 610; Saunders *v.* Isbell, 5 Tex. Civ. App. 515; Halbert *v.* De Bode, 15 Tex. Civ. App. 629; Peterson *v.* McCaulay, (Tex. Civ. App. 1894) 25 S. W. Rep. 829; Turner *v.* Cochran, (Tex. Civ. App. 1901) 63 S. W. Rep. 151; Oaks *v.* West, (Tex. Civ. App. 1901) 64 S. W. Rep. 1033.

Virginia. — Lamar *v.* Hale, 79 Va. 147.

West Virginia. — See Hill *v.* Ruffner, 3 W. Va. 538.

But a Purchaser from a Bona Fide Purchaser must prove lack of notice. Jackson *v.* Waldstein, (Tex. 1894) 27 S. W. Rep. 26.

And a Purchaser from a Grantee with Notice must prove lack of notice. Gallatian *v.* Cunningham, 8 Cow. (N. Y.) 382.

4. Purchaser Must Prove Lack of Notice. — Wilhoit *v.* Lyons, 98 Cal. 409; Beattie *v.* Crewdson, 124 Cal. 577.

5. Purchaser Must Prove Purchase and Payment — **Prior Claimant Must Prove Notice.** — Barton *v.* Barton, 75 Ala. 400; Hodges *v.* Winston, 94 Ala. 576; Block, etc., Iron Co. *v.* Holcomb-Brown Iron Co., 105 Iowa 624, 67 Am. St. Rep. 319; Atkinson *v.* Greaves, 70 Miss. 42; Morris *v.* Daniels, 35 Ohio St. 406. See also Craft *v.* Russell, 67 Ala. 9; Taylor *v.* Agricultural, etc., Assoc., 68 Ala. 229; Cresswell *v.* Jones, 68 Ala. 420; Coskrey *v.* Smith, 126 Ala. 120.

6. Inference of Notice Must Be Rebutted by Purchaser. — Farley *v.* Bateman, 40 W. Va. 542.

7. Fraud in Grantor — Onus Probandi on Purchaser — *Alabama*. — Whelan *v.* McCreary, 64 Ala. 319.

3. Recital in Deed as Evidence of Payment. — It appears to be a general rule that a recital in the purchaser's deed that the purchase money or other consideration for the conveyance has been paid is not evidence of the fact of payment as against a stranger to the deed who claims adversely to the purchaser and under a prior right, and hence that to sustain the defense of purchase for value and without notice payment of the consideration must be established by evidence other than the recital in the instrument of conveyance.¹ There is much authority, however, supporting the proposition that the recital in a deed that the consideration has been paid is *prima facie* evidence of the fact, even as against strangers to the instrument, and consequently is competent to show the fact in favor of the purchaser as against the claimant of a prior right or title.² But even in a jurisdiction where such a recital is *prima facie* evidence, it is held that inasmuch as this rule is contrary to the general principle, the recital should be strictly construed and not extended beyond its necessary import.³

Fraudulent Conveyances. — In cases where conveyances are sought to be impeached as fraudulent as to creditors or purchasers, a like diversity of opinion exists concerning the weight to be attached to recitals in the pur-

Iowa. — Sillyman *v.* King, 36 Iowa 207; Throckmorton *v.* Rider, 42 Iowa 84; Light *v.* West, 42 Iowa 141; Anderson *v.* Buck, 66 Iowa 490; Rush *v.* Mitchell, 71 Iowa 333.

Kansas. — Salisbury *v.* Barton, 63 Kan. 552.

Michigan. — Letson *v.* Reed, 45 Mich. 27.

Missouri. — Connecticut Mut. L. Ins. Co. *v.* Smith, 117 Mo. 261, 38 Am. St. Rep. 656.

Nebraska. — See Phoenix Mut. L. Ins. Co. *v.* Brown, 37 Neb. 705.

New York. — Simpson *v.* Del Hoyo, 94 N. Y. 189.

Oregon. — Weber *v.* Rothchild, 15 Oregon 385.

1. General Rule — Recital Not Evidence — United States. — Simmons Creek Coal Co. *v.* Doran, 142 U. S. 437; Lakin *v.* Sierra Buttes Gold Min. Co., 25 Fed. Rep. 337; Reorganized Church, etc., *v.* Church of Christ, 60 Fed. Rep. 946. See also Boone *v.* Chiles, 10 Pet. (U. S.) 177.

Alabama. — Nolen *v.* Gwyn, 16 Ala. 725. See also Doe *v.* Reeves, 10 Ala. 137.

California. — Colton *v.* Seavey, 22 Cal. 497; Long *v.* Dollarhide, 24 Cal. 218; Galland *v.* Jackman, 26 Cal. 80.

Delaware. — Dick *v.* Doughten, 1 Del. Ch. 320.

Illinois. — See the note to the following paragraph of text.

Iowa. — Sillyman *v.* King, 36 Iowa 207; Throckmorton *v.* Rider, 42 Iowa 84; Hogdon *v.* Green, 56 Iowa 733.

Kentucky. — Edwards *v.* Ballard, 14 B. Mon. (Ky.) 233; Goins *v.* Allen, 4 Bush (Ky.) 608.

Michigan. — See Hull *v.* Swarthout, 29 Mich. 249.

New Hampshire. — See Kimball *v.* Fenner, 12 N. H. 248.

Ohio. — Morris *v.* Daniels, 35 Ohio St. 406; Ranney *v.* Hardy, 43 Ohio St. 157.

Oregon. — Wood *v.* Rayburn, 18 Oregon 3.

Pennsylvania. — Lloyd *v.* Lynch, 28 Pa. St. 419, 70 Am. Dec. 137; Union Canal Co. *v.* Young, 1 Whart. (Pa.) 410, 30 Am. Dec. 212; Lewis *v.* Bradford, 10 Watts (Pa.) 82. See also Rogers *v.* Hall, 4 Watts (Pa.) 359; Baum *v.* Dubois, 43 Pa. St. 260.

Texas. — Watkins *v.* Edwards, 23 Tex. 443;

Hawley *v.* Bullock, 29 Tex. 216; Hamman *v.* Keigwin, 39 Tex. 34; Harrison *v.* Boring, 44 Tex. 263; Houston, etc., *R. Co. v.* Chaffin, 60 Tex. 553; Lindsay *v.* Freeman, 83 Tex. 259; Freeman *v.* Tinsley, (Tex. Civ. App. 1897) 40 S. W. Rep. 835; Robertson *v.* McClay, 19 Tex. Civ. App. 513.

And see the titles CONSIDERATION, vol. 6, p. 667; RECEIPTS, *post*; RECITALS.

Recital in Judgment. — The same principle applies where the purchaser claims under a judgment made to serve the purposes of a deed, the recitals in such judgment not being evidence of payment of the consideration as against prior claimants. Lindsay *v.* Freeman, 83 Tex. 259.

2. Recital Prima Facie Evidence — Illinois. — Ryder *v.* Rush, 102 Ill. 338; Anthony *v.* Wheeler, 130 Ill. 128, 17 Am. St. Rep. 288, note. *Contra*, Brown *v.* Welch, 18 Ill. 343, 68 Am. Dec. 549; Roseman *v.* Miller, 84 Ill. 297; Wait *v.* Smith, 92 Ill. 386 (holding that the recital is not evidence of the fact of payment).

Mississippi. — Parker *v.* Foy, 43 Miss. 260, 5 Am. Rep. 484; Hiller *v.* Jones, 66 Miss. 636.

Montana. — Mullins *v.* Butte Hardware Co., 25 Mont. 525.

New Jersey. — Roll *v.* Rea, 50 N. J. L. 264.

New York. — Jackson *v.* McChesney, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521; Webster *v.* Van Steenberg, 46 Barb. (N. Y.) 214; Hendy *v.* Smith, 49 Hun (N. Y.) 510; Wood *v.* Chapin, 13 N. Y. 509, 67 Am. Dec. 62; Lacustrine Fertilizer Co. *v.* Lake Guano, etc., Co., 82 N. Y. 476; Todd *v.* Eighmie, 4 N. Y. App. Div. 9; Turner *v.* Howard, 10 N. Y. App. Div. 555; Doody *v.* Hollwedel, 22 N. Y. App. Div. 456. *Tennessee.* — See Haywood *v.* Moore, 2 Humph. (Tenn.) 584; Bayliss *v.* Williams, 6 Coldw. (Tenn.) 440.

Wisconsin. — Hoyt *v.* Jones, 31 Wis. 389.

3. Turner *v.* Howard, 10 N. Y. App. Div. 555, holding that a recital of a consideration of "one dollar and other good and valuable considerations," without further proof, was insufficient to constitute the grantee a purchaser for value. See also *supra*, this title, *Essential Elements of Bona Fide Purchase — Consideration or Value.*

chasers' deeds, some courts holding the recitals to be no evidence of payment, and others holding them to be *prima facie* evidence of that fact.¹

VII. PROTECTION AND MODE OF RELIEF — 1. Rights Against Which Purchaser Is Protected. — Inasmuch as the doctrine of purchase for value and without notice is involved in a great many branches of the law, it is hardly practicable to enumerate in this title all the various claims and rights against which a *bona fide* purchaser will be protected in equity. Generally the statement that certain rights will or will not be enforced as against such a purchaser will be found in the various titles throughout this work where those specific rights are treated.² A few instances, however, may properly be mentioned in this discussion.

Equitable Rights in General. — When a purchaser of the legal title occupies the position of a purchaser for value and without notice, he will be protected as of course against all prior equitable rights and titles of third persons,³ especially where the equity sought to be asserted is secret or latent.⁴ Among the particular equitable rights against which the purchaser will be protected in equity are resulting trusts,⁵ contracts by the vendor to convey to third persons,⁶ parol agreements between prior grantors and grantees that deeds absolute in form shall be held as mortgages,⁷ and vendors' liens for unpaid

1. See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 488.

2. See the table of cross-references at the beginning of this title, and the specific cross-references throughout. See also *supra*, this title, *Essential Elements of Bona Fide Purchase — Acquisition of Legal Title*.

3. **Protection Against Prior Equities** — *United States*. — *Lea v. Polk County Copper Co.*, 21 How. (U. S.) 493.

Alabama. — *Turner v. Wilkinson*, 72 Ala. 367.

Colorado. — *Learned v. Tritch*, 6 Colo. 432.

Illinois. — *Pitts v. Cable*, 44 Ill. 103; *Erwin v. Hall* 18 Ill. App. 315.

Kentucky. — *Clark v. Hunt*, 3 J. J. Marsh. (Ky.) 553.

Maryland. — *Dannison v. Robinett*, 2 Har. & J. (Md.) 55.

New York. — *Harrington v. Erie County Sav. Bank*, 101 N. Y. 257.

Oregon. — *Wells v. Neff*, 14 Oregon 66.

Pennsylvania. — *Bigley v. Jones*, 114 Pa. St. 517.

Tennessee. — *Edmondson v. Hays*, 1 Overt. (Tenn.) 509; *Perkins v. Hays*, *Cooke* (Tenn.) 163, 5 Am. Dec. 680; *White v. Dougherty*, *Mart. & Y.* (Tenn.) 309, 17 Am. Dec. 802.

4. *United States*. — *Alexander v. Pendleton*, 8 Cranch (U. S.) 469.

Alabama. — *Rogers v. Adams*, 66 Ala. 600.

Indiana. — *Gifford v. Bennett*, 75 Ind. 528.

Rooker v. Rooker, 75 Ind. 571; *Fitzpatrick v. Papa*, 89 Ind. 17.

Kentucky. — *Moore v. Dodd*, 1 A. K. Marsh. (Ky.) 140.

Louisiana. — *Lester v. Connelly*, 46 La. Ann. 340; *Broussard v. Broussard*, 45 La. Ann. 1085.

Mississippi. — *Atkinson v. Greaves*, 70 Miss. 42; *Clark v. Rainey*, 72 Miss. 151.

Nevada. — *Rickards v. Hutchinson*, 18 Nev. 215.

New York. — See *Doremus v. Doremus*, 66 Hun (N. Y.) 111.

Texas. — *Flanagan v. Oberthier*, 50 Tex. 379; *Parker v. Coop*, 60 Tex. 114.

Virginia. — *Wilcox v. Calloway*, 1 Wash. (Va.) 41; *Zollman v. Moore*, 21 Gratt. (Va.) 313.

The principle as stated in the text embodies what may be called the typical case of protection to a *bona fide* purchaser; and it is reiterated so many times in the cases cited throughout this title that additional citation of authority is deemed unnecessary.

The rule is not affected by the circumstance that the adverse equity is held by an infant. *Hardin v. Harrington*, 11 Bush (Ky.) 367.

5. **Protection Against Resulting Trusts.** — *Fahn v. Bleckley*, 55 Ga. 81; *Parker v. Barnesville Sav. Bank*, 107 Ga. 650; *Bass v. Wheelless*, 2 Tenn. Ch. 531.

For a Full Discussion, see the title IMPLIED TRUSTS, vol. 15, p. 1200.

A Resulting Trust Cannot Be Enforced Against a Mortgagee for Value and Without Notice. — *Cook v. Parham*, 63 Ala. 456; *Mobile L. Ins. Co. v. Randall*, 71 Ala. 220; *Flynt v. Hubbard*, 57 Miss. 471; *Fessenden v. Taft*, 65 N. H. 39.

6. **Prior Contract to Convey Not Enforceable Against Bona Fide Purchaser.** — *Rayne v. Baker*, 1 Giff. 241; *Kearnes v. Hill*, 21 Fla. 185; *Walker v. Cameron*, 78 Iowa 315; *Craig v. Leiper*, 2 Verg. (Tenn.) 103, 24 Am. Dec. 479. Rule Applied to Bond to Convey Title. — *Arnold v. Barnett*, 90 Ga. 334; *Combs v. Hall*, (Ky. 1901) 60 S. W. Rep. 647, 22 Ky. L. Rep. 1418.

For a Full Discussion, see the title SPECIFIC PERFORMANCE.

Prior Parol Partition between Grantor and his Cotenant — Purchaser Protected. — *Allday v. Whitaker*, 66 Tex. 669.

7. **Purchaser Protected Against Parol Defeasance of Absolute Deed** — *England*. — *Harding v. Hardret*, 18 Vin. Abr. 116.

District of Columbia. — *Hayward v. Mayse*, 1 App. Cas. (D. C.) 133.

Illinois. — *Jenkins v. Rosenberg*, 105 Ill. 157. See also *Baldwin v. Sager*, 70 Ill. 503.

Indiana. — *Crane v. Buchanan*, 29 Ind. 570.

Iowa. — See *Gray v. Coan*, 40 Iowa 327.

Louisiana. — *Broussard v. West*, 47 La. Ann. 1033.

New Jersey. — *Hogan v. Jaques*, 19 N. J. Eq. 123, 97 Am. Dec. 644.

New York. — *Whittick v. Kane*, 1 Paige (N.

purchase money in prior conveyances.¹

2. Affirmative Relief to Purchaser as Plaintiff. — The rule has long been settled in equity jurisprudence that the fact that a person is a purchaser for value and without notice, while it may be a perfect ground of defense, is not available as a ground for affirmative relief to the purchaser as a party plaintiff.² The instances, if any, in which affirmative relief may be granted to a *bona fide* purchaser are few and exceptional, and must rest either upon their own peculiar facts or upon fraud in the person against whom the relief is sought, or upon the provisions of some statute.³ But the rule that the purchaser cannot have affirmative relief does not, of course, embrace the relief sought by a mortgagee⁴ or an assignee of a mortgage⁵ in an action of foreclosure.

PURCHASE SCALE. — See note 6.

PURCHASE, WORDS OF. — See LIMITATION, WORDS OF, vol. 19, p. 334; and see the titles CHILD — CHILDREN, vol. 5, p. 1082; HEIR, HEIRS, AND THE LIKE, vol. 15, p. 318; ISSUE (DESCENDANTS), vol. 17, p. 543; SHELLEY'S CASE (RULE IN); SUCCESSION; WILLS.

PURE — PURELY. — See note 7.

Y.) 202; *Hogarty v. Lynch*, 6 Bosw. (N. Y.) 138; *Wilson v. Parshall*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 479.

Pennsylvania. — *Pancake v. Cauffman*, 114 Pa. St. 113.

South Carolina. — *Jones v. Hudson*, 23 S. Car. 404.

Texas. — *Hicks v. Hicks*, (Tex. Civ. App. 1894) 26 S. W. Rep. 227.

Vermont. — *Conner v. Chase*, 15 Vt. 764.

1. Purchaser Protected Against Lien of Prior Vendor. — *Carroll v. Gilham*, 21 Oregon 21; *Lewis v. Henderson*, 22 Oregon 548; *High v. Batte*, 10 Verg. (Tenn.) 335; *National Valley Bank v. Harman*, 75 Va. 607.

Rule Applied to Mortgagees. — *Austin v. Pulschien*, 112 Cal. 528; *Patterson v. Johnston*, 7 Ohio (pt. i.) 225.

For a Full Discussion, see the title VENDORS' LIEN.

2. Bona Fide Purchaser Not Entitled to Affirmative Relief as Plaintiff. — *Patterson v. Slaughter*, Amb. 293; *German Sav., etc., Soc. v. De Lashmutter*, 67 Fed. Rep. 400; *Beekman v. Frost*, 18 Johns. (N. Y.) 544; *Jackson v. Cadwell*, 1 Cow. (N. Y.) 642.

3. German Sav., etc., Soc. v. De Lashmutter, 67 Fed. Rep. 400. See also the titles RECORDING ACTS; SHERIFF'S SALES.

For an instance of relief granted to a *bona fide* purchaser upon a bill in the nature of a bill *quia timet*, see *Martin v. Hewitt*, 44 Ala. 418.

It is to be observed, however, that the foregoing rule has reference only to a proceeding by the purchaser as against a third person holding an adverse equity or right, and does not apply to suits between the purchaser and his vendor. Thus, where the title ostensibly conveyed to the purchaser has entirely failed, he may be entitled to recover the purchase money from his vendor. *Gordon v. Weaver*, (Tenn. Ch. 1899) 53 S. W. Rep. 740; *Smith v. Nolen*, 21 Tex. 496. See also *Houston, etc., R. Co. v. Chaffin*, 60 Tex. 553. See generally the title VENDOR AND PURCHASER.

4. Bona Fide Mortgagee Entitled to Foreclose. — *Turman v. Bell*, 54 Ark. 273, 26 Am. St. Rep. 35; *Werner v. Franklin Nat. Bank*, 166

N. Y. 619, *affirming* 49 N. Y. App. Div. 423; *Brigham v. Thompson*, 12 Tex. Civ. App. 562.

Where mortgagees or grantees and cestuis in a deed of trust have taken for value and without notice of a prior equity, the land shall be sold and the proceeds appropriated first to the demands of the mortgagees or creditors, and the balance, if any, to the claims of the prior incumbrancer. *Kesner v. Trigg*, 98 U. S. 50; *Wood v. State Bank*, 5 T. B. Mon. (Ky.) 198.

5. Bona Fide Assignee of Mortgage Entitled to Foreclose. — *McCurdy v. Agnew*, 8 N. J. Eq. 733, *reversing* 8 N. J. Eq. 9. See generally the title MORTGAGES, vol. 20, p. 1044.

6. Purchase Scale. — One of the partners in a firm engaged in conducting a sawmill purchased certain logs on the account of the firm; the firm, however, was dissatisfied with the contract, and the partner who had made it agreed to buy the logs from the firm on his own account, the firm agreeing to saw them at so much per thousand "at *purchase scale*." The court held that the meaning of the term *purchase scale* should not have been left to the jury, saying: "There is no doubt as to the meaning of the term *purchase scale*. It clearly meant the scale made at the time of the purchase." *Hayes v. Cummings*, 99 Mich. 206.

7. Technically Pure. — In *Matheson v. Campbell*, 60 Fed. Rep. 608, it was said: "'Technically *pure*' means *pure* in the ordinary acceptation of the terms of the art. 'Chemically *pure*' means absolutely *pure*."

Pure Water. (See also the title WATERWORKS AND WATER COMPANIES.) — In *Com. v. Towanda Water Works*, (Pa. 1888) 15 Atl. Rep. 440, it was held that the term "*pure water*," as used in an act requiring water companies to furnish *pure water*, must be construed as meaning wholesome — ordinarily *pure* — and not in the abstract or chemical sense of absolutely *pure*. See also *Atty.-Gen. v. Petersburg, etc., R. Co.*, 6 Ired. L. (28 N. Car.) 465; *Com. v. Towanda Water Works*, 22 W. N. C. (Pa.) 429.

Pure Accident. (See also ACCIDENT, vol. 1, p.

PURELY PUBLIC CHARITY.—See the references under PUBLIC TRUST OR CHARITY, *ante*.

PURGATORY.—See note 1.

PURPORT. (See also TENOR, and see the titles FORGERY, 9 ENCYC. OF PL. AND PR. 546; LIBEL AND SLANDER, 13 ENCYC. OF PL. AND PR. 26.)—The word “purport” imports what appears on the face of the instrument; it means the apparent and not the legal import.² Purport means to import; to imply.³

PURPOSE — PURPOSELY.—“Purpose” means that which a person sets before himself as an object to be reached or accomplished; the end or aim to which the view is directed in any plan, measure, or exertion; end, or the view

272.)—In *Fidelity, etc., Co. v. Cutts*, 95 Me. 164, it was said: “But in the discussion of questions of liability for negligence, the term ‘pure accident’ or ‘simple accident’ is uniformly employed in contradistinction to ‘culpable negligence,’ to indicate the absence of any legal liability. A ‘purely accidental’ occurrence may cause damage without legal fault on the part of any one. *Conway v. Lewiston, etc., Horse R. Co.*, 90 Me. 205. ‘Simple accidents have not yet been eliminated from the facts of human experience.’ *Conley v. American Express Co.*, 87 Me. 352. ‘Pure accidents will always continue among the inexplicable factors in the problem of life.’ *Cunningham v. Bath Iron Works*, 92 Me. 501.”

Pure Plea.—See PLEA, vol. 22, p. 836. See also *DaCosta v. Dibble*, 40 Fla. 421.

Purely Money Demand.—See *Soules v. Soules*, 35 U. C. Q. B. 334; *Kelly v. Isolated Risk, etc., Ins. Co.*, 26 U. C. C. P. 299; *Cole v. Montreal Bank*, 39 U. C. Q. B. 54; *Kavanagh v. Kingston*, 39 U. C. Q. B. 415; *Hamilton Bank v. Western Assur. Co.*, 38 U. C. Q. B. 609.

“Purely” Equivalent to “Wholly.”—*Kentucky Female Orphan School v. Louisville*, 100 Ky. 470.

1. Purgatory.—In *Harrison v. Brophy*, 59 Kan. 3, it was said: “*Purgatory* is defined by an authoritative expositor of the church’s creed to be ‘a state of suffering after this life, in which those souls are for a time detained who depart this life after their deadly sins have been remitted as to the stain and guilt, and as to the everlasting pain that was due to them, but who have on account of those sins still some debt of temporal punishment to pay; as also those souls which leave this world guilty only of venial sins. In *purgatory* these souls are purified and rendered fit to enter into heaven, where nothing defiled enters.’ Catholic Belief (Lambert’s Am. ed.) 196. Devotees of this church ‘also believe that the souls in *purgatory* * * * are relieved by the sacrifice of the mass, by prayer, and pious works and almsdeeds.’”

2. Purport.—*Rex v. Jones*, 1 Dougl. 300; *U. S. v. Turner*, 7 Pet. (U. S.) 135; *Van Horne v. State*, 5 Ark 353; *State v. Fenly*, 18 Mo. 454; *State v. Ward*, 2 Hawks (9 N. Car.) 447; *Gibbons v. State*, 36 Tex. Crim. 469.

In *Downing v. State*, 4 Mo. 576, the indictment charged that the defendant put in circulation a certain note *purporting* that five dollars would be paid to the holder thereof, and the note offered in evidence *purported* that five

dollars would be paid to the bearer thereof. The court held that this was clearly a wrong description of the note. And see *State v. Page*, 19 Mo. 218.

Popular Sense.—In *State v. Harris*, 5 Ired. L. (27 N. Car.) 287, it was held that, in a statute making it indictable to pass a counterfeit banknote “*purporting* to be a bill or note issued by order of the president and directors of any bank,” the legislature did not use the word *purporting* in its strict technical sense, as meaning that these words should appear on the face of the counterfeit bill or note, but in its popular signification, to denote a bill or note presumed to have been issued by the order of the president and directors of the bank.

Purport Clause.—“In the ordinary form of the indictment [for forgery], we have seen, the recitation of the tenor of the instrument is preceded by its mention as *purporting* to be a bond, * * * or whatever else it appears on its face to be. This is termed the *purport* clause. Now, in reason, the *purport* of recited words is matter not of fact but of law—not for the jury, but for the court, and on familiar principles it need not be alleged. Therefore it is believed that the *purport* clause in the indictment for forgery is never necessary.” 2 Bishop on Criminal Procedure (3d ed.), § 413, followed in *Myers v. State*, 101 Ind. 381. See also *Sharley v. State*, 54 Ind. 168; *Harding v. State*, 54 Ind. 359; *State v. Gustin*, 5 N. J. L. 857.

Purport and Tenor.—See TENOR.

3. Furport.—*State v. Harris*, 5 Ired. L. (27 N. Car.) 295.

“*Purport* means the design or tendency; meaning; import.” *State v. Sherwood*, 90 Iowa 553, quoted in *State v. Burling*, 102 Iowa 681.

Foreign Laws.—A Wisconsin statute provided that printed copies of the statute laws of any state or territory of the United States *purporting* to be published under the authority of their respective governments should be admitted as evidence of such laws. It was held that laws of another state which were compiled and printed by a private individual, but were authorized by a statute of that state which declared them to be competent evidence of the several acts and resolutions therein contained, *purported* to be published under the authority of that state. *Hollister v. McCord*, 111 Wis. 538. See also *Falls v. U. S. Savings, etc., Co.*, 97 Ala. 417; *Merrifield v. Robbins*, 8 Gray (Mass.) 150; and see the title FOREIGN LAWS, vol. 13, p. 1050.

itself; design; intention.¹ Purposely means by purpose or design; intentionally; with premeditation.²

PURPRESTURE. (See also the titles ACCRETION, vol. 1, p. 472; WHARVES AND WHARFINGERS.)—A purpresture is an inclosure or appropriation by a private party of a part of that which belongs to and ought to be open and free to the enjoyment of the public at large.³

1. Purpose.—Webst. Dict., *quoted* in Loftin *v.* Watson, 32 Ark. 420; Homewood *v.* Wilmington, 5 Houst. (Del.) 127.

Purpose is a synonym for design, intention, aim. Anderson *v.* Hooks, 9 Ala. 709.

Intent.—In Phillips *v.* State, (Tex. Crim. 1898) 45 S. W. Rep. 709, the trial court instructed that "the offense of burglary in the nighttime is constituted by entering a house by force in the nighttime for the *purpose* of committing the crime of theft." It was objected to this instruction that the word *purpose* was used instead of the word "intent." The appellate court held that the objection was hypercritical.

Purpose of School—Purposes and Uses.—In Board of Education *v.* Fonda, 77 N. Y. 360, it was said: "A *purpose* is that which one sets before himself to strive for and reach. It is the end rather than the means thereto. So the *purpose* of a school, the end of setting it up, is strictly the mental training and finish of the scholars; and the schoolhouse is but a means to that end. But the word in the plural, *purposes*, is sometimes of the same sense as the word 'uses.'"

Same—Charitable Purposes and Charitable Uses **Synonymous.**—*In re* Sutton, (1901) 2 Ch. 644.

Charitable Purposes.—See the title CHARITIES AND TRUSTS FOR CHARITABLE USES, vol. 5, p. 893.

Consideration and Purpose Distinguished.—In holding that an acknowledgment of a mortgage which did not show that the mortgage was executed for the *purpose* therein expressed was sufficient, the court said: "In ordinary parlance the considerations which prompt an action may not be easily distinguished from the *purposes* sought to be effected. But with regard to legal instruments, and in the connection in which it is used in the statute, the word 'consideration' has a more limited and technical meaning, distinct from motives or *purposes*. It means something of value in the eye of the law; something in the way of price or compensation which may be of value to the obligor or of detriment to the obligee. Whereas *purposes* evidently means the effect which the instrument is intended to have upon the rights of the contracting parties and the status of the subject-matter. To illustrate in case of a mortgage. The loan is the consideration; but the *purpose* of the mortgage is to create a certain and definite security for the repayment, either by bill in equity or sale under a power." Ford *v.* Burks, 37 Ark. 94. And see the title CONSIDERATION, vol. 6, p. 672.

Other Purposes—Ejusdem Generis. (See also OTHER, vol. 21, p. 1011.)—In *In re* Barre Water Co., 62 Vt. 30, it was said: "The words 'other *purposes*' must be construed to refer to *purposes ejusdem generis* with the *purposes* specially mentioned, and to mean other like *purposes*, or other like public *purposes*."

Humane Purposes.—See HUMANE, vol. 15, p. 783.

Public Purpose.—See PUBLIC PURPOSE, *ante*.

Religious Purpose.—See RELIGIOUS PURPOSE.

Sanitary Purpose.—See SANITARY.

2. Purposely.—Whitman *v.* State, 17 Neb. 226, *quoting* Webst. Dict.

Murder. (See also the title MURDER AND MANSLAUGHTER, vol. 21, pp. 83, 157.)—The meaning of the word *purposely* may be fully expressed in an indictment by the use of the words "with intent," or "feloniously." Carder *v.* State, 17 Ind. 307.

Purposely killing is intentionally and willfully killing. Lang *v.* State, 84 Ala. 5; Fahnestock *v.* State, 23 Ind. 262; State *v.* Del Bello, 8 Ohio Dec. 455; State *v.* Straub, 16 Wash. 121.

Purposely and Maliciously.—See MALICIOUS—MALICIOUSLY, vol. 19, p. 627.

3. Purpresture.—See the title NUISANCES, vol. 21, p. 683. See also U. S. *v.* Debs, 64 Fed. Rep. 740; Chicago *v.* Ward, 169 Ill. 392; Grand Rapids *v.* Powers, 89 Mich. 112; Moyamensing Tp. *v.* Long, 1 Pars. Eq. Cas. (Pa.) 145; State *v.* Goodnight, 70 Tex. 682; People *v.* Chicago, 193 Ill. 507; Quincy *v.* Jones, 76 Ill. 231; Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 180. And see *dissenting* opinion of Magruder, J., in People *v.* Chicago, 193 Ill. 563.

In Revell *v.* People, 177 Ill. 480, it was said: "*Purprestures*—more properly *pourprises*—is derived from the French *pourprise*, and according to Lord Coke signifies a close or inclosure; that is, when one encroaches and makes that safe to himself which ought to be common to many." See to the same effect State *v.* Kean, 69 N. H. 122, *citing* Co. Litt. 277*b*.

Examples.—In Revell *v.* People, 177 Ill. 468, 69 Am. St. Rep. 257, it was held that where a shore owner on Lake Michigan, without grant or other authority from the state, erected piers in the lake in front of his premises, the piers constituted a *purpresture*. See also People *v.* Vanderbilt, 28 N. Y. 396.

In Union Depot, etc., Co. *v.* Brunswick, 31 Minn. 302, it was held that if a riparian owner unlawfully intruded into a stream beyond the "point of navigability" and there filled up the bed of the stream so as to obstruct the public right of navigation, for the sole purpose of extending his possession, this would constitute a *purpresture* which the public would have a right to abate as a public nuisance.

In State *v.* Goodnight, 70 Tex. 682, it was held that the unlawful inclosure of school lands was both a *purpresture* and a public nuisance.

In Atty.-Gen. *v.* Evart Booming Co., 34 Mich. 473, it was said: "An unauthorized inclosure of a part of a highway may also be a *purpresture* and a public wrong, whether the highway be one by land or by water."

PURSE. — See PRIZE, *ante*.

PURSUANCE. — See note 1.

PURSUANT. — See note 2.

PURSUIT. — See note 3.

PUT. — I. A “put,” in the language of stockbrokers, is defined to be the “privilege of delivering or not delivering” the thing sold, and a “call” is defined to be the “privilege of calling for or not calling for” the thing bought.⁴ II. To put means to lay or place.⁵

Any unauthorized erection over a highway is a *purpresture*. State *v.* Kean, 69 N. H. 122; Knox *v.* New York, 55 Barb. (N. Y.) 404.

Purpresture and Nuisance Distinguished. — See the title NUISANCES, vol. 21, p. 683. And see U. S. *v.* Debs, 64 Fed. Rep. 740; Smith *v.* Rochester, 92 N. Y. 483; Moyamensing Tp. *v.* Long, 1 Pars. Eq. Cas. (Pa.) 145. Compare Delaware, etc., Canal Co. *v.* Lawrence, 2 Hun (N. Y.) 163.

1. In Pursuance. — “A thing is to be considered as done ‘in *pursuance* of the act’ when the person who does it is acting honestly and *bona fide*, either under the powers which the act gives or in discharge of the duties which it imposes.” Smith *v.* Shaw, 10 B. & C. 284, 21 E. C. L. 78. See to the same effect Thomas *v.* Stephenson, 2 El. & Bl. 108, 75 E. C. L. 108.

So it has been held that if any public or private body or person charged with the execution of an act honestly intends to put the law in motion, and really and not unreasonably believes in the existence of facts which, if existent, would justify his acting, and acts accordingly, his conduct will be “in *pursuance*” or “under or by virtue” of the statute under which he believes he is acting, although he errs in such belief. The question whether there was in fact reasonable ground for such belief is a subordinate question, though one very material to be pressed on the minds of the jury. But the presence or absence of such reasonable ground can only be relied on for the purpose of determining whether the belief was *bona fide* or not. Hermann *v.* Seneschal, 13 C. B. N. S. 392, 106 E. C. L. 392. See also Booth *v.* Clive, 10 C. B. 827, 70 E. C. L. 827; Read *v.* Coker, 13 C. B. 863, 76 E. C. L. 863; Horn *v.* Thornborough, 3 Exch. 846; Cann *v.* Clipperton, 10 Ad. & El. 582, 37 E. C. L. 178, 2 Per. & Dav. 560; Rudd *v.* Scott, 2 Scott N. R. 631; Roberts *v.* Orchard, 2 H. & C. 769; Selmes *v.* Judge, L. R. 6 Q. B. 724; Chamberlain *v.* King, L. R. 6 C. P. 474; Midland R. Co. *v.* Witherington, Dist., 11 Q. B. D. 788; Lea *v.* Facey, 19 Q. B. D. 352; Cox *v.* Reid, 13 Q. B. 558, 66 E. C. L. 558; Hughes *v.* Buckland, 15 M. & W. 346; Rochfort *v.* Rynd, 9 L. R. Ir. 204; O’Dea *v.* Hickman, 18 L. R. Ir. 233.

The phrase “in execution and *pursuance* of” in an indictment for conspiracy has been held to mean “to effect the object of.” U. S. *v.* Nunnemacher, 7 Biss. (U. S.) 137; U. S. *v.* Boyden, 1 Lowell (U. S.) 268.

2. Pursuant. — The affiant in an affidavit for an attachment stated a debt to exist, but in a subsequent part of the affidavit he stated the debt to be *pursuant* to a judgment. The court said: “This will not do. The word *pursuant* has several meanings, some of which, in the connection the word is here used, would

qualify the positive declaration before made into a mere assertion that, according to the judgment, so much was due. This was not enough. Wright *v.* Cogswell, 1 McLean (U. S.) 471; Bickerdike *v.* Bollman, 1 T. R. 406. ‘According to,’ ‘as appears from,’ ‘by the terms of,’ ‘*pursuant* to,’ or other equivalent terms referring to the judgment may be all true, and yet, in point of fact, nothing be due upon it.” Quarles *v.* Robinson, 2 Pin. (Wis.) 99. And see ACCORDING, vol. 1, p. 430.

Pursuant to Law. — See LAW, vol. 18, p. 572.

3. Pursuit. — By the general corporation law of Oregon, the formation of corporations is authorized “for the purpose of engaging in any lawful enterprise, business, *pursuit*, or occupation,” and it has been held that the words “business” and *pursuit*, as thus used, are not restricted to schemes for making money. The court said: “The words ‘business’ and *pursuit* are used with reference to any object consistent with the interests of society that may engage the attention of men and invite their co-operation.” Maxwell *v.* Akin, 89 Fed. Rep. 180.

4. Put. (See also the titles GAMBLING CONTRACTS, vol. 14, p. 576; OPTIONS, vol. 21, p. 924.) — Minnesota Lumber Co. *v.* Whitebreast Coal Co., 160 Ill. 97. See also Maurer *v.* King, 127 Cal. 114; Webster *v.* Sturges, 7 Ill. App. 563; Bigelow *v.* Benedict, 70 N. Y. 202. And see CALL, vol. 5, p. 107.

5. Put. — A lien was created upon all the goods, implements, stock, fixtures, tools, and other personal property which might be *put* on certain premises. In construing this lien, the court said: “The farm produce may also be properly said to be *put* upon the premises. The word *put*, in a general sense, means simply to ‘lay or place.’ When the crops were planted they were *put* upon the premises. This is also true of the hay, although while in the form of growing grass it was part of the realty.” McCaffrey *v.* Woodin, 65 N. Y. 469.

Put in Repair. — In Wayzata *v.* Great Northern R. Co., 50 Minn. 438, it was held that where the charter of a railroad company gave to it a right to construct its railroad upon and along a highway, road, street, etc., if necessary, but required the company to “*put* such highway, etc., in such condition and state of repair as not to impair or interfere with its free and proper use,” the requirement was a continuing one, so that the company might at all times be required to keep the highway in the specified condition and state of repair, so far as consistent with the presence of the railroad upon it.

Put into His Hands. — The declaration alleged that a writ was *put* into the hands of the constable for service. The court said: “And we think, under this declaration, that

PUTATIVE. — See note 1.

PUTS. — See PUT, *ante*.

PUTTING CHARACTER IN ISSUE. — See note 2.

PUTTING IN FEAR. — See the title ROBBERY.

QUACK MEDICINE. (See also the title DRUGGIST, vol. 10, p. 266.) — See note 3.

QUADROON. — A descendant of a mulatto and a white is called a quadroon.⁴

QUALIFICATION — QUALIFY — QUALIFIED. — “Qualification” is defined as the endowment or acquirement which renders eligible to place or position.⁵

proof that the writ was offered to him, and made subject to his control, and his attention called to the duty required of him, is proof that it was ‘put into his hands.’ A sheriff may be without hands, or otherwise disabled from the manual taking of a writ, and the process may be, from the necessity of the case, put into his hat or pocket, and in such case it is ‘put into his hands’ and possession.” *Patten v. Sowles*, 51 Vt. 391.

Put Away. — In *Rex v. Palmer*, 2 Leach C. C. 978, R. & R. C. C. 72, 1 B. & P. N. R. 96, it was held that if a person knowingly delivered a forged banknote to another person, for the purpose of its being knowingly uttered by such other person, who uttered it accordingly, the deliverer of such note might be convicted of having “disposed of and put away” the note.

In *Rex v. Giles*, 1 Moody 166, it was held that giving a forged note to an innocent agent or accomplice that he might pass it was a disposing of it and putting it away.

1. **Putative Father.** — See *State v. Nestaval*, 72 Minn. 415; and see the title BASTARDY, vol. 3, p. 871.

Putative Matrimony. (See also the title MARRIAGE, vol. 19, p. 1156.) — In *Smith v. Smith*, 1 Tex. 628, it was said: “Putative matrimony is defined to be a marriage which, being null on account of some dissolving impediment, is held, notwithstanding, for a true marriage, because of its having been contracted in good faith, by both or one of the spouses being ignorant of the impediment. Good faith is always presumed, and he who would impede its effects must prove that it did not exist. To make the good faith perfect, it is necessary that the marriage should have been celebrated with the prescribed solemnities — that the spouses may have been ignorant of the annulling vice, and that their ignorance be excusable. Even after such marriage is annulled, it produces the civil effect of true matrimony, as well with respect to the spouses as with respect to the offspring.”

2. **Putting Character in Issue.** (See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 850.) — In *Porter v. Seiler*, 23 Pa. St. 430, it was said: “Putting character in issue is a technical expression which does not mean simply that the character may be affected by the result, but that it is of particular importance in the suit itself; as the character of the plaintiff in an action of slander, or that of a woman in an action on the case for seduction.” See also *Dudley v. McCluer*, 65 Mo. 243; *Stark v. Publishers*, *George Knapp*, etc., 160 Mo. 529.

3. **Quack Medicine.** — In *Kohler Mfg. Co. v. Beeshore*, (C. C. A.) 59 Fed. Rep. 574, it was

said: “It has been more than once held in this circuit that courts of equity will not intervene by injunction in disputes between the owners of quack medicines, meaning thereby remedies or specifics whose composition is kept secret, and which are sold to be used by the purchasers without the advice of regular or licensed physicians. *Fowle v. Spear*, 4 Pa. L. J. Rep. 145, 7 Pa. L. J. 176; *Heath v. Wright*, 3 Wall. Jr. (C. C.) 141. A similar view has prevailed in several state courts. *Wolfe v. Burke*, 56 N. Y. 115; *Smith v. Woodruff*, 48 Barb. (N. Y.) 438; *Laird v. Wilder*, 9 Bush (Ky.) 132.”

4. **Quadroon.** (See also MULATTO, vol. 20, p. 1079.) — *State v. Davis*, 2 Bailey L. (S. Car.) 559, where it was said that the term had not been adopted in South Carolina, and that a quadroon would in that state be called a mulatto or a person of color. See also *Thurman v. State*, 18 Ala. 280.

5. **Qualification.** — *Hyde v. State*, 52 Miss. 672. See also *Cummings v. Missouri*, 4 Wall. (U. S.) 319.

“Qualification for office * * * is endowment or accomplishment that fits for an office; having the legal requisites; endowed with qualities fit or suitable for the purpose.” *Com. v. Hanley*, 9 Pa. St. 517, quoted in *State v. Seay*, 64 Mo. 101, 27 Am. Rep. 206.

Absence of Disqualifications. — “The word qualification * * * implies not only the presence of every requisite which the constitution demands, but also the absence of every disqualification which it imposes.” *Hall v. Hostetter*, 17 B. Mon. (Ky.) 786, quoted in *Com. v. Jones*, 10 Bush (Ky.) 744.

Disqualification. — A statute relating to elections provided that so much thereof as related to the qualification of electors and candidates should take effect on a certain date. It was held that the word qualification, as thus used, did not include disqualification. *Reg. v. Manning*, 4 Ont. Pr. 73.

Grand Juror. — In *Byrne v. State*, 12 Wis. 519, it was held that the words “any person not having all the qualifications of an elector,” in a statute prescribing the qualifications of grand jurors, meant any person disqualified, incapacitated, or disentitled to vote from any of the causes fixed by law, and referred to the condition of the person at the time when his vote was received.

Juror — Bias. — Act Cong. July 20, 1840, prescribed that jurors in the federal courts must have the same qualifications as jurors in the state courts. It was held that the word qualifications, as here used, referred to general qualifications, as age, citizenship, etc., and

While the word "qualification" in one sense means fitness for, in another sense it is the doing of some act as a condition of taking or holding office.¹

QUALIFIED ACCEPTANCE. — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, pp. 208, 219, 224, 375.

QUALIFIED ELECTOR — VOTER. (See also the title **ELECTIONS**, vol. 10, p. 589 *et seq.*; and see **ELECTOR**, vol. 10, p. 860; **MAJORITY**, vol. 19, p. 613; **VOTER**.) — Without any accompanying explanation or limitation, the term "qualified elector" or "qualified voter" means one who is qualified to vote at an election for public officers.²

not to personal objections, such as bias, interest, and the like, which disqualify only at the instance of a party. *U. S. v. Williams*, 1 Dill. (U. S.) 485. See also the title **JURY AND JURY TRIAL**, vol. 17, p. 1086.

Qualified Teacher — Certificate. (See also the title **SCHOOLS**.) — In *Goetz v. School-Dist. No. 59*, 31 Minn. 164, it was held that an allegation in a complaint that the plaintiff was "a duly qualified teacher of and in the public schools of said state" included the fact that he had received the certificate required by the statute, "for without that fact he could not be a duly qualified teacher."

But in *Jackson School Tp. v. Farlow*, 75 Ind. 118, it was held, in an action by a teacher upon a contract entered into by him with a township trustee, that the complaint must allege that he had obtained the requisite license, and that an averment that he was "prepared and qualified in every particular to perform all the conditions of the contract" was not equivalent to such an allegation.

1. Condition Precedent to Holding Office. — *People v. Palen*, 74 Hun (N. Y.) 292; *People v. Crissey*, 91 N. Y. 616; *Vaughan v. Johnson*, 77 Va. 300.

Statutory Definition. — "The word *qualified*, when applied to any person elected or appointed to office, shall mean the performance by such person of those things which are required by law to be performed by him previous to his entering upon the duties of his office." Stat. Wis. (1898), § 4971, subd. 15; *State v. Knight*, 82 Wis. 160.

Qualified in Sense of Sworn In. — See *Ross v. Williamson*, 44 Ga. 503.

Sworn and Qualified. — In *Paca v. Dutton*, 4 Mo. 373, it was said: "Another objection taken to the final certificate of the clerk is that it says the judge was 'duly commissioned and sworn,' and the Act of Congress says the certificate shall say 'duly commissioned and qualified.' It is best to pursue the very words of the act. We are not entirely certain that Congress meant by the word *qualified* no more than that which is comprehended by the word 'sworn.'"

Oath. — "To *qualify* for an office means to take an oath of office." *People v. McKinney*, 52 N. Y. 380. See to the same effect *People v. Palen*, 74 Hun (N. Y.) 292. And see *Hale v. Salter*, 25 La. Ann. 324; *Archer v. State*, 74 Md. 447; *Ex p. Smith*, 8 S. Car. 519. See also *infra*, this note, *Holding Office until Successor Qualifies*.

Same — Holding Office until Successor Qualifies. (See also *supra*, this note, *Oath*, and see the title **PUBLIC OFFICERS**, *post*.) — Where a statute provided for the appointment of clerks *pro tempore* to fill vacancies, and authorized them

to hold office until their successors should be elected and *qualified*, it was held that the word *qualified* meant "nothing more than that the person elected has complied with the requisitions of the statute by giving bond and taking the oath of office." *State v. Neibling*, 6 Ohio St. 44. See to the same effect *State v. Albert*, 55 Kan. 159.

In *State v. Boyd*, 31 Neb. 732, it was said: "By 'failure to *qualify*' is meant failure to give the bond and take the oath of office required by the constitution."

And in *State v. Bemenderfer*, 96 Ind. 376, the court said: "The term *qualified*, as used in the statute, does not mean possessed of the necessary political, mental, and moral endowments, but means the acts performed after election, as taking an official oath and executing an official bond." See also *Searcy v. Grow*, 15 Cal. 117; *Steinback v. State*, 38 Ind. 483; *People v. Palen*, 74 Hun (N. Y.) 293.

But in *Com. v. Hanley*, 9 Pa. St. 517, it was said: "Being duly *qualified* in the constitutional sense, and in the ordinary acceptation of the words, unquestionably means that he, the successor, shall possess every *qualification*; that he shall, in all respects, comply with every requisite before entering on the duties of the office; that, in addition to being elected by the *qualified* electors, he shall be commissioned by the governor, give bond as required by law, and that he shall be bound by oath or affirmation (*vide* 8th article of constitution) to support the constitution of the commonwealth and to perform the duties of the office with fidelity."

Test Oath. — The Constitution of *New York* provides (art. 13, § 1), that no other oath, declaration, or test than the oath therein prescribed shall be required as a *qualification* for any office of public trust. A statute provided that every excise commissioner must make and file an oath that he was not interested in the manufacture or sale of intoxicating liquors. It was held that the statute was unconstitutional. The court said that the word *qualification* was "used in the constitution in the sense of something to be done before taking office, as a condition of holding it; in the sense of taking an oath of office, not in the sense of fitness." *People v. Palen*, 74 Hun (N. Y.) 293.

Qualify in Sense of Probate. — The word *qualify* has been held to be equivalent to "probate" where used in a statute authorizing probate judges "to *qualify* wills by receiving the evidence of the witnesses," etc. *Bent v. Thompson*, 5 N. Mex. 408.

2. Qualified Elector or Voter. — *Eagle County v. People*, 26 Colo. 297; *Beardstown v. Virginia*, 76 Ill. 34; *State v. Williams*, 5 Wis. 308; *State v. Tuttle*, 53 Wis. 45.

Registration Necessary. — By the term "qualified voter" is implied not simply that a person is eligible to be a voter, but also that he is registered as such in the way and manner prescribed by law.¹

QUALIFIED FEE. — A limited or qualified fee simple is such as has some collateral matter annexed to it whereby it is made by some means determinable, viz., by limitation or condition.²

QUALIFIED INDORSER. — See the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**, vol. 4, p. 275.

QUALIFIED PILOT. — See the title **PILOTS**, vol. 22, p. 814.

QUALIFIED PRIVILEGED COMMUNICATION. — See the title **LIBEL AND SLANDER**, vol. 18, p. 1029.

"A *qualified voter* is one who by law, at an election, is entitled to vote." *State v. Brassfield*, 67 Mo. 337. Standing alone, the term *qualified electors* means "persons who are legally qualified to vote." *State v. Crook*, 126 Ala. 600, *quoting* *Bouv. L. Dict.*

In *Com. v. Hanley*, 9 Pa. St. 518, it was said that the term *qualified electors* means "citizens, either native or naturalized, who have paid taxes and who are in all other respects entitled to vote."

Tally Sheet of Last General Election. — In *Bell v. Americus*, 79 Ga. 152, it was held, under a constitutional provision prohibiting any municipal corporation from incurring indebtedness without the consent of two-thirds of the *qualified voters* thereof at an election held for the purpose, that the legislature could prescribe the rule by which to ascertain whether two-thirds of the legally *qualified voters* voted at such election, and that an act providing that in determining the question the tally sheet of the last general election held in such municipality should be taken as a correct enumeration of the *qualified voters* thereof was constitutional.

The term *qualified voters*, as used in the Constitution of *Mississippi* in existence in 1883, art. 12, § 14, which required the assent of two-thirds of the *qualified voters* of a county to an issue of municipal bonds, was held in *Carroll County v. Smith*, 111 U. S. 556, to mean those qualified and actually voting, and not those qualified and entitled to vote. See also *Cronly v. Tucson*, (Ariz. 1899) 56 Pac. Rep. 877.

Elected and Qualified. — In *State v. Andrews*, (Kan. 1902) 67 Pac. Rep. 877, it was said: "The authorities are substantially agreed that there is a broad distinction between the meaning of the words 'elected and qualified' and that of 'qualified' alone, and the distinction is based upon the consideration that the word 'elected' has a well-defined and universally recognized meaning, and that when used it may not be assumed that the constitution framers intended it should have no significance, and might therefore be ignored."

Citizens and Qualified Electors Distinguished — Women. — In *State v. Ah Chew*, 16 Nev. 59, it was said: "Women are citizens, but they are not, under the constitution and laws of this state, *qualified electors*. They have no right to vote or hold any office."

The Constitution of *Colorado* makes ineligible to hold any county office every person who is not a *qualified elector*. It was held that the term *qualified elector* was here used in its broadest sense, meaning a person qualified to

vote generally, and did not include women. *Matter of House Bill 166*, 9 Colo. 628.

County-seat. (See also the title **COUNTY-SEAT**, vol. 7, pp. 1026, 1033.) — A statute provided that the question of the removal of a county-seat might be submitted to the voters whenever one-third of the *qualified voters* of the county petitioned therefor. In construing this statute the court said: "As the statute provides that all persons returned on the assessor's list as liable to pay a poll tax shall be counted as *qualified voters*, in ascertaining the total number of such voters in the county, we think that the right to petition for the removal of a county-seat is not confined to those only that have paid a poll tax, but extends to all citizens of the county who would have the right to vote upon the payment of a poll tax. In order to carry out the evident purpose of the legislature, the phrase *qualified voters* used in the act must be given this meaning in determining the qualification of petitioners, and not be restricted to such only as have paid their poll tax." *Dunn v. Lott*, 67 Ark. 593.

In *Wilson v. Bartlett*, (Idaho 1900) 62 Pac. Rep. 416, it was held that a *qualified elector* to sign a petition for the removal of a county-seat was one who possessed all the qualifications enumerated in the constitution.

Place of Voting. — In *Soldiers' Voting Bill*, 45 N. H. 602, it was said: "If the provisions of the state constitution make it a qualification of the voter for senators, within the meaning of the word 'qualifications' as used in the Constitution of the United States, that the vote should be cast in the place where the voter resides, then the legislature have not constitutional power to authorize votes for representatives to be given in other places than those where the voters dwell. * * * Now it would be an artificial and forced construction to hold that, in speaking generally of the qualifications of a voter, it would be intended to include as a qualification the place where by law he was required to give his vote."

1. Registration Necessary. — *State v. Brassfield*, 67 Mo. 337; *Smith v. Wilmington*, 98 N. Car. 348; *McDowell v. Massachusetts*, etc., Constr. Co., 96 N. Car. 514; *Southerland v. Board of Aldermen*, 96 N. Car. 49; *Duke v. Brown*, 96 N. Car. 127; *Wood v. Oxford*, 97 N. Car. 227; *Mew v. Charleston*, etc., R. Co., 55 S. Car. 90. But see *Davis v. Dawson*, 90 Ga. 520; *Madison v. Wade*, 88 Ga. 699.

2. Qualified Fee. — *Lott v. Wyckoff*, 1 Barb. (N. Y.) 575. See also the title **ESTATES**, vol. 11, p. 368.

QUALIFIED TITLE. — See note 1.

QUALITY. (See also the titles FRAUD AND DECEIT, vol. 14, p. 12; IMPLIED WARRANTIES, vol. 15, p. 1210; SALES; WARRANTY.) — Quality is defined as the condition of being of such a sort as distinguished from others; special or temporary character; profession, occupation.²

QUANDO ACCIDERINT. — When they shall come in; when they shall come to hand. A judgment against an executor or administrator directed to be satisfied out of the assets when they shall afterwards come to his hands is termed a judgment *quando acciderint*. Such a judgment is proper if the defendant has pleaded *plene administravit*, and it admits that the defendant has fully administered up to that time.³

QUANTI MINORIS. — An action of the civil law, adopted in *Louisiana*, to obtain a reduction in the price of a thing sold in consequence of a defect found in the article after the sale. The action must be begun within twelve months from the date of the sale, or at least from the time within which the defect became known to the purchaser, and it lies equally in cases where the seller knew of the defects of the thing sold as in those wherein he was ignorant of them and was acting in good faith.⁴

QUANTITY. (See also QUALITY, *ante*; and see the titles FRAUD AND

1. **Qualified Title.** — In *Illinois Steel Co. v. Bilot*, 109 Wis. 426, with regard to the rule that riparian owners have a *qualified title* to submerged lands in a navigable river, the court said: "We should say in passing that the term *qualified title*, as above used, refers to that interest in the beds of navigable streams which has passed to private ownership according to the uniform holdings of this court — a full title, subject to the public rights which were incident to the lands forming such beds at the time of the creation of the trust above mentioned." See also the title RIPARIAN RIGHTS.

2. **Quality.** — *Webst. Dict., quoted in State v. Martin*, 60 Ark. 353.

Kind and Quality Used Synonymously. — See *U. S. v. One Hundred and Thirty-Two Packages Spirituous Liquors*, 65 Fed. Rep. 982. Compare *Francis v. Maas*, 3 Q. B. D. 343.

Grade and Quality. — See *Whitehall Mfg. Co. v. Wise*, 119 Pa. St. 494.

Trademark. — In *Dennison Mfg. Co. v. Thomas Mfg. Co.*, 94 Fed. Rep. 657, it was said: "The word *quality* is used in different senses in the cases. It is employed in some to denote the grade, ingredients, or properties of an article, and in others to indicate generally the merit or excellence of an article as associated with or coming from a certain source. While there can be no valid trademark as denoting *quality* when used merely in the former sense, there may be a valid trademark as indicating *quality* when used in the latter sense." See also the title TRADE-MARKS.

Quality of Testimony — Instructions. — In *Gilmore v. Seattle, etc., R. Co.*, (Wash. 1902) 69 Pac. Rep. 744, the trial court instructed the jury that it should consider the *quality* of the testimony rather than the number of witnesses. This was held to be error, the court saying: "If by the use of the term *quality* the court meant the better evidence, then the court has invaded the province of the jury, for it is for the jury to say whether they will regard the testimony of the greater number of

witnesses testifying as more or less controlling than the better testimony of the fewer number." See also *Morton v. O'Connor*, 85 Ill. App. 273.

Land — Taxation. (See also the title TAXATION.) — By an *English* statute lands were to be rated for taxation according to their quantity and *quality*. In construing this statute *Lush, J.*, said: "The word *quality* cannot mean 'producing *quality*,' but the obvious intention is that the value shall be estimated with reference to that of land of a similar description not built upon, though it may be enhanced in value by the proximity of buildings." *Regent's Canal Co. v. St. Pancras*, 3 Q. B. D. 79.

Same — Cultivation. — Upon the meaning of *quality* of land, as the term is used in the rule that upon the partial failure of consideration in the *quality* of the land sold the vendee may recover damages, the court said: "To confine the term *quality*, in this connection, to natural *qualities*, such as fertility of soil and the like, would be a narrow construction. It must be understood in a more comprehensive sense, as embracing not only *qualities* essentially inherent in the land itself, but also adventitious *qualities* — *qualities* extrinsically added, such as preparation for cultivation or any other material improvement made upon the land." *Barnes v. Anderson*, 21 Ark. 126. See also the title VENDOR AND PURCHASER.

Same — Location and Circumstances. — A statute provided that in proceedings to assess damages for land taken under the right of eminent domain, the *quality* of the land must be described. It was held that the description of *quality* must have reference to the location and circumstances. *Pennsylvania R. Co. v. Bruner*, 55 Pa. St. 320. See also the title EMINENT DOMAIN, vol. 10, p. 1043.

3. **Quando Acciderint.** — See the title EXECUTORS AND ADMINISTRATORS, 8 ENCYC. OF PL. AND PR. 691.

4. **Quanti Minoris.** — *Millaudon v. Soubercase*, 3 Mart. N. S. (La.) 287.

DECEIT, vol. 14, p. 12; IMPLIED WARRANTIES, vol. 15, p. 1210; SALES; WARRANTY.) — See note 1.

QUANTUM. — Quantum means quantity, amount.²

QUANTUM DAMNIFICATUS. — An issue directed by a court of equity to be tried in a court of law, to ascertain by a jury the amount of damages suffered by the nonperformance of some collateral undertaking to secure which a penalty has been given. When such damages have thus been ascertained the court will grant relief upon their payment.³

QUANTUM MERUIT. — In pleading, as much as he has deserved. Where a person employs another to do work for him, without any agreement as to compensation, the law implies a promise to pay for the services as much as they may deserve or merit. In such case the plaintiff may suggest in his declaration that the defendant promised to pay him as much as he reasonably deserved, and then aver that his trouble was worth such a sum of money, which the defendant has omitted to pay. This is called an assumpsit on a *quantum meruit*.⁴

QUANTUM VALEBAT. — The name of the common count for goods sold and delivered.

1. **Quantity — Boundaries.** — In Pennsylvania R. Co. v. Bruner, 55 Pa. St. 318, it was held that in a proceeding to assess damages for land taken by a railroad company, a report setting out the adjoiners and boundaries, with a draft showing the length, breadth, courses, and distances of the ground taken, without a calculation of the contents, sufficiently set forth the *quantity* of land taken. See generally the title EMINENT DOMAIN, 7 ENCYC. OF PL. AND PR. 597.

Quantity Guaranteed. — The defendant, a common carrier, signed a bill of lading acknowledging receipt of a specified *quantity* of wheat and containing the words "*quantity guaranteed*." It was held that the words "*quantity guaranteed*" might be regarded as a technical expression, known to and understood by persons in the business, and evidence by such a person was proper to explain it. Bissel v. Campbell, 54 N. Y. 353.

Divers and Sundry. — In Com. v. O'Connell, 12 Allen (Mass.) 453, which was a prosecution for larceny, it was said: "It is not perceived * * * that the description of bank bills as '*a quantity*,' instead of '*divers and sundry*,' constitutes an error." See also State v. Hanchew, 3 Wash. 12, and see generally the title LARCENY, 12 ENCYC. OF PL. AND PR. 987 *et seq.*

2. **Quantum.** — Connelly v. Western Union Tel. Co., (Va. 1902) 40 S. E. Rep. 622.

3. **Quantum Damnificatus.** — Bouv. L. Dict., citing 4 Bouv. Inst. n. 3913.

4. **Quantum Meruit.** — Bouv. L. Dict.; 3 Black. Com. 161. See also the title MASTER AND SERVANT, vol. 20, pp. 25, 36, 43. And see ENCYC. OF PL. AND PR., titles ASSUMPSIT, vol. 2, p. 1010; WORK AND LABOR, vol. 22, p. 1360.

Quantum Valebat. — See ENCYC. OF PL. AND PR., titles ASSUMPSIT, vol. 2, pp. 1005, 1006; SALES, vol. 19, p. 15 *et seq.*

QUARANTINE.

BY THOMAS JOHNSON MICHIE.

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CROSS-REFERENCES.

See also the titles *ADULTERATION*, vol. 1, p. 738; *BOARDS OF HEALTH*, vol. 4, p. 596; *CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES*, vol. 7, p. 226; *DEMURRAGE*, vol. 9, p. 248; *HOSPITALS AND ASYLUMS*, vol. 15, p. 757; *INTERSTATE COMMERCE*, vol. 17, p. 34; *NUISANCES*, vol. 21, p. 679; *POLICE POWER*, vol. 22, p. 914; *PUBLIC OFFICERS*, *ante*; *SHIPS AND SHIPPING*.

I. DEFINITION. — The term “quarantine” was originally used to denote the forty days during which a ship arriving in port and known or suspected to be infected with a malignant or contagious disease was not allowed to land its passengers, freight, or crew, for fear of communicating such disease. In modern usage, it applies to a space of time, varying according to the exigencies of the case, during which certain persons are required to forbear all intercourse with others in order to prevent the spread of some disease with which they are supposed to be infected.¹

II. WHO MAY MAKE REGULATIONS. — A state may, in the exercise of its police power, pass quarantine and health laws with penalties for their violation, although they affect commerce in transit, and such statutes have been held constitutional in a large number of cases.² The statutes of the United

1. Definition. — Anderson's Law Dict.; Century Dict.; Gibson *v. The Steamer Madras*, 5 Hawaii 120. See also 10 Law Mag. & Rev. (14th series) 73; 2 Bl. Com. 135.

Prohibition Against Entering Harbor. — In Gibson *v. The Steamer Madras*, 5 Hawaii 109, it was held, under the circumstances, that a steamer with smallpox on board was not in quarantine during the time she was outside the harbor, pending a controversy with the board of health, and under a prohibition from it to enter the harbor.

Purchase of Vaccine Matter. — In Daniel *v. Putnam County*, 113 Ga. 570, it is said: “In view of * * * the history of our legislation in reference to the prevention of smallpox, it seems very evident that the word ‘quarantine,’ as used in the paragraph of the constitution which provides for what purposes counties may levy taxes, was not intended to have any more than its usual and legitimate meaning; and that it cannot be held that a

purchaser of vaccine matter, to be used to prevent the spread of smallpox in a county, was made for quarantine purposes, within the meaning of the word ‘quarantine’ as used in the constitution.” And see the title *POLICE POWER*, vol. 22, p. 923.

Vaccination. — See the titles *SCHOOLS*; *VACCINATION*.

The Object of Quarantine is to prevent the entrance or spread of disease. McNorton *v. Val Verde County*, (Tex. Civ. App. 1894) 25 S. W. Rep. 653.

“The prevention of disease is the essence of a quarantine law. Such law is directed not only to the actually diseased, but to what has become exposed to disease.” Smith *v. St. Louis, etc., R. Co.*, 181 U. S. 248.

2. Constitutionality of State Laws — *United States*. — Hannibal, *etc., R. Co. v. Husen*, 95 U. S. 465; *Morgan's Steamship Co. v. Board of Health*, 118 U. S. 455; *Crutcher v. Kentucky*, 141 U. S. 47; *Waterbury v. Street*, 3 U.

States have enjoined the observance of state quarantine and health statutes and regulations on customs, revenue, and other officers of the United States.¹

Municipal Authorities. — It has been held that a municipal corporation has no power to establish and enforce quarantine regulations, where such power has not been expressly granted it, and cannot be necessarily or fairly implied as incident to the powers expressly granted.² Municipal corporations, however, are usually authorized to establish a quarantine by their charters or by general law.³

III. PARTICULAR REGULATIONS AND CONSTRUCTION OF STATUTES. — Quarantine regulations must be reasonable, and in the note will be found collected a number of cases in which particular statutes or regulations have been considered by the courts.⁴

S. App. 147; *Peete v. Morgan*, 19 Wall. (U. S.) 581; *Gibbons v. Ogden*, 9 Wheat. (U. S.) 203; *Brown v. Maryland*, 12 Wheat. (U. S.) 419; *License Cases*, 5 How. (U. S.) 504; *Passenger Cases*, 7 How. (U. S.) 399; *U. S. v. Mills*, 7 Pet. (U. S.) 141; *Minneapolis, etc., R. Co. v. Milner*, 57 Fed. Rep. 276.

Florida. — *Ferrari v. Board of Health*, 24 Fla. 390.

Louisiana. — *Compagnie Francaise, etc., v. State Board of Health*, 51 La. Ann. 645, 72 Am. St. Rep. 458.

Michigan. — *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525.

Missouri. — *St. Louis v. McCoy*, 18 Mo. 238; *St. Louis v. Boffinger*, 19 Mo. 13.

Pennsylvania. — *Board of Health v. Loyd*, 1 Phila. (Pa.) 20, 7 Leg. Int. (Pa.) 7.

Vermont. — *State v. Speyer*, 67 Vt. 502, 48 Am. St. Rep. 832.

Due Process of Law. — The detention of persons or property liable to communicate disease, and even the destruction of property, have been held to be due process of law. *Slaughter House Cases*, 16 Wall. (U. S.) 36; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113.

1. State Quarantine — United States Officers. — *Rev. Stat. U. S.*, § 4792; *Rev. Stat. U. S., Supp.* (1874-91), p. 157, c. 66, § 5; *Ex p. O'Donovan*, 24 Fla. 281. See also *Gibbons v. Ogden*, 9 Wheat. (U. S.) 203; *Morgan's Steamship Co. v. Board of Health*, 118 U. S. 455.

The President is authorized to purchase or erect suitable quarantine storehouses, and the secretary of the treasury to extend the time for entry of vessels subject to quarantine laws. *Rev. Stat. U. S.*, §§ 4794-4796.

Power of Congress. — That Congress can control state laws so far as it may be necessary to control them for the regulation of commerce, see *Gibbons v. Ogden*, 9 Wheat. (U. S.) 1; *Passenger Cases*, 7 How. (U. S.) 399; *U. S. v. Mills*, 7 Pet. (U. S.) 141.

2. Municipal Authorities. — *New Decatur v. Berry*, 90 Ala. 432, 24 Am. St. Rep. 827.

In *Boon v. Utica*, 2 Barb. (N. Y.) 104, it was held that a municipal corporation had no power to direct the removal of a person sick with an infectious or contagious disease, from one place to another, without his consent.

3. Municipalities. — *Ex p. O'Donovan*, 24 Fla. 281, 23 Am. & Eng. Corp. Cas. 11, note; *Dubois v. Augusta, Dudley*, (Ga.) 30; *Anderson v. O'Conner*, 98 Ind. 168; *Harrison v. Baltimore*, 1 Gill (Md.) 264; *St. Louis v. McCoy*, 18 Mo. 238; *St. Louis v. Boffinger*, 19 Mo. 13; *Turner*

v. Toledo, 8 Ohio Cir. Dec. 196; *Zellner v. Allentown*, 5 Pa. Dist. 547, 18 Pa. Co. Ct. 162; *Bates v. Houston*, 14 Tex. Civ. App. 287. And see the title **POLICE POWER**, vol. 22, p. 922.

Delegation of Power. — In *Metcalfe v. St. Louis*, 11 Mo. 102, it was held that a statute authorizing a city to make quarantine regulations was not unconstitutional as a delegation of power.

In *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525, it was held that a statute providing that the state board of health might make rules for the inspection of the baggage of persons coming from a country where contagious diseases exist, was not a delegation of legislative power.

But in *Ex p. Cox*, 63 Cal. 21, it was held that the *California Act* of the 4th of March, 1881, relating to the Board of State Viticultural Commissioners, and providing that the officer therein mentioned should have power, subject to the approval of the board, to make and enforce rules and regulations in the nature of a quarantine for certain purposes, in so far as it declared that a wilful violation of the quarantine regulations of the board should be a misdemeanor, amounted to a delegation of legislative power, and was unconstitutional.

Board of Health. (See also the title **BOARDS OF HEALTH**, vol. 4, p. 596.) — A statute authorizing the establishment of a quarantine by a board of health was held not itself to establish the quarantine without action on the part of the board of health. *Ex p. O'Donovan*, 24 Fla. 281.

Same — Omission to Create. — In *Rae v. Flint*, 51 Mich. 526, it was held that the obligation and the power of the city council to act as a board of health to prevent the spread of contagion were not lessened by its omission to create a separate board of health.

4. Extent of Authority. — In *Sumner v. Philadelphia*, 9 Phila. (Pa.) 408, 30 Leg. Int. (Pa.) 329, it was held that a board of health had not an unlimited, arbitrary right to detain a vessel after there was no longer an appearance of malignant disease upon it.

Unreasonable Order of State Board of Health. — In *Wilson v. Alabama G. S. R. Co.*, 77 Miss. 714, 78 Am. St. Rep. 543, it was held that an order of the state board of health prohibiting all persons from getting off trains or boats at any point in the state was unreasonable and void. See also *Kosciusko v. Slomberg*, 68 Miss. 469, 24 Am. St. Rep. 281.

Existence of Pestilential Disease. — In *Eddy v. Board of Health*, 10 Phila. (Pa.) 94, 30 Leg. Int. (Pa.) 392, it was held that the power of the

IV. CHARGES FOR QUARANTINE SERVICES. — Reasonable charges for quarantine services may be imposed upon a vessel under state authority,¹ and it has been held that the prohibition of the imposition of tonnage taxes by a state

board of health of Philadelphia did not extend to the removal of tenants from their houses, and closing up the latter, unless justified by the existence of a pestilential disease, and such an action would be restrained by injunction.

Noninfected Persons. — The quarantine authorities may detain immigrants from noninfected countries, who have mingled with other passengers who could communicate pestilence or disease to which they themselves have been exposed or subjected. *Minneapolis, etc., R. Co. v. Milner*, 57 Fed. Rep. 276.

Dead Bodies. — In *Lake Erie, etc., R. Co. v. James*, 10 Ind. App. 550, it was held that a regulation of the state board of health providing that every dead body must be accompanied by a person in charge, who must present a transit permit from the proper health authority, giving permission for the removal, and showing the name and age of the deceased, the place and cause of death, the point to which the body is to be shipped, and the names of the medical attendant and undertaker, was a reasonable regulation.

Disinfection of Baggage. — Where a statute authorized state boards of health to establish regulations for the disinfection of the baggage of passengers coming from a country where a contagious disease existed, it was held that the board had no power to subject to disinfection the baggage of all immigrants whether or not such immigrants came from a port or locality where any dangerous, communicable disease existed. *Hurst v. Warner*, 102 Mich. 238, 47 Am. St. Rep. 525.

Disinfection of Rags. — In *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113, it was held that a regulation of the board of health providing for the disinfection of rags brought into the port was valid.

And for a regulation as to the importation of rags, see *Lockwood v. Bartlett*, 130 N. Y. 340.

Second-hand Clothing. — An ordinance forbidding second-hand clothing to be brought into or sold in a town has been held unreasonable and void. *Kosciusko v. Slomberg*, 68 Miss. 469, 24 Am. St. Rep. 281. To the same effect see *Greensboro v. Ehrenreich*, 80 Ala. 579, 60 Am. Rep. 130. See also *Weil v. Record*, 24 N. J. Eq. 169.

Express Business. — In *Matter of Smith*, 146 N. Y. 68, it was held that the mere fact that a person carried on an express business in a district in which there were many cases of small-pox would not justify his detention in quarantine until he consented to be vaccinated.

Deviation. — In *Forbes v. Board of Health*, 28 Fla. 26, it was held that under the *Florida* acts a county board of health had no authority without an examination or inspection to require vessels, upon entering a port within the jurisdiction of said board, to deviate from their course six miles and to go to a quarantine station for inspection and examination.

Requirement of Display of Flags until Vessel Visited by Quarantine Officer — *Indictment.* — *Bloom v. State*, 57 Miss. 752.

Appropriation of Vessel. — In *Mitchell v.*

Rockland, 45 Me. 496, it was held that where a vessel was subject to quarantine regulations, the officers of a town were not authorized to appropriate any part thereof for a hospital and to exclude the owner from the possession or control of any part of the vessel.

Forfeiture of Vessel for Violation of Quarantine Law. — See *Smith v. Maryland*, 18 How. (U. S.) 71.

Seizure of House and Furniture. — *Spring v. Hyde Park*, 137 Mass. 554, 50 Am. Rep. 334. See also *Brown v. Murdock*, 140 Mass. 314.

Disobedience of a Quarantine Order — **Averment of Knowledge of Order Held Necessary.** — *State v. Butts*, 3 S. Dak. 577.

Punishment under 26 Geo. II., Chapter 6, Section 1. — *Rex v. Harris*, 4 T. R. 202.

Exercise of Right of Eminent Domain to Acquire Lands for Establishment of Quarantine Station. — *Philadelphia Quarantine Station*, 22 Pa. Co. Ct. 176, 8 Pa. Dist. 157.

New York Act. — See *People v. Roff*, (Supm. Ct.) 3 Park. Crim. (N. Y.) 216.

Statute Establishing and Regulating Quarantine at the Lower Bay of New York. — *Seguine v. Schultz*, (Supm. Ct. Spec. T.) 31 How. Pr. (N. Y.) 398.

Health Officer at Port of New York. — In *Young v. Flower*, (Supm. Ct. Spec. T.) 3 Misc. (N. Y.) 34, it was held that in cases of necessity and in the presence of immediate danger the health officer of the port of New York might temporarily bring persons suspected with being infected with contagious diseases into any county of the state, notwithstanding the protest of the local health board.

Quarantine Commissioner. — As to the qualifications of a quarantine commissioner, see *People v. Platt*, 117 N. Y. 159.

Florida Act. — See *Ex p. O'Donovan*, 24 Fla. 281; *Ferrari v. Board of Health*, 24 Fla. 390.

Statutes Construed in Pari Materia. — *Ferrari v. Board of Health*, 24 Fla. 390; *Ex p. O'Donovan*, 24 Fla. 281.

1. Reasonable Charges May Be Imposed upon Vessels for Quarantine Services. — *Peete v. Morgan*, 19 Wall. (U. S.) 581; *Ferrari v. Board of Health*, 24 Fla. 390; *Morgan's Louisiana, etc., R. Co. v. Board of Health*, 36 La. Ann. 666, 118 U. S. 455; *Harrison v. Baltimore*, 1 Gill (Md.) 264; *Lockwood v. Bartlett*, 130 N. Y. 340.

But in *Forbes v. Board of Health*, 28 Fla. 26, it was held that under the *Florida* acts a county board of health had no authority to demand and collect from vessels coming into the jurisdiction of said board, fees for fumigation or disinfection, unless said vessels were subject to and had been put in quarantine.

Seamen. — In *Provincetown v. Smith*, 120 Mass. 96, it was held that the owner of a vessel under quarantine regulations was not liable for the expenses of a seaman at a hospital to which he had been transferred by order of the board of health of a town.

Same — **Lien.** — In *Platt v. The Georgia*, 34 Fed. Rep. 79, it was held that the services of quarantine commissioners in the care of sick seamen were maritime in their nature, and

does not forbid a charge for services under a quarantine act.¹ Expenses incurred under municipal regulations are to be borne by the municipal authorities where the patients or persons liable for their support are unable to pay them.²

V. LIABILITY FOR DAMAGES GROWING OUT OF ENFORCEMENT OF QUARANTINE REGULATIONS. — There can be no recovery from the municipal or state authorities of compensation for losses occasioned by the quarantining and disinfecting of premises infected with a contagious disease, where the only use made of the premises was such as was necessary for the proper care of the patients who were found suffering from the disease.³ Nor can a municipal corporation be held liable for an act of its health officer in wrongfully confining to quarantine a citizen supposed to be afflicted with a contagious disease, since in this respect the municipality is exercising a governmental duty.⁴ But though the municipality is not liable, the officer is if his acts are wrongful or unlawful.⁵

that a lien arising therefrom upon a vessel should be enforced by proceedings in admiralty.

Carrier. — In *Minneapolis, etc., R. Co. v. Milner*, 57 Fed. Rep. 276, it was held that the costs and charges which are incurred in quarantine inspection may lawfully be imposed on a carrier who brings suspected passengers within the state.

Owner of Vessel. — But in *New Orleans v. Windermere*, 12 La. Ann. 84, it was held that if during the voyage a contagious disease breaks out on the vessel, and on her arrival at port the city authorities find it necessary, in order to prevent the spreading of the infection, to have the sick passengers sent to a hospital to be treated, the owners of the vessel cannot be made liable for the expenses incurred thereby.

1. Tonnage Taxes. — *Peete v. Morgan*, 19 Wall. (U. S.) 581; *Morgan's Louisiana, etc., R. etc., Co. v. Board of Health*, 36 La. Ann. 666, 118 U. S. 455. And see the cases cited in the preceding note.

But in *Ferrari v. Board of Health*, 24 Fla. 391, it was held that quarantine charges could not be based on the tonnage of a vessel, as such charges would be tonnage taxes in violation of the Constitution of the United States. See also *Peete v. Morgan*, 19 Wall. (U. S.) 581; *Passenger Cases*, 7 How. (U. S.) 283.

2. Liability of Municipality. — *People v. Maccomb County*, 3 Mich. 475. See also *Matter of Taxpayers*, 157 N. Y. 78, reversing 27 N. Y. App. Div. 353.

In *Elliott v. Kalkaska Supervisors*, 58 Mich. 452, 55 Am. Rep. 706, it was held that the authority of a township board of health to guard against smallpox extended to making contracts for the nursing of patients and for destruction of infected clothing. See also *Rae v. Flint*, 51 Mich. 526.

Municipality Not Primarily Liable for the Expenses Incident to Quarantine. — But the patient, or the person liable for his support, is primarily liable for the expenses of quarantine. *Kollock v. Stevens Point*, 37 Wis. 348.

Disinfecting Property — Owner May Be Charged with the Expense. — *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 59 Am. Rep. 113. See also *Lockwood v. Bartlett*, 130 N. Y. 340.

Expenses of Burial. — In *McNorton v. Val Verde County*, (Tex. Civ. App. 1894) 25 S. W. Rep. 654, it was held that a county was not

liable for the burial expenses of a pauper who died in a pesthouse, which was in charge of the state under the quarantine laws.

3. Damages. — *Webb v. Board of Health*, 116 Mich. 516, 72 Am. St. Rep. 541.

Mandamus to Board of Supervisors Refused. — *Farnsworth v. Kalkaska County*, 56 Mich. 640.

Cases Allowing Compensation. — But in *Safford v. Board of Health*, 110 Mich. 81, 64 Am. St. Rep. 332, it was held that under the *Michigan* Act No. 403, Local Acts of 1893, prescribing the powers and duties of the board of health of the city of Detroit in cases of pestilence or epidemics, it was the duty of the board to award compensation for damages directly arising from its action in using a hotel for a hospital during an epidemic of smallpox among the inmates, and in causing the destruction of infected property.

And in *Boom v. Utica*, 2 Barb. (N. Y.) 104, it was held that a municipal corporation had no power to order the forcible seizure of a person's house and its occupation as a pesthouse, without his consent and against his will, and for such an act would be liable in damages.

Duty to Provide Food. — *Zellner v. Allentown*, 5 Pa. Dist. 547, 18 Pa. Co. Ct. 162.

4. Wrongful Confinement — Liability of Municipality. — *Mitchell v. Rockland*, 52 Me. 118; *Barbour v. Ellsworth*, 67 Me. 294; *Tilford v. New York*, 1 N. Y. App. Div. 199; *Turner v. Toledo*, 8 Ohio Cir. Dec. 196; *Bates v. Houston*, 14 Tex. Civ. App. 287.

In *White v. Marshfield*, 48 Vt. 20, it was held that the duties imposed and the powers conferred upon selectmen by a *Vermont* statute, when persons were infected with smallpox, were not imposed and conferred upon the town as such; and that the town was not liable for the acts or default of its selectmen in that behalf.

Appropriating House Without Owner's Consent. — No action can be maintained against a city or town for the unlawful acts of its health committee or other officers in taking possession of a house and using it for a smallpox hospital without the consent of the owner and without legal authority. *Lynde v. Rockland*, 66 Me. 309.

5. Liability of Officer. — *Forbes v. Board of Health*, 28 Fla. 26; *Beers v. Board of Health*, 35 La. Ann. 1132, 48 Am. Rep. 256; *Brown v. Murdock*, 140 Mass. 314; *Hersey v. Chapin*,

VI. CARRIERS --- WHARFINGERS. — A carrier may defend an action for non-delivery of goods or passengers at their place of destination on the ground that such delivery would be a breach of the quarantine regulations in force at that point.¹

VII. ANIMALS. — In a number of states statutes have been passed regulating the introduction of cattle into the state for the purpose of excluding cattle suffering with contagious diseases. Such statutes have been held constitutional.²

QUARANTINE (WIDOW'S). — See the title DOWER, vol. 10, p. 148.

QUARE CLAUSUM FREGIT. — See the title TRESPASS, 21 ENCYC. OF PL. AND PR. 786.

QUARREL. — See note.³

QUARRY. (See also the titles MINES AND MINING CLAIMS, vol. 20, p. 683; PROFIT À PRENDRE, *ante*.) — The word "quarry" is derived from the French word *quarrière*. "In the Latin of the lower ages, *quadratarius* was a stonecutter *qui marmora quadrat*, and hence *quarrière*, the place where he

162 Mass. 176; Aaron *v.* Broiles, 64 Tex. 316, 53 Am. Rep. 764.

1. **Carriers — Defense.** — In Wilson *v.* Alabama G. S. R. Co., 77 Miss. 714, 78 Am. St. Rep. 543, it was held that if a quarantine order of a state board of health was void, but was maintained by *vis major*, a railroad might yield thereto without actual collision, and might defend a suit against it by showing that the real cause of its action or failure to act complained of in suit was such uncontrollable necessity.

But in Ft. Worth, etc., R. Co. *v.* Masterson, (Tex. 1902) 66 S. W. Rep. 833, it was held that the existence of a void quarantine would not justify a railroad company in refusing to receive cattle for transportation.

In St. Louis Southwestern R. Co. *v.* Smith, 20 Tex. Civ. App. 451, it was held that a common carrier was not liable for its failure to deliver within the state of Texas cattle shipped from another state, where such delivery was forbidden by the live stock quarantine laws of Texas, and the shipper knew that such quarantine was in effect when he shipped the cattle.

Liability to Passenger for Detention. — As to the liability of a carrier to a passenger who is detained in quarantine by reason of an infectious disease among his fellow passengers, see The Normannia, 62 Fed. Rep. 469.

Charter-party. — In Waterbury *v.* Street, 3 U. S. App. 147, it was held that a steamer was excused from proceeding, as required by a provision of a charter-party, to a certain city by reason of the existence of a quarantine there.

Notice of Quarantine. — In Alabama, etc., R. Co. *v.* Hayne, 76 Miss. 538, it was held that an instruction that if the carrier knew when he received goods that he could not deliver them on account of the quarantine, he was liable for loss caused by delay, should have been qualified by a statement that there must have been a failure to notify the consignee of such inability.

In St. Clair *v.* Kansas City, etc., R. Co., 76 Miss. 473, it was held that if a ticket agent of a railroad company, knowing of the quarantine regulations prohibiting travel on a particular route, of which his principal was the initial

carrier, induced a person who was ignorant of the facts to buy a ticket by said route, the initial carrier would be liable for damages resulting from detention, owing to quarantine.

Wharfage. — In Elwell *v.* Fabre, 52 Hun (N. Y.) 70, where a steamboat line contracted with a wharfinger to pay wharfage "commencing with and including the day of each steamer's arrival in the port of New York," it was held that after arrival at port the steamship company was liable for wharfage upon vessels detained at quarantine.

2. **Constitutional Law — Live Stock.** (See also the titles ANIMALS, vol. 2, p. 380; INTERSTATE COMMERCE, vol. 17, p. 84.) — Kimmish *v.* Ball, 129 U. S. 217; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248; Reid *v.* People, (Colo. 1902) 68 Pac. Rep. 228; State *v.* Rasmussen, (Idaho 1900) 59 Pac. Rep. 933, *affirmed* 181 U. S. 198; St. Louis Southwestern R. Co. *v.* Smith, 20 Tex. Civ. App. 461.

In Hannibal, etc., R. Co. *v.* Husen, 95 U. S. 465, the *Missouri* statute against the introduction of Texas cattle was held void upon the ground that no discrimination was made by the law, in the transportation forbidden, between sound cattle and diseased cattle.

Strict Construction of Powers. — Asbell *v.* Edwards, 63 Kan. 610.

Liability Where Sound Animals Are Condemned and Destroyed as Diseased. — See Shipman *v.* Live-Stock Sanitary Commission, 115 Mich. 488.

Replevin Against Sheriff — Order of Quarantine Board as Justification. — Hardwick *v.* Brookover, 48 Kan. 609. See also Asbell *v.* Edwards, 63 Kan. 610.

Illinois Act Construed. — See Pierce *v.* Dillingham, 96 Ill. App. 300.

Massachusetts Act Construed. — See Kenneson *v.* Framingham, 168 Mass. 236.

Texas Live-stock Act Construed. — Roberson *v.* State, 38 Tex. Crim. 507; Ft. Worth, etc., R. Co. *v.* Masterson, (Tex. 1902) 66 S. W. Rep. 833.

3. **Quarrel.** — "It takes two to make a quarrel." Carr *v.* Conyers, 84 Ga. 287, 28 Am. & Eng. Corp. Cas. 138.

quadrates, or cuts the stone in squares; the place where the stone is cut in squares, generally a stone-pit;" clearly, therefore, referring to a place upon or above, and not under, the ground.¹

QUARTERLY. — Quarterly is the same as quarter-yearly, and means once in a quarter of a year.²

QUARTERS. — See note 3.

QUARTO DIE POST. — See note 4.

QUARTZ. — See note 5.

QUASH. — To quash is defined as to annul, overthrow, or vacate by judicial action.⁶

QUASI. — As if; a Latin word which marks a resemblance and which supposes a difference between two objects.⁷

1. **Quarry** — **Underground Excavation Not Included.** — *Bell v. Wilson*, L. R. 1 Ch. 309, *quoting* Encyc. Metropolitana.

In *Glasgow v. Farie*, 13 App. Cas. 677, it was said: "The word *quarry* is, no doubt, inapplicable to underground excavations; but the word 'mining' may without impropriety be used to denote some *quarries*. Dr. Johnson defines a *quarry* to be a stone mine."

Boundaries. — In *Huffman v. Hummer*, 18 N. J. Eq. 83, in construing a contract to convey lands bounded on the south by a line ten paces north of certain *quarries*, the face of the *quarries*, as worked, being towards the south, it was held that lands bounded on the south by a line ten yards north of the face of the *quarries*, as worked, were meant, without regard to the extent towards the north of the stone that constituted the *quarries*.

Working Quarry Lease. — See *Miller v. Chester Slate Co.*, 129 Pa. St. 81.

2. **Quarterly.** — *Kirk v. Hartman*, 63 Pa. St. 106. See also *Brunswick v. Finney*, 54 Ga. 323.

3. **Quarters.** — In *St. Cross Hospital v. de Walden*, 6 T. R. 338, it was held that if the *reddendum* in a renewed hospital lease was so many *quarters* of corn, it would be understood to mean legal *quarters*, reckoning the bushel at eight gallons, although the old leases before the statute 22 & 23 Car. II., c. 12, contained the same *reddendum*, and although formerly the lessees paid by composition, reckoning the bushel at nine gallons. See also the title **WEIGHTS AND MEASURES**.

4. **Quarto Die Post.** (See also **ENCYC. OF PL. AND PR.**, titles **DEFAULTS**, vol. 6, p. 62 *et seq.*; **RETURNS**, vol. 18, p. 901.) — In *Vollmer v. Avondale Marble Co.*, 10 Pa. Dist. 434, it was said, *quoting* Co. Litt. 135a: "'The day that is *quarto die post* is called *dies gratia*; for the very day of return is the day in law, and to that day the judgment hath relation; but no default shall be recorded till the fourth day be past, unless it be in a writ of right, where the law alloweth no day but only the day of return.' * * * The allowance of the *dies gratia* or the *quarto die post* was the practice in the English courts, and was presumably, upon the adoption of the common law in this state, introduced as the proper and approved practice thereunder, for we find it recognized in a number of our reports and in the Pennsylvania works on practice."

5. **Quartz.** — See *Bridgeport Wood Finishing Co. v. Hooper*, 5 Fed. Rep. 69.

6. **Quash.** — *Hood v. French*, 37 Fla. 122,

quoting Abb. L. Dict.; *Crawford v. Stewart*, 38 Pa. St. 36.

In *Bosley v. Bruner*, 24 Miss. 462, it was said: "The term *quash*, as applied to writs of error or other writs, is predicated of some defect in the writ itself, or in the form of the writ, which defect does not reach to the merits of the case. *Tidd's Pr.* 161, 1163. The usual practice in this state has been, as far as we have been able to ascertain it, whenever a writ is *quashed* for mere formal exceptions, to grant a party a new writ upon his original plaint."

Quash and Dismiss Distinguished. — See **DISMISS**, vol. 9, p. 505.

To Confirm — To Discharge — To Quash. — See *West Buffalo v. Walker Tp.*, 8 Pa. St. 180.

7. **Quasi.** — *Bouv. L. Dict.*, *quoted* in *People v. Bradley*, 60 Ill. 402.

Quasi Conveyance. — A will is a *quasi* conveyance. *May v. Slaughter*, 3 A. K. Marsh. (Ky.) 509.

Quasi-judicial Officer. — In *School Dist. No. Two v. Lambert*, 28 Oregon 223, it was said: "Where a power vests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer having no authority of a judicial character, the expression used is generally '*quasi* judicial,' so that where, in the exercise of a power, an officer is vested with a discretion, his act is regarded as *quasi* judicial." See also *U. S. v. Arredondo*, 6 Pet. (U. S.) 691; *U. S. v. California, etc., Land Co.*, 148 U. S. 31. And see the title **PUBLIC OFFICERS**, *ante*.

Quasi-probate Duty. — In *Atty.-Gen. v. Dodgington*, (1897) 1 Q. B. 734, the court said: "The duties specified in the schedule are probate duty and what may be termed '*quasi*-probate duty,' namely, duty payable in respect of dispositions not strictly testamentary, but dispositions which the legislature thought proper to include within the scope of the duty as being dispositions which might have a tendency to evade, and be executed for the purpose of evading, probate duty." See also the title **SUCCESSION TAXES**.

Quasi Public. — In *McKinnon v. Bliss*, 21 N. Y. 217, upon the admissibility of hearsay evidence, the court said: "But there are, no doubt, other cases in which the same kind of evidence may be received, for the purpose of establishing a mere private right, when the fact to be proved is one of a *quasi*-public nature, that is, one which interests a multitude

QUASI CONTRACTS. — See the titles *CONTRACTS*, vol. 8, pp. 91, 92; *IMPLIED OR QUASI CONTRACTS*, vol. 15, p. 1076.

QUASI CORPORATIONS — QUASI-MUNICIPAL CORPORATIONS — QUASI-PUBLIC CORPORATIONS. (See also the titles *CORPORATIONS (PRIVATE)*, vol. 7, p. 639; *COUNTIES*, vol. 7, pp. 901, 902; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1130; *MUNICIPAL SECURITIES*, vol. 21, p. 13; *SCHOOLS*; *TOWNS AND TOWNSHIPS*.) — Associations and government institutions possessing only a portion of the attributes which distinguish ordinary private or public corporations have sometimes been denominated "*quasi corporations*." Towns and other political divisions, school districts, boards of commissioners, overseers or trustees of the poor, etc., having authority to act and bring suit as united bodies, without regard to their membership for the time being, are *quasi corporations* of a public character.¹

of people or an entire community." See also the title *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 9.

1. Quasi Corporations. — *Wambersie v. Orange Humane Soc.*, 84 Va. 452.

In *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 103 U. S. 708, the court said: "What is meant by the words *quasi corporation*, as used in the authorities, is not always very clear. It is a phrase generally applied to a body which exercises certain functions of a corporate character, but which has not been created a corporation by any statute, general or special."

Counties Held to Be Quasi Corporations. — See the title *COUNTIES*, vol. 7, pp. 901, 902, and see *Granger v. Pulaski County*, 26 Ark. 37; *Goodnow v. Ramsey County*, 11 Minn. 31; *Warner v. Beers*, 23 Wend. (N. Y.) 175.

But in *Louisville, etc., R. Co. v. Davidson County Ct.*, 1 Sneed (Tenn.) 637, it was held that a county was neither a corporation nor a *quasi corporation*.

Board of Commissioners of County Held to Be Quasi Corporation. — See the title *COUNTY COMMISSIONERS*, vol. 7, p. 975, and see *Hamilton County v. Mighels*, 7 Ohio St. 109.

Drainage Commissioners Held to Be Quasi Corporation. — See *State v. Stewart*, 74 Wis. 620. See also the title *DRAINS AND SEWERS*, vol. 10, pp. 233, 234.

Fire Department Held to Be Quasi Corporation. — See *Clarissy v. Metropolitan Fire Dept.*, (N. Y. Super. Ct. Gen. T.) 7 Abb. Pr. N. S. (N. Y.) 352.

Highway Commissioners. — See the title *HIGHWAYS*, vol. 15, p. 411, and see *Road Com'rs v. McPherson*, 1 Spears L. (S. Car.) 218.

Levee District. — See *Carson v. St. Francis Levee Dist.*, 59 Ark. 533.

Levy Court Quasi Corporation. — In *Levy Ct. v. Coroner*, 2 Wall. (U. S.) 507, the Supreme Court of the United States held a levy court to be a *quasi corporation*.

Overseers of Poor. — See the title *CORPORATIONS (PRIVATE)*, vol. 7, p. 639, note.

Parish Quasi Corporation. — See *Adams v. Wiscasset Bank*, 1 Me. 361.

Churchwardens of Parish Held to Be a Quasi Corporation. — See *Withnell v. Gartham*, 6 T. R. 396.

Railroads. — See the title *RAILROADS*, *post*.

School Districts and Trustees Are Quasi Corporations. — *People v. Dupuyt*, 71 Ill. 654; *People v. School Trustees*, 78 Ill. 136; *Beach v. Leahy*,

11 Kan. 23; *Andrews v. Estes*, 11 Me. 267, 26 Am. Dec. 521; *Fourth School-Dist. v. Wood*, 13 Mass. 198; *Goodnow v. Ramsey County*, 11 Minn. 31; *Littlewort v. Davis*, 50 Miss. 403; *Carmichael v. School Lands*, 3 How. (Miss.) 84.

In *Harris v. School Dist. No. 10*, 28 N. H. 62, it was said: "School districts are *quasi corporations* of the most limited powers known to the laws. They have no powers derived from usage."

In *Beach v. Leahy*, 11 Kan. 23, it was held that a school district was only a *quasi corporation*, although declared by the statute to be a body corporate.

But in *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.*, 103 U. S. 708, it was held that by statute in *Nebraska* school districts are corporations in the fullest sense of that word, and not *quasi corporations*.

So in *Bassett v. Fish*, 75 N. Y. 311, it was said: "Now it is true that the trustees of an ordinary school district are a *quasi corporation*, and have corporate powers *sub modo*, and for a few specified purposes only (2 Kent's Com. 278). Had no more been said in this statute than to give power to form a union district, and to elect trustees of it, they would have become such a corporation, and so would the board into which they were constituted. When, then, the legislature by the same act declared that the board was thereby created a body corporate, it must have meant to go further than merely to make a *quasi corporation*."

Schools. — In 1789 M. bequeathed his estate in trust for the education of the poor children of Orange county. Until 1811 this trust remained unadministered. Then the legislature chartered the Orange Humane Society to administer it, which it did until 1876, when the legislature repealed the Act of 1811, and transferred the fund to the Orange county school board. It was held that this fund had been dedicated to public uses; that the Orange Humane Society was a *quasi-public corporation*; that over it the legislature, as *parens patriæ*, had exclusive control; and that the act repealing its charter was a valid act. *Wambersie v. Orange Humane Soc.*, 84 Va. 446.

Street Commissioners Held to Be Quasi Corporation. — See *English v. Jersey City*, 42 N. J. L. 275.

Town Held to Be Quasi Corporation. — See *Adams v. Wiscasset Bank*, 1 Me. 361; *Riddle v. Merrimack River Locks, etc.*, 7 Mass. 169;

QUASI CRIME — QUASI CRIMINAL. — See note 1.

QUASI DEPOSIT. — See the title DEPOSIT, vol. 9, p. 282.

QUASI DERELICT. — See note 2.

QUASI EASEMENTS. — See note 3.

QUASI-PUBLIC RECORDS. — See the titles DOCUMENTARY EVIDENCE, vol. 9, p. 877; RECORD.

QUAY. (See also the title WHARVES AND WHARFINGERS.) — A quay is defined to be a wharf at which goods or wares may be landed or shipped.⁴ The word "quay" has several significations. In a strict sense it may be confined to a sloping wall; in another, to the part of a port destined for the reception of merchandise. In a more enlarged sense it designates the whole space which separates the first row of houses of a city from the sea or river.⁵

QUESTION. — See note 6.

Fourth School-Dist. v. Wood, 13 Mass. 198; Goodnow v. Ramsey County, 11 Minn. 31; Warner v. Beers, 23 Wend. (N. Y.) 175.

1. **Quasi Crime — Quasi Criminal.** — See CRIME — CRIMINAL, vol. 8, p. 252, note, and generally the title FINES AND PENALTIES, vol. 13, p. 52.

As to Prosecutions for Bastardy, see State v. Snure, 29 Minn. 132, and the title BASTARDY, vol. 3, p. 875, note.

2. **Quasi Derelict.** — A case of *quasi derelict* occurs when the vessel is not abandoned, but those on board are physically and mentally incapable of doing anything for their safety. Sturtevant v. The Bark George Nicholas, 1 Newb. Adm. 452. See also DERELICT, vol. 9, p. 395.

3. **Quasi Easements.** (See also the title EASEMENTS, vol. 10, pp. 405, 406.) — "There are rights which are mentioned in the books as *quasi easements*: (1) Where there has been an easement proper with a dominant and servient tenement, and the ownership of such tenements has been unified. In such a case, when the ownership is again severed by a conveyance of the dominant tenement, the way will not pass by the general word 'appurtenances' merely, but there must be particular or general words indicating an intention to grant the way. * * * (2) There are other *quasi easements*, as when the owner of land has constructed a way or drain over one portion of it for the benefit of another portion, and there has never been a separate ownership of a dominant and servient tenement. This class is again subdivided into those which are called continuous, as a drain or sewer which is used continuously without the intervention of man, and those which are called noncontinuous, as a right of way which can only be used by the intervention of man repeated at intervals when user is desired." Parsons v. Johnson, 68 N. Y. 65.

4. Rowan v. Portland, 8 B. Mon. (Ky.) 253.

5. **Quay.** — De Armas v. New Orleans, 5 La. 152, *per* Martin, J., *dissenting*.

In New Orleans v. U. S., 10 Pet. (U. S.) 715, the vacant space in contest had been dedicated by the Western Company to public use, so far as a dedication was shown by the plan of the city and the indorsement of the word *quay* upon it. McLean, J., said: "In the agreed facts a *quay* is admitted to be a vacant space between the first row of buildings and the water's edge, and is used for the reception of goods and merchandise imported or to be exported. * * * The term is well understood in all commercial countries; and whilst there

may be some differences of opinion as to its definition, there can be little or none in regard to the probable and commercial signification of it. It designates a space of ground appropriated to the public use — such use as the convenience of commerce requires."

6. **Question.** — A Michigan statute (now Comp. Laws 1897, § 662) provides that when a probate judge is interested in any *question* to be decided by the court, he shall be deemed to be incapacitated for acting in the decision of that *question*. In McFarlane v. Clark, 39 Mich. 45, a will was presented for allowance in a probate court the judge of which was a legatee under the will. The probate judge made an order assigning a date for a hearing thereon, and requiring notice thereof by publication in a daily paper for three successive weeks previous to such day of hearing. The appellate court, *per* Cooley, J., said: "A *question* implies something in controversy, or which may be the subject of controversy, but this order was the determination of no *question*; it was only preliminary to the making of questions. It was in no proper sense judicial action at all." See generally the title JUDGE, vol. 17, p. 732 *et seq.*

In King v. McLean Asylum, (C. C. A.) 64 Fed. Rep. 339, it was said: "Our conclusion is that this history of the proceedings of the [constitutional] convention shows a settled purpose to include within the federal judicial jurisdiction all '*questions* which involve the national peace and harmony,' and that the word *questions* includes every issue capable of a judicial determination."

Question and Case. — See CASE, vol. 5, p. 748; also Pratt v. Paris Gas Light, etc., Co., 168 U. S. 259.

Question, Matter, Cause, or Proceeding. — Rev. Stat. U. S., § 5501, provides that any person acting on behalf of the United States in an official capacity who shall receive any money "with intent to have his decision or action on any *question*, matter, cause, or proceeding * * * influenced thereby" is punishable. It was held that a certificate which a member of a board of examining surgeons, appointed by the commissioner of pensions, was required to make out was a decision or action on a *question*, matter, cause, or proceeding. U. S. v. Van Leuven, 62 Fed. Rep. 62.

Federal Question. — See the title UNITED STATES COURTS.

Leading Question. — See the title EXAMINATION OF WITNESSES, 8 ENCYC. OF PL. AND PR. 80 *et seq.*

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPEDIA OF PLEADING AND PRACTICE, *titles* APPEALS, vol. 2, p. 1; DEMURRERS TO EVIDENCE, vol. 6, p. 438; DIRECTING VERDICT, vol. 6, p. 667; DISMISSAL, DISCONTINUANCE, AND NONSUIT, vol. 6, p. 823; FINDINGS OF COURT, vol. 8, p. 931; INSTRUCTIONS, vol. 11, p. 47; ISSUES TO THE JURY, vol. 11, p. 599; LEGAL CONCLUSIONS, vol. 12, p. 1020; NEW TRIAL, vol. 14, p. 707.

See also in this work the titles CONTRIBUTORY NEGLIGENCE, vol. 7, p. 363; COURTS, vol. 8, p. 21; CRIMINAL LAW, vol. 8, p. 274; DAMAGES, vol. 8, p. 536; EVIDENCE, vol. 11, p. 484; JUDICIAL NOTICE, vol. 17, p. 892; JURISDICTION, vol. 17, p. 1039; JURY AND JURY TRIAL, vol. 17, p. 1086; NEGLIGENCE, vol. 21, p. 455; PRESUMPTIONS, vol. 22, p. 1232; WITNESSES, *and the cross-references there given.*

I. IN GENERAL. — Logically considered, the trial of every case is an effort to complete a final syllogism, having, for one premise, matter of law; for the other, matter of fact; and for the conclusion the resulting proposition of liable or not liable, or, in a criminal case, guilty or not guilty. It is the duty of the court to supply the jury, if there is one, with material for the major premise of this syllogism; and it is the duty of the jury to collect from the evidence the minor premise, compare the two, draw the conclusion, and declare it in the verdict.¹

In England and in the United States Courts, where the practice exists of charging the jury as to the court's opinion of the facts and the weight of evidence, the line between law and fact is not drawn as it is in the state courts. The law is burdened and obscured by a great mass of common opinion, general understanding, practice, precedent, and authority (especially as to presumptions), that has passed for law, but is in truth not law, but fact, coming down to us largely by descent from the ancient custom of the court giving the jury its opinion of the evidence. To clear the law of this incumbrance, revive elementary principles strictly legal in their nature, separate the province of the court from the province of the jury, and maintain the latter in its entirety, is a duty put upon the state courts by constitutional provisions.²

II. PROVINCES OF COURT AND JURY RESPECTIVELY — 1. In Trials by Court with Jury — *a.* IN GENERAL. — The line between the duties of a court and of a jury, in the trial of causes at law, both civil and criminal, is, as will be seen more particularly hereinafter, perfectly well defined; and the rigid observance of it is of the last importance to the administration of systematic justice. While, on the one hand, the jury are the sole ultimate judges of the facts, they are, on the other, to receive the law applicable to the case before them, solely from the publicly given instructions of the court. In this way court and jury are made responsible, each in its appropriate department, for the part taken by each in the trial and decision of causes, and in this way alone can errors of fact and errors of law be traced, for the purpose of correction, to their proper sources.³

b. PROVINCE OF COURT TO DETERMINE QUESTIONS OF LAW IN CIVIL CASES. — The rule is well settled, and it would seem has never been doubted or questioned, that in civil actions tried before a court with a jury it is the province of the court to determine questions of law.⁴

1. See *Habersham v. State*, 56 Ga. 61.

2. *Per Doe, J.*, in *State v. Hodge*, 50 N. H. 50.

Distinctions Between Questions of Fact and Issues of Fact. — In *Heilig v. Stokes*, 63 N. Car. 612, it was declared under Const. N. Car., art. 4, § 10, which withheld from the Supreme Court jurisdiction to try "any issue of fact," that there is a distinction between questions of fact and issues of fact, and that the words "issues of fact" mean technically such matters of fact as are put in issue by the pleadings, and a decision of which would be final and conclude the parties upon the matters in controversy in the issue.

3. Provinces of Court and Jury Respectively Where Case Is Tried Before Court and Jury. — *State v. Smith*, 6 R. I. 33, *per Ames, C. J.* In this case the defendant was prosecuted for a statutory offense and a new trial was granted because the jury sent for and obtained a copy of the statute in order to determine what the law was.

4. Questions of Law Are for the Court in Civil Cases — *England.* — *Grendon v. Lincoln*, Plowd. 493; *Willion v. Berkley*, Plowd. 223; *Town-*

send's Case, Plowd. 111; *Rex v. St. Asaph*, 3 T. R. 431, note.

United States. — *New York Cent., etc., R. Co. v. Fraloff*, 100 U. S. 24; *Cahoon v. Ring*, 1 Cliff. (U. S.) 592; *U. S. v. Carlton*, 1 Gall. (U. S.) 400; *Steele v. Spencer*, 1 Pet. (U. S.) 552; *U. S. v. Battiste*, 2 Sumn. (U. S.) 240.

Alabama. — *Dickson v. Bamberger*, 107 Ala. 293; *Pollak v. Davidson*, 87 Ala. 551; *Westbrook v. Fulton*, 79 Ala. 510; *Bernstein v. Humes*, 78 Ala. 134; *Alexander v. Wheeler*, 69 Ala. 332; *Jones v. Pullen*, 66 Ala. 306; *Chisholm v. Cowles*, 42 Ala. 179; *Riley v. Riley*, 36 Ala. 496; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *Moore v. Leseur*, 18 Ala. 606.

Arkansas. — *Curtis v. State*, 36 Ark. 284.

California. — *Eastin v. Stockton Bank*, 66 Cal. 123, 56 Am. Rep. 77; *Fulton v. Onesti*, 66 Cal. 575; *Gerke v. California Steam Nav. Co.*, 9 Cal. 251, 70 Am. Dec. 650.

Connecticut. — *Morris v. Platt*, 32 Conn. 75.

District of Columbia. — *Thomas v. Presbrey*, 5 App. Cas. (D. C.) 217.

Georgia. — *Allen v. Frost*, 62 Ga. 659.

Illinois. — *Pennsylvania Coal Co. v. Conlan*,

Reference of Questions of Law to Jury. — It is error for the court to refer a question which is purely of a legal character to the determination of the jury;¹ but neither the submission by the court of a question of law to the jury nor the finding of the jury thereon is good ground for exception or assignment of error, provided such finding of the jury is right in law under the evidence in the case.²

c. PROVINCE OF COURT TO DETERMINE QUESTIONS OF LAW IN CRIMINAL CASES — (1) *At Common Law.* — In the *English* and the federal courts and in the courts of the great majority of the states the doctrine is well and firmly established that in the absence of any constitutional or statutory provision to the contrary it is the exclusive province of the court to determine all questions of law that arise in criminal prosecutions.³

101 Ill. 93, 6 Am. & Eng. R. Cas. 243; *Angelo v. Faul*, 85 Ill. 106; *Shackleford v. Bailey*, 35 Ill. 387. See also *Jacks v. Stimpson*, 13 Ill. 701.

Indiana. — *Conner v. Citizens St. R. Co.*, 105 Ind. 62, 55 Am. Rep. 177, 26 Am. & Eng. R. Cas. 210; *Evans v. Browne*, 30 Ind. 514, 95 Am. Dec. 710; *Jeffersonville, etc., R. Co. v. Peters*, 1 Ind. App. 69; *Townsend v. State*, 2 Blackf. (Ind.) 152.

Iowa. — *Hatfield v. Chicago, etc., R. Co.*, 61 Iowa 434, 11 Am. & Eng. R. Cas. 153.

Kansas. — *Drumm v. Cessnum*, 58 Kan. 331. *Kentucky.* — *Thornberry v. Churchill*, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125.

Maine. — *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62; *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48.

Maryland. — *Northern Cent. R. Co. v. State*, 31 Md. 357, 100 Am. Dec. 69; *Orear v. McDonald*, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Massachusetts. — *Williams v. Grealy*, 112 Mass. 79.

Michigan. — *Kempsey v. McGinniss*, 21 Mich. 123; *Farmers, etc., Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457.

Missouri. — *Coleman v. Roberts*, 1 Mo. 97.

New Hampshire. — *Bartlett v. Hoyt*, 33 N. H. 151.

New Jersey. — *Central R. Co. v. Moore*, 24 N. J. L. 824.

New York. — *Burt v. Horner*, 5 Barb. (N. Y.) 504; *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208.

North Carolina. — *Den v. Morrison*, 3 Murph. (7 N. Car.) 551.

Pennsylvania. — *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

South Carolina. — *Eason v. Miller*, 15 S. Car. 202; *Scott v. Crews*, 2 S. Car. 522. See also *Fairchild v. Bell*, 2 Brev. (S. Car.) 129, 3 Am. Dec. 702.

South Dakota. — *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462.

Tennessee. — *Fink v. Evans*, 95 Tenn. 413; *Robinson v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 594.

Texas. — *Bryant v. Kelton*, 1 Tex. 415.

Virginia. — *Keen v. Monroe*, 75 Va. 424.

Question of Law as to What a Party's Duty Is under Given Circumstances. — *Nolan v. New York, etc., R. Co.*, 53 Conn. 461.

Province of Court to Draw Inferences of Law from Facts Found by Jury. — *Markley v. Kirby*, 6 Kan. App. 494.

Disregard of Instructions by Jury. — Where the jury brings in a verdict contrary to the instructions of the court, a new trial may be granted. *Fairchild v. Bell*, 2 Brev. (S. Car.) 129, 3 Am. Dec. 702.

1. **Error in Submitting Question of Law to Jury.** — *Shaw v. Wallace*, 2 Stew. & P. (Ala.) 193.

2. **Harmless Error in Submitting Questions of Law to Jury.** — *McCormack v. Phillips*, 4 Dak. 506; *Coleman v. Heurich*, 2 Mackey (D. C.) 189.

3. **Questions of Law Are for the Court in Criminal Cases.** — 1 Best Ev. (Morgan's ed.), § 82; *Cooley Const. Lim.* 323, 324; *Forsyth Hist. of Trial by Jury* (Lond. ed., 1852), pp. 261, 262, 282 (Morgan's ed., pp. 235, 236); 1 *Greenl. Ev.*, § 49; 3 *Phill. Ev.* (Hill & Cowan's notes), pt. 2, 1501; *Proffat on Trial by Jury*, § 375; 1 *Taylor Ev.*, §§ 21-24; *Stark Ev.*, p. 816; *Worthington's Inquiry into the Power of Juries*, pp. 193, 194, which authorities were cited in *Sparf v. U. S.*, 156 U. S. 51, in which case the question was elaborately considered. See also the following cases:

England. — *Reg. v. Parish*, 8 C. & P. 94, 34 E. C. L. 307. See also *Parmiter v. Coupland*, 6 M. & W. 105.

United States. — *U. S. v. Keller*, 19 Fed. Rep. 633; *U. S. v. Houghton*, 14 Fed. Rep. 544; *U. S. v. Taylor*, 11 Fed. Rep. 470; *U. S. v. Shive*, *Baldw.* (U. S.) 510; *U. S. v. Wilson*, *Baldw.* (U. S.) 78; *U. S. v. Anthony*, 11 *Blatchf.* (U. S.) 200; *U. S. v. Riley*, 5 *Blatchf.* (U. S.) 204; *Stettinius v. U. S.*, 5 *Cranch* (C. C.) 573; *U. S. v. Stockwell*, 4 *Cranch* (C. C.) 671, 27 Fed. Cas. No. 16,405; *Com. v. Zimmerman*, 1 *Cranch* (C. C.) 47; *U. S. v. Morris*, 1 *Curt.* (U. S.) 48; *U. S. v. Carlton*, 1 *Gall.* (U. S.) 400; *U. S. v. Greathouse*, 4 *Sawy.* (U. S.) 457; *U. S. v. Battiste*, 2 *Sumn.* (U. S.) 240. See *contra*, *U. S. v. Callender*, 25 Fed. Cas. No. 14,709, holding that juries are judges of the law, but not of the constitutionality of a statute; *U. S. v. Poyllon*, *Law Repos.* (1 N. Car.) 60, 27 Fed. Cas. No. 16,081.

Alabama. — *Withers v. State*, 117 Ala. 89; *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163; *Goodwin v. State*, 102 Ala. 87; *Welsh v. State*, 97 Ala. 1; *Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8; *Dotson v. State*, 88 Ala. 208; *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25; *Batre v. State*, 18 Ala. 123; *Pierson v. State*, 12 Ala. 149; *State v. Jones*, 5 Ala. 666. See also *Burton v. State*, 107 Ala. 108; *Johnson v. State*, 59 Ala. 37; *Matthews v. State*, 55 Ala. 65; *Washington v. State*, 53 Ala. 29; *Bob v. State*, 32 Ala. 560; *Martha v. State*, 26 Ala. 72.

Authority of Juries to Find General Verdicts. — The unquestionable power of juries to find general verdicts, involving both law and fact, furnishes the foundation for the opinion that they are judges of the law as well as of the facts, and gives some plausibility to that opinion. They are not, however, compelled

Arkansas. — *Sweeney v. State*, 35 Ark. 585; *Robinson v. State*, 33 Ark. 180; *Edwards v. State*, 22 Ark. 253; *Pleasant v. State*, 13 Ark. 360. See *contra*, *Patterson v. State*, 7 Ark. 59, 44 Am. Dec. 530.

California. — *People v. Ivey*, 49 Cal. 56; *People v. Anderson*, 44 Cal. 65. See also *People v. Glenn*, 10 Cal. 32.

Colorado. — See *Solander v. People*, 2 Colo. 48.

Delaware. — *State v. Jeandell*, 5 Harr. (Del.) 483.

District of Columbia. — See *Brady v. U. S.*, 1 App. Cas. (D. C.) 246.

Florida. — See *Lambright v. State*, 34 Fla. 564; *Simon v. State*, 5 Fla. 285.

Georgia. — *Berry v. State*, 105 Ga. 683; *Hunt v. State*, 81 Ga. 140; *Robinson v. State*, 66 Ga. 517; *Malone v. State*, 66 Ga. 539; *Hill v. State*, 64 Ga. 453; *Habersham v. State*, 56 Ga. 61; *McMath v. State*, 55 Ga. 303; *Brown v. State*, 40 Ga. 689. See *contra*, *Anderson v. State*, 42 Ga. 9; *Clarke v. State*, 35 Ga. 75; *McPherson v. State*, 22 Ga. 478; *McGuffie v. State*, 17 Ga. 497; *Holder v. State*, 5 Ga. 441.

Indiana. — *McDonald v. State*, 63 Ind. 544; *Williams v. State*, 10 Ind. 503, wherein it is recognized *obiter* that in the absence of constitutional or statutory provisions the doctrine is as stated in the text, the rule in Indiana being changed by the constitution.

Iowa. — *State v. Reilly*, 104 Iowa 13; *State v. Moore*, 81 Iowa 578; *State v. Delong*, 12 Iowa 453. See also *Franks v. State*, 1 Greene (Iowa) 511.

Kansas. — *State v. Bowen*, 16 Kan. 475.

Kentucky. — *Montee v. Com.*, 3 J. J. Marsh. (Ky.) 132. See also *Dugan v. Com.*, 102 Ky. 241; *Hudson v. Com.*, 2 Duv. (Ky.) 531.

Maine. — *State v. Wright*, 53 Me. 328. See also *State v. Kimball*, 50 Me. 409. See *contra*, *State v. Snow*, 18 Me. 346.

Massachusetts. — *Com. v. Abbott*, 13 Met. (Mass.) 120; *Com. v. Porter*, 10 Met. (Mass.) 263, which cases, decided before the enactment of any statute upon the subject, support the proposition stated in the text. See *contra*, *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534, wherein the power of the court was confined to the determination of the admissibility of evidence; *Com. v. Worcester*, 3 Pick. (Mass.) 462. Compare *Com. v. Blanding*, 3 Pick. (Mass.) 304, 15 Am. Dec. 214.

Michigan. — *People v. Neumann*, 85 Mich. 98; *People v. Waldvogel*, 49 Mich. 337; *People v. Mortimer*, 48 Mich. 37; *Hamilton v. People*, 29 Mich. 173. See also *People v. Jenness*, 5 Mich. 305.

Mississippi. — *Williams v. State*, 32 Miss. 389, 66 Am. Dec. 615.

Missouri. — *Hardy v. State*, 7 Mo. 607. See also *State v. Hopper*, 71 Mo. 425.

Nebraska. — *Parrish v. State*, 14 Neb. 60. See also *Shepherd v. State*, 31 Neb. 389.

New Hampshire. — *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242; *Lord v. State*, 16 N. H. 325, 41 Am. Dec. 729; *Pierce v. State*, 13 N. H. 536.

New Jersey. — *Roesel v. State*, 62 N. J. L. 216; *Drake v. State*, 53 N. J. L. 23.

New York. — *People v. Bennett*, 49 N. Y. 137; *Duffy v. People*, 26 N. Y. 588; *Carpenter v. People*, 8 Barb. (N. Y.) 603; *People v. Pine*, 2 Barb. (N. Y.) 566, *per* Barculo, J.; *People v. Crosswell*, 3 Johns. Cas. (N. Y.) 337, decided by a divided court; *People v. Finnegan*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 147; *Safford v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 474. See also *People v. Gaffney*, (Buffalo Super. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 36; *People v. Hartung*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 256.

North Carolina. — See *State v. Elwood*, 73 N. Car. 189.

Ohio. — *Adams v. State*, 29 Ohio St. 412; *Montgomery v. State*, 11 Ohio 424; *Robbins v. State*, 8 Ohio St. 131.

Oregon. — See *State v. Carr*, 28 Oregon 389.

Pennsylvania. — *Theel v. Com.*, (Pa. 1888) 12 Atl. Rep. 148; *Com. v. McManus*, 143 Pa. St. 64; *Nicholson v. Com.*, 96 Pa. St. 503; *Com. v. Harman*, 4 Pa. St. 269; *State v. Bell*, Add. (Pa.) 156, 1 Am. Dec. 298; *State v. McFall*, Add. (Pa.) 255; *Com. v. Van Sickle*, Bright. (Pa.) 69. See also *Nicholson v. Com.*, 96 Pa. St. 503. See *contra*, *Kane v. Com.*, 80 Pa. St. 522, 33 Am. Rep. 787, *per* Sharswood, C. J.

Rhode Island. — *State v. Smith*, 6 R. I. 33.

South Carolina. — *State v. Drawdy*, 14 Rich. L. (S. Car.) 87. See also *State v. Stello*, 49 S. Car. 488; *State v. Williams*, 32 S. Car. 123. Compare *State v. Allen*, 1 McCord L. (S. Car.) 525, 10 Am. Dec. 687, which was a prosecution for libel.

Texas. — *Irish v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 633; *Pridgen v. State*, 31 Tex. 420, *per* Lindsay, J.; *Nels v. State*, 2 Tex. 280. See also *Carter v. State*, 37 Tex. 362.

Vermont. — *State v. Burpee*, 65 Vt. 1, 26 Am. St. Rep. 775, in which case the court overruled *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90, and all the previous cases which had followed that case. See also *State v. White*, 70 Vt. 225. See *contra*, *State v. Meyer*, 58 Vt. 457; *State v. Haynes*, 36 Vt. 667; *State v. Wilkinson*, 2 Vt. 480, 21 Am. Dec. 560, *per* Prentiss, J. Compare *State v. McDonnell*, 32 Vt. 491.

Virginia. — *Brown v. Com.*, 86 Va. 466, in which case it was held that the court properly refused an instruction that the jury were the judges of the law as well as the facts. See also *Day v. Com.*, 2 Gratt. (Va.) 561; *Com. v. Garth*, 3 Leigh (Va.) 760, *per* Summers, J.; *Davenport v. Com.*, 1 Leigh (Va.) 588. Compare *Gwatkin v. Com.*, 9 Leigh (Pa.) 678, 33 Am. Dec. 264; *Doss v. Com.*, 1 Gratt. (Va.) 557, *per* Smith, J., *obiter*; *Dance's Case*, 5 Munf. (Va.) 349, *per* Roane, J., *obiter*; *Baker v. Preston*, Gilm. (Va.) 235, *per* White, J., *obiter*.

West Virginia. — See *State v. Michael*, 37 W. Va. 565.

Review of Authorities. — For able discussions of this question and exhaustive reviews of

to decide legal questions, having the right to find special verdicts giving the facts, and leaving the legal conclusions, which result from such facts, to the court. When they find general verdicts it is their duty to be governed by the instructions of the court as to all legal questions involved in such verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided no means, in criminal cases, of reviewing their decisions in favor of the defendant, whether of law or fact, or of ascertaining the grounds upon which their verdicts are based.¹

Instructions Which Submit Questions of Law to the Jury should not be given in those states where questions of law are for the court,² but it has been almost uniformly held that error in submitting a question of law to the jury is one of which the defendant cannot complain.³

(2) *Constitutional Provisions.* — In *Indiana*, *Louisiana*, and *Maryland* it is

early cases which were decided before all doubts upon the question had been removed, see the following cases: *Sparf v. U. S.*, 156 U. S. 51; *U. S. v. Morris*, 1 Curt. (U. S.) 48; *State v. Wright*, 53 Me. 328; *Com. v. Anthes*, 5 Gray (Mass.) 185; *State v. Hodge*, 50 N. H. 510; *Pierce v. State*, 13 N. H. 536; *Roesel v. State*, 62 N. J. L. 216; *Drake v. State*, 53 N. J. L. 23; *State v. Jay*, 34 N. J. L. 368, *per* Beasley, C. J.; *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90; *Brown v. Com.*, 86 Va. 466.

Provision of Const. U. S., Art. 6. — Some light is thrown upon this question by Const. U. S., art. 6, which after declaring that the constitution, laws, and treaties of the United States shall be the supreme law of the land, provides that "the judges, in every state, shall be bound thereby." *U. S. v. Morris*, 1 Curt. (U. S.) 48, which was a criminal prosecution.

Doctrine in Virginia that Court Must Not Voluntarily Instruct Jury as to Law of the Case. — In Virginia it is not the practice of the court unasked to charge the jury upon the law of the case, yet the mere fact that it does so cannot, of itself, be assigned as error. *Dejarnette v. Com.*, 75 Va. 867.

The Court May Direct the Jury to Take the Law from the Court. — *Hunt v. State*, 81 Ga. 140, *following* *Malone v. State*, 66 Ga. 539; *Robinson v. State*, 66 Ga. 517; *Hill v. State*, 64 Ga. 453. See also *State v. Miller*, 53 Iowa 154, holding that it was not error to caution the jury that they had no authority to construe the law except as given them by the court, and that unless their verdict should accord with the law as so given they would be guilty of wilful perjury.

In Kentucky, Minnesota and Texas It Is Provided by Statute that the jury shall not decide questions of law. *Com. v. Van Tuyl*, 1 Met. (Ky.) 1, 71 Am. Dec. 455, wherein it was held that such a statute is constitutional; *State v. Rheams*, 34 Minn. 18; *State v. Taunt*, 16 Minn. 100; *Johnson v. State*, 5 Tex. App. 423.

North Carolina Statute Allowing Counsel to Argue Both Law and Facts to Jury in Criminal Cases. — See *State v. Miller*, 75 N. Car. 73.

1. Authority of Juries to Find General Verdicts. — 5 Bac. Abr. 384, tit. Juries, M.; 1 Co. Litt. 155b, note; 2 Hawk. P. C., c. 72, p. 163, which authorities were cited in *Roesel v. State*, 62 N. J. L. 216. See also the following cases:

United States. — *U. S. v. Taylor*, 11 Fed. Rep. 470. See also *U. S. v. Morris*, 1 Curt. (U. S.) 48.

Alabama. — *State v. Jones*, 5 Ala. 666.

Arkansas. — *Robinson v. State*, 33 Ark. 180.

Delaware. — *State v. Jeandell*, 5 Harr. (Del.) 475.

Georgia. — *Berry v. State*, 105 Ga. 683; *Robinson v. State*, 66 Ga. 517; *Anderson v. State*, 42 Ga. 9; *McDaniel v. State*, 30 Ga. 853; *McGuffie v. State*, 17 Ga. 497.

Indiana. — *Townsend v. State*, 2 Blackf. (Ind.) 151.

Kentucky. — *Com. v. Van Tuyl*, 1 Met. (Ky.) 1, 71 Am. Dec. 455.

Louisiana. — *State v. Jurche*, 17 La. Ann. 71.

Maine. — *State v. Wright*, 53 Me. 328; *State v. Snow*, 18 Me. 346.

Massachusetts. — *Com. v. Knapp*, 10 Pick. (Mass.) 477, 20 Am. Dec. 534; *Com. v. Corter*, 10 Met. (Mass.) 263.

Michigan. — *People v. Neumann*, 85 Mich. 98; *People v. Mortimer*, 48 Mich. 37.

Nebraska. — *Parrish v. State*, 14 Neb. 60.

New Jersey. — *Roesel v. State*, 62 N. J. L. 216.

New York. — *Duffy v. People*, 26 N. Y. 588.

Pennsylvania. — *Kane v. Com.*, 89 Pa. St. 522, 33 Am. Rep. 787.

South Carolina. — *State v. Allen*, 1 McCord L. (S. Car.) 525, 10 Am. Dec. 687; *State v. Drawdy*, 14 Rich. L. (S. Car.) 87.

Vermont. — *State v. Croteau*, 23 Vt. 14, 54 Am. Dec. 90.

Virginia. — *Brown v. Com.*, 86 Va. 466.

Where the Issue Involves a Mixed Question of Law and Evidence the jury is necessarily the judge of the law and testimony in order to determine the criminal intent, etc. *Robinson v. State*, 33 Ark. 180; *Pleasant v. State*, 13 Ark. 360.

The Two Branches of the Rule Are Reconcilable in that the jury may be judges of the law without having the right to contradict the court or to reject what is delivered as law from the bench. *Habersham v. State*, 56 Ga. 61, *per* Bleckley, J.

2. Submitting Legal Questions to Jury. — *Paul v. State*, 100 Ala. 136; *Bob v. State*, 32 Ala. 560; *Pierce v. State*, 13 N. H. 536.

3. Harmless Error in Submitting Legal Questions to Jury. — *Pleasant v. State*, 13 Ark. 360; *Brown v. State*, 40 Ga. 689; *State v. Johnson*, 30 La. Ann. 904, wherein it was held that it is not error to charge the jury that "if they thought they knew more of the law than the judge, it was their privilege to so believe."

provided by constitution that the jury shall be judges of the law in criminal cases,¹ but it has been declared that such a constitutional provision does not confer upon the jury the right to disregard the law, and that the court may advise the jury that although they have the legal right to disagree with the court as to what the law is, still they should weigh the court's instructions and not disregard them without proper reason.²

(3) *Statutory Provisions.* — In *Connecticut* and *Illinois* statutes have been enacted which either in terms or by implication make juries judges of the law in criminal cases.³

The English Libel Act, otherwise known as Fox's Libel Act, which provides with reference to prosecutions for libel that "the court or judge before whom such indictment or information shall be tried shall, according to their or his discretion, give their or his opinion and directions to the jury on the matter in issue between the king and the defendant, in like manner as in other criminal cases," did not change in any degree the general common-law rule in criminal cases as to the right of the court to decide the law and the duty of the jury to apply the law thus given to the facts, subject to the condition, inseparable from the jury system, that the jury by general verdict of necessity determine in the particular case both the law and the fact as compounded in the issue submitted to them.⁴

2. In Trials by Court Without Jury. — It is the prevailing doctrine of the federal and state courts, in some of which it is fixed by statute, and in most adopted as resting upon reason and sound principle, that the finding of a

1. Constitutional Provisions Making Juries Judges of the Law in Criminal Cases — *Indiana.*

— *Blaker v. State*, 130 Ind. 203; *Anderson v. State*, 104 Ind. 467; *Stout v. State*, 96 Ind. 407; *Hudelson v. State*, 94 Ind. 426, 48 Am. Rep. 171; *Nuzum v. State*, 88 Ind. 599; *Powers v. State*, 87 Ind. 144; *Fowler v. State*, 85 Ind. 538; *Keiser v. State*, 83 Ind. 234; *McDonald v. State*, 63 Ind. 544; *McCarthy v. State*, 56 Ind. 203; *Clem v. State*, 42 Ind. 420, 13 Am. Rep. 369; *Daily v. State*, 10 Ind. 536; *Williams v. State*, 10 Ind. 503; *Lynch v. State*, 9 Ind. 541; *Hogg v. State*, 7 Ind. 551; *Stocking v. State*, 7 Ind. 326; *Driskill v. State*, 7 Ind. 338; *Murphy v. State*, 6 Ind. 490; *Armstrong v. State*, 4 Blackf. (Ind.) 247.

Louisiana. — *State v. Ford*, 37 La. Ann. 443; *State v. Vinson*, 37 La. Ann. 792; *State v. Tally*, 23 La. Ann. 677; *State v. Saliba*, 18 La. Ann. 35; *State v. Jurche*, 17 La. Ann. 71; *State v. Scott*, 12 La. Ann. 386; *State v. Bal-lerio*, 11 La. Ann. 81; *State v. Scott*, 11 La. Ann. 429. See also *State v. Cason*, 28 La. Ann. 40.

Maryland. — *Swann v. State*, 64 Md. 423; *World v. State*, 50 Md. 49; *Forwood v. State*, 49 Md. 531; *Bloomer v. State*, 48 Md. 521; *Broll v. State*, 45 Md. 356; *Wheeler v. State*, 42 Md. 563; *Franklin v. State*, 12 Md. 236. See also *Bell v. State*, 57 Md. 108.

The Constitution of Georgia of 1877 declared that the juries in criminal cases are "judges of the law as well as the facts." *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Ridenhour v. State*, 75 Ga. 382. But it seems that this provision is no longer in force. See *Berry v. State*, 105 Ga. 683.

2. *Constitutions Construed.* — *Blaker v. State*, 130 Ind. 203; *Anderson v. State*, 104 Ind. 467; *State v. Ford*, 37 La. Ann. 443. See also *Danforth v. State*, 75 Ga. 614, 58 Am. Rep. 480; *Ridenhour v. State*, 75 Ga. 382, which cases

were decided under a constitutional provision which it would seem is no longer in force.

3. *Statutory Provisions Making Juries Judges of the Law in Criminal Cases* — *Connecticut.* — *State v. Fetterer*, 65 Conn. 287; *State v. Thomas*, 47 Conn. 546, 36 Am. Rep. 98; *State v. Buckley*, 40 Conn. 246.

Illinois. — *Mullinix v. People*, 76 Ill. 211; *Adams v. People*, 47 Ill. 376; *Fisher v. People*, 23 Ill. 283.

Construction of Statute. — In *Spies v. People*, 122 Ill. 252, it was held that although it is provided by statute that "juries in all criminal cases shall be judges of the law and fact," it is proper to instruct the jury that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so," but that "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court." See also *Com. v. Anthes*, 12 Gray (Mass.) 29, 5 Gray (Mass.) 185.

A Statute of Georgia in force in 1860 made juries judges of the law as well as of fact. *Dickens v. State*, 30 Ga. 383. But this statute, it would seem, is no longer in force. See *Berry v. State*, 105 Ga. 683.

Massachusetts Statute Construed. — It has been held that Stat. Mass. 1855, c. 152, declaring that it shall be the duty of the jury after receiving the instructions of the court "to decide at their discretion, by a general verdict, both the fact and the law involved in the issue, or to return a special verdict, at their election," does not confer upon the jury the rightful power to determine questions involved against the instructions of the court. *Com. v. Anthes*, 5 Gray (Mass.) 185, 12 Gray (Mass.) 29.

4. *Effect of English Libel Act.* — *Parmiter v. Coupland*, 6 M. & W. 105; *Reeves v. Templar*, 2 Jur. 137, cited in *Spaff v. U. S.*, 156 U. S. 51.

court sitting without a jury is in the nature of a special verdict, and conclusive as to the facts of the case, where the evidence is not set forth in full and exceptions taken to the findings as not supported by evidence.¹

III. MIXED QUESTIONS OF LAW AND FACT — 1. Definition. — Every case involves one or more questions of law and of fact, and therefore one or more questions of mixed law and fact; but the term "mixed question of law and fact" has come to have a less comprehensive meaning, and, as used in its restricted sense, does not seem to be capable of a very exact definition. It has been declared that although there are some plain lines of demarcation between what are questions of law for the court and questions of fact for the jury, there is a borderland of controversy in which the opposing principles seem to be in continual conflict, and that this conflict often is ended in a reasonable compromise by which the question has become what is termed a "mixed question of law and fact" to be submitted to the decision of the jury under proper instructions of the court.² A mixed question of law and fact seems to be, therefore, the question that arises in that class of cases where the facts are to be determined by the jury and where, in addition, the law, although it affords general principles, does not give the precise rules for the determination of the case, so that it is incumbent upon the jury to ascertain not only the facts, but also the application of the law, stated by the court more abstractly than in ordinary cases, the findings of the jury being not merely findings of fact but findings upon the ultimate question or questions involved in the case as to the rights and liability of the party.³

2. Provinces of Court and Jury Respectively — In General. — Where there is a mixed question of law and fact, as in cases in which there are presented pure questions of law and pure questions of fact, it is the exclusive province of the court to declare to the jury what the law is, and it is the exclusive province of the jury to ascertain what the facts are, the only difference in such case being that the jury are to apply the facts as they may find them to the rules of law which are given in the instructions and make one or more findings which embody not only the facts found but also the jury's application of the law to such facts; *e. g.*, in an action for negligence the court will instruct the jury as to what constitutes negligence, and the jury will find whether or not there was negligence, thereby not only finding the facts, but also applying the law as declared by the court.⁴

1. Province of Court to Find Facts in Trials Without Jury. — *Woodruff v. McDonald*, 33 Ark. 97; *Allen v. Jones*, 50 Mo. 205; *Kelly v. Miller*, 39 Miss. 17; *Bass v. Walsh*, 39 Mo. 192; *Lee v. Ashbrook*, 14 Mo. 378, 55 Am. Dec. 110; *Toomey v. Atyoe*, 95 Tenn. 373; *Bell v. State*, 18 Tex. App. 53, 51 Am. Rep. 293; *Missouri Pac. R. Co. v. York*, 2 Tex. App. Civ. Cas., § 641; *Kahn v. Central Smelting Co.*, 2 Utah 371.

Where Jury Is Waived in Criminal Cases. — It is the province of the court to weigh the evidence and to pass upon the law and the facts in a criminal case when a jury is waived. *Briggs v. State*, 6 Tex. App. 144.

In Suits in Equity questions of fact are for the court. *Webster v. Webster*, 33 N. H. 18, 66 Am. Dec. 705; *Creed v. Lancaster Bank*, 1 Ohio St. 1.

2. Per Sharswood, J., in McKibbin v. Martin, 64 Pa. St. 352, 3 Am. Rep. 588.

3. Mixed Question of Law and Fact Defined. — *Colley v. Westbrook*, 57 Me. 181, 2 Am. Rep. 30. See also the following cases: *East Tennessee, etc., R. Co. v. Bayliss*, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Day v.*

Owen, 5 Mich. 520, 72 Am. Dec. 62; *Plummer v. Gheen*, 3 Hawks (10 N. Car.) 66, 14 Am. Dec. 572; *Jessup v. Johnston*, 3 Jones L. (48 N. Car.) 335, 67 Am. Dec. 243; *Oxnard v. Var-num*, 111 Pa. St. 193, 56 Am. Rep. 255; *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125; *Scott v. Crews*, 2 S. Car. 522; *Jackson v. Bell*, 5 S. Dak. 257.

4. Province of Court with Reference to Mixed Questions of Law and Fact. — *Indianapolis, etc., R. Co. v. Morgenstern*, 106 Ill. 216, 12 Am. & Eng. R. Cas. 228; *Baltimore, etc., R. Co. v. Breinig*, 25 Md. 378, 90 Am. Dec. 49; *Macklot v. Dubreuil*, 9 Mo. 477, 43 Am. Dec. 550; *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Doll v. Schoenberg*, 2 Disney (Ohio) 54; *Bamberger v. Citizens' St. R. Co.*, 95 Tenn. 18, 49 Am. St. Rep. 909; *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

Province of Jury with Respect to Mixed Questions of Law and Fact — United States. — *Jackson v. Porter*, 1 Paine (U. S.) 457.

Alabama. — *Nelson v. Howison*, 122 Ala. 573; *Mauldin v. Branch Bank*, 2 Ala. 502.

District of Columbia. — *McDade v. Washing-*

Submission of Questions of Law to the Jury. — When a question is a mixed question of law and fact the court should not leave to the jury in part a question of law. Thus, in an action for malicious prosecution, the question of probable cause being a mixed question of law and fact, the court should not leave it to the jury to say as a question of fact on the evidence whether or not there was probable cause. It is the duty of the court to determine whether the proof of certain facts constitutes probable cause, and it is the duty of the jury to say whether or not there is proof of such facts.¹

When Submission of Question of Fact to Jury Is Unnecessary and Improper. — It is only when the evidence is conflicting or the admitted facts are such that reasonable minds may draw different inferences from them that a mixed question of law and fact arises. When the facts are admitted or are undisputed, or where the evidence is not conflicting, there is no question which need be submitted as a question of fact, and the court may withdraw the case from the jury and itself decide all questions which are involved as questions of law; *e. g.*, the question of negligence is often a mixed question of law and fact; but when the direct fact or facts in issue are ascertained by undisputed evidence, and such fact or facts are decisive of the case, a question of law is raised and the court should decide it without submitting any question to the jury.²

3. Illustrations of Mixed Questions of Law and Fact. — Without attempting to enumerate the multitudinous questions which come within this category, it is sufficient to say said by way of illustration that conspicuous among them are the questions what constitutes an estoppel,³ what constitutes negligence,⁴ what constitutes probable cause in an action for malicious prosecution,⁵ and

ton, etc., R. Co., 5 Mackey (D. C.) 144, 26 Am. & Eng. R. Cas. 325; *Muller v. District of Columbia*, 5 Mackey (D. C.) 286.

Indiana. — *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322; *Puterbaugh v. Puterbaugh*, 7 Ind. App. 280; *James v. Gillen*, 3 Ind. App. 472.

Kentucky. — *Chiles v. Drake*, 2 Met. (Ky.) 146, 74 Am. Dec. 406.

Massachusetts. — *Hopewell Mills v. Taunton Sav. Bank*, 150 Mass. 519, 15 Am. St. Rep. 235.

Missouri. — *Yarnall v. St. Louis, etc., R. Co.*, 75 Mo. 575.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327.

North Carolina. — *Crudup v. Thomas*, 126 N. Car. 333; *Brown v. Mitchell*, 102 N. Car. 347, 11 Am. St. Rep. 748; *Tate v. Greenlee*, 3 Murph. (7 N. Car.) 556.

Ohio. — *Jenkins v. Little Miami R. Co.*, 2 Disney (Ohio) 49.

West Virginia. — *Washington v. Baltimore, etc., R. Co.*, 17 W. Va. 190.

1. Submission of Questions of Law to the Jury. — *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62; *Ulmer v. Leland*, 1 Me. 135, 10 Am. Dec. 48; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125.

Illustration of Erroneous Instruction. — Where there is a mixed question of law and fact the court in instructing the jury should not leave it for the jury to determine what the law is. Thus, in an action for negligence an instruction that there can be no recovery by the plaintiff if the injury was caused "by his own neglect or want of care" is erroneous, because it fails to define the character of neglect or want of care which will preclude the recovery. *Northern Cent. R. Co. v. State*, 31 Md. 357, 100 Am. Dec. 69.

2. When Submission of Question of Fact to Jury Is Unnecessary and Improper — *England.* — *Davis*

v. Hardy, 6 B. & C. 225, 13 E. C. L. 152, 9 Dowl. & R. 380.

United States. — *Crescent City Live Stock Co. v. Butchers' Union Slaughter-House Co.*, 120 U. S. 141; *Toland v. Sprague*, 12 Pet. (U. S.) 336; *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 578; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129.

Arkansas. — *Dodd v. McCraw*, 8 Ark. 83, 46 Am. Dec. 301.

Illinois. — *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268.

Indiana. — *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322.

Maine. — *Cooper v. Waldron*, 50 Me. 80.

Maryland. — *Baltimore, etc., R. Co. v. Mali*, 66 Md. 53, 28 Am. & Eng. R. Cas. 628; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; *Cathell v. Goodwin*, 1 Har. & G. (Md.) 470; *Orear v. McDonald*, 9 Gill (Md.) 350, 52 Am. Dec. 703.

Massachusetts. — *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49.

New Jersey. — *Central R. Co. v. Moore*, 24 N. J. L. 824.

New York. — *Carpenter v. Sheldon*, 5 Sandf. (N. Y.) 77.

North Carolina. — *Button v. Atlanta, etc., R. Co.*, 88 N. Car. 536, 43 Am. Rep. 749.

Virginia. — *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

Wisconsin. — *Hogan v. Chicago, etc., R. Co.*, 59 Wis. 139.

3. What Constitutes an Estoppel. — *Thomas v. Presbrey*, 5 App. Cas. (D. C.) 217. See also title ESTOPPEL, vol. 11, p. 385.

4. What Constitutes Negligence. — *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388. See also title NEGLIGENCE, vol. 21, p. 455.

5. What Constitutes Probable Cause in an Action for Malicious Prosecution. — *Porter v. White*,

who are fellow-servants.¹

IV. ENUMERATION OF QUESTIONS OF LAW — 1. In General. — Of course, it would be impracticable as well as useless to attempt to enumerate all of the questions of law which it is the exclusive province of the court to determine.²

2. **Constitutional Questions.** — All questions of constitutional law are, of course, for the court.³

3. **Questions of Statutory Law.** — Whatever question may arise as to what is the statutory law, whether in a civil action or in a criminal prosecution, is a question of law for the court.⁴

4. **Questions Arising upon Pleadings.** — All questions which arise upon the pleadings are questions of law for the court.⁵

5 Mackey (D. C.) 180; Costello v. Knight, 4 Mackey (D. C.) 65; Tolman v. Phelps, 3 Mackey (D. C.) 154; Coleman v. Heurich, 2 Mackey (D. C.) 189; Johns v. Marsh, 52 Md. 333; Medcalfe v. Brooklyn L. Ins. Co., 45 Md. 205; Stansbury v. Fogle, 37 Md. 386; Cooper v. Utterbach, 37 Md. 317; Boyd v. Cross, 35 Md. 197. See also the title MALICIOUS PROSECUTION, vol. 19, p. 647.

1. **Question as to Who Are Fellow-servants.** — Chicago, etc., R. Co. v. Moranda, 108 Ill. 576; Indianapolis, etc., R. Co. v. Morgenstern, 106 Ill. 216; Dryburg v. Mercur Gold Min., etc., Co., 18 Utah 410. See also the title FELLOW-SERVANTS, vol. 12, p. 893.

2. **Ascertainment and Construction of Laws.** — It is almost a self-evident proposition that laws, whether written or statute, domestic or foreign, must be ascertained in the general, and always construed, by the court. Inge v. Murphy, 10 Ala. 885.

When There Is No Question of Fact necessarily, the only question involved is one of law. U. S. v. Carlton, 1 Gall. (U. S.) 400, in which case it was declared by Story, J., that what constitutes an importation is, when all the facts are given, a question of law.

The Question of Jurisdiction is one of law; thus, in an action in which the validity of an order appointing an administrator is in question the validity of such order and the jurisdiction of the court to make it are questions of law for the court. Sims v. Boynton, 32 Ala. 353.

Where Jurisdiction Is Affected by a Question of Boundaries. — The boundary of a state, when a material fact in the determination of the extent of the jurisdiction of a court, is not a simple question of law. The description of a boundary may be a matter of construction, which belongs to the court; but the application of the evidence in the ascertainment of it as thus described and interpreted, with a view to its location and settlement, belongs to the jury. U. S. v. Jackalow, 1 Black (U. S.) 484.

Question of Law as to Validity of Ordinance. — Ex p. Frank, 52 Cal. 606, 28 Am. Rep. 642.

Rules for Ascertaining Damages — Question of Law for Court. — Christian v. Irwin, 125 Ill. 619; Chicago, etc., R. Co. v. Bonifield, 104 Ill. 223, 8 Am. & Eng. R. Cas. 493.

Question of Law as to Presumption of Evidence when Evidence Is Evenly Balanced. — In a suit in equity, when the evidence is evenly balanced, the decision of the court may turn upon a question of law as to what is the presumption in such a case. Cox v. Palmer, 1 McCrary (U. S.) 431, in which case the question

was whether an interlineation in a deed was presumably an unauthorized alteration of the instrument after execution.

3. **Constitutional Questions.** — Scott v. Clark County, 34 Ark. 283, in which case the question was whether the statute had passed both houses of the legislature in a constitutional manner.

Questions of Constitutional Law Are for Court in Criminal Cases. — U. S. v. Shive, Baldw. (U. S.) 510; U. S. v. Callender, 25 Fed. Cas. No. 14,709; Ex p. Frank, 52 Cal. 606, 28 Am. Rep. 642; State v. McKee, 73 Conn. 18; State v. Main, 69 Conn. 123, 61 Am. St. Rep. 35; Pierce v. State, 13 N. H. 536.

Where the Constitution Makes the Jury the Judges of the Law in Criminal Cases, nevertheless juries are not judges of constitutional questions. State v. Main, 69 Conn. 123, 61 Am. St. Rep. 35; Franklin v. State, 12 Md. 236. See contra, Lynch v. State, 9 Ind. 541. Compare State v. Buckley, 40 Conn. 246.

4. **Questions of Statutory Law Are for the Court in Civil Cases.** — Peters v. New Orleans, etc., R. Co., 56 Ala. 528; Evans v. Browne, 30 Ind. 514, 95 Am. Dec. 710.

Questions of Statutory Law Are for the Court in Criminal Cases. — State v. Kimball, 50 Me. 409; Carpenter v. People, 8 Barb. (N. Y.) 603.

5. **Questions Arising upon Pleadings.** — St. James Military Academy v. Gaiser, 125 Mo. 517, 46 Am. St. Rep. 502; Eason v. Miller, 15 S. Car. 202.

Questions for Court as to Whether or Not Indictment Has Been Mutilated. — Com. v. Davis, 11 Gray (Mass.) 4.

Question of Law for Court as to Sufficiency of Plea in Criminal Cases. — Cameron v. State, (Tex. Crim. 1894) 25 S. W. Rep. 288.

Question of Law as to What Issues Are Raised by the Pleadings. — Bardwell v. Ziegler, 3 Wash. 34.

Construction of Pleadings — Question of Law for Court. — Alexander v. Wheeler, 69 Ala. 332.

Question of Law for Court as to Sufficiency of Indictment. — Smith v. People, 47 N. Y. 303.

Where an Issue of Law Is Joined and the validity of a deed or other contract is drawn in question by the state of pleadings for fraud or other cause, it is the province of the court to declare the law arising on the facts presented by the pleadings, and if the conclusion of fraud naturally flows from the facts of the case, the court is competent to declare the deed fraudulent and void. Richards v. Hazzard, 1 Stew. & P. (Ala.) 139.

Questions of Law Arising upon Demurrer to Pleading. — Rooks v. State, 83 Ala. 79.

5. Materiality of Facts as Affecting Rights and Liabilities. — It may be stated as a general rule that all questions as to the materiality of facts as affecting rights and liabilities are questions of law for the court. As an illustration of this rule it may be stated that where a written instrument has been altered it is a question of law for the court and of fact for the jury to determine whether or not the alteration is a material one.¹

6. Questions Arising upon Construction of Documents, Records, and Other Writings — a. IN GENERAL. — It is both the province and the duty of the court in civil cases to expound to the jury all written instruments and to state their legal effect.²

1. Materiality of Facts as Affecting Rights and Liabilities. — *Steele v. Spencer*, 1 Pet. (U. S.) 552; *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261. See also the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181.

Question of Law as to Materiality of Testimony on Prosecution for Perjury. — *Nelson v. State*, 32 Ark. 192. See also the title PERJURY, vol. 22, p. 680.

2. Construction of Writings Is for the Court in Civil Cases — England. — *Berwick v. Horsfall*, 4 C. B. N. S. 450, 93 E. C. L. 450; *Begg v. Forbes*, 30 Eng. L. & Eq. 508; *Simpson v. Holliday*, L. R. 1 H. L. 320; *Hutchison v. Bowker*, 5 M. & W. 535.

Canada. — *Bell v. McKindsey*, 23 U. C. Q. B. 162.

United States. — *Cahoon v. Ring*, 1 Cliff. (U. S.) 592; *U. S. v. Shaw*, 1 Cliff. (U. S.) 317; *Levy v. Gadsby*, 3 Cranch (U. S.) 186; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 420; *Brown v. Huger*, 21 How. (U. S.) 305; *Anderson v. Bock*, 15 How. (U. S.) 323; *Bell v. Bruen*, 1 How. (U. S.) 169; *Jackson v. Porter*, 1 Paine (U. S.) 457; *Steele v. Spencer*, 1 Pet. (U. S.) 552; *Minor v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Piles v. Bouldin*, 11 Wheat. (U. S.) 325.

Alabama. — *American Oak Extract Co. v. Ryan*, 104 Ala. 267; *Davis v. Badder*, 95 Ala. 348; *Bernstein v. Humes*, 78 Ala. 134; *Boykin v. Mobile Bank*, 72 Ala. 262, 47 Am. Rep. 408; *Jones v. Pullen*, 66 Ala. 306; *Claghorn v. Lingo*, 62 Ala. 230; *Bernstein v. Humes*, 60 Ala. 582, 31 Am. Rep. 52; *Price v. Mazange*, 31 Ala. 701; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Magee v. Hallett*, 22 Ala. 609; *Brazier v. Burt*, 18 Ala. 201; *Moore v. Leseur*, 18 Ala. 606; *Kidd v. Cromwell*, 17 Ala. 648; *Long v. Rogers*, 17 Ala. 540; *Holman v. Crane*, 16 Ala. 570; *Branch Bank v. Boykin*, 9 Ala. 320; *Sewall v. Henry*, 9 Ala. 24; *Courtland v. Tarlton*, 8 Ala. 532; *Gazzam v. Poyntz*, 4 Ala. 374, 37 Am. Dec. 745; *Earbee v. Craig*, 1 Ala. 607; *Ashurst v. Martin*, 9 Port. (Ala.) 566; *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Martin v. Chapman*, 6 Port. (Ala.) 344; *Richards v. Hazzard*, 1 Stew. & P. (Ala.) 139.

Arkansas. — *Estes v. Boothe*, 20 Ark. 583.

Connecticut. — *Merwin v. Morris*, 71 Conn. 555; *Wooster v. Butler*, 13 Conn. 309.

Georgia. — *Allen v. Frost*, 62 Ga. 659.

Illinois. — *Trotter v. St. Louis, etc., R. Co.*, 180 Ill. 471; *Spencer v. Dougherty*, 23 Ill. App. 399.

Indiana. — *Symmes v. Brown*, 13 Ind. 318.

Kentucky. — *Sook v. Knowles*, 1 Bibb (Ky.) 283; *Venable v. McDonald*, 4 Dana (Ky.) 336; *Miller v. Shackleford*, 4 Dana (Ky.) 264;

Thornberry v. Churchill, 4 T. B. Mon. (Ky.) 29, 16 Am. Dec. 125.

Maine. — *Randall v. Thornton*, 43 Me. 226, 69 Am. Dec. 56.

Maryland. — *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Negley v. Farrow*, 60 Md. 158, 45 Am. Rep. 715; *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573; *Cook v. Carroll*, 6 Md. 104.

Massachusetts. — *Snow v. Orleans*, 126 Mass. 453; *Fowle v. Bigelow*, 10 Mass. 379; *Cabot v. Winsor*, 1 Allen (Mass.) 546; *Rice v. Codman*, 1 Allen (Mass.) 377.

Michigan. — *Brown v. Schiappacasse*, 115 Mich. 47.

Missouri. — *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Whitelsey v. Kellogg*, 28 Mo. 404; *Drew v. Towle*, 30 N. H. 531, 64 Am. Dec. 309.

New Hampshire. — *Dean v. Erskine*, 18 N. H. 81.

North Carolina. — *Redmond v. Stepp*, 100 N. Car. 212; *Sellers v. Johnson*, 65 N. Car. 104; *Hurley v. Morgan*, 1 Dev. & B. L. (18 N. Car.) 425, 28 Am. Dec. 579; *Doe v. Paine*, 4 Hawks (11 N. Car.) 64, 15 Am. Dec. 507; *Festerman v. Parker*, 10 Ired. L. (32 N. Car.) 474; *Collins v. Benbury*, 5 Ired. L. (27 N. Car.) 118, 42 Am. Dec. 155.

Ohio. — *Townsend v. Lorain Bank*, 2 Ohio St. 345; *Van Ingen v. Newton*, 1 Disney (Ohio) 482.

Pennsylvania. — *Cox v. Freedley*, 33 Pa. St. 124, 75 Am. Dec. 584; *Nourse v. Lloyd*, 1 Pa. St. 229; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387; *Vincent v. Huff*, 8 S. & R. (Pa.) 381. See also *Holmes v. Chartlers Oil Co.*, 138 Pa. St. 546, 21 Am. St. Rep. 919; *McFarland v. Newman*, 9 Watts (Pa.) 55, 34 Am. Dec. 497.

Rhode Island. — *Boston, etc., Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Davis v. Western Massachusetts Ins. Co.*, 8 R. I. 277; *Wheeler v. Schroeder*, 4 R. I. 383.

South Carolina. — *Sudduth v. Sumerai*, 61 S. Car. 276; *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 190.

Tennessee. — *Memphis v. Waite*, 102 Tenn. 274.

Texas. — *Heidenheimer v. Blumenkron*, 56 Tex. 311; *Gardner v. Stell*, 34 Tex. 561.

Vermont. — *Woodbury Granite Co. v. Mulliken*, 66 Vt. 465.

Virginia. — *Camp v. Wilson*, 97 Va. 265; *Washington Southern R. Co. v. Lacey*, 94 Va. 460; *Poage v. Bell*, 3 Rand. (Va.) 586.

Washington. — *Creagh v. Equitable L. Assur. Soc.*, 19 Wash. 108.

Illustrations — Question of Law as to Construction of Subsequent Promise. — Where the words

Intent. — As a corollary from this rule it follows, of course, that wherever the intent of the parties is to be ascertained from a writing the question is one of law for the court.¹

In Criminal Prosecutions the rule is equally applicable, and it is well settled that the construction of written documents, contracts, and deeds is for the court rather than for the jury.²

Where Written Instrument Has Been Lost. — Even where a written instrument has been lost and parol evidence of its contents has been received its construction is for the court.³

Where Instrument Consists of Written Correspondence. — The rule that it is the duty of the court to construe written instruments is not affected by the fact that the instrument consists of written correspondence extending over a considerable length of time or that it may embrace a great variety of circumstances.⁴

relied on to take a case out of the statute of limitations amount in law to an express promise, there is no necessity for referring their construction to the jury, but the court may instruct them as to the legal effect of the words. *Evans v. Carey*, 29 Ala. 99.

Question of Law as to Whether Instrument Is Sealed or Not. — Whether a writing sued on is a sealed instrument or not, there being no such ambiguity as would authorize explanatory parol proof, must be determined by the construction of the instrument itself, and is a question peculiarly within the province of the court. *Moore v. Leseur*, 18 Ala. 606.

The Question Whether a Contract on Its Face and by Its Own Terms Per Se Imports Usury is a question of law to be determined by the court. *Woolsey v. Jones*, 84 Ala. 88. See also *USURY*.

Whether a Proposition Made in Writing Is an Offer of Compromise or Not is a question of law for the court. *Courtland v. Tarlton*, 8 Ala. 532.

Question of Law as to Sufficiency of Notice of Protest. — *Harris v. Robinson*, 4 How. (U. S.) 336; *Rhett v. Poe*, 2 How. (U. S.) 457; *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 578; *Stanley v. Mobile Bank*, 23 Ala. 652; *Pinkham v. Macy*, 9 Met. (Mass.) 174; *Gilbert v. Dennis*, 3 Met. (Mass.) 495, 38 Am. Dec. 329; *Ransom v. Mack*, 2 Hill (N. Y.) 587, 38 Am. Dec. 602; *Remer v. Downer*, 23 Wend. (N. Y.) 620; *Brenzer v. Wightman*, 7 W. & S. (Pa.) 264.

Question of Law as to Construction of Municipal Ordinances. — *Barnes v. Mobile*, 19 Ala. 707; *Washington Southern R. Co. v. Lacey*, 94 Va. 460. See also the title *ORDINANCES*, vol. 21, p. 943.

Question of Law as to Construction and Effect of Permit from Municipal Authorities. — Where municipal authorities give a permit to construct a vault in a street, the question whether such permit is a protection from liability for damages caused by the flooding of adjoining premises is one of law for the court. *Mairs v. Manhattan Real Estate Assoc.*, 89 N. Y. 498.

Question as to What Constitutes Dedication. — The rule that whether a plat contains a dedication of a strip of ground to the public is a question of law for the court to determine is confined to cases where there was an express dedication by acts done which the dedicator would not be allowed to dispute, and where the only question could be, whether such acts constituted in law a dedication. *Tilzie v. Haye*, 8 Wash. 187.

Question of Law as to Interpretation of Charter and By-laws of Corporation. — *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324; *Inge v. Murphy*, 10 Ala. 885.

Question of Law as to Construction of Mortgage. — *Price v. Mazange*, 31 Ala. 701. See also the title *MORTGAGES*, vol. 20, p. 888.

What Constitutes Compliance with Contract Containing "More or Less" Clause. — The words "more or less" used as descriptive of quantity in a contract of sale are intended to permit the vendor to fulfil his contract by a delivery of so much as may reasonably and fairly be held to be a compliance with the contract after making due allowance for an excess or short delivery arising from the usual or ordinary causes; and what is a reasonable limit and a substantial compliance with such contract, if the facts are not in dispute between the parties, is a question for the determination of the court. *Cabot v. Winsor*, 1 Allen (Mass.) 546, in which case the court cited *Cross v. Eglin*, 2 B. & Ad. 106, 22 E. C. L. 36; *Moore v. Campbell*, 10 Exch. 323; *Bourne v. Seymour*, 16 C. B. 337, 81 E. C. L. 337; *Stebbins v. Eddy*, 4 Mason (U. S.) 414, and *Pembroke Iron Co. v. Parsons*, 5 Gray (Mass.) 589. See also the title *MORE OR LESS*, vol. 20, p. 873.

Question of Law as to Signing and Attestation of Will. — It is for the court to determine what facts are necessary to establish the signing and attestation of a will. *Riley v. Riley*, 36 Ala. 496; *Bramel v. Bramel*, 101 Ky. 64. See also the title *WILLS*.

Respective Provinces of Court and Jury in Determining Boundaries. — See *infra*, this title, V. 17. *Place or Location*.

1. **Question of Intent Is for the Court.** — *McCutchen v. McCutchen*, 9 Port. (Ala.) 650; *Brown v. Schiappacasse*, 115 Mich. 47.

Question of Intent Arising Otherwise than upon Construction of Writings. — See *infra*, this title, V. 5. *Questions Arising upon Oral Contracts*; V. 8. *v. Intent*.

2. **Construction of Writings Is for Court in Criminal Prosecutions.** — *Hogg v. State*, 7 Ind. 551; *State v. Delong*, 12 Iowa 453; *State v. Moy Looke*, 7 Oregon 54; *Theel v. Com.*, (Pa. 1888) 12 Atl. Rep. 148; *State v. Williams*, 32 S. Car. 123.

3. **Where Written Instrument Has Been Lost.** — *Berwick v. Horsfall*, 4 C. B. N. S. 450, 93 E. C. L. 450.

4. **Where Instrument Consists of Written Correspondence.** — *U. S. v. Shaw*, 1 Cliff. (U. S.) 317.

Question of Fact as to What Construction Has Been Placed upon Writings by Parties. — Where there is conflicting evidence as to what construction has been placed upon a writing by the parties, a question of fact as to what such construction was arises which it is the province of the jury to determine.¹

Where Writings Are Compared and Contrasted. — It is the province of the court to compare and contrast written documents and to state to the jury as a matter of law their meaning and effect upon each other.²

Distinction Depending upon Whether Words Are Used in Ordinary Sense or Not. — It is not proper to submit to the jury the meaning of a word which is apparently used in its ordinary sense, for that is a question of law determinable by the court.³ Where, however, writings contain peculiar words of art, or phrases used in commerce or trade, the determination of the meaning of such words or phrases should be left to the jury; but subject to this ascertainment by the jury it is for the court to decide the meaning of the instruments.⁴

b. QUESTIONS ARISING UPON CONSTRUCTION OF RECORDS. — The construction of judicial records is for the court; thus, questions as to the legal effect of decrees and orders are for the court.⁵

On an Issue of Nul Tiel Record in a criminal prosecution a question of law for the court is presented, and there is no issue to be tried by the jury.⁶

c. WHERE PAROL EVIDENCE IS INTRODUCED TO EXPLAIN WRITINGS. — When the legal operation and effect of a written instrument depend not only upon the meaning and construction of the words used therein, but upon collateral facts *in pais* and extrinsic evidence, the inference of fact to be drawn from the evidence should be submitted to the jury where such parol evidence is conflicting or different inferences may be drawn from the collateral facts;⁷ but it has been declared that even when extraneous evidence is

1. **Question of Fact as to What Construction Has Been Placed upon Writings by Parties.** — *Camp v. Wilson*, 97 Va. 265.

2. **Where Writings Are Compared and Contrasted.** — *Payne v. Pomeroy*, 21 D. C. 243.

3. **Question for Court as to Meaning of Words Used in Ordinary Sense.** — *Atty.-Gen. v. Dublin*, 38 N. H. 459; *Collins v. Benbury*, 5 Ired. L. (27 N. Car.) 118, 42 Am. Dec. 155. See also *Starnes v. Erwin*, 10 Ired. L. (32 N. Car.) 226; *Islay v. Stewart*, 4 Dev. & B. L. (20 N. Car.) 160.

4. **Question for Jury as to Meaning of Words Used in Extraordinary Sense.** — *Payne v. Pomeroy*, 21 D. C. 243; *Festerman v. Parker*, 10 Ired. L. (32 N. Car.) 474.

Georgia Statute. — Code Ga., § 2754, in force in 1886, provided as follows: "Where no matter of fact is involved, the construction of a contract is a question for the court, but in case there is a fact, such, for instance, as the proper reading of an obscurely written word, then the question as to that fact is for the jury." *Brand v. Lawrenceville Branch R. Co.*, 77 Ga. 506.

5. **Questions Arising upon Construction of Records.** — *Steed v. Knowles*, 79 Ala. 446; *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 117; *Shook v. Blount*, 67 Ala. 301; *Sims v. Boynton*, 32 Ala. 353; *Wyatt v. Steele*, 26 Ala. 639; *Hempstead v. Des Moines*, 52 Iowa 303. See also *Andrews v. Graves*, 1 Dill. (U. S.) 108.

Question of Law as to Construction of Affidavit in Action for Malicious Prosecution. — *Long v. Rodgers*, 19 Ala. 321, 17 Ala. 540.

Question of Fact Arising upon Records of Corporation. — In *St. Louis*, etc., *R. Co. v. Eakins*, 30 Iowa 279, the records of a railroad company were offered in evidence for the purpose of showing the acts and proceedings of the cor-

poration, and it was declared that it was for the jury to determine what such records proved.

6. **Question of Law for Court on Plea Nul Tiel Record.** — *Brady v. Com.*, 1 Bibb (Ky.) 517; *Hill v. State*, 2 Yerg. (Tenn.) 248.

Construction of Record Is for Court in Criminal Cases. — *State v. Gorham*, 67 Me. 247, in which case, on a prosecution for being a common seller of intoxicating liquor, the records of prior conviction were introduced in evidence, and it was held that the construction of such records was for the court and that the force and effect of such records and the inference to be drawn from the facts established by them were for the jury. See also *State v. White*, 70 Vt. 225, citing 1 Greenl. Ev. (12th ed., § 277, and notes 2, 3).

Question of Law for Court as to Legal Effect of Orders of Commissioners' Court as to Effect of Local Option Election. — *Irish v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 633.

Province of Court with Reference to Plea of Autrefois Acquit. — It is the duty of the court to declare the legal effect of a record which is offered to sustain the plea of *autrefois acquit* or discontinuance, and the record itself cannot be gainsaid by parol evidence; therefore the court may charge the jury that the pleas are not sustained by the proof, when that is the fact. *Martha v. State*, 26 Ala. 72.

Question of Law for Court as to Construction of Commission Appointing Special Policeman. — *Carlisle v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 365, which was a prosecution for murder.

7. **Province of Jury Where Parol Evidence Is Admitted** — *England*. — *Norman v. Morrell*, 4 Ves. Jr. 769.

United States. — *Barreda v. Silsbee*, 21 How.

admitted to aid in the construction of a writing and to show the circumstances under which it is made, it is the province and duty of the court to direct the effect of such evidence and to instruct the jury what shall be the construction if certain facts are proved.¹

7. Questions Arising upon the Evidence — *a.* **ADMISSIBILITY OF EVIDENCE** — **In General.** — It is the province of the court to determine all questions on the admissibility of evidence, as well as to instruct the jury in the rules of law by which the evidence is to be weighed.²

Preliminary Questions of Fact Involved in Determining Admissibility of Evidence. — If the decision of the question of the admissibility of evidence depends on the decision of other questions of fact, these preliminary questions of fact are first to be tried by the court, though it may, if it chooses, take the opinion of the jury upon such preliminary questions.³

(U. S.) 168; *Etting v. U. S. Bank*, 11 Wheat. (U. S.) 68. See also *U. S. v. Shaw*, 1 Cliff. (U. S.) 317.

Alabama. — *Memphis, etc., R. Co. v. Graham*, 94 Ala. 545; *Boykin v. Mobile Bank*, 72 Ala. 262, 47 Am. Rep. 408; *Holman v. Crane*, 16 Ala. 570; *Sewall v. Henry*, 9 Ala. 24.

Connecticut. — *Wooster v. Butler*, 13 Conn. 309.

Indiana. — *Symmes v. Brown*, 13 Ind. 319.

Maine. — *Haven v. Brown*, 7 Me. 421, 22 Am. Dec. 208.

Maryland. — *Warner v. Miltenberger*, 21 Md. 264, 83 Am. Dec. 573.

Missouri. — *Spalding v. Taylor*, 1 Mo. App. 34.

New York. — *Arthur v. Roberts*, 60 Barb. (N. Y.) 580.

Pennsylvania. — *Carroll v. Miner*, 1 Pa. Super. Ct. 439, 38 W. N. C. (Pa.) 194; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387; *Harper v. Kean*, 11 S. & R. (Pa.) 280; *Armstrong v. Burrows*, 6 Watts (Pa.) 266.

Rhode Island. — *Boston, etc., Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3; *Davis v. Western Massachusetts Ins. Co.*, 8 R. I. 277.

Virginia. — *Camp v. Wilson*, 97 Va. 265.

1. Province of Court When Parol Evidence Is Admitted. — *Fowle v. Bigelow*, 10 Mass. 379. See also *Remon v. Hayward*, 2 Ad. & El. 666, 29 E. C. L. 173; *Earbee v. Craig*, 1 Ala. 607.

Question of Fact for Jury Where There Is an Ambiguity. — It is a question of fact for the jury whether or not "three hundred dollars" was intended to mean three hundred dollars. *Burnham v. Allen*, 1 Gray (Mass.) 496.

2. Question of Law for Court as to Admissibility of Evidence — *United States.* — *Hopt v. People*, 110 U. S. 574.

Alabama. — *Goodwin v. State*, 102 Ala. 87; *Redd v. State*, 69 Ala. 255; *Thomason v. Odum*, 31 Ala. 108, 68 Am. Dec. 159; *Scott v. Cox*, 20 Ala. 294; *Brazier v. Burt*, 18 Ala. 201; *Batte v. State*, 18 Ala. 119; *Degraffenreid v. Thomas*, 14 Ala. 681.

Arkansas. — *Campbell v. State*, 38 Ark. 498; *Runnels v. State*, 28 Ark. 121; *Wallace v. State*, 28 Ark. 531.

California. — *People v. Ivey*, 49 Cal. 56.

Colorado. — *Solander v. People*, 2 Colo. 48.

District of Columbia. — *Hardy v. U. S.*, 3 App. Cas. (D. C.) 35; *Brady v. U. S.*, 1 App. Cas. (D. C.) 246.

Florida. — *Simon v. State*, 5 Fla. 285.

Georgia. — *Peterson v. State*, 47 Ga. 524.

Indiana. — *Guetig v. State*, 63 Ind. 278. See also *Simpson v. State*, 31 Ind. 90.

Iowa. — *State v. Elliott*, 45 Iowa 486.

Maine. — *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172.

Massachusetts. — *Com. v. Reagan*, 175 Mass. 335, 78 Am. St. Rep. 496; *Mathes v. Robinson*, 8 Met. (Mass.) 269, 41 Am. Dec. 505.

Michigan. — *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

Missouri. — *State v. Johnson*, 118 Mo. 491, 40 Am. St. Rep. 405; *State v. Simon*, 50 Mo. 370.

North Carolina. — *State v. Efler*, 85 N. Car. 585; *State v. Poll*, 1 Hawks (8 N. Car.) 442, 9 Am. Dec. 655; *Doe v. Fulgham*, 2 Murph. (6 N. Car.) 364.

Oklahoma. — *Peters v. U. S.*, 2 Okla. 138.

Pennsylvania. — *Wilson v. Van Leer*, 127 Pa. St. 371, 14 Am. St. Rep. 854; *Sitler v. Gehr*, 105 Pa. St. 577, 51 Am. Rep. 214.

Tennessee. — *Anthony v. State*, Meigs (Tenn.) 278, 33 Am. Dec. 143.

Vermont. — *State v. Gorham*, 67 Vt. 365.

Virginia. — *Vass v. Com.*, 3 Leigh (Va.) 786, 24 Am. Dec. 695.

See also the title EVIDENCE, vol. II, p. 496.

3. Preliminary Questions of Fact Involved in Determining Admissibility of Evidence. — 1 Greenl. Ev., § 49, which authority was quoted in *Scott v. Cox*, 20 Ala. 294. See also the title EVIDENCE, vol. II, p. 496 *et seq.* And see the following illustrations of the rule stated in the text:

Illustrations of Preliminary Facts Which the Court May Determine — *Question Whether Confessions Were Voluntary.* — When, on a criminal prosecution, the question arises whether confessions were voluntarily made, the admissibility of the confessions is for the court; but when such confessions are admitted, if the jury, from all the circumstances, are not satisfied that they were voluntary and intelligently made, it is their province and duty to reject them. 1 Greenl. Ev. 219, 230; 1 Phill. Ev. 543, which authorities were cited in *State v. Duncan*, 64 Mo. 262; *Goodwin v. State*, 102 Ala. 87. See also the title CONFESSIONS, vol. 6, pp. 548, 580.

Question for Court as to Prima Facie Existence of Conspiracy. — In order to allow the testimony of a conspirator to go to the jury against a fellow conspirator a foundation must be laid by proof sufficient in the opinion of the court to establish *prima facie* the existence of the

When Court May Submit Preliminary Questions to Jury. — Although the general rule is that matters preliminary to the admission of evidence should be determined by the court, yet when the court is in doubt about the matter it may submit the questions arising upon the preliminary proof to the jury under instructions to make no use of the evidence unless satisfied by the preliminary proof that it is competent.¹

b. COMPETENCY OF WITNESSES. — As will be found discussed more fully in another title of this work, the competency of a witness is always a question of law for the court, even though this question may involve a question of fact as to his qualification.²

c. SUFFICIENCY OF EVIDENCE TO GO TO JURY OR SUSTAIN VERDICT — (1) In Civil Cases — (a) In General. — In every civil case at the close of the plaintiff's evidence, and likewise after all of the evidence has been introduced, a question of law arises as to the sufficiency of the evidence to go to the jury; and if the case is submitted to the jury, after a verdict has been returned, a question of law arises as to the sufficiency of the evidence to sustain such verdict.³ These questions may, of course, be raised or not, at the discretion of the parties.

conspiracy. *Phoenix Ins. Co. v. Moog*, 78 Ala. 254, 56 Am. Rep. 31, in which case the court cited 1 Greenl. Ev., § 111; *Steph. Dig. Ev.*, art. 4, p. 8; *McAnally v. State*, 74 Ala. 9; *Ormsby v. People*, 53 N. Y. 472.

Question of Fact for Court as to Whether Loss of Instrument Has Been Shown. — The question as to whether the loss of an instrument has been sufficiently proved to admit secondary evidence is to be determined by the court. *Taylor v. Riggs*, 1 Pet. (U. S.) 591; *Daly v. Bernstein*, 6 N. Mex. 380, in which case the court cited 1 Greenl. Ev., § 558.

Question of Fact for Court as to Whether Document Is Ancient or Not. — Where a deed is offered in evidence as an ancient document and its age is in dispute, it being contended that its date has been altered, it is for the court to inspect the paper and hear such evidence as may be offered concerning its age, and determine whether it bears such marks of suspicion unexplained as to justify its rejection as an ancient document. *Wisdom v. Reeves*, 110 Ala. 418.

Question of Fact as to Genuineness of Standard of Comparison. — Upon the question whether a given writing or written word is sufficiently proved to have been written by the defendant to allow it to be submitted to the jury as a standard of comparison, the court must pass in the first instance; and on appeal, so far as his decision is of a question of fact merely it must be filed if there is any proper evidence to support it. *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172; *Com. v. Coe*, 115 Mass. 481.

Question of Fact Where Evidence of Character Is Offered. — Upon a prosecution for murder the preliminary question whether the conduct of the deceased and the circumstances of the killing were such as to authorize the admission in evidence of his character is one to be determined by the court. *King v. State*, 90 Ala. 612.

Questions of Fact Arising Where Dying Declarations Are Offered. — Where it is sought to introduce evidence of a dying declaration, the truth of the facts put in evidence to show that the declarations were made in view of speedy death was a matter exclusively for the court to determine. 1 East P. C. 357; *Phill. Ev.*,

Cowen & Hill's notes, pt. 1, p. 253; *Ward v. State*, 78 Ala. 441; *Faire v. State*, 58 Ala. 79; *State v. Elliott*, 45 Iowa 486; *State v. Simon*, 50 Mo. 370; *State v. Poll*, 1 Hawks (8 N. Car.) 442, 9 Am. Dec. 655; *Anthony v. State*, Meigs (Tenn.) 278, 33 Am. Dec. 143. See also the title DYING DECLARATIONS, vol. 10, pp. 384, 385.

1. When Court May Submit Preliminary Questions to Jury. — *Burdge v. State*, 53 Ohio St. 512; *Turpin v. State*, 19 Ohio St. 540; *Bartlett v. Hoyt*, 33 N. H. 151, wherein it was held that it was within the discretion of the court to submit to the jury the question upon the evidence presented whether a statement made by the defendant was an admission of a fact and thus competent as evidence, or a mere offer or proposition for a settlement, and therefore competent to be submitted to the jury as substantial evidence in the case. See also *Downer v. Button*, 26 N. H. 344. See further the title EVIDENCE, vol. 11, p. 497.

Submission of Question of Variance to Jury. — In *Turpin v. State*, 19 Ohio St. 540, which was a prosecution for forgery, the court, being uncertain, left to the jury the question whether there was a variance between the name to the instrument as laid in the indictment and that to the instrument in evidence, and on appeal it was held that this course was proper.

2. Competency of Witnesses. — See the title WITNESSES.

Question of Law and Fact for Court as to Competency of Child as Witness. — *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4. See also the title INFANTS, vol. 16, p. 267.

Question of Law and Fact for Court as to Sanity of Witness. — *Campbell v. State*, 23 Ala. 44.

Questions of Law and Fact as to Competency of Attesting Witness to Will. — *Fuller v. Fuller*, 83 Ky. 345. See also *Bramel v. Bramel*, 101 Ky. 64. See also the title WILLS.

Questions of Law and Fact as to Qualifications of Expert Witnesses. — *Dole v. Johnson*, 50 N. H. 452; *Jones v. Tucker*, 41 N. H. 546; *Sarle v. Arnold*, 7 R. I. 582; *Traver v. Spokane St. R. Co.*, 25 Wash. 225. See also the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

3. Question of Law as to Sufficiency of Evidence to Go to Jury or Sustain Verdict. — *United States*, — *Railway Officials*, etc., *Acc. Assoc. v. Wil-*

(b) **Withdrawal of Case from Jury — When Case May Be Withdrawn from Jury.** — When the sufficiency of the evidence to go to the jury is raised by a motion for a nonsuit, by a demurrer to the evidence, or by a request for an instruction to find for a particular party, or an instruction which assumes one or more facts in the case as not open to investigation by the jury, according to the practice in the particular state and the circumstances of the case, if the evidence is free from conflict or the facts are undisputed or conclusively proved, so that there is no reasonable chance for drawing different conclusions from them, the court may and must withdraw the whole case from the jury, or the particular fact or facts in issue as to which there is no conflict in the evidence.¹

son, (C. C. A.) 100 Fed. Rep. 368; *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373.

Alabama. — *Pollak v. Davidson*, 87 Ala. 551; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Mobile, etc., R. Co. v. Thomas*, 42 Ala. 672; *Weaver v. Lapsley*, 42 Ala. 601, 94 Am. Dec. 671; *Swift v. Fitzhugh*, 9 Port. (Ala.) 39.

California. — *Selden v. Cashman*, 20 Cal. 56, 81 Am. Dec. 93; *Dalrymple v. Hanson*, 1 Cal. 125; *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303. See also *Fulton v. Onesti*, 66 Cal. 575; *Ringgold v. Haven*, 1 Cal. 108.

Delaware. — *Wells v. Parsons*, 3 Harr. (Del.) 505.

District of Columbia. — *Pabst v. Baltimore, etc., R. Co.*, 2 MacArthur (D. C.) 42.

Illinois. — *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268. See also *Chicago City R. Co. v. Van Vleck*, 143 Ill. 480.

Indiana. — *Conner v. Citizens' St. R. Co.*, 105 Ind. 62, 55 Am. Rep. 177, 26 Am. & Eng. R. Cas. 210; *Western Union Tel. Co. v. McDaniel*, 103 Ind. 294; *Indianapolis v. Cook*, 99 Ind. 10, 7 Am. & Eng. Corp. Cas. 81; *Pittsburgh, etc., R. Co. v. Spencer*, 98 Ind. 186; *Evansville, etc., R. Co. v. Duncan*, 28 Ind. 441, 92 Am. Dec. 322; *Home Ins. Co. v. Marple*, 1 Ind. App. 411; *Louisville, etc., R. Co. v. Eves*, 1 Ind. App. 224.

Iowa. — *Shuman v. Supreme Lodge, etc.*, 110 Iowa 480; *Eddy v. Wilson*, 1 Greene (Iowa) 259; *Mason v. Lewis*, 1 Greene (Iowa) 494.

Kansas. — *Drumm v. Cessnum*, 58 Kan. 331; *Parli v. Reed*, 30 Kan. 534; *Case v. Hannahs*, 2 Kan. 490; *Brown v. Cory*, 9 Kan. App. 702; *McLain v. Birchfield*, 7 Kan. App. 752.

Kentucky. — *Louisville, etc., R. Co. v. Arnold*, (Ky. 1900) 56 S. W. Rep. 809; *Hollon v. Lilly*, 100 Ky. 553; *Alexander v. Louisville, etc., R. Co.*, 83 Ky. 589, 25 Am. & Eng. R. Cas. 458.

Massachusetts. — *Stone v. Crocker*, 24 Pick. (Mass.) 81; *Davis v. Jenney*, 1 Met. (Mass.) 221.

Michigan. — *Mynning v. Detroit, etc., R. Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 28 Am. & Eng. R. Cas. 667; *Carver v. Detroit, etc., R. Co.*, 61 Mich. 584; *Mitchell v. Chicago, etc., R. Co.*, 51 Mich. 236, 47 Am. Rep. 566, 18 Am. & Eng. R. Cas. 176; *Haas v. Grand Rapids, etc., R. Co.*, 47 Mich. 401, 8 Am. & Eng. R. Cas. 268.

Missouri. — *Schmidt v. St. Louis R. Co.*, 163 Mo. 645; *Adams v. Missouri Pac. R. Co.*, 100 Mo. 555; *Fletcher v. Atlantic, etc., R. Co.*, 64 Mo. 484; *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431; *Hill v. Palm*, 38 Mo. 13; *Russell v. Barcroft*, 1 Mo. 662.

New Mexico. — *U. S. v. Gumm*, 9 N. Mex. 611; *Candelaria v. Atchison, etc., R. Co.*, 6 N. Mex. 266.

New York. — *Greany v. Long Island R. Co.*, 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; *Besson v. Southard*, 10 N. Y. 240; *Pratt v. Hull*, 13 Johns. (N. Y.) 334; *Clements v. Benjamin*, 12 Johns. (N. Y.) 299; *Betts v. Jackson*, 6 Wend. (N. Y.) 173; *Stuart v. Simpson*, 1 Wend. (N. Y.) 376.

North Carolina. — *Wallace v. Western North Carolina R. Co.*, 98 N. Car. 494, 2 Am. St. Rep. 347; *Britton v. Atlanta, etc., R. Co.*, 88 N. Car. 536, 43 Am. Rep. 749; *Satterwhite v. Hicks*, Busb. L. (44 N. Car.) 105, 57 Am. Dec. 577; *Festerman v. Parker*, 10 Ired. L. (32 N. Car.) 474; *Jessup v. Johnston*, 3 Jones L. (48 N. Car.) 335, 67 Am. Dec. 243; *Doe v. Fulgham*, 2 Murph. (6 N. Car.) 364.

Ohio. — *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101.

Pennsylvania. — *Sidney School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494, 9 Am. St. Rep. 124; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125.

South Dakota. — *Yankton F. Ins. Co. v. Fremont, etc., R. Co.*, 7 S. Dak. 428.

Texas. — *Cotulla v. Kerr*, 74 Tex. 89, 15 Am. St. Rep. 819.

Utah. — *Durnell v. Sowden*, 5 Utah 216.

1. When Case May Be Withdrawn from Jury

— *United States.* — *Delaware, etc., R. Co. v. Converse*, 139 U. S. 469; *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727; *Schofield v. Chicago, etc., R. Co.*, 114 U. S. 615, 19 Am. & Eng. R. Cas. 353; *Baylis v. Travellers' Ins. Co.*, 113 U. S. 316; *Anderson County Com'rs v. Beal*, 113 U. S. 227; *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 478; *Griggs v. Houston*, 104 U. S. 553; *Bowditch v. Boston*, 101 U. S. 16; *New York Cent., etc., R. Co. v. Falloff*, 100 U. S. 24; *Herbert v. Butler*, 97 U. S. 319; *Four Packages v. U. S.*, 97 U. S. 404; *Marion County v. Clark*, 94 U. S. 278; *Chicago, etc., R. Co. v. Houston*, 95 U. S. 607; *Gowen v. Harley*, 12 U. S. App. 574; *Bliven v. New England Screw Co.*, 23 How. (U. S.) 433; *Parks v. Ross*, 11 How. (U. S.) 362; *Jackson v. Porter*, 1 Paine (U. S.) 457; *Toland v. Sprague*, 12 Pet. (U. S.) 300; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Schuykill, etc., Imp. Co. v. Munson*, 14 Wall. (U. S.) 442; *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604; *Schuchardt v. Allens*, 1 Wall. (U. S.) 359; *Ponder v. Jerome Hill Cotton Co.*, (C. C. A.) 100 Fed. Rep. 373; *Chicago, etc., R. Co. v. Belliwith*, (C. C. A.) 83 Fed. Rep. 437; *Motey v. Pickle Marble, etc., Co.*, (C. C. A.) 74 Fed. Rep. 155; *Laclede Fire-Brick Mfg. Co.*

When Evidence of Adverse Party Will Preclude Withdrawal of Case from Jury. — The court may refuse to withdraw the case from the jury even though the evidence introduced by the plaintiff is such as to justify such action, if the court is

v. Hartford Steam-Boiler Inspection, etc., Co., (C. C. A.) 60 Fed. Rep. 351. See also *Whitney v. New York, etc.*, R. Co. (C. C. A.) 102 Fed. Rep. 850.

Alabama. — *Wellman v. Jones*, 124 Ala. 580; *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Law v. Law*, 83 Ala. 432; *Louisville, etc., R. Co. v. Allen*, 78 Ala. 494, 28 Am. & Eng. R. Cas. 514; *Upson v. Raiford*, 29 Ala. 188; *Henderson v. Mabry*, 13 Ala. 713; *Swift v. Fitzhugh*, 9 Port. (Ala.) 39.

California. — *Williams v. Southern Pac. R. Co.*, 72 Cal. 120; *McQuilken v. Central Pac. R. Co.*, 50 Cal. 7.

Colorado. — *Colorado Cent. R. Co. v. Martin*, 7 Colo 592.

Connecticut. — *Morris v. Platt*, 32 Conn. 75.

Dakota. — *Mares v. Northern Pac. R. Co.*, 3 Dak. 339, 17 Am. & Eng. R. Cas. 620.

District of Columbia. — *Coleman v. Heurich*, 2 Mackey (D. C.) 189; *Fowler v. Great Falls Ice Co.*, 1 MacArthur (D. C.) 14.

Illinois. — *Chicago, etc., R. Co. v. Carey*, 115 Ill. 115; *Abend v. Terre Haute, etc., R. Co.*, 111 Ill. 202, 53 Am. Rep. 616, 17 Am. & Eng. R. Cas. 614; *Frazer v. Howe*, 106 Ill. 563; *Ackerstadt v. Chicago City R. Co.*, 94 Ill. App. 130.

Indiana. — *Weis v. Madison*, 75 Ind. 241, 39 Am. Rep. 135; *Beliefontaine R. Co. v. Hunter*, 33 Ind. 335, 5 Am. Rep. 201.

Kansas. — *Union Pac. R. Co. v. Adams*, 33 Kan. 427, 19 Am. & Eng. R. Cas. 376; *Case v. Hannahs*, 2 Kan. 490.

Maine. — *Moore v. McKenney*, 83 Me. 80, 23 Am. St. Rep. 753; *Jewell v. Gagné*, 82 Me. 430; *Merrill v. North Yarmouth*, 78 Me. 200, 57 Am. Rep. 794; *Heath v. Jaquith*, 68 Me. 433; *Cooper v. Waldron*, 50 Me. 80.

Maryland. — *Schermer v. Neurath*, 54 Md. 491, 39 Am. Rep. 397; *Lewis v. Baltimore, etc., R. Co.*, 38 Md. 588, 17 Am. Rep. 521; *Baltimore City Pass. R. Co. v. Wilkinson*, 30 Md. 224; *Sprigg v. Moale*, 28 Md. 497, 92 Am. Dec. 698; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302.

Massachusetts. — *Stewart v. Boston, etc., R. Co.*, 146 Mass. 605; *Riley v. Connecticut River R. Co.*, 135 Mass. 292, 15 Am. & Eng. R. Cas. 181; *Tully v. Fitchburg R. Co.*, 134 Mass. 499, 14 Am. & Eng. R. Cas. 682; *Allyn v. Boston, etc., R. Co.*, 105 Mass. 77; *Burns v. Boston, etc., R. Co.*, 101 Mass. 50; *Todd v. Old Colony, etc., R. Co.*, 7 Allen (Mass.) 207, 83 Am. Dec. 679, 3 Allen (Mass.) 18, 80 Am. Dec. 49; *Gavett v. Manchester, etc., R. Co.*, 16 Gr y (Mass.) 501, 77 Am. Dec. 422; *Lucas v. New Bedford, etc., R. Co.*, 6 Gray (Mass.) 64, 66 Am. Dec. 406; *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187, 79 Am. Dec. 724.

Michigan. — *Brudin v. Inglis*, 121 Mich. 410; *Peppett v. Michigan Cent. R. Co.*, 119 Mich. 640; *Hunt v. Supreme Council, etc.*, 64 Mich. 671, 8 Am. St. Rep. 855; *Mynning v. Detroit, etc., R. Co.*, 64 Mich. 93, 8 Am. St. Rep. 804, 28 Am. & Eng. R. Cas. 667; *Novock v. Michigan Cent. R. Co.*, 63 Mich. 121; *Conely v. McDonald*, 40 Mich. 158; *Lake Shore, etc., R. Co. v. Miller*, 25 Mich. 274.

Minnesota. — *Denman v. St. Paul, etc., R. Co.*, 26 Minn. 357; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 293.

Missouri. — *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467; *Yarnall v. St. Louis, etc., R. Co.*, 75 Mo. 575; *Turner v. Hannibal, etc., R. Co.*, 74 Mo. 603, 6 Am. & Eng. R. Cas. 38; *Zimmerman v. Hannibal, etc., R. Co.*, 71 Mo. 476, 2 Am. & Eng. R. Cas. 191; *Henze v. St. Louis, etc., R. Co.*, 71 Mo. 636, 2 Am. & Eng. R. Cas. 212; *Maher v. Atlantic, etc., R. Co.*, 64 Mo. 267.

Nevada. — *Fenstermaker v. Page*, 20 Nev. 290; *Ricord v. Central Pac. R. Co.*, 15 Nev. 167.

New Hampshire. — *Young v. Stevens*, 48 N. H. 133, 97 Am. Dec. 592, 2 Am. Rep. 202; *Dame v. Dame*, 20 N. H. 28.

New Jersey. — *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525.

New York. — *Filer v. New York Cent. R. Co.*, 49 N. Y. 47, 10 Am. Rep. 327; *Gonzales v. New York, etc., R. Co.*, 38 N. Y. 440, 98 Am. Dec. 58.

North Dakota. — *Patterson v. Plummer*, 10 N. Dak. 95; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615; *Smith v. Northern Pac. R. Co.*, 3 N. Dak. 17; *Slattery v. Donnelly*, 1 N. Dak. 264.

Pennsylvania. — *Lonzer v. Lehigh Valley R. Co.*, 196 Pa. St. 610; *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600, 28 Am. & Eng. R. Cas. 397; *Somerset, etc., R. Co. v. Galbraith*, 109 Pa. St. 32, 23 Am. & Eng. R. Cas. 375; *Furbush v. Greene*, 108 Pa. St. 504; *Reading, etc., R. Co. v. Ritchie*, 102 Pa. St. 425, 19 Am. & Eng. R. Cas. 267; *Philadelphia, etc., R. Co. v. Schertle*, 97 Pa. St. 450, 2 Am. & Eng. R. Cas. 158; *Hyatt v. Johnston*, 91 Pa. St. 200; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413; *McKee v. Bidwell*, 74 Pa. St. 218; *North Pennsylvania R. Co. v. Heileman*, 49 Pa. St. 60, 88 Am. Dec. 482.

Rhode Island. — *Chaffee v. Old Colony R. Co.*, 17 R. I. 658; *Hampson v. Taylor*, 15 R. I. 83.

South Carolina. — *Hillhouse v. Jennings*, 60 S. Car. 392; *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 28 Am. St. Rep. 883; *Hooper v. Columbia, etc., R. Co.*, 21 S. Car. 541, 53 Am. Rep. 691, 28 Am. & Eng. R. Cas. 433.

South Dakota. — *Griswold v. Sundback*, 6 S. Dak. 269; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 3 S. Dak. 205; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462.

Texas. — *Good v. Galveston, etc., R. Co.*, (Tex. 1889) 11 S. W. Rep. 854, 40 Am. & Eng. R. Cas. 98.

Virginia. — *Dun v. Seaboard, etc., R. Co.*, 78 Va. 645, 49 Am. Rep. 388.

Washington. — *Creagh v. Equitable L. Assur. Soc.*, 19 Wash. 108.

West Virginia. — *Woolwine v. Chesapeake, etc., R. Co.*, 36 W. Va. 329, 32 Am. St. Rep. 859; *Johnson v. Baltimore, etc., R. Co.*, 25 W. Va. 571.

not asked to do so until after the defendant has introduced evidence, and the evidence introduced by the defendant tends to show the facts sought to be established by the plaintiff.¹

Evidence of Opposite Party Must Be Assumed to Be True. — On application to withdraw the case, or a question of fact, from the jury, whatever may be the particular form or nature of the application the evidence of the opposite party must be assumed to be true, and he must be given the benefit of all legitimate inferences therefrom in his favor.²

Requisite Caution in Withdrawing Case from Jury. — This power of the court to withdraw the case or particular questions of fact from the jury because the evidence is not conflicting should undoubtedly be exercised only in a very clear case, and in no case when the evidence is to any extent conflicting, or when the evidence is such that different minds might honestly draw different conclusions therefrom, and, of course, the inferences or conclusions of the court must be such as can be reasonably drawn from the evidence itself.³

Review on Appeal. — Where the trial court erroneously fails to withdraw the case from the jury, and the verdict returned is wholly unsupported by the evidence, an appellate court will reverse the judgment of the trial court and proceed to render such judgment as ought to have been given below.⁴

Question of Fact for Jury Although There Is No Conflict in the Evidence. — In many cases where the facts are undisputed the effect of them is for the court and not for the decision of the jury. Certain facts, however, may be supposed to be clearly established from which one sensible, impartial man would draw one inference, and another man equally sensible and equally impartial would draw another inference, *e. g.*, in cases where the question is one of negli-

Wisconsin. — *Leavitt v. Chicago, etc., R. Co.*, 64 Wis. 228; *Delaney v. Milwaukee, etc., R. Co.*, 33 Wis. 67; *Rothe v. Milwaukee, etc., R. Co.*, 21 Wis. 256.

By Withdrawing the Case from the Jury the Province of the Jury Is Not Invaded when there are no facts in dispute and the court pronounces its judgment solely on the legal effect of admitted facts. *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80, 8 Am. & Eng. R. Cas. 467.

1. *Chicago, etc., R. Co. v. Carey*, 115 Ill. 115.

2. **Evidence of Opposite Party Must Be Assumed to Be True** — *United States*. — *Randall v. Baltimore, etc., R. Co.*, 109 U. S. 482; *Parks v. Ross*, 11 How. (U. S.) 373.

Georgia. — *Walker v. Supple*, 54 Ga. 178.

Illinois. — *Doane v. Lockwood*, 115 Ill. 490; *Chicago, etc., R. Co. v. Lewis*, 109 Ill. 121.

Indiana. — *Nordyke, etc., Co. v. Van Sant*, 99 Ind. 188; *Talkington v. Parish*, 89 Ind. 202; *Purcell v. English*, 86 Ind. 34, 44 Am. Rep. 255.

Iowa. — *Stone v. Chicago, etc., R. Co.*, 47 Iowa 82, 29 Am. Rep. 458.

Kansas. — *Christie v. Barnes*, 33 Kan. 317; *Wolf v. Washer*, 32 Kan. 533; *Bequillard v. Bartlett*, 19 Kan. 382, 27 Am. Rep. 120.

Missouri. — *Smith v. Hutchinson*, 83 Mo. 683; *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219, 39 Am. Rep. 503.

New York. — *Cook v. New York Cent. R. Co.*, 1 Abb. App. Dec. (N. Y.) 432; *Myers v. Dixon*, (N. Y. Super. Ct. Gen. T.) 45 How. Pr. (N. Y.) 48.

Oklahoma. — *Baker v. Nichols, etc., Co.*, 10 Okla. 685.

Pennsylvania. — *Sidney School Furniture Co. v. Warsaw School Dist.*, 122 Pa. St. 494,

9 Am. St. Rep. 124; *Maynes v. Atwater*, 88 Pa. St. 496.

South Dakota. — *Marshall v. Harney Peak Tin Min., etc., Co.*, 1 S. Dak. 350.

Question of Law as to What Is a Variance. — *Davidson v. Graham*, 2 Ohio St. 131.

3. **Requisite Caution in Withdrawing Case from Jury.** — *Williamson v. Fischer*, 50 Mo. 198; *Central R. Co. v. Moore*, 24 N. J. L. 824; *Labar v. Koplin*, 4 N. Y. 548; *South Bend Toy Mfg. Co. v. Dakota F. & M. Ins. Co.*, 3 S. Dak. 205.

4. *Alexander v. Harrison*, 38 Mo. 258, 90 Am. Dec. 431.

Where a Fact Is Shown by Documents and there is no testimony to the contrary, there is no question of fact which should be submitted to the jury. *Hunt v. Supreme Council, etc.*, 64 Mich. 671, 8 Am. St. Rep. 855. See also *supra*, this section, *Questions Arising upon Construction of Documents, Records, and Other Writings.*

Pennsylvania Statute Authorizing Reservation of Questions of Law. — In Pennsylvania it has been held under statutes authorizing the courts of Common Pleas "to reserve questions of law which may arise at the trial," that while the question "whether under all the evidence" or "upon the whole testimony the plaintiff is entitled to recover" cannot be reserved, because it involves the drawing of inferences of fact from the evidence, which is the province of the jury, the court may reserve the question "whether there is any evidence" of a fact essential to recovery, this question being a pure question of law. *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348. See also *Williams v. Crystal Lake Water Co.*, 191 Pa. St. 98; *Fisher v. Scharadin*, 186 Pa. St. 565; *Boyle v. Mahanoy City*, 187 Pa. St. 1; *Newhard v. Pennsylvania R. Co.*, 153 Pa. St. 417;

gence or contributory negligence; and it is this class of cases, and those akin to it, that the law commits to the decision of a jury, even where there is no conflict of evidence.¹

The "Scintilla Doctrine." — Decided cases may be found where it is held that if there is a scintilla of evidence in support of any theory of the case the court is bound to leave it to the jury, but decisions of high authority have established a more reasonable rule that in every case before the evidence is left to the jury there is a preliminary question for the court, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.²

Where Verdict Would Be Set Aside. — It is the settled law that when evidence is of such a character that, should the jury find for one side rather than the other, it would be the duty of the court to set aside such verdict, it will, in the first instance, direct a verdict for the party thus entitled to it.³

Power and Duty of Court to Weigh Evidence. — Where the court is asked to withdraw the case, or one or more questions of fact involved, from the jury, it is not the province of the court to weigh the evidence and determine what are the proper inferences to be drawn therefrom, but the only question is whether there is any testimony tending to establish the fact or facts which the court is asked as a matter of law to find.⁴

Withdrawal of Isolated Questions Which Are Material to Recovery or Defense. — The rule here under discussion that the court may decide as a matter of law that there is no sufficient evidence to go to the jury involves the right and the duty of the court not only to withdraw the case in its entirety from the jury where such action would be proper, but also to withdraw isolated questions of fact which are material to the plaintiff's right of recovery or to the defense; and it is well

Koons v. Western Union Tel. Co., 102 Pa. St. 164; Wilde v. Trainor, 59 Pa. St. 439.

1. **Question of Fact for Jury although There Is No Conflict in the Evidence.** — *Per* Hunt, J., in *Sioux City, etc.*, R. Co. v. Stout, 17 Wall. (U. S.) 657, cited with approval in *Ohio, etc.*, R. Co. v. Collarn, 73 Ind. 261, 38 Am. Rep. 134, 5 Am. & Eng. R. Cas. 554.

2. **The "Scintilla Doctrine."** — Thompson on Trials, §§ 2247-2249, which authority was cited in *Bowman v. Eppinger*, 1 N. Dak. 21. See also the following cases: *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727; *Marshall v. Hubbard*, 117 U. S. 415; *Schofield v. Chicago, etc.*, R. Co., 114 U. S. 615; *Marion County v. Clark*, 94 U. S. 284; *Pleasants v. Fant*, 22 Wall. (U. S.) 116; *Schuylkill, etc.*, Imp. Co. v. Munson, 14 Wall. (U. S.) 448; *Knapp v. Sioux Falls Nat. Bank*, 5 Dak. 378; *Star Wagon Co. v. Matthiessen*, 3 Dak. 233; *Finney v. Northern Pac. R. Co.*, 3 Dak. 270. Compare *Upson v. Raiford*, 29 Ala. 188.

In *California* it has been declared that the rule is that any degree of conflict in the evidence, however slight, will avail to support a verdict and judgment on appeal. Where the court can plainly see that the conflict is not a substantial one, the court will not hesitate to interfere. *Williams v. Southern Pac. R. Co.*, 72 Cal. 120.

Circumstantial Evidence. — In *McDermott v. San Francisco, etc.*, R. Co., 68 Cal. 33, it was held that a question of fact for the jury was presented as to the defendant's negligence because the testimony given to prove negligence was circumstantial.

3. **Where Verdict Would Be Set Aside** — *England.* — *Toomey v. London, etc.*, R. Co., 3 C. B. N. S. 146, 91 E. C. L. 146.

United States. — *Delaware, etc.*, R. Co. v. Converse, 139 U. S. 469; *Randall v. Baltimore, etc.*, R. Co., 109 U. S. 478; *Bowditch v. Boston*, 101 U. S. 16; *Marion County v. Clark*, 94 U. S. 278.

Dakota. — *Knapp v. Sioux Falls Nat. Bank*, 5 Dak. 378; *Star Wagon Co. v. Matthiessen*, 3 Dak. 233.

New Mexico. — *Lutz v. Atlantic, etc.*, R. Co., 6 N. Mex. 496; *Candelaria v. Atchison, etc.*, R. Co., 6 N. Mex. 266; *Gildersleeve v. Atkinson*, 6 N. Mex. 250.

New York. — *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *Neuendorff v. World Mut. L. Ins. Co.*, 69 N. Y. 389; *Kelsey v. Northern Light Oil Co.*, 45 N. Y. 509; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451, which was a civil action. See also *Bagley v. Bowe*, 105 N. Y. 171, 59 Am. Rep. 488; *Colt v. Sixth Ave. R. Co.*, 49 N. Y. 671.

Pennsylvania. — *Hyatt v. Johnston*, 91 Pa. St. 200.

South Dakota. — *McKeever v. Homestake Min. Co.*, 10 S. Dak. 599; *Haugen v. Chicago, etc.*, R. Co., 3 S. Dak. 394; *Canton First Nat. Bank v. North*, 2 S. Dak. 480; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462.

4. **Power and Duty of Court to Weigh Evidence.** — *Frazer v. Howe*, 106 Ill. 563; *Pennsylvania R. Co. v. Stoelke*, 104 Ill. 201; *Crowe v. People*, 92 Ill. 231; *Hubner v. Feige*, 90 Ill. 208; *Toledo, etc.*, R. Co. v. Patterson, 94 Ill. App. 670; *Rykard v. Davenport*, 61 S. Car. 215; *Harvey v. Doty*, 50 S. Car. 548.

settled that the court may single out any question as to which there is no conflict of evidence, or as to which different minds could not draw different inferences, and withdraw it from the jury.¹

Withdrawing Case from Jury at Instance of Plaintiff. — There are cases in which the facts being undisputed, *e. g.*, where the facts as to the negligence of the defendant in a given case are undisputed, it becomes the duty of the court to decide as a matter of law what the liability of the defendant is, yet it is only in those cases where the question of fact is entirely free from doubt, and where only one conclusion can be fairly arrived at therefrom, that the court has the right thus to apply the law without the action of the jury.²

When Case Should Not Be Withdrawn from Jury. — It is well settled that it is only when the evidence leaves the material facts admitted or substantially undisputed, and only when these facts are such that reasonable men, in the exercise of an honest and impartial judgment, can fairly draw but one conclusion from them, that the court may properly withdraw the case from the jury. If the evidence relative to the material facts develops a substantial conflict, or from the admitted or established facts the unprejudiced minds of reasonable men may well draw different conclusions, it is the duty of the court to submit the issues to the jury.³

1. Withdrawal of Isolated Questions Which Are Material to Recovery or Defense. — *St. Louis, etc., R. Co. v. Denty*, 63 Ark. 177; *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742; *Gavett v. Manchester, etc., R. Co.*, 16 Gray (Mass.) 501, 77 Am. Dec. 422; *Tobias v. Michigan Cent. R. Co.*, 103 Mich. 330; *Denham v. Trinity County Lumber Co.*, 73 Tex. 78; *Hesser v. Grafton*, 33 W. Va. 548, 31 Am. & Eng. Corp. Cas. 117; *Sheff v. Huntington*, 16 W. Va. 307.

2. Withdrawing Case from Jury at Instance of Plaintiff. — *Anthony v. Wheeler*, 130 Ill. 128, 17 Am. St. Rep. 281; *Heinsen v. Lamb*, 117 Ill. 549; *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 21 Am. & Eng. R. Cas. 364; *Underwood v. Stack*, 15 Wash. 497; *Schwartz v. Shall*, 45 W. Va. 405.

3. When Case Should Not Be Withdrawn from Jury — *United States*. — *Gardner v. Michigan Cent. R. Co.*, 150 U. S. 349; *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *New York Cent., etc., R. Co. v. Fraloff*, 100 U. S. 24; *Weightman v. Washington, I Black (U. S.) 39*; *Footte v. Silsby, I Blatchf. (U. S.) 445*; *Dorr v. Swartwout, I Blatchf. (U. S.) 179*; *Thompson v. Campbell, Hempst. (U. S.) 8*; *O'Neill v. Chicago, etc., R. Co., I McCrary (U. S.) 505*; *Greenleaf v. Birth, 9 Pet. (U. S.) 299*; *Crane v. Morris, 6 Pet. (U. S.) 609*; *D'Wolf v. Rabaud, I Pet. (U. S.) 497*; *Doe v. Grymes, I Pet. (U. S.) 471*; *Washington Bank v. Triplett, I Pet. (U. S.) 31*; *New Jersey R. Co. v. Pollard, 22 Wall. (U. S.) 341*; *Schuchardt v. Allen, I Wall. (U. S.) 359*; *Wyandotte, etc., R. Co. v. King Bridge Co., (C. C. A.) 100 Fed. Rep. 197*; *Standard L., etc., Ins. Co. v. Thornton, (C. C. A.) 100 Fed. Rep. 582*; *Railway Officials, etc., Acc. Assoc. v. Wilson, (C. C. A.) 100 Fed. Rep. 368*; *Chicago Great Western R. Co. v. Price, (C. C. A.) 97 Fed. Rep. 423*; *Nyback v. Champagne Lumber Co., (C. C. A.) 90 Fed. Rep. 774*; *Drake v. Stewart, (C. C. A.) 76 Fed. Rep. 140*; *Northwestern Fuel Co. v. Danielson, (C. C. A.) 57 Fed. Rep. 915*; *Union Pac. R. Co. v. Jarvi, (C. C. A.) 53 Fed. Rep. 65*.

Alabama. — *Hall v. Posey*, 79 Ala. 84; *East Tennessee, etc., R. Co. v. Bayliss*, 74 Ala. 150,

19 Am. & Eng. R. Cas. 480; *Williams v. Harts-horn*, 30 Ala. 211; *Lawler v. Norris*, 28 Ala. 675; *Hunt v. Stewart*, 7 Ala. 525.

Arkansas. — *Rice v. Wood*, 61 Ark. 442; *Martin v. Webb*, 5 Ark. 74.

California. — *McNamara v. North Pac. R. Co.*, 50 Cal. 581. See also *Williams v. Southern Pac. R. Co.*, 72 Cal. 120.

Colorado. — *Colorado Cent. R. Co. v. Martin*, 7 Colo. 592.

District of Columbia. — *District of Columbia v. Payne*, 13 App. Cas. (D. C.) 500; *Washington, etc., R. Co. v. Grant*, 11 App. Cas. (D. C.) 107; *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38; *Washington Gas Light Co. v. Poore*, 3 App. Cas. (D. C.) 127; *Howes v. District of Columbia*, 2 App. Cas. (D. C.) 188.

Illinois. — *Schmidt v. Chicago, etc., R. Co.*, 83 Ill. 405.

Indiana. — *Booe v. Davis*, 5 Blackf. (Ind.) 115, 33 Am. Dec. 457.

Maine. — *Nugent v. Boston, etc., R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151; *Lesan v. Maine Cent. R. Co.*, 77 Me. 85, 23 Am. & Eng. R. Cas., 245; *Lake v. Milliken*, 62 Me. 240, 16 Am. Rep. 456.

Maryland. — *Smith v. Heldman*, 93 Md. 343; *Hergenrather v. Spielman*, (Md. 1891) 22 Atl. Rep. 1106; *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392; *Baltimore, etc., R. Co. v. Mali*, 66 Md. 53, 28 Am. & Eng. R. Cas. 628; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53, 48 Am. Rep. 88; *State v. Baltimore, etc., R. Co.*, 58 Md. 482, 15 Am. & Eng. R. Cas. 409; *Pittsburg, etc., R. Co. v. Andrews*, 39 Md. 329, 17 Am. Rep. 568; *Morrison v. Whiteside*, 17 Md. 452, 79 Am. Dec. 661; *Spring Garden Mut. Ins. Co. v. Evans*, 9 Md. 1, 66 Am. Dec. 308.

Massachusetts. — *O'Neil v. Hanscom*, 175 Mass. 313; *McKimble v. Boston, etc., R. Co.*, 141 Mass. 463, 24 Am. & Eng. R. Cas. 463; *Korbe v. Barbour*, 130 Mass. 255; *Hawks v. Northampton*, 121 Mass. 10; *Mulligan v. Curtis*, 100 Mass. 512, 97 Am. Dec. 121; *Fox v. Sackett*, 10 Allen (Mass.) 535, 87 Am. Dec. 682; *Mitchell v. New England Marine Ins. Co.*, 6 Pick. (Mass.) 118.

(o) **Setting Aside Verdict — When Verdict May Be Set Aside.** — It is a question of law for the court to determine whether or not the verdict found by a jury is supported by the evidence, and although the court cannot weigh the evidence, balance conflicts therein, and substitute its own findings for those of the jury, it has unquestioned authority to set aside a verdict which the evidence does not support.¹

Verdict of Jury When Issue at Law Has Been Directed by Chancellor. — Where in a suit in equity an issue at law is directed, the verdict of a jury upon the issue directed is entitled to great consideration, but no weight whatever can attach

Michigan. — *Lowell v. Watertown Tp.*, 58 Mich. 568; *Hassenyer v. Michigan Cent. R. Co.*, 48 Mich. 205, 42 Am. Rep. 470; *Lake Shore, etc., R. Co. v. Bangs*, 47 Mich. 470; *Marcott v. Marquette, etc., R. Co.*, 47 Mich. 1; *Teipel v. Hilsendegen*, 44 Mich. 461; *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99.

Missouri. — *Wells v. Gaty*, 8 Mo. 681; *Mauerman v. Siemerts*, 71 Mo. 101; *Conroy v. Vulcan Iron Works*, 62 Mo. 35; *Mathews v. St. Louis Grain Elevator Co.*, 50 Mo. 149; *Woods v. Atlantic Mut. Ins. Co.*, 50 Mo. 112.

Nebraska. — *Lincoln v. Gillilan*, 18 Neb. 114. *New Jersey.* — *Orange, etc., Horse R. Co. v. Ward*, 47 N. J. L. 506; *Moebus v. Becker*, 46 N. J. L. 41; *Delaware, etc., R. Co. v. Toffey*, 38 N. J. L. 525; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Central R. Co. v. Moore*, 24 N. J. L. 824.

New York. — *Wilcox v. Rome, etc., R. Co.*, 39 N. Y. 358, 100 Am. Dec. 440; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Ireland v. Oswego, etc., Plank Road Co.*, 13 N. Y. 526; *Holbrook v. Utica, etc., R. Co.*, 12 N. Y. 236, 64 Am. Dec. 502; *Wylie v. Kelly*, 41 Barb. (N. Y.) 594.

Pennsylvania. — *Lehigh, etc., Coal Co. v. Lear*, (Pa. 1887) 9 Atl. Rep. 267, 32 Am. & Eng. R. Cas. 74; *Devlin v. Beacon Light Co.*, 192 Pa. St. 188, 198 Pa. St. 583; *Collins v. Lynch*, 157 Pa. St. 246, 37 Am. St. Rep. 723; *Forker v. Sandy Lake*, 130 Pa. St. 123, 31 Am. & Eng. Corp. Cas. 61; *Bennett v. Morrison*, 120 Pa. St. 390, 6 Am. St. Rep. 711; *Taylor v. Delaware, etc., Canal Co.*, 113 Pa. St. 162, 57 Am. Rep. 446, 28 Am. & Eng. R. Cas. 656; *West Philadelphia Pass. R. Co. v. Gallagher*, 108 Pa. St. 524, 27 Am. & Eng. R. Cas. 204; *Northumberland First Nat. Bank v. McMichael*, 106 Pa. St. 460, 51 Am. Rep. 529; *Mullan v. Philadelphia, etc., Steamship Co.*, 78 Pa. St. 25, 21 Am. Rep. 2; *Lehigh Valley R. Co. v. Hall*, 61 Pa. St. 361; *McCully v. Clarke*, 40 Pa. St. 399, 80 Am. Dec. 584; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387; *Brown v. Pennsylvania R. Co.*, 15 Phila. (Pa.) 321, 39 Leg. Int. (Pa.) 178; *Trovillo v. Tilford*, 6 Watts (Pa.) 468, 31 Am. Dec. 484; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33; *Philadelphia, etc., R. Co. v. Troutman*, (Pa. 1882) 6 Am. & Eng. R. Cas. 117.

Rhode Island. — *Boss v. Providence, etc., R. Co.*, 15 R. I. 149, 21 Am. & Eng. R. Cas. 364.

South Carolina. — *Hillhouse v. Jennings*, 60 S. Car. 392; *Harvey v. Doty*, 50 S. Car. 548; *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 28 Am. St. Rep. 883; *Carter v. Oliver Oil Co.*, 34 S. Car. 211, 27 Am. St. Rep. 815; *Hooper v. Columbia, etc., R. Co.*, 21 S. Car. 541, 53 Am. Rep. 691, 28 Am. & Eng. R. Cas.

433; *Carolina Nat. Bank v. Wallace*, 13 S. Car. 347, 36 Am. Rep. 694.

South Dakota. — *Haugen v. Chicago, etc., R. Co.*, 3 S. Dak. 394.

Tennessee. — *Scruggs v. Brackin*, 4 Verg. (Tenn.) 528.

Vermont. — *Carey v. Hart*, 63 Vt. 424; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613; *Briggs v. Taylor*, 28 Vt. 183.

Washington. — *Clancy v. Reis*, 5 Wash. 371.

Wisconsin. — *Cantwell v. Appleton*, 71 Wis. 463; *Leavitt v. Chicago, etc., R. Co.*, 64 Wis. 228; *Townley v. Chicago, etc., R. Co.*, 53 Wis. 626. See also *Spencer v. Milwaukee, etc., R. Co.*, 17 Wis. 487, 84 Am. Dec. 758.

Reasonable Doubts as to Meaning of Evidence. — It has been said that it is the better rule in all cases to submit the matter to the jury where there may be reasonable doubt as to the meaning of the evidence. *Crudup v. Thomas*, 126 N. Car. 333, *per Furches*, J.

Inferences to Be Drawn from Evidence Must Be Certain and Incontrovertible. — The inferences to be drawn from the evidence must be either certain or incontrovertible, or they cannot be decided upon by the court. *Leavitt v. Chicago, etc., R. Co.*, 64 Wis. 228.

1. When Verdict May Be Set Aside in Civil Cases. — In the following civil cases it was held that the court has authority to set aside a verdict when it is not supported by the evidence:

United States. — *Kohne v. Insurance Co. of North America*, 1 Wash. (U. S.) 123.

Arkansas. — *St. Louis, etc., R. Co. v. Morgart*, (Ark. 1888) 8 S. W. Rep. 179.

Georgia. — *Georgia R., etc., Co. v. Neely*, 56 Ga. 540.

Hawaii. — *Kaaihue v. Crabbe*, 3 Hawaii 768.

Illinois. — *Toledo, etc., R. Co. v. Miller*, 76 Ill. 278; *Illinois Cent. R. Co. v. Slarton*, 54 Ill. 133, 5 Am. Rep. 109; *Leadbeater v. Roth*, 25 Ill. 587; *Eldridge v. Rowe*, 7 Ill. 91, 43 Am. Dec. 41; *Toledo, etc., R. Co. v. Patterson*, 94 Ill. App. 670.

Indiana. — *Louisville, etc., R. Co. v. Schmidt*, 81 Ind. 264, 8 Am. & Eng. R. Cas. 245; *Indianapolis, etc., R. Co. v. Kennedy*, 77 Ind. 507, 3 Am. & Eng. R. Cas. 467.

Iowa. — *State v. Haven*, 43 Iowa 181.

Maine. — *Cunningham v. Bath Iron Works*, 92 Me. 501; *Corson v. Maine Cent. R. Co.*, 76 Me. 244, 17 Am. & Eng. R. Cas. 634; *Gleason v. Bremen*, 50 Me. 222; *Kimball v. Bates*, 50 Me. 308.

Texas. — *Houston, etc., R. Co. v. Richards*, 59 Tex. 373, 12 Am. & Eng. R. Cas. 70.

Virginia. — *Piedmont Electric Illuminating Co. v. Patteson*, 84 Va. 747.

to it when the proof before the chancellor in the first instance did not warrant him in directing the issue, or, in other words, when the case made at the hearing was such as to entitle the one party or the other to an immediate decree.¹

When Verdict Should Not Be Set Aside. — The court, however, has no authority to disturb a verdict of a jury which is supported by some evidence, even though the jury's findings of fact are not such as the court would have made.²

(2) *In Criminal Cases* — (a) **Withdrawal of Case from Jury — At Instance of Defendant.** — In criminal prosecutions the court can and must determine, when it is asked to do so, whether or not the prosecution has made a case for the jury, and if it clearly appears that no offense has been proven it is proper to determine as a question of law that the defendant is not guilty.³

Peremptory Instruction to Find Defendant Guilty. — It is not competent for the court in a criminal case to instruct the jury peremptorily to find the defendant guilty of the offense charged or of any criminal offense less than that charged, because the credibility of the witnesses who have testified to the defendant's guilt is for the jury, and because, as a verdict of acquittal cannot be set aside, if the court could direct a verdict of guilty it could do indirectly that which it has no power to do directly.⁴

Directing the Jury that Defendant Is Guilty if Jury Believes Testimony. — When all the evidence given on the trial proceeds from the state, and it is without conflict, and establishes beyond a doubt the guilt of the accused, it is not error for the court to charge the jury that if they believe the testimony they ought to find the defendant guilty.⁵

Directing Jury that Offense Less than That Charged Is Not Proven. — Where there is no evidence whatever to support a verdict of guilty of an offense less than the one charged, the court may charge the jury as matter of law that the evidence does not authorize any verdict except one of guilty or one of not guilty of the particular offense charged, and such an instruction is not an interference with the legitimate functions of the jury, and therefore with the constitutional right of the accused to be tried by a jury.⁶

1. *Atwood v. Smith*, 11 Ala. 894.

2. **When Verdict Should Not Be Disturbed in Civil Cases.** — *Earnest v. Southern Express Co.*, 1 Woods (U. S.) 573; *McDermott v. San Francisco*, etc., R. Co., 68 Cal. 33; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266; *Baltimore*, etc., R. Co. v. *Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700; *Bowen v. Flanagan*, 84 Va. 313; *Hemmingway v. Chicago*, etc., R. Co., 72 Wis. 42, 7 Am. St. Rep. 823; *Wheeler v. Westport*, 30 Wis. 302.

3. **When Criminal Case Should Be Withdrawn from Jury.** — *State v. Lucas*, 124 N. Car. 825; *Peters v. U. S.*, 2 Okla. 138.

When Criminal Case Should Not Be Withdrawn from Jury. — *State v. Hallock*, 70 Vt. 159.

4. **Court Has No Authority to Give Peremptory Instruction to Find Defendant Guilty.** — *Sparf v. U. S.*, 156 U. S. 51; *U. S. v. Taylor*, 3 McCrary (U. S.) 500; *U. S. v. Taylor*, 11 Fed. Rep. 470; *State v. Jackson*, 42 Kan. 384. See also *Ryder v. State*, 100 Ga. 528, 62 Am. St. Rep. 334; *People v. Wiman*, (Supm. Ct.) 9 Misc. (N. Y.) 441. Compare *Brown v. State*, 31 Ala. 353, where the defendant was indicted for selling liquor to be "drunk on or about the premises," and, it being shown that the liquor was drunk in a public road in front of the defendant's store, in full view thereof, and within the distance of from ten to twenty steps, it

was held that it was proper to instruct the jury that it was drunk about the premises; *People v. Neumann*, 85 Mich. 98.

5. **Directing Jury that Defendant Is Guilty if Jury Believes Testimony.** — *Dill v. State*, 25 Ala. 15; *Thompson v. State*, 21 Ala. 48; *State v. Fetterer*, 65 Conn. 287; *Hunt v. State*, 81 Ga. 140; *People v. Neumann*, 85 Mich. 98; *State v. McLain*, 104 N. Car. 894; *State v. Vines*, 93 N. Car. 493, 53 Am. Rep. 466; *State v. McFall*, Add. (Pa.) 255. See also *Kinnebrew v. State*, 80 Ga. 232; *Ells v. State*, 20 Ga. 438.

6. **Directing Jury that Offense Less than That Charged Is Not Proven.** — *Sparf v. U. S.*, 156 U. S. 51; *People v. McNutt*, 93 Cal. 658; *People v. Wright*, 93 Cal. 564; *State v. Jones*, 64 Mo. 391; *State v. McKinney*, 111 N. Car. 683; *State v. Elwood*, 73 N. Car. 189. See also *People v. Barry*, 90 Cal. 41; *People v. Madden*, 76 Cal. 521; *State v. Joeckel*, 44 Mo. 236; *State v. Starr*, 38 Mo. 273; *State v. Schoenwald*, 31 Mo. 147; *State v. Byrne*, 24 Mo. 151.

Assuming Existence of Facts as Agreed upon by Parties. — It is often a matter of convenience in giving instructions, and avoids circumlocution, to assume the existence of certain facts about which the parties are agreed; and neither party, under such circumstances, can afterwards make the assumption a ground of objection to the instructions. *Martin v. People*, 13 Ill. 341. See also *Theel v. Com.*, (Pa. 1888) 12 Atl. Rep. 148.

(b) **Setting Aside Verdict — At Instance of Defendant.** — The court may determine as a question of law that a verdict of guilty in a criminal case is not supported by the evidence, being guided by the same rules as govern the setting aside of verdicts in civil cases except to the extent that such rules are changed by the principle that the defendant in a criminal case must be proven to be guilty beyond a reasonable doubt, and not by a bare preponderance of evidence.¹

At Instance of Prosecution. — It is well settled, however, that where there is a verdict of not guilty the court has no authority to inquire into the correctness of such verdict or set it aside on the ground that there is no evidence to support it.²

V. ENUMERATION OF QUESTIONS OF FACT AND OF MIXED QUESTIONS OF LAW AND FACT — 1. In General. — It would not be practicable or useful to attempt to enumerate fully the myriads of questions of fact and of questions of mixed law and fact which it is the province of a jury to determine; and accordingly it is deemed proper to state merely the general rules for ascertaining what are such questions and to state some of the most common questions which have been held to be proper for submission to the jury.

2. Questions Arising upon Evidence Which Is Not Conflicting. — Even when there is no conflict in the evidence, or when the facts are not disputed, if different minds might honestly draw different conclusions from the evidence, or from the undisputed facts, a question of fact is presented which should be left to the jury for its determination.³

3. Questions Arising upon Conflicting Evidence. — In both civil and criminal actions where the evidence on material points is conflicting or where, the facts being undisputed, different minds might draw different conclusions from

Withdrawal of Case from Jury as Respects Defense of Insanity. — In *State v. Stephens*, 96 Mo. 637, it was held that where the defendant introduces evidence to show his insanity and the same is stricken out at his request, the court may charge the jury that there is no evidence authorizing an acquittal on the ground of his insanity.

1. When Verdict May Be Set Aside in Criminal Prosecutions. — *Com. v. Shepard*, 1 Allen (Mass.) 575.

Contra. — In *U. S. v. Gibert*, 2 Sumn. (U. S.) 19, it was held by Story, J., that a new trial cannot be granted in a capital case after a verdict regularly rendered upon a sufficient indictment. *Davis, J., dissenting.*

When Verdict Should Not Be Disturbed in Criminal Cases. — *State v. Godfrey*, 60 S. Car. 498.

2. Court Has No Authority to Disturb Verdict of Acquittal in Criminal Cases — England. — *Rex v. Bear*, 2 Salk. 417.

Iowa. — *State v. Kinney*, 44 Iowa 444; *State v. Johnson*, 2 Iowa 549.

Kansas. — *State v. Phillips*, 33 Kan. 100; *State v. Crosby*, 17 Kan. 396; *State v. Carmichael*, 3 Kan. 102. See also *Oswego v. Belt*, 16 Kan. 480.

Kentucky. — *Com. v. Sanford*, 5 Litt. (Ky.) 289; *Com. v. Van Tuyl*, 1 Met. (Ky.) 1, 71 Am. Dec. 455.

Massachusetts. — *Com. v. Cummings*, 3 Cush. (Mass.) 212, 50 Am. Dec. 732.

Michigan. — *Hamilton v. People*, 29 Mich. 173.

Mississippi. — *State v. Anderson*, 3 Smed. & M. (Miss.) 751.

Missouri. — *State v. Carroll*, 7 Mo. 286; *State v. Heatherly*, 4 Mo. 478.

New Jersey. — *State v. De Hart*, 7 N. J. L.

172. See also *State v. Kanouse*, 20 N. J. L. 115.

New York. — *People v. Corning*, 2 N. Y. 9; *People v. Comstock*, 8 Wend. (N. Y.) 549. See also *People v. Pine*, 2 Barb. (N. Y.) 566; *People v. Tarbox*, (Supm. Ct. Gen. T.) 30 How. Pr. (N. Y.) 318.

North Carolina. — *State v. Phillips*, 66 N. Car. 646; *State v. Martin*, 3 Hawks (10 N. Car.) 381; *State v. Taylor*, 1 Hawks (8 N. Car.) 462.

South Carolina. — *State v. Wright*, 3 Brev. (S. Car.) 421, in which case it was declared that the rule is applicable to both felonies and misdemeanors.

Tennessee. — *State v. Reynolds*, 4 Hayw. (Tenn.) 110; *State v. Solomons*, 6 Yerg. (Tenn.) 360, 27 Am. Dec. 469.

Texas. — *State v. Burris*, 3 Tex. 119; *Zollicoffer v. State*, 16 Tex. App. 312.

Wisconsin. — *State v. Kemp*, 17 Wis. 669.

Compare U. S. v. Simms, 1 Cranch (U. S.) 252; *State v. Buchanan*, 5 Har. & J. (Md.) 317, 9 Am. Dec. 534.

In Virginia, by Statute, in Prosecutions for Violations of Laws Relating to the Revenue a writ of error lies for the commonwealth. *Com. v. Scott*, 10 Gratt. (Va.) 749.

3. Questions Arising upon Evidence Which Is Not Conflicting. — *Sioux City, etc., R. Co. v. Stout*, 17 Wall. (U. S.) 664; *Domingus v. State*, 94 Ala. 9; *Oliver v. State*, 17 Ala. 587; *Mares v. Northern Pac. R. Co.*, 3 Dak. 336, 17 Am. & Eng. R. Cas. 620; *Furnish v. Missouri Pac. R. Co.*, 102 Mo. 669, 22 Am. St. Rep. 800; *Griswold v. American Cent. Ins. Co.*, 1 Mo. App. 97, affirmed 70 Mo. 654; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462; *Evansich v. Gulf, etc., R. Co.*, 57 Tex. 126, 44 Am. Rep. 586, 6 Am. & Eng. R. Cas. 182.

them, the question presented is one of fact for the jury.¹

1. Question of Fact for Jury on Conflicting Evidence in Civil Cases — *England*. — *Chaplin v. Rogers*, 1 East 192; *Dublin, etc., R. Co. v. Slatery*, 3 App. Cas. 1155; *Bridges v. North London R. Co.*, L. R. 7 H. L. 213; *Robson v. North Eastern R. Co.*, L. R. 10 Q. B. 271; *Grendon v. Lincoln, Plowd.* 493; *Willion v. Berkley, Plowd.* 223.

Canada. — *Peck v. Phoenix Mut. Ins. Co.*, 45 U. C. Q. B. 620; *Anonymous*, 29 U. C. Q. B. 456; *Carrall v. Montreal Bank*, 21 U. C. Q. B. 18.

United States. — *Grand Trunk R. Co. v. Ives*, 144 U. S. 408; *New York Cent., etc., R. Co. v. Fraloff*, 100 U. S. 24; *Upton v. Tribilcock*, 91 U. S. 45; *Weightman v. Washington*, 1 Black (U. S.) 39; *Hazard v. Chicago, etc., R. Co.*, 1 Biss. (U. S.) 503; *Dorr v. Swartwout*, 1 Blatchf. (U. S.) 179; *Ware v. St. Paul Water Co.*, 1 Dill. (U. S.) 465; *Anderson v. Bock*, 15 How. (U. S.) 323; *Miller v. Union Pac. R. Co.*, 4 McCrary (U. S.) 115, 6 Am. & Eng. R. Cas. 615; *O'Neill v. Chicago, etc., R. Co.*, 1 McCrary (U. S.) 505; *McKinney v. Neil*, 1 McLean (U. S.) 540; *Gregg v. Sayre*, 8 Pet. (U. S.) 244; *Sioux City, etc., R. Co. v. Stout*, 17 Wall. (U. S.) 657; *Schuchardt v. Allen*, 1 Wall. (U. S.) 359; *Kohne v. Insurance Co. of North America*, 1 Wash. (U. S.) 123; *Railway Officials*, etc., Acc. Assoc. v. Wilson, (C. C. A.) 100 Fed. Rep. 368; *Nyback v. Champagne Lumber Co.*, (C. C. A.) 90 Fed. Rep. 774; *O'Neil v. St. Louis, etc., R. Co.*, 9 Fed. Rep. 337; *North Noonday Min. Co. v. Orient Min. Co.*, 1 Fed. Rep. 522.

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New Jersey. — *Moebus v. Becker*, 46 N. J. L. 41; *Smith v. New York*, etc., R. Co., 46 N. J. L. 7, 18 Am. & Eng. R. Cas. 399; *Delaware*, etc., R. Co. v. *Toffey*, 38 N. J. L. 525; *Pennsylvania R. Co. v. Matthews*, 36 N. J. L. 531; *Central R. Co. v. Moore*, 24 N. J. L. 824.

New Mexico. — *Daly v. Bernstein*, 1 N. Mex. 380; *Crabtree v. Segrist*, 3 N. Mex. 278.

New York. — *Place v. New York Cent.*, etc., R. Co., 167 N. Y. 345; *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *People v. Ferraro*, 161 N. Y. 365, 14 N. Y. Crim. 266; *Greany v. Long Island R. Co.*, 101 N. Y. 419, 24 Am. & Eng. R. Cas. 473; *Tolman v. Syracuse*, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649, 23 Am. & Eng. R. Cas. 313; *Kellogg v. New York Cent.*, etc., R. Co., 79 N. Y. 72; *Harris v. Uebelhoefer*, 75 N. Y. 169; *Remsen v. People*, 43 N. Y. 6; *Mangam v. Brooklyn R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Davenport v. Ruckman*, 37 N. Y. 568; *McIntyre v. New York Cent. R. Co.*, 37 N. Y. 287; *Duffy v. People*, 26 N. Y. 588; *Farmer v. Manhattan Sav. Inst.*, 60 Hun (N. Y.) 462; *Wylie v. Kelly*, 41 Barb. (N. Y.) 594; *McGrath v. Hudson River R. Co.*, 32 Barb. (N. Y.) 144, 19 How. Pr. (N. Y.) 211; *Drake v. Elwyn*, 1 Cai. (N. Y.) 184; *Saling v. German Sav. Bank*, 15 Daly (N. Y.) 386; *Byrd v. Hall*, 2 Keyes (N. Y.) 646; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258; *McQueen v. Brown*, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 740.

North Carolina. — *Cook v. Southern R. Co.*, 128 N. Car. 333; *Short v. Gill*, 126 N. Car. 803; *Crudup v. Thomas*, 126 N. Car. 333; *Lay v. Richmond*, etc., R. Co., 106 N. Car. 404, 42 Am. & Eng. R. Cas. 110; *Brown v. Mitchell*, 102 N. Car. 347, 11 Am. St. Rep. 748; *State v. Green*, 100 N. Car. 419; *Johnson v. Allen*, 100 N. Car. 131; *Wallace v. Western North Carolina R. Co.*, 98 N. Car. 494, 2 Am. St. Rep. 347; *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34, 2 Am. St. Rep. 312; *Clark v. Wagoner*, 70 N. Car. 706; *Jordan v. Coffield*, 70 N. Car. 110; *Williams v. Peal*, 4 Dev. & B. L. (20 N. Car.) 471; *Plummer v. Gheen*, 3 Hawks (10 N. Car.)

66, 14 Am. Dec. 572; *Trotter v. Howard*, 1 Hawks (8 N. Car.) 320, 9 Am. Dec. 640; *State v. Boon*, 13 Ired. L. (35 N. Car.) 244, 57 Am. Dec. 555; *Herring v. Wilmington*, etc., R. Co., 10 Ired. L. (32 N. Car.) 402, 51 Am. Dec. 395; *Festerman v. Parker*, 10 Ired. L. (32 N. Car.) 474; *Icehour v. Rives*, 10 Ired. L. (32 N. Car.) 256; *Dea v. Morrison*, 3 Murph. (7 N. Car.) 551; *Doe v. Fulgham*, 2 Murph. (6 N. Car.) 364; *Legget v. Blount*, Term (4 N. Car.) 123, 7 Am. Dec. 702.

North Dakota. — *Vickery v. Burton*, 6 N. Dak. 245; *McRea v. Hillsboro Nat. Bank*, 6 N. Dak. 353; *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615; *Acme Harvester Co. v. Axtell*, 5 N. Dak. 315; *Hazelton Boiler Co. v. Fargo Gas*, etc., Co., 4 N. Dak. 365; *Bennett v. Northern Pac. R. Co.*, 3 N. Dak. 91; *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252; *Slatery v. Donnelly*, 1 N. Dak. 264.

Ohio. — *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 60 Am. St. Rep. 700; *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699; *Alexander v. Pennsylvania Co.*, 48 Ohio St. 623; *Dick v. Indianapolis*, etc., R. Co., 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101; *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579; *Cleveland*, etc., R. Co. v. *Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454; *French v. Millard*, 2 Ohio St. 44; *Doll v. Schoenberg*, 2 Disney (Ohio) 54; *Jenkins v. Little Miami R. Co.*, 2 Disney (Ohio) 49; *Van Ingen v. Newton*, 1 Disney (Ohio) 482; *Harris v. Protection Ins. Co.*, Wright (Ohio) 548.

Pennsylvania. — *Lehigh*, etc., *Coal Co. v. Lear*, (Pa. 1887) 9 Atl. Rep. 267, 32 Am. & Eng. R. Cas. 74; *Devlin v. Beacon Light Co.*, 198 Pa. St. 583; *Casey v. Pennsylvania Asphalt Paving Co.*, 198 Pa. St. 348; *Collins v. Lynch*, 157 Pa. St. 246, 37 Am. St. Rep. 723; *Lehigh Valley R. Co. v. Greiner*, 113 Pa. St. 600, 28 Am. & Eng. R. Cas. 397; *Somerset*, etc., R. Co. v. *Galbraith*, 109 Pa. St. 32, 23 Am. & Eng. R. Cas. 375; *Annaville Nat. Bank v. Kettering*, 106 Pa. St. 531, 51 Am. Rep. 536; *Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567; *Leas v. Walls*, 101 Pa. St. 57, 47 Am. Rep. 699; *Hass v. Philadelphia*, etc., *Steamship Co.*, 88 Pa. St. 269, 32 Am. Rep. 462; *Nagle v. Allegheny Valley R. Co.*, 88 Pa. St. 35, 32 Am. Rep. 413; *Pennsylvania R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Johnson v. Bruner*, 61 Pa. St. 58, 100 Am. Dec. 613; *Smith v. O'Connor*, 48 Pa. St. 218, 86 Am. Dec. 582; *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60, 78 Am. Dec. 322; *McMichael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560; *Porter v. Patterson*, 15 Pa. St. 229; *Hoopes v. Garver*, 15 Pa. St. 517; *Ginder v. Farnum*, 10 Pa. St. 98; *Miles v. Stevens*, 3 Pa. St. 21, 45 Am. Dec. 621; *Travis v. Smith*, 1 Pa. St. 234, 44 Am. Dec. 125; *Rose v. Story*, 1 Pa. St. 190, 44 Am. Dec. 121; *Sidwell v. Evans*, 1 P. & W. (Pa.) 383, 21 Am. Dec. 387; *Stahl v. Berger*, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666; *Hoy v. Sterrett*, 2 Watts (Pa.) 327, 27 Am. Dec. 313.

Rhode Island. — *Hampson v. Taylor*, 15 R. I. 83; *Boss v. Providence*, etc., R. Co., 15 R. I. 149, 21 Am. & Eng. R. Cas. 364; *Butcher v. Providence Gas Co.*, 12 R. I. 149, 34 Am. Rep. 626.

South Carolina. — *State v. Godfrey*, 60 S. Car. 498; *Carter v. Oliver Oil Co.*, 34 S. Car. 211, 27 Am. St. Rep. 815; *State v. Carroll*, 30 S. Car. 85, 14 Am. St. Rep. 883; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 30 Am. & Eng. R. Cas. 571; *Carolina Nat. Bank v. Wallace*, 13 S. Car. 347, 36 Am. Rep. 694.

South Dakota. — *McKeever v. Homestake Min. Co.*, 10 S. Dak. 599; *Wood v. Steinau*, 9 S. Dak. 110; *Page v. Chicago, etc.*, R. Co., 7 S. Dak. 297; *Knight v. Towles*, 6 S. Dak. 575; *Sweet v. Chicago, etc.*, R. Co., 6 S. Dak. 281; *Harrison v. Chicago, etc.*, R. Co., 6 S. Dak. 100; *McLaughlin v. Wheeler*, 1 S. Dak. 497.

Tennessee. — *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823; *Shadden v. McElwee*, 86 Tenn. 146, 6 Am. St. Rep. 821; *Jones v. Wasson*, 3 Baxt. (Tenn.) 211; *Cobb v. Wallace*, 5 Coldw. (Tenn.) 540; *Pilcher v. Hart*, 1 Humph. (Tenn.) 524; *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.) 104; *Robinson v. Louisville, etc.*, R. Co., 2 Lea (Tenn.) 594; *Swindle v. State*, 2 Yerg. (Tenn.) 581, 24 Am. Dec. 515.

Texas. — *Johnson v. State*, (Tex. Crim. 1902) 66 S. W. Rep. 1097; *Good v. Galveston, etc.*, R. Co., (Tex. 1889) 11 S. W. Rep. 854, 40 Am. & Eng. R. Cas. 93; *Texas, etc.*, R. Co. *v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929; *Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792; *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768; *Gulf, etc.*, R. Co. *v. Gasscamp*, 69 Tex. 545, 34 Am. & Eng. R. Cas. 6; *Texas, etc.*, R. Co. *v. Levi*, 59 Tex. 674, 13 Am. & Eng. R. Cas. 464; *Galveston, etc.*, R. Co. *v. Moore*, 59 Tex. 64, 46 Am. Rep. 265, 10 Am. & Eng. R. Cas. 745; *Texas, etc.*, R. Co. *v. Chapman*, 57 Tex. 75; *Drinkard v. Ingram*, 21 Tex. 650, 73 Am. Dec. 250; *Shepherd v. Cassidy*, 20 Tex. 24, 70 Am. Dec. 372; *Ellis v. Mathews*, 19 Tex. 390, 70 Am. Dec. 353; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154; *Jones v. State*, 13 Tex. 168, 62 Am. Dec. 550; *Bryant v. Kelton*, 1 Tex. 415; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108.

Utah. — *Dryburg v. Mercur Gold Min., etc.*, Co., 18 Utah 410; *Lowe v. Herald Co.*, 6 Utah 175; *Burrows v. Guest*, 5 Utah 91.

Vermont. — *State v. Hallock*, 70 Vt. 159; *Carey v. Hart*, 63 Vt. 424; *State v. Dana*, 59 Vt. 614; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Hill v. New Haven*, 37 Vt. 501, 88 Am. Dec. 613.

Virginia. — *Bowen v. Flanagan*, 84 Va. 313; *Dejarnette v. Com.*, 75 Va. 867; *Coleman v. Com.*, 25 Gratt. (Va.) 865, 18 Am. Rep. 711; *Doss v. Com.*, 1 Gratt. (Va.) 557; *Ross v. Gill*, 1 Wash. (Va.) 87.

Washington. — *Traver v. Spokane St. R. Co.*, 25 Wash. 225; *Swadling v. Barneson*, 21 Wash. 699; *Lane v. Spokane Falls, etc.*, R. Co., 21 Wash. 119, 75 Am. St. Rep. 821; *Sproul v. Seattle*, 17 Wash. 256; *State v. Barr*, 11 Wash. 481, 48 Am. St. Rep. 890; *State v. Knowlton*, 11 Wash. 512; *Mitchell v. Tacoma R. etc.*, Co., 9 Wash. 120; *Klepsch v. Donald*, 8 Wash. 162; *Northern Pac. R. Co. v. Holmes*, 3 Wash. Ter. 543.

West Virginia. — *Young v. West Virginia, etc.*, R. Co., 44 W. Va. 218; *Schwarzbach v. Ohio Valley Protective Union*, 25 W. Va. 622, 52 Am. Rep. 227; *State v. Greer*, 22 W. Va. 800; *Sheff v. Huntington*, 16 W. Va. 307.

Wisconsin. — *Spearbracker v. Larrabee*, 64 Wis. 573; *Leavitt v. Chicago, etc.*, R. Co., 64 Wis. 228; *Brown v. Chicago, etc.*, R. Co., 54 Wis. 342, 41 Am. Rep. 41; *Townley v. Chicago, etc.*, R. Co., 53 Wis. 626; *Wheeler v. Westport*, 30 Wis. 392; *Langhoff v. Milwaukee, etc.*, R. Co., 19 Wis. 498; *Spencer v. Milwaukee, etc.*, R. Co., 17 Wis. 487, 84 Am. Dec. 758.

Where Auditor's Report Is Put in Evidence. — In *Massachusetts* it has been held that where the plaintiff puts in evidence an auditor's report in his favor it is for the jury to say what weight they will give to the report, the report being merely the auditor's judgment on evidence which the jury has heard. *Wyman v. Whicher*, 179 Mass. 276.

Question of Fact for Jury on Conflicting Evidence in Criminal Prosecutions — *England.* — *Penn's Case*, 6 How. St. Pr. 951.

United States. — *U. S. v. Alden*, 1 Sprague (U. S.) 95.

Alabama. — *Thomas v. State*, 130 Ala. 62; *Henderson v. State*, 129 Ala. 104; *Kilgore v. State*, 124 Ala. 24; *Washington v. State*, 125 Ala. 40; *Welch v. State*, 124 Ala. 41; *Keller v. State*, 123 Ala. 94; *Maddox v. State*, 122 Ala. 110; *May v. State*, 115 Ala. 14; *Koch v. State*, 115 Ala. 99; *White v. State*, 111 Ala. 92; *Barnes v. State*, 103 Ala. 44; *Ezell v. State*, 102 Ala. 101; *Gilyard v. State*, 98 Ala. 59; *Lang v. State*, 97 Ala. 41; *Garrett v. State*, 97 Ala. 18; *Mitchell v. State*, 94 Ala. 68; *Norris v. State*, 87 Ala. 85; *Davenport v. State*, 85 Ala. 336; *Seams v. State*, 84 Ala. 410; *Steele v. State*, 83 Ala. 20; *Finch v. State*, 81 Ala. 41; *Johnson v. State*, 73 Ala. 523; *Redd v. State*, 69 Ala. 255; *Young v. State*, 68 Ala. 569; *Murphy v. State*, 63 Ala. 1; *Hinds v. State*, 55 Ala. 145; *Levy v. State*, 49 Ala. 390; *Williams v. State*, 47 Ala. 659; *Melton v. State*, 45 Ala. 56; *Sims v. State*, 43 Ala. 33; *Hall v. State*, 40 Ala. 698; *Collins v. State*, 33 Ala. 434, 73 Am. Dec. 426; *Bob v. State*, 32 Ala. 560; *Seaborn v. State*, 20 Ala. 15; *Moore v. State*, 12 Ala. 764, 46 Am. Dec. 276; *Hawkins v. State*, 3 Stew. & P. (Ala.) 63.

California. — *People v. Hertz*, 105 Cal. 660; *People v. Robertson*, 67 Cal. 646; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505.

District of Columbia. — *Hardy v. U. S.*, 3 App. Cas. (D. C.) 35; *U. S. v. Neverson*, 1 Mackey (D. C.) 152.

Hawaii. — *Provisional Government v. Smith*, 9 Hawaii 257.

Indiana. — *Guetig v. State*, 63 Ind. 278; *Armstrong v. State*, 4 Blackf. (Ind.) 247.

Iowa. — *State v. Spayde*, 110 Iowa 726; *State v. Curran*, 51 Iowa 112; *State v. Mizner*, 50 Iowa 145, 32 Am. Rep. 128; *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 125.

Kansas. — *State v. Wilson*, 62 Kan. 621; *State v. Newman*, 57 Kan. 705; *State v. Johnson*, 6 Kan. App. 119.

Kentucky. — *Wright v. Com.*, 85 Ky. 123.

Massachusetts. — *Com. v. Leonard*, 140 Mass. 473, 54 Am. Rep. 485.

Michigan. — *People v. Garbutt*, 17 Mich. 9, 97 Am. Dec. 162.

Missouri. — *Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325.

Nevada. — *State v. Harkin*, 7 Nev. 377; *State v. Newton*, 4 Nev. 410.

Questions of Fact Dependent upon Philosophical Principles and Mechanical Skill and Judgment. — Where a question before a jury is dependent for its solution upon philosophical principles and mechanical skill and judgment, the conclusions of the jury will be respected on appeal as much as in any other case.¹

Question of Fact for Jury on Plea in Abatement. — Where the defendant in a criminal prosecution pleads in abatement, questions arising upon such plea other than those which are determinable upon a bare inspection and construction of a record are for the jury.²

Question of Fact for Jury on Plea of Former Jeopardy. — Where, on a criminal prosecution, the defendant pleads a previous acquittal or conviction of the offense charged and the issue is not to be tried upon the record, but upon parol evidence as to the identity of the offense previously charged or the identity of the defendant, a question of fact is presented for the jury.³

Questions Arising upon Matters of Which Court Will Take Judicial Notice. — It has been held that in a civil action where the matter is one of which the court will take judicial notice there is no question to be left to the jury.⁴

Question of Fact Presented by Circumstantial Evidence. — Where the evidence is cir-

New Mexico. — *U. S. v. Gumm*, 9 N. Mex. 611; *Territory v. O'Donnell*, 4 N. Mex. 66; *Territory v. Romine*, 2 N. Mex. 114.

New York. — *People v. Ferraro*, 161 N. Y. 365, 14 N. Y. Crim. 265; *Remsen v. People*, 43 N. Y. 6.

North Carolina. — *State v. Jones*, 126 N. Car. 1099.

Oklahoma. — *Archer v. U. S.*, 9 Okla. 569.

Tennessee. — *Persons v. State*, 90 Tenn. 291.

Texas. — *Doss v. State*, 21 Tex. App. 505, 57 Am. Rep. 618; *Chester v. State*, 1 Tex. App. 707; *Searcy v. State*, 1 Tex. App. 440.

Vermont. — *State v. Hallock*, 70 Vt. 159.

Washington. — *State v. Burns*, 19 Wash. 52.

See also such titles as *EMBEZZLEMENT*, vol. 10, p. 976; *LARCENY*, vol. 18, p. 456; *ROBBERY*, and other titles in this work relating to criminal prosecutions.

By a Statute of New Mexico in force in 1881 it was provided as follows: "All issues of fact in a criminal case shall be tried by a jury." *Territory v. Romine*, 2 N. Mex. 114.

Uncontradicted Testimony Is Never Equivalent to an Admitted Fact, as the jury may not believe it, and this is especially so where the alleged facts are peculiarly within the knowledge of the witness. *Per Douglas, J.*, in *Mitchell v. Carolina Cent. R. Co.*, 124 N. Car. 236.

Interpretation of Testimony. — Where on a prosecution for cheating by false pretenses the prosecutor testified that he had "every confidence in" the defendant, it was for the jury to say how far such testimony was a denial of reliance upon the false pretense. *Com. v. Coe*, 115 Mass. 481.

Where a physician testifies on a prosecution for assault and battery that he had examined a wound, but did not examine another wound, a charge to the jury that "they could consider whether the witness in saying that he did not examine the wound meant that he did not examine it as a physician, or that he did not seek or look at it at all," is not erroneous. *Rosenbaum v. State*, 33 Ala. 354.

Question of Fact for Jury as to Whether Offense Is Second Offense. — *Hines v. State*, 26 Ga. 614.

Question of Fact for Jury as to Whether Defend-

ant Attempted to Escape. — *State v. James*, 45 Iowa 412.

Question of Fact as to Limitations in Criminal Prosecution. — *People v. Price*, 74 Mich. 37. See also *People v. Clement*, 72 Mich. 116, where there was a question of fact as to whether or not a warrant had been issued within the time limit.

1. Questions of Fact Dependent upon Philosophical Principles and Mechanical Skill and Judgment. — *Gagg v. Vetter*, 41 Ind. 228, 13 Am. Rep. 322, in which case the question was whether or not a chimney and furnace had been properly constructed and whether or not dangerous or improper fuel had been used in such furnace.

2. Question of Fact for Jury on Plea in Abatement. — *Cason v. State*, 22 Ark. 214; *Cooper v. State*, 21 Ark. 228; *Woodward v. State*, 33 Fla. 508, holding that an issue made on a plea in abatement which alleges that the notice of the drawing of juries required by the statute was not given is one of fact for the jury; *Day v. Com.*, 2 Gratt. (Va.) 561.

Questions Arising upon Inspection of Record. — See *supra*, this title, IV. 6. *b. Questions Arising upon Construction of Records.*

3. Question of Fact for Jury on Plea of Former Jeopardy. — *State v. Williams*, 45 La. Ann. 936; *State v. Priebrnow*, 16 Neb. 131; *State v. Johnson*, 11 Nev. 273; *Grant v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 527; *McCullough v. State*, (Tex. Crim. 1896) 34 S. W. Rep. 753.

Questions of Law for Court on Plea of Former Acquittal. — *People v. Ammerman*, 118 Cal. 23, in which case there was no conflict in the evidence upon such plea.

Questions Arising upon Inspection of Record. — See *supra*, this title, IV. 6. *b. Questions Arising upon Construction of Records.*

4. Questions Arising upon Matters of Which Court Will Take Judicial Notice. — *Gilbert v. Flint, etc.*, R. Co., 51 Mich. 488, 47 Am. Rep. 592, 15 Am. & Eng. R. Cas. 491, in which case it was held that it was error to leave to the jury the question whether or not a box freight car standing still at a highway crossing is of itself a frightful object to a horse of ordinary gentleness. See also *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726.

cumstantial the question presented is peculiarly one for the jury, and this observation applies both in civil actions and criminal prosecutions.¹

4. Questions Arising upon Credibility of Witnesses. — As a general proposition, applicable alike to civil actions and criminal prosecutions, the credibility of all the testimony is a question of fact which must be submitted to the jury. Hence, as a general rule, in charging juries it is improper to presume, or to state as a fact, any material matter which depends upon the sufficiency of all the testimony for its establishment.²

1. Question of Fact Presented by Circumstantial Evidence. — *Marcott v. Marquette*, etc., R. Co., 47 Mich. 1; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Chester v. State*, 1 Tex. App. 707.

2. Question of Fact as to Credibility of Witnesses in Civil Actions. — *United States*. — Congress, etc., *Spring Co. v. Edgar*, 90 U. S. 658; *McKay v. Irvine*, 10 Fed. Rep. 725.

Alabama. — *Davis Wagon Co. v. Cannon*, 120 Ala. 301; *Bynon v. State*, 117 Ala. 80, 67 Am. St. Rep. 163; *Louisville*, etc., R. Co. v. *Malone*, 109 Ala. 509; *Nelson v. Warren*, 93 Ala. 408; *Blanchard v. Floyd*, 93 Ala. 53, *Mobile*, etc., R. Co. v. *Ladd*, 92 Ala. 287; *Alabama G. S. R. Co. v. Moody*, 90 Ala. 46; *McKenzie v. Wimberly*, 86 Ala. 195; *Skeggs v. Horton*, 82 Ala. 352; *Hancock v. Kelly*, 81 Ala. 368; *Carter v. Chambers*, 79 Ala. 223; *Montgomery*, etc., R. Co. v. *Chambers*, 79 Ala. 338, *Moore v. State*, 68 Ala. 360; *Taylor v. Kelly*, 31 Ala. 59, 68 Am. Dec. 150; *Adams v. Davis*, 16 Ala. 748; *Henderson v. Mabry*, 13 Ala. 713; *Moore v. Jones*, 13 Ala. 296; *McCutchen v. McCutchen*, 9 Port. (Ala.) 650.

Arkansas. — *Little Rock*, etc., R. Co. v. *Finley*, 37 Ark. 562; *Lavender v. Hudgens*, 32 Ark. 763.

Connecticut. — *Flint v. Norwich*, etc., *Transp. Co.*, 34 Conn. 554.

District of Columbia. — *Olmstead v. Webb*, 5 App. Cas. (D. C.) 38.

Illinois. — *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243; *Baker v. Young*, 44 Ill. 42, 92 Am. Dec. 149; *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474, 92 Am. Dec. 85; *Crabtree v. Hagenbaugh*, 25 Ill. 233, 79 Am. Dec. 324.

Indiana. — *Travellers' Ins. Co. v. Chappel- low*, 83 Ind. 429; *Nelson v. Vorce*, 55 Ind. 455.

Kentucky. — *White v. Fox*, 1 Bibb (Ky.) 369, 4 Am. Dec. 643.

Maryland. — *Baltimore*, etc., R. Co. v. *Kean*, 65 Md. 394, 28 Am. & Eng. R. Cas. 580; *Pitts- burg*, etc., R. Co. v. *Andrews*, 39 Md. 329, 17 Am. Rep. 569.

Massachusetts. — *Tully v. Fitchburg R. Co.*, 134 Mass. 490, 14 Am. & Eng. R. Cas. 682; *Husted v. O'Donnell*, 118 Mass. 424; *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Gavett v. Manchester*, etc., R. Co., 16 Gray (Mass.) 501, 77 Am. Dec. 422; *Perkins v. Augusta Ins.*, etc., Co., 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Sperry v. Wilcox*, 1 Met. (Mass.) 267.

Michigan. — *Holmes v. Deppert*, 122 Mich. 275; *Henry v. Henry*, 122 Mich. 6; *Green v. Chicago*, etc., R. Co., 110 Mich. 648; *Thomp- son v. Price*, 100 Mich. 558.

Mississippi. — *Kelly v. Miller*, 39 Miss. 17.

Missouri. — *Brown v. Mays*, 80 Mo. App. 81; *Mauerman v. Siemerts*, 71 Mo. 101; *Downing*

v. Missouri, etc., R. Co., 70 Mo. App. 657; *Paulette v. Brown*, 40 Mo. 52.

New Jersey. — *Central R. Co. v. Moore*, 24 N. J. L. 824.

New York. — *McDonald v. Metropolitan St. R. Co.*, 167 N. Y. 66; *Hull v. Littauer*, 162 N. Y. 569; *Merrill v. Grinnell*, 30 N. Y. 594; *Gold- smith v. Coverly*, 75 Hun (N. Y.) 48, 31 Abb. N. Cas. (N. Y.) 149.

North Carolina. — *Flynt v. Bodenhamer*, 80 N. Car. 205.

Ohio. — *French v. Millard*, 2 Ohio St. 44.

Oklahoma. — *Baker v. Nichols*, etc., Co., 10 Okla. 685.

Pennsylvania. — *Devlin v. Beacon Light Co.*, 198 Pa. St. 583; *Bennett v. Morrison*, 120 Pa. St. 390, 6 Am. St. Rep. 711; *Somerset*, etc., R. Co. v. *Galbraith*, 109 Pa. St. 32, 23 Am. & Eng. R. Cas. 375; *Annvill Nat. Bank v. Ket- tering*, 106 Pa. St. 531, 51 Am. Rep. 536; *Penn- sylvania R. Co. v. Hope*, 80 Pa. St. 373, 21 Am. Rep. 100; *Ginder v. Farnum*, 10 Pa. St. 98; *Bilborough v. Coulter*, 5 Phila. (Pa.) 12, 19 Leg. Int. (Pa.) 44; *Flemming v. Marine Ins. Co.*, 4 Whart. (Pa.) 59, 33 Am. Dec. 33.

Rhode Island. — *Wilson v. Conway F. Ins. Co.*, 4 R. I. 141.

South Carolina. — *Rykard v. Davenport*, 61 S. Car. 215; *Harvey v. Doty*, 50 S. Car. 548.

South Dakota. — *Drew v. Watertown F. Ins. Co.*, 6 S. Dak. 335.

Texas. — *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828; *Weaver v. Nugent*, 72 Tex. 272, 13 Am. St. Rep. 792; *Boon v. Weather- ed*, 23 Tex. 687.

Washington. — *Traver v. Spokane St. R. Co.*, 25 Wash. 225; *Lyts v. Keevey*, 5 Wash. 606.

West Virginia. — *Young v. West Virginia*, etc., R. Co., 44 W. Va. 218.

Wyoming. — *Riner v. New Hampshire F. Ins. Co.*, 9 Wyo. 446.

Question for Jury as to Credibility of Expert Witnesses. — *Hull v. St. Louis*, (Mo. 1897) 39 S. W. Rep. 446.

Question of Fact as to Credibility of Witnesses in Criminal Prosecutions. — *Alabama*. — *Spicer v. State*, 105 Ala. 123; *Paul v. State*, 100 Ala. 136; *Prior v. State*, 99 Ala. 196; *Gilyard v. State*, 98 Ala. 59; *Horn v. State*, 98 Ala. 23; *Harris v. State*, 96 Ala. 24; *Smith v. State*, 92 Ala. 69; *Lowe v. State*, 88 Ala. 8; *Childress v. State*, 86 Ala. 77; *Segars v. State*, 86 Ala. 59; *Armstrong v. State*, 83 Ala. 49; *Nabors v. State*, 82 Ala. 8; *McKee v. State*, 82 Ala. 32; *Childs v. State*, 76 Ala. 93; *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4; *Corley v. State*, 28 Ala. 22.

Arkansas. — *Maclin v. State*, 44 Ark. 115; *Mize v. State*, 36 Ark. 653; *Wallace v. State*, 28 Ark. 531; *Flanagin v. State*, 25 Ark. 92.

California. — *People v. Hertz*, 105 Cal. 660; *People v. Levison*, 16 Cal. 98, 76 Am. Dec. 505.

Sufficiency of Corroborating Evidence. — Where the rules of law require that no verdict, judgment, or decision shall be based on the testimony of a witness unless such witness is corroborated, the sufficiency of the corroborating evidence adduced is a question solely for the jury.¹

Where Testimony of Plaintiff as Witness Is Contradictory. — Where the answers to the questions propounded to the plaintiff as a witness are contradictory, it is for the jury to determine which answers are to be believed.²

5. Questions Arising upon Oral Contracts. — Where a contract is verbal and the evidence is conflicting as to its terms, a question of fact for the jury is presented as to what are the terms of the contract;³ but where there is no conflict as to the terms of an oral contract its construction is a question of law for the court, and not a question for the jury.⁴

6. Existence, and Natural Events, Conditions, and Phenomena. — Where the evidence is conflicting or the facts adduced are such that different inferences may be drawn from them, questions as to the existence of things animate or inanimate, as to the nature and condition of such things, and as to the occurrence of natural phenomena, are questions of fact for the jury.⁵

Dakota. — Territory *v.* Egan, 3 Dak. 119.

Illinois. — McMahon *v.* People, 120 Ill. 584.

Iowa. — State *v.* Bell, 49 Iowa 440.

Kentucky. — Wright *v.* Com., 85 Ky. 123.

Michigan. — Hamilton *v.* People, 29 Mich.

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New Mexico. — Territory *v.* Chavez, 8 N. Mex. 528; Territory *v.* O'Donnell, 4 N. Mex. 66; Territory *v.* Romine, 2 N. Mex. 114.

New York. — People *v.* Ferraro, 161 N. Y. 365, 14 N. Y. Crim. 266; People *v.* Barone, 161 N. Y. 451, 14 N. Y. Crim. 351.

North Carolina. — State *v.* Vines, 93 N. Car. 493, 53 Am. Rep. 466.

Rhode Island. — State *v.* Hoxsie, 15 R. I. 1, 2 Am. St. Rep. 838, 1 N. Eng. Rep. 29.

Texas. — Brown *v.* State, 23 Tex. 195; Doss *v.* State, 21 Tex. App. 505, 57 Am. Rep. 618; Searcy *v.* State, 1 Tex. App. 440; Chester *v.* State, 1 Tex. App. 707.

Vermont. — State *v.* Dana, 59 Vt. 614.

Virginia. — Coleman *v.* Com., 25 Gratt. (Va.) 865, 18 Am. Rep. 711.

Question of Fact as to Credibility of Accused When He Testifies in His Own Behalf. — State *v.* Newton, 4 Nev. 410.

Question for Jury as to Credibility of Accomplice. — Collins *v.* People, 98 Ill. 584, 38 Am. Rep. 105; Stocking *v.* State, 7 Ind. 326.

Question of Fact as to Corroboration of Prosecutrix. — Munkers *v.* State, 87 Ala. 94; State *v.* Bell, 49 Iowa 440; State *v.* Brinkhaus, 34 Minn. 285; Crandall *v.* People, 2 Lans. (N. Y.) 309. The foregoing cases were prosecutions for seduction. See also the titles RAPE, *post*; SEDUCTION.

1. Sufficiency of Corroborating Evidence. — Gildersleeve *v.* Atkinson, 6 N. Mex. 250, in which case it was held that where it is required by statute that testimony as to a transaction with a decedent shall be corroborated, the sufficiency of the corroborating evidence is for the jury.

2. State *v.* Holton, 59 Kan. 707.

3. Terms of Oral Contract. — American Oak Extract Co. *v.* Ryan, 104 Ala. 267; Swanner *v.* Swanner, 50 Ala. 66; Festerman *v.* Parker, 10 Ired. L. (32 N. Car.) 474; Elder *v.* Rourke, 27 Oregon 363; Bilborough *v.* Coulter, 5 Phila. (Pa.) 12, 19 Leg. Int. (Pa.) 44.

Question of Fact for Jury as to Existence of Warranty. — Englehardt *v.* Clanton, 83 Ala. 336.

Question of Fact for Jury as to Whether Debt Barred by Bankruptcy Has Been Renewed. — Bennett *v.* Everett, 3 R. I. 152, 67 Am. Dec. 498.

Question of Fact for Jury Where Written Contract Is Explained by Parol Evidence. — See *supra*, this title, *Enumeration of Questions of Law — Questions Arising upon Construction of Documents, etc.*, — Where Parol Evidence Is Introduced to Explain Writings.

4. When Terms Are Not Disputed. — Barnhill *v.* Howard, 104 Ala. 412; Festerman *v.* Parker, 10 Ired. L. (32 N. Car.) 474. See also Foley *v.* Felrath, 98 Ala. 176, 39 Am. St. Rep. 39; Evans *v.* Carey, 29 Ala. 99.

5. Question of Fact as to Birth. — See such titles as BASTARDY, vol. 3, p. 871; SEDUCTION; WILLS.

Question of Fact as to Existence of Custom or Usage. — Munkers *v.* State, 87 Ala. 94; Haas *v.* Hudmon, 83 Ala. 174; Allegre *v.* Maryland Ins. Co., 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; Carolina Nat. Bank *v.* Wallace, 13 S. Car. 347, 36 Am. Rep. 694. See also the title USAGES AND CUSTOMS.

Question of Fact as to Whether Occurrence in Nature Is Extraordinary. — Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, citing Gray *v.* Harris, 107 Mass. 492, 9 Am. Rep. 61, and Houston, etc., R. Co. *v.* Parker, 50 Tex. 330.

Question of Fact as to Whether Paper Was Incomplete When It Was Delivered. — Abbott *v.* Rose, 62 Me. 104, 16 Am. Rep. 427.

Question of Fact as to Whether Lights Were Burning. — Nyback *v.* Champagne Lumber Co., 63 U. S. App. 519; Galveston *v.* Hemmis, 72 Tex. 558, 13 Am. St. Rep. 828.

Question of Fact as to How Dark It Was When Accident Happened. — Nyback *v.* Champagne Lumber Co., (C. C. A.) 90 Fed. Rep. 774; Brackenridge *v.* Fitchburg, 145 Mass. 160, 18 Am. & Eng. Corp. Cas. 287.

Question of Fact for Jury as to Existence of Disease. — State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242; State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533, in which cases it was held that it is a question of fact for the jury whether there is such a mental disease as dipsomania.

7. Physical Capacity, Condition, and Age of Persons. — In all cases in which the evidence is conflicting questions as to the physical capacity, condition, and age of a person are questions of fact which it is the sole province of the jury to determine.¹

8. Mental Qualities and Conditions, and Operations of the Mind — *a.* **MENTAL QUALITIES AND CAPACITY.** — In civil actions and in criminal prosecutions questions as to a person's mental qualities and capacity are questions of mixed law and fact, such questions being presented to the jury as questions of fact under the instructions of the court as to what degree of mental capacity will make a person responsible for his acts, or what degree of mental incapacity will relieve him from liability for his acts.²

b. **INFLUENCES OPERATING UPON THE MIND.** — It is a question of fact for the jury whether in a given case there was freedom of the will or coercion of the mind.³

c. **KNOWLEDGE OR NOTICE.** — The question whether a person had knowl-

Question of Fact for Jury as to Truth of Statement. — *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 426; *Daly v. Bernstein*, 6 N. Mex. 380; *Lowe v. Herald Co.*, 6 Utah 175. See also the titles **FRAUD AND DECEIT**, vol. 14, p. 12; **LIBEL AND SLANDER**, vol. 18, p. 851.

1. Whether a Person Is a Mulatto. — *State v. Scott*, 1 Bailey L. (S. Car.) 270.

Fitness for Position. — *Moore v. Chicago*, etc., R. Co., 65 Iowa 505, 54 Am. Rep. 26, 22 Am. & Eng. R. Cas. 396, in which case the question was whether the person had sufficient physical strength to qualify him to act as a baggageman and express messenger.

Capacity to Commit Crime of Person Between Seven and Fourteen Years of Age. — *State v. Learnard*, 41 Vt. 585.

Whether Person Could See Train. — *Chicago City R. Co. v. Van Vleck*, 143 Ill. 480; *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243; *Cleveland*, etc., R. Co. v. *Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

Whether Person Could Hear Train. — *Petty v. Hannibal*, etc., R. Co., 88 Mo. 306, 28 Am. & Eng. R. Cas. 618.

Whether Person Was Diseased. — *Dorev v. Metropolitan L. Ins. Co.*, 172 Mass. 234; *Woodman v. Nottingham*, 49 N. H. 387, 6 Am. Rep. 526.

Whether Leg of Person Was Discolored or Inflamed. — *Sullivan v. McGraw*, 118 Mich. 39.

Habits of Person. — *Norfolk*, etc., R. Co. v. *Hoover*, 79 Md. 253, 47 Am. St. Rep. 392, in which case the question was whether a servant was intemperate in the use of intoxicating liquors.

Financial Condition of Person. — *Bradley v. Poole*, 98 Mass. 169, 93 Am. Dec. 144.

Age of Person. — *Freiberg v. State*, 94 Ala. 91; *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 56 Am. & Eng. R. Cas. 571.

2. Question of Fact as to Mental Qualities and Capacity in Civil Actions. — *Burney v. Torrey*, 100 Ala. 157, 46 Am. St. Rep. 33; *Walker v. Walker*, 34 Ala. 469; *Abraham v. Wilkins*, 17 Ark. 292; *Tobin v. Jenkins*, 29 Ark. 151; *McDaniel v. Crosby*, 19 Ark. 533; *Rogers v. Diamond*, 13 Ark. 474; *Gardner v. Lamback*, 47 Ga. 133; *Shuman v. Supreme Lodge Knights*, etc., 110 Iowa 480; *Hill v. Nash*, 41 Me. 585, 66 Am. Dec. 266; *John Hancock Mut. L. Ins.*

Co. v. Moore, 34 Mich. 41; *Kelly v. Miller*, 39 Miss. 17; *Haynes v. Haynes*, 33 Ohio St. 598, 31 Am. Rep. 579. See the titles **INSANITY**, vol. 16, p. 603; **TESTAMENTARY CAPACITY**.

Question of Fact as to Mental Qualities and Capacity in Criminal Prosecutions. — *Parsons v. State*, 81 Ala. 577, 60 Am. Rep. 193; *McLean v. State*, 16 Ala. 672; *McKenzie v. State*, 26 Ark. 334; *Guetig v. State*, 63 Ind. 278; *State v. Newman*, 57 Kan. 705; *State v. Pike*, 49 N. H. 399, 6 Am. Rep. 533; *People v. Pine*, 2 Barb. (N. Y.) 566; *State v. Jones*, 126 N. Car. 1099.

Question of Fact as to Mental Development and Discretion of Children. — *Moore v. Metropolitan R. Co.*, 2 Mackey (D. C.) 437; *Rockford*, etc., R. Co. v. *Delaney*, 82 Ill. 198, 25 Am. Rep. 310; *Chicago*, etc., R. Co. v. *Becker*, 76 Ill. 32; *Lynch v. Metropolitan St. R. Co.*, 112 Mo. 420, 56 Am. & Eng. R. Cas. 571; *Evansich v. Gulf*, etc., R. Co., 57 Tex. 126, 44 Am. Rep. 586, 6 Am. & Eng. R. Cas. 182.

Question of Law as to Requisite Degree of Mental Capacity. — *Dunham's Appeal*, 27 Conn. 192; *Kempsey v. McGinniss*, 21 Mich. 123.

Question of Fact as to Existence of Mental Disease. — *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242, which was a criminal prosecution.

Question of Fact as to Whether Acts Were Offspring of Mental Disease. — *State v. Jones*, 50 N. H. 369, 9 Am. Rep. 242.

Question of Fact as to Whether Mental Capacity Was Affected by Drunkenness. — *McDaniel v. Crosby*, 19 Ark. 533; *State v. Carey*, 15 Wash. 549.

Question of Fact as to Whether Mind Was Diverted. — *Lichtenberger v. Meriden*, 100 Iowa 221.

Question of Fact as to Whether Passion Was Aroused. — *Smith v. State*, 103 Ala. 4, which was a prosecution for murder.

Question of Fact as to Whether Reliance Was Placed upon False Representations. — *Banta v. Savage*, 12 Nev. 155; *Daly v. Bernstein*, 6 N. Mex. 380.

3. Influences Operating upon the Mind. — *Ewing v. Peck*, 26 Ala. 413; *Jenkins v. Tobin*, 31 Ark. 306; *Tobin v. Jenkins*, 29 Ark. 151; *State v. Kellar*, 8 N. Dak. 563, 73 Am. St. Rep. 776; *Monroe v. Barclay*, 17 Ohio St. 302, 93 Am. Dec. 620. See also the titles **DURESS**, vol. 10, p. 320; **FRAUD AND DECEIT**, vol. 14, p. 12; **MIS-TAKE**, vol. 20, p. 505; **UNDUE INFLUENCE**.

edge or notice of facts or circumstances is a question of fact for the jury.¹

d. BELIEF. — What a person believed is a question of fact for the jury.²

e. INTENT — (1) *In Civil Actions.* — The question of intent in civil actions is commonly one for the jury, where it does not follow as a clear deduction from undisputed facts, or is not imputed by the mere construction by the court of a written instrument, unaided by extrinsic evidence. In such instances it becomes a question of law to be determined by the court.³

1. **Knowledge or Notice** — *United States.* — *Nyback v. Champagne Lumber Co.*, (C. C. A.) 90 Fed. Rep. 774.

Alabama. — *Foxworth v. Brown*, 114 Ala. 299; *Smith v. Collins*, 94 Ala. 394; *Collins v. State*, 33 Ala. 434, 73 Am. Dec. 426, *Saltmarsh v. Bower*, 22 Ala. 221.

Arkansas. — *Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Burr v. Williams*, 20 Ark. 171.

District of Columbia. — *District of Columbia v. Payne*, 13 App. Cas. (D. C.) 500.

California. — *Elledge v. National City, etc.*, R. Co., 100 Cal. 282, 38 Am. St. Rep. 290.

Illinois. — *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243; *Erie, etc., Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51.

Indiana. — *Judd v. Gray*, 156 Ind. 278.

Iowa. — *Alexander v. Staley*, 110 Iowa 607.

Kansas. — *Davis v. Holton*, 59 Kan. 707; *Kansas City v. Bradbury*, 45 Kan. 381, 23 Am. St. Rep. 731.

Maine. — *Colley v. Westbrook*, 57 Me. 181, 2 Am. Rep. 30; *Garcelon v. Hampden F. Ins. Co.*, 50 Me. 580.

Maryland. — *Norfolk, etc., R. Co. v. Hoover*, 79 Md. 253, 47 Am. St. Rep. 392.

Massachusetts. — *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

Michigan. — *Michigan Cent. R. Co. v. Gilbert*, 46 Mich. 176.

Missouri. — *Wilson v. Huston*, 13 Mo. 146, 53 Am. Dec. 138.

New York. — *Duffy v. People*, 26 N. Y. 588.

Pennsylvania. — *McMichael v. McDermott*, 17 Pa. St. 353, 55 Am. Dec. 560.

South Dakota. — *Rapp v. Giddings*, 4 S. Dak. 492.

Texas. — *Galveston v. Hemmis*, 72 Tex. 558, 13 Am. St. Rep. 828; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611.

Wisconsin. — *Warner v. Benjamin*, 89 Wis. 290.

Question of Fact as to Whether Act Was Done by Mistake. — *Tubb v. Madding, Minor (Ala.)* 129.

Illustrations of Questions as to Knowledge or Notice. — In *Louisville, etc., R. Co. v. Watson*, 90 Ala. 68, it was held that in an action by a servant of a railroad company for personal injuries, it is a question of fact for the jury whether he had knowledge of a rule of the railroad company which he violated.

In an action against a street-railroad company for injuries received by a passenger while alighting from a street car, the question whether the conductor knew that the passenger was getting off the car, the evidence being conflicting, is one of fact for the jury. *Washington, etc., R. Co. v. Grant*, 11 App. Cas. (D. C.) 107.

Question of Fact as to Knowledge of Speed at Which Train Was Going. — *Gratiot v. Missouri Pac. R. Co.*, 116 Mo. 450.

Question of Fact as to Notice or Knowledge of Another's Fraudulent Intent. — *State v. Mason*, 112 Mo. 374, 34 Am. St. Rep. 390.

Questions of Fact as to Whether Party Had Means of Knowledge. — *Hadley v. Clinton County Importing Co.*, 13 Ohio St. 502, 82 Am. Dec. 454.

Question of Fact as to Whether Plaintiff Knew Proper Manner of Doing Work in Which He Was Engaged. — *Nyback v. Champagne Lumber Co.*, 63 U. S. App. 519, which was an action by a servant against his master for negligence.

2. **Question of Fact as to Belief.** — *Kolka v. Jones*, 6 N. Dak. 461, 66 Am. St. Rep. 615, which was an action for malicious prosecution.

3. **Question of Fact as to Intent in Civil Cases.** — *Alabama.* — *Woolsey v. Jones*, 84 Ala. 88; *Law v. Law*, 83 Ala. 432; *De Lacy v. Tillman*, 83 Ala. 155; *Tillman v. De Lacy*, 80 Ala. 103; *Brown v. Freeman*, 79 Ala. 406; *Gardner v. Boothe*, 31 Ala. 186; *Ewing v. Peck*, 26 Ala. 413.

California. — *Carpentier v. Mendenhall*, 28 Cal. 484, 87 Am. Dec. 135; *Wellington v. Sedgwick*, 12 Cal. 469; *Billings v. Billings*, 2 Cal. 107, 56 Am. Dec. 319.

Iowa. — *Press v. Duncan*, 100 Iowa 355; *Davidson v. Vorse*, 52 Iowa 384; *Manderschid v. Dubuque*, 29 Iowa 73, 4 Am. Rep. 196; *Onstott v. Murray*, 22 Iowa 457.

Kansas. — *Traders' Bank v. Kirwin First Nat. Bank*, 6 Kan. App. 400.

Maine. — *Schwartz v. Kuhn*, 10 Me. 274, 25 Am. Dec. 239.

Massachusetts. — *Homer v. Perkins*, 124 Mass. 431, 26 Am. Rep. 677; *Morse v. Shaw*, 124 Mass. 59; *Cummings v. Wyman*, 10 Mass. 465; *Smith v. Dennie*, 6 Pick. (Mass.) 262, 17 Am. Dec. 368; *Deerfield v. Delano*, 1 Pick. (Mass.) 465.

Michigan. — *Gregory v. Wendell*, 39 Mich. 337, 33 Am. Rep. 390; *Jackson v. Dean*, 1 Dougl. (Mich.) 519; *Gardner v. Gorham*, 1 Dougl. (Mich.) 507.

Missouri. — *Lindsay v. Davis*, 30 Mo. 406; *Bidault v. Wales*, 20 Mo. 546, 64 Am. Dec. 205.

New Hampshire. — *Newport First Nat. Bank v. Hunton*, 69 N. H. 509; *Fuller v. Brown*, 67 N. H. 188; *Kelsea v. Haines*, 41 N. H. 246; *Fuller v. Bean*, 34 N. H. 290.

New York. — *Miller v. Jones*, 66 Barb. (N. Y.) 148; *Fleeman v. McKean*, 25 Barb. (N. Y.) 474; *Byrd v. Hall*, 2 Keyes (N. Y.) 646.

North Carolina. — *Hardy v. Simpson*, 13 Ired. L. (35 N. Car.) 132.

Pennsylvania. — *Renninger v. Spatz*, 128 Pa. St. 524, 15 Am. St. Rep. 692; *Seeger v. Pettit*, 77 Pa. St. 437, 18 Am. Rep. 452; *McKibbin v. Martin*, 64 Pa. St. 352, 3 Am. Rep. 588; *Moore*

(2) *In Criminal Cases.* — In every accusation of crime there is involved the question of felonious or criminal intent, which is usually, if not in all cases, a question of fact peculiarly within the province of the jury to decide. A charge to the jurors that upon the facts testified to, assuming them to be true, it would be their duty to convict the prisoner, if ever proper, would be so only in the very rare cases in which the force of the facts proved is such as to make the inference of criminal intent an inference of law and not of fact.¹

f. MOTIVE. — The question of motive is one of fact for the jury.²

g. MALICE. — It is for the court to define the legal import of the word "malice," but the question whether it existed in a particular instance is one of fact for the jury.³

v. Collishaw, 10 Pa. St. 224; *Hudson v. Reel*, 5 Pa. St. 279.

South Carolina. — *Harvey v. Doty*, 50 S. Car. 548; *Hume v. Providence Washington Ins. Co.*, 23 S. Car. 190; *Hamilton v. Greenwood*, 1 Bay (S. Car.) 173, 1 Am. Dec. 607. See also *Pregnall v. Miller*, 21 S. Car. 385, 53 Am. Rep. 684.

South Dakota. — *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462.

Tennessee. — *Jones v. Wasson*, 3 Baxt. (Tenn.) 211.

Texas. — *Holland v. Thompson*, 12 Tex. Civ. App. 471; *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768; *Shepherd v. Cassidy*, 20 Tex. 24, 70 Am. Dec. 372; *Linn v. Wright*, 18 Tex. 317, 70 Am. Dec. 282; *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 154; *Bryant v. Kelton*, 1 Tex. 415; *Briscoe v. Bronaugh*, 1 Tex. 326, 46 Am. Dec. 108.

Intention Derivable from Construction of Writings. — See *supra*, this title, *Enumeration of Questions of Law — Questions Arising upon Construction of Documents, Records, and Other Writings.*

Question of Fact as to Purpose of Party. — *Payne v. Pomeroy*, 21 D. C. 243.

Question of Fact as to Abandonment. — The question of abandonment being one of intention, the question whether a person who has made a location of mining ground abandons such location by making a second location upon the same lode is one of fact for the jury. *Weill v. Lucerne Min. Co.*, 11 Nev. 200.

1. Question of Fact as to Intent in Criminal Cases. — *Alabama.* — *Walker v. State*, 117 Ala. 42; *Barnes v. State*, 103 Ala. 44; *Sims v. State*, 99 Ala. 161; *Lang v. State*, 97 Ala. 41; *Reeves v. State*, 95 Ala. 31; *Fonville v. State*, 91 Ala. 39; *Money v. State*, 89 Ala. 110; *Washington v. State*, 63 Ala. 135, 35 Am. Rep. 8; *Jordan v. State*, 52 Ala. 188; *Ogletree v. State*, 28 Ala. 693; *Oliver v. State*, 17 Ala. 587; *Ivey v. State*, 12 Ala. 276.

Dakota. — *Territory v. Keyes*, 5 Dak. 244.

Nevada. — *State v. Newton*, 4 Nev. 410.

New York. — *Duffy v. People*, 26 N. Y. 588; *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337.

North Carolina. — *State v. Boon*, 13 Ired. L. (35 N. Car.) 244, 57 Am. Dec. 555.

Vermont. — *State v. White*, 70 Vt. 225.

Question of Law as to Effect of Intent. — On a criminal prosecution it is a question of fact for the jury to determine with what particular intent the alleged act was done, but it is a question of law for the court whether the intent was wicked or virtuous, criminal or inno-

cent. *People v. Croswell*, 3 Johns. Cas. (N. Y.) 337, *per* Kent, J.

Where Evidence Is Not Conflicting. — In all cases free from doubt, and where the evidence is not conflicting, the question of intent is one for the court. *Johnson v. State*, 73 Ala. 523, which was a prosecution for larceny.

Question of Fact as to Purpose. — In *Armstrong v. State*, 4 Blackf. (Ind.) 247, which was a prosecution for keeping a room to be used and occupied for gambling, it was held that it was a question of fact for the jury whether the room was occupied for that purpose.

Question of Fact as to Purpose for Which Paper Was Emitted. — On a prosecution for the statutory offense of emitting paper for general circulation, the question whether it was emitted for general circulation is one of fact for the jury. *Jordan v. State*, 52 Ala. 188.

Question of Fact as to Whether Act Was Done Wilfully. — *People v. Pine*, 2 Barb. (N. Y.) 566, which was a prosecution for murder.

2. Question of Fact as to Motive. — *Salm v. State*, 89 Ala. 56; *Burke v. State*, 71 Ala. 377; *Cummings v. Wyman*, 10 Mass. 465. See the titles treating of particular crimes.

3. Question of Fact as to Malice. — *United States.* — *U. S. v. Alden*, 1 Sprague (U. S.) 95.

Alabama. — *Dixon v. State*, 128 Ala. 54; *King v. State*, 90 Ala. 612.

Arkansas. — *Stallings v. Whittaker*, 55 Ark. 494; *Lemay v. Williams*, 32 Ark. 166.

Connecticut. — *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106.

District of Columbia. — *Porter v. White*, 5 Mackey (D. C.) 180.

Indiana. — *Newell v. Downs*, 8 Blackf. (Ind.) 523.

Kansas. — *Malone v. Murphy*, 2 Kan. 250.

Kentucky. — *Buntun v. Worley*, 4 Bibb (Ky.) 38, 7 Am. Dec. 735; *Trabue v. Mays*, 3 Dana (Ky.) 138, 28 Am. Dec. 61.

Maine. — *Cooper v. Waldron*, 50 Me. 80.

Maryland. — *Smith v. Thompson*, 55 Md. 5, 39 Am. Rep. 409; *Turner v. Walker*, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

Michigan. — *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

Missouri. — *Hyde v. McCabe*, 100 Mo. 412.

New York. — *Laird v. Taylor*, 66 Barb. (N. Y.) 139.

North Carolina. — *Plummer v. Gheen*, 3 Hawks (10 N. Car.) 66, 14 Am. Dec. 572; *Johnson v. Chambers*, 10 Ired. L. (32 N. Car.) 287.

Utah. — *Lowe v. Herald Co.*, 6 Utah 175.

Question of Fact for Jury as to Whether Drunkenness Incapacitated Defendant from Entertaining Malice. — *King v. State*, 90 Ala. 612.

9. Relations of Persons. — Questions as to what relations exist or did exist between persons are ordinarily questions of fact to be determined by the jury under appropriate instructions from the court.¹

10. Nature, Quality, and Condition of Things — *a. QUESTIONS OF FACT.* — Questions as to the nature, quality, and condition of things, regarded simply as natural things and not as things which the law defines and requires to possess certain characteristics, are, where the evidence is conflicting, pure questions of fact which it is the sole province of the jury to determine.²

Distinction Between Malice in Law and Malice in Fact. — There is a distinction between malice in fact and malice in law. Malice in law is not necessarily inconsistent with an honest or even a laudable purpose, and is a presumption of law from certain facts proved, whereas malice in fact is actual malice, *i. e.*, such as is inconsistent with an innocent purpose. For example, to make an accusation knowing it to be false is actually malicious. Whether actual malice exists in any given case is a question of fact for the jury. *Jellison v. Goodwin*, 43 Me. 287, 69 Am. Dec. 62.

1. Relations of Persons — *United States.* — *Irwin v. Williar*, 110 U. S. 506.

Alabama. — *Mickle v. State*, (Ala. 1896) 21 So. Rep. 66; *Gibson v. Snow Hardware Co.*, 94 Ala. 346; *South, etc., Alabama R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Witcher v. Brewer*, 49 Ala. 119; *McDonnell v. Branch Bank*, 20 Ala. 313.

Arkansas. — *Vahlberg v. Keaton*, 51 Ark. 534, 14 Am. St. Rep. 73.

California. — *Mateer v. Brown*, 1 Cal. 221, 52 Am. Dec. 303.

Illinois. — *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *Chicago, etc., R. Co. v. Kelly*, 127 Ill. 637; *Hannibal, etc., R. Co. v. Martin*, 111 Ill. 219; *Chicago, etc., R. Co. v. Moranda*, 108 Ill. 576; *Indianapolis, etc., R. Co. v. Morgenstern*, 106 Ill. 216; *Hankinson v. Lombard*, 25 Ill. 572, 79 Am. Dec. 348.

Minnesota. — *Johanke v. Schmidt*, 79 Minn. 261.

Missouri. — *Sprague v. Sea*, 152 Mo. 327; *Brown v. Mays*, 80 Mo. App. 81.

Rhode Island. — *Boston, etc., Smelting Co. v. Smith*, 13 R. I. 27, 43 Am. Rep. 3.

Texas. — *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768.

West Virginia. — *Thompson v. Douglass*, 35 W. Va. 337.

See also such titles as HUSBAND AND WIFE, vol. 15, p. 785; MARRIAGE, vol. 19, p. 1156; MASTER AND SERVANT, vol. 20, p. 3; PARENT AND CHILD, vol. 21, p. 1034; PARTNERSHIP, vol. 22, p. 2.

Fraudulent Conveyances — **Question of Fact as to Relationship of Parties.** — In *Smith v. Collins*, 94 Ala. 394, it was held that where it is sought to have a conveyance declared fraudulent, it is proper to instruct the jurors that they are the sole judges of the weight to be given to the fact of relationship of the parties to the conveyance, and that no presumption of fraud is drawn from such relationship.

Question of Law for Court as to Whether Railroad Company Was Carrier or Warehouseman. — See *Columbus, etc., R. Co. v. Ludden*, 89 Ala. 612, in which case there was no conflict in the evidence as to the length of time which had elapsed from the arrival and unloading of the

goods to the time at which it was claimed the liability as common carrier ceased. The court cited *Roth v. Buffalo, etc., R. Co.*, 34 N. Y. 548, 90 Am. Dec. 736.

2. Questions of Fact as to Nature, Quality, and Condition of Things. — *Buffington v. Atlantic, etc., R. Co.*, 64 Mo. 246, in which case it was held that where there is conflicting evidence as to whether the buffer of an engine and the buffer of a car would strike each other on a level track, the question was one of fact for the jury.

Question of Fact as to Whether Thing Is in Good Condition or Is Defective. — *Harris v. Great Barrington*, 169 Mass. 271; *Pomaski v. Grant*, 119 Mich. 675; *Young v. Webb City*, 150 Mo. 333; *Chamberlain v. Enfield*, 43 N. H. 356, in which case the question was whether a road was encumbered; *Forker v. Sandy Lake*, 130 Pa. St. 123, 31 Am. & Eng. Corp. Cas. 61, wherein the question was whether a sidewalk was sufficient; *McCloskey v. Moies*, 19 R. I. 297, wherein the question was whether a highway was defective; *Galveston v. Heinmis*, 72 Tex. 558, 13 Am. St. Rep. 828, wherein the question was whether a defect in a highway was open and visible; *Texas, etc., R. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929.

Question of Fact as to Correctness of Scales. — *Boyce v. Barker*, 119 Mich. 157.

Question of Fact as to Whether Stains Were Bloodstains. — *Campbell v. State*, 23 Ala. 44.

Question of Fact as to Extent and Character of Rain Storm. — *Stoher v. St. Louis, etc., R. Co.*, 91 Mo. 509, 31 Am. & Eng. R. Cas. 229, which was an action for personal injuries caused by the giving way of a roadbed.

Question of Fact as to Practicability of Covering Pit. — In *Beauchamp v. Saginaw Min. Co.*, 50 Mich. 163, 45 Am. Rep. 30, it was held that it was a question of fact for the jury whether it was practicable and necessary to cover a mining pit when blasting.

Question of Fact as to Suitableness of Appliances for Purposes for Which Used. — *Lambert v. Pembroke*, 66 N. H. 280.

Question of Fact as to Whether Material Is Inflammable. — See *Gram v. Northern Pac. R. Co.*, 1 N. Dak. 252.

Question of Fact as to Drainage Capacity of Culvert. — *Stoher v. St. Louis, etc., R. Co.*, 91 Mo. 509, 31 Am. & Eng. R. Cas. 229, which was an action for personal injuries caused by the giving way of a roadbed.

Question of Fact as to Whether Light Was Brilliant and Conspicuous. — *Pennsylvania Coal Co. v. Conlan*, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243.

Question of Fact as to Whether Liquor Is Intoxicating. — *Allred v. State*, 89 Ala. 112; *Wall v. State*, 78 Ala. 417; *Intoxicating Liquor Cases*, 25 Kan. 751, 37 Am. Rep. 284, *State v. Muncey*, 28 W. Va. 494.

b. MIXED QUESTIONS OF LAW AND FACT. — Where, however, a thing is one which the law defines and which, to come within the legal definition, must possess certain characteristics other than those impressed upon it by nature, *e. g.*, baggage, a fixture, a homestead, and like things, the question whether it has the nature and qualities or is in the condition required by law is a question of mixed law and fact, and is, where the evidence is conflicting, or the facts are such that different minds might draw different inferences, one for the jury to find under instructions from the court as to what the law requires.¹

11. Ownership and Possession of Property — *a. OWNERSHIP.* — What constitutes ownership of or title to property as an abstract legal proposition is, of course, a question of law for the court, but in particular cases where the evidence is conflicting, whether the property is real or personal, and whether the question arises in a civil action or a criminal prosecution, the question is one of mixed law and fact, *i. e.*, one for the determination of the jury guided by the court's instructions.²

b. POSSESSION — (1) *In General.* — Likewise the question who was or is in possession is, in strictness, a mixed question of law and fact; but ordinarily, by reason of there being no question raised as to what in law amounts to possession, the question is practically one of fact only.³

(2) *Nature of Possession.* — Questions as to the nature of possession as fulfilling some requirement of law, *e. g.*, the question whether there was adverse possession, are questions of mixed law and fact to be determined by the jury under the court's instructions.⁴

Question of Fact for Jury as to Whether Animals Were Diseased. — *Troy v. State*, 10 Tex. App. 319.

Question of Fact as to Whether Benefits Resulted to Abutting Owners from Elevated Railroad. — *Bischoff v. New York El. R. Co.*, 61 N. Y. Super. Ct. 211.

1. Mixed Questions of Law and Fact as to Nature, Quality, and Condition of Things. — *Williams v. Brooklyn El. R. Co.*, 126 N. Y. 96, 46 Am. & Eng. R. Cas. 149.

Mixed Question of Law and Fact as to What Are Necessaries for Infants. — *Beeler v. Young*, 1 Bibb (Ky.) 519; *Jordan v. Coffield*, 70 N. Car. 110.

Mixed Question of Law and Fact as to What Is Baggage. — *Merrill v. Grinnell*, 30 N. Y. 594; *Bonner v. Blum*, (Tex. Civ. App. 1894) 25 S. W. Rep. 60; *Missouri Pac. R. Co. v. York*, 2 Tex. App. Civ. Cas., § 641; *Jones v. Priester*, 1 Tex. App. Civ. Cas., § 614. See also the title *BAGGAGE*, vol. 3, pp. 535, 536, 542, 565.

Mixed Question of Law and Fact as to What Are Fixtures. — *De Lacy v. Tillman*, 83 Ala. 155, 80 Ala. 103; *Gresham v. Taylor*, 51 Ala. 505; *Philadelphia Mortg., etc., Co. v. Miller*, 20 Wash. 607, 72 Am. St. Rep. 138. See also the title *FIXTURES*, vol. 13, p. 600.

Mixed Questions of Law and Fact as to What Is a Deadly Weapon. — Where the deadliness of a weapon depends upon its particular character or upon the manner in which it is used, the question is one for the jury under an instruction as to what constitutes a deadly weapon. *Jenkins v. State*, 82 Ala. 25; *Dolan v. State*, 81 Ala. 11; *Sylvester v. State*, 71 Ala. 17; *State v. Rigg*, 10 Nev. 284. See also *Garrett v. State*, 97 Ala. 18.

Mixed Question of Law and Fact as to Navigability of Water. — *Olive v. State*, 86 Ala. 88; *Peters v. New Orleans, etc., R. Co.*, 56 Ala. 528; *Rhodes v. Otis*, 33 Ala. 578, 73 Am. Dec. 439; *Little Rock, etc., R. Co. v. Brooks*, 39

Ark. 403, 43 Am. Rep. 277; *Treat v. Lord*, 42 Me. 552, 66 Am. Dec. 298; *Morgan v. King*, 18 Barb. (N. Y.) 285; *Eulrich v. Richter*, 37 Wis. 226.

Mixed Question of Law and Fact as to What Is a Public Place. — On a prosecution for betting at a game played with cards at a public house or other public place, it is a question for the jury whether the house at which the defendant is shown to have played and bet was a public place. *Jackson v. State*, 117 Ala. 155.

Erroneous and Insufficiently Qualified Expressions as to the nature of the above questions are sometimes found in the books, it being said by courts and text writers that such questions are questions of fact for the jury, but they clearly mean that such questions, so far as they depend upon conflict in the evidence, are questions for the jury, and do not mean that they are questions which the jury may determine without instructions from the court.

2. Mixed Question of Law and Fact as to What Constitutes Ownership. — *Smart v. Hodges*, 105 Ala. 634; *Tait v. Murphy*, 80 Ala. 440; *Corbett v. State*, 31 Ala. 329; *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174; *Hanlen v. Baden*, 6 Kan. App. 635; *State v. Cardelli*, 19 Nev. 319; *Slattery v. Donnelly*, 1 N. Dak. 264; *Trovillo v. Tilford*, 6 Watts (Pa.) 468, 31 Am. Dec. 484; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462. See also *Pryor v. Portsmouth Cattle Co.*, 6 N. Mex. 44.

3. Mixed Question of Law and Fact as to What Constitutes Possession. — *Moody v. Amazon Ins. Co.*, 52 Ohio St. 12, 49 Am. St. Rep. 699, in which case the court said: "What constitutes vacancy or nonoccupancy of a building is a question of law; but whether a building is vacant or unoccupied, or not, within the meaning of the law, is a question of fact for the jury."

4. Mixed Question of Law and Fact as to Nature of Possession — *Alabama*. — *Wisdom v. Reeves*,

12. Performance or Accomplishment of Acts and Nature of Acts — a. IN GENERAL. — Questions as to whether acts have been performed or accomplished, by whom they were done, and their nature, are never, where the evidence is conflicting, such that they can be decided by the court without submission to the jury. The precise nature of such questions has been somewhat obscured and involved in doubt by loose expressions contained in judicial opinions where the questions of law involved were conceded, or were not seriously pressed, with the result that there is a tendency to say that some of such questions are questions of fact for the jury, even though technically they are mixed questions of law and fact. All difficulties are removed when it is considered that the questions whether an act was done, how it was accomplished, and by whom it was performed, are purely questions of fact when the acts are considered merely as physical acts, but that the questions are mixed questions of law and fact, to be determined by the jury under the instructions of the court, when they are questions as to whether or not rules of law have been complied with, or violated, or ignored. For examples, the question whether a bell was rung is one of fact, but it is a mixed question of law and fact whether a husband has abandoned his wife; and it is a question of fact whether an injury was self-inflicted or inflicted by another, but a question of mixed law and fact whether an act was done by an agent as such or by one in his own behalf — questions of mixed law and fact, of course, always involving questions of fact for the jury.¹

110 Ala. 418; Nashville, etc., R. Co. v. Hammond, 104 Ala. 191; Steed v. Knowles, 97 Ala. 573; Woods v. Montevallo Coal, etc., Co., 84 Ala. 560, 5 Am. St. Rep. 393; Collins v. Johnson, 57 Ala. 304; Rivers v. Thompson, 43 Ala. 633; Lucas v. Daniels, 34 Ala. 188; Benje v. Creagh, 21 Ala. 151; Brown v. Lipscomb, 9 Port. (Ala.) 472.

Missouri. — Macklot v. Dubreuil, 9 Mo. 477, 43 Am. Dec. 550.

New York. — Clapp v. Bromagham, 9 Cow. (N. Y.) 530; Jackson v. Joy, 9 Johns. (N. Y.) 102.

Pennsylvania. — Bennett v. Morrison, 120 Pa. St. 390, 6 Am. St. Rep. 711.

South Carolina. — Sudduth v. Sumeral, 61 S. Car. 276; Pregnall v. Miller, 21 S. Car. 385, 53 Am. Rep. 684; Roberts v. Roberts, 2 McCord L. (S. Car.) 268, 13 Am. Dec. 721.

1. Question of Fact for Jury as to Physical Acts — Connecticut. — Nolan v. New York, etc., R. Co., 53 Conn. 461.

Hawaii. — Pahukula v. Parke, 6 Hawaii 210.

Illinois. — Mellick v. De Seelhorst, 1 Ill. 221, 12 Am. Dec. 172.

Iowa. — Kaufman v. Farley Mfg. Co., 78 Iowa 679, 16 Am. St. Rep. 462; Case v. Burrows, 52 Iowa 146; Manderschied v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196.

Kansas. — Flanigan v. Waters, 57 Kan. 18.

Maryland. — Susquehanna Fertilizer Co. v. White, 66 Md. 444, 59 Am. Rep. 186.

Massachusetts. — Daniels v. Hudson River F. Ins. Co., 12 Cush. (Mass.) 426.

Minnesota. — Johanke v. Schmidt, 79 Minn. 261.

Missouri. — Sprague v. Sea, 152 Mo. 327.

New York. — Justice v. Lang, 52 N. Y. 323; Martin v. Wright, 13 Wend. (N. Y.) 460, 28 Am. Dec. 468.

North Carolina. — State v. Freeman, 100 N. Car. 429; Icehour v. Rives, 10 Ired. L. (32 N. Car.) 256.

Pennsylvania. — Holmes v. Charters Oil Co., 138 Pa. St. 546, 21 Am. St. Rep. 919; Clark v. Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307.

Rhode Island. — Partlow v. Cooke, 2 R. I. 451.

South Carolina. — Harvey v. Doty, 50 S. Car. 548.

South Dakota. — Page v. Chicago, etc., R. Co., 7 S. Dak. 297.

Tennessee. — Hines v. Willcox, 96 Tenn. 148, 54 Am. St. Rep. 823; Swindle v. State, 2 Verg. (Tenn.) 581, 24 Am. Dec. 515.

Illustrations of Questions of Fact as to Physical Acts — Question as to Whether Person Was Seen. — Gratiot v. Missouri Pac. R. Co., 116 Mo. 450. Question as to What Words Were Used. — Johnson v. State, (Tex. Crim. 1902) 66 S. W. Rep. 1097.

Question as to Whether Signals Were Given. — Lapsley v. Union Pac. R. Co., 50 Fed. Rep. 172; Nehrbus v. Central Pac. R. Co., 62 Cal. 320, 14 Am. & Eng. R. Cas. 670; Kansas City, etc., R. Co. v. Lane, 33 Kan. 702; Kansas Pac. R. Co. v. Richardson, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96; Illinois Cent. R. Co. v. Mizell, 100 Ky. 235; Beauchamp v. Saginaw Min. Co., 50 Mich. 163, 45 Am. Rep. 30; Marcott v. Marquette, etc., R. Co., 47 Mich. 1; Gratiot v. Missouri Pac. R. Co., 116 Mo. 450; Kellogg v. New York Cent., etc., R. Co., 79 N. Y. 72; Place v. New York Cent., etc., R. Co., 167 N. Y. 345.

Question as to Whether Notices Were Posted or Mailed. — Tognini v. Kyle, 17 Nev. 209, 45 Am. Rep. 442; Braddock v. Philadelphia, etc., R. Co., 45 N. J. L. 363. See also Crawford v. Branch of State Bank, 7 Ala. 205; Jones v. Sisson, 6 Gray (Mass.) 288.

Question as to Whether Notice Was Received. — Carolina Nat. Bank v. Wallace, 13 S. Car. 347, 36 Am. Rep. 694.

Question as to Whether Substitution Was Made. — Ginder v. Farnum, 10 Pa. St. 98,

Abandonment. — The question of abandonment is a mixed question of law and fact.¹

Acceptance. — The question of acceptance is ordinarily a question of mixed law and fact.²

Acquiescence, Ratification, and Waiver. — The questions of acquiescence, ratification, and waiver are questions of fact for the jury, to be determined under the instruction of the court as to the legal effect of the party's acts, although ordinarily they are loosely spoken of as being pure questions of fact.³

Delivery. — The question whether property has been delivered is, strictly speaking, one of mixed law and fact, but ordinarily, by reason of the fact that there is no question raised as to what the law requires with reference to a delivery, the question is spoken of as one of fact.⁴

Performance of Contract. — Whether a contract has been performed or complied with is a question of fact for the jury under the instructions of the court, though in many cases the question of law is lost sight of and the question, in disregard of its technical nature, is considered as a mere question of fact.⁵

Miscellaneous Questions of Mixed Law and Fact. — In the note will be found further illustrations of questions of mixed law and fact as to the performance of acts.⁶

wherein a will was written on several sheets of paper fastened together by a string, and it was held that it was a question of fact for the jury whether any of the sheets of the will had been substituted.

Question as to Whether Railroad Has Been Finished. — Toledo, etc., R. Co. v. Johnson, 49 Mich. 149.

Whether Articles Were Being Used as Tools of Trade. — Woods v. Keyes, 14 Allen (Mass.) 236, 92 Am. Dec. 766.

1. Question of Mixed Law and Fact as to Abandonment. — Taylor v. Carpenter, 2 Woodb. & M. (U. S.) 1; State v. Seay, 64 Mo. 89, 27 Am. Rep. 206; Shepherd v. Cassiday, 20 Tex. 24, 70 Am. Dec. 372.

2. Acceptance. — Wolfe v. Parham, 18 Ala. 441; Manderschied v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196; Bass v. Walsh, 39 Mo. 192; Northumberland First Nat. Bank v. McMichael, 106 Pa. St. 460, 51 Am. Rep. 529.

3. Mixed Question of Law and Fact as to Acquiescence. — Rogers v. Brooks, 105 Ala. 549; White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Green v. Chicago, etc., R. Co., 110 Mich. 648; Taylor v. Delaware, etc., Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446, 28 Am. & Eng. R. Cas. 656. See also Hoopes v. Garver, 15 Pa. St. 517; Delaney v. Milwaukee, etc., R. Co., 33 Wis. 67.

Mixed Question of Law and Fact as to Ratification. — Gibson v. Snow Hardware Co., 94 Ala. 346; Abbott v. May, 50 Ala. 97; Bradford v. Bush, 10 Ala. 386; Farmers, etc., Bank v. Troy City Bank, 1 Dougl. (Mich.) 457; Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611.

Mixed Question of Law and Fact as to Waiver — *United States.* — Union Bank v. Magruder, 7 Pet. (U. S.) 287.

Alabama. — Young v. Arntze, 86 Ala. 116; Wolfe v. Parham, 18 Ala. 441.

Arkansas. — Grimes v. Bush, 16 Ark. 647.

District of Columbia. — Payne v. Pomeroy, 21 D. C. 243.

Illinois. — Germania F. Ins. Co. v. Klewer, 129 Ill. 599.

Massachusetts. — Fox v. Harding, 7 Cush. (Mass.) 516; Smith v. Dennie, 6 Pick. (Mass.) 262, 17 Am. Dec. 368.

Michigan. — Walter v. Mutual City, etc., F. Ins. Co., 120 Mich. 35.

New Hampshire. — Fuller v. Brown, 67 N. H. 188; Kelsea v. Haines, 41 N. H. 246.

Pennsylvania. — Annville Nat. Bank v. Kettering, 106 Pa. St. 531, 51 Am. Rep. 536.

Rhode Island. — Goodell v. Fairbrother, 12 R. I. 233, 34 Am. Rep. 631.

Question of Law for Court as to What Ascertained Facts Amount to Waiver. — Wilson v. Huston, 13 Mo. 146, 53 Am. Dec. 138.

4. Mixed Question of Law and Fact as to Delivery. — Alabama G. S. R. Co. v. Eichofer, 100 Ala. 224; South, etc., Alabama R. Co. v. Wood, 71 Ala. 215, 46 Am. Rep. 309; Gregory v. Walker, 38 Ala. 26; Thomas v. Degraffenreid, 17 Ala. 602; M'Cutchen v. M'Cutchen, 9 Port. (Ala.) 650; Evans v. Rudy, 34 Ark. 383; Harvey v. Rose, 26 Ark. 3, 7 Am. Rep. 595; Carpenter v. Clark, 2 Nev. 243; Sidney School Furniture Co. v. Warsaw School Dist., 122 Pa. St. 494, 9 Am. St. Rep. 124; Hannah v. Swarner, 8 Watts (Pa.) 9, 34 Am. Dec. 442; Chandler v. Fulton, 10 Tex. 2, 60 Am. Dec. 188.

Mixed Question of Law and Fact as to What Constitutes Change of Possession. — Claffin v. Rosenberg, 42 Mo. 439, 97 Am. Dec. 336; Chamberlain v. Stern, 11 Nev. 268; Masters v. Teller, 7 Okla. 668; Renninger v. Spatz, 128 Pa. St. 524, 15 Am. St. Rep. 692.

5. Mixed Question of Law and Fact as to Performance of Contract. — Mobile, etc., R. Co. v. Hopkins, 41 Ala. 486; Shaw v. Wallace, 2 Stew. & P. (Ala.) 193; Spencer v. Dougherty, 23 Ill. App. 399; Tunnison v. Field, 21 Ill. 108; Kelsea v. Haines, 41 N. H. 246; Elder v. Rourke, 27 Oregon 363. See also the title CONTRACTS, vol. 7, p. 88.

6. Miscellaneous Questions of Mixed Law and Fact — *Performance of Legal Duty.* — Chicago, etc., R. Co. v. Hutchinson, 120 Ill. 587.

Dedication. — Sultzner v. State, 43 Ala. 24; Manderschied v. Dubuque, 29 Iowa 73, 4 Am. Rep. 196.

Taking by Virtue of Power of Eminent Domain. — Montgomery v. Townsend, 80 Ala. 489, 60 Am. Rep. 112.

Payment. — Bufford v. Rainey, 122 Ala. 565; Briggs v. Holmes, 118 Pa. St. 283, 4 Am. St.

b. BY WHOM ACTS WERE INSTIGATED, DONE, OR OMITTED. — The question by whom acts were instigated, done, or omitted is one of fact except in those cases in which one person is acting through another and there is a question of law as to what relation existed between him and such other.¹

c. UPON WHOM OR WHAT THINGS ACTS OPERATED. — It is a question of fact for the jury to determine upon whom or what things acts operated.²

d. NATURE OF ACTS AND METHODS OF ACCOMPLISHING THEM. — Questions as to the nature of acts and the methods or means used to perform them are questions of fact when such questions are merely as to natural characteristics and physical agencies;³ but they are questions of mixed law and fact when the inquiry is as to the nature of the acts as legal acts, or the nature of the methods or means by which they were performed as fulfilling or violating provisions of law.⁴

Rep. 597. See also the title PAYMENT, vol. 22, p. 513.

Eviction of Tenant by Landlord. — *Rice v. Dudley*, 65 Ala. 68. See also *Hayner v. Smith*, 63 Ill. 430; *Cummings v. Wyman*, 10 Mass. 465; *Bolton v. Hamilton*, 2 W. & S. (Pa.) 294, 37 Am. Dec. 509. See further the title LANDLORD AND TENANT, vol. 18, p. 149.

Trespass. — *Little v. State*, 89 Ala. 99. See also the title TRESPASS.

Violation of Municipal Ordinance. — *Barnes v. Mobile*, 19 Ala. 707. See also the title ORDINANCES, vol. 21, p. 943.

Formation of Conspiracy. — *State v. McCann*, 16 Wash. 249. See also the title CONSPIRACY, vol. 6, p. 830.

Rescission of Contract. — *Upton v. Tribilcock*, 91 U. S. 45. See also the title RESCISSION.

Emancipation of Child by Parent. — *Beaver v. Bare*, 104 Pa. St. 58, 49 Am. Rep. 567. See also the title PARENT AND CHILD, vol. 21, p. 1034.

Deviation in Marine Insurance. — *Hulse v. Providence Washington Ins. Co.*, 23 S. Car. 190. See also the title MARINE INSURANCE, vol. 19, p. 930.

Increase of Risk by Insured. — *Houghton v. Manufacturers Mut. F. Ins. Co.*, 8 Met. (Mass.) 114, 41 Am. Dec. 489, wherein the precise question was what constituted a cessation of work on the insured premises within the meaning of the policy; *Peet v. Dakota F. & M. Ins. Co.*, 1 S. Dak. 462, wherein the precise question was whether there had been a material increase of the risk by a change of occupancy or business, etc.

1. Question of Fact for Jury as to Who Instigated, Did, or Omitted Acts. — *Railway Officials'*, etc., *Acc. Assoc. v. Wilson*, (C. C. A.) 100 Fed. Rep. 368; *Standard L., etc., Ins. Co. v. Thornton*, (C. C. A.) 100 Fed. Rep. 582; *Hall v. State*, 40 Ala. 698; *Corbett v. State*, 31 Ala. 329; *Burr v. Williams*, 20 Ark. 171; *Guardian Mut. L. Ins. Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180; *Susquehanna Fertilizer Co. v. White*, 66 Md. 444, 59 Am. Rep. 186; *Ellis v. People*, (Supm. Ct. Gen. T.) 21 How. Pr. (N. Y.) 356; *Hussey v. Norfolk Southern R. Co.*, 98 N. Car. 34, 2 Am. St. Rep. 312; *Searcy v. State*, 1 Tex. App. 440.

Question of Fact as to Who Constructed Turntable and Who Was in Charge of It. — *Nagel v. Missouri Pac. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418, 10 Am. & Eng. R. Cas. 702.

Whether Arrest of Plaintiff Was at Instance of Defendant Is Question of Fact for Jury. — *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608.

Question of Fact as to Whether Negligence Consisted of Acts of Engineer or Conductor. — *Dick v. Indianapolis, etc., R. Co.*, 38 Ohio St. 389, 8 Am. & Eng. R. Cas. 101.

Question of Fact for Jury as to Whether Seal Was Affixed or Adopted by Defendant. — *Yarborough v. Monday*, 3 Dev. L. (14 N. Car.) 420, wherein, however, it was recognized that what constitutes a seal is a question of law. See also *supra*, this title, *Enumeration of Questions of Law—Questions Arising upon Construction of Documents, Records, and Other Writings*.

Where One Person Is Acting through Another. — See such titles as AGENCY, vol. 1, p. 930; MASTER AND SERVANT, vol. 20, p. 3; PARTNERSHIP, vol. 22, p. 2.

2. Upon Whom or What Things Acts Operated. — *Anderson v. State*, 79 Ala. 5, holding that on a prosecution for murder it is a question for the jury whether threats made by the defendant referred to the deceased; *Chamberlin v. Smith*, 1 Mo. 482, holding that where there is a general admission of indebtedness it is a question of fact for the jury whether such admission related to a particular item of indebtedness; *Riner v. New Hampshire F. Ins. Co.*, 9 Wyo. 446, wherein the question was whether money paid was applied by the debtor to one debt or another.

3. Question of Fact as to Nature of Acts and Methods of Accomplishing Them—Direction from Which Blow Came. — *McKee v. State*, 82 Ala. 32.

Rate of Speed at Which Train Was Being Run. — *Schmidt v. Chicago, etc., R. Co.*, 83 Ill. 405; *Toledo, etc., R. Co. v. Patterson*, 94 Ill. App. 670; *Strand v. Chicago, etc., R. Co.*, 64 Mich. 216, 28 Am. & Eng. R. Cas. 213; *Marcott v. Marquette, etc. R. Co.*, 47 Mich. 1; *Central R. Co. v. Moore*, 24 N. J. L. 824.

Extent to Which Way Was Traveled. — *Green v. Chicago, etc., R. Co.*, 110 Mich. 648.

Question as to Tendency of Acts to Injure Health. — *Robinson v. Robinson*, 66 N. H. 600, 49 Am. St. Rep. 632, which was a suit for divorce.

Question as to Nature of Person's Business. — *Stanton v. French*, 91 Cal. 274, 25 Am. St. Rep. 174; *Johnson v. London Guarantee, etc., Co.*, 115 Mich. 86, 69 Am. St. Rep. 549; *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476, which were cases arising under statutes of exemptions.

Question as to Person's Habits. — *Mullinix v. People*, 76 Ill. 211; *State v. Carroll*, 30 S. Car. 85, 14 Am. St. Rep. 883.

4. Mixed Questions of Law and Fact as to Nature of Acts and Methods of Accomplishing Them

13. Time — *a.* **PARTICULAR TIME AT WHICH ACT WAS DONE OR EVENT HAPPENED.** — The question as to the time when an act was done or an event happened and questions as to priorities purely in point of time are questions of fact for the jury.¹

b. **DURATION.** — Questions of duration are questions of fact for the jury where the evidence is conflicting,² but the question whether there has been such lapse of time as the law requires, forbids, or bases certain results upon, may be a question of mixed law and fact.³

14. Value. — The question of value is, where the evidence is conflicting, one of fact for the jury.⁴

15. Quantity or Amount. — Questions as to quantity or amount are questions of fact for the jury.⁵

16. Distance and Dimensions. — Questions as to distance and dimensions are questions of fact.⁶

17. Place or Location. — Questions as to place or location are questions of fact.⁷

— *Whether Acts Were Done in Good Faith.* — Tucker v. Wilamouicz, 8 Ark. 157; Anderson v. Friend, 71 Ill. 475; Slattery v. Donnelly, 1 N. Dak. 264; Woonsocket Rubber Co. v. Loewenberg, 17 Wash. 29, 61 Am. St. Rep. 902. See also the titles FRAUD AND DECEIT, vol. 14, p. 12; MALICIOUS PROSECUTION, vol. 19, p. 647.

Excess of Authority by Agent. — McClung v. Spotswood, 19 Ala. 165. See also the title AGENCY, vol. 1, p. 930.

Negligence. — Buckingham v. Payne, 36 Barb. (N. Y.) 81; Word v. Morgan, 5 Sneed (Tenn.) 79. See also the title NEGLIGENCE, vol. 21, p. 455.

Contributory Negligence. — Mims v. Mitchell, 1 Tex. 443. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368.

1. Question of Fact as to Time When Act Was Done or Event Happened. — Nyback v. Champagne Lumber Co., (C. C. A.) 90 Fed. Rep. 774; Wells v. Cody, 112 Ala. 278, in which case the question was whether an assignment antedated the levy of an execution; Tinker v. State, 96 Ala. 115; South, etc., Alabama R. Co. v. Wood, 71 Ala. 215, 46 Am. Rep. 309, in which case the question was whether goods were lost before or after their delivery to a carrier; Montgomery, etc., R. Co. v. Moore, 51 Ala. 394; Gist v. Gans, 30 Ark. 285; Burr v. Williams, 20 Ark. 171; Davidson v. Vorse, 52 Iowa 384; Sharon v. Davidson, 4 Nev. 416; Staininger v. Andrews, 4 Nev. 59; Jackson v. Osborn, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Ex p.* Stephens, 1 McCord L. (S. Car.) 87.

Question of Fact as to Time When Whistle Was Blown. — Tolman v. Syracuse, etc., R. Co., 98 N. Y. 198, 50 Am. Rep. 649, 23 Am. & Eng. R. Cas. 313, in which case the question was whether a whistle was blown before or at the moment of the occurrence of an accident.

2. Question of Fact as to Duration. — Freiberg v. State, 94 Ala. 91; East Tennessee, etc., R. Co. v. Bayliss, 74 Ala. 150, 19 Am. & Eng. R. Cas. 480; Taylor v. Middleton, 67 Cal. 656; Neil v. Case, 25 Kan. 510, 37 Am. Rep. 259; Colley v. Westbrook, 57 Me. 181, 2 Am. Rep. 30; Harris v. Great Barrington, 169 Mass. 271; Young v. Webb City, 150 Mo. 333; Franklin v. Baker, 48 Ohio St. 266, 29 Am. St. Rep. 547; Haynes v. Haynes, 33 Ohio St. 598, 31 Am. Rep. 579. See also Roberts v. Roberts, 2 McCord L. (S. Car.) 268, 13 Am. Dec. 721.

Question of Fact as to Usual Period of Voyage. — Mackay v. Rhinelander, 1 Johns. Cas. (N. Y.) 408, which was an action on a policy of marine insurance. The question was whether a passage of ten weeks and four days was within the usual period of a voyage from Boston to Surinam, and it was held that such question was one of fact for the jury.

3. Question of Mixed Law and Fact as to Duration. — Young v. Webb City, 150 Mo. 333, wherein the question was whether a defect in a sidewalk had existed for such length of time as to justify a presumption of notice to the defendant city.

4. Question of Fact as to Value. — McKay v. Irvine, 10 Fed. Rep. 725; Corbett v. State, 31 Ala. 329; People v. Hertz, 105 Cal. 660; California Southern R. Co. v. Southern Pac. R. Co., 67 Cal. 59, 20 Am. & Eng. R. Cas. 309; Bradley v. Poole, 98 Mass. 169, 93 Am. Dec. 144; Hull v. St. Louis, (Mo. 1897) 39 S. W. Rep. 446; State v. Mason, 112 Mo. 374, 34 Am. St. Rep. 390; Furnish v. Missouri Pac. R. Co., 102 Mo. 669, 22 Am. St. Rep. 800; Price v. Barnard, 70 Mo. App. 175; Gregg v. Northern R. Co., 67 N. H. 452; Lindsey v. Union Mut. F. Ins. Co., 3 R. I. 157.

5. Questions of Fact as to Quantity or Amount. — Tubb v. Madding, Minor (Ala.) 129; Bush v. Northern Pac. R. Co., 3 Dak. 444, 18 Am. & Eng. R. Cas. 559; Burrows v. Guest, 5 Utah 91.

6. Question of Fact as to Distance. — Little Rock, etc., R. Co. v. Byars, 58 Ark. 108.

Question of Fact as to Width. — Burrows v. Guest, 5 Utah 91.

Question of Fact as to Extent of Occupancy. — Henry v. Henry, 122 Mich. 6.

Question of Fact as to Distance from Railroad Crossing at Which Signal Was Given. — Kansas Pac. R. Co. v. Richardson, 25 Kan. 391, 6 Am. & Eng. R. Cas. 96; McCormick v. Kansas City, etc., R. Co., 50 Mo. App. 109.

Question of Fact as to How Far Railroad Tracks Are from Each Other. — Pennsylvania Coal Co. v. Conlan, 101 Ill. 93, 6 Am. & Eng. R. Cas. 243.

Question of Fact as to How Far View Was Obstructed. — Randall v. Connecticut River R. Co., 132 Mass. 269.

7. Question of Fact as to Place or Location. — Cook v. State, 83 Ala. 62, 3 Am. St. Rep. 688,

Question of Boundaries. — It is a question for the court to decide what are the boundaries in a deed, the construction of deeds and writings being a question of law for the court, but upon conflicting evidence it is a question of fact for the jury to determine what land is located within the boundaries as ascertained by the court.¹

18. Identity — a. IN GENERAL. — All questions of identity are, where the evidence is conflicting, questions of fact for the jury.²

b. OF PERSONS. — The question of personal identity is one solely for the jury.³

c. OF PROPERTY. — Where the evidence is conflicting respecting the identity of property, a question of fact is presented which should be submitted to the jury.⁴

19. Cause and Effect — a. IN GENERAL. — Questions as to cause and effect are questions of fact for the jury.⁵

b. PROXIMATE CAUSE. — The question as to what is the proximate cause of an injury or loss is ordinarily, where the evidence is conflicting, one of fact for the jury.⁶

20. Reasonableness — a. IN GENERAL. — When the evidence is conflicting the question of reasonableness is never one of law for the court. Whether it is a question of fact or a question of mixed law and fact depends upon the

holding that on a prosecution for arson it is a question of fact for the jury whether a barn charged to have been burnt was within the curtilage; *Reynolds v. West*, 1 Cal. 322; *State v. Spayde*, 110 Iowa 726, wherein the question was as to venue; *Hurley v. Morgan*, 1 Dev. & B. L. (18 N. Car.) 425, 28 Am. Dec. 579; *Doe v. Paine*, 4 Hawks (11 N. Car.) 64, 15 Am. Dec. 507.

Question of Fact for Jury as to Land from Which Lumber Was Cut. — *U. S. v. Gumm*, 9 N. Mex. 611.

Question of Fact as to Where Fire Was Lighted. — *Henry v. Southern Pac. R. Co.*, 50 Cal. 176.

Question of Fact as to Place Where Signal Was Given. — *Tolman v. Syracuse, etc., R. Co.*, 98 N. Y. 198, 50 Am. Rep. 649, 23 Am. & Eng. R. Cas. 313, which was an action for an injury at a railroad crossing, the question being whether the whistle was blown at the whistling post or at the crossing.

Question of Fact as to Location of Cars at Time of Railroad Accident. — *Place v. New York Cent., etc., R. Co.*, 167 N. Y. 345.

Question of Fact as to Position of Person at Particular Time. — *Townley v. Chicago, etc., R. Co.*, 53 Wis. 626. See also *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633.

Question of Fact as to Alibi. — *Pate v. State*, 94 Ala. 14; *Albritton v. State*, 94 Ala. 76; *Chester v. State*, 1 Tex. App. 707. See also the title *ALIBI*, vol. 2, p. 53.

Question of Fact as to Habitancy. — *Lyman v. Fiske*, 17 Pick. (Mass.) 231, 28 Am. Dec. 293, following *Makepeace v. Lee*, cited in *Harvard College v. Gore*, 5 Pick. (Mass.) 378.

1. Respective Provinces of Court and Jury in Determining Boundaries. — *Miller v. Cullum*, 4 Ala. 576; *Reynolds v. West*, 1 Cal. 322; *Redmond v. Stepp*, 100 N. Car. 212; *Hurley v. Morgan*, 1 Dev. & B. L. (18 N. Car.) 425, 28 Am. Dec. 579; *Doe v. Paine*, 4 Hawks (11 N. Car.) 64, 15 Am. Dec. 507; *Sudduth v. Sumeral*, 61 S. Car. 276.

Whether a Particular Place Is Within the Boundaries of a State is not a question of law for the court, but a matter of fact for the jury. *U. S. v. Jackalow*, 1 Black (U. S.) 484, which was a criminal prosecution.

2. Question of Fact as to Identity. — *Payne v. Pomeroy*, 21 D. C. 243; *Ball v. Biggam*, 6 Kan. App. 42. See also *Johnson v. State*, 26 Ga. 611; *Nourse v. Lloyd*, 1 Pa. St. 229; *Richardson v. Stewart*, 2 S. & R. (Pa.) 87. See the title *IDENTITY*, vol. 15, p. 918.

Question of Fact as to Whether Names Are Idem Sonans. — *Munkers v. State*, 87 Ala. 94; *Com. v. Donovan*, 13 Allen (Mass.) 571. See also the title *NAME*, vol. 21, p. 317.

3. Question of Fact as to Identity of Persons. — *Chandler v. Shehan*, 7 Ala. 251; *Johnson v. State*, 73 Ga. 107; *Moore v. State*, 73 Ga. 139; *State v. Lashus*, 79 Me. 504.

4. Question of Fact as to Identity of Property. — *Tait v. Murphy*, 80 Ala. 440; *State v. Cardelli*, 19 Nev. 319.

Identification of Land by Boundaries in Deed, Etc. — See *supra*, this section, *Place or Location*.

5. Questions of Fact as to Cause and Effect. — *Perry v. Southern Pac. R. Co.*, 50 Cal. 578; *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Davidson v. Vorse*, 52 Iowa 384; *Texas, etc., R. Co. v. Robertson*, 82 Tex. 657, 27 Am. St. Rep. 929.

Question of Fact as to Cause of Death. — *Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 56, 14 Am. St. Rep. 196; *Ball v. Wabash, etc., R. Co.*, 83 Mo. 574, 25 Am. & Eng. R. Cas. 384.

Question of Fact as to How Wounds Were Caused. — *State v. Musgrave*, 43 W. Va. 672.

Question of Fact as to How Delay Was Occasioned. — *Galbraith v. Chicago Architectural Iron Works*, 50 Ill. App. 247.

Question of Fact as to Effect of Use of Steam Engine Near Insured Property. — *Long v. Beeber*, 106 Pa. St. 466, 51 Am. Rep. 532, which was an action on a fire-insurance policy.

6. Question of Fact as to Proximate Cause. — See the titles *DAMAGES*, vol. 8, p. 581 *et seq.*; *NEGLIGENCE*, vol. 21, p. 508 *et seq.*

precise nature of the question and the form in which it is put — it being a question of mixed law and fact if its determination requires the application of rules of law, otherwise a question of pure fact.¹

When the Facts Are Ascertained the question of reasonableness may be one of law for the court which should not be submitted to the jury.²

Reasonableness of Ordinance. — The reasonableness of an ordinance is, as a general proposition, a question of law for the court.³

b. OF ACTS, METHODS, AND INSTRUMENTALITIES — In General. — As a general proposition the question as to the reasonableness of an act is a mixed question of law and fact.⁴

Necessity for Acts. — Whether or not an act was reasonably necessary is a mixed question of law and fact for the jury.⁵

Probable Cause. — The question of probable cause in an action of malicious prosecution is ordinarily a mixed question of law and fact.⁶

Reasonableness of Instrumentalities. — As a general proposition it is a mixed question of law and fact whether a suitable instrument was employed in the performance of an act.⁷

Reasonableness of Rule or Regulation. — Although there is a conflict of authority

1. Question of Fact as to Reasonableness. — *California Southern R. Co. v. Southern Pac. R. Co.*, 67 Cal. 59, 20 Am. & Eng. R. Cas. 309, in which case it was held that a question as to how one railroad should cross another, whether on a level, above, or below the other road, in order to secure the greatest public benefit and least private injury, was a question of fact for the jury.

Question of Fact as to Whether Property Was Reasonably Necessary. — *Jaquith v. Scott*, 63 N. H. 5, 56 Am. Rep. 476; *Richards v. Hubbard*, 59 N. H. 153, 47 Am. Rep. 188, which were cases arising under the statute of exemptions.

Mixed Question of Law and Fact as to Reasonableness. — It is in one sense the province of the court to define what in law will constitute a reasonable or adequate provocation for an act, but it is not in ordinary cases the province of the court to determine whether the provocation proved in a particular case is sufficient or reasonable. This is essentially a question of fact for the jury, to be decided with reference to the peculiar phase of each particular case, under proper instructions from the court. *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781.

2. Question of Law as to Reasonableness Where Facts Are Ascertained. — *St. Louis, etc., R. Co. v. Adcock*, 52 Ark. 406, 40 Am. & Eng. R. Cas. 682. See also *St. Louis, etc., R. Co. v. Denty*, 63 Ark. 177; *Riggin v. Patapsco Ins. Co.*, 7 Har. & J. (Md.) 279, 16 Am. Dec. 302; *Tobias v. Michigan Cent. R. Co.*, 103 Mich. 330.

The Doctrine as Laid Down by Lord Mansfield is that "wherever a rule can be laid down in respect to reasonableness it should be decided by the court and adhered to by every one for the sake of certainty." *Tindal v. Brown*, 1 T. R. 167.

3. Question of Law as to Reasonableness of Ordinance. — *Lake View v. Tate*, 130 Ill. 247; *Kneedler v. Norristown*, 100 Pa. St. 368, 45 Am. Rep. 333. See also the title ORDINANCES, vol. 21, pp. 988, 989.

4. Mixed Question of Law and Fact as to Reasonableness of Acts. — *Perkins v. Augusta Ins., etc., Co.*, 10 Gray (Mass.) 312, 71 Am. Dec. 654; *Com. v. York*, 9 Met. (Mass.) 93, 43 Am. Dec.

373; *Myers v. Richmond, etc., R. Co.*, 87 N. Car. 345, 8 Am. & Eng. R. Cas. 293; *Cleveland, etc., R. Co. v. Crawford*, 24 Ohio St. 631, 15 Am. Rep. 633; *Allegheny v. Zimmerman*, 95 Pa. St. 287, 40 Am. Rep. 649; *Simms v. South Carolina R. Co.*, 27 S. Car. 268, 30 Am. & Eng. R. Cas. 571.

Question of Mixed Law and Fact as to Exercise of Reasonable Diligence. — *Staininger v. Andrews*, 4 Nev. 59, wherein the question was whether a settler on public land had proceeded with reasonable diligence to follow up his location with necessary improvements. See also such titles as CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; NEGLIGENCE, vol. 21, p. 455.

Mixed Question of Law and Fact as to Reasonableness of Punishment Inflicted by a School Teacher upon Children. — *State v. Mizner*, 50 Iowa 145, 32 Am. Rep. 128; *Com. v. Randall*, 4 Gray (Mass.) 36; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

5. Mixed Question of Law and Fact as to Necessity of Acts Done on Sunday. — *Hooper v. Edwards*, 18 Ala. 280, 25 Ala. 528; *Stewart v. Davis*, 31 Ark. 518, 25 Am. Rep. 576; *State v. Knight*, 29 W. Va. 340; *State v. Baltimore, etc., R. Co.*, 24 W. Va. 783, 49 Am. Rep. 290. See also the title SUNDAY AND HOLIDAYS.

Mixed Question of Law and Fact as to Necessity of Exposure to Danger. — *Columbian Acc. Co. v. Sanford*, 50 Ill. App. 424, which was an action upon a policy of accident insurance.

Mixed Question of Law and Fact as to Self-defense in Prosecution for Murder. — *Garrett v. State*, 97 Ala. 18; *Gibson v. State*, 91 Ala. 64; *Poe v. State*, 87 Ala. 65; *Watson v. State*, 82 Ala. 10; *Morris v. Platt*, 32 Conn. 75; *Galagher v. State*, 3 Minn. 270; *Nalley v. State*, 28 Tex. App. 387; *State v. Barr*, 11 Wash. 481, 48 Am. St. Rep. 890; *Palmer v. State*, 9 Wyo. 40.

6. See the title MALICIOUS PROSECUTION, vol. 19, p. 669 *et seq.*

7. Lander v. Seaver, 32 Vt. 114, 76 Am. Dec. 156, wherein it was held that the question whether a rawhide is a proper instrument for the punishment of school children is a question of fact for the jury on a suitable instruction.

upon the question, the better opinion appears to be that the reasonableness or unreasonableness of a rule or regulation made by a party, *e. g.*, a railroad company, is generally a mixed question of law and fact. As its reasonableness depends upon the existence of particular facts and circumstances, it is necessarily a question for the jury under appropriate instructions from the court, but if the facts are determined the question is a proper one for the court.¹

c. OF TIME — (1) In General. — Ordinarily the reasonableness of the time at which an act was done or which was allowed to elapse before the doing of an act is a mixed question of law and fact, not only where the evidence is conflicting as to the time or lapse of time, but even where the facts are established, and it should be left to be decided by the jury under the direction of the court upon the particular circumstances of the case. The time, however, may be so short or so long that the court will declare it to be reasonable or unreasonable as a matter of law.²

(2) As Respects Notice. — In accordance with the rule that has just been stated, the reasonableness of a notice as respects the time at which it was given or the length of time that was given by the notice is a mixed question of law and fact, or a question of law for the court.³

1. When Reasonableness of Rule Is Mixed Question of Law and Fact. — *State v. Chovin*, 7 Iowa 204; *Day v. Owen*, 5 Mich. 520, 72 Am. Dec. 62; *State v. Overton*, 24 N. J. L. 435, 61 Am. Dec. 671; *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231; *Texas, etc., R. Co. v. Adams*, 78 Tex. 372, 22 Am. St. Rep. 56; *Brown v. Western Union Tel. Co.*, 6 Utah 219.

When Reasonableness of Rule Is Question of Law. — *Kansas City, etc., R. Co. v. Hammond*, 58 Ark. 324; *Illinois Cent. R. Co. v. Whittemore*, 43 Ill. 420, 92 Am. Dec. 138; *Hoffbauer v. Delhi, etc., R. Co.*, 52 Iowa 342, 35 Am. Rep. 278; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141, 12 Am. & Eng. R. Cas. 119; *Vedder v. Fellows*, 20 N. Y. 126; *Tracy v. New York, etc., R. Co.*, 9 Bosw. (N. Y.) 396; *Pittsburgh, etc., R. Co. v. Lyon*, 123 Pa. St. 140, 10 Am. St. Rep. 517, 37 Am. & Eng. R. Cas. 231.

2. Mixed Question of Law and Fact as to Reasonableness of Time — England. — *Muilman v. D'Eguino*, 2 H. Bl. 569; *Fry v. Hill*, 7 Taunt. 398, 2 E. C. L. 397.

United States. — *Wiggins v. Burkham*, 10 Wall. (U. S.) 129, in which case the question was what is a reasonable time within which to disaffirm an account rendered.

Alabama. — *Murrell v. Whiting*, 32 Ala. 55.

Arkansas. — *Little Rock, etc., R. Co. v. Birnie*, 59 Ark. 68.

Illinois. — *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *Niagara F. Ins. Co. v. Scammon*, 100 Ill. 644. See also *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268.

Kentucky. — *Green v. Hollingsworth*, 5 Dana (Ky.) 173, 30 Am. Dec. 680, in which case the question was as to the time within which one who borrows an article must return it when the time for its return is not stipulated.

Maine. — *Wilder v. Sprague*, 50 Me. 354. See also *Howe v. Huntington*, 15 Me. 350.

Maryland. — *Baltimore, etc., R. Co. v. Pumphrey*, 59 Md. 390, 9 Am. & Eng. R. Cas. 331, in which case the question was whether the delay by a carrier in the delivery of goods was reasonable.

Massachusetts. — *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217, 66 Am. Dec. 473, in which case the question was whether or not a bill of exchange was presented within such reasonable time as to charge the indorsers; *Reynolds v. Ocean Ins. Co.*, 22 Pick. (Mass.) 191, 33 Am. Dec. 727, wherein the question was whether a vessel had been abandoned within a reasonable time; *Davis v. Western Massachusetts Ins. Co.*, 8 R. I. 277.

Michigan. — *Maher v. People*, 10 Mich. 212, 81 Am. Dec. 781, wherein the question was whether an assault with intent to kill was made within a reasonable time after the defendant was provoked.

New York. — *Salmon v. Grosvenor*, 66 Barb. (N. Y.) 160.

North Dakota. — *Acme Harvester Co. v. AxteLL*, 5 N. Dak. 315.

Pennsylvania. — *Somerset, etc., R. Co. v. Galbraith*, 109 Pa. St. 32, 23 Am. & Eng. R. Cas. 375; *Porter v. Patterson*, 15 Pa. St. 229.

Rhode Island. — *Bacon v. Harris*, 15 R. I. 599; *Lindsey v. Union Mut. F. Ins. Co.*, 3 R. I. 157.

Tennessee. — *Washington v. Johnson*, 7 Humph. (Tenn.) 468.

Texas. — *Searcy v. Hunter*, 81 Tex. 644, 26 Am. St. Rep. 837.

Utah. — *Brown v. Western Union Tel. Co.*, 6 Utah 219.

West Virginia. — *Thompson v. Douglass*, 35 W. Va. 337.

Question of Law as to Reasonableness of Time. — *Little Rock, etc., R. Co. v. Birnie*, 59 Ark. 66; *Jones v. Robinson*, 11 Ark. 504, 54 Am. Dec. 212; *Chicago, etc., R. Co. v. Boyce*, 73 Ill. 510, 24 Am. Rep. 268; *Gilmore v. Wilbur*, 12 Pick. (Mass.) 120, 22 Am. Dec. 410; *Loring v. Boston*, 7 Met. (Mass.) 409; *Derosia v. Winona, etc., R. Co.*, 18 Minn. 133; *Johnson v. Whitman Agricultural Co.*, 20 Mo. App. 100; *Aymar v. Beers*, 7 Cow. (N. Y.) 705, 17 Am. Dec. 538; *Durnell v. Sowden*, 5 Utah 216.

3. Mixed Question of Law and Fact as to Reasonableness of Notice. — *Mauldin v. Branch Bank*, 2 Ala. 502; *Mitchum v. State Bank*, 9 Dana (Ky.) 166; *Mallory v. Kirwan*, 2 Dall.

d. OF QUANTITY. — Reasonableness of quantity is, as a general proposition, a mixed question of law and fact.¹

VI. INVASION OF JURY'S PROVINCE BY COURT — Doctrine Stated. — As a corollary from the rule which has been stated throughout this title, that it is the province of the jury to determine questions of fact, it is well settled that the court must not, in either a civil action or a criminal prosecution, invade the province of the jury by determining questions of fact, by assuming that a fact as to which there is a conflict in the evidence has been proven, or by otherwise expressing an opinion as to the facts in the case.²

(Pa.) 192; *Carolina Nat. Bank v. Wallace*, 13 S. Car. 347, 36 Am. Rep. 694; *Wadsworth v. Allen*, 8 Gratt. (Va.) 174, 56 Am. Dec. 137.

Question of Law as to Reasonableness of Notice. — *Mowatt v. Howland*, 3 Day (Conn.) 353; *Hussey v. Freeman*, 10 Mass. 84; *Haddock v. Murray*, 1 N. H. 140, 8 Am. Dec. 43.

1. Mixed Question of Law and Fact as to Reasonableness of Quantity. — *Kansas City, etc., R. Co. v. Morrison*, 34 Kan. 502, 55 Am. Rep. 252, 23 Am. & Eng. R. Cas. 481; *Root v. New York Cent. Sleeping Car Co.*, 28 Mo. App. 199, wherein the question was as to the quantity of baggage that was reasonable.

Question of Fact as to Reasonableness of Charge or Price. — *Beeler v. Young*, 1 Bibb (Ky.) 519; *Jordan v. Coffield*, 70 N. Car. 110.

2. Invading Province of Jury in Civil Cases — *Alabama*. — *Louisville, etc., R. Co. v. Stewart*, 128 Ala. 313; *Louisville, etc., R. Co. v. Morgan*, 114 Ala. 449; *Anniston Lime, etc., Co. v. Lewis*, 107 Ala. 535; *Louisville, etc., R. Co. v. Hurt*, 101 Ala. 34; *Paul v. State*, 100 Ala. 136; *Louisville, etc., R. Co. v. Davis*, 99 Ala. 593; *Moody v. Alabama G. S. R. Co.*, 99 Ala. 553; *Trufant v. White*, 99 Ala. 526; *Richmond, etc., R. Co. v. Greenwood*, 99 Ala. 501; *Rodgers v. Crook*, 97 Ala. 722.

California. — *Caldwell v. Center*, 30 Cal. 539, 89 Am. Dec. 131.

Illinois. — *Holloway v. Johnson*, 129 Ill. 367; *Chicago, etc., R. Co. v. Kelly*, 127 Ill. 637; *Myers v. Indianapolis, etc., R. Co.*, 113 Ill. 386.

Indiana. — *Judd v. Gray*, 156 Ind. 278; *Louisville, etc., R. Co. v. Falvey*, 104 Ind. 409, 23 Am. & Eng. R. Cas. 522; *Noblesville, etc., Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224; *Home Ins. Co. v. Marple*, 1 Ind. App. 411.

Iowa. — *West v. Ward*, 77 Iowa 323, 14 Am. St. Rep. 284; *Houser v. Chicago, etc., R. Co.*, 60 Iowa 230, 46 Am. Rep. 65, 8 Am. & Eng. R. Cas. 500; *Bryan v. Brazil*, 52 Iowa 350; *Case v. Burrows*, 52 Iowa 146.

Kansas. — *Baughman v. Penn.*, 33 Kan. 504; *Cavender v. Roberson*, 33 Kan. 626.

Kentucky. — *Henderson County v. Dixon*, (Ky. 1891) 63 S. W. Rep. 756; *Cadiz v. Hillman*, (Ky. 1899) 50 S. W. Rep. 49.

Maryland. — *Grove v. Brien*, 1 Md. 438.

North Carolina. — *Trotter v. Howard*, 1 Hawks (8 N. Car.) 320, 9 Am. Dec. 640; *Den v. Morrison*, 3 Murph. (7 N. Car.) 551.

Oklahoma. — *Archer v. U. S.*, 9 Okla. 569.

Pennsylvania. — *Forker v. Sandy Lake*, 130 Pa. St. 123, 31 Am. & Eng. Corp. Cas. 61.

South Carolina. — *Sudduth v. Sumeral*, 61 S. Car. 276; *Samuels v. Richmond, etc., R. Co.*, 35 S. Car. 493, 28 Am. St. Rep. 883; *Simms v.*

South Carolina R. Co., 27 S. Car. 268, 30 Am. & Eng. R. Cas. 571.

Tennessee. — *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823; *Robinson v. Louisville, etc., R. Co.*, 2 Lea (Tenn.) 594.

Texas. — *Bradstreet Co. v. Gill*, 72 Tex. 115, 13 Am. St. Rep. 768; *Drinkard v. Ingram*, 21 Tex. 650, 73 Am. Dec. 250.

Instructions as to Credibility of Witness Who Has Sworn Falsely. — In *Paullette v. Brown*, 40 Mo. 52, it was held that it is proper to instruct the jury that if a witness has wilfully and knowingly sworn falsely to any material matter in the case, it is authorized to discredit the whole of the testimony of such witness.

Invading Province of Jury in Criminal Cases. — *United States*. — *Hickory v. U. S.*, 160 U. S. 408; *Starr v. U. S.*, 164 U. S. 627.

Alabama. — *Walker v. State*, 117 Ala. 42; *Cobb v. State*, 115 Ala. 18; *Domingus v. State*, 94 Ala. 9; *Smith v. State*, 92 Ala. 69; *Steele v. State*, 83 Ala. 20; *Pellum v. State*, 89 Ala. 28; *Lowe v. State*, 88 Ala. 8; *Watson v. State*, 82 Ala. 10; *Corley v. State*, 28 Ala. 22.

California. — *People v. Hertz*, 105 Cal. 660. *Illinois*. — *Davison v. People*, 90 Ill. 221.

Iowa. — *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408.

Kansas. — *State v. Newman*, 57 Kan. 705.

North Carolina. — *State v. Dixon*, 75 N. Car. 275.

Tennessee. — *Persons v. State*, 90 Tenn. 291.

Texas. — *Chester v. State*, 1 Tex. App. 707; *Searcy v. State*, 1 Tex. App. 440.

Virginia. — *Dejarnette v. Com.*, 75 Va. 867.

West Virginia. — *State v. Staley*, 45 W. Va. 792.

In Arkansas Judges Are Prohibited by the Constitution from charging juries with regard to matters of fact, and may not comment upon the evidence. *Campbell v. State*, 38 Ark. 498.

Nevada Constitution. — An instruction which assumes an issuable fact as proven violates that provision of the Nevada Constitution which prohibits judges from charging juries with respect to matters of fact. *Tognini v. Kyle*, 17 Nev. 209, 45 Am. Rep. 442; *State v. Harkins*, 7 Nev. 377; *State v. Ah Tong*, 7 Nev. 148.

North Carolina Statute. — Code N. Car., § 413, in force in 1888, prohibited the court from giving any opinion "whether a fact is fully or sufficiently proven." *State v. Freeman*, 100 N. Car. 429.

South Carolina Constitution. — Const. S. Car. 1895, art. 5, § 26, provides that "judges shall not charge juries in respect to matters of fact." *State v. Stello*, 49 S. Car. 488.

QUESTIONS OF LAW AND FACT—QUITCLAIM.

Extent to Which Federal Courts May Express Opinion as to Weight of Evidence. — The federal practice permits the presiding judge to state to the jury his own impressions as to the defendant's guilt, provided every disputed fact in the case is fairly and unreservedly left to the jury.¹

QUIA TIMET. — See the title **BILLS QUIA TIMET**, 3 ENCYC. OF PL. AND PR. 599.

QUICK DISPATCH. — See the title **DEMURRAGE**, vol. 9, p. 237, and see **DISPATCH**, vol. 9, p. 539.

QUICKSAND. — Quicksand is defined to be "a fine-grained, loose sand, into which a ship sinks by her own weight as soon as the water retreats from her bottom."²

QUICK WITH CHILD. (See also the titles **ABORTION**, vol. 1, p. 187; **CHILD** — **CHILDREN**, vol. 5, p. 1084; **MEDICAL JURISPRUDENCE**, vol. 20, p. 535; **MURDER AND MANSLAUGHTER**, vol. 21, p. 101; and see **DE VENTRE INSPICIENDO**, vol. 8, p. 832.) — See note 3.

QUIET ENJOYMENT. (See also the title **COVENANTS**, vol. 8, p. 97.) — A covenant for quiet enjoyment is defined to be an assurance against the consequences of a defective title and of any disturbances thereupon.⁴

QUIET HOUSE — See note 5.

QUIETING TITLE — REMOVAL OF CLOUD. — See the title **QUIETING TITLE** — **REMOVAL OF CLOUD**, 17 ENCYC. OF PL. AND PR. 274, and in this work the title **CLOUD ON TITLE**, vol. 6, p. 149.

QUIT. — See note 6.

QUI TAM ACTIONS. — See the titles **PENALTIES AND PENAL ACTIONS**, 16 ENCYC. OF PL. AND PR. 229.

QUITCLAIM. (See also the title **DEEDS**, vol. 9, p. 104.) — A quitclaim deed is defined as a form of deed of the nature of a release.⁷

Texas Statute Prohibiting Charge on Weight of Evidence. — *Martin v. State*, 38 Tex. Crim. 285, which case was decided under Rev. Code Crim. Pro. Tex., §§ 705, 716.

Washington Constitution. — Const. Wash., art. 4, § 16, provides as follows: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." *Bardwell v. Ziegler*, 3 Wash. 34, in which case it was declared that this constitutional provision is more restricted than the constitutional provisions of any other state, and intends that the judge shall make no reference to the testimony for the purpose of informing the jury what it proves or does not prove, but shall content himself with declaring the law.

1. *Hart v. U. S.*, (C. C. A.) 84 Fed. Rep. 799.

2. **Quicksand.** — *The Sandringham* 10 Fed. Rep. 562, quoting *Smyth's Dict. Naut. Terms*.

3. **Quick with Child.** — In *State v. Emerich*, 13 Mo. App. 493, it was said: "The physicians all testified that it was formerly held in the profession that the fœtus was not alive until it was felt by the mother to move, and that when this happened it used to be said that she was *quick with child*, and not before; but that in the present stage of medical science it is known that the fœtus is quick from the moment of conception, in the sense that it is alive from that moment."

4. **Quiet Enjoyment.** — *Kane v. Mink*, 64 Iowa 86, quoting *Bouv. L. Dict.*

5. **Quiet House.** (By the *Texas* statute (now Rev. Stat. 1895, art. 3380), requiring from

liquor dealers a bond conditioned that an open, quiet, and orderly house shall be kept, a *quiet house* is defined to be "one in which no music, loud or boisterous talking, yelling, or indecent or vulgar language is allowed, used, or practiced, or any other noise calculated to disturb or annoy persons residing or doing business in the vicinity." *Cunningham v. Porchet*, 23 Tex. Civ. App. 82. See also *State v. Austin Club*, 89 Tex. 20.

6. **Quit — Landlord and Tenant.** — See the title **LANDLORD AND TENANT**, vol. 18, p. 396.

Quit — Sell — Release. (See also the title **DEEDS**, vol. 9, p. 136 *et seq.*) — In *Gordon v. Haywood*, 2 N. H. 404, it was said: "The first objection to the words used by the husband is that the expression '*quit my right*,' etc., is not tantamount to the words '*sell*' or '*release*.' But the best lexicographers assign to it a similar meaning; and by it the husband clearly intended to abandon, resign, or quitclaim to the grantee all his interest in the premises."

Quit in Sense of "to Leave Permanently." — See *Prieto v. St. Alphonsus Convent of Mercy*, 52 La. Ann. 631.

7. **Quitclaim.** — *Nathans v. Arkwright*, 66 Ga. 186, quoting *Bouv. L. Dict.*

In *Ely v. Stannard*, 44 Conn., 533, it was said: "A *quitclaim* or release deed is one of the regular modes of conveying property known to the law, and it is almost the only mode in practice where a party sells property and does not wish to warrant the title." See also *Hoyt v. Ketcham*, 54 Conn. 60.

QUITRENT. — See note 1.

QUOD CUM. — *Quod cum* in pleading means "for that whereas;" a form of introducing matter of inducement in those actions in which introductory matter is allowed to explain the nature of the claim, as *assumpsit* and *case*. This form is not allowable to introduce the matter which constitutes the gravamen of the charge, as such matter must be stated by positive averment, while *quod cum* introduces the matter which depends upon it by way of recital merely.²

In *State v. Kemmerer*, 14 S. Dak. 174, it was said: "'A form of deed of the nature of a release, containing words of grant as well as release, commonly known as a *quitclaim* deed, has long been in use in this country.' 3 Washb. Real Prop. (5th ed.), p. 376."

Operative Words. — The operative words of a *quitclaim* deed are "remise, release, and forever *quitclaim*." *Citizens' Bank v. Shaw*, 14 S. Dak. 204, *quoting* Bouv. L. Dict. and And. L. Dict. See also the title DEEDS, vol. 9, p. 137, note.

Recording Acts. (See also the title RECORDING ACTS.) — In *Wilhelm v. Wilken*, 75 Hun (N. Y.) 555, *affirmed* 149 N. Y. 447, it was held that a so-called *quitclaim* deed which contained the words "remise, release, and *quitclaim*" as the words of conveyance was a

conveyance within the recording acts. The court said: "An ordinary *quitclaim* deed is a deed of lease and release, and by this statute is deemed to be a grant."

Release. — In *Hill v. Dyer*, 3 Me. 445, it was held that under a power to execute a release title to land, a deed purporting to grant, sell, and *quitclaim* was a substantial execution of the authority, the word *quitclaim* being of an equivalent meaning with the term "release." See also RELEASE.

1. **Quitrent.** — "A *quitrent* was so called because the [feudal] tenant thereby went quit and free of all other services." *De Lancey v. Piepgras*, 138 N. Y. 39.

2. **Quod Cum.** — *Spiker v. Bohrer*, 37 W. Va. 260, *quoting* Bouv. L. Dict.

QUORUM.

BY THOMAS JOHNSON MICHIE.

- I. DEFINITION, 589.
- II. LEGISLATIVE AND CORPORATE BODIES, 589.
- III. JUDICIAL BODIES, 590.
- IV. COUNTING A QUORUM, 591.
- V. PRESUMPTION OF CONTINUANCE, 591.
- VI. MAJORITY OF QUORUM MAY ACT, 591.

CROSS-REFERENCES.

See also the titles *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 871; *ORDINANCES*, vol. 21, p. 943; *PROXIES*, ante; *STATUTES*; *STOCK AND STOCKHOLDERS*. And see *MAJORITY*, vol. 19, p. 613.

I. DEFINITION. — A quorum is the number of members of a deliberative or judicial body whose presence is necessary for the transaction of business.¹

II. LEGISLATIVE AND CORPORATE BODIES. — A body indefinite as to number may act by a majority of the members present at any legal meeting, no matter how small a proportion they may constitute of the whole number entitled to be present;² but by the common law a majority of a select and definite body constitutes a quorum.³

1. **Definition.** — *Snider v. Rinehart*, 18 Colo. 23; *State v. Wilkesville Tp.*, 20 Ohio St. 294; *Schuykill Haven Nominations*, 20 Pa. Co. Ct. 420.

2. **Indefinite Body.** — *Rex v. Varlo*, 1 Cowp. 248; *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Kimball v. Marshall*, 44 N. H. 465; *Field v. Field*, 9 Wend. (N. Y.) 403; *Madison Ave. Baptist Church v. Oliver St. Baptist Church*, 5 Robt. (N. Y.) 649; *Ostrom v. Greene*, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 183, *affirmed* 30 N. Y. App. Div. 621, 161 N. Y. 353; *Craig v. First Presb. Church*, 88 Pa. St. 42, 32 Am. Rep. 417; *Stone v. Small*, 54 Vt. 498.

3. **Definite Body — Majority Constitutes a Quorum** — *England*. — *Oldknow v. Wainwright*, 1 W. Bl. 229; *Gosling v. Veley*, 7 Q. B. 406, 53 E. C. L. 406; *Newhaven Local Board v. Newhaven School Board*, 30 Ch. D. 350; *Rex v. Varlo*, 1 Cowp. 250; *Rex v. Monday*, 2 Cowp. 530; *Rex v. Bellringer*, 4 T. R. 810; *Rex v. Miller*, 6 T. R. 268; *Rex v. Headley*, 7 B. & C. 496, 14 E. C. L. 93; *Blacket v. Blizard*, 9 B. & C. 851, 17 E. C. L. 508; *Rex v. Bower*, 1 B. & C. 492, 8 E. C. L. 209.

United States. — *Brown v. District of Columbia*, 127 U. S. 579; *U. S. v. Ballin*, 144 U. S. 1. *Indiana*. — *Price v. Grand Rapids, etc., R. Co.*, 13 Ind. 58.

Iowa. — *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

Kentucky. — *Somerset v. Smith*, 105 Ky. 678; *Bybee v. Smith*, (Ky. 1901) 61 S. W. Rep. 15.

Louisiana. — *Warnock v. Lafayette*, 4 La. Ann. 419.

Maine. — *Cram v. Bangor House Proprietary*, 12 Me. 354.

Maryland. — *Heiskell v. Baltimore*, 65 Md. 125, 57 Am. Rep. 308.

Massachusetts. — *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99; *Sargent v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743; *Damon v. Granby*, 2 Pick. (Mass.) 352; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243.

Michigan. — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124, 43 Am. Dec. 457.

Minnesota. — *State v. Chute*, 34 Minn. 135.

Missouri. — *Hax v. Davis Mill Co.*, 39 Mo. App. 453; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53.

New Hampshire. — *Despatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

New Jersey. — *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *State v. Jersey City*, 27 N. J. L. 493; *Cadmus v. Farr*, 47 N. J. L. 208; *Barnert v. Paterson*, 48 N. J. L. 395; *Hutchinson v. Belmar*, 61 N. J. L. 443, *affirmed* 62 N. J. L. 450.

New York. — *People v. Walker*, 23 Barb. (N. Y.) 304, 2 Abb. Pr. (N. Y.) 421; *Ex p. Willcocks*, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; *Madison Ave Baptist Church v. Oliver St. Baptist Church*, 5 Robt. (N. Y.) 649; *Farmers' L. & T. Co. v. Aberle*, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 264.

One Person. — It has been held that one person cannot constitute a quorum; that at least two persons are necessary to hold a corporate meeting.¹

Presiding Officer and Half of the Members of the Assembly. — It has been held that where a city council consisted of six members, with the mayor as presiding officer, the mayor and three councilmen did not constitute a quorum.²

Disqualification on Account of Interest. — Members of a body who are disqualified on account of interest cannot be counted in determining whether or not a quorum is present.³

III. JUDICIAL BODIES. — A majority of the justices constituting a court are a quorum;⁴ and the act or decision of a majority of such quorum is the act

North Carolina. — *Stanford v. Ellington*, 117 N. Car. 158, 53 Am. St. Rep. 580; *Cleveland Cotton Mills v. Cleveland County*, 108 N. Car. 678.

Ohio. — *State v. Green*, 37 Ohio St. 227; *Deglow v. Kruse*, 57 Ohio St. 434.

Pennsylvania. — *Com. v. Read*, 2 Ashm. (Pa.) 261; *Doyle's Nomination*, 7 Pa. Dist. 635.

South Carolina. — *State v. Deliesseleine*, 1 McCord L. (S. Car.) 52; *State v. Huggins*, Harp. L. (S. Car.) 139.

Tennessee. — *Cowan v. Murch*, 97 Tenn. 590.

Utah. — *Leavitt v. Oxford*, etc., Silver Min. Co., 3 Utah 265, 4 Am. & Eng. Corp. Cas. 234.

Virginia. — *Booker v. Young*, 12 Gratt. (Va.) 303.

In *Williams v. Benet*, 35 S. Car. 150, it was said: "If the house consists of one hundred and twenty-four members, and a majority of the house is declared to be a quorum, it is practically the same thing as saying that any sixty-three members of the house shall constitute a quorum; and this is what has been said in the case of *State v. Hayne*, 8 S. Car. 367."

Where a Statute Requires the Presence of All or a Certain Number a majority is not sufficient. *Ex p. Rogers*, 7 Cow. (N. Y.) 526. See also *Rex v. Miller*, 6 T. R. 268; *Curry v. Claysville Cemetery Assoc.*, 5 Pa. Super. Ct. 289.

Supreme Court — Whole Body Need Not Be in Existence. — *Williams v. Benet*, 35 S. Car. 150.

But where a charter required that the mayor and common clerk for the time being and the common council for the time being, or the major part of them, should elect, and the common council was a definite body consisting of thirty-six, it was held that a majority of the whole number must meet to form an elective assembly; and that if the corporation was so reduced as that so many did not remain, no election could be had at all. *Rex v. Bellringer*, 4 T. R. 810.

Directors — Stockholders. — See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 871; STOCK; STOCKHOLDERS.

1. One Person. — *Sharp v. Dawes*, 2 Q. B. D. 26, 46 L. J. Q. B. D. 104.

But in *Morrill v. Little Falls Mfg. Co.*, 53 Minn. 371, it was said: "But this decision is based upon a narrow lexicographical definition of the word 'meeting' as the coming together of two or more persons — a reason that does not commend itself to our judgment."

2. Presiding Officer and Half of the Members of the Assembly. — *Somerset v. Smith*, 105 Ky. 678; *Somerset v. Somerset Banking Co.*, (Ky. 1900) 60 S. W. Rep. 5; *Bybee v. Smith*,

(Ky. 1901) 61 S. W. Rep. 15; *Atty.-Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576; *Cate v. Martin*, 70 N. H. 142; *Mills v. Gleason*, 11 Wis. 493.

County Auditor — Township Trustees. — In *State v. Porter*, 113 Ind. 79, it was held that the county auditor, not being a member of the board of trustees, could not be counted in determining whether or not a quorum was present.

3. Disqualification on Account of Interest. — *Smith v. Los Angeles Immigration*, etc., Assoc., 78 Cal. 289, 12 Am. St. Rep. 53; *Curtin v. Salmon River Hydraulic Gold Min.*, etc., Co., 130 Cal. 345; *Jones v. Morrison*, 31 Minn. 140; *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 139; *Metropolitan Telephone*, etc., Co. v. *Domestic Tel.*, etc., Co., 44 N. J. Eq. 568; *Butts v. Wood*, 37 N. Y. 317; *Copeland v. Johnson Mfg. Co.*, 47 Hun (N. Y.) 235; *San Antonio St. R. Co. v. Adams*, 87 Tex. 125, reversing (Tex. Civ. App. 1894) 25 S. W. Rep. 639. Compare *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516.

Interested Trustee. — In *U. S. Ice*, etc., Co. v. *Reed*, (Supm. Ct. Spec. T.) 2 How. Pr. N. S. (N. Y.) 253, the court said: "A trustee whose attendance is necessary to make a quorum cannot act upon a claim in his own favor to bind the corporation, and by his presence he thus acted."

A vote of confirmation of an assessment passed at a meeting of a board of trustees consisting of the number of five, in which only four members attended, and in which vote two trustees concurred, the others, being interested, declining to vote, was held not a valid act, although the two trustees who did not vote assented to the vote of their colleagues. *Coles v. Williamsburgh*, 10 Wend. (N. Y.) 661.

De Facto Officers. — It has been held that *de facto* officers may help to constitute a quorum. *Pence v. Frankfurt*, 101 Ky. 534.

Majority of Members Qualified Sufficient. — See *State v. Huggins*, Harp. L. (S. Car.) 139.

Judicial Quorum. — See *infra*, this title, JUDICIAL BODIES.

4. Majority of a Judicial Body Constitutes a Quorum. — *Snider v. Rinehart*, 18 Colo. 18; *Cowan v. Murch*, 97 Tenn. 590.

A Judge Who Is Disqualified cannot form one of the number necessary to constitute a quorum. *Cincinnati*, etc., R. Co. v. *McKeen*, 149 U. S. 259.

In *Gwin v. O'Daniel*, 85 Tex. 563, and *Austin v. Nalle*, 85 Tex. 520, it was held that two members of the Court of Civil Appeals constituted a quorum, although the third might be disqualified.

or decision of the court.¹

IV. COUNTING A QUORUM. — In the absence of any constitutional limitation a legislative body may prescribe the method to be pursued by it to determine the presence of a quorum, and members present, though not voting, may be counted to complete the number necessary for a quorum if such is the method prescribed.²

V. PRESUMPTION OF CONTINUANCE. — Where it appears that a quorum was present at a certain time, and it does not appear that after that time there was an adjournment, it will be presumed that the quorum continued to be present.³

VI. MAJORITY OF QUORUM MAY ACT. — A quorum is, for all legal purposes, as much the body to which it appertains as if every member were present, and when a quorum has met an act of the majority of such quorum is an act of the body itself.⁴ But the will of the majority must be expressed at a regular

In *Nephi Irrigation Co. v. Jenkins*, 8 Utah 452, it was held that the justice who tried a case in the court below might sit in the Supreme Court for the purpose of making a quorum, although the statute provided that no justice should act as a member of the Supreme Court in any action appealed from his decision in the court below.

The Constitution of South Carolina provided that the Supreme Court should consist of a chief justice and two associate justices, any two of whom should constitute a quorum. Where the chief justice was dead and one of the associate justices was disqualified on account of interest, it was held that an acting justice appointed by the governor with the remaining associate justice would constitute a quorum of the court. *Williams v. Benet*, 35 S. Car. 150; *Aultman v. Utsey*, 35 S. Car. 596. See also *Sullivan v. Speights*, 14 S. Car. 358.

1. A Quorum of a Judicial Body Can Exercise the Functions of That Body. — *Snider v. Rinehart*, 18 Colo. 18; *McFarland v. Cray*, 6 Wend (N. Y.) 297; *Louisville, etc., R. Co. v. Davidson County Ct.* 1 Sneed (Tenn.) 637, 62 Am. Dec. 424. And see *infra*, this title, *Majority of Quorum May Act*.

2. Counting a Quorum. — *U. S. v. Ballin*, 144 U. S. 1; *Atty.-Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576; *State v. Green*, 37 Ohio St. 227. See also *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *State v. Vanosial*, 131 Ind. 388.

But Where the Legislature Has Not Adopted the Rule allowing the speaker to count members present and not voting to make a quorum, the speaker has no power. *Stanford v. Ellington*, 117 N. Car. 158, 53 Am. St. Rep. 580. See also *U. S. v. Ballin*, 144 U. S. 1.

Absent Members. — In *Dingwall v. Detroit*, 82 Mich. 568, the court declared illegal the action taken by a portion of the common council of the city of Detroit in counting, for the purpose of completing a quorum, absent members who had left the meeting and the council chamber for the purpose of breaking the quorum.

3. Presumption of Continuance. — *Stanford v. Ellington*, 117 N. Car. 161, 53 Am. St. Rep. 580.

4. When a Quorum Has Met, the Majority of Such Quorum May Act — *England*. — *Rex v. Monday*, 2 Cowp. 530; *Cotton v. Davies*, 1 Stra. 53; *Rex v. Beeston*, 3 T. R. 592; *Rex v. Bellringer*, 4 T. R. 810; *Rex v. Miller*, 6 T. R. 268; *Cortis v. Kent Water Works*, 7 B. & C.

314, 14 E. C. L. 52; *Rex v. Headley*, 7 B. & C. 496, 14 E. C. L. 93; *Blacket v. Blizard*, 9 B. & C. 851, 17 E. C. L. 508.

United States. — *St. Joseph Tp. v. Rogers*, 16 Wall. (U. S.) 644; *Cass County v. Johnston*, 95 U. S. 360.

California. — *Smith v. Los Angeles Immigration, etc., Assoc.*, 78 Cal. 289, 12 Am. St. Rep. 53.

Florida. — *Martin v. Townsend*, 32 Fla. 318; *Atkins v. Phillips*, 26 Fla. 281.

Illinois. — *Carrollton v. Clark*, 21 Ill. App. 76.

Indiana. — *Price v. Grand Rapids, etc., R. Co.*, 13 Ind. 58.

Iowa. — *Buell v. Buckingham*, 16 Iowa 284, 85 Am. Dec. 516; *Cascaden v. Waterloo*, 106 Iowa 673.

Kentucky. — *Morton v. Youngerman*, 89 Ky. 505; *Lewis v. Brandenburg*, 105 Ky. 14.

Louisiana. — *Warnock v. Lafayette*, 4 La. Ann. 419.

Maine. — *Cram v. Bangor House Proprietary*, 12 Me. 354.

Massachusetts. — *Damon v. Granby*, 2 Pick. (Mass.) 353; *Williams v. School Dist. No. 1*, 21 Pick. (Mass.) 75, 32 Am. Dec. 243; *Kingsbury v. Centre School Dist.*, 12 Met. (Mass.) 99; *Sargeant v. Webster*, 13 Met. (Mass.) 497, 46 Am. Dec. 743.

Michigan. — *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124 43 Am. Dec. 457; *Southworth v. Palmyra, etc., R. Co.* 2 Mich. 287; *Ten Eyck v. Pontiac, etc., R. Co.*, 74 Mich. 226, 16 Am. St. Rep. 633.

Minnesota. — *Taylor v. Taylor*, 10 Minn. 107; *State v. Chute*, 34 Minn. 135.

Mississippi. — *Green v. Weller*, 32 Miss. 700.

Missouri. — *State v. McBride*, 4 Mo. 308, 29 Am. Dec. 636; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Hax v. Davis Mill Co.*, 39 Mo. App. 453.

Montana. — *State v. Yates*, 19 Mont. 235.

Nebraska. — *State v. Bemis*, 45 Neb. 724; *North Platte v. North Platte Water Works Co.*, 56 Neb. 403.

New Hampshire. — *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Richardson v. Union Cong. Soc.*, 58 N. H. 187; *Atty.-Gen. v. Shepard*, 62 N. H. 383, 13 Am. St. Rep. 576.

New Jersey. — *Wells v. Rahway White Rubber Co.*, 19 N. J. Eq. 402; *State v. Jersey City*, 27 N. J. L. 493; *McDermott v. Kenny*, 45 N. J. L. 251; *Cadmus v. Farr*, 47 N. J. L. 208; *Barnert v. Paterson*, 48 N. J. L. 395; *Hutchin-*

meeting at which all of the members might have been present.¹ And where by statute a majority of all the members is required for action, a majority of a quorum, if less than a majority of the whole number of the members of the body, will be insufficient.² A legislative or other collective body cannot act without the presence of a quorum,³ but less than a quorum may adjourn.⁴

Members Present and Refusing to Vote. — When a part of the members present refuse to vote at all, a vote may be legally decided by a majority of those actually voting, though they do not constitute a majority of the whole number present. This rule rests upon the principle that members present and not voting will be deemed to assent to the action of those who do vote.⁵

son *v.* Belmar, 61 N. J. L. 443, *affirmed* 62 N. J. L. 450.

New York. — People *v.* Walker, 23 Barb. (N. Y.) 304, 2 Abb. Pr. (N. Y.) 421; Porter *v.* Robinson, 30 Hun (N. Y.) 209; Ostrom *v.* Green, (Supm. Ct. Tr. T.) 20 Misc. (N. Y.) 184, *affirmed* 30 N. Y. App. Div. 621, 161 N. Y. 353; *Ex p.* Willcocks, 7 Cow. (N. Y.) 402, 17 Am. Dec. 525; Madison Ave. Baptist Church *v.* Oliver St. Baptist Church, 5 Robt. (N. Y.) 649; McFarland *v.* Crary, 6 Wend. (N. Y.) 298.

North Carolina. — Stanford *v.* Ellington, 117 N. Car. 158, 53 Am. St. Rep. 580.

Ohio. — State *v.* Wilkesville Tp., 20 Ohio St. 288; State *v.* Green, 37 Ohio St. 227.

Pennsylvania. — Com. v. Read, 2 Ashm. (Pa.) 261; Doyle's Nomination, 7 Pa. Dist. 635.

South Carolina. — State *v.* Delieesseline, 1 McCord L. (S. Car.) 52; Morton *v.* Comptroller Gen., 4 S. Car. 463; State *v.* Huggins, Harp. L. (S. Car.) 139.

Tennessee. — Lawrence *v.* Ingersoll, 88 Tenn. 52, 17 Am. St. Rep. 870; Cowan *v.* Murch, 97 Tenn. 590.

And see *supra*, this title, *Judicial Bodies*.

Where a municipal charter provided that a majority should be required to form a quorum, and a rule of proceeding was adopted by the council that no ordinance should be put on its third reading at the same meeting at which it was first read, except by unanimous consent of the council, the court construed this rule to mean unanimous consent of all the members present when the third reading was asked, whether a bare majority or more. Atkins *v.* Phillips, 26 Fla. 281, 34 Am. & Eng. Corp. Cas. 195.

By Statute a Vote of Two-thirds of a City Council Was Necessary to enact certain measures. It was held that by this was meant two-thirds of a quorum and not two-thirds of the whole number of members elected. Warnock *v.* Lafayette, 4 La. Ann. 419. See also Southworth *v.* Palmyra, etc., R. Co., 2 Mich. 287; Green *v.* Weller, 32 Miss. 650; State *v.* McBride, 4 Mo. 303, 29 Am. Dec. 636. Compare Logansport *v.* Legg, 20 Ind. 315, where it was held that if the charter of a city required the concurrence of two-thirds of the members, two-thirds of a quorum was not sufficient.

1. Regular Meeting Necessary. — D'Arcy *v.* Tamar, etc., R. Co., L. R. 2 Exch. 158; Junction R. Co. *v.* Reeve, 15 Ind. 237; Peirce *v.* New Orleans Bldg. Co., 9 La. 397, 29 Am. Dec. 448; Elliot *v.* Abbot, 12 N. H. 549, 37 Am. Dec. 227; Dispatch Line of Packets *v.* Bellamy Mfg. Co., 12 N. H. 205; People *v.* Batchelor, 22 N. Y. 146, *per Denio*, J.; Duke *v.* Markham, 105 N. Car. 131, 18 Am. St. Rep. 889. Compare

Middlebury Bank *v.* Rutland, etc., R. Co., 30 Vt. 159.

2. Majority of Those Elected and Not a Majority of the Quorum Required to Act. — Grindley *v.* Barker, 1 B. & P. 229; Anniston *v.* Davis, 98 Ala. 629, 39 Am. St. Rep. 94; San Francisco *v.* Hazen, 5 Cal. 169; McCracken *v.* San Francisco, 16 Cal. 591; Pimental *v.* San Francisco, 21 Cal. 361; Evanston *v.* O'Leary, 70 Ill. App. 124; Cascaden *v.* Waterloo, 106 Iowa 673; Edgerly *v.* Emerson, 23 N. H. 555, 55 Am. Dec. 207; State *v.* Wilkesville Tp., 20 Ohio St. 288; Leavitt *v.* Oxford, etc., Silver Min. Co., 3 Utah 265, 4 Am. & Eng. Corp. Cas. 234.

3. Presence of Quorum Necessary — England. — Rex *v.* Wyllyams, 3 Dowl. & R. 75, 16 E. C. L. 139; Ducarry *v.* Gill, 4 C. & P. 121, 19 E. C. L. 302; Sharp *v.* Dawes, 2 Q. B. D. 26; Blacket *v.* Blizard, 9 B. & C. 851, 17 E. C. L. 508; Rex *v.* Grimes, 5 Burr. 2598.

United States. — Brown *v.* District of Columbia, 127 U. S. 579.

Alabama. — Moses *v.* Tompkins, 84 Ala. 613.

Indiana. — Price *v.* Grand Rapids, etc., R. Co., 13 Ind. 58; Cowley *v.* Grand Rapids, etc., R. Co., 13 Ind. 61; Hamilton *v.* Grand Rapids, etc., R. Co., 13 Ind. 347; Logansport *v.* Legg, 20 Ind. 315; State *v.* Porter, 113 Ind. 79.

Michigan. — Dingwall *v.* Detroit, 82 Mich. 568.

Nevada. — State *v.* Curtis, 9 Nev. 325.

New Jersey. — Coryell *v.* New Hope Delaware Bridge Co., 9 N. J. Eq. 457.

New York. — Moore *v.* St. Thomas Church, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 51; McFarland *v.* Crary, 6 Wend. (N. Y.) 298.

Ohio. — State *v.* Wilkesville Tp., 20 Ohio St. 288.

Rhode Island. — Lockwood *v.* Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

4. Adjournment. — Kimball *v.* Marshall, 44 N. H. 465; Smith *v.* Law, 21 N. Y. 296.

5. Silence Presumed to Be Acquiescence — England. — Rex *v.* Monday, 2 Cowp. 530; Oldknow *v.* Wainwright, 2 Burr. 1017.

United States. — U. S. *v.* Ballin, 144 U. S. 1. *Connecticut.* — State *v.* Chapman, 44 Conn. 600.

Illinois. — Launtz *v.* People, 113 Ill. 137, 55 Am. Rep. 405.

Indiana. — Rushville Gas Co. *v.* Rushville, 121 Ind. 206, 16 Am. St. Rep. 388; State *v.* Dillon, 125 Ind. 65; State *v.* Vanosdal, 131 Ind. 388.

Kentucky. — Morton *v.* Youngerman, 89 Ky. 505, 30 Am. & Eng. Corp. Cas. 449.

Massachusetts. — Sudbury *v.* Stearns, 21 Pick. (Mass.) 148.

Delegation of Power for Private Purposes to Two or More. — Where there is a delegation of authority to two or more persons for private purposes it must be executed by all to be effectual, unless it should appear that it was intended that a majority should act.¹

Boards, Committees, Commissions, Etc. — It has been held, where statutes constitute a board of commissioners or other officers to decide any matter, but make no provision that a majority shall constitute a quorum, that all must be present to hear and consult, though a majority may decide.² Of course, when a statute under which the commission or committee acts requires the presence or concurrence of all, the concurrence of a majority is not sufficient.³ Where a statute constitutes a certain number of the members of a commission a quorum, it has been held that a rule of the commission requiring a larger number to constitute a quorum was void.⁴

QUOTA. — The proportion or share of a common burden which belongs to each of several persons or places.⁵

QUOTE. — To quote is to name, as the price of stock, produce, etc.; to name the current price of.⁶

Michigan. — Ten Eyck *v.* Pontiac, etc., R. Co., 74 Mich. 226, 16 Am. St. Rep. 633.

Montana. — State *v.* Yates, 19 Mont. 239.

New Hampshire. — Atty.-Gen. *v.* Shepard, 62 N. H. 383, 13 Am. St. Rep. 576.

New York. — McFarland *v.* Crary, 6 Wend. (N. Y.) 297.

North Dakota. — State *v.* Archibald, 5 N. Dak. 359.

Ohio. — State *v.* Green, 37 Ohio St. 227.

Pennsylvania. — Beck, etc., Nominations, 7 Pa. Dist. 629; Com. *v.* Wickersham, 66 Pa. St. 134.

Virginia. — Booker *v.* Young, 12 Gratt. (Va.) 303.

Silent Members Not Presumed to Acquiesce. — In State *v.* Fagan, 42 Conn. 32, it was held, where a statute required "a majority vote of the qualified members present," that a majority of all actually voting was not sufficient if less than a majority of the qualified members was present.

Where by statute a majority of the whole number of voters is required, a minority is insufficient where the majority refuses to act. Gosling *v.* Veley, 4 H. L. Cas. 679, reversing 7 Q. B. 406, 53 E. C. L. 406.

Blank Votes. — And in Lawrence *v.* Ingersoll, 88 Tenn. 52, 17 Am. St. Rep. 870, the court, in a well-considered opinion, held that when an election is to be made by a select and definite number of electors, a majority of those actually present must vote to elect; and in order to the determination of the number constituting a majority of those present, members casting blank votes must be counted present and not voting. See also Com. *v.* Wickersham, 66 Pa. St. 134; People *v.* Conklin, 7 Hun (N. Y.) 188.

Majority of a Quorum of Members Elected and

Voting. — A rule had been adopted by a city council which read as follows: "A majority of a quorum of members elected and voting shall be necessary to choose any officer elected by this board." In construing this provision the court said: "We are of the opinion that the meaning of it is that a 'quorum of the members elected' should vote, and that a majority of that quorum could elect when the quorum was 'voting.'" Collopy *v.* Cloherty, (Ky. 1897) 39 S. W. Rep. 431.

1. Delegation of Power to Two or More. — Damon *v.* Granby, 2 Pick. (Mass.) 352; Green *v.* Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Cowan *v.* Murch, 97 Tenn. 597. See also the title AGENCY, vol. 1, p. 1057.

2. See the title PUBLIC OFFICERS, section IX. *q. ante.*

3. People *v.* Coghill, 47 Cal. 361; Powell *v.* Tuttle, 3 N. Y. 396; New York L. Ins. Co. *v.* Staats, 21 Barb. (N. Y.) 576.

4. Tappan *v.* Long Branch Police, etc., Commission, 59 N. J. L. 371.

5. Quota. — Bridgewater *v.* Plymouth, 97 Mass. 390. See also Taber *v.* Erie County, 131 N. Y. 442.

6. Quote. — Johnston *v.* Rogers, 30 Ont. 156. In that case the defendants, dealers in flour, wrote to the plaintiffs, bakers, that they wished to secure their patronage as customers, saying: "We *quote* you" prices and terms for specified kinds of flour, and adding a suggestion that the plaintiffs should use the wire to order. The plaintiffs answered by telegram that they would take two cars "at your offer of yesterday." The defendants did not deliver the flour. It was held that there was no contract. See also Harvey *v.* Facey, (1893) A. C. 552. And see the title CONTRACTS, vol. 7, p. 138.

QUO WARRANTO.

BY WILLIAM B. HALE.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 17, p. 383.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the following titles: *DE FACTO CORPORATIONS*, vol. 8, p. 747; *DE FACTO OFFICERS*, vol. 8, p. 771; *DISSOLUTION OF CORPORATIONS*, vol. 9, p. 544; *ELECTIONS*, vol. 10, p. 552; *INJUNCTIONS*, vol. 16, p. 337; *MANDAMUS*, vol. 19, p. 709; *PROHIBITION*, ante; *PUBLIC OFFICERS*, ante; *ULTRA VIRES*.

I. DEFINITION AND SCOPE OF TITLE — **Definition.** — In its broadest sense quo warranto may be defined as a legal proceeding to determine the right to an office or franchise, and to oust the defendant therefrom if his title is found to be fatally defective.¹

Scope of Title. — This article is confined to a statement of the principles governing the remedy and to an enumeration of the cases where it is an appropriate or exclusive remedy. The detailed discussion of the right to an office, franchise, or privilege under particular statutes or circumstances is relegated to the special titles in this work dealing with such subjects.²

II. NATURE AND ORIGIN OF REMEDY — **1. Ancient Writ of Quo Warranto.** — Originally at common law the writ of quo warranto was a writ in the nature of a writ of right for the crown against the usurper of an office or franchise, whereby the authority of the usurper was inquired into and the right determined. It commanded the respondent to show by what authority — quo warranto — he assumed to exercise the office of franchise, having never had any grant of it or having forfeited it by neglect or abuse.³ The writ is a very ancient one. The earliest instance of its use appearing of record is said to have been in 1198, during the reign of Richard I.⁴ The writ was much abused and became a powerful instrument in aid of the encroachments of the royal prerogative.⁵ These abuses were checked and the use of the writ regulated by the statutes of quo warranto enacted during the reign of Edward I.⁶

1. Definitions. — *Com. v. Lexington, etc.*, Turnpike Road Co., 6 B. Mon. (Ky.) 397; *State v. St. Louis Perpetual Marine, etc.*, Ins. Co., 8 Mo. 330; *State v. Balcom*, 71 Mo. App. 27; *People v. Adams*, 9 Wend. (N. Y.) 464; *Com. v. Dillon*, 81* Pa. St. 45; *Com. v. Small*, 26 Pa. St. 35.

2. See titles *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *FRANCHISES*, vol. 14, p. 4; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123, and other similar titles; *OFFICERS AND AGENTS OF PRIVATE CORPORATIONS*, vol. 21, p. 833; *PUBLIC OFFICERS*, ante.

3. Ancient Writ Defined. — 3 Bl. Com. 262; *Comyns's Dig.*, title Quo Warranto; *Finch's Law* 332.

United States. — *Ames v. Kansas*, 111 U. S. 449.

Arkansas. — *State v. Evans*, 3 Ark. 588, 36 Am. Dec. 468; *State v. Ashley*, 1 Ark. 304.

Dakota. — *Territory v. Hauxhurst*, 3 Dak. 208.

Georgia. — *Whelchel v. State*, 76 Ga. 647; *Stone v. Wetmore*, 44 Ga. 497.

Kentucky. — *Com. v. Lexington, etc.*, Turnpike Road Co., 6 B. Mon. (Ky.) 397.

Mississippi. — *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

Missouri. — *State v. Stone*, 25 Mo. 555; *State v. St. Louis Perpetual Marine, etc.*, Ins. Co., 8 Mo. 330.

New York. — *People v. Pease*, 30 Barb. (N. Y.) 588.

Rhode Island. — *State v. Brown*, 5 R. I. 7.

South Carolina. — *State v. Champlin*, 2 Bailey L. (S. Car.) 220.

Wisconsin. — *State v. Portage City Water Co.*, 107 Wis. 441.

4. Antiquity of Writ. — *Darley v. Reg.*, 12 Cl. & F. 520; *People v. Londoner*, 13 Colo. 306. See also *State v. Stewart*, 6 Houst. (Del.) 359.

5. 2 Co. Inst. 280. Compare *Crabb's Hist. Eng. Law* 174; 2 *Reeves's Hist. Eng. Law* (Phila. 1880) 523; 1 *Pollock and M. Hist. Eng. Law* (2d ed.) 572. And see *People v. Bristol, etc.*, Turnpike Road, 23 Wend. (N. Y.) 222.

6. Statutes of Quo Warranto. — 6 Edw. I., c. 2; 18 Edw. I., c. 2.

These statutes may be read in the appendix to *High's Extraordinary Legal Remedies*.

2. Information in Nature of Quo Warranto. — At an early day, the time of which cannot be precisely determined,¹ the writ of quo warranto fell into disuse and its place was taken by an information in the nature of quo warranto, which is now the exclusive remedy in England and in most of the states of the Union.² In the United States the terms "quo warranto" and "information in the nature of quo warranto" are generally, but not always, used as wholly synonymous terms.³ The information lies in all cases where formerly the writ would have issued,⁴ and, in the absence of constitutional or statutory provisions, in no other cases.⁵

3. Modern Statutory Regulations and Substitutes. — In the absence of statutory provisions the common-law remedy by information in the nature of quo warranto is the proper remedy in appropriate cases.⁶ But statutory regulations exist very generally in the several states.⁷ In some states an ordinary civil action serves the purpose of the former writ of information,⁸ both the

1. The authorities are in accord in fixing the time at the abolition of the circuits of the king's justices in eyre, and the substitution thereof of the justices of assize, but are not in accord as to the time of such abolition and substitution. Coke assigns the time to the reign of Richard II. (2 Inst. 498). See also Crabb's Eng. Law 277; Opinion of Tindal, C. J., in *Darley v. Reg.*, 12 Cl. & F. 520; *State v. Ashley*, 1 Ark. 279; *State v. Stewart*, 6 Houst. (Del.) 381; *State v. Stewart*, 32 Mo. 379; *State v. Moores*, 56 Neb. 1; *State v. West Wisconsin R. Co.*, 34 Wis. 211.

2. Information Now Exclusive Remedy — *United States*. — *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *Ames v. Kansas*, 111 U. S. 449.

Alabama. — *State v. Paul*, 5 Stew. & P. (Ala.) 40; *State v. Porter*, 1 Ala. 694.

Arkansas. — *State v. Real Estate Bank*, 5 Ark. 598, 41 Am. Dec. 109; *State v. Ashley*, 1 Ark. 279.

Delaware. — *State v. Stewart*, 6 Houst. (Del.) 372.

Florida. — *State v. Gleason*, 12 Fla. 212.

Georgia. — *Whelchel v. State*, 76 Ga. 647.

Illinois. — *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 451; *Atty.-Gen. v. Salem*, 103 Mass. 138.

Mississippi. — *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

Missouri. — *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265; *State v. Stewart*, 32 Mo. 381; *State v. St. Louis Perpetual Marine, etc.*, Ins. Co., 8 Mo. 330.

Nebraska. — *State v. Moores*, 56 Neb. 1.

New Hampshire. — *State v. Portland, etc.*, R. Co., 58 N. H. 113.

New Jersey. — *Gibbs v. Somers Point*, 49 N. J. L. 517; *State v. Parkhurst*, 9 N. J. L. 437.

New Mexico. — *Territory v. Ashenfelter*, 4 N. Mex. 85.

New York. — *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

Pennsylvania. — *Com. v. Murray*, 11 S. & R. (Pa.) 73, 14 Am. Dec. 614.

Virginia. — *Shumate v. Fauquier County*, 84 Va. 578.

Wisconsin. — *Atty.-Gen. v. Superior, etc.*, R. Co., 93 Wis. 613.

And see 3 Black. Com. 263.

Originally Only a Criminal Proceeding. — *State v. Ashley*, 1 Ark. 279. See *infra*, this section, *Civil or Criminal Character*.

3. People v. Keeling, 4 Colo. 129. See *infra*, this title, *Principles Governing Use of Remedy* — *Leave of Court; Jurisdiction*.

In this article the term "quo warranto" is used as including both the information and the modern statutory substitutes, except where the context shows that the term is used in a more limited sense.

4. Lindsey v. Atty.-Gen., 33 Miss. 509.

5. State v. Ashley, 1 Ark. 279; *Com. v. Murray*, 11 S. & R. (Pa.) 73, 14 Am. Dec. 614.

6. In Absence of Statute. — *State v. Stewart*, 6 Houst. (Del.) 372; *Territory v. Ashenfelter*, 4 N. Mex. 85. See also *Com. v. Allen*, 128 Mass. 310.

In at least one state, *Tennessee*, the remedy by quo warranto has never existed. See *infra*, this section, *Legal or Equitable Character*.

7. Statutory Regulations in General. — *State v. Elliott*, 117 Ala. 172; *People v. Londoner*, 13 Colo. 314; *Vrooman v. Michie*, 69 Mich. 42; *Com. v. Dillon*, 61 Pa. St. 488.

In *Massachusetts* it was held that while proceedings by private individuals are regulated by statute, an information may be filed as at common law, without the aid of any statute, by the attorney-general *ex officio* in the name and on behalf of the commonwealth. *Com. v. Allen*, 128 Mass. 310.

8. Civil Action. — See generally the following cases:

Alabama. — *State v. Price*, 50 Ala. 571.

Colorado. — *Central, etc., Road Co. v. People*, 5 Colo. 42; *Atchison, etc., R. Co. v. People*, 5 Colo. 62.

Idaho. — *People v. Havird*, 2 Idaho 498; *People v. Green*, 1 Idaho 235.

Indiana. — *State v. Hyde*, 121 Ind. 20; *State v. Bell*, 116 Ind. 5.

Iowa. — *State v. Simpkins*, 77 Iowa 678; *State v. Minton*, 40 Iowa 591.

Minnesota. — *State v. Parker*, 25 Minn. 215.

Nevada. — *State v. Haskell*, 14 Nev. 209.

New York. — *People v. Clute*, 52 N. Y. 576.

North Dakota. — *Wishek v. Becker*, 10 N. Dak. 63.

Ohio. — *State v. Sullivan*, 8 Ohio Cir. Dec. 346.

Oregon. — *State v. Stevens*, 29 Oregon 471; *State v. Douglas County Road Co.*, 10 Oregon 199.

South Carolina. — *State v. Evans*, 33 S. Car. 612.

writ and the information being sometimes expressly abolished.¹ In other states special statutory proceedings are provided to serve the same purpose.² These various statutory provisions amount simply to changes in the form of the remedy. The remedy remains substantially in fact, as it is frequently called in name, quo warranto, and except as modified by statute is governed by common-law principles.³ Quo warranto statutes are remedial, and are to be construed and administered so as to advance the remedy and render it effectual.⁴

4. Extraordinary Prerogative Character. — Originally both the writ and the information were exclusively prerogative remedies, available only to redress or punish encroachments upon the prerogative of the crown, and issued only at the instance of the crown.⁵ This prerogative character is still retained to the extent that the proceedings are in the name of the state or sovereign, and are limited to cases where, in theory at least, the rights of the public are involved. The remedy is not available for the trial of purely private rights.⁶

The Statute of Anne authorized the filing of an information, by leave of court, upon the relation of a private person in cases of usurpation or intrusion into

Utah. — *People v. Cohn*, 7 Utah 352; *People v. Clayton*, 4 Utah 433.

Wisconsin. — *State v. Portage City Water Co.*, 107 Wis. 441; *State v. Dahl*, 65 Wis. 510; *State v. Pierce*, 35 Wis. 101; *State v. Dousman*, 28 Wis. 542; *State v. Palmer*, 24 Wis. 63; *State v. Riordan*, 24 Wis. 484; *State v. Messmore*, 14 Wis. 115.

1. Writ and Information Abolished. — *United States.* — *Foster v. Kansas*, 112 U. S. 205; *Ames v. Kansas*, 111 U. S. 449.

California. — See *People v. Dashaway Assoc.*, 84 Cal. 114.

Colorado. — *Atchison, etc., R. Co. v. People*, 5 Colo. 60; *Central, etc., Road Co. v. People*, 5 Colo. 42; *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301. But see *People v. Reid*, 11 Colo. 138.

Dakota. — *Territory v. Hauxhurst*, 3 Dak. 208.

Iowa. — *State v. Independent School Dist.*, 44 Iowa 227.

Kansas. — See *State v. Allen*, 5 Kan. 213.

Kentucky. — *Com. v. Frankfort*, 13 Bush (Ky.) 186.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

New York. — *Morris v. Whelan*, (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 64; *People v. Nolan*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 471, 101 N. Y. 543; *People v. Albany, etc., R. Co.*, 1 Lans. (N. Y.) 308, 57 N. Y. 161; *People v. Hills*, 1 Lans. (N. Y.) 203; *People v. Hall*, 80 N. Y. 119; *People v. Thacher*, 55 N. Y. 535, 14 Am. Rep. 312; *People v. Clute*, 52 N. Y. 577; *People v. Pease*, 27 N. Y. 63; *People v. Ryder*, 12 N. Y. 433; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451.

North Carolina. — *Saunders v. Gatling*, 81 N. Car. 301; *People v. Heaton*, 77 N. Car. 18; *Patterson v. Hubbs*, 65 N. Car. 119.

Oregon. — *State v. Douglas County Road Co.*, 10 Oregon 198.

South Carolina. — *Alexander v. McKenzie*, 2 S. Car. 81.

2. Special Statutory Proceedings. — See the codes and statutes of the various states.

3. Remedy Substantially Unchanged. — *Alabama.* — *State v. Elliott*, 117 Ala. 172; *Leigh v. State*, 69 Ala. 261.

California. — *People v. Dashaway Assoc.*, 84 Cal. 114; *People v. Bingham*, 82 Cal. 238.

Dakota. — *Territory v. Hauxhurst*, 3 Dak. 208.

Indiana. — *Creek v. State*, 77 Ind. 180.

Iowa. — *State v. Independent School Dist.*, 44 Iowa 227.

Kansas. — *State v. Topeka*, 31 Kan. 454; *State v. Allen*, 5 Kan. 213.

Maine. — *Ex p. Davis*, 41 Me. 38.

Missouri. — *State v. Meek*, 129 Mo. 431.

New York. — *People v. Platt*, 46 Hun (N. Y.) 394; *People v. Hall*, 80 N. Y. 117. See *People v. Richardson*, 4 Cow. (N. Y.) 97.

North Carolina. — *Saunders v. Gatling*, 81 N. Car. 301.

North Dakota. — *Wishek v. Becker*, 10 N. Dak. 63.

Oklahoma. — *Bradford v. Territory*, 1 Okla. 366.

Oregon. — *State v. Douglas County Road Co.*, 10 Oregon 198.

Utah. — *Preshaw v. Dec*, 6 Utah 360; *People v. Clayton*, 4 Utah 433.

Washington. — *State v. Van Brocklin*, 8 Wash. 559.

Wisconsin. — *State v. Portage City Water Co.*, 107 Wis. 441; *State v. Von Baumbach*, 12 Wis. 310.

As to the Maine Statute of 1880, see *infra*, this section, *Legal or Equitable Character*, note.

As to Tennessee, see *infra*, this section, *Legal or Equitable Character*, note.

4. Construction of Statutes. — *Com. v. Dillon*, 61 Pa. St. 488; *State v. Portage City Water Co.*, 107 Wis. 441.

5. Ancient Prerogative Character. — *State v. Ashley*, 1 Ark. 279; *State v. Stewart*, 6 Houst. (Del.) 376; *Lindsey v. Atty.-Gen.*, 33 Miss. 508; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253. See also *Com. v. Lexington, etc., Turnpike Road Co.*, 6 B. Mon. (Ky.) 398.

6. Modern Character. — See *infra*, this title, *Use of Remedy in Particular Cases*; *Campbell v. Goodrich*, 27 Ark. 12; *Cupit v. Park City Bank*, 20 Utah 293. See also *People v. Londoner*, 13 Colo. 311; *People v. Ridgely*, 21 Ill. 65; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

any municipal office or franchise in the kingdom.¹ This statute is the origin of the use of the information as a means of determining civil rights between parties.² It forms the basis of the remedy in *England* and the *United States* except where the proceedings have been established or modified by statute.³

5. Civil or Criminal Character. — The Writ of Quo Warranto, as distinguished from the information, was strictly a civil remedy, prosecuted for the benefit of the king, to seize a franchise or oust a usurper.⁴

The Information in the Nature of Quo Warranto was originally a criminal proceeding in which the usurpation of an office or franchise was punished as a criminal offense.⁵ But after the proceeding by information supplanted the writ of quo warranto, the information came to be treated as a civil proceeding in everything except form, a merely nominal fine or none at all being imposed, and such has always been its character in most, if not all, the states of the Union,⁶ though in some cases, while used only as a civil remedy, it has been so far treated as criminal in form as to require matters of pleading and jurisdiction to be governed accordingly.⁷ Constitutional provisions prohibiting

1. Statute of Anne. — 9 Anne, c. 20.

2. High, on Ex. Rem., § 602; State v. Ashley, 1 Ark. 279.

3. Territory v. Virginia Road Co., 2 Mont. 96. See also State v. Ashley, 1 Ark. 279.

4. Writ a Civil Remedy. — Rex v. Marsden, 3 Burr. 1817; Ames v. Kansas, 111 U. S. 449; State v. Real Estate Bank, 5 Ark. 598, 41 Am. Dec. 109; State v. Ashley, 1 Ark. 305; State v. Lupton, 64 Mo. 415, 27 Am. Rep. 253; State v. Equitable Loan, etc., Assoc., 142 Mo. 335; State v. Moores, 56 Neb. 1; State v. Parkhurst, 9 N. J. L. 427. But see State v. Porter, 1 Ala. 693; Lindsey v. Atty.-Gen., 33 Miss. 527; Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371.

It seems that both the writ and the information might have been maintained at the same time, the former to determine the civil right and the latter to punish the usurper. State v. Gleason, 12 Fla. 218.

5. Information Originally a Criminal Proceeding. — 3 Black. Com. 263; Rex v. Marsden, 3 Burr. 1817; State v. Ashley, 1 Ark. 279; State v. Equitable Loan, etc., Assoc., 142 Mo. 335; State v. Moores, 56 Neb. 1; State v. Roe, 26 N. J. L. 217; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Atty.-Gen. v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371. See also *infra*, this title, *Judgment*.

6. Information Now a Civil Remedy. — 3 Black. Com. 263.

England. — Rex v. Francis, 2 T. R. 484.

United States. — Gunton v. Ingle, 4 Cranch (C. C.) 440, 11 Fed. Cas. No. 5,870; Ames v. Kansas, 111 U. S. 449.

Alabama. — State v. Price, 50 Ala. 568; State v. Burnett, 2 Ala. 140.

Arkansas. — State v. Johnson, 26 Ark. 281; State v. Real Estate Bank, 5 Ark. 598, 41 Am. Dec. 109; State v. Ashley, 1 Ark. 279.

California. — People v. Dashaway Assoc., 84 Cal. 118.

Delaware. — State v. Stewart, 6 Houst. (Del.) 372.

Florida. — State v. Gleason, 12 Fla. 218.

Georgia. — Whelchel v. State, 76 Ga. 647; Morris v. Underwood, 19 Ga. 563.

Illinois. — Distilling, etc., Co. v. People, 156 Ill. 482; People v. Bruennemer, 168 Ill. 485; Lavalle v. People, 68 Ill. 252; People v. Boyd, 30 Ill. App. 608, *affirmed* 132 Ill. 60; Ens-

ming v. People, 47 Ill. 384, 95 Am. Dec. 495; People v. Shaw, 13 Ill. 581.

Indiana. — Jones v. State, 112 Ind. 195; Robertson v. State, 109 Ind. 79; Vincennes Bank v. State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234.

Kansas. — Foster v. State, 32 Kan. 765.

Maine. — Reed v. Cumberland, etc., Canal Corp., 65 Me. 53.

Massachusetts. — Atty.-Gen. v. Sullivan, 163 Mass. 449.

Michigan. — People v. Miller, 15 Mich. 357; People v. Sackett, 14 Mich. 246.

Mississippi. — Lindsey v. Atty.-Gen., 33 Miss. 508; Commercial Bank v. State, 4 Smed. & M. (Miss.) 504.

Missouri. — State v. Lupton, 64 Mo. 415, 27 Am. Rep. 253; State v. Vail, 53 Mo. 97; State v. Kupferle, 44 Mo. 154, 100 Am. Dec. 265; State v. Lawrence, 38 Mo. 535; State v. Stewart, 32 Mo. 379; State v. Alt, 26 Mo. App. 673. New Hampshire. — Osgood v. Jones, 60 N. H. 548.

New York. — People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

North Carolina. — Burton v. Patton, 2 Jones L. (47 N. Car.) 124, 62 Am. Dec. 194; State v. Hardie, 1 Ired. L. (23 N. Car.) 42; Saunders v. Gatling, 81 N. Car. 298.

Ohio. — State v. McDaniel, 22 Ohio St. 361; State v. American Eclectic Medical College, 6 Ohio Dec. (Reprint) 844, 8 Am. L. Rec. 422.

Pennsylvania. — Com. v. Philadelphia County, 1 S. & R. (Pa.) 382; Com. v. M'Closkey, 2 Rawle (Pa.) 369.

Rhode Island. — State v. Kearn, 17 R. I. 393. Texas. — State v. DeGress, 53 Tex. 387.

Vermont. — State v. Smith, 48 Vt. 282.

Virginia. — Com. v. Birchett, 2 Va. Cas. 51; Shumate v. Fauquier County, 84 Va. 578.

Wisconsin. — Atty.-Gen. v. Barstow, 4 Wis. 567.

Quasi Criminal. — The proceeding by quo warranto is sometimes said to be *quasi criminal* in its nature. State v. Porter, 1 Ala. 693; State v. Campbell, 120 Mo. 396; State v. Baker, 38 Wis. 71.

7. Present Criminal Features. — Arkansas. — State v. Ashley, 1 Ark. 279; State v. Brown, 1 Ark. 336.

California. — See also People v. Gillespie, 1 Cal. 344.

the prosecution of criminal offenses otherwise than by indictment do not inhibit informations in the nature of quo warranto,¹ unless it should be attempted to impose a substantial fine or inflict some other punishment, in which case the information would be a real criminal prosecution.² As already stated, in some states an ordinary civil action has been substituted for the writ or information, thus obviating the anomaly of using the form of a criminal proceeding to enforce a civil right.³

6. Action or Special Proceeding. — In the absence of statutory provision to that effect, an information in the nature of quo warranto is not an action or "a civil action" within the meaning of modern practice codes or constitutional provisions.⁴ The proceeding is special and *sui juris*.⁵ But statutes exist in some states under which the remedy is considered a civil action.⁶

7. Legal or Equitable Character. — The action or proceeding is a legal and not an equitable proceeding.⁷

III. PRINCIPLES GOVERNING USE OF REMEDY — 1. General Rule. — An

Illinois. — *Hay v. People*, 59 Ill. 94; *Wight v. People*, 15 Ill. 417; *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459; *People v. Mississippi*, etc., R. Co., 13 Ill. 66; *Minck v. People*, 6 Ill. App. 127; *Lecroix v. People*, 6 Ill. App. 129; *Wagner v. People*, 6 Ill. App. 129. See also *Cheshire v. People*, 116 Ill. 493. But see *People v. Boyd*, 30 Ill. App. 608.

Missouri. — *Compare State v. Campbell*, 120 Mo. 396.

New York. — *People v. Jones*, 18 Wend. (N. Y.) 601; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 377.

Wisconsin. — *State v. West Wisconsin R. Co.*, 34 Wis. 197.

1. Constitutional Requirements of Indictment. — *State v. Stewart*, 6 Houst. (Del.) 376; *Vincennes Bank v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; *State v. Vail*, 53 Mo. 97; *Atty.-Gen. v. Delaware*, etc., R. Co., 38 N. J. L. 282; *Respublica v. Wray*, 3 Dall. (Pa.) 490; *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 385.

2. State v. Hardie, 1 Fred. L. (23 N. Car.) 49. See *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459.

3. Civil Action Substituted — *United States.* — *Ames v. Kansas*, 111 U. S. 449.

Colorado. — *Atchison*, etc., R. Co. v. *People*, 5 Colo. 60; *Central*, etc., Road Co. v. *People*, 5 Colo. 40.

Florida. — *State v. Saxon*, 25 Fla. 342.

Iowa. — *State v. Simpkins*, 77 Iowa 678.

Kansas. — *Foster v. State*, 32 Kan. 767; *State v. Wilson*, 30 Kan. 669.

Mississippi. — *Commercial Bank v. State*, 4 Smed. & M. (Miss.) 439.

Nevada. — *State v. Haskell*, 14 Nev. 209.

New York. — *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451.

Ohio. — *State v. McDaniel*, 22 Ohio St. 361.

Texas. — *Davis v. State*, 75 Tex. 426.

4. Not an Action — *England.* — *Rex v. Leigh*, 4 Burr. 2143; *Rex v. Grimes*, 4 Burr. 2147; *Rex v. Newland*, Say 96.

Alabama. — *Capital City Water Co. v. State*, 105 Ala. 406.

Connecticut. — *State v. Kennedy*, 69 Conn. 227.

Georgia. — See *Western*, etc., R. Co. v. *State*, 69 Ga. 524.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 446.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

Montana. — *Territory v. Virginia Road Co.*, 2 Mont. 96.

New Jersey. — *Atty.-Gen. v. Delaware*, etc., R. Co., 38 N. J. L. 282; *State v. Roe*, 26 N. J. L. 215.

New York. — *People v. Jones*, 18 Wend. (N. Y.) 601; *People v. Adams*, 9 Wend. (N. Y.) 464.

Oklahoma. — But see *Bradford v. Territory*, 1 Okla. 366.

Washington. — *State v. Doherty*, 16 Wash. 382, 58 Am. St. Rep. 39; *State v. Fawcett*, 17 Wash. 188.

5. Com. v. Dillon, 61 Pa. St. 488.

6. Civil Action under Statute. — *State v. Price*, 50 Ala. 571; *Lee v. State*, 49 Ala. 50; *People v. Bingham*, 82 Cal. 238; *Jones v. State*, 112 Ind. 195; *State v. Simpkins*, 77 Iowa 678; *People v. Clute*, 52 N. Y. 576; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *Davis v. State*, 75 Tex. 426; *Hussey v. Heim*, 17 Tex. Civ. App. 153; *State v. McDonald*, 108 Wis. 8.

7. Legal Proceeding. — *Fulgham v. Johnson*, 40 Ga. 166; *State v. Gaston*, 79 Iowa 457; *State v. Alt*, 26 Mo. App. 673. See *Hullman v. Honcomp*, 5 Ohio St. 237. See also *Kilpatrick v. Smith*, 77 Va. 347. See also generally *supra*, this section, *Ancient Writ of Quo Warranto*; *Information in Nature of Quo Warranto*.

Equity Jurisdiction under Statute. — In *Tennessee* it was held at an early day that neither the ancient writ of quo warranto nor the information in the nature thereof was ever in force, and the remedies obtainable under those proceedings are to be sought by a bill in equity under statutory provision, said to be a bill in the nature of quo warranto. *State v. Turk, Mart. & Y. (Tenn.)* 287; *Hyde v. Trewhitt*, 7 Coldw. (Tenn.) 62; *State v. McConnell*, 3 Lea (Tenn.) 335; *Atty.-Gen. v. Leaf*, 9 Humph. (Tenn.) 755; *Boring v. Griffith*, 1 Heisk. (Tenn.) 456; *State v. Merchants Ins., etc., Co.*, 8 Humph. (Tenn.) 252.

In *Maine*, under the statute of 1880, c. 198, a speedy remedy was provided to enable parties duly elected to an office, but not declared to be so elected, to contest their rights before a judicial tribunal by bill in the place of quo warranto and mandamus. *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

information in the nature of quo warranto, or the statutory substitute therefor, lies where a person has usurped an office or franchise, or where having once lawfully held such office or franchise he has forfeited it by misuser or non-user.¹ Where the right to an office or franchise is not involved, quo warranto is not an appropriate remedy.²

2. Possession and User. — Quo warranto will not lie unless there is an actual wrongful possession and user by the respondent of the office or franchise in question. A mere claim of right is not enough,³ unless the statute has expressly extended the remedy to such cases.⁴ The proceeding will not lie where the office is vacant.⁵ But where there has once been possession and user of an office, a mere subsequent abandonment, without resignation, does not render the office vacant in such a sense as to oust the remedy by quo warranto.⁶ The remedy will not lie to determine the title to an office before commencement of the term of office.⁷ What constitutes possession and user of an office or franchise has been elsewhere fully considered.⁸

3. Exclusiveness of Remedy. — In the absence of statute creating concurrent remedies,⁹ quo warranto is the exclusive remedy in cases where it is appropriate.¹⁰ Thus the right to an office or franchise cannot be collaterally attacked, but must be directly attacked, if at all, by proceedings in quo warranto.¹¹

4. Leave of Court — *a. WRIT OF QUO WARRANTO.* — At common law, as has been seen,¹² the writ of quo warranto was a writ of right for the crown and might be sued out by the attorney-general *ex officio* without leave of

1. Lies for Usurpation of Office or Franchise. — 3 Black. Com. 263; Leigh *v.* State, 69 Ala. 261; State *v.* Ashley, 1 Ark. 279; Atty.-Gen. *v.* Salem, 103 Mass. 139; People *v.* Bristol, etc., Turnpike Road, 32 Wend. (N. Y.) 222; People *v.* Neubrand, 23 N. Y. App. Div. 50; State *v.* Brown, 5 R. I. 7; Bradley *v.* McCrabb, Dall. (Tex.) 504; State *v.* Boston, etc., R. Co., 25 Vt. 433. See also generally *infra*, this title, *Use of Remedy in Particular Cases*, and generally *supra*, this title, *Nature and Origin of Remedy*.

2. People *v.* Grand County, 6 Colo. 209. See also *infra*, this title, *Use of Remedy in Particular Cases* — *Public Officers* — *Official Misconduct or Illegal Action*; *Miscellaneous Cases* — *Adoption of Fence Law* — *Location of County Seat*.

3. Possession and User Necessary — *England.* — Rex *v.* Slythe, 9 Dowl. & R. 226, 6 B. & C. 240, 13 E. C. L. 156; Reg. *v.* Jones, 28 L. T. N. S. 270; Reg. *v.* Slatter, 3 Per. & Dav. 263, 11 Ad. & El. 505, 39 E. C. L. 153; Rex *v.* Whitwell, 5 T. R. 85; Reg. *v.* Quayle, 11 Ad. & El. 508, 39 E. C. L. 153; Rex *v.* Ponsonby, 1 Ves. Jr. 1, 2 Bro. P. C. (Tomi.) 311, 1 Ken. K. B. 1; Reg. *v.* Armstrong, 2 Jur. N. S. 211.

Florida. — MacDonald *v.* Rehrer, 22 Fla. 198. *Mississippi.* — Sublett *v.* Bedwell, 47 Miss. 266, 12 Am. Rep. 338.

Missouri. — But see State *v.* Meek, 129 Mo. 432.

New Hampshire. — Atty.-Gen. *v.* Megin, 63 N. H. 378; Osgood *v.* Jones, 60 N. H. 282.

New Jersey. — Roberson *v.* Bayonne, 58 N. J. L. 326; Haines *v.* Chosen Freeholders, 47 N. J. L. 454.

New York. — People *v.* Ferris, 16 Hun (N. Y.) 221, 76 N. Y. 326; People *v.* McCullough, (Supm. Ct. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 129; Clapp *v.* Guy, 31 N. Y. App. Div. 535;

People *v.* Thompson, 16 Wend. (N. Y.) 655; People *v.* Brooklyn, 77 N. Y. 503, 33 Am. Rep. 659.

Pennsylvania. — Updegraff *v.* Crans, 47 Pa. St. 103; Com. *v.* McMullin, 3 Pa. Co. Ct. 548.

4. In Iowa, under statute, the District Court may try title to an office against a defendant not in possession thereof, at the instance of one in possession thereof. State *v.* Van Beek, 87 Iowa 569, 43 Am. St. Rep. 397.

5. Office Vacant. — Board of Auditors *v.* Benoit, 20 Mich. 176, 4 Am. Rep. 382.

6. Abandonment of Office. — State *v.* Graham, 13 Kan. 141. See also Braidy *v.* Theritt, 17 Kan. 471.

7. Before Commencement of Term of Office. — People *v.* McCullough, (Supm. Ct. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 129. *Contra*, under Iowa statute, State *v.* Van Beek, 87 Iowa 569, 43 Am. St. Rep. 397.

8. What Constitutes Possession and User. — See the titles DE FACTO CORPORATIONS, vol. 8, p. 747; DE FACTO OFFICERS, vol. 8, p. 771; PUBLIC OFFICERS, *ante*. See also the following quo warranto cases: Rex *v.* Tate, 4 East 337; Rex *v.* Harwood, 2 East 177; Rex *v.* Whitwell, 5 T. R. 85; Reg. *v.* Jones, 28 L. T. N. S. 270; Reg. *v.* Tidy, (1892) 2 Q. B. 179; People *v.* Callaghan, 83 Ill. 135; State *v.* Meek, 129 Mo. 436; La Pointe *v.* O'Malley, 46 Wis. 35.

9. See *infra*, this section, Other Adequate Remedy.

10. Quo Warranto as Exclusive Remedy. — Desmond *v.* McCarthy, 17 Iowa 525; Jenkins *v.* Baxter, 160 Pa. St. 200; Gilroy's Appeal, 100 Pa. St. 5; Com. *v.* Graham, 64 Pa. St. 342.

11. See the titles DE FACTO CORPORATIONS, vol. 8, p. 747; DE FACTO OFFICERS, vol. 8, p. 771.

12. See *supra*, this title, Nature and Origin of Remedy — Ancient Writ of Quo Warranto.

court,¹ and where the writ as distinguished from the information is still recognized as an appropriate form of proceeding,² no leave of court is necessary, and the remedy may be claimed as of right in appropriate cases.³

b. INFORMATIONS IN NATURE OF QUO WARRANTO.—The attorney-general has always had the right, *ex officio*, to file and prosecute an information in the nature of quo warranto, on behalf of the crown or public, without leave of court, and such is still the general rule.⁴ But the statute of Anne, which first authorized informations in the nature of quo warranto to be filed at the relation of private persons, required leave of court as a condition precedent to the right of a private relator to file such information.⁵ This practice has been preserved, and it is still the general rule that leave of court is necessary in the case of informations by a private relator;⁶ but leave may be necessary where the attorney-general merely allows private counsel to use his name, as

1. *Leave Unnecessary in Case of Writ.*—*Rex v. Trelawney*, 3 Burr. 1616; *Atty.-Gen. v. Sullivan*, 163 Mass. 446.

2. See *infra*, this title, *Jurisdiction*.

3. *Ex p. Atty.-Gen.*, 1 Cal. 85; *State v. Stone*, 25 Mo. 555; *State v. St. Louis Perpetual Marine, etc.*, Ins. Co., 8 Mo. 330; *State v. Balcom*, 71 Mo. App. 28.

4. *Ex Officio Informations without Leave*—*England*,—*Rex v. Philipps*, 3 Burr. 1565.

Alabama.—*Contra*, *State v. Burnett*, 2 Ala. 140.

Colorado.—*People v. Regents of State University*, 24 Colo. 175.

Florida.—*State v. Gleason*, 12 Fla. 190.

Massachusetts.—*Goddard v. Smithett*, 3 Gray (Mass.) 116; *Haupt v. Rogers*, 170 Mass. 71; *Atty.-Gen. v. Sullivan*, 163 Mass. 446; *Com. v. Allen*, 128 Mass. 308.

Michigan.—*McDonald v. Alcona County*, 91 Mich. 459; *People v. Hartwell*, 12 Mich. 522.

Missouri.—*State v. Equitable Loan, etc.*, Assoc., 142 Mo. 335; *State v. Berkeley*, 140 Mo. 184; *State v. Westport*, 116 Mo. 582; *State v. McMillan*, 108 Mo. 157; *State v. Rose*, 84 Mo. 196; *State v. Vail*, 53 Mo. 97; *State v. Buskirk*, 43 Mo. 112; *State v. Lawrence*, 38 Mo. 538; *State v. Bernoudy*, 36 Mo. 279; *State v. Stewart*, 32 Mo. 379; *State v. Balcom*, 71 Mo. App. 28.

New Jersey.—*Miller v. Seymour*, (N. J. 1902) 51 Atl. Rep. 719; *Gibbs v. Somers Point*, 49 N. J. L. 517; *Atty.-Gen. v. Delaware, etc.*, R. Co., 38 N. J. L. 282.

Ohio.—*State v. Pennsylvania, etc.*, Canal Co., 23 Ohio St. 121; *State v. Smith*, 3 Ohio Cir. Dec. 515, 6 Ohio Cir. Ct. 410.

Pennsylvania.—*Com. v. Walter*, 83 Pa. St. 105, 24 Am. Rep. 154; *Com. v. Jones*, 1 Leg. Rec. (Pa.) 293.

Rhode Island.—*State v. Brown*, 5 R. I. 1.

South Carolina.—*State v. Delieesseline*, 1 McCord L. (S. Car.) 52.

Utah.—*State v. Elliott*, 13 Utah 200.

5. *Leave Necessary under Statute of Anne.*—*State v. Gleason*, 12 Fla. 220; *State v. Elliott*, 13 Utah 204.

Statutes 9 Anne and 4 and 5 Wm. & M.—"The two Acts of Parliament (of 4 and 5 W. & M., c. 18, and 9 Anne, c. 20) relate to quite different objects, and are the reverse of each other. The former restrains the clerk of the crown in this court from exhibiting or filing informations without leave of the court in cases where all

the king's subjects might, before the making of that act, have made use of his name without such leave. The latter lets in everybody who desires it, to make use of his name in prosecuting usurpers of franchises, whereas before no subject could have done so. But it provides that these informations (as well as those for misdemeanors) must be under the leave and discretion of the court. Therefore, the court ought not to give such leave without sufficient reason." *Per* Wilmot, J., in *Rex v. Trelawney*, 3 Burr. 1615.

In *State v. Stewart*, 32 Mo. 379, it was said: "There are in England three distinct classes of informations in the nature of a quo warranto: first, those filed by the attorney-general without leave of the court and without any relators; second, those filed with the leave of the court, by the clerk of the crown, by virtue of his common-law power; and third, informations by the clerk of the crown on the relation of some one, and by leave of the court, under the statute of 9 Anne, c. 20."

6. *England*.—*Rex v. Philipps*, 4 Burr. 2089. *United States*.—*Boyd v. Nebraska*, 143 U. S. 135.

Alabama.—*State v. Burnett*, 2 Ala. 140.

Delaware.—*Lynch v. Martin*, 6 Houst. (Del.) 487.

Georgia.—*Stone v. Wetmore*, 44 Ga. 497; *Crovatt v. Mason*, 101 Ga. 246.

Illinois.—*People v. Waite*, 70 Ill. 25; *Lavalle v. People*, 68 Ill. 252.

Massachusetts.—*Atty.-Gen. v. Sullivan*, 163 Mass. 446.

Michigan.—*McDonald v. Alcona County*, 91 Mich. 459; *Vrooman v. Michie*, 69 Mich. 42; *Atty.-Gen. v. Erie, etc.*, R. Co., 55 Mich. 15; *People v. Tisdale*, 1 Dougl. (Mich.) 59.

Minnesota.—*State v. Dahl*, 69 Minn. 113; *State v. Dowlan*, 33 Minn. 536.

Missouri.—*State v. Rose*, 84 Mo. 198; *State v. Buskirk*, 43 Mo. 112; *State v. Lawrence*, 38 Mo. 535; *State v. Stewart*, 32 Mo. 379; *State v. Stone*, 25 Mo. 555; *State v. St. Louis Perpetual Marine, etc.*, Ins. Co., 8 Mo. 330; *State v. Balcom*, 71 Mo. App. 28.

New Jersey.—*Miller v. Seymour*, (N. J. 1902) 51 Atl. Rep. 719; *Gibbs v. Somers Point*, 49 N. J. L. 517; *Atty.-Gen. v. Delaware, etc.*, R. Co., 38 N. J. L. 285.

Ohio.—*State v. Smith*, 3 Ohio Cir. Dec. 515, 6 Ohio Cir. Ct. 410.

Pennsylvania.—*Com. v. Reigart*, 14 S. & R. (Pa.) 216; *Com. v. Quin*, 1 W. N. C. (Pa.) 401;

is sometimes done, in order to procure the writ.¹ Want of prior formal leave may be waived by acquiescence, and does not necessarily constitute reversible error.²

c. MODERN STATUTORY PROCEEDINGS. — The necessity of prior leave of court under modern statutory regulations and forms of proceeding depends, of course, upon the terms of the statute in force.³ But the general rule seems to be substantially the same as at common law, after the statute of Anne. That is to say, proceedings by the attorney-general *ex officio*, in behalf of the public, may be brought without leave of court, while proceedings at the instance of private persons to try the right as between party and party cannot be prosecuted without leave of court.⁴ Under some statutes, however, a private relator may prosecute the proceeding without leave of court.⁵

5. Discretion of Court — a. STATEMENT OF RULE. — In cases where prior leave of court is necessary, that is, where the proceedings are at the relation of a private person and not by the attorney-general *ex officio*, the granting or withholding of leave is a matter resting within the sound discretion of the court.⁶ Where leave is not necessary, the court has no discretion, but must

Com. v. Cluley, 56 Pa. St. 272, 94 Am. Dec. 75; Com. v. Jones, 12 Pa. St. 365, 1 Leg. Rec. (Pa.) 293.

Rhode Island. — State v. Brown, 5 R. I. 1.

South Carolina. — State v. Dellesseline, 1 McCord L. (S. Car.) 52.

Texas. — East Dallas v. State, 73 Tex. 370.

Utah. — State v. Elliott, 13 Utah 200.

Vermont. — State v. Mead, 56 Vt. 353; State v. Bradford, 32 Vt. 50.

The Unnecessary Mention of a Relator is mere surplusage and does not necessitate leave of court. Com. v. Allen, 128 Mass. 310. See also State v. Brown, 5 R. I. 5.

Leave of Court to File the Information Is Unnecessary under Comp. Laws Mich. 1897, § 9939, and a relator named without his authority cannot have the information dismissed. People v. Knight, 13 Mich. 230.

1. Com. v. Walter, 83 Pa. St. 107, 24 Am. Rep. 154.

2. Waiver of Objection to Want of Leave. — Dickson v. People, 17 Ill. 191. See also State v. Hardie, 1 Ired. L. (23 N. Car.) 42.

Where a petition is filed without leave it will be taken as an application for leave. State v. Buskirk, 43 Mo. 112.

3. See codes and statutes of the various states.

4. See *supra*, this section, subdiv. b. *Informations in Nature of Quo Warranto*. See also the following cases decided under particular statutes: People v. Regents of State University, 24 Colo. 175; Atty.-Gen. v. Lorman, 59 Mich. 157, 60 Am. Rep. 287; State v. St. Louis Perpetual Marine, etc., Ins. Co., 8 Mo. 330.

5. Proceedings Without Leave under Statute. — Capital City Water Co. v. State, 105 Ala. 422; State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151; Tuscaloosa Scientific, etc., Assoc. v. State, 58 Ala. 54; Davis v. Davis, 57 N. J. L. 80; State v. Thompson, 34 Ohio St. 365; State v. Chandler, 2 Ohio Dec. (Reprint) 164, 1 West. L. Month. 602; Mills v. State, 2 Wash. 571. See State v. Burnett, 2 Ala. 140.

6. Granting of Leave Discretionary with Court — England. — Rex v. Parry, 6 Ad. & El. 810, 33 E. C. L. 218; Rex v. Sargent, 5 T. R. 467; Rex v. Dawes, 4 Burr. 2022; Rex v. Wardroper, 4 Burr. 1964; Rex v. Trevenen, 2 B. & Ald.

479; Rex v. Stacey, 1 T. R. 1; Rex v. Carter, 1 Cowp. 58.

United States. — Guntton v. Ingle, 4 Cranch (C. C.) 440, 11 Fed. Cas. No. 5,870.

Alabama. — State v. Centreville Bridge Co., 18 Ala. 678. See State v. Burnett, 2 Ala. 140.

Colorado. — People v. Keeling, 4 Colo. 129.

Delaware. — Lynch v. Martin, 6 Houst. (Del.) 487.

Georgia. — Stone v. Wetmore, 44 Ga. 495; Cole v. Dyer, 29 Ga. 437.

Illinois. — People v. Mineral Marsh Drainage Dist., 193 Ill. 428; McPhail v. People, 160 Ill. 77, 52 Am. St. Rep. 306; People v. North Chicago R. Co., 88 Ill. 543; People v. Callaghan, 83 Ill. 128; People v. Moore, 73 Ill. 132; People v. Waite, 70 Ill. 25; Martens v. People, 85 Ill. App. 66; People v. Hamilton, 24 Ill. App. 609.

Kansas. — Weston v. Lane, 40 Kan. 479, 10 Am. St. Rep. 224; Tarbox v. Sughrue, 36 Kan. 225.

Maine. — Reed v. Cumberland, etc., Canal Corp., 65 Me. 53.

Michigan. — People v. Tisdale, 1 Dougl. (Mich.) 59; Cain v. Brown, 111 Mich. 657; Atty.-Gen. v. Erie, etc., R. Co., 55 Mich. 15; People v. Hartwell, 12 Mich. 522.

Minnesota. — State v. Dahl, 69 Minn. 108; State v. Lockerby, 57 Minn. 411; State v. Dowlan, 33 Minn. 536.

Missouri. — State v. Vail, 53 Mo. 97; State v. Lawrence, 38 Mo. 535; State v. Stewart, 32 Mo. 379; State v. Balcom, 71 Mo. App. 27.

Nebraska. — State v. Stein, 13 Neb. 529.

New Jersey. — Roche v. Bruggemann, 53 N. J. L. 122; State v. Tolan, 33 N. J. L. 195; Miller v. Utter, 14 N. J. L. 86; Camman v. Bridgewater Copper Min. Co., 12 N. J. L. 84.

New York. — People v. Kip, 4 Cow. (N. Y.) 382; People v. Tibbets, 4 Cow. (N. Y.) 358; People v. Sweeting, 2 Johns. (N. Y.) 184.

Pennsylvania. — Com. v. Arrison, 15 S. & R. (Pa.) 127, 16 Am. Dec. 531; Com. v. Reigart, 14 S. & R. (Pa.) 216; Com. v. Davis, 109 Pa. St. 128; Com. v. McCarter, 98 Pa. St. 607, 11 W. N. C. (Pa.) 178; Com. v. Graham, 64 Pa. St. 339; Com. v. Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; Com. v. Jones, 12 Pa. St. 365; Miller

enforce the law applicable to the case.¹ In any case, the court ought not to arbitrarily refuse leave.²

b. CONSIDERATIONS AFFECTING EXERCISE OF DISCRETION. — Formerly leave was granted to file an information almost as a matter of course, but subsequently the rule became established that leave should be granted with caution, and with a view to all the circumstances of the case.³ The applicant must make some affirmative showing why leave should be granted,⁴ and the respondent may be heard by counter-affidavits.⁵ The existence of legal defects in the title of the respondent is not conclusive that leave must be granted,⁶ and *a fortiori* mere irregularities not affecting the result are not sufficient to require the granting of leave.⁷ Where there is a want of probable cause, leave may be refused.⁸ But ordinarily the merits of the application should not be considered in advance of the hearing, other than to ascertain whether or not there is reasonable ground for investigating further.⁹ Where the facts are disputed, or involve new and doubtful questions of law, leave should ordinarily be granted;¹⁰ though where a question of law is decisive, and such question can be conveniently determined upon the application for leave, it is proper for the court to decide the question at that stage of the case, and refuse leave upon a decision of the legal question in favor of the respondent.¹¹ The interests of the public and innocent parties may be considered, and where the proceeding would result in injury or inconvenience without any corresponding benefit, and no private right of the relator is involved, leave may properly be refused.¹² The importance of the office or interests affected

v. McCutchen, 2 Pars. Eq. Cas. (Pa.) 208; *Com. v. Quin*, 1 W. N. C. (Pa.) 401.

Rhode Island. — *State v. Brown*, 5 R. I. 1.

South Carolina. — *State v. Lehre*, 7 Rich. L. (S. Car.) 234; *State v. Schnierle*, 5 Rich. L. (S. Car.) 300.

Texas. — *East Dallas v. State*, 73 Tex. 370.

Utah. — *State v. Elliott*, 13 Utah 200.

Vermont. — *State v. Mead*, 56 Vt. 353; *State v. Smith*, 48 Vt. 266.

Washington. — *Mills v. State*, 2 Wash. 569.

West Virginia. — *State v. Shank*, 36 W. Va. 223.

1. Where Leave Unnecessary. — See *supra*, this section, *Leave of Court*.

2. Discretion Not Arbitrary. — *People v. North Chicago R. Co.*, 88 Ill. 543; *People v. Callaghan*, 83 Ill. 128; *People v. Waite*, 70 Ill. 25. See *State v. Burnett*, 2 Ala. 140.

3. Discretion Governed by Circumstances of Case. — *Rex v. Stacey*, 1 T. R. 1; *People v. North Chicago R. Co.*, 88 Ill. 537; *Cain v. Brown*, 111 Mich. 660; *Atty.-Gen. v. Megin*, 63 N. H. 378; *State v. Tolán*, 33 N. J. L. 195; *State v. Schnierle*, 5 Rich. L. (S. Car.) 302; *State v. Elliott*, 13 Utah 207; *State v. McGeary*, 69 Vt. 467; *State v. Fisher*, 28 Vt. 714; *Mills v. State*, 2 Wash. 569.

4. Affirmative Showing Necessary. — *Rex v. Harwood*, 2 East 177; *Republica v. Wray* 3 Dall. (Pa.) 490; *Lynch v. Martin*, 6 Houst. (Del.) 487; *Stone v. Wetmore*, 44 Ga. 495; *Place v. People*, 192 Ill. 160; *Vrooman v. Michie*, 69 Mich. 42; *Com. v. Jordon*, 4 L. T. N. S. (Pa.) 54. See *People v. Golden Rule*, 114 Ill. 34.

5. Counter-affidavits. — *Lynch v. Martin*, 6 Houst. (Del.) 487; *People v. North Chicago R. Co.*, 88 Ill. 537; *People v. Moore*, 73 Ill. 132; *People v. McFall*, 26 Ill. App. 319; *Miller v. Seymour*, (N. J. 1902) 51 Atl. Rep. 719. Compare *People v. Waite*, 70 Ill. 25.

6. Defects in Title. — *Rex v. Parry*, 6 Ad. & El. 810, 33 E. C. L. 218, 2 N. & P. 414; *People v. Keeling*, 4 Colo. 131; *State v. Tolán*, 33 N. J. L. 195; *Com. v. Jones*, 12 Pa. St. 365; *Com. v. McCarter*, 98 Pa. St. 615; *State v. McGeary*, 69 Vt. 467; *State v. McNaughton*, 56 Vt. 736; *State v. Mead*, 56 Vt. 353. See *Com. v. Cluley*, 56 Pa. St. 271, 94 Am. Dec. 75.

7. Mere Irregularities Not Controlling. — *Reg. v. Ward*, L. R. 8 Q. B. 210, 42 L. J. Q. B. D. 126, 28 L. T. N. S. 118, 21 W. R. 632; *Reg. v. Cousins*, 42 L. J. Q. B. D. 124, 28 L. T. N. S. 116; *Rex v. Osbourne*, 4 East 327.

8. Probable Cause. — *People v. Mineral Marsh Drainage Dist.*, 193 Ill. 428; *People v. Callaghan*, 83 Ill. 131; *People v. McFall*, 26 Ill. App. 319; *State v. Delieesseline*, 1 McCord L. (S. Car.) 58.

Leave to file an information cannot be refused upon the mere chance that a trial may fail. *People v. Tibbets*, 4 Cow. (N. Y.) 358.

9. Merits Not Determined. — *Ex p. Atty.-Gen.*, 1 Cal. 86.

10. New and Doubtful Questions of Law and Fact. — *Rex v. Carter*, 1 Cowp. 58, Loft 516; *Rex v. Godwin*, 1 Dougl. 397; *Atty.-Gen. v. Chicago, etc., R. Co.*, 112 Ill. 520; *Miller v. Utter*, 14 N. J. L. 84.

11. Question of Law Decisive. — *State v. Gardner*, 3 S. Dak. 553.

12. Interest of Public and Third Persons. — *Rex v. Dawes*, 4 Burr. 2120; *People v. Keeling*, 4 Colo. 129; *People v. Callaghan*, 83 Ill. 128; *People v. Boyd*, 30 Ill. App. 608; *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *State v. Hoff*, 88 Tex. 297; *State v. Mead*, 56 Vt. 353; *State v. Knight*, 82 Wis. 151.

That the application against a member of a corporation is based on grounds affecting his individual title in common with that of every other member of the corporation, and that the effect will be to dissolve the corporation, is

may be considered.¹ The shortness of the term of office, or the fact that it is nearly expired, may be considered ground for refusing leave.² Another adequate remedy is sufficient ground for refusing leave.³ The motives of the relator and the relations of the parties to the matter in controversy may be considered.⁴ Where the relator is without interest in the controversy, the court may properly refuse leave.⁵ It is no objection that the proceeding is a friendly one brought for the purpose of enabling the respondent to disclaim.⁶ Where the remedy would be unavailing and useless, leave may be denied.⁷ A renewed application will be refused where the effect of granting it will be to raise questions once decided.⁸

c. **EXHAUSTION OF DISCRETION.** — Where leave is improvidently granted, the court may, upon the hearing, refuse relief upon the same grounds for which it might have refused leave to file the information.⁹ But there are cases holding that where the court allows an information to be filed, its discretion is exhausted, and the case must then be determined strictly according to law. The court has no discretion to dispense with the law after the information has been filed.¹⁰ If, however, leave has been improvidently granted, the court may vacate the order at any time during the term at which it was granted.¹¹

6. Discretion of Prosecuting Officer. — At common law and in cases not governed by statute, the court has no authority to direct the filing of an information, and the matter is wholly within the discretion of the attorney-general or other proper prosecuting officer,¹² except, perhaps, in cases where

not of itself and standing alone, as a proposition of law or as a settled point of practice, a ground for refusing leave to file an information. *State v. Tolan*, 33 N. J. L. 199.

1. Importance of Interests Affected. — *State v. Dahl*, 69 Minn. 114; *State v. McGeary*, 69 Vt. 467; *State v. Fisher*, 28 Vt. 714.

2. See *infra*, this title, *Use of Remedy in Particular Cases* — subdiv. 1. a. (5) *Expiration of Term*.

3. See *infra*, this section, *Other Adequate Remedy*.

4. Motives of Relator. — *Rex v. Cudlipp*, 6 T. R. 503; *Rex v. Benney*, 1 B. & Ad. 684, 20 E. C. L. 470; *Rex v. Dawes*, 1 W. Bl. 634; *Miller v. Seymour*, (N. J. 1902) 51 Atl. Rep. 719; *Com. v. McCarter*, 98 Pa. St. 608. See *Rex v. Wakelin*, 1 B. & Ad. 50, 20 E. C. L. 342. Compare *State v. Gleason*, 12 Fla. 190.

A quo warranto cannot be maintained upon the relation of one whose title to the office the respondent continues to hold was acquired through fraud and violence at the polls; the court will not aid him. *Soucy v. People*, 113 Ill. 109.

Fictitious Controversy, Not Affecting Occupancy of Office — Information Dismissed. — *State v. McCullough*, 20 Nev. 154.

5. Relator without Interest. — *State v. Dahl*, 69 Minn. 108; *State v. Vail*, 53 Mo. 110; *State v. Tolan*, 33 N. J. L. 195; *Mills v. State*, 2 Wash. 569. See also *infra*, this title, *Parties — Who May Maintain Proceedings*.

6. Friendly Proceeding. — *Rex v. Marshall*, 2 Chit. 370, 18 E. C. L. 371.

7. Writ Unavailing or Useless. — *Ex p. Richards*, 3 Q. B. D. 368; *State v. Centreville Bridge Co.*, 18 Ala. 678; *Atty.-Gen. v. Erie*, etc., R. Co., 55 Mich. 15. See *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213. See also *infra*, this title, *Use of Remedy in Particular Cases* — subdiv. 1. a. (5) *Expiration of Term*.

8. Renewed Application — Res Judicata. — *Rex v. Orde*, 8 Ad. & El. 420, note, 35 E. C. L. 418, note; *Rex v. Langhorn*, 2 N. & M. 618, 28 E. C. L. 373.

9. Leave Improvidently Granted. — *People v. Wild Cat Special Drainage Dist.*, 31 Ill. App. 223; *People v. Hamilton*, 24 Ill. App. 609; *Com. v. Cluley*, 50 Pa. St. 272, 94 Am. Dec. 75; *State v. Hoff*, 88 Tex. 299; *State v. Elliott*, 13 Utah 200. See *Miller v. Utter*, 14 N. J. L. 86. See also *State v. Gleason*, 12 Fla. 217; *State v. Chiggett*, 73 Mo. 388.

10. Discretion Exhausted by Granting Leave. — *People v. Regents of State University*, 24 Colo. 175; *People v. Golden Rule*, 114 Ill. 45; *State v. Brown*, 5 R. I. 6; *State v. Shank*, 36 W. Va. 230.

11. Vacation of Order. — *People v. Golden Rule*, 114 Ill. 34; *People v. Lake St. El. R. Co.*, 54 Ill. App. 348; *State v. Shank*, 36 W. Va. 223.

12. Discretion of Prosecuting Officer — Control by Court — Florida. — *State v. Gleason*, 12 Fla. 213.

Massachusetts. — *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Com. v. Allen*, 128 Mass. 310; *Atty.-Gen. v. Sullivan*, 163 Mass. 448; *Haupt v. Rogers*, 170 Mass. 71.

Michigan. — See *Cain v. Brown*, 111 Mich. 660; *Yates v. Atty.-Gen.*, 41 Mich. 728.

Minnesota. — *State v. Sharp*, 27 Minn. 38.

New Jersey. — *State v. Paterson*, etc., Turnpike Co., 21 N. J. L. 9.

Oregon. — See also *Everding v. McGinn*, 23 Oregon 15.

New York. — *People v. Atty.-Gen.*, 22 Barb. (N. Y.) 114; *People v. Fairchild*, 8 Hun (N. Y.) 335, 67 N. Y. 334.

South Carolina. — *State v. Delieesseline*, 1 McCord L. (S. Car.) 52.

English Practice — Master of Crown Office. — In *Goddard v. Smithett*, 3 Gray (Mass.) 116, the court explained the practice of the Court of

such discretion has been clearly abused.¹ It has been said that the court will not even aid him by its advice and directions,² although a contrary view has been taken.³ But when a private citizen is the relator, the attorney-general or other public officer cannot prevent the court from assuming jurisdiction and granting leave to file the information by refusing to consent to the use of his name,⁴ except where by statute his consent to the filing of the information is necessary.⁵ But great weight will be given to the refusal of the attorney-general where no private interest of the relator is involved.⁶ It is sufficient if the attorney-general's consent is obtained at any time before trial.⁷ Acting as an attorney in the case is sufficient to show consent.⁸ Under some statutes, a prior application to the prosecuting officer, and a refusal by him to file the information, are necessary to enable a private relator to do so.⁹

7. Limitation and Laches. — In the absence of a statute there is no limitation as to the time within which the attorney-general may file an information on behalf of the people.¹⁰ A statute applicable to criminal prosecutions under penal laws does not apply to quo warranto proceedings, since, as has been seen,¹¹ such proceedings are civil and not criminal in character.¹² But the general statute of limitations has been held to apply to a proceeding by quo warranto to enforce private rights,¹³ though it does not apply to proceedings prosecuted by the state.¹⁴ In some jurisdictions there are special statutes of limitation applicable to quo warranto proceedings.¹⁵ Where leave of court

King's or Queen's Bench in England in directing the master of the crown office to file an information in the nature of a quo warranto on application of a private person. The court there said: "But there being no corresponding office or officer in this commonwealth, * * * no corresponding practice could prevail here."

Under Special Statutory Provisions it has been held that the state's officer may be directed by the general assembly, the governor, or the court to institute quo warranto proceedings. See *Tuscaloosa Scientific, etc., Assoc. v. State*, 58 Ala. 54; *State v. Tipton*, 109 Ind. 76; *Scott v. Clark*, 1 Iowa 78; *State v. St. Louis Perpetual Marine, etc., Ins. Co.*, 8 Mo. 330; *State v. Taylor*, 50 Ohio St. 120; *Thompson v. Watson*, 48 Ohio St. 552.

Under the *Ohio* statute the Supreme Court will not direct the attorney-general to bring quo warranto proceedings unless something connected with the court is involved. *State v. Taylor*, 50 Ohio St. 120, following *Thompson v. Watson*, 48 Ohio St. 552.

1. Abuse of Discretion. — *Cain v. Brown*, 111 Mich. 660 [citing *Lamoreaux v. Ellis*, 89 Mich. 146, and *Coon v. Atty.-Gen.*, 42 Mich. 65]; *Yates v. Atty.-Gen.*, 41 Mich. 728; *State v. Dahl*, 69 Minn. 108; *State v. Sharp*, 27 Minn. 38. See also *Mt. Pleasant Bank Case*, 5 Ohio 250.

Mandamus Will Not Issue to a Prosecuting Attorney to compel the filing of an information in the nature of a quo warranto, at the instance of a private person, unless the facts making a case for interference on the part of such officer are clearly made to appear by affidavit in such way as to render the affiant guilty of perjury if any material allegation is false. *Cain v. Brown*, 111 Mich. 657. See also *Fuller v. Ellis*, 98 Mich. 96; *Everding v. McGinn*, 23 Oregon 15.

2. Advice and Direction of Court. — *Goddard v. Smithett*, 3 Gray (Mass.) 116. See also

Atty.-Gen. v. Sullivan, 163 Mass. 448; *Com. v. Allen*, 128 Mass. 308.

3. State v. Deliesseleine, 1 McCord L. (S. Car.) 52.

4. Right of Private Relator to Use Prosecuting Officer's Name. — *State v. Dahl*, 69 Minn. 108; *State v. Withers*, 121 N. Car. 376; *State v. Elliott*, 13 Utah 200. See *State v. Chandler*, 2 Ohio Dec. (Reprint) 164, 1 West. L. Month. 602; *State v. Schnierle*, 5 Rich. L. (S. Car.) 301. See also *People v. Regents of State University*, 24 Colo. 175; *Boyd v. Nebraska*, 143 U. S. 135.

5. See *Duffy v. State*, 60 Neb. 812.

6. State v. Dahl, 69 Minn. 112; *State v. Tracy*, 48 Minn. 497; *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304.

7. Consent Before Trial Sufficient. — *State v. Withers*, 121 N. Car. 376.

8. Implied Assent. — *Duffy v. State*, 60 Neb. 812.

9. Prior Application to Prosecuting Officer. — *State v. Frazier*, 28 Neb. 438.

10. In Absence of Statute. — *People v. Gary*, 196 Ill. 310; *People v. Pullman's Palace Car Co.*, 175 Ill. 125; *Catlett v. People*, 151 Ill. 16; *Com. v. Allen*, 128 Mass. 310; *State v. Pawtuxet Turnpike Co.*, 8 R. I. 521; *State v. Wofford*, 90 Tex. 514. See *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 263.

11. See *supra*, this title, *Nature and Origin of Remedy — Civil or Criminal Character*.

12. Criminal Statute of Limitations. — *Com. v. Birchett*, 2 Va. Cas. 51.

13. General Statute of Limitations. — *People v. Boyd*, 30 Ill. App. 608, affirmed 132 Ill. 60.

14. McPhail v. People, 160 Ill. 77, 52 Am. St. Rep. 306, affirming 56 Ill. App. 289. See *State v. Gordon*, 87 Ind. 175. But compare *People v. Boyd*, 30 Ill. App. 608, 132 Ill. 60.

15. Special Statutes of Limitation. — *Reg. v. Harris*, 3 Per. & Dav. 266, 11 Ad. & El. 518, 39 E. C. L. 154, 8 Dowl. 499; *Rex v. Stokes*, 2 M. & S. 71; *State v. Buckley*, 60 Ohio St. 273;

is necessary, and the court has a discretion,¹ lapse of time and laches may be sufficient ground for withholding leave to file the information.² The doctrine of laches has been applied even against the state,³ though some courts refuse to extend the doctrine to such cases.⁴

8. Acquiescence and Estoppel. — Acquiescence by the relator, or participation by him in the irregularities complained of, is sufficient to estop him from maintaining quo warranto proceedings based upon such irregularities.⁵ But acquiescence by the relator or other persons interested does not operate to estop the state.⁶ Even the state by recognition of a corporation may be estopped to question its existence by quo warranto.⁷

9. Other Adequate Remedy — *a.* **GENERAL RULE.** — Quo warranto being an extraordinary remedy, it is a general rule that it will not lie where the party aggrieved can obtain full and adequate relief in the usual course of proceedings at law, or by the ordinary forms of civil action.⁸ It is always

State v. Beecher, 16 Ohio 358; *State v. Miami Exporting Co.*, 11 Ohio 126; *State v. Bingham*, 7 Ohio Cir. Dec. 522, 14 Ohio Cir. Ct. 245; *State v. Standard Oil Co.*, 49 Ohio St. 137, 34 Am. St. Rep. 541.

1. See *supra*, this section, *Leave of Court; Discretion of Court.*

2. Laches and Delay Ground for Refusing Leave — *England.* — *Rex v. Peacock*, 4 T. R. 684; *Reg. v. Francis*, 18 Q. B. 526, 83 E. C. L. 526; *Ex p. Birkbeck*, L. R. 9 Q. B. 256; *Reg. v. Preece*, Dav. & M. 156, 5 Q. B. 94, 48 E. C. L. 94; *In re Dunn*, 10 Jur. 1095; *Rex v. Brooks*, 2 M. & R. 389, 8 B. & C. 321, 15 E. C. L. 229, 6 L. J. K. B. 322; *Rex v. Dickin*, 4 T. R. 282; *Rex v. Newling*, 3 T. R. 315; *Rex v. Stacey*, 1 T. R. 1. And see *Reg. v. Hodson*, 4 Q. B. 648, note *b*, 45 E. C. L. 648, note *b*.

Illinois. — *People v. Schnepf*, 179 Ill. 305; *McPhail v. People*, 160 Ill. 77, 52 Am. St. Rep. 306, *affirming* 56 Ill. App. 289; *Jo. Daviess County v. Magoon*, 109 Ill. 142; *School Trustees v. School Directors*, 88 Ill. 100; *People v. Boyd*, 30 Ill. App. 608, *affirmed* 132 Ill. 60. But see *Place v. People*, 87 Ill. App. 527, 192 Ill. 160.

Indiana. — *State v. Gordon*, 87 Ind. 171.

Massachusetts. — *Com. v. Allen*, 128 Mass. 310.

Michigan. — *People v. Oakland County Bank*, 1 Dougl. (Mich.) 282.

Missouri. — *State v. Westport*, 116 Mo. 593.

Pennsylvania. — *Com. v. New York, etc.*, Coal, etc., Co., 10 Pa. Co. Ct. 129.

3. Application Against State. — *People v. Boyd*, 30 Ill. App. 608, *affirmed* 132 Ill. 60; *State v. Bailey*, 19 Ind. 452; *State v. Westport*, 116 Mo. 595; *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206. But see *State v. Wofford*, 90 Tex. 514. See also *infra*, this section, *Acquiescence and Estoppel*.

4. *People v. Pullman's Palace Car Co.*, 175 Ill. 125.

5. Relator Estopped by His Own Conduct — *England.* — *Rex v. Symmons*, 4 T. R. 223; *Rex v. Parkyn*, 1 B. & Ad. 690, 20 E. C. L. 472; *Reg. v. Greene*, 2 Q. B. 460, 42 E. C. L. 760, 6 Jur. 777; *Reg. v. Lofthouse*, L. R. 1 Q. B. 433; *Rex v. Slythe*, 6 B. & C. 240, 13 E. C. L. 156; *Rex v. Parry*, 6 Ad. & El. 810, 33 E. C. L. 218, 2 N. & P. 414; *Rex v. Mortlock*, 3 T. R. 300; *Rex v. Stacey*, 1 T. R. 1; *Rex v. Dawes*, 1 W. Bl. 634; *Rex v. Anderson*, 2 Q. B. 740, 42 E. C. L. 891; *Rex v. Payne*, 2 Chit.

369, 18 E. C. L. 370. But see *Rex v. Trevenen*, 2 B. & Ald. 339.

Georgia. — *Dorsey v. Ansley*, 72 Ga. 460; *Collins v. Huff*, 63 Ga. 211; *Stone v. Wetmore*, 44 Ga. 497; *Cole v. Dyer*, 29 Ga. 439.

Illinois. — *People v. Schnepf*, 179 Ill. 305; *Frick v. School Trustees*, 99 Ill. 167; *People v. North Chicago R. Co.*, 88 Ill. 537; *People v. Moore*, 73 Ill. 132; *People v. Waite*, 70 Ill. 25. But see *Place v. People*, 87 Ill. App. 527, *affirmed* 192 Ill. 160.

Indiana. — See also *State v. Gordon*, 87 Ind. 173.

Louisiana. — *Ransdell v. Ariail*, 13 La. Ann. 459; *Guzman v. Walker*, 11 La. Ann. 693.

Missouri. — *State v. Westport*, 116 Mo. 582.

New Hampshire. — *Cate v. Furber*, 56 N. H. 224.

New Jersey. — *Terhune v. Potts*, 47 N. J. L. 218; *State v. Tolan*, 33 N. J. L. 198.

Pennsylvania. — *Miller v. McCutchen*, 2 Pars. Eq. Cas. (Pa.) 205.

Texas. — *Maddox v. York*, 21 Tex. Civ. App. 622.

See also *supra*, this section, *Limitation and Laches*.

Circumstances Insufficient to Estop Relators. —

Rex v. Smith, 3 T. R. 573; *Rex v. Benney*, 1 B. & Ad. 684, 20 E. C. L. 470; *Rex v. Morris*, 3 East 213; *Rex v. Clarke*, 1 East 38; *State v. Frantz*, 55 Neb. 167.

6. Estoppel of State. — *State v. Sharp*, 27 Minn. 38; *State v. Harris*, 52 Vt. 216. Compare *State v. Seay*, 64 Mo. 89, 27 Am. Rep. 206.

7. Recognition of Corporation by State. — *Reg. v. Archdall*, 3 N. & P. 696, 8 Ad. & El. 281, 35 E. C. L. 389; *State v. Leatherman*, 38 Ark. 81; *People v. Farnham*, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304; *People v. Maynard*, 15 Mich. 463; *State v. Westport*, 116 Mo. 582. But see *People v. Gary*, 196 Ill. 320.

The state cannot be estopped from instituting quo warranto proceedings against a corporate body on the ground that it has been recognized as a corporation by a municipality. *Atty.-Gen. v. Hanchett*, 42 Mich. 436.

8. General Rule — *Illinois.* — *People v. Cooper*, 139 Ill. 461.

Kansas. — *Tarbox v. Sughrue*, 36 Kan. 228; *State v. Wilson*, 30 Kan. 661.

New York. — *People v. Hillsdale, etc.*, Turnpike Co., 2 Johns. (N. Y.) 190.

Ohio. — *State v. Marlow*, 15 Ohio St. 114.

sufficient ground for refusing leave to file an information that there is another adequate remedy.¹ But if such other remedy is not adequate, it will not oust the remedy by quo warranto.²

b. CONCURRENT AND EXCLUSIVE REMEDIES — (1) *Constitutional and Statutory Remedies*. — Where the jurisdiction in quo warranto rests upon constitutional provisions it cannot be taken away or impaired by statutes providing other forms of remedies for cases where quo warranto is an appropriate remedy,³ except where the statutory remedy is created in pursuance of constitutional provisions.⁴ In many states the jurisdiction of the supreme or other appellate court in quo warranto is conferred by the constitution, while that of other courts rests upon statute. In such states a statutory remedy may not be exclusive in the supreme or appellate court, but may be exclusive in other courts.⁵ Where no constitutional jurisdiction is involved, it is a question of statutory construction in each case whether the remedies are concurrent or exclusive,⁶ and statutory remedies have been held to be exclusive,⁷ or not exclusive,⁸ according to the intent of the statute as construed by the court. It has been held that a statutory remedy is not exclusive unless the remedy by quo warranto is expressly or by necessary implication taken away.⁹ So a statute creating merely a private remedy does not affect the remedy of the state by quo warranto to oust a usurper of its offices or franchises.¹⁰ Where a new right, or the means of acquiring it, and an

Pennsylvania. — *Com. v. Baxter*, 35 Pa. St. 263; *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185.

South Carolina. — *State v. Wadkins*, 1 Rich. L. (S. Car.) 42.

Not Proper Remedy for Recovery of Real Estate. — *State v. Shields*, 56 Ind. 528.

1. Another Remedy Ground for Refusing Leave. — *Tarbox v. Sughrue*, 36 Kan. 225; *State v. Wilson*, 30 Kan. 661; *Lord v. Every*, 38 Mich. 405; *Carpenter v. Wayland Wood Mfg. Co.*, 33 Mich. 473; *State v. Lockerby*, 57 Minn. 411; *State v. Dowlan*, 33 Minn. 536; *State v. Moriarty*, 82 Minn. 68; *Hunter v. Chandler*, 45 Mo. 453; *State v. Stewart*, 32 Mo. 379; *State v. Balcom*, 71 Mo. App. 28.

2. Other Remedy Not Adequate. — *Lee v. State*, 49 Ala. 1; *Tarbox v. Sughrue*, 36 Kan. 225.

A Criminal Prosecution and Fine is not such an adequate remedy as to oust the remedy by quo warranto. *State v. Capital City Dairy Co.*, 62 Ohio St. 350.

3. Constitutional Jurisdiction Not Impaired by Statutory Remedy — *Colorado*. — *People v. Londoner*, 13 Colo. 303; *People v. Reid*, 11 Colo. 138; *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *People v. Curley*, 5 Colo. 417; *People v. Keeling*, 4 Colo. 129.

Kansas. — *State v. Allen*, 5 Kan. 214.

Mississippi. — *Hyde v. State*, 52 Miss. 665.

Missouri. — *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 337.

Nebraska. — *Kane v. People*, 4 Neb. 509.

New Jersey. — *Conery v. Conger*, 53 N. J. L. 658, affirming 52 N. J. L. 417.

Wisconsin. — *State v. Baker*, 38 Wis. 80, disapproving *State v. Messmore*, 14 Wis. 115.

See also *infra*, this title, *Jurisdiction*.

4. Statutory Remedies of Constitutional Origin. — *People v. Londoner*, 13 Colo. 303; *Corbitt v. McDaniel*, 77 Ga. 544 (commented on in *Cutts v. Scandrett*, 108 Ga. 629); *Kane v. People*, 4 Neb. 509; *State v. Marlow*, 15 Ohio St. 133.

5. Distinction Between Jurisdiction of Appellate and Superior Courts. — *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *Atchison, etc., R. Co. v. People*, 5 Colo. 60; *Central, etc., Road Co. v. People*, 5 Colo. 42.

6. As Question of Construction. — See *Cutts v. Scandrett*, 108 Ga. 627; *State v. Dowlan*, 33 Minn. 536. See generally the title *STATUTES*.

7. Exclusive Statutory Remedies. — *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *People v. Boughton*, 5 Colo. 487; *Atchison, etc., R. Co. v. People*, 5 Colo. 60; *State v. Funk*, 8 Ohio Cir. Dec. 782, 16 Ohio Cir. Ct. 155; *Com. v. Garrigues*, 28 Pa. St. 9, 70 Am. Dec. 103.

8. Concurrent Statutory Remedies. — *Robinson v. Jones*, 14 Fla. 256; *McAllen v. Rhodes*, 65 Tex. 351.

A provision of the constitution that "two-thirds of the legislature shall have power to revoke and repeal all private corporations" does not restrict the power of the state to institute a proceeding for the forfeiture of a charter. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

9. When Statutory Remedy Deemed Exclusive. — *Reg. v. Morton*, (1892) 1 Q. B. 39; *State v. Elliott*, 117 Ala. 150; *Parks v. State*, 100 Ala. 634; *People v. Londoner*, 13 Colo. 303; *Snowball v. People*, 147 Ill. 260; *Com. v. Frankfort*, 13 Bush (Ky.) 186; *Hyde v. State*, 52 Miss. 670; *State v. Fitzgerald*, 44 Mo. 425; *Territory v. Virginia Road Co.*, 2 Mont. 103; *People v. Bristol, etc., Turnpike Road*, 23 Wend. (N. Y.) 222; *People v. Hillsdale, etc., Turnpike Road*, 23 Wend. (N. Y.) 254; *People v. Hall*, 80 N. Y. 124; *State v. Kempf*, 60 Wis. 470, 2 Am. St. Rep. 753. See *People v. Sutter St. R. Co.*, 117 Cal. 604. Compare *Cutts v. Scandrett*, 108 Ga. 626; *State v. Wright*, 10 Heisk. (Tenn.) 237.

10. Private Remedy. — *People v. Holden*, 28 Cal. 123; *People v. Londoner*, 13 Colo. 311; *Snowball v. People*, 147 Ill. 260; *Territory v. Armstrong*, 6 Dak. 226; *Territory v. Hauxhurst*, 3 Dak. 213; *Com. v. Towanda Water-*

adequate remedy for its invasion are provided by the same statute, parties injured are confined to the statutory remedy,¹ but this rule does not apply to proceedings on behalf of the state.²

(2) *Election Contest*. — The cases in the different states are conflicting upon the question whether a statutory remedy for the contest of an election is the exclusive remedy in such cases, or merely cumulative and alternative to the remedy by quo warranto.³ Much of this apparent conflict is undoubtedly due to differences in the provisions and constructions of the statutes and constitutions involved.⁴ An election contest has been held to be the exclusive remedy for the determination of the particular questions for the trial of which it was created, as the number and legality of votes cast at an election,⁵ while quo warranto will lie to determine questions not triable in an election contest.⁶ Where an election contest will not remove the incumbent from office, quo warranto will lie, as the other remedy is not adequate,⁷ but a statutory proceeding by which the incumbent can be ousted and the contestant installed is a more adequate remedy than quo warranto.⁸ In several states it has been held that a proceeding in quo warranto is not an "election contest," the object and effect of the two proceedings being different.⁹ Under some statutes the view has been taken that an election contest is the exclusive remedy available to the rival candidates, but that the state may test the title of an officer by quo warranto,¹⁰ though there is also authority for the view that even the state is confined to the remedy by election contest.¹¹

(3) *Bodies Deciding Qualifications of Their Own Members*. — Statutes providing that a town or city council shall have the power to decide the election and qualifications of its own members have been held not to deprive the courts of jurisdiction to determine the same question in quo warranto,¹² and

Works, (Pa. 1888) 15 Atl. Rep. 440; Birmingham, etc., Turnpike Road Co. v. Com., 1 Penny. (Pa.) 458. See also *People v. Hall*, 80 N. Y. 119.

1. Right and Remedy Created by Same Statute. — *People v. Hall*, 80 N. Y. 119.

2. *Snowball v. People*, 147 Ill. 260; *People v. Hall*, 80 N. Y. 119. See also *People v. Londoner*, 13 Colo. 303; *Cutts v. Scandrett*, 108 Ga. 626; *Hyde v. State*, 52 Miss. 665.

3. See the title ELECTIONS, vol. 10, p. 800.

4. See *supra*, this section, subdiv. *Constitutional and Statutory Remedies*. See also *Kane v. People*, 4 Neb. 509.

5. Contest Exclusive on Some Questions and Not on Others. — *Cutts v. Scandrett*, 108 Ga. 626; *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 515; *State v. Mason*, 77 Mo. 189; *State v. Townsley*, 56 Mo. 107; *State v. Vail*, 53 Mo. 97; *State v. Deliesseline*, 1 McCord L. (S. Car.) 52.

Under a statute providing that a city council shall be the sole judge of the election and qualification of its members, the court has no jurisdiction to determine whether the election was regularly conducted or not, but quo warranto lies to determine whether there was an office or vacancy to fill. *Com. v. Meeser*, 44 Pa. St. 341, cited and principle applied in *State v. O'Brien*, 47 Ohio St. 464.

6. *Cutts v. Scandrett*, 108 Ga. 626; *Corbitt v. McDaniel*, 77 Ga. 544; *State v. O'Brien*, 47 Ohio St. 464; *Com. v. Meeser*, 44 Pa. St. 341. See *Crovatt v. Mason*, 101 Ga. 246, explained in *Cutts v. Scandrett*, 108 Ga. 629; *State v. Townsley*, 56 Mo. 107.

Even if contest before the executive be the exclusive remedy in cases where full opportunity has been afforded to have the contest

heard and determined, yet where a commission has issued inadvertently pending the contest, and after due notice to the governor, the remedy of quo warranto is available. *Hardin v. Colquitt*, 63 Ga. 588.

7. Respondent in Possession. — *Lee v. State*, 49 Ala. 51; *Tarbox v. Sughrue*, 36 Kan. 225.

8. *Prince v. Skillin*, 71 Me. 361, 36 Am. Rep. 325.

9. Quo Warranto Not an Election Contest. — *People v. Londoner*, 13 Colo. 303; *Snowball v. People*, 147 Ill. 260; *State v. Francis*, 88 Mo. 557.

10. Distinction Between Claim of State and Rival Candidate. — *Davis v. Dawson*, 90 Ga. 817; *Snowball v. People*, 147 Ill. 260; *Gray v. State*, 19 Tex. Civ. App. 521. See *Cutts v. Scandrett*, 108 Ga. 629.

The mere pendency of an election contest between rival claimants is no defense to quo warranto by the state. *State v. Buckland*, 23 Kan. 261; *Vogel v. State*, 107 Ind. 374.

11. See *Cutts v. Scandrett*, 108 Ga. 626; *State v. Marlow*, 15 Ohio St. 114.

12. Remedy Deemed Not Exclusive — *Colorado*. — *People v. Londoner*, 13 Colo. 303; *Darrow v. People*, 8 Colo. 417.

Florida. — *Buckman v. State*, 34 Fla. 48; *State v. Anderson*, 26 Fla. 240.

Missouri. — *State v. Fitzgerald*, 44 Mo. 425. *New York*. — *People v. Hall*, 80 N. Y. 117.

Oregon. — *State v. McKinnon*, 8 Oregon 493. *Pennsylvania*. — *Com. v. M'Closkey*, 2 Rawle (Pa.) 369.

Washington. — *State v. Morris*, 14 Wash. 262; *State v. Van Brocklin*, 8 Wash. 559.

Wisconsin. — *State v. Kempf*, 69 Wis. 470, 2 Am. St. Rep. 753.

the action of such board is not conclusive in quo warranto proceedings.¹ In other cases the jurisdiction of the city council or board is deemed exclusive upon the questions which it is authorized to determine,² and such determination is final.³ The jurisdiction of state legislative bodies in election contests affecting their own members has universally been held exclusive,⁴ but this rule does not apply to municipal bodies, and the reasoning of the rule in one class of cases will not apply in the other.⁵

10. Public or Private Rights.— Quo warranto is not the proper remedy for the trial of exclusively private rights. It is available only where the public, in theory at least, have some interest,⁶ though such public interest is not always very marked or apparent.⁷ Originally, as has been seen, both the writ and the information were purely prerogative remedies available only to the crown,⁸ but by the statute of Anne, and analogous statutes existing in all the United States, the remedy has been extended and made available to private persons specially interested in the public question to try the right as between party and party.⁹

IV. JURISDICTION — 1. In General.— The jurisdiction of particular state courts in quo warranto is regulated by the constitutions and statutes of the

1. *State v. Anderson*, 26 Fla. 240; *State v. Fitzgerald*, 44 Mo. 425; *State v. Morris*, 14 Wash. 262. See generally *Kendell v. Camden*, 47 N. J. L. 64, 54 Am. Rep. 117.

But as such a provision does give judicial power to the board of aldermen, where a person claiming to be a member of said board has instituted before it a proceeding which has been decided against him, such an adjudication until reversed is conclusive as to him, and is a bar to an action brought by him to test his claim, although it is not a bar as against the people. *People v. Hall*, 80 N. Y. 117.

2. **View that Remedy Is Exclusive.**— *Darrow v. People*, 8 Colo. 417; *State v. Dowlan*, 33 Minn. 536; *Stearns v. Wyoming*, 53 Ohio St. 353; *State v. O'Brien*, 47 Ohio St. 464; *State v. Berry*, 47 Ohio St. 232; *Com. v. Henszey*, 81* Pa. St. 101; *Com. v. Meeser*, 44 Pa. St. 341; *Com. v. Garrigues*, 28 Pa. St. 9, 70 Am. Dec. 103; *Seay v. Hunt*, 55 Tex. 545.

Court's Authority to Inquire into Forfeiture of Office.— If a municipal council has power to judge and determine the qualifications of its members, it does not follow that the authority of the court is taken away to inquire into a forfeiture which does not take place until the member has been admitted to his seat. *Com. v. Allen*, 70 Pa. St. 471.

3. *People v. Harshaw*, 60 Mich. 200, 1 Am. St. Rep. 498; *Stearns v. Wyoming*, 53 Ohio St. 353; *State v. Harmon*, 31 Ohio St. 250; *Seay v. Hunt*, 55 Tex. 545.

4. **State Legislature.**— *People v. Londoner*, 13 Colo. 307; *State v. Tomlinson*, 20 Kan. 692; *People v. Hall*, 80 N. Y. 117.

5. **Municipal Bodies.**— *People v. Londoner*, 13 Colo. 307 [citing *Kendall v. Camden*, 47 N. J. L. 64, 54 Am. Rep. 117; *People v. Hall*, 80 N. Y. 117; *Com. v. Allen*, 70 Pa. St. 465; *State v. Hempf*, 69 Wis. 470, 2 Am. St. Rep. 753].

6. **Not Available as a Purely Private Remedy**— *England*.— *Ex p. Smyth*, 11 W. R. 754, 8 L. T. N. S. 458.

United States.— *Gunton v. Ingle*, 4 Cranch (C. C.) 438, 11 Fed. Cas. No. 5,870.

Arkansas.— *Campbell v. Goodrich*, 27 Ark. 12.

Colorado.— *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301. See also *People v. Londoner*, 13 Colo. 309.

Illinois.— *People v. Cooper*, 139 Ill. 461; *People v. Wild Cat Special Drainage Dist.*, 31 Ill. App. 219; *Minck v. People*, 6 Ill. App. 127.

Indiana.— *State v. Shields*, 56 Ind. 528.

Kentucky.— See also *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 406; *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 518.

Michigan.— *Atty.-Gen. v. Detroit Suburban R. Co.*, 96 Mich. 65; *Maybury v. Mutual Gas-Light Co.*, 38 Mich. 154.

Montana.— *Territory v. Virginia Road Co.*, 2 Mont. 103.

New Jersey.— *Bownes v. Meehan*, 45 N. J. L. 189.

Pennsylvania.— *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 189.

Texas.— *Morris v. Schooner Leona*, 67 Tex. 303.

Utah.— *Cupit v. Park City Bank*, 20 Utah 293.

See also *infra*, this title, *Use of Remedy in Particular Cases — Public Officers*.

A quo warranto cannot be allowed against one for assuming a franchise of a merely private nature. *People v. Ridgley*, 21 Ill. 65.

The Propriety of the Exercise of the Right of Eminent Domain will not be tried in quo warranto, and individuals injured must seek redress in the ordinary course of law. *State v. Pittsburgh, etc., R. Co.*, 50 Ohio St. 250; *People v. Hillsdale, etc., Turnpike Co.*, 2 Johns. (N. Y.) 190. See also *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

7. See *infra*, this title, *Use of Remedy in Particular Cases — Officers of Private Corporations*.

8. See *supra*, this title, *Nature and Origin of Remedy — Extraordinary Prerogative Character*.

9. See *supra*, this title, *Nature and Origin of Remedy — Extraordinary Prerogative Character*, and *infra*, this title, *Parties — Who May Maintain Proceedings*.

Quo warranto is used to enforce both public and private rights. Its purpose is dual. *People v. Boyd*, 132 Ill. 60.

various states,¹ though the common law may be looked to for the ascertainment of rights and remedies appropriate for their enforcement and protection.² In one state neither the writ of quo warranto nor the information in the nature thereof was ever in force, and by statute the remedy is by bill in equity.³

2. Appellate Courts. — In many of the states, by constitutional or statutory provisions, the appellate courts or courts of last resort are vested with original jurisdiction in quo warranto proceedings.⁴ Where such jurisdiction is conferred by the constitution, it is immaterial that the legislature has made no provision regulating the procedure, and in such case the court will proceed according to the course of the common law.⁵ Such grant of jurisdiction is not exclusive, and the legislature may confer concurrent original jurisdiction upon inferior courts.⁶ In cases of concurrent jurisdiction, the supreme or appellate court, in its discretion, will usually decline to entertain the proceedings where there is a complete and adequate remedy in some other court,

1. Statutory and Constitutional Provisions. — See codes and statutes of the various states. See also *Lindsey v. Atty.-Gen.*, 33 Miss. 524; *State v. Boston*, etc., R. Co., 25 Vt. 433; *State v. Smith*, 48 Vt. 16.

2. Common Law. — *Lindsey v. Atty.-Gen.*, 33 Miss. 524.

3. Tennessee — Remedy by Bill in Equity. — See further *supra*, this title, *Nature and Origin of Remedy — Legal or Equitable Character.*

Maryland. — In *Hawkins v. State*, 81 Md. 306, it was held that quo warranto proceedings could not be brought in that state without express legislative authority; that the state's attorney having no such authority to bring quo warranto to oust a public officer, such a proceeding by him would not lie. *Harwood v. Marshall*, 9 Md. 99, was commented on.

4. Original Jurisdiction of Supreme or Appellate Courts. — *Alabama.* — *State v. Porter*, 1 Ala. 688; *State v. Williams*, 1 Ala. 342.

Arkansas. — *State v. Leatherman*, 38 Ark. 81; *State v. Johnson*, 26 Ark. 281; *Price v. Page*, 25 Ark. 527; *State v. Real Estate Bank*, 5 Ark. 598, 41 Am. Dec. 109; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *State v. Ashley*, 1 Ark. 513; *State v. Ashley*, 1 Ark. 279; *State v. Brown*, 1 Ark. 336. *Contra, Ex p. Marr*, 12 Ark. 85.

Colorado. — *People v. Londoner*, 13 Colo. 303; *People v. Reid*, 11 Colo. 138; *People v. Boughton*, 5 Colo. 487; *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *People v. Curley*, 5 Colo. 417; *People v. Keeling*, 4 Colo. 129. But see *People v. Goddard*, 8 Colo. 461.

Florida. — *State v. Gleason*, 12 Fla. 190; *State v. Johnson*, 13 Fla. 33; *Ex p. White*, 4 Fla. 165.

Kansas. — *State v. Topeka*, 31 Kan. 454; *State v. Wilson*, 30 Kan. 661; *State v. Allen*, 5 Kan. 220; *State v. Kelly*, 2 Kan. App. 178.

Maine. — *Harriman v. Waldo County*, 53 Me. 83.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 450.

Michigan. — *Atty.-Gen. v. May*, 97 Mich. 568; *Atty.-Gen. v. McQuade*, 94 Mich. 439.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *State v. Minnesota Cent. R. Co.*, 36 Minn. 246; *State v. St. Paul*, etc., R. Co., 35 Minn. 222; *State v. Harrison*, 34 Minn. 526; *State v. Dowlan*, 33 Minn. 536; *State v. Sharp*, 27 Minn. 38.

Missouri. — *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 336; *State v. Vail*, 53 Mo. 112; *State v. Lawrence*, 38 Mo. 539; *State v. Stewart*, 32 Mo. 384; *State v. Stone*, 25 Mo. 555; *State v. St. Louis Perpetual Marine, etc., Ins. Co.*, 8 Mo. 330; *State v. Merry*, 3 Mo. 278; *State v. Branch*, 28 Mo. App. 131.

Nebraska. — *State v. Boyd*, 31 Neb. 682; *State v. Frazier*, 28 Neb. 453; *State v. Stein*, 13 Neb. 529.

New Jersey. — *Convery v. Conger*, 53 N. J. L. 658; *Miller v. Utter*, 14 N. J. L. 84; *Cammann v. Bridgewater Copper Min. Co.*, 12 N. J. L. 84.

Ohio. — *State v. Cincinnati, etc., R. Co.*, 47 Ohio St. 130; *State v. Baughman*, 38 Ohio St. 459.

Pennsylvania. — *Com. v. Dumbauld*, 97 Pa. St. 293. *Compare Com. v. Smith*, 4 Binn. (Pa.) 117.

South Carolina. — *State v. Bowen*, 8 S. Car. 382; *Alexander v. McKenzie*, 2 S. Car. 81.

South Dakota. — *State v. Gardner*, 3 S. Dak. 553.

Utah. — *State v. Elliott*, 13 Utah 207.

Vermont. — *State v. Smith*, 48 Vt. 16; *State v. Boston, etc., R. Co.*, 25 Vt. 441.

Wisconsin. — *State v. Milwaukee, etc., R. Co.*, 45 Wis. 579; *Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466; *State v. West Wisconsin R. Co.*, 34 Wis. 197; *State v. Messmore*, 14 Wis. 115; *State v. Dousman*, 28 Wis. 542; *Atty.-Gen. v. Barstow*, 4 Wis. 567; *Atty.-Gen. v. Blossom*, 1 Wis. 317. But see *Atty.-Gen. v. Eau Claire*, 37 Wis. 445; *State v. Baker*, 38 Wis. 77.

Jurisdiction Depends on Character of Office. — Sometimes the jurisdiction of the Supreme Court or Circuit Court depends upon the character of the office in question, as under a statute providing that Circuit Courts shall not allow informations against state officers, *Secord v. Foutch*, 44 Mich. 90; or under a constitutional provision giving jurisdiction to the Supreme Court to issue writs of quo warranto to officers whose jurisdiction extends over the state, *Com. v. Dumbauld*, 97 Pa. St. 293. See also *Com. v. Frankfort*, 13 Bush (Ky.) 186.

5. No Statute Regulating Procedure. — *State v. Gleason*, 12 Fla. 209; *State v. Lawrence*, 38 Mo. 539; *State v. Merry*, 3 Mo. 278. But see *Ex p. Atty.-Gen.*, 1 Cal. 85.

6. Grant Not Exclusive. — *State v. Kelly*, 2 Kan. App. 178.

and no special reason appears why the proceedings should be taken in the first instance in the appellate court,¹ and this rule is especially applicable where the interests of only a private relator, and not of the whole community, are involved.² In the absence of statutory or constitutional provisions, a court of purely appellate jurisdiction has no original jurisdiction in quo warranto.³ Under a grant of merely supervisory jurisdiction, an appellate court has no original jurisdiction in quo warranto, since that remedy is not adapted to control or supervise.⁴

3. Courts of Original Jurisdiction. — Courts of general original jurisdiction, such as the circuit or district courts, are usually vested with jurisdiction in quo warranto, either concurrently with the appellate courts or for enforcing specific statutory substitutes.⁵ The limits of this jurisdiction depend upon

1. Concurrent Jurisdiction of Appellate and Inferior Court — *Alabama*. — State v. Porter, 1 Ala. 688; State v. Williams, 1 Ala. 342.

Arkansas. — *Ex p.* Good, 19 Ark. 410; *Ex p.* Allis, 12 Ark. 101.

Colorado. — People v. Martin, 19 Colo. 565.

Kentucky. — Com. v. Frankfort, 13 Bush (Ky.) 186.

Michigan. — Lamoreaux v. Ellis, 89 Mich. 151; Atty.-Gen. v. James, 73 Mich. 234; Coon v. Atty.-Gen., 42 Mich. 65.

Minnesota. — State v. Otis, 58 Minn. 275.

Missouri. — State v. Claggett, 73 Mo. 388; State v. Vail, 53 Mo. 97; State v. Buskirk, 43 Mo. 111; State v. Lawrence, 38 Mo. 535; State v. Stewart, 32 Mo. 379; State v. Balcom, 71 Mo. App. 27; State v. Branch, 28 Mo. App. 131.

Utah. — State v. Elliott, 13 Utah 200.

Wisconsin. — State v. Shaughnessey, 86 Wis. 645; State v. Baker, 38 Wis. 71.

Where a Court of Intermediate Appellate Jurisdiction was vested with the same original jurisdiction in quo warranto proceedings as the Supreme Court, the same rule of construction and of practice was held to apply in both courts, and a special reason should be shown why the former should exercise its constitutional jurisdiction. State v. Branch, 28 Mo. App. 131; State v. Balcom, 71 Mo. App. 27.

Where the Prosecuting Attorney Declines to File an Information, this affords sufficient ground for seeking relief through the attorney-general in the Supreme Court. Lamoreaux v. Ellis, 89 Mich. 152.

2. Where Merely Private Rights Are Involved — *Arkansas*. — State v. Johnson, 26 Ark. 281; Caldwell v. Bell, 6 Ark. 231.

Minnesota. — State v. Dowlan, 33 Minn. 536; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304.

Missouri. — State v. Claggett, 73 Mo. 388; State v. Vail, 53 Mo. 97; Hunter v. Chandler, 45 Mo. 453; State v. Buskirk, 43 Mo. 112; State v. Stewart, 32 Mo. 379; State v. Balcom, 71 Mo. App. 28.

Utah. — State v. Elliott, 13 Utah 200.

Wisconsin. — State v. Shaughnessey, 86 Wis. 647; State v. Baker, 38 Wis. 77; Atty.-Gen. v. Eau Claire, 37 Wis. 400; Atty.-Gen. v. Barstow, 4 Wis. 567.

Gross Abuse of a Corporate Franchise is a cause of paramount public importance, of which the Supreme Court may take jurisdiction. State v. Milwaukee, etc., R. Co., 45 Wis. 585.

3. Courts of Purely Appellate Jurisdiction. — *Ex p.* Atty.-Gen., 1 Cal. 85; State v. Stewart,

32 Mo. 384; Watkins v. Venable, 99 Va. 440, 3 Va. Supm. Ct. Rep. 329.

4. Under Grant of Supervisory Jurisdiction. — State v. Ashley, 1 Ark. 280; State v. Gleason, 12 Fla. 190.

5. Courts of Original Jurisdiction — *Alabama*. — Lee v. State, 49 Ala. 43.

California. — People v. Bingham, 82 Cal. 238. But see People v. Gillespie, 1 Cal. 342.

Colorado. — People v. Londoner, 13 Colo. 303; People v. Colorado Eastern R. Co., 8 Colo. App. 301; People v. Boughton, 5 Colo. 487.

Delaware. — State v. Stewart, 6 Houst. (Del.) 359; State v. Hancock, 2 Penn. (Del.) 253; State v. Green, 1 Penn. (Del.) 63.

Florida. — Enterprise v. State, 29 Fla. 128.

Illinois. — Snowball v. People, 147 Ill. 260, 43 Ill. App. 241.

Indiana. — State v. Kankakee Valley Draining Co., 42 Ind. 353.

Michigan. — Vrooman v. Michie, 69 Mich. 44; Secord v. Fouch, 44 Mich. 89; Coon v. Atty.-Gen., 42 Mich. 65.

Mississippi. — Lindsey v. Atty.-Gen., 33 Miss. 524.

Missouri. — State v. Rose, 84 Mo. 201; State v. Buskirk, 43 Mo. 112; State v. Lawrence, 38 Mo. 539; State v. Stewart, 32 Mo. 385; State v. Scott, 17 Mo. 521; State v. Balcom, 71 Mo. App. 29; State v. Miller, 1 Mo. App. 48.

Nebraska. — State v. Frantz, 55 Neb. 167.

New Mexico. — Territory v. Ashenfelder, 4 N. Mex. 85.

Ohio. — State v. Buckland, 5 Ohio St. 216.

Pennsylvania. — Com. v. Order of Solon, 166 Pa. St. 33; Com. v. Haeseler, 161 Pa. St. 92; Cleaver v. Com., 34 Pa. St. 283; Field v. Com., 32 Pa. St. 478; Com. v. Towanda Water Works, 22 W. N. C. (Pa.) 429; Com. v. Mosier, 5 Luz. Leg. Reg. (Pa.) 158.

South Carolina. — State v. Evans, 33 S. Car. 612.

Texas. — Largen v. State, 76 Tex. 323; McAllen v. Rhodes, 65 Tex. 348; Morris v. State, 62 Tex. 728; State v. De Gress, 53 Tex. 387. But see State v. Owens, 63 Tex. 261; *Ex p.* Towles, 48 Tex. 413.

Virginia. — Watkins v. Venable, 99 Va. 440; Bland, etc., County Judge Case, 33 Gratt. (Va.) 443.

Wisconsin. — State v. Portage City Water Co., 107 Wis. 441; State v. Shaughnessey, 86 Wis. 646.

See also *infra*, this section, *Amount in Controversy*.

the terms of the statute conferring it.¹ For the purpose of statutes regulating jurisdiction, quo warranto proceedings are civil and not criminal.² In the absence of any general or special law upon the subject, courts of general original common-law jurisdiction have jurisdiction in quo warranto.³

4. State or Federal Courts. — A state court has no jurisdiction of quo warranto in the name of the state to determine the right to an office or franchise under the Constitution and laws of the United States.⁴ But the mere fact that the franchise or privilege usurped or misused affects interstate commerce does not oust the state courts of jurisdiction.⁵

5. Removal of Causes. — Quo warranto proceedings to try a civil right are suits of a civil nature within the Removal Acts, and are subject to removal as any other civil actions.⁶

6. Distinction Between Writ and Information in Grant of Jurisdiction. — The term "writ of quo warranto" as used in constitutional grants of jurisdiction to particular courts is held to include informations in the nature of quo warranto,⁷ or other statutory substitutes for the common-law remedy,⁸ upon the ground that at the time of the adoption of such constitutional provisions the ancient and technical writ had long been obsolete, and it had become

1. Statutory Limitation. — See *State v. Lingo*, 26 Mo. 496.

Thus in some states the jurisdiction of Circuit Courts does not extend to state offices. *Secord v. Foutch*, 44 Mich. 90; *Field v. Com.*, 32 Pa. St. 478; *Leib v. Com.*, 9 Watts (Pa.) 200.

2. State v. Lingo. 26 Mo. 496. But see *People v. Gillespie*, 1 Cal. 344. See generally *supra*, this title, *Nature and Origin of Remedy—Civil or Criminal Character*.

3. In Absence of Special Statute. — *State v. Stewart*, 6 Houst. (Del.) 371; *Snowball v. People*, 147 Ill. 265; *State v. Lobsinger*, 7 Mo. App. 106; *Kane v. People*, 4 Neb. 509; *People v. Hall*, 80 N. Y. 117. See *State v. Portage City Water Co.*, 107 Wis. 447. See also *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

4. Officer of National Bank. — In *State v. Curtis*, 35 Conn. 374, 95 Am. Dec. 263, it was held that an information in the nature of quo warranto will not lie in a state court to try the right to the office of director in a bank organized under the national currency act.

Presidential Electors. — *State v. Bowen*, 8 S. Car. 400, holding that an information cannot be maintained in the name of the state to determine the title of an elector of president and vice-president of the United States, and that the objection could be raised by a plea to the jurisdiction of the state court. Compare *State v. Bowen*, 8 S. Car. 382.

The question involved in these cases seems to have been really a question as to the proper party plaintiff.

5. Interstate Commerce Affected. — *State v. Cincinnati, etc.*, R. Co., 47 Ohio St. 130.

Generally as to the respective state and federal jurisdiction in matters affecting interstate commerce, see the title *INTERSTATE COMMERCE*, vol. 17, p. 34.

6. Removal to Federal Court. — *Ames v. Kansas*, 111 U. S. 449. See also *State v. Bowen*, 8 S. Car. 382.

Suits Arising under Laws of United States. — Proceedings by a state against a corporation under its own laws, in the nature of quo warranto for the abandonment, relinquishment, and surrender of its powers to another corpora-

tion with which it has been consolidated under a law of the United States, and proceedings against the directors of said consolidated company for usurping the powers of such state corporation are, when in the form of civil actions, suits arising under the laws of the United States within the meaning of the acts regulating the removal of causes. *Ames v. Kansas*, 111 U. S. 449.

7. Writ and Information Used Synonymously — *Arkansas*. — *State v. Leatherman*, 38 Ark. 83. *Colorado*. — *People v. Londoner*, 13 Colo. 303; *People v. Keeling*, 4 Colo. 129.

Connecticut. — *State v. Keena*, 64 Conn. 215. *Florida*. — *State v. Anderson*, 26 Fla. 240; *State v. Gleason*, 12 Fla. 190.

Kansas. — *State v. Wilson*, 30 Kan. 661. *Louisiana*. — *State v. Ramos*, 10 La. Ann. 420; *Reynolds v. Baldwin*, 1 La. Ann. 165.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 451.

Michigan. — *Vrooman v. Michie*, 69 Mich. 42. *Minnesota*. — *State v. Tracy*, 48 Minn. 497.

Mississippi. — *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686.

Missouri. — *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 325; *State v. Vail*, 53 Mo. 107; *State v. Merry*, 3 Mo. 278; *State v. Stewart*, 32 Mo. 382.

Nebraska. — *State v. Boyd*, 31 Neb. 682. *New Hampshire*. — *State v. Portland, etc., R. Co.*, 58 N. H. 113.

New York. — *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

Pennsylvania. — *Brower v. Levan*, 7 Pa. Dist. 704.

South Dakota. — *State v. Gardner*, 3 S. Dak. 553.

Utah. — *State v. Elliott*, 13 Utah 200.

Wisconsin. — *Atty.-Gen. v. Superior, etc., R. Co.*, 93 Wis. 613; *State v. Baker*, 38 Wis. 71; *State v. West Wisconsin R. Co.*, 34 Wis. 107; *State v. Messmore*, 14 Wis. 115; *Atty.-Gen. v. Barstow*, 4 Wis. 567; *Atty.-Gen. v. Blossom*, 1 Wis. 317.

8. Alexander v. McKenzie, 2 S. Car. 81. See also *State v. Bowen*, 8 S. Car. 382; *State v. Bowen*, 8 S. Car. 401.

customary to use the expression "writ of quo warranto" as synonymous with, and a shorter form of expression for, "information in the nature of quo warranto."¹ A few early cases took the view that such provisions restored the ancient remedy by writ and did not confer jurisdiction of an information.²

7. Statutory Impairment of Constitutional Jurisdiction. — Where jurisdiction in quo warranto is conferred by constitutional provision, such jurisdiction cannot be in any way impaired or altered by statutory provision.³ Thus, where the jurisdiction is vested in the court, it cannot be transferred to a single justice of the court.⁴ So, as has been seen, the creation of new statutory remedies does not oust the constitutional remedy by quo warranto.⁵

8. Amount in Controversy. — When the jurisdiction of a court depends upon the amount in controversy, such court has jurisdiction of informations in the nature of a quo warranto, where the value of the office, measured by the salary or emoluments thereof, is within such jurisdictional amount.⁶

V. PARTIES — 1. Who May Maintain Proceedings — *a. STATE OR SOVEREIGN.* — At common law quo warranto proceedings must be prosecuted in the name of the state or sovereign, as the writ only lies in cases affecting public rights,⁷ and this is still the rule where the purpose of the proceeding is to inquire into a right or to redress a wrong concerning the state.⁸ In such

1. *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 336. And see the cases in the last two preceding notes.

2. **Contrary View.** — *State v. Johnson*, 26 Ark. 281; *State v. Real Estate Bank*, 5 Ark. 598, 41 Am. Dec. 109; *State v. Ashley*, 1 Ark. 306; *State v. Stone*, 25 Mo. 555; *State v. St. Louis Perpetual Marine, etc., Ins. Co.*, 8 Mo. 330. And see *State v. Brown*, 1 Ark. 336.

In other states also the writ seems to have been retained as the proper remedy on behalf of the state. *Reed v. Cumberland, etc., Canal Corp.*, 65 Me. 53; *Leib v. Com.*, 9 Watts (Pa.) 200; *Com. v. Sturtevant*, 182 Pa. St. 324; *Com. v. Walter*, 83 Pa. St. 105, 24 Am. Rep. 154; *Com. v. Graham*, 64 Pa. St. 341; *State v. Boston, etc., R. Co.*, 25 Vt. 441; *Bland, etc., County Judge Case*, 33 Gratt. (Va.) 448.

3. **Power of Legislature.** — *People v. Bingham*, 82 Cal. 238; *People v. Reid*, 11 Colo. 140; *People v. Boughton*, 5 Colo. 487; *State v. Wilson*, 30 Kan. 661; *State v. Allen*, 5 Kan. 213; *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 337; *Convery v. Conger*, 53 N. J. L. 658; *State v. Baker*, 38 Wis. 71; *State v. Messmore*, 14 Wis. 115. Compare *People v. Harshaw*, 60 Mich. 203, 1 Am. St. Rep. 498. See also *People v. Hall*, 80 N. Y. 117.

4. **Power of Single Justice.** — *State v. Conklin*, 33 Wis. 687; *U. S. v. Lockwood*, 1 Pin. (Wis.) 364. See also *McDonald v. Alcona County*, 91 Mich. 459.

5. See *supra*, this title, *Principles Governing Use of Remedy* — subdiv. 9. b. (1) *Constitutional and Statutory Remedies*.

6. **Jurisdiction as Affected by Amount in Controversy.** — *Largen v. State*, 76 Tex. 323; *Hunnicut v. State*, 75 Tex. 233; *Little v. State*, 75 Tex. 619; *East Dallas v. State*, 73 Tex. 370; *McAllen v. Rhodes*, 65 Tex. 348; *State v. Owens*, 63 Tex. 261; *Morris v. State*, 62 Tex. 728; *State v. De Gress*, 53 Tex. 387; *Williamson v. Lane*, 52 Tex. 335.

Where the constitution provides that the Superior Court shall have jurisdiction in all cases in which the demand, etc., amounts to three hundred dollars, such court has jurisdic-

tion of an action in the nature of quo warranto at the instance of the attorney-general to oust one claiming to exercise a public office, the statute providing that in such a proceeding a penalty of five thousand dollars may be recovered. *People v. Bingham*, 82 Cal. 239, *distinguishing* *People v. Metzker*, 47 Cal. 524.

7. **At Common Law** — *England.* — *Rex v. Carmarthen*, 2 Burr. 869; *Rex v. Pasmore*, 3 T. R. 199; *Lowther's Case*, 2 Ld. Raym. 1409.

Arkansas. — *State v. Ashley*, 1 Ark. 304.

Florida. — *Robinson v. Jones*, 14 Fla. 256; *State v. Gleason*, 12 Fla. 212.

Indiana. — *Eaton v. State*, 7 Blackf. (Ind.) 65; *State v. Smith*, 32 Ind. 213.

Kansas. — *Bartlett v. State*, 13 Kan. 99.

Kentucky. — *Com. v. Lexington, etc., Turnpike Road Co.*, 6 B. Mon. (Ky.) 397.

Massachusetts. — *Haupt v. Rogers*, 170 Mass. 71; *Rice v. National Bank*, 126 Mass. 300; *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

Minnesota. — *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304.

Mississippi. — *Harrison v. Greaves*, 59 Miss. 453; *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

Nebraska. — *State v. Stein*, 13 Neb. 529.

New Jersey. — *Gibbs v. Somers Point*, 49 N. J. L. 515; *State v. Paterson, etc., Turnpike Co.*, 21 N. J. L. 9.

North Carolina. — *Houston v. Neuse River Nav. Co.*, 8 Jones L. (53 N. Car.) 476; *Saunders v. Gatling*, 81 N. Car. 298.

Ohio. — *Crawford v. State*, 52 Ohio St. 62; *State v. Moffitt*, 5 Ohio 358; *Mt. Pleasant Bank Case*, 5 Ohio 249.

Pennsylvania. — *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *Com. v. Burrell*, 7 Pa. St. 34.

South Carolina. — *Cleary v. Delieesseline*, 1 McCord L. (S. Car.) 35; *State v. Delieesseline*, 1 McCord L. (S. Car.) 52; *State v. Schnierle*, 5 Rich. L. (S. Car.) 299.

Texas. — *Wright v. Allen*, 2 Tex. 158.

Wisconsin. — *U. S. v. Lockwood*, 1 Pin. (Wis.) 359.

8. **Modern Rule in Cases Affecting Only Public Rights** — *Arkansas.* — *Campbell v. Goodrich*,

cases the attorney-general or other public prosecuting officer is the proper person to institute the proceedings and be named as relator.¹ In proceedings by the state in matters affecting only public rights, no relator is necessary,² but the unnecessary insertion of a relator is immaterial.³

b. PRIVATE INDIVIDUALS — RELATORS — (1) General Rules. — At common law, prior to the statute of Anne, a private individual could not, without the intervention of the attorney-general or other public prosecutor, either as of right, or by leave of court, file an information in the nature of quo warranto, and in the absence of statute changing the rule this is still the law.⁴ But recognizing that individuals as well as the public at large may be interested in the usurpation of public offices or franchises, the statute of Anne provided that in certain cases informations might be filed upon the relation of any person interested,⁵ leave of court to do so having been first obtained,⁶ and similar statutes are very generally in force throughout the United States.⁷ In most states, although a private individual may appear as a relator, the proceedings must still be brought in the name of the state, as, in theory at least, the interests of the state are involved.⁸ In such cases both the state

27 Ark. 12; State *v.* McDiarmid, 27 Ark. 176; Caldwell *v.* Bell, 6 Ark. 231.

Colorado. — People *v.* Colorado Eastern R. Co., 8 Colo. App. 301.

Florida. — State *v.* Gleason, 12 Fla. 214.

Illinois. — People *v.* North Chicago R. Co., 88 Ill. 537.

Iowa. — Scott *v.* Clark, 1 Iowa 78.

Kansas. — Bartlett *v.* State, 13 Kan. 99.

Kentucky. — Com. *v.* Lexington, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 397.

Missouri. — State *v.* Berkeley, 140 Mo. 184.

Montana. — Territory *v.* Virginia Road Co., 2 Mont. 103.

New Hampshire. — Osgood *v.* Jones, 60 N. H. 273.

Pennsylvania. — Com. *v.* Burrell, 7 Pa. St. 34.

South Carolina. — Cleary *v.* Delieesseline, 1 McCord L. (S. Car.) 35.

Wisconsin. — State *v.* Baker, 38 Wis. 77.

See also *infra*, this section, *Interest of Relator*, 1. **Proper Prosecuting Officer.** — See *infra*, this section.

2. **Relator Unnecessary.** — Bartlett *v.* State, 13 Kan. 99; Com. *v.* Fowler, 10 Mass. 295; State *v.* Smith, 3 Minn. 240, 74 Am. Dec. 749; State *v.* Equitable Loan, etc., Assoc., 142 Mo. 338; State *v.* McMillan, 108 Mo. 153; State *v.* Rose, 84 Mo. 198; State *v.* Bernoudy, 36 Mo. 279; State *v.* Hardie, 1 Ired. L. (23 N. Car.) 42; State *v.* Milwaukee, etc., R. Co., 45 Wis. 585.

3. **Insertion of Relator Immaterial.** — *California.* — People *v.* Sutter St. R. Co., 117 Cal. 604.

Illinois. — Chesshire *v.* People, 116 Ill. 493; People *v.* Golden Rule, 114 Ill. 34 [*distinguishing* People *v.* North Chicago R. Co., 88 Ill. 538, in that the application in the latter case was by a private party].

Massachusetts. — Com. *v.* Allen, 128 Mass. 310; Atty.-Gen. *v.* Adonai Shomo Corp., 167 Mass. 424.

Michigan. — Atty.-Gen. *v.* James, 73 Mich. 234.

Minnesota. — State *v.* Sharp, 27 Minn. 38.

Missouri. — State *v.* Vail, 53 Mo. 97; State *v.* Jenkins, 25 Mo. App. 484.

New York. — Thompson *v.* People, 23 Wend. (N. Y.) 537.

North Carolina. — State *v.* Hardie, 1 Ired. L. (23 N. Car.) 42.

Ohio. — State *v.* Heinmiller, 38 Ohio St. 110;

State *v.* Sullivan, 8 Ohio Cir. Dec. 346, 15 Ohio Cir. Ct. 477.

Oregon. — State *v.* Douglas County Road Co., 10 Oregon 201.

Texas. — Mathews *v.* State, 82 Tex. 577;

State *v.* De Gress, 53 Tex. 387.

4. **In Absence of Statute.** — *Arkansas.* — State *v.* Ashley, 1 Ark. 279. See also Campbell *v.* Goodrich, 27 Ark. 12; State *v.* McDiarmid, 27 Ark. 176.

Florida. — State *v.* Gleason, 12 Fla. 212.

Kentucky. — Com. *v.* Lexington, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 398.

Massachusetts. — Haupt *v.* Rogers, 170 Mass. 71; Atty.-Gen. *v.* Sullivan, 163 Mass. 446; Rice *v.* National Bank, 126 Mass. 300; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50; Goddard *v.* Smithett, 3 Gray (Mass.) 116.

Minnesota. — State *v.* Dahl, 69 Minn. 109.

New Hampshire. — Osgood *v.* Jones, 60 N. H. 548.

New Jersey. — Miller *v.* Utter, 14 N. J. L. 87.

Texas. — Wright *v.* Allen, 2 Tex. 158.

5. **Statute of Anne.** — 9 Anne, c. 20; State *v.* Ashley, 1 Ark. 279; Miller *v.* Utter, 14 N. J. L. 87. See State *v.* Stewart, 6 Houst. (Del.) 373.

When the information in the nature of quo warranto took the place of the ancient writ, it became the practice of the officers of the crown to file informations in their own discretion upon the applications of private persons, but the latter were not named as relators in the proceedings. The statute of 9 Anne required that in informations relating to corporate offices or franchises the name of the relator should be mentioned. State *v.* Gleason, 12 Fla. 215.

6. See *supra*, this title, *Principles Governing Use of Remedy* — *Leave of Court*.

7. **Modern Statutes.** — Yonkey *v.* State, 27 Ind. 236; State *v.* Stewart, 6 Houst. (Del.) 373; Haupt *v.* Rogers, 170 Mass. 71; Atty.-Gen. *v.* Sullivan, 163 Mass. 448; Goddard *v.* Smithett, 3 Gray (Mass.) 116; People *v.* Ryder, 12 N. Y. 433; State *v.* Stevens, 29 Oregon 464; Com. *v.* Swank, 79 Pa. St. 154; Com. *v.* Jones, 1 Leg. Rec. (Pa.) 293.

8. **Proceeding Still in Name of State.** — Chesshire *v.* People, 116 Ill. 493; Eaton *v.* State, 7

and the relator may be real parties in interest.¹ In a few states a person claiming a public office is authorized to bring an action in his own name against the incumbent to determine the right.² But in the absence of express statutory authority a private person has no right to proceed in his own name without the interposition of the proper state officer.³ In some jurisdictions the relator, having an interest, may be joined with the state as a coplaintiff.⁴

(2) *Interest of Relator.* — A private person is not entitled to prosecute the proceeding unless he has a special interest in the matter in controversy.⁵ Statutes permitting relators to institute proceedings in the name of the state or to bring private actions in their own names give no right of private action in matters which concern the public only, and in which the relator is not specially interested, unless by positive and express provision the remedy is extended to such cases.⁶ The private interest of the relator must be one in

Blackf. (Ind.) 65; *Lindsey v. Atty.-Gen.*, 33 Miss. 508; *Hargrove v. Hunt*, 73 N. Car. 24; *State v. Schnierle*, 5 Rich. L. (S. Car.) 300; *State v. Bradford*, 32 Vt. 50. See *State v. Stewart*, 6 Houst. (Del.) 373.

1. *Real Party in Interest* — *Dakota.* — *Territory v. Hauxhurst*, 3 Dak. 208.

Georgia. — *Churchill v. Walker*, 68 Ga. 681.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333; *State v. Gastinel*, 18 La. Ann. 517.

Michigan. — *Atty.-Gen. v. James*, 73 Mich. 234; *People v. Pratt*, 14 Mich. 333.

Minnesota. — *State v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

Montana. — *People v. McIntyre*, 10 Mont. 166.

New Hampshire. — *Osgood v. Jones*, 60 N. H. 548.

New York. — *People v. Walker*, 23 Barb. (N. Y.) 304; *People v. Atty.-Gen.*, 22 Barb. (N. Y.) 117; *People v. Ryder*, 12 N. Y. 433.

North Carolina. — *State v. Hardie*, 1 Ired. L. (23 N. Car.) 42.

Ohio. — *State v. Sullivan*, 8 Ohio Cir. Dec. 346.

Oregon. — *State v. Stevens*, 29 Oregon 471. See *State v. Douglas County Road Co.*, 10 Oregon 198.

Rhode Island. — *State v. Brown*, 5 R. I. 1.

Utah. — *People v. Clayton*, 4 Utah 433.

Wisconsin. — *State v. Kromer*, 38 Wis. 548; *State v. Pierce*, 35 Wis. 101; *Atty.-Gen. v. Barstow*, 4 Wis. 567.

2. *Private Action to Determine Right to Office.* — *Reynolds v. State*, 61 Ind. 392; *Brown v. Jeffries*, 42 Kan. 605; *Weston v. Lane*, 40 Kan. 480; *Moss v. Patterson*, 40 Kan. 726; *Bartlett v. State*, 13 Kan. 102; *Tillman v. Otter*, 93 Ky. 600; *Vrooman v. Michie*, 69 Mich. 44; *McAllen v. Rhodes*, 65 Tex. 348; *Preshaw v. Dee*, 6 Utah 360. See also *State v. Hamilton County*, 39 Kan. 85.

3. *Necessity of Interposition of State Officer.* — *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *Wallace v. Anderson*, 5 Wheat. (U. S.) 292; *State v. Stewart*, 6 Houst. (Del.) 373; *Scott v. Clark*, 1 Iowa 78; *Haupt v. Rogers*, 170 Mass. 71; *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Saunders v. Gatling*, 81 N. Car. 298; *State v. Taylor*, 50 Ohio St. 120; *Wright v. Allen*, 2 Tex. 158; *U. S. v. Lockwood*, 1 Pin. (Wis.) 364.

4. *Joinder of Relator with State.* — *People v. De Bevoise*, 27 Hun (N. Y.) 596; *People*

v. Ryder, 12 N. Y. 433. Compare *Bartlett v. State*, 13 Kan. 99.

Generally as to joinder of parties, see title QUO WARRANTO in ENCYC. OF PL. AND PR., vol. 17, p. 383.

5. *Special Interest Necessary* — *England.* — *Rex v. Saunders*, 3 East 119. But see *Rex v. Kemp*, 1 East 46, note a.

Colorado. — *People v. Londoner*, 13 Colo. 314; *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

Georgia. — *Churchill v. Walker*, 68 Ga. 684; *Stone v. Wetmore*, 44 Ga. 497.

Illinois. — *Dickson v. People*, 17 Ill. 191; *Place v. People*, 83 Ill. App. 84.

Indiana. — *State v. Gordon*, 87 Ind. 173; *State v. Smith*, 32 Ind. 213.

Iowa. — *State v. Des Moines*, 96 Iowa 521, 59 Am. St. Rep. 381.

Louisiana. — *Voisin v. Leche*, 23 La. Ann. 25; *State v. Mason*, 14 La. Ann. 510.

Massachusetts. — *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436.

Michigan. — *Lamoureux v. Ellis*, 89 Mich. 146; *People v. Nappa*, 80 Mich. 487.

Minnesota. — *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304.

Missouri. — *State v. Berkeley*, 140 Mo. 184; *State v. Vail*, 53 Mo. 97.

New Jersey. — *State v. Tolan*, 33 N. J. L. 198.

North Carolina. — *Hines v. Vann*, 118 N. Car. 3.

Ohio. — *State v. Taylor*, 50 Ohio St. 120.

Pennsylvania. — *Com. v. Swank*, 79 Pa. St. 154; *Com. v. Cluley*, 56 Pa. St. 270, 94 Am. Dec. 75; *Com. v. West*, 5 Pa. Co. Ct. 219; *Com. v. Brosnahan*, 1 Leg. Rec. (Pa.) 59.

Washington. — *Mills v. State*, 2 Wash. 568.

6. *Effect of Statutory Provisions* — *California.* — *People v. Sutter St. R. Co.*, 117 Cal. 604.

Colorado. — *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

Georgia. — *Hardin v. Colquitt*, 63 Ga. 594; *Collins v. Huff*, 63 Ga. 208; *Stone v. Wetmore*, 44 Ga. 496.

Illinois. — *People v. North Chicago R. Co.*, 88 Ill. 537.

Indiana. — *State v. Smith*, 32 Ind. 213; *Scott v. State*, 151 Ind. 556.

Kansas. — *Miller v. Palermo*, 12 Kan. 14.

Kentucky. — *Com. v. Lexington, etc., Turnpike Road Co.*, 6 B. Mon. (Ky.) 397.

Louisiana. — *Voisin v. Leche*, 23 La. Ann. 26; *State v. Mason*, 14 La. Ann. 510.

which the public is concerned.¹

c. APPLICATION OF RULES TO PARTICULAR CASES — (1) Public Offices. — The State or Sovereign under whom a public office is held is primarily the proper party to maintain quo warranto to try the right to a state or municipal office,² though under the statute of Anne, and similar statutes in the *United States*, a private person, specially interested, is also entitled to maintain the proceeding as relator or otherwise.³

A Claimant of a Public Office has a sufficient interest to entitle him to maintain quo warranto against the wrongful incumbent,⁴ though, of course, he cannot

Massachusetts. — *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

Michigan. — *People v. Tisdale*, 1 Dougl. (Mich.) 59. See *Cain v. Brown*, 111 Mich. 657.

Minnesota. — *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304; *State v. Smith*, 3 Minn. 240, 74 Am. Dec. 749. But see *State v. Dahl*, 67 Minn. 108.

Missouri. — *State v. Boal*, 46 Mo. 528.

New Jersey. — *Davis v. Davis*, 57 N. J. L. 203; *State v. Paterson, etc.*, Turnpike Co., 21 N. J. L. 9.

New York. — *Demarest v. Wickham*, 63 N. Y. 323.

North Carolina. — *Saunders v. Gatling*, 81 N. Car. 301; *People v. Heaton*, 77 N. Car. 18.

Pennsylvania. — *Com. v. McCarter*, 98 Pa. S. 612; *Com. v. Cluley*, 56 Pa. St. 270, 94 Am. Dec. 75; *Com. v. Hough*, 22 Pa. Co. Ct. 440; *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Farmers' Bank*, 20 Pa. St. 415; *Com. v. Philadelphia, etc.*, R. Co., 20 Pa. St. 518; *Com. v. Burrell*, 7 Pa. St. 34.

Rhode Island. — *State v. Brown*, 5 R. I. 1.

Texas. — *Hunnicut v. State*, 75 Tex. 233; *State v. Owens*, 63 Tex. 265.

Washington. — *Mills v. State*, 2 Wash. 566.

West Virginia. — *State v. Matthews*, 44 W. Va. 372.

1. *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

As to the Sufficiency of the Interest to enable a relator to maintain the proceedings, see *infra*, this section, *Application of Rules to Particular Cases*.

2. *State or Sovereign — Illinois.* — *Chesshire v. People*, 116 Ill. 493.

Indiana. — *Vogel v. State*, 107 Ind. 374.

Kansas. — *Bartlett v. State*, 13 Kan. 99.

Kentucky. — *Wheeler v. Com.*, 98 Ky. 59.

United States. — *Wallace v. Anderson*, 5 Wheat. (U. S.) 291.

Arkansas. — *Campbell v. Goodrich*, 27 Ark. 12; *State v. McDiarmid*, 27 Ark. 176.

Colorado. — *In re Fire, etc.*, Com'rs, 19 Colo. 499.

Florida. — *State v. Gleason*, 12 Fla. 214.

Idaho. — *People v. Green*, 1 Idaho 235.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 448; *Com. v. Allen*, 128 Mass. 310; *Com. v. Hawkes*, 123 Mass. 525; *Atty.-Gen. v. Simonds*, 111 Mass. 256; *Com. v. Fowler*, 10 Mass. 295.

Michigan. — *People v. Hatch*, 60 Mich. 229.

Minnesota. — *State v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

Mississippi. — *Harrison v. Greaves*, 59 Miss. 453.

Missouri. — *State v. Berkeley*, 140 Mo. 184; *State v. McMillan*, 108 Mo. 157.

Nevada. — *State v. Sadler*, 25 Nev. 131.

Ohio. — *State v. Thompson*, 34 Ohio St. 366; *State v. Sullivan*, 8 Ohio Cir. Dec. 346, 15 Ohio Cir. Ct. 477; *State v. Anderson*, 45 Ohio St. 196.

Pennsylvania. — *Gilroy v. Com.*, 105 Pa. St. 484; *Com. v. Cluley*, 56 Pa. St. 270, 94 Am. Dec. 75; *Com. v. Hough*, 22 Pa. Co. Ct. 440; *Com. v. De Turk*, 6 Pa. Co. Ct. 94.

South Carolina. — *State v. Schnierle*, 5 Rich. L. (S. Car.) 301; *State v. Bowen*, 8 S. Car. 400.

Washington. — *Mills v. State*, 2 Wash. 566.

Wisconsin. — *State v. Mott*, 111 Wis. 19.

See also *infra*, this title, *Proper Officer to Prosecute*.

Federal Office. — Quo warranto proceedings to test the right to a federal office must be in the name of the United States. *Territory v. Lockwood*, 3 Wall. (U. S.) 236; *State v. Bowen*, 8 S. Car. 400; *Wallace v. Anderson*, 5 Wheat. (U. S.) 291. See also *State v. Curtis*, 35 Conn. 379, 95 Am. Dec. 263.

3. **Private Persons Specially Interested.** — See *supra*, this section, *Private Individuals — Relators*. See also *State v. Stewart*, 6 Houst. (Del.) 359; *Com. v. Lexington, etc.*, Turnpike Road Co., 6 B. Mon. (Ky.) 397; *State v. Dahl*, 66 Minn. 110; *State v. Stewart*, 32 Mo. 382; *Com. v. Burrell*, 7 Pa. St. 34; *Com. v. Arrison*, 15 S. & R. (Pa.) 129; *State v. West Wisconsin R. Co.*, 34 Wis. 208.

4. **Claimant of Office — California.** — *Magee v. Calaveras County*, 10 Cal. 376.

Florida. — *State v. Anderson*, 26 Fla. 240; *Lake v. State*, 18 Fla. 501.

Georgia. — *Stone v. Wetmore*, 44 Ga. 496.

Indiana. — *Yonkey v. State*, 27 Ind. 236.

Kansas. — *Bartlett v. State*, 13 Kan. 99.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333; *State v. Miltenberger*, 33 La. Ann. 263.

Michigan. — *Vrooman v. Michie*, 69 Mich. 42.

Minnesota. — *State v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

Mississippi. — *Lindsey v. Atty.-Gen.*, 33 Miss. 508; *State v. Morgan*, (Miss. 1902) 31 So. Rep. 789; *Roane v. Matthews*, 75 Miss. 94.

Nebraska. — *State v. Boyd*, 34 Neb. 435.

Nevada. — *State v. Sadler*, 25 Nev. 131.

New Jersey. — *Manahan v. Watts*, 64 N. J. L. 465.

New York. — *People v. De Bevoise*, 27 Hun (N. Y.) 596; *People v. Ryder*, 12 N. Y. 433.

Ohio. — *State v. Thompson*, 34 Ohio St. 367.

Pennsylvania. — *Com. v. McCarter*, 98 Pa. St. 614; *Com. v. Swank*, 79 Pa. St. 154; *Com. v. Small*, 26 Pa. St. 37; *Com. v. Bumm*, 10 Phila. (Pa.) 162, 31 Leg. Int. (Pa.) 340; *Com. v. Hough*, 22 Pa. Co. Ct. 440; *Com. v. Stuck-*

maintain the proceedings upon any ground which affects his own title equally with that of the defendant, as where both claim under a void election or an unconstitutional statute,¹ unless he has some other interest sufficient to maintain the proceeding.² Where the title of the claimant is defective, and he has no other interest, he cannot maintain the proceedings.³ The claimant need not qualify or offer to qualify before commencing the proceeding, as in many cases this would be impossible or useless until the incumbent is ousted.⁴

A Defeated Candidate, though not himself claiming the office, has sufficient interest to maintain quo warranto to set aside the result of an election and have the office declared vacant.⁵

A Private Individual cannot maintain quo warranto to try the right of the incumbent to a public office,⁶ unless he himself claims to be entitled to the office,⁷ or unless he has some other special interest therein, sufficient to maintain the proceedings.⁸ Under some statutes a private relator cannot maintain the proceeding without showing a demand upon the prosecuting officer to proceed and a refusal upon his part to do so.⁹

Any Citizen and Taxpayer of a Municipal Corporation may maintain the proceeding to try the title to an office under the municipality and to oust an unlawful incumbent.¹⁰ This has been held in regard to the office of alderman, or

rath, 22 Pittsb. Leg. J. (Pa.) 97; Com. v. Hargest, 2 Dauphin Co. Rep. (Pa.) 409.

Texas. — Little v. State, 75 Tex. 616.

Utah. — People v. Cohn, 7 Utah 352.

1. Rex v. Cudlipp, 6 T. R. 503; Rex v. Bond, 2 T. R. 767; Davis v. Dawson, 90 Ga. 817; Hardin v. Colquitt, 63 Ga. 588; Collins v. Huff, 63 Ga. 207; Frey v. Michie, 68 Mich. 323; State v. Stuht, 52 Neb. 209. Compare Com. v. Stevens, 168 Pa. St. 582.

2. Davis v. Dawson, 90 Ga. 817; Hardin v. Colquitt, 63 Ga. 588.

3. Title of Plaintiff Defective. — Crovatt v. Mason, 101 Ga. 246; Com. v. McCarter, 98 Pa. St. 614; Com. v. Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; Com. v. Machamer, 18 Pa. Co. Ct. 92, 5 Pa. Dist. 560. See also *infra*, this title. *Use of Remedy in Particular Cases* — subdv. 1. c. *Trial of Relator's Title to Office.*

Abandonment of Claim to Office by relator disqualifies him to maintain the prosecution. Guzman v. Walker, 11 La. Ann. 693; Ransdell v. Ariail, 13 La. Ann. 459; State v. Boyd, 34 Neb. 435; State v. Moores, 52 Neb. 634.

4. **Qualification of Claimant.** — People v. Shorb, 100 Cal. 541; Magee v. Calaveras County, 10 Cal. 376; People v. Miller, 16 Mich. 56, 24 Mich. 458, 9 Am. Rep. 131; People v. Mayworm, 5 Mich. 146; State v. Frantz, 55 Neb. 172; Little v. State, 75 Tex. 616. *Contra*, Manahan v. Watts, 64 N. J. L. 465. But see People v. McManus, 34 Barb. (N. Y.) 621.

5. **Defeated Candidate.** — Londoner v. People, 15 Colo. 557; Davis v. Dawson, 90 Ga. 817; Crovatt v. Mason, 101 Ga. 246. Compare Hardin v. Colquitt, 63 Ga. 588; Com. v. Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; State v. Matthews, 44 W. Va. 372.

6. **Private Individuals.** — Scott v. State, 151 Ind. 556; Voisin v. Leche, 23 La. Ann. 25; Barnum v. Gilman, 27 Minn. 466, 38 Am. Rep. 304; State v. Stein, 13 Neb. 529; Kane v. People, 4 Neb. 509; State v. Taylor, 50 Ohio St. 120; Com. v. McCarter, 98 Pa. St. 607; Com. v. Cluley, 56 Pa. St. 270, 94 Am. Dec. 75; Com. v. Horne, 10 Phila. (Pa.) 164, 31 Leg. Int. (Pa.) 340; Com. v. Burrell, 7 Pa. St. 34;

Com. v. Stevens, 6 Luz. Leg. Reg. (Pa.) 37; Com. v. West, 5 Pa. Co. Ct. 219; Com. v. Grover, 2 Kulp (Pa.) 232; Cleary v. Deliesse-line, 1 McCord L. (S. Car.) 35; State v. Schnierle, 5 Rich. L. (S. Car.) 304; State v. Matthews, 44 W. Va. 372; Mills v. State, 2 Wash. 570. Compare *Cheshire v. People*, 116 Ill. 493. But see *Lamoreaux v. Ellis*, 89 Mich. 146; State v. Dahl, 69 Minn. 108.

7. See *supra*, this section, *Private Individuals* — *Relators.*

8. Churchill v. Walker, 68 Ga. 685; Collins v. Huff, 63 Ga. 208; State v. Vail, 53 Mo. 97; State v. Brown, 31 N. J. L. 355; Foard v. Hall, 111 N. Car. 370.

An Officer Elect, prior to the commencement of his term, has not a sufficient interest to maintain the proceedings. Scott v. State, 151 Ind. 556.

9. **Refusal of Prosecuting Officer to Proceed.** — Boyd v. Nebraska, 143 U. S. 135; State v. Anderson, 26 Fla. 240; Lake v. State, 18 Fla. 501; Harpham v. State, (Neb. 1901) 88 N. W. Rep. 489; State v. Boyd, 34 Neb. 435; State v. Frazier, 28 Neb. 438; State v. Sadler, 25 Nev. 131. See People v. Grand River Bridge Co., 13 Colo. 11, 16 Am. St. Rep. 182. *Contra*, State v. Orvis, 20 Wis. 235.

Under a statute permitting an information by a private relator on his own complaint "when the office usurped pertains to a county, town, city, or district," an information by a private relator in a case involving such office need not allege a refusal by the attorney-general to act. State v. Orvis, 20 Wis. 238.

10. **Citizens and Taxpayers of Municipal Corporations** — *England.* — Reg. v. Briggs, 11 L. T. N. S. 372; Reg. v. Quayle, 11 Ad. & El. 508, 39 E. C. L. 153, 5 Jur. 386; Rex v. Trevenen, 2 B. & Ald. 479; Rex v. Parry, 2 N. & P. 414, 6 Ad. & El. 810, 33 E. C. L. 218; Rex v. Clarke, 1 East 38.

Colorado. — Londoner v. People, 15 Colo. 557; People v. Londoner, 13 Colo. 303; Darrow v. People, 8 Colo. 417.

Connecticut. — Hinckley v. Breen, 55 Conn. 119; State v. Martin, 46 Conn. 482.

member of the common council or municipal assembly,¹ mayor,² county superintendent of the poor,³ town commissioner,⁴ tax collector,⁵ city surveyor,⁶ street inspector,⁷ or against persons charged with usurping the functions of a board of assessment and revision of city taxes.⁸ It has been held in *England* that a burgess is a good relator in an information against a town councilor⁹ or a town clerk.¹⁰ A private relator cannot maintain quo warranto to oust an officer of a *de facto* municipal corporation upon the ground that the corporation has no legal existence, since that question can be raised only by the state acting through the public prosecutor.¹¹ A further objection to such a proceeding is that quo warranto against an officer of a municipality admits the legal existence of the corporation.¹² But a contrary view has been sometimes taken.¹³

Members of a Board of public officers may maintain quo warranto against other persons who claim to be members or officers of the board.¹⁴

The Mayor of a City has been held not entitled to maintain the proceeding against one claiming the office of city councilman, because not sufficiently interested therein.¹⁵

A Justice of the Peace is a proper relator in case of usurpation of the office of alderman of the same ward.¹⁶

Acquiescence or Estoppel may bar a particular relator.¹⁷

Georgia. — *Davis v. Dawson*, 90 Ga. 817; *Churchill v. Walker*, 68 Ga. 681; *Hardin v. Colquitt*, 63 Ga. 588; *Collins v. Huff*, 63 Ga. 208; *Crovatt v. Mason*, 101 Ga. 246.

Kansas. — *Contra*, *Miller v. Palermo*, 12 Kan. 14.

Louisiana. — *State v. Gastinel*, 20 La. Ann. 114. *Contra*, *Voisin v. Leche*, 23 La. Ann. 25; *State v. Mason*, 14 La. Ann. 510.

Michigan. — *Lamoreaux v. Ellis*, 89 Mich. 146; *Taggart v. James*, 73 Mich. 234.

Missouri. — *State v. Vail*, 53 Mo. 110; *State v. Jenkins*, 25 Mo. App. 484.

New Jersey. — *State v. Hammer*, 42 N. J. L. 435; *State v. Tolan*, 33 N. J. L. 199.

North Carolina. — *Hines v. Vann*, 118 N. C. 31; *Foard v. Hall*, 111 N. C. 369.

Pennsylvania. — *Com. v. Meeser*, 44 Pa. St. 341; *Com. v. Keilly*, 4 Phila. (Pa.) 329, 18 Leg. Int. (Pa.) 29; *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382; *Com. v. Jones*, 1 Leg. Rec. (Pa.) 293. *Contra*, *Com. v. Wisler*, 11 W. N. C. (Pa.) 513; *Com. v. Stevens*, 6 Luz. Leg. Rec. (Pa.) 37; *Com. v. Grover*, 2 Kulp (Pa.) 232.

Washington. — *Compare Mills v. State*, 2 Wash. 566.

West Virginia. — *Contra*, *State v. Matthews*, 44 W. Va. 372.

1. Member of City Council. — *Reg. v. Quayle*, 11 Ad. & El. 508, 39 E. C. L. 153; *Rex v. Hodge*, 2 B. & Ald. 344, note; *Darrow v. People*, 8 Colo. 425; *Davis v. Dawson*, 90 Ga. 817; *State v. Tolan*, 33 N. J. L. 199; *Com. v. Meeser*, 44 Pa. St. 341; *Com. v. Mosier*, 5 Luz. Leg. Rec. (Pa.) 158. See also *Chicago v. People*, 80 Ill. 496.

But see *Mills v. State*, 2 Wash. 566, holding that the mayor of a city cannot maintain the proceeding against a member of the city council but that the proceeding must be brought by the state.

2. Mayor. — *Rex v. White*, 5 Ad. & El. 613, 31 E. C. L. 400; *Londoner v. People*, 15 Colo. 557; *People v. Londoner*, 13 Colo. 314; *Com. v. Jones*, 12 Pa. St. 365. *Compare* *Com. v. McCarter*, 98 Pa. St. 607.

3. Superintendent of the Poor. — *Lamoreaux v. Ellis*, 89 Mich. 152; *Taggart v. James*, 73 Mich. 234.

4. Town Commissioner. — *Reg. v. Briggs*, 11 L. T. N. S. 372; *Rex v. Clarke*, 1 East 38.

5. Tax Collector. — *Com. v. Philadelphia County*, 1 S. & R. (Pa.) 382.

6. City Surveyor. — *Com. v. Keilly*, 4 Phila. (Pa.) 329, 18 Leg. Int. (Pa.) 29.

7. Street Inspector. — *State v. Martin*, 46 Conn. 479.

8. Board of Assessment and Revision of Taxes. — *State v. Hammer*, 42 N. J. L. 435.

9. Burgess. — *Rex v. Parry*, 2 N. & P. 414, 6 Ad. & El. 810, 33 E. C. L. 218.

10. Rex v. Davies, 1 M. & R. 538, 17 E. C. L. 277.

11. Attacking Corporate Existence. — *Rex v. Bond*, 2 T. R. 767; *Steelman v. Vickers*, 51 N. J. L. 180. See *Rex v. Clarke*, 1 East 38, 5 Rev. Rep. 508; *Ewing v. State*, 81 Tex. 172. But see *Rex v. Trevenen*, 2 B. & Ald. 479. *Compare* *State v. Leatherman*, 38 Ark. 84; *Rex v. White*, 5 Ad. & El. 613, 31 E. C. L. 400; *Terhune v. Potts*, 47 N. J. L. 218; *State v. Tolan*, 33 N. J. L. 195. See also *infra*, this section, *Public or Municipal Corporations*.

12. State v. North, 42 Conn. 79. But see *People v. Riverside*, 66 Cal. 288.

13. Rex v. White, 1 N. & P. 84, 5 Ad. & El. 613, 31 E. C. L. 400. See *Scrafford v. Gladwin County*, 41 Mich. 652; *State v. Jenkins*, 25 Mo. App. 484. See also *infra*, this section, *Against Whom Maintainable* — *Public or Municipal Corporations*.

A Burgess is a Good Relator, although the effect of the information would be to dissolve the corporation. *Rex v. Parry*, 2 N. & P. 414, 6 Ad. & El. 810, 33 E. C. L. 218.

14. Members of Board of Public Officers. — *Dickson v. People*, 17 Ill. 191; *Com. v. Fletcher*, 180 Pa. St. 456.

15. Mayor. — *Mills v. State*, 2 Wash. 566.

16. Justice of the Peace. — *Com. v. Brunner*, 3 Del. Co. Rep. (Pa.) 551, 6 Pa. Co. Ct. 323.

17. Acquiescence and Estoppel. — *Rex v. Slythe*,

(2) *Public or Municipal Corporations.* — As a general rule, quo warranto to determine the legal existence of a municipal corporation can be maintained only by the state and not by a private relator.¹ A landowner may maintain quo warranto to try the legality of the organization of a municipal corporation within the limits of which his land has been included, or to try the validity of proceedings extending the corporate limits so as to include his land.²

(3) *Private Corporations.* — The right to be a corporation is a franchise held by grant from the state, and when the object of the proceedings is to destroy the corporation and not merely to correct an abuse, the state and not a private relator is the proper moving party.³ But the information may be

9 Dowl. & R. 181, 6 B. & C. 240, 13 E. C. L. 156; Rex v. Symmons, 4 T. R. 223; Rex v. Mortlock, 3 T. R. 300; Reg. v. Lofthouse, 7 B. & S. 447, 35 L. J. Q. B. D. 145; Rex v. Benney, 1 B. & Ad. 684, 20 E. C. L. 470; Rex v. Parkyn, 1 B. & Ad. 690, 20 E. C. L. 472; Rex v. Trevenen, 2 B. & Ald. 339, 20 Rev. Rep. 461; Rex v. Payne, 2 Chit. 369, 18 E. C. L. 370; Reg. v. Greene, 2 Gale & D. 24, 2 Q. B. 460, 42 E. C. L. 760, 6 Jur. 777; Rex v. Morris, 3 East 213; Rex v. Clarke, 1 East 38, 5 Rev. Rep. 505. See generally *supra*, this title, *Principles Governing Use of Remedy — Acquiescence and Estoppel.*

1. *State or Sovereign — England.* — Rex v. Ogden, 10 B. & C. 230, 21 E. C. L. 61; Rex v. Parry 6 Ad. & El. 810, 33 E. C. L. 218; Rex v. White, 5 Ad. & El. 613, 31 E. C. L. 400; Le Roy v. Cusacke, 2 Rolle 115.

Dakota. — See *Territory v. Armstrong*, 6 Dak. 226.

Alabama. — *State v. Cahaba*, 30 Ala. 66.

Florida. — *Robinson v. Jones*, 14 Fla. 256.

Illinois. — *McGahan v. People*, 191 Ill. 493; *Chicago v. People*, 80 Ill. 406.

Indiana. — *Mullikin v. Bloomington*, 72 Ind. 161.

Kansas. — *State v. McLaughlin*, 15 Kan. 233, 22 Am. Rep. 264; *Miller v. Palermo*, 12 Kan. 14.

Massachusetts. — *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

Michigan. — But see *Scrafford v. Gladwin County*, 41 Mich. 648.

Minnesota. — *State v. Tracy*, 48 Minn. 497.

Missouri. — *State v. Westport*, 116 Mo. 583. Compare *State v. Jenkins*, 25 Mo. App. 484.

New Jersey. — *Steelman v. Vickers*, 51 N. J. L. 180; *Campbell v. Wainright*, 50 N. J. L. 557; *Gibbs v. Somers Point*, 49 N. J. L. 518; *Stout v. Zulick*, 48 N. J. L. 599; *Terhune v. Potts*, 47 N. J. L. 218; *Atty.-Gen. v. Delaware, etc., R. Co.*, 38 N. J. L. 282; *State v. Tolan*, 33 N. J. L. 195; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *State v. Brown*, 31 N. J. L. 355; *State v. Paterson, etc., Turnpike Co.*, 21 N. J. L. 9; *Miller v. Utter*, 14 N. J. L. 84.

New York. — *People v. Richardson*, 4 Cow. (N. Y.) 109, note.

Pennsylvania. — *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392.

Vermont. — See also *State v. Vershire*, 52 Vt. 41.

Washington. — *State v. Horan*, 22 Wash. 197; *Mills v. State*, 2 Wash. 566.

See also *infra*, this section, *Private Corporations.*

2. *Landowner.* — *State v. Mote*, 48 Neb. 683; *State v. Dimond*, 44 Neb. 154. See also *State v. Jenkins*, 25 Mo. App. 484.

As to the appropriateness of the remedy in such cases, see *infra*, this title, *Use of Remedy in Particular Cases — Public or Municipal Corporations.*

3. *State or Sovereign — England.* — Rex v. Carmarthen, 2 Burr. 869; Rex v. Ogden, 10 B. & C. 230, 21 E. C. L. 61; Rex v. Pasmore, 3 T. R. 199; Rex v. Trevenen, 2 B. & Ald. 479; Rex v. White, 5 Ad. & El. 613, 31 E. C. L. 400; Rex v. Parry, 6 Ad. & El. 810, 33 E. C. L. 218.

United States. — U. S. v. Williams, 5 Cranch (C. C.) 62.

Alabama. — *State v. Cahaba*, 30 Ala. 67.

Colorado. — *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

District of Columbia. — *Morrow v. Edwards*, 20 D. C. 475.

Georgia. — *Cole v. Dyer*, 29 Ga. 436.

Illinois. — *People v. North Chicago R. Co.*, 88 Ill. 537; *Chicago v. People*, 80 Ill. 496.

Indiana. — See also *State v. Gordon*, 87 Ind. 173.

Kansas. — *Miller v. Palermo*, 12 Kan. 16.

Kentucky. — *Chambers v. Baptist Educational Soc.*, 1 B. Mon. (Ky.) 220.

Maryland. — *Regents of State University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

Massachusetts. — *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344; *Atty.-Gen. v. Adonai Shomo Corp.*, 167 Mass. 424; *Kenney v. Consumers' Gas Co.*, 142 Mass. 417; *Rice v. National Bank*, 126 Mass. 300; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50. But see *Hastings v. Amherst, etc., R. Co.*, 9 Cush. (Mass.) 596.

Minnesota. — *State v. Tracy*, 48 Minn. 497. See also *State v. Sharp*, 27 Minn. 38.

Missouri. — *Tyree v. Bingham*, 100 Mo. 451.

New Jersey. — *Richman v. Adams*, 59 N. J. L. 289; *Steelman v. Vickers*, 51 N. J. L. 180; *Campbell v. Wainright*, 50 N. J. L. 555; *Gibbs v. Somers Point*, 49 N. J. L. 515; *Terhune v. Potts*, 47 N. J. L. 218; *West Jersey R. Co. v. Cape May, etc., R. Co.*, 34 N. J. Eq. 164; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755; *State v. Paterson, etc., Turnpike Co.*, 21 N. J. L. 9.

North Carolina. — *Houston v. Neuse River Nav. Co.*, 8 Jones L. (53 N. Car.) 477.

Ohio. — See *Mt. Pleasant Bank Case*, 5 Ohio 249.

Oregon. — *State v. Douglas County Road Co.*, 10 Oregon 201.

Pennsylvania. — *Com. v. Allegheny Bridge Co.*, 20 Pa. St. 185; *Murphy v. Farmers' Bank*,

filed on the relation of a private person against an officer of a corporation on grounds affecting his individual title, although the same objections may apply to the title of every other officer and member of the corporation, and the application is incidentally, in effect, against the whole corporation.¹ In a few jurisdictions private relators have been permitted to maintain proceedings for the dissolution of a corporation.²

(4) *Officers of Private Corporations.* — Quo warranto proceedings to try the right to a corporate office may be brought by the state through its designated officers,³ or, under the statutes of most states, by stockholders⁴ or directors.⁵ One without interest cannot maintain the proceeding.⁶ A claimant to the office has sufficient interest to maintain the proceeding.⁷ Acquiescence or estoppel may bar a particular relator.⁸

(5) *Franchises.* — The state through its designated officers may maintain quo warranto to try the right to a franchise,⁹ and by statute persons specially interested may maintain the proceeding as relators or otherwise.¹⁰ In the case of a federal franchise the proceedings must be brought in the name of the United States.¹¹

2. Against Whom Maintainable — a. GENERAL RULE AS TO DEFENDANTS.

— Quo warranto proceedings must be brought directly against the person or

20 Pa. St. 415; *Com. v. Philadelphia, etc.*, R. Co., 20 Pa. St. 518; *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392; *Com. v. Railroad Co.*, 10 W. N. C. (Pa.) 400; *Com. v. Burrell*, 7 Pa. St. 39.

Wisconsin. — *State v. West Winconsin R. Co.*, 34 Wis. 208.

See also *infra*, this subdivision, (5) *Franchises*, and *supra*, (2) *Public or Municipal Corporations*.

As to Particular Franchises of Corporations, other than the right to be a corporation, see *infra*, this title, *Use of Remedy in Particular Cases — Franchises*.

1. *Corporate Existence Collaterally Determined.* — *Rex v. White*, 5 Ad. & El. 613, 31 E. C. L. 400; *Terhune v. Potts*, 47 N. J. L. 218; *State v. Tolan*, 33 N. J. L. 195; *State v. Goowin*, 69 Tex. 55. *Contra*, *Steelman v. Vickers*, 51 N. J. L. 180, which was the case of a municipal corporation. *Compare* *Gibbs v. Somers Point*, 49 N. J. L. 518. See also *infra*, this section, 2. c. *Private Corporations*.

2. *Private Relators.* — *Capital City Water Co. v. State*, 105 Ala. 422; *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151; *Tuscaloosa Scientific, etc., Assoc. v. State*, 58 Ala. 54; *State v. Charleston*, 1 Treadw. (S. Car.) 36. *Compare* *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *State v. Sharp*, 27 Minn. 38. See also *Hartnett v. Plumbers' Supply Co.*, 169 Mass. 229.

The Fact that the Relator Owns Lands Which the Corporation Has Appropriated without compensation does not give him such an interest as enables him to maintain the action to dissolve the corporation. His interest is not one in which the public is concerned, being merely a right to sue for damages. *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182.

The Fact that the Relator Is a Creditor of the Corporation and has an action pending for the recovery of the debt, makes him competent. *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392.

3. *State.* — *Crawford v. State*, 52 Ohio St. 62. See also *People v. Nappa*, 80 Mich. 487.

4. *Stockholders.* — *State v. Vail*, 53 Mo. 110;

Com. v. Stevens, 168 Pa. St. 582; *State v. Horan*, 22 Wash. 197. But see *State v. Lockerby*, 57 Minn. 411.

Under the *Ohio* statute, the members of a private corporation cannot maintain quo warranto to try the right to an office in the corporation, but the proceedings must be brought by the attorney-general or prosecuting attorney. *Crawford v. State*, 52 Ohio St. 62.

5. *Directors.* — *Place v. People*, 83 Ill. App. 84.

6. *Persons Without Interest.* — *People v. Nappa*, 80 Mich. 487. See *State v. Vail*, 53 Mo. 110.

7. *Claimant of Corporate Office.* — *Place v. People*, 192 Ill. 160; *Com. v. Filer*, 30 Pittsb. Leg. J. (Pa.) 286; *State v. Horan*, 22 Wash. 197. See *People v. De Mill*, 15 Mich. 164, 93 Am. Dec. 179.

8. *Acquiescence or Estoppel.* — *People v. Moore*, 73 Ill. 132. See also *supra*, this title, *Principles Governing Use of Remedy — Acquiescence and Estoppel*.

9. *State.* — *People v. Golden Rule*, 114 Ill. 34; *State v. Smith*, 32 Ind. 213. See also generally *infra*, this section.

The State May Waive any breach of conditions expressed or implied, and the court cannot give judgment for the seizure of the franchises or privileges unless the commonwealth is a party in interest to the suit and thus assents to the judgment. *Com. v. Union F. & M. Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50; *State v. Cahaba*, 30 Ala. 67; *People v. North Chicago R. Co.*, 88 Ill. 544; *People v. Grand River Bridge Co.*, 13 Colo. 11, 16 Am. St. Rep. 182; *Chambers v. Baptist Educational Soc.*, 1 B. Mon. (Ky.) 220; *Com. v. Farmers' Bank*, 2 Grant Cas. (Pa.) 392.

10. *Persons Specially Interested.* — *State v. Smith*, 32 Ind. 213; *Rice v. National Bank*, 126 Mass. 300; *Banton v. Wilson*, 4 Tex. 400. See *People v. Regents of State University*, 24 Colo. 175.

11. *Federal Franchise.* — *State v. Curtis*, 35 Conn. 379, 95 Am. Dec. 263. See also *Valentine v. Berrien Springs Water Power Co.*, (Mich. 1901) 87 N. W. Rep. 370.

persons whom it is sought to oust from the office or franchise in question.¹ No other person is a necessary or proper party defendant,² certainly not persons who have no interest in the proceedings and against whom no relief is sought.³ But the court will protect the rights of third persons.⁴ The joinder of parties is a question of procedure, beyond the scope of this article.⁵

b. PUBLIC OR MUNICIPAL CORPORATIONS. — It is sometimes held that quo warranto proceedings to oust a *de facto* public or municipal corporation from its corporate franchise may be brought directly against the corporation in its corporate name.⁶ But the better opinion seems to be that where the proceedings are based upon an original lack of authority the proceedings must be against the individuals who unlawfully assume to be a municipal corporation, while in cases of forfeiture, or the usurpation of particular franchises, the proceedings should be against the corporation as such.⁷ This is the rule as to private corporations, and there seems to be no reason for any distinction.⁸ Sometimes it has been held that the question of corporate existence could be tried in proceedings against the officers of the municipality.⁹ But in the absence of statutory authority for such a proceeding, while corporate existence may be determined as an incident to the trial of the right to exercise a municipal office, the judgment is not binding upon the corporation.¹⁰ Quo warranto to test the right of a legal municipality to exercise jurisdiction over certain territory, as in cases of an attempted extension of corporate limits, may

1. Defendants. — *People v. O'Hair*, 128 Ill. 20. See *supra*, this title, *Definition*, etc.; *Nature and Origin of Remedy*.

2. State v. Simpkins, 77 Iowa 676; *State v. Atchison*, etc., R. Co., 24 Neb. 143, 8 Am. St. Rep. 164; *Com. v. Masonic Home*, 20 Pa. Co. Ct. 465, 6 Pa. Dist. 732; *State v. Shank*, 36 W. Va. 223.

A Judgment Against Deputies, at the relation of an appointee to fill a vacancy created *ipso facto* by operation of law, is proper. *People v. Shorb*, 100 Cal. 537, 38 Am. St. Rep. 310.

3. Persons Against Whom No Relief Sought. — *Foard v. Hall*, 111 N. Car. 369.

4. Rights of Third Persons Protected. — *State v. Atchison*, etc., R. Co., 24 Neb. 143, 8 Am. St. Rep. 164.

5. Joinder of Parties. — See the title QUO WARRANTO, in *ENCYC. OF PL. AND PR.*, vol. 17, p. 383.

6. Against Public or Municipal Corporations in Corporate Name. — *Rex v. Chester*, cited in *Rex v. Amery*, 2 T. R. 566; *People v. Riverside*, 66 Cal. 288; *State v. North*, 42 Conn. 79; *Scrafford v. Gladwin County*, 41 Mich. 648; *State v. Crow Wing County*, 66 Minn. 519; *State v. Fridley Park*, 61 Minn. 146; *State v. Minnetonka*, 57 Minn. 526; *State v. Tracy*, 48 Minn. 497; *State v. Atlantic Highlands Borough Commission*, 50 N. J. L. 457; *State v. Bradford*, 32 Vt. 50.

7. When Against Individuals and When Against Corporation. — *People v. Bruenner*, 168 Ill. 485; *People v. Peoria*, 166 Ill. 522; *Cheshire v. People*, 116 Ill. 493; *People v. Spring Valley*, 129 Ill. 169; *District No. 7 v. People*, 75 Ill. App. 539; *State v. Independent School Dist.*, 44 Iowa 227; *State v. Topeka*, 31 Kan. 452; *State v. Fleming*, 158 Mo. 558; *State v. Weatherby*, 45 Mo. 18; *State v. Jenkins*, 25 Mo. App. 487; *State v. Uridil*, 37 Neb. 371; *Ewing v. State*, 81 Tex. 172.

8. See infra, this section, *Private Corporations*.

9. Against Officers — England. — *Rex v. Carmarthen*, 1 W. Bl. 187. *Contra*, *Reg. v. Taylor*, 11 Ad. & El. 949, 39 E. C. L. 280.

Arkansas. — *Beavers v. State*, 60 Ark. 124; *State v. Leatherman*, 38 Ark. 83 (decided under a special constitutional provision).

California. — *Contra*, *People v. Gunn*, 85 Cal. 244.

Connecticut. — *Contra*, *State v. North*, 42 Conn. 79.

Dakota. — *Territory v. Armstrong*, 6 Dak. 226.

Illinois. — *Cheshire v. People*, 116 Ill. 493.

Michigan. — *People v. Gladwin County*, 41 Mich. 647; *Atty.-Gen. v. Page*, 38 Mich. 286; *Fractional School Dist. No. 1 v. School Inspectors*, 27 Mich. 3; *People v. Maynard*, 15 Mich. 463.

Minnesota. — *State v. Sharp*, 27 Minn. 38; *State v. Parker*, 25 Minn. 218.

Missouri. — *State v. Coffee*, 59 Mo. 59; *State v. Weatherby*, 45 Mo. 17; *State v. Scott*, 17 Mo. 521.

Nebraska. — *State v. Uridil*, 37 Neb. 371.

Texas. — *Mathews v. State*, 82 Tex. 577; *Ewing v. State*, 81 Tex. 172; *Largen v. State*, 76 Tex. 323; *State v. Goowin*, 69 Tex. 57. See also *State v. Wofford*, 90 Tex. 514.

Wisconsin. — See also *State v. Tuttle*, 53 Wis. 45; *State v. Cram*, 16 Wis. 343.

Since it may be impracticable to make all the inhabitants of a *de facto* municipal corporation parties defendant, it has been held sufficient to proceed against the persons assuming to compose the governing body. *Ewing v. State*, 81 Tex. 172.

10. Scrafford v. Gladwin County, 41 Mich. 652; *State v. Goowin*, 69 Tex. 57.

Quo Warranto Against a Single Officer of a municipality does not make the corporation a party any more than it would be in a private suit. *Scrafford v. Gladwin County*, 41 Mich. 648.

be brought directly against the municipality,¹ but when the right to exercise jurisdiction over territory depends upon the legality of an organization as a municipal corporation, the individuals assuming jurisdiction are the proper defendants according to the usual rule already stated.²

c. PRIVATE CORPORATIONS. — It is usually held that quo warranto proceedings to oust from a corporate franchise must be brought against the individuals charged with the unlawful user of the franchise, instead of against the corporation,³ and it is said that the effect of bringing the proceedings against the corporation in its corporate name is to admit the corporate existence.⁴ This rule seems correct in principle where the exercise of corporate franchises is wholly unauthorized from the beginning. Where, however, there was originally a valid corporate organization, and it is sought to enforce a forfeiture, or where it is sought merely to oust a corporation from the exercise of particular franchises unlawfully assumed, the proceedings must be against the corporation and not merely against its officers, agents, or stockholders.⁵

1. Territorial Jurisdiction of Corporation. — *People v. Oakland*, 92 Cal. 614; *People v. Peoria*, 166 Ill. 517. See also *East Dallas v. State*, 73 Tex. 371.

2. Territory v. Armstrong, 6 Dak. 226; *People v. Spring Valley*, 129 Ill. 169; *District No. 7 v. People*, 75 Ill. App. 540; *State v. Independent School Dist.*, 44 Iowa 227; *State v. Fleming*, 147 Mo. 1; *State v. McReynolds*, 61 Mo. 203.

3. Ouster from Corporate Franchise — Individuals. — *People v. Spring Valley*, 129 Ill. 169; *Mud Creek Draining Co. v. State*, 43 Ind. 236; *State v. Brown*, 33 Miss. 500; *State v. Fleming*, 147 Mo. 1; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262; *State v. American Eclectic Medical College*, 6 Ohio Dec. (Reprint) 844, 8 Am. L. Rec. 422. See also *Com. v. Frankfort*, 13 Bush (Ky.) 186. *Contra*, *People v. Flint*, 64 Cal. 49.

Numerous Parties — Parties by Representation. — See *State v. Independent School Dist.*, 44 Iowa 227; *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151; *State v. Sherman*, 22 Ohio St. 411.

4. Bringing Proceedings Against Corporation Held to Admit Corporate Existence — England. — *Rex v. Amery*, 2 T. R. 515; *Rex v. Carmarthen*, 1 W. Bl. 187, 2 Burr. 869.

California. — *People v. Stanford*, 77 Cal. 360. *Contra*, *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172.

Illinois. — *People v. Bruennemer*, 168 Ill. 482; *Distilling, etc., Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200; *North, etc., Rolling Stock Co. v. People*, 147 Ill. 234; *People v. Spring Valley*, 129 Ill. 169.

Indiana. — *Mud Creek Draining Co. v. State*, 43 Ind. 236.

Iowa. — *State v. Independent School Dist.*, 44 Iowa 227.

Kansas. — *State v. Ford County*, 12 Kan. 444.

Massachusetts. — *Com. v. Tenth Massachusetts Turnpike Corp.*, 5 Cush. (Mass.) 509.

Michigan. — *Nelson v. McArthur*, 38 Mich. 204.

Mississippi. — *State v. Commercial Bank*, 33 Miss. 474; *Commercial Bank v. State*, 6 Smed. & M. (Miss.) 599.

Missouri. — *State v. Fleming*, 147 Mo. 1;

State v. Hannibal, etc., Gravel Road Co., 37 Mo. App. 496.

Nebraska. — See also *State v. Uridil*, 37 Neb. 371.

New Hampshire. — See also *State v. Olcott*, 6 N. H. 77.

New York. — *People v. Ravenswood, etc., Turnpike, etc., Co.*, 20 Barb. (N. Y.) 518; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33. *Contra*, *People v. Hudson Bank*, 6 Cow. (N. Y.) 217.

Ohio. — *State v. Cincinnati Gas-Light, etc., Co.*, 18 Ohio St. 262.

5. Forfeiture or Ouster from Particular Franchises — Corporation — England. — *Rex v. Amery*, 2 T. R. 515; *Rex v. Carmarthen*, 1 W. Bl. 187, 2 Burr. 869.

Alabama. — *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151.

Arkansas. — *Smith v. State*, 21 Ark. 294.

California. — *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172; *People v. Stanford*, 77 Cal. 360.

Illinois. — *People v. Bruennemer*, 168 Ill. 485; *People v. Peoria*, 166 Ill. 522; *People v. Spring Valley*, 129 Ill. 169; *Cheshire v. People*, 116 Ill. 493; *People v. Board of Education*, 101 Ill. 308, 40 Am. Rep. 196.

Iowa. — *State v. Independent School Dist.*, 44 Iowa 227.

Kansas. — *State v. Topeka*, 31 Kan. 452.

Massachusetts. — *Com. v. Tenth Massachusetts Turnpike Corp.*, 5 Cush. (Mass.) 509.

Michigan. — *Atty.-Gen. v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287; *Scraftford v. Gladwin County*, 41 Mich. 647; *Nelson v. McArthur*, 38 Mich. 204.

Minnesota. — *State v. Somerby*, 42 Minn. 55.

Mississippi. — *Compare State v. Brown*, 33 Miss. 500.

Missouri. — *State v. Fleming*, 147 Mo. 1, citing 19 AM. AND ENG. ENCYC. OF LAW 682; *State v. Hannibal, etc., County Gravel Road Co.*, 37 Mo. App. 496.

Montana. — *Territory v. Virginia Road Co.*, 2 Mont. 103.

Nebraska. — *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164, 38 Neb. 437.

New Hampshire. — *State v. Barron*, 57 N. H. 502.

New York. — *People v. Ravenswood, etc., Turnpike, etc., Co.*, 20 Barb. (N. Y.) 518; *Peo-*

Proceedings to test the right of a foreign corporation to do business within the state must be brought directly against the corporation which is a necessary party.¹

VI. PROPER OFFICER TO PROSECUTE — 1. In General. — Quo warranto should be prosecuted by the law officer who represents the sovereign from whom the franchise or office originates.² The right of particular officers to prosecute is sometimes rested upon the common-law powers of such officers,³ but usually the matter is regulated by express statutory or constitutional provisions, the attorney-general or the attorney for the county being designated as the proper officer to prosecute.⁴ Such express provisions are exclusive,⁵ though, of course, a statute cannot take away the power to prosecute if conferred by the constitution.⁶

2. Particular Officers. — Usually where the proceeding is on behalf of the state at large, and in a matter which concerns the state at large, the attorney-general is the proper prosecuting officer,⁷ as in such proceedings instituted

ple *v. Bristol*, etc., Turnpike Road, 23 Wend. (N. Y.) 222; *People v. Rensselaer*, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; *People v. Geneva College*, 5 Wend. (N. Y.) 211; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

Ohio. — *State v. Robinson*, 9 Ohio Dec. (Reprint) 383, 12 Cinc. L. Bul. 269; *State v. Taylor*, 25 Ohio St. 279; *State v. Cincinnati Gas-Light*, etc., Co., 18 Ohio St. 262.

Pennsylvania. — *Com. v. Northeastern El. R. Co.*, 161 Pa. St. 409.

Virginia. — *Com. v. James River Co.*, 2 Va. Cas. 190.

1. Ousting Foreign Corporation from Right to Do Business in State. — *State v. Somerby*, 42 Minn. 55. As to appropriateness of remedy, see *infra*, this title, *Use of Remedy in Particular Cases* — subdiv. 3, *b. Right of Foreign Corporation to Do Business in State*.

2. Law Officer of Sovereign. — *People v. Colorado Eastern R. Co.*, 8 Colo. App. 301; *State v. Gleason*, 12 Fla. 214; *Com. v. Fowler*, 10 Mass. 293; *State v. Stewart*, 32 Mo. 379. But compare *People v. Regents of State University*, 24 Colo. 175. See generally *infra*, this section, and see *State v. Ashley*, 1 Ark. 304; *State v. Stein*, 13 Neb. 529.

3. Under Common-law Powers. — *Boyd v. Nebraska*, 143 U. S. 145; *State v. Keena*, 64 Conn. 215; *State v. Gleason*, 12 Fla. 212; *Com. v. Allen*, 128 Mass. 310; *State v. Equitable Loan*, etc., Assoc., 142 Mo. 325. But see *State v. Seattle Gas*, etc., Co., (Wash. 1902) 68 Pac. Rep. 946; *Hawkins v. State*, 81 Md. 306.

4. Under Statutory Provisions — *Florida*. — *State v. Gleason*, 12 Fla. 190.

Illinois. — *Porter v. People*, 182 Ill. 516.

Indiana. — *Eaton v. State*, 7 Blackf. (Ind.) 65.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333.

Maine. — *Reed v. Cumberland*, etc., Canal Corp., 65 Me. 132.

Maryland. — *Hawkins v. State*, 81 Md. 306.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

Mississippi. — *State v. Morgan*, (Miss. 1902) 31 So. Rep. 789.

Missouri. — *State v. Equitable Loan*, etc., Assoc., 142 Mo. 337; *State v. McMillan*, 108 Mo. 153; *Tyree v. Bingham*, 100 Mo. 451;

State v. Frazier, 98 Mo. 426; *State v. Rose*, 84 Mo. 198.

New Hampshire. — *Osgood v. Jones*, 60 N. H. 548.

Ohio. — *Crawford v. State*, 52 Ohio St. 62; *State v. Taylor*, 50 Ohio St. 120; *State v. Anderson*, 45 Ohio St. 196; *State v. Thompson*, 34 Ohio St. 366; *State v. Buckland*, 5 Ohio St. 216.

Oregon. — *State v. Stevens*, 29 Oregon 464.

Pennsylvania. — *Com. v. Commercial Bank*, 28 Pa. St. 391; *Com. v. Burrell*, 7 Pa. St. 34.

Texas. — *Banton v. Wilson*, 4 Tex. 400.

West Virginia. — *State v. Matthews*, 44 W. Va. 372.

Wisconsin. — *State v. Kromer*, 38 Wis. 548.

5. Statutes Exclusive. — *Houston v. Neuse River Nav. Co.*, 8 Jones L. (53 N. Car.) 476; *Com. v. Reed*, 18 Pittsb. Leg. J. (Pa.) 131; *State v. International*, etc., R. Co., 89 Tex. 562; *State v. Seattle Gas*, etc., Co., (Wash. 1902) 68 Pac. Rep. 946.

6. State v. Equitable Loan, etc., Assoc., 142 Mo. 325, holding that a statute making it the duty of the supervisor of building and loan associations to institute proceedings against such associations in the Circuit Court did not deprive the attorney-general of power to institute quo warranto in the Supreme Court under its constitutional jurisdiction.

7. Attorney-General — *Florida*. — *State v. Gleason*, 12 Fla. 190.

Kansas. — *State v. Regents of University*, 55 Kan. 389.

Kentucky. — *Com. v. Lexington*, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 397; *Wheeler v. Com.*, 98 Ky. 59.

Massachusetts. — *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Haupt v. Rogers*, 170 Mass. 71; *Rice v. National Bank*, 126 Mass. 300.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

Mississippi. — *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

Missouri. — *State v. McMillan*, 108 Mo. 153; *State v. Rose*, 84 Mo. 198; *State v. Frazier*, 98 Mo. 426.

New Hampshire. — *Osgood v. Jones*, 60 N. H. 548.

Ohio. — *Crawford v. State*, 52 Ohio St. 62; *State v. Taylor*, 50 Ohio St. 120; *State v. Anderson*, 45 Ohio St. 196.

originally in the Supreme Court or court of last resort,¹ though sometimes the attorney-general is the proper officer to act on behalf of the state even in the lower courts.² The district attorney or other prosecuting officer of the county is usually the proper officer to represent the people in such proceedings in the county and other inferior courts,³ and sometimes it has been held that he is the proper prosecutor even in proceedings in the appellate or Supreme Court.⁴

VII. BURDEN OF PROOF. — At common law, and in the absence of statute changing the rule, the burden of showing right or title to the office or franchise usurped is upon the respondent,⁵ and the rule is the same even under modern

Pennsylvania. — *Com. v. Burrell*, 7 Pa. St. 34.
West Virginia. — *State v. Matthews*, 44 W. Va. 372.

Wisconsin. — *State v. Kromer*, 38 Wis. 548.
1. Attorney-General in Supreme Court. — *Caldwell v. Bell*, 6 Ark. 231; *State v. Frazier*, 28 Neb. 438; *State v. Cones*, 15 Neb. 444; *State v. Heinmiller*, 38 Ohio St. 110; *State v. Thompson*, 34 Ohio St. 365; *State v. Milwaukee, etc.*, R. Co., 45 Wis. 585; *State v. Baker*, 38 Wis. 77.

2. Attorney-General in Lower Courts. — *Vrooman v. Michie*, 69 Mich. 44; *Lindsey v. Atty.-Gen.*, 33 Miss. 525; *State v. Thompson*, 34 Ohio St. 367; *Fraternal Guardians' Assigned Estate*, 159 Pa. St. 603.

In *Little v. State*, 75 Tex. 618, a proceeding in quo warranto was instituted by the attorney-general and the district attorney in the District Court.

3. District or County Attorney — *Colorado.* — *People v. Regents of University*, 24 Colo. 175; *In re Fire, etc.*, Com'rs, 19 Colo. 482; *Atchison, etc.*, R. Co. *v. People*, 5 Colo. 60.

Dakota. — *Territory v. Armstrong*, 6 Dak. 226.

Idaho. — *People v. Green*, 1 Idaho 235.
Indiana. — *Eaton v. State*, 7 Blackf. (Ind.) 65; *Eel River R. Co. v. State*, 155 Ind. 433.

Iowa. — *Davis v. Best*, 2 Iowa 96.
Kansas. — *Bartlett v. State*, 13 Kan. 99; *State v. Allen*, 5 Kan. 213.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333.

Maryland. — *Contra*, *Hawkins v. State*, 81 Md. 306.

Michigan. — *Pound v. Atty.-Gen.*, 119 Mich. 528.

Mississippi. — *Brady v. Howe*, 50 Miss. 607.

Missouri. — *State v. McMillan*, 108 Mo. 157; *State v. Frazier*, 98 Mo. 426; *State v. Rose*, 84 Mo. 198; *State v. Scott*, 17 Mo. 521.

Montana. — *Territory v. Virginia Road Co.*, 2 Mont. 103.

Nebraska. — *State v. Frazier*, 28 Neb. 438.

Ohio. — *State v. Thompson*, 34 Ohio St. 367.

Oregon. — *State v. Stevens*, 29 Oregon 471; *State v. Douglas County Road Co.*, 10 Oregon 201.

Pennsylvania. — *Gilroy v. Com.*, 105 Pa. St. 484; *Com. v. Commercial Bank*, 28 Pa. St. 391; *Com. v. De Turk*, 6 Pa. Co. Ct. 94.

Texas. — *Fowler v. State*, 68 Tex. 30; *Morris v. State*, 62 Tex. 738; *State v. Southern Pac. R. Co.*, 24 Tex. 80; *Hussey v. Heim*, 17 Tex. Civ. App. 153.

Utah. — *People v. Cohn*, 7 Utah 352; *People v. Clayton*, 4 Utah 433.

Washington. — *State v. Seattle Gas, etc., Co.*, (Wash. 1902) 68 Pac. Rep. 946.

Upon Reaching the Supreme Court the attorney-general at once becomes enitled to control the further progress of the proceeding. *People v. Regents of State University*, 24 Colo. 175.

4. State v. Majors, 16 Kan. 440; *State v. Allen*, 5 Kan. 213; *State v. Kelly*, 2 Kan. App. 178. See also *State v. McMillan*, 108 Mo. 153.

5. Burden on Respondent — *England.* — *Rex v. Leigh*, 4 Burr. 2143.

Alabama. — *State v. Foster*, 130 Ala. 154.

Arkansas. — *State v. McDiarmid*, 27 Ark. 176; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *State v. Ashley*, 1 Ark. 513.

California. — *People v. Volcano Canyon Toll-Road Co.*, 100 Cal. 87.

Colorado. — *Lyons, etc., Road Co. v. People*, (Colo. 1902) 68 Pac. Rep. 275.

Connecticut. — *State v. Chatfield*, 71 Conn. 104; *State v. Lashar*, 71 Conn. 540.

Florida. — *State v. Gleason*, 12 Fla. 265; *Simonon v. State*, (Fla. 1902) 31 So. Rep. 821.

Illinois. — *McGahan v. People*, 191 Ill. 496; *People v. Bruennemer*, 168 Ill. 482; *People v. Peoria*, 166 Ill. 517; *Kamp v. People*, 141 Ill. 16; *People v. Cooper*, 139 Ill. 461; *Gunterman v. People*, 138 Ill. 522; *Swarth v. People*, 109 Ill. 632; *Chicago City R. Co. v. People*, 73 Ill. 541; *People v. Ridgley*, 21 Ill. 65; *Clark v. People*, 15 Ill. 213; *Latham v. People*, 95 Ill. App. 528; *Gorman v. People*, 78 Ill. App. 385.

Michigan. — *Larke v. Crawford*, 28 Mich. 88; *Keeler v. Robertson*, 27 Mich. 116; *People v. Mayworm*, 5 Mich. 146. See also *People v. Miles*, 2 Mich. 348.

Minnesota. — *State v. Sharp*, 27 Minn. 38; *State v. Tracy*, 48 Minn. 497.

Mississippi. — *State v. Brown*, 34 Miss. 688.

Missouri. — *State v. Hogan*, 163 Mo. 43; *State v. Powles*, 136 Mo. 376; *State v. McCann*, 13 Mo. App. 588, *affirmed* 88 Mo. 386. But see *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

Nebraska. — *State v. Davis*, (Neb. 1902) 90 N. W. Rep. 232.

Nevada. — *State v. Haskell*, 14 Nev. 209.

New Hampshire. — *State v. Barron*, 57 N. H. 502.

New York. — *People v. Pease*, 30 Barb. (N. Y.) 588; *People v. Thornton*, 25 Hun (N. Y.) 456, 60 How. Pr. (N. Y.) 457; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; *People v. Bartlett*, 6 Wend. (N. Y.) 422; *People v. Perley*, 80 N. Y. 624; *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312, *dismissing appeal* 7 Lans. (N. Y.) 274, 1 Thomp. & C. (N. Y.) 158.

Ohio. — *State v. Beecher*, 15 Ohio 723.

Pennsylvania. — *Com. v. Hargest*, 2 Dauphin Co. Rep. (Pa.) 409.

statutory regulations as to form where the proceeding is really by and in behalf of the state and not merely formally so.¹ But where an original right in the respondent is conceded or proved the burden of showing a forfeiture is upon the relator or the state,² and the burden of showing facts in excuse or avoidance of the forfeiture is upon the respondent.³ In proceedings in behalf of a private relator, under statutes which permit his claim to be tried in such proceeding the burden is upon the relator to show a good title in himself even though the proceeding is, in form, prosecuted in behalf of the state,⁴ though the burden may be shifted as in other cases by the state of the pleadings.⁵ In such case the rights of three parties are involved in the decision, viz., the relator, the respondent, and the public, and the court may oust the respondent if found not entitled to the office, without necessarily determining that the relator is entitled. The burden is upon each party to establish his own title.⁶

VIII. EVIDENCE. — The evidence by which the title to an office or a franchise may be established has been appropriately treated in other articles in this work.⁷

IX. JURY TRIAL. — It is the usual practice to submit issues of fact arising in quo warranto proceedings to a jury,⁸ many cases holding that a party has

Rhode Island. — *State v. Kearn*, 17 R. I. 391.
Tennessee. — *State v. Allen*, (Tenn. Ch. 1900) 57 S. W. Rep. 182.

Utah. — *People v. Clayton*, 4 Utah 421; *People v. Jack*, 4 Utah 438.

Vermont. — *State v. Smith*, 48 Vt. 266. *Contra*, *State v. Hunton*, 28 Vt. 594.

Wisconsin. — *State v. Norton*, 46 Wis. 332; *Atty.-Gen. v. Barstow*, 4 Wis. 567.

1. *Montgomery v. State*, 107 Ala. 384; *Territory v. Hauxhurst*, 3 Dak. 208; *State v. Townsley*, 56 Mo. 107; *People v. Clayton*, 4 Utah 433. See also cases cited in preceding note.

2. **Burden of Showing Forfeiture.** — *North*, etc., *Rolling Stock Co. v. People*, 147 Ill. 246; *State v. Talbot*, 123 Mo. 69; *State v. Haskell*, 14 Nev. 209. See also *Territory v. Virginia Road Co.*, 2 Mont. 109.

3. *People v. Hillsdale*, etc. *Turnpike Road*, 23 Wend. (N. Y.) 254.

4. **Burden on Relator to Show His Own Title** — *Connecticut.* — *Phelan v. Walsh*, 62 Conn. 287. *Kansas.* — *Tarbox v. Sughrue*, 36 Kan. 228; *State v. Cobb*, 2 Kan. 48. But compare *Brown v. Jeffries*, 42 Kan. 605.

Kentucky. — *Tillman v. Otter*, 93 Ky. 600. *Louisiana.* — *State v. Miltenberger*, 33 La. Ann. 263.

Michigan. — *Atty.-Gen. v. May*, 99 Mich. 538; *Vrooman v. Michie*, 69 Mich. 42; *Frey v. Michie*, 68 Mich. 323; *People v. Molitor*, 23 Mich. 341.

Minnesota. — *State v. Oftedal*, 72 Minn. 498. *Mississippi.* — *Andrews v. State*, 69 Miss. 740.

Missouri. — *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

Nebraska. — *State v. Moores*, 52 Neb. 634; *State v. Davis*, (Neb. 1902) 90 N. W. Rep. 232; *State v. Boyd*, 34 Neb. 435.

New York. — *People v. Perley*, 80 N. Y. 624; *People v. Lacoste*, 37 N. Y. 192; *People v. Anthony*, 6 Hun (N. Y.) 142; *People v. Clute*, 52 N. Y. 576. See also *People v. Thacher*, 55 N. Y. 535, 14 Am. Rep. 312.

North Carolina. — *Stanford v. Ellington*, 117 N. Car. 158, 53 Am. St. Rep. 580; *Roberts v. Calvert*, 98 N. Car. 580.

Ohio. — *State v. Hay*, Wright (Ohio) 96.

Pennsylvania. — *Com. v. Hargest*, 2 Dauphin Co. Rep. (Pa.) 409.

Vermont. — See also *State v. Hunton*, 28 Vt. 594.

Wisconsin. — *Atty.-Gen. v. Barstow*, 4 Wis. 567.

See also *People v. Clayton*, 4 Utah 433; *Montgomery v. State*, 107 Ala. 384.

5. **Burden Shifted by Pleadings.** — *Brown v. Jeffries*, 42 Kan. 605.

6. **Burden on Each to Establish His Own Title.** — *Keeler v. Robertson*, 27 Mich. 116; *People v. Connor*, 13 Mich. 238; *People v. Thacher*, 55 N. Y. 525, 14 Am. Rep. 312; *State v. Norton*, 46 Wis. 332; *Atty.-Gen. v. Barstow*, 4 Wis. 567.

The default of the respondent does not establish the relator's title, nor entitle him to judgment, though it does authorize a judgment of ouster. *People v. Connor*, 13 Mich. 238.

7. **Evidence of Title to Office or Franchise.** — See titles CORPORATIONS (PRIVATE), vol. 7, p. 620; ELECTIONS, vol. 10, p. 552; PUBLIC OFFICERS, ante; and the titles of other particular offices and franchises.

8. **Facts Usually Submitted to Jury** — *England.* — *Rex v. Bell*, 2 Stra. 995; *Nevill v. Payne*, Cro. Eliz. 304; *Rex v. Phillips*, 1 Burr. 293; *Rex v. Carpenter*, 2 Show. 47; *Rex v. Malden*, 4 Burr. 2135; *Strata Mercella's Case*, 9 Coke 23; *Atty.-Gen. v. Farnham*, Hardres 504; *Rex v. Bennett*, 1 Stra. 101; *Rex v. Higgins*, T. Raym. 484; *Darell v. Bridge*, 1 W. Bl. 46; *Rex v. Cambridge*, 4 Burr. 2010; *Rex v. Francis*, 2 T. R. 484; *Rex v. Mein*, 3 T. R. 596.

United States. — *U. S. v. Addison*, 6 Wall. (U. S.) 291.

Alabama. — *Lee v. State*, 49 Ala. 43.

Colorado. — *Londoner v. People*, 15 Colo. 570.

Florida. — *Buckman v. State*, 34 Fla. 48; *Van Dorn v. State*, 34 Fla. 62.

Georgia. — *Hardin v. Colquitt*, 63 Ga. 589.

Illinois. — *People v. Golden Rule*, 114 Ill. 34; *Hay v. People*, 59 Ill. 94; *Wight v. People*, 15 Ill. 417; *Donnelly v. People*, 11 Ill. 552, 52 Am. Dec. 459.

a constitutional or statutory right to a jury trial in such proceedings.¹ Other cases have taken a contrary view.² Of course, if there is no issue of fact, there is no right to a jury trial in any event.³ The constitutional right to a jury trial has been elsewhere fully considered.⁴

X. JUDGMENT — 1. Ouster. — Where the respondent is defeated in the proceeding, the judgment is ouster from the office, franchise, or privilege usurped or forfeited.⁵

2. Fine — At Common Law. — As the information in the nature of quo warranto was originally regarded as a criminal proceeding, the judgment upon conviction was formerly fine as well as ouster, though at a very early date the proceeding lost its character and the fine came to be merely nominal.⁶ The

Louisiana. — State *v.* Gilmore, 23 La. Ann. 606.

Massachusetts. — Com. *v.* Tenth Massachusetts Turnpike Corp., 11 Cush. (Mass.) 171; Atty.-Gen. *v.* Sullivan, 163 Mass. 450; Com. *v.* Dearborn, 15 Mass. 125.

Michigan. — Harbaugh *v.* People, 33 Mich. 241; Coon *v.* Plymouth Plank Road Co., 32 Mich. 248; People *v.* Doesburg, 16 Mich. 133; People *v.* Sackett, 14 Mich. 243.

Missouri. — State *v.* Townsley, 56 Mo. 109. *Nebraska.* — State *v.* Moores, 56 Neb. 1, on rehearing, 58 Neb. 285.

New York. — People *v.* Richardson, 4 Cow. (N. Y.) 97, 100, note; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33, and note.

Ohio. — State *v.* Urbana, etc., Mut. Ins. Co., 14 Ohio 6.

Pennsylvania. — Com. *v.* Smith, 4 Binn. (Pa.) 117.

Wisconsin. — State *v.* Messmore, 14 Wis. 115.

1. Jury Trial a Constitutional Right — California. — *Ex p.* Atty.-Gen., 1 Cal. 85.

Florida. — Van Dorn *v.* State, 34 Fla. 62; Buckman *v.* State, 34 Fla. 54.

Idaho. — People *v.* Havird, 2 Idaho 498.

Illinois. — Latham *v.* People, 95 Ill. App. 528; Paul *v.* People, 82 Ill. 82.

Indiana. — Reynolds *v.* State, 61 Ind. 402.

Michigan. — See also People *v.* Doesburg, 16 Mich. 133.

New York. — People *v.* Albany, etc., R. Co. 57 N. Y. 161.

Oklahoma. — Bradford *v.* Territory, 1 Okla. 366.

Pennsylvania. — Com. *v.* Walter, 83 Pa. St. 108; Com. *v.* Allen, 70 Pa. St. 472; *Respublica v.* Wray, 3 Dall. (Pa.) 490.

Wisconsin. — State *v.* McDonald, 108 Wis. 8.

2. No Constitutional Right to Jury Trial — United States. — Wilson *v.* North Carolina, 169 U. S. 586; Kennard *v.* Louisiana, 92 U. S. 482.

Alabama. — Taliaferro *v.* Lee, 97 Ala. 92.

Arkansas. — State *v.* Johnson, 26 Ark. 281.

Colorado. — Londoner *v.* People, 15 Colo. 557.

Massachusetts. — Atty.-Gen. *v.* Sullivan, 163 Mass. 446; Atty.-Gen. *v.* Crocker, 138 Mass. 214; Com. *v.* Harriman, 134 Mass. 314; Com. *v.* Swasey, 133 Mass. 538; Com. *v.* Allen, 128 Mass. 308.

Minnesota. — State *v.* Minnesota Thresher Mfg. Co., 40 Minn. 213.

Missouri. — State *v.* Lupton, 64 Mo. 415; State *v.* Vail, 53 Mo. 97.

Nebraska. — State *v.* Moores, 56 Neb. 1, on rehearing, 58 Neb. 285.

Washington. — State *v.* Doherty, 16 Wash. 382, 58 Am. St. Rep. 39; State *v.* Fawcett, 17 Wash. 188.

3. No Issue of Fact. — Lee *v.* State, 49 Ala. 51; Caldwell *v.* Wilson, 121 N. Car. 425.

4. See titles CONSTITUTIONAL LAW, vol. 6, p. 882; JURY AND JURY TRIAL, vol. 17, p. 1086.

5. Ouster — England. — Rex *v.* Leigh, 4 Burr. 2143; Reg. *v.* Tyrrell, 11 Mod. 235; Rex *v.* London, 1 Show. 274; Penryn's Case, 1 Stra. 582.

Arkansas. — State *v.* Real Estate Bank, 5 Ark. 598.

California. — People *v.* Dashaway Assoc., 84 Cal. 118; People *v.* Banvard, 27 Cal. 470.

Florida. — State *v.* Herndon, 23 Fla. 287.

Illinois. — Place *v.* People, 83 Ill. App. 84.

Kansas. — State *v.* Mutual L. Ins. Co., 59 Kan. 772, 51 Pac. Rep. 88.

Kentucky. — Chambers *v.* Baptist Educational Soc., 1 B. Mon. (Ky.) 220.

Massachusetts. — Campbell *v.* Talbot, 132 Mass. 174; Atty.-Gen. *v.* Salem, 103 Mass. 139; Com. *v.* Union F. & M. Ins. Co., 5 Mass. 230, 4 Am. Dec. 50.

Michigan. — People *v.* Denton, 35 Mich. 305; People *v.* Connor, 13 Mich. 238.

Missouri. — State *v.* McCann, 11 Mo. App. 596, 81 Mo. 479.

New York. — People *v.* Snedeker, (Supm. Ct.) 3 Abb. Pr. (N. Y.) 233; People *v.* Ryder, 16 Barb. (N. Y.) 370; People *v.* Hudson Bank, 6 Cow. (N. Y.) 217; People *v.* Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; People *v.* Thompson, 21 Wend. (N. Y.) 235, 23 Wend. (N. Y.) 537; People *v.* Rensselaer, etc., R. Co., 15 Wend. (N. Y.) 128, 30 Am. Dec. 33.

Ohio. — Gano *v.* State, 10 Ohio St. 237.

Rhode Island. — State *v.* Brown, 5 R. I. 1; State *v.* Smith, 17 R. I. 415.

Two Incompatible Offices. — In *Pennsylvania* it was held that if the defendant held two offices which were incompatible with each other, a judgment of ouster would be entered against him in accordance with his election, but that if he refused to make an election judgment would be according to the petition of the relator. Com. *v.* Haeseler, 161 Pa. St. 92; De Turk *v.* Com., 129 Pa. St. 151, 15 Am. St. Rep. 705.

6. Fine under Informations. — 3 Black. Com. 263; State *v.* Ashley, 1 Ark. 279; Vincennes Bank *v.* State, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; State *v.* Lupton, 64 Mo. 415, 27 Am. Rep. 253; Adams *v.* Haines, 48 N. J. L. 25. See Atty.-Gen. *v.* Sullivan, 163 Mass. 449. See also *supra*, this title, *Nature and Origin of Remedy — Civil or Criminal Character.*

proceedings had upon the writ did not contemplate a fine or punishment, but merely judgment of ouster or seizure of the franchise usurped.¹

In the United States the courts are often invested with the power to inflict a fine upon judgment of ouster,² though in the absence of statute the court has no such power.³ Where the defendant has acted in good faith no fine will be imposed,⁴ or at most merely a nominal fine.⁵ The imposition of a fine is in the discretion of the court.⁶

3. Damages. — Some statutes authorize a recovery in the same proceeding, against the defendant, of the damages sustained by the person entitled to the office.⁷ In the absence of such a statute any claim for damages must be asserted in a separate action.⁸

4. Operation and Effect. — A judgment of ouster does not destroy the franchise in question, but merely ousts the respondent from its enjoyment, and leaves the franchise to be held by the state or such person as has the title thereto.⁹ There is a distinction between a judgment of ouster and of seizure in the case of franchises.¹⁰ In quo warranto to try title to office, a judgment of ouster divests the person ousted of all official authority and completely

In *Reg. v. Tyrrell*, 11 Mod. 235, judgment was given that the defendant should be ousted of his office, but pardoning the fine.

1. No Fine under Writ. — 3 Black. Com. 263; *State v. Ashley*, 1 Ark. 279.

2. Fine under American Statutes — California. — *People v. Perry*, 79 Cal. 105.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 446; *Atty.-Gen. v. Salem*, 103 Mass. 139.

Missouri. — *State v. Vail*, 53 Mo. 97.

New Jersey. — *Davis v. Davis*, 57 N. J. L. 203; *Adams v. Haines*, 48 N. J. L. 25; *Hammer v. State*, 44 N. J. L. 667; *Miller v. Utter*, 14 N. J. L. 84; *Bowles v. Meehan*, 45 N. J. L. 189.

New York. — *People v. Ravenswood, etc., Turnpike, etc., Co.*, 20 Barb. (N. Y.) 518; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 128, 30 Am. Dec. 33; *People v. Weeks, (C. Pl. Tr. T.)* 11 N. Y. Supp. 671.

Pennsylvania. — See *Com. v. Woelper*, 3 S. & R. (Pa.) 52.

Rhode Island. — *State v. Kearn*, 17 R. I. 393.

Wisconsin. — *State v. Baker*, 38 Wis. 71; *State v. Pierce*, 35 Wis. 101.

Statute of Anne Re-enacted — Nominal Fine Only. — *State v. De Gress*, 53 Tex. 397.

3. Fine in Absence of Statute. — *State v. Kearn*, 17 R. I. 393.

4. Fine Where Defendant Acted in Good Faith. — *Atty.-Gen. v. James*, 74 Mich. 733; *State v. Bernoudy*, 36 Mo. 279; *St. Stephen Church Cases, (C. Pl. Tr. T.)* 25 Abb. N. Cas. 258; *People v. Nolan, (Supm. Ct. Spec. T.)* 65 How. Pr. (N. Y.) 468; *People v. Weeks, (C. Pl. Tr. T.)* 11 N. Y. Supp. 671.

If the Court Omits to Impose a Fine, this is conclusively for the benefit of the defendant, and, even if improper, the omission cannot be assigned as error. *Vincennes Bank v. State*, 1 Blackf. (Ind.) 274, 12 Am. Dec. 234.

5. People v. Young Men's, etc., Benev. Soc. No. 1, 41 Mich. 67; *State v. McAdoo*, 36 Mo. 454; *Vincennes Bank v. State*, 1 Blackf. (Ind.) 274, 12 Am. Dec. 234; *State v. Brown*, 5 R. I. 1.

6. Discretion of Court. — *People v. Miller*, 16 Mich. 205.

7. Damages Recoverable in Quo Warranto. —

People v. Nolan, 30 Hun (N. Y.) 484, 65 How. Pr. (N. Y.) 468; *People v. Nolan*, 101 N. Y. 539, 32 Hun (N. Y.) 612; *Palmer v. Darby*, 4 Ohio Dec. 48, 2 Ohio N. P. 401, holding that attorneys' fees and expenses of suit cannot be recovered as damages.

In an action of quo warranto judgment for damages against the defendant is unwarranted where there is no showing that he had collected any of the salary of the office. *State v. Van Brocklin*, 8 Wash. 557.

8. Separate Action for Damages. — *People v. Snedeker, (Supm. Ct.)* 3 Abb. Pr. (N. Y.) 233; *McCall v. Webb*, 126 N. Car. 760.

Penalty. — See *Pugh v. Miller*, 27 Ind. App. 522.

9. Ouster from Franchise. — *Smith's Case*, 4 Mod. 53; *State v. Harris*, 3 Ark. 570, 36 Am. Dec. 460; *People v. Dashaway Assoc.*, 84 Cal. 114; *Dodge v. People*, 113 Ill. 491; *Vincennes Bank v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; *Campbell v. Talbot*, 132 Mass. 174; *People v. Ravenswood, etc., Turnpike, etc., Co.*, 20 Barb. (N. Y.) 518; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 128, 30 Am. Dec. 33.

A Mere Judgment of Forfeiture does not *ipso facto* work a dissolution of the corporation, but there must be execution for the seizure of the franchises before the penalties of forfeiture take place. *Nevitt v. Port Gibson Bank*, 6 Smed. & M. (Miss.) 514; *People v. Richardson*, 4 Cow. (N. Y.) 122, note. But this writ, in point of fact, is not always issued. 2 Kyd on Corp. 309.

10. Distinction Between Ouster and Seizure. — The distinction is thus set forth in *Rex v. London*, 2 T. R. 522: "Where it clearly appears to the court that a liberty is usurped by wrong, and upon no title, judgment only of ouster shall be entered. But when it appears that a liberty has been granted, but has been misused, judgment of seizure into the king's hands shall be given." See *People v. Bartlett*, 6 Wend. (N. Y.) 422; *People v. Rensselaer, etc., R. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33.

As to the effect of a judgment of seizure, see *Vincennes Bank v. State*, 1 Blackf. (Ind.) 267, 12 Am. Dec. 234; 2 Kyd on Corp. 409.

excludes him from the office as long as the judgment remains in force.¹ Such judgment takes effect from its rendition and produces an instantaneous vacancy in the office. It is self-executing.² The judgment creates no new rights, but merely declares existing ones.³ A judgment of ouster is not retroactive so as to affect or destroy acts done or contracts made prior to its rendition,⁴ and recitals to that effect in the judgment may be disregarded as surplusage.⁵

5. Res Judicata and Collateral Attack. — The judgment is *res judicata* upon the rights in issue,⁶ and cannot be collaterally attacked.⁷

6. Contempt Proceedings. — Disobedience of a judgment of ouster may be punished as a contempt of court.⁸

XI. Costs. — On informations in nature of quo warranto, at common law, where there is no relator the court cannot give judgment against the defendant for costs.⁹ The right to, and liability for, costs is a matter of statutory regulation.¹⁰ In *England* the statute of Anne authorized the recovery of costs by or against the relator,¹¹ and under statutes in the *United States* the

1. Ouster from Office. — *Rex v. Hull*, 11 Mod. 390; *Rex v. Serle*, 8 Mod. 332; *U. S. v. Addison*, 6 Wall. (U. S.) 297, 22 How. (U. S.) 175; *Fulgham v. Johnson*, 40 Ga. 166; *People v. Stephenson*, 98 Mich. 218; *Fawcett v. Superior Ct.*, 15 Wash. 342, 55 Am. St. Rep. 894.

2. Judgment Self-executing — *United States v. Wilson v. North Carolina*, 169 U. S. 586. *Colorado*. — See also *Londoner v. People*, 15 Colo. 557.

Georgia. — *Fulgham v. Johnson*, 40 Ga. 166. *Iowa*. — *Jayne v. Drorbaugh*, 63 Iowa 711. *Michigan*. — *People v. Stephenson*, 98 Mich. 218.

Mississippi. — *Hyde v. State*, 52 Miss. 665.

New York. — *People v. Conover*, (Supm. Ct.) 6 Abb. Pr. (N. Y.) 220; *Welch v. Cook*, (Supm. Ct.) 7 How. Pr. (N. Y.) 282; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600.

North Carolina. — *Caldwell v. Wilson*, 121 N. Car. 425, 480, 61 Am. St. Rep. 672.

Texas. — *State v. Owens*, 63 Tex. 265.

But in *State v. Smith*, 17 R. I. 416, where the defendant justified upon two grounds, first, under a re-election, and second, under his right to hold over under a former election, it was held that upon finding that the defendant had no right to hold under the election in which the relator claimed, but still had a right to hold over until his successor could qualify, a judgment of ouster should be limited to his holding or exercising the office until his successor could qualify to act.

The judgment does not necessarily declare a vacancy in the office, this depending upon the further question whether any one else is entitled to it. *State v. Ralls County Ct.*, 45 Mo. 58.

A Writ of Assistance or Leave to Issue an Execution should not be granted directing the sheriff to put the successful party into possession of the office and the books and papers belonging to it. So far as the office is concerned, such judgment executes itself, and so far as the possession of the possession of the books and papers is concerned, the remedy provided by the code must be pursued. *People v. Conover*, (Supm. Ct.) 6 Abb. Pr. (N. Y.) 220.

3. Judgment Merely Declaratory of Existing Rights. — *Atty.-Gen. v. Barstow*, 4 Wis. 567.

4. Judgment Not Retroactive. — *Gaff v. Flesher*, 33 Ohio St. 115.

As to validity of past acts, see generally title DE FACTO OFFICERS, vol. 8, p. 771.

5. Schaefer v. People, 20 Ill. App. 605.

6. As Res Judicata. — High on Ex. Leg. Rem. (2d ed.), § 748; *Le Roy v. Trinity House, Sid.* (pt. i.) 86; *Rex v. Serle*, 8 Mod. 332; *Rex v. Clarke*, 2 East 75; *State v. Gleason*, 12 Fla. 218; *Hartr v. Harvey*, 32 Barb. (N. Y.) 55; *Shumate v. Fauquier County*, 84 Va. 574.

A judgment upon an information filed in the Circuit Court by a private relator to try title to an office does not estop the people. *Vrooman v. Michie*, 69 Mich. 42; *State v. Cincinnati Gas Light, etc., Co.*, 18 Ohio St. 262.

7. Collateral Attack. — *Ex p. Henshaw*, 73 Cal. 486; *Mannix v. State*, 115 Ind. 245.

8. Disobedience as a Contempt. — *State v. Harris*, 3 Ark. 579, 36 Am. Dec. 460; *Pyron v. State*, 8 Ga. 230; *Caldwell v. Wilson*, 121 N. Car. 425, 480, 61 Am. St. Rep. 672. See *Wilson v. North Carolina*, 169 U. S. 586. But see *Fulgham v. Johnson*, 40 Ga. 166.

9. At Common Law. — *Com. v. Woelper*, 3 S. & R. (Pa.) 52. See also cases cited *infra*, this section, as to costs under the statute of Anne.

10. Statutory Regulation. — See codes and statutes of the various states. See also in ENCYC. PL. AND PR., vol. 5, p. 100, title COSTS, and vol. 17, p. 383, title QUO WARRANTO.

Security for Costs. — See generally the following cases:

England. — *Rex v. Wynne*, 2 M. & S. 346; *Rex v. Wakelin*, 1 B. & Ad. 50, 20 E. C. L. 342.

Alabama. — *Capital City Water Co. v. State*, 105 Ala. 406; *Lee v. State*, 49 Ala. 51; *Taylor v. State*, 31 Ala. 386; *State v. Cahaba*, 30 Ala. 66.

Florida. — *State v. Anderson*, 26 Fla. 260.

Ohio. — *State v. Sullivan*, 8 Ohio Cir. Dec. 346, 15 Ohio Cir. Ct. 477.

Texas. — *State v. Broach*, (Tex. Civ. App. 1896) 35 S. W. Rep. 86.

11. Costs under Statute of Anne. — *Ballard v. Halliwell*, 65 L. J. Q. B. D. 332; *Reg. v. Morgan*, 26 L. T. N. S. 790; *Reg. v. Earnshaw*, 22 L. J. Q. B. D. 174; *Reg. v. Blizard*, 7 B. & S. 922; *Reg. v. Grimshaw*, 12 Jur. 134, 5 Dowl. & L. 249; *Rex v. M'Kay*, 8 Dowl. & R. 393; *Rex v. Wardroper*, 4 Burr. 1903, 1 East 40, note b; *Rex v. Lewis*, 2 Burr. 780; *Reg. v. Green*, 7 Jur. 440, 12 L. J. Q. B. D. 239; *Reg.*

rule is generally the same.¹ Proceedings in quo warranto have been held not to be "actions" within the meaning of a statute regulating costs in actions.²

XII. USE OF REMEDY IN PARTICULAR CASES — 1. Public Officers — a. APPROPRIATENESS AND EXCLUSIVENESS OF REMEDY — (1) In General. — At Common Law, and in the absence of statutes changing the rule and providing other remedies, quo warranto, or the statutory substitute therefor, is the appropriate and exclusive remedy to try the title to a public office, and to oust a usurper.³

v. Dudley, 4 Jur. 915; *Rowley v. Reg.*, 6 Q. B. 668, 51 E. C. L. 668; *Rex v. Jefferson*, 5 B. & Ad. 855, 27 E. C. L. 214; *Reg. v. Hartley*, 3 El. & Bl. 143, 77 E. C. L. 143; *Rex v. Hall*, 2 Dowl. & R. 341, 16 E. C. L. 91, 1 B. & C. 237, 8 E. C. L. 101; *Rex v. Holt*, 2 Chit. 366, 18 E. C. L. 370; *Rex v. Amery*, 1 Anstr. 178; *Lloyd v. Reg.*, 2 B. & S. 656, 110 E. C. L. 656; *Reg. v. Backhouse*, 7 B. & S. 911; *Reg. v. Morton*, 4 Q. B. 146, 45 E. C. L. 146; *Reg. v. May*, 15 Jur. 129, 2 L. M. & P. 144; *Reg. v. Sidney*, 2 L. M. & P. 149; *Rex v. Wallis*, 5 T. R. 375; *Rex v. Downes*, 1 T. R. 453; *Rex v. Williams*, 1 W. Bl. 93. And see *Rogers v. London*, etc., R. Co., 26 W. R. 102.

1. Costs under Statutes in the United States — Illinois. — *People v. Mineral Marsh Drainage Dist. Com'rs*, 193 Ill. 428.

Kansas. — *Moss v. Patterson*, 40 Kan. 726; *Peter v. Blue*, 40 Kan. 727.

Michigan. — *People v. Lord*, 9 Mich. 227.

Missouri. — *State v. Vail*, 53 Mo. 97.

New York. — *People v. Clute*, 52 N. Y. 576; *People v. Loomis*, 8 Wend. (N. Y.) 396.

North Carolina. — *State v. King*, 1 Ired. L. (23 N. Car.) 22; *State v. Hardie*, 1 Ired. L. (23 N. Car.) 42; *Hill v. Bonner*, Busb. L. (44 N. Car.) 257; *Houston v. Neuse River Nav. Co.*, 8 Jones L. (53 N. Car.) 476.

Ohio. — *State v. Sutton*, 7 Ohio Dec. (Reprint) 644, 4 Cinc. L. Bul. 614, 6 Ohio Dec. (Reprint) 786, 8 Am. L. Rec. 135; *State v. Ward*, 17 Ohio St. 543.

Texas. — *State v. Broach*, (Tex. Civ. App. 1896) 35 S. W. Rep. 86; *Hussey v. Heim*, 17 Tex. Civ. App. 153.

Vermont. — *State v. Bradford*, 32 Vt. 50.

West Virginia. — But see *Roberts v. Paul*, 50 W. Va. 528.

Wisconsin. — *State v. Jenkins*, 46 Wis. 616.

2. Not an Action within Statute as to Costs — Double Costs. — *People v. Adams*, 9 Wend. (N. Y.) 464.

Extra Allowance. — *People v. Flag*, 25 Barb. (N. Y.) 652.

Contra. — *Hussey v. Heim*, 17 Tex. Civ. App. 153.

3. General Rule — England. — *Darley v. Reg.*, 12 Cl. & F. 520; *Reg. v. Fox*, 8 El. & Bl. 939, 92 E. C. L. 939, 4 Jur. N. S. 410; *Rex v. Bedford Level Corp.*, 6 East 356; *Rex v. Colchester*, 2 T. R. 259; *Reg. v. Ricketts*, 3 N. & P. 151; *Rex v. Oxford*, 1 N. & P. 474, 6 Ad. & El. 349, 33 E. C. L. 87. And see *Frost v. Chester*, 5 El. & Bl. 531, 85 E. C. L. 531.

United States. — *U. S. v. Addison*, 6 Wall. (U. S.) 291; *Gunton v. Ingle*, 4 Cranch (C. C.) 438, 11 Fed. Cas. No. 5,870; *Union Pac. R. Co. v. Hall*, 91 U. S. 343.

Alabama. — *Leigh v. State*, 69 Ala. 261; *Ex p. Harris*, 52 Ala. 87, 23 Am. Rep. 559; *Nolen v. State*, 118 Ala. 154; *State v. Elliott*, 117 Ala. 150; *Montgomery v. State*, 107 Ala. 372.

Arkansas. — *State v. Hixon*, 27 Ark. 398; *Caldwell v. Bell*, 6 Ark. 227; *Rhodes v. Driver*, 69 Ark. 606.

California. — *Hull v. Superior Ct.*, 63 Cal. 174; *Palmer v. Woodbury*, 14 Cal. 43; *People v. Scannell*, 7 Cal. 432.

Colorado. — *Denver v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *People v. Londoner*, 13 Colo. 303; *Baxter v. Hallett*, 1 Colo. 352; *Watson v. County Treasurer*, 10 Colo. App. 181; *People v. Carver*, 5 Colo. App. 156.

Connecticut. — *State v. Bulkeley*, 61 Conn. 290; *Harrison v. Simonds*, 44 Conn. 320; *State v. North*, 42 Conn. 86; *Duane v. McDonald*, 41 Conn. 517. Compare *State v. Lewis*, 51 Conn. 123.

Dakota. — *Territory v. Armstrong*, 6 Dak. 226.

Delaware. — *State v. Stewart*, 6 Houst. (Del.) 359.

Florida. — *State v. Jones*, 16 Fla. 311; *State v. Gleason*, 12 Fla. 211; *Buckman v. State*, 34 Fla. 48.

Georgia. — *Crovatt v. Mason*, 101 Ga. 246; *Churchill v. Walker*, 68 Ga. 681; *Hardin v. Colquitt*, 63 Ga. 588; *State v. Gilbert*, 51 Ga. 224; *Stone v. Wetmore*, 44 Ga. 496; *Bonner v. State*, 7 Ga. 473.

Illinois. — *Place v. People*, 192 Ill. 165; *Snowball v. People*, 147 Ill. 260; *Smith v. People*, 140 Ill. 355; *Delahanty v. Warner*, 75 Ill. 185, 20 Am. Rep. 237; *People v. Whitcomb*, 55 Ill. 172; *Akin v. Matteson*, 17 Ill. 167; *People v. Forquer*, 1 Ill. 104; *Latham v. People*, 95 Ill. App. 528; *Patterson v. People*, 65 Ill. App. 651.

Indiana. — *Carmel Natural Gas, etc., Co. v. Small*, 150 Ind. 427; *Parsons v. Durand*, 150 Ind. 203; *Wood v. State*, 130 Ind. 364, *State v. Gorby*, 122 Ind. 17; *Brown v. Goben*, 122 Ind. 113; *Mannix v. State*, 115 Ind. 245; *Griebel v. State*, 111 Ind. 369; *State v. Gallagher*, 81 Ind. 558; *Gass v. State*, 34 Ind. 425; *Yonkey v. State*, 27 Ind. 236.

Iowa. — *State v. Minton*, 49 Iowa 591; *Desmond v. McCarthy*, 17 Iowa 525; *State v. Funck*, 17 Iowa 365; *Scott v. Clark*, 1 Iowa 78.

Kansas. — *Neeland v. State*, 39 Kan. 154; *Foster v. State*, 32 Kan. 765; *State v. Wilson*, 30 Kan. 666; *Braidy v. Theritt*, 17 Kan. 471; *State v. McLaughlin*, 15 Kan. 232, 22 Am. Rep. 264; *State v. Graham*, 13 Kan. 141; *Hussey v. Hamilton*, 5 Kan. 462.

Kentucky. — *Com. v. Frazier*, 4 T. B. Mon. (Ky.) 515; *Tillman v. Otter*, 93 Ky. 600.

Louisiana. — *Peters v. Bell*, 51 La. Ann. 1621; *State v. Mason*, 14 La. Ann. 510; *State v. Ramos*, 10 La. Ann. 420; *Reynolds v. Baldwin*, 1 La. Ann. 162.

Maine. — *French v. Cowan*, 79 Me. 426.

Massachusetts. — *First Parish v. Stearns*, 21 Pick. (Mass.) 148; *Atty.-Gen. v. Sullivan*, 163 Mass. 448; *Com. v. Allen*, 128 Mass. 308; *Com.*

Collateral Attack. — The title to a public office cannot be collaterally attacked. ¹

Constitutionality of Statute under Which Office Exercised. — In the exercise of a public office or franchise depending upon a legislative enactment, the constitution-

v. Hawkes, 123 Mass. 525; *Atty.-Gen. v. Simonds*, 111 Mass. 258; *Atty.-Gen. v. Salem*, 103 Mass. 138.

Michigan. — *People v. Tisdale*, 1 Dougl. (Mich.) 59; *Fuller v. Ellis*, 98 Mich. 96; *Lamoreaux v. Ellis*, 89 Mich. 151; *Frey v. Michie*, 68 Mich. 323; *Curran v. Norris*, 58 Mich. 512; *Throop v. Langdon*, 40 Mich. 674; *Ellis v. Lennon*, 86 Mich. 468.

Minnesota. — *Burke v. Leland*, 51 Minn. 355.

Mississippi. — *Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686; *Lindsey v. Atty.-Gen.*, 33 Miss. 508.

Missouri. — *State v. May*, 106 Mo. 488; *State v. Frazier*, 98 Mo. 426; *State v. Townsley*, 56 Mo. 107; *State v. Boal*, 46 Mo. 528; *Hunter v. Chandler*, 45 Mo. 452; *State v. Steers*, 44 Mo. 223; *State v. Lawrence*, 45 Mo. 452; *State v. Stewart*, 32 Mo. 379; *St. Louis County Ct. v. Sharks*, 10 Mo. 117, 45 Am. Dec. 355; *State v. Meek*, 129 Mo. 431; *State v. Lobsinger*, 7 Mo. App. 109; *Ex p. Bellows*, 1 Mo. 115.

Montana. — *State v. Fransham*, 19 Mont. 273.

Nebraska. — *State v. Frantz*, 55 Neb. 167; *State v. Uridil*, 37 Neb. 371; *State v. Frazier*, 28 Neb. 438.

Nevada. — *State v. Cronan*, 23 Nev. 437; *Denver v. Hobart*, 10 Nev. 28; *State v. Sadler*, 25 Nev. 131.

New Hampshire. — *Osgood v. Jones*, 60 N. H. 543.

New Jersey. — *Roberson v. Bayonne*, 58 N. J. L. 326; *Loper v. Millville*, 53 N. J. L. 362; *Leeds v. Atlantic City*, 52 N. J. L. 332; *Haines v. Chosen Freeholders*, 47 N. J. L. 454; *Henry v. Camden*, 42 N. J. L. 335; *Bownes v. Meehan*, 45 N. J. L. 189; *State v. Ocean Tp.*, 39 N. J. L. 75; *State v. Chosen Freeholders*, 35 N. J. L. 217; *State v. Passaic County*, 25 N. J. L. 354; *Johnston v. Jones*, 23 N. J. Eq. 216; *Miller v. Utter*, 14 N. J. L. 84; *Roche v. Bruggemann*, 53 N. J. L. 122; *Matter of Cleveland*, 51 N. J. L. 311.

New York. — *New York v. Conover*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 171; *Lewis v. Oliver*, (Brooklyn City Ct.) 4 Abb. Pr. (N. Y.) 121; *People v. Ryder*, 16 Barb. (N. Y.) 370; *People v. Van Slyck*, 4 Cow. (N. Y.) 297; *People v. Rupp*, 90 Hun (N. Y.) 145; *People v. Sheffield*, 47 Hun (N. Y.) 481; *People v. New York*, 3 Johns. Cas. (N. Y.) 79; *People v. Hillsdale*, etc., *Turnpike Co.*, 2 Johns. (N. Y.) 190; *People v. Vail*, 20 Wend. (N. Y.) 12; *People v. Tobey*, 153 N. Y. 381; *Matter of Gardner*, 68 N. Y. 467; *People v. Lane*, 55 N. Y. 219; *People v. Neubrand*, 32 N. Y. App. Div. 49; *People v. Scannel*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 298; *People v. Alms-House Com'rs*, 65 Hun (N. Y.) 169; *People v. Holcomb*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 459; *Matter of Hart*, 161 N. Y. 507.

North Carolina. — *State v. Withers*, 121 N. Car. 376; *Lyon v. Granville County*, 120 N. Car. 237; *Baxter v. Ellis*, 111 N. Car. 124; *De Berry v. Nicholson*, 102 N. Car. 465, 11 Am. St. Rep. 767; *State v. Boone*, 98 N. Car. 573; *Ellison v. Raleigh*, 89 N. Car. 125; *Peebles v. Davie County*, 82 N. Car. 385; *Saunders v.*

Gatling, 81 N. Car. 298; *Davis v. Moss*, 81 N. Car. 303; *Swain v. McRae*, 80 N. Car. 111; *Sneed v. Bullock*, 77 N. Car. 282; *State v. Norman*, 82 N. Car. 687; *State v. Wilson*, 72 N. Car. 155; *Brown v. Turner*, 70 N. Car. 93.

Ohio. — *State v. O'Brien*, 47 Ohio St. 464; *State v. Anderson*, 45 Ohio St. 196; *State v. Buchanan*, *Wright* (Ohio) 233; *State v. Craig*, 11 Ohio Cir. Dec. 553, 21 Ohio Cir. Ct. 175; *State v. Davies*, 5 Ohio Cir. Dec. 525, 12 Ohio Cir. Ct. 218.

Oregon. — *Hamlin v. Kassafer*, 15 Oregon 456, 3 Am. St. Rep. 176.

Pennsylvania. — *Respublica v. Wray*, 3 Dall. (Pa.) 490; *Brower v. Kantner*, 190 Pa. St. 182; *Bedford Springs Co. v. McMeen*, 161 Pa. St. 639; *Com. v. Haeseler*, 161 Pa. St. 92; *Jenkins v. Baxter*, 160 Pa. St. 200; *Gilroy's Appeal*, 100 Pa. St. 5; *Campbell v. Com.*, 96 Pa. St. 344; *Com. v. Meeser*, 44 Pa. St. 341; *Clark v. Com.*, 29 Pa. St. 129; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450; *In re Murphy*, 22 Pa. Co. Ct. 29; *Com. v. Shoener*, 1 Leg. Chron. (Pa.) 177.

Rhode Island. — *State v. Kearns*, 17 R. I. 391; *State v. Brown*, 5 R. I. 1.

South Carolina. — *State v. Champlin*, 2 Bailey L. (S. Car.) 220; *State v. Schnierle*, 5 Rich. L. (S. Car.) 300; *State v. Bowen*, 8 S. Car. 388.

Texas. — *Ex p. Bland*, Dall. (Tex.) 406; *Hunnicut v. State*, 75 Tex. 233; *Little v. State*, 75 Tex. 616; *Williams v. State*, 69 Tex. 368; *McAllen v. Rhodes*, 65 Tex. 348; *State v. Owens*, 63 Tex. 261; *Grant v. Chambers*, 34 Tex. 573; *Gray v. State*, 19 Tex. Civ. App. 521.

Utah. — *State v. Beardsley*, 13 Utah 502; *State v. Elliott*, 13 Utah 208.

Vermont. — *State v. McGeary*, 69 Vt. 461; *State v. Boston*, etc., R. Co., 25 Vt. 433.

Virginia. — *Watkins v. Venable*, 99 Va. 440; *Kilpatrick v. Smith*, 77 Va. 347; *Blanton v. Southern Fertilizing Co.*, 77 Va. 335.

Washington. — *State v. Kirkwood*, 15 Wash. 298; *State v. Van Brocklin*, 8 Wash. 557; *Hill v. Territory*, 2 Wash. Ter. 147.

Wisconsin. — *State v. Cunningham*, 83 Wis. 90; *State v. West Wisconsin R. Co.*, 34 Wis. 197.

See also *supra*, this title, *Principles Governing Use of Remedy—Other Adequate Remedy.*

1. Collateral Attack—United States. — *U. S. v. Alexander*, 46 Fed. Rep. 728.

Arkansas. — *Barton v. Lattourette*, 55 Ark. 81; *Keith v. State*, 49 Ark. 439; *Kaufman v. Stone*, 25 Ark. 336.

Colorado. — *Monash v. Rhodes*, 11 Colo. App. 404; *Pueblo County v. Gould*, 6 Colo. App. 44.

Delaware. — *Lee v. Wilmington*, 1 Marv. (Del.) 65.

Florida. — *State v. Gleason*, 12 Fla. 190.

Illinois. — *Pritchett v. People*, 6 Ill. 525; *Lewistown v. Proctor*, 23 Ill. 533.

Indiana. — *Osborne v. State*, 128 Ind. 129.

Kentucky. — See *Newcum v. Kirtley*, 13 B. Mon. (Ky.) 518.

Michigan. — *Tower v. Welker*, 93 Mich. 332; *Lamoreaux v. Ellis*, 89 Mich. 151; *Frey v.*

ality of such enactment may be inquired into in quo warranto proceedings against the person assuming to exercise the office or franchise.¹

The Questions upon Which Title to Office Depends, such as eligibility, election, appointment, qualification, and the like, have been elsewhere specially considered.²

(2) *Forfeiture of Office.* — Quo warranto is the appropriate remedy to enforce the forfeiture of an office, or a removal for cause,³ unless, of course, another and exclusive remedy has been provided by the constitution or statute, such as impeachment proceedings, or proceedings before an officer vested with the power of removal.⁴ The existence of the cause of forfeiture may be determined in the quo warranto proceedings, and it is not necessary that there should have been a prior judicial ascertainment thereof,⁵ except, of course, where it is the prior conviction which is made the cause of forfeiture, for in such a case there can be no forfeiture until conviction.⁶ What will operate as a forfeiture of office has been elsewhere considered.⁷

(3) *Official Misconduct or Illegal Action.* — Quo warranto will not lie merely to redress official misconduct, or to test the legality of official action upon the part of one whose right to exercise the legitimate powers of the office is not in issue.⁸

(4) *Existence of Office.* — Quo warranto will not lie to try the title to an

Michie, 68 Mich. 323; Johns v. People, 25 Mich. 499.

Mississippi. — Moore v. Caldwell, Freem. (Miss.) 222.

Missouri. — Hunter v. Chandler, 45 Mo. 452.

New Jersey. — Loper v. Millville, 53 N. J. L. 362; State v. Ocean Tp., 39 N. J. L. 75.

New York. — People v. Cook, 14 Barb. (N. Y.) 259.

Oregon. — State v. Whitney, 7 Oregon 386.

Pennsylvania. — Clark v. Com., 29 Pa. St. 129.

Texas. — Grant v. Chambers, 34 Tex. 585.

Wisconsin. — Atty.-Gen. v. Barstow, 4 Wis. 567.

See the title DE FACTO OFFICERS, vol. 8, p. 823.

A court may determine without an action which of two persons claiming to be sheriff is the lawful officer authorized to serve its process. McCue v. Circuit Ct., 51 Iowa 60.

1. *Determination of Constitutional Questions* — Florida. — Crawford v. Bradford, 23 Fla. 406; State v. Jones, 16 Fla. 306.

Illinois. — Hinze v. People, 92 Ill. 406.

Michigan. — Bolt v. Riordan, 73 Mich. 508; Taggart v. Perkins, 73 Mich. 303; Atty.-Gen. v. Amos, 60 Mich. 372; Atty.-Gen. v. Holihan, 29 Mich. 116; People v. Maynard, 15 Mich. 463; People v. Jackson, etc., Plank Road Co., 9 Mich. 285.

Missouri. — State v. Scott, 17 Mo. 521.

New York. — Tappan v. Gray, 7 Hill (N. Y.) 259.

Ohio. — State v. Beal, 60 Ohio St. 208; State v. Heffner, 59 Ohio St. 368; State v. Baughman, 38 Ohio St. 455.

Pennsylvania. — Com. v. Denworth, 145 Pa. St. 177.

Rhode Island. — See Newport v. Horton, 22 R. I. 196.

Wisconsin. — State v. Riordan, 24 Wis. 484.

2. See the title PUBLIC OFFICERS, ante, and cross-references there given.

3. *Forfeiture — Removal* — Arkansas. — State v. Hixon, 27 Ark. 398.

Colorado. — People v. Goddard, 8 Colo. 432.

Illinois. — Burgess v. Davis, 138 Ill. 578.

Indiana. — Chambers v. State, 127 Ind. 365; Knox County v. Johnson, 124 Ind. 145, 19 Am. St. Rep. 88; State v. Harrison, 113 Ind. 434, 3 Am. St. Rep. 663; Wood v. State, 130 Ind. 364.

Kansas. — State v. Wilson, 30 Kan. 661; State v. Graham, 13 Kan. 141.

Maine. — Woodside v. Wagg, 71 Me. 207.

Massachusetts. — Com. v. Cooley, 1 Allen (Mass.) 358; Com. v. Hawkes, 123 Mass. 525.

Mississippi. — Hyde v. State, 52 Miss. 670.

Missouri. — State v. Seay, 64 Mo. 89, 27 Am. Rep. 206; State v. Bernoudy, 36 Mo. 279.

New York. — People v. Ferguson, 20 N. Y. Wkly. Dig. 276.

North Carolina. — State v. Norman, 82 N. Car. 687.

Ohio. — State v. McLain, 58 Ohio St. 313.

Oklahoma. — Bradford v. Territory, 2 Okla. 228.

Pennsylvania. — Leonard v. Com., 112 Pa. St. 607; Com. v. Allen, 70 Pa. St. 471; Cleaveland v. Com., 34 Pa. St. 283; Com. v. M'Williams, 11 Pa. St. 61.

Virginia. — Bland, etc., County Judge Case, 33 Gratt. (Va.) 443.

4. Bruce's Case, 2 Stra. 819; State v. Gardner, 43 Ala. 234; State v. Hixon, 27 Ark. 398; State v. McLain, 58 Ohio St. 313.

5. Reg. v. Owen, 15 Q. B. 476, 69 E. C. L. 476, 14 Jur. 953; State v. Wilson, 30 Kan. 666; State v. Graham, 13 Kan. 136; State v. Allen, 5 Kan. 213; Brady v. Howe, 50 Miss. 607; Com. v. Walter, 83 Pa. St. 105, 24 Am. Rep. 154; Com. v. Allen, 70 Pa. St. 472; Royall v. Thomas, 28 Gratt. (Va.) 130, 26 Am. Rep. 335.

6. State v. Wilson, 30 Kan. 669; State v. Ragsdale, 59 Mo. App. 590.

7. See the title PUBLIC OFFICERS, ante.

8. *Not a Remedy for Misconduct or Illegal Action.* — Leigh v. State, 69 Ala. 261; State v. Evans, 3 Ark. 585, 36 Am. Dec. 468; Dart v. Houston, 2 Ga. 506; People v. Whitcomb, 55 Ill. 172; State v. Lyons, 31 Iowa 432; State v. Smith, 55 Tex. 450. See also McDonald v. Alcona County, 91 Mich. 459. But see *infra*, this section, *Franchises*.

office which has no legal existence.¹ But it has been held that quo warranto is a proper remedy against persons who assume to hold offices created by an unconstitutional statute.²

(5) *Expiration of Term.* — Leave to file an information to try the title to an office may be refused, and generally will be refused, when the term of office has expired³ or will expire before the proceedings can be determined.⁴ It has been frequently held that a judgment of ouster will not be entered against an officer after his term of office has expired, and that if the term expires *pendente lite* the proceedings should be dismissed, because no substantial right could be subverted by such a judgment.⁵ But where ouster of the incumbent is not the sole object of the proceedings, as where a fine is to be imposed, or where a conviction is necessary to invalidate past acts or to enable the relator to recover damages or costs, the proceedings may be brought or continued even after the expiration of the term of office involved.⁶

1. Office Without Legal Existence. — *State v. North*, 42 Conn. 87; *State v. Lehre*, 7 Rich. L. (S. Car.) 234. See also *Minck v. People*, 6 Ill. App. 127; *Miller v. Utter*, 14 N. J. L. 87; *State v. Parker*, 25 Minn. 215; *Rex v. Boyles*, 2 Sira. 836. But see *People v. Carpenter*, 24 N. Y. 86.

2. Hinze v. People, 92 Ill. 406.

3. Leave Refused After Expiration of Term. — *Matter of Harris*, 6 Ad. & El. 475, 33 E. C. L. 117; *Morris v. Underwood*, 19 Ga. 559; *State v. Jacobs*, 17 Ohio 143; *State v. Taylor*, 12 Ohio St. 130.

Death of Incumbent. — After the death of a mayor, his eligibility to election cannot be disputed. *Rex v. Spearing*, 1 T. R. 4, note. *Quere*, whether a derivative title can be impeached when the person from whom it was derived dies in the undisturbed possession of it. *Rex v. Stacey*, 1 T. R. 1.

Removal of Officer. — The court refused a rule for a quo warranto against the town clerk of a borough, which was moved for in order to contest his right to compensation as a displaced officer under 5 and 6 Wm. IV., c. 76, § 66. *Rex v. Harris*, 1 N. & P. 576, 36 E. C. L. 474, W. W. & D. 237, 6 Ad. & El. 475, 33 E. C. L. 117.

Abolition of Office. — The title of the relator to the office which he seeks having been extinguished by the repeal of the law creating the office, the court did not err in refusing to allow the information quo warranto to be filed. *Butner v. Boifeuillet*, 100 Ga. 744. *Compare People v. Rodgers*, 118 Cal. 393.

Expiration of Relator's Term. — See *Churchill v. Walker*, 68 Ga. 685; *State v. Sutton*, 7 Ohio Dec. (Reprint) 644, 4 Cinc. L. Bul. 614; *Com. v. Swasey*, 133 Mass. 538.

4. England. — *Reg. v. Cousins*, 42 L. J. Q. B. 124, 28 L. T. N. S. 116.

Georgia. — *Morris v. Underwood*, 19 Ga. 560. *Massachusetts.* — *Com. v. Athearn*, 3 Mass. 285.

Michigan. — *People v. Tisdale*, 1 Dougl. (Mich.) 59; *People v. Hartwell*, 12 Mich. 508, 86 Am. Dec. 70.

New York. — *People v. Sweeting*, 2 Johns. (N. Y.) 184; *People v. Loomis*, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33.

Ohio. — *State v. Ward*, 17 Ohio St. 543; *State v. Jacobs*, 17 Ohio 143.

Pennsylvania. — *Com. v. Reigart*, 14 S. & R. (Pa.) 216; *Com. v. Quin*, 1 W. N. C. (Pa.) 401; *Com. v. Cosgrove*, 4 L. T. N. S. (Pa.) 13; *Com. v. Amsden*, 4 L. T. N. S. (Pa.) 53.

South Carolina. — *State v. Lehre*, 7 Rich. L. (S. Car.) 256; *State v. Schnierle*, 5 Rich. L. (S. Car.) 302.

Vermont. — *State v. Fisher*, 28 Vt. 714.

Annual or Short Term Office. — It has been sometimes held or stated that the proceeding does not lie against an officer elected for one year only or less, because it would be impossible to decide the question until the expiration of the term, when the mischief complained of would be gone. *Com. v. Athearn*, 3 Mass. 285; *State v. Fisher*, 28 Vt. 714. See also *State v. Mead*, 56 Vt. 353; *State v. McNaughton*, 56 Vt. 736; *State v. McGeary*, 69 Vt. 467. *Contra*, *Atty.-Gen. v. Megin*, 63 N. H. 378. And see *People v. Tibbets*, 4 Cow. (N. Y.) 358.

5. Dismissal upon Expiration of Term Pendente Lite — *Connecticut.* — *State v. Tudor*, 5 Day (Conn.) 335, 5 Am. Dec. 162.

Georgia. — *Churchill v. Walker*, 68 Ga. 681; *Morris v. Underwood*, 19 Ga. 560. See also *Holmes v. Sikes*, 113 Ga. 582.

Iowa. — *State v. Powell*, 101 Iowa 382; *State v. Porter*, 58 Iowa 19.

Kansas. — *Hurd v. Beck*, (Kan. 1896) 45 Pac. Rep. 92.

North Carolina. — *Colvard v. Graham County*, 95 N. Car. 515.

Ohio. — *State v. Sutton*, 7 Ohio Dec. (Reprint) 644, 4 Cinc. L. Bul. 614; *State v. Jacobs*, 17 Ohio 143; *State v. Taylor*, 12 Ohio St. 136. See *State v. Ward*, 17 Ohio St. 543.

South Carolina. — *State v. Westmoreland*, 29 S. Car. 1.

Washington. — *State v. Wickersham*, 16 Wash. 162. See also *State v. Prosser*, 16 Wash. 608.

6. Ouster Not Sole Object of Proceeding — *England.* — *Rex v. New Radnor*, 2 Ken. K. B. (pt. i.) 498; *Reg. v. Blizard*, L. R. 2 Q. B. 55; *Rex v. Williams*, 1 W. Bl. 93.

California. — *People v. Rodgers*, 118 Cal. 394. *Massachusetts.* — *Com. v. Swasey*, 133 Mass. 540.

Michigan. — *People v. Hartwell*, 12 Mich. 522, 86 Am. Dec. 70.

Nebraska. — *Dean v. State*, 56 Neb. 301.

New Jersey. — *Hammer v. State*, 44 N. J. L. 667.

New York. — *People v. Loomis*, 8 Wend. (N. Y.) 396, 24 Am. Dec. 33.

North Carolina. — *Burton v. Patton*, 2 Jones L. (47 N. Car.) 124, 62 Am. Dec. 194.

Pennsylvania. — *Com. v. Smith*, 45 Pa. St. 59.

b. WHO ARE PUBLIC OFFICERS SUBJECT TO WRIT — (1) *In General*. — Quo warranto will lie only to try the title to a public office as distinguished from a mere employment as deputy or servant.¹ The office must be a permanent substantive office, and not merely a position held at the will of others.² In *England* an information in the nature of quo warranto will lie for usurping any office, whether created by charter of the crown alone or by the crown with the consent of Parliament, provided the office be of a public nature and a substantive office, and not merely the function or employment of a deputy or servant held at the will and pleasure of others.³ The statute of Anne by its terms extended only to offices and franchises in municipal corporations.⁴ But corresponding statutes in the *United States* are not so limited, and extend to any public office or franchise, state or municipal.⁵

(2) *Particular Officers*. — Who are public officers has been fully treated in

Wisconsin. — State *v.* Pierce, 35 Wis. 93.

Resignation Pending Proceedings. — The court will make the rule absolute, although the party has, since the rule obtained, resigned his office, and his resignation has been accepted. Rex *v.* Warlow, 2 M. & S. 75. And see Reg. *v.* Blizard, L. R. 2 Q. B. 55; Hunter *v.* Chandler, 45 Mo. 452; Atty.-Gen. *v.* Johnson, 63 N. H. 622; Rex *v.* Payne, 2 Chit. 367, 18 E. C. L. 370; State *v.* McDaniel, 22 Ohio St. 354. *Contra*, Roberts *v.* Paul, 50 W. Va. 528.

1. **Lies Only for Public Office** — *England*. — Rex *v.* Ogden, 10 B. & C. 230, 21 E. C. L. 61; Reg. *v.* Mousley, 8 Q. B. 946, 55 E. C. L. 946; Darley *v.* Reg., 12 Cl. & F. 520; Reg. *v.* Auchinleck, 28 L. R. Ir. 404; Pender *v.* Lushington, 6 Ch. D. 70; Pulbrook *v.* Richmond Consol. Min. Co., 9 Ch. D. 610; *Ex p.* Smyth, 11 W. R. 754, 8 L. T. N. S. 458; Reg. *v.* Fox, 8 El. & Bl. 939, 92 E. C. L. 939; Rex *v.* Bedford Level Corp., 6 East 356; Matter of Aston Union, 6 Ad. & El. 784, 33 E. C. L. 210.

Illinois. — Ptacek *v.* People, 94 Ill. App. 571.

Massachusetts. — Haupt *v.* Rogers, 170 Mass. 71; Atty.-Gen. *v.* Drohan, 169 Mass. 535, 61 Am. St. Rep. 301; Brown *v.* Russell, 166 Mass. 14, 55 Am. St. Rep. 357; Com. *v.* Swasey, 133 Mass. 538; Com. *v.* Allen, 128 Mass. 308; Atty.-Gen. *v.* Simonds, 111 Mass. 256; Com. *v.* Dearborn, 15 Mass. 125.

Michigan. — Trainor *v.* Wayne County, 89 Mich. 171; Atty.-Gen. *v.* Cain, 84 Mich. 223; People *v.* De Mill, 15 Mich. 182, 93 Am. Dec. 179; Throop *v.* Langdon, 40 Mich. 674; Ellis *v.* Lennon, 86 Mich. 468.

Nevada. — State *v.* Cronan, 23 Nev. 437.

New York. — People *v.* Hills, 1 Lans. (N. Y.) 202.

North Carolina. — Eliason *v.* Coleman, 86 N. Car. 235.

Ohio. — State *v.* Jennings, 57 Ohio St. 415, 63 Am. St. Rep. 723.

Rhode Island. — State *v.* Brown, 5 R. I. 1.

South Carolina. — State *v.* Champlin, 2 Bailey L. (S. Car.) 220.

But see *infra*, this section, *Officers of Private Corporations*.

2. **Permanent Substantive Office**. — Bradley *v.* Sylvester, 25 L. T. N. S. 459; Reg. *v.* Fox, 8 El. & Bl. 939, 92 E. C. L. 939; Rex *v.* Wheeler, 3 Keb. 360; State *v.* Stewart, 6 Houst. (Del.) 377; State *v.* Champlin, 2 Bailey L. (S. Car.) 220.

3. **In England**. — Darley *v.* Reg., 12 Cl. & F. 520, which is the leading case. See also Rex

v. —, 2 Chit. 365, 18 E. C. L. 370; Reg. *v.* Booth, 12 Q. B. 384, 64 E. C. L. 884; Rex *v.* Badcock, cited in Rex *v.* Bedford Level Corp., 6 East 359; Reg. *v.* Guardians of Poor, 17 Q. B. 149, 79 E. C. L. 149; Hill *v.* Reg., 8 Moo. P. C. 139; Rex *v.* Mein, 3 T. R. 596; Rex *v.* Colchester, 2 T. R. 259; Reg. *v.* Grimshaw, 10 Q. B. 747, 59 E. C. L. 747; Rex *v.* Highmore, 1 Dowl. & R. 438, 5 B. & Ald. 771, 7 E. C. L. 254; Darell *v.* Bridge, 1 W. Bl. 46; Reg. *v.* Owen, 15 Q. B. 476, 69 E. C. L. 476; Rex *v.* Williams, 1 Burr. 402, 2 Ken. K. B. (pt. i.) 68; Rex *v.* Winchester, 2 N. & P. 274, 7 Ad. & El. 215, 34 E. C. L. 81; Rex *v.* Richmond, 6 T. R. 560; Reg. *v.* Ireland, 9 B. & S. 19; Reg. *v.* Derby, 2 N. & P. 589, 7 Ad. & El. 419, 34 E. C. L. 135; Rex *v.* Beedle, 3 Ad. & El. 467, 30 E. C. L. 132; Rex *v.* Bond, 6 Dowl. & R. 333, 16 E. C. L. 261; Rex *v.* Lawrence, 2 Chit. 371, 18 E. C. L. 371; Reg. *v.* Backhouse, L. R. 2 Q. B. 16, 13 W. R. 846; Matter of Aston Union, 6 Ad. & El. 784, 33 E. C. L. 210; Rex *v.* Carpenter, 1 N. & P. 773; Reg. *v.* Hampton, 6 B. & S. 923, 118 E. C. L. 923; Reg. *v.* Fox, 8 El. & Bl. 939, 92 E. C. L. 939; Rex *v.* Ramsden, 5 N. & M. 325, 3 Ad. & El. 456, 30 E. C. L. 132; Rex *v.* Danberry, 1 Bott's P. L. 324; Reg. *v.* Simpson, 19 W. R. 73; Rex *v.* Gregory, 4 T. R. 240, note; Rex *v.* Hanley, 3 Ad. & El. 463, note; Rex *v.* Herefordshire, 1 Chit. 700, 18 E. C. L. 206; Reg. *v.* Mousley, 8 Q. B. 946, 55 E. C. L. 946; Rex *v.* McKay, 6 Dowl. & R. 432, 4 B. & C. 351, 10 E. C. L. 353; Rex *v.* Shepherd, 4 T. R. 381; *In re* Barlow, 30 L. J. Q. B. 271, 5 L. T. N. S. 289; Bradley *v.* Sylvester, 25 L. T. N. S. 459; Reg. *v.* Morgan, 26 L. T. N. S. 790; Reg. *v.* Ward, L. R. 8 Q. B. 210; Reg. *v.* Diplock, L. R. 4 Q. B. 549; Reg. *v.* McCarthy, 10 Ir. C. L. 312; Reg. *v.* Pepper, 3 N. & P. 154, 7 Ad. & El. 745, 34 E. C. L. 212; Rex *v.* Bedford Level Corp., 6 East 356; Rex *v.* Harwood, 2 East 177. See Reg. *v.* Backhouse, 7 B. & S. 911.

4. **Statute of Anne**. — Rex *v.* Williams, 1 Burr. 407. See also Cochran *v.* McCleary, 22 Iowa 87; Bownes *v.* Meehan, 45 N. J. L. 189.

5. **Statutes in United States**. — Cochran *v.* McCleary, 22 Iowa 86; Bownes *v.* Meehan, 45 N. J. L. 189; State *v.* Parkhurst, 9 N. J. L. 437; State *v.* Dellesseline, 1 McCord L. (S. Car.) 59. *Contra*, Terry *v.* Stauffer, 17 La. Ann. 306; State *v.* Smith, 55 Tex. 451, holding that in adopting the language of the statute of Anne its construction by the English courts was also adopted.

another connection.¹ But for convenience of reference a number of cases have been grouped in the notes wherein quo warranto has been deemed a proper remedy as applied to particular offices,² and also cases where it has

1. See the title PUBLIC OFFICERS, *ante*.

2. **Legislative, Executive, or Judicial Officers.** — State *v.* Gleason, 12 Fla. 190; Com. *v.* Swasey, 133 Mass. 538; Com. *v.* Fowler, 10 Mass. 290; State *v.* Boyd, 31 Neb. 704; State *v.* Sadler, 25 Nev. 131; Campbell *v.* Com., 96 Pa. St. 344; State *v.* Deliesseline, 1 McCord L. (S. Car.) 52; Grant *v.* Chambers, 34 Tex. 573; U. S. *v.* Lockwood, 1 Pin. (Wis.) 329; Atty.-Gen. *v.* Barstow, 4 Wis. 567. But see State *v.* Paul, 5 Stew. & P. (Ala.) 40; State *v.* Baxter, 28 Ark. 129.

State or Municipal Officers. — State *v.* Gastinel, 18 La. Ann. 517; State *v.* Frazier, 98 Mo. 426; State *v.* Parkhurst, 9 N. J. L. 437; Foard *v.* Hall, 111 N. Car. 372; *In re* Murphy, 22 Pa. Ct. Ct. 290; State *v.* Deliesseline, 1 McCord L. (S. Car.) 52.

Governor. — State *v.* Boyd, 31 Neb. 682; Atty.-Gen. *v.* Barstow, 4 Wis. 567.

Member of Town or City Council. — State *v.* Anderson, 26 Fla. 240; State *v.* Ramos, 10 La. Ann. 420; Reynolds *v.* Baldwin, 1 La. Ann. 162; Cassel's Petition, 14 Montg. Co. Rep. (Pa.) 101; State *v.* Van Brocklin, 8 Wash. 558.

President of City Council. — State *v.* Anderson, 45 Ohio St. 196.

City Treasurer. — State *v.* Von Baumbach, 12 Wis. 310.

City Attorney. — Carpenter *v.* People, 8 Colo. 116.

County, Circuit, or District Judge. — People *v.* Brown, 23 Colo. 425; Allen *v.* Glynn, 17 Colo. 338, 31 Am. St. Rep. 304; People *v.* Rucker, 5 Colo. 455; State *v.* Goetze, 22 Wis. 363; State *v.* Boyd, 21 Wis. 208; State *v.* Messmore, 14 Wis. 115.

Police Judge. — People *v.* Curley, 5 Colo. 412; McPhail *v.* People, 160 Ill. 77, 52 Am. St. Rep. 306.

Municipal Judge. — State *v.* Foote, 11 Wis. 14, 78 Am. Dec. 689.

Probate Judge. — U. S. *v.* Lockwood, 1 Pin. (Wis.) 359; Com. *v.* Fowler, 10 Mass. 290.

Special Judge. — Caldwell *v.* Bell, 6 Ark. 227.

Military Officers. — Miller *v.* Utter, 14 N. J. L. 89; People *v.* Sampson, 25 Barb. (N. Y.) 254; Field *v.* Com., 32 Pa. St. 478; Com. *v.* Small, 26 Pa. St. 35; Brower *v.* Levan, 7 Pa. Dist. 704; State *v.* Brown, 5 R. I. 7. But see State *v.* Wadkins, 1 Rich. L. (S. Car.) 42.

Street Inspectors. — State *v.* Martin, 46 Conn. 480.

Prison Inspectors or Commissioners. — Com. *v.* Douglass, 1 Binn. (Pa.) 77; State *v.* McGarry, 21 Wis. 496; Atty.-Gen. *v.* Brown, 1 Wis. 513.

Justice of Peace. — State *v.* Hutt, 2 Ark. 282; State *v.* Lobsinger, 7 Mo. App. 109; State *v.* Davies, 5 Ohio Cir. Dec. 525, 12 Ohio Cir. Ct. 218; State *v.* Tierney, 23 Wis. 430; State *v.* Hadley, 7 Wis. 700; Atty.-Gen. *v.* McDonald, 3 Wis. 805.

City Physician. — Com. *v.* Swasey, 133 Mass. 538.

Excise Commissioners. — Hann *v.* Bedell (N. J. 1901) 50 Atl. Rep. 364; People *v.* Martin, 19 Colo. 565.

Jailer. — Bownes *v.* Meehan, 45 N. J. L. 189.

Sheriff. — State *v.* McAdoo, 36 Mo. 453; State *v.* Orvis, 20 Wis. 235; State *v.* Main, 16 Wis. 398; State *v.* Cram, 16 Wis. 343; Atty.-Gen. *v.* Brunst, 3 Wis. 787.

County Superintendent. — Field *v.* Com., 32 Pa. St. 478; State *v.* Goldthwaite, 16 Wis. 146.

Bailiffs. — Rex *v.* Boyles, 2 Ld. Raym. 1559; Rex *v.* Bingham, 2 East 308; Rex *v.* Highmore, 1 Dowl. & R. 438.

Constables. — Rex *v.* Goudge, 2 Stra. 1213. See Locklear *v.* Harris, 108 Ga. 809.

Register. — Rex *v.* Hall, 1 B. & C. 123, 8 E. C. L. 53.

Recorder. — State *v.* Gastinel, 18 La. Ann. 517, 20 La. Ann. 114; State *v.* Ramos, 10 La. Ann. 420; Reynolds *v.* Baldwin, 1 La. Ann. 162.

Trustee of School Lands. — Moore *v.* Caldwell, Freem. (Miss.) 222.

School Officers. — Renwick *v.* Hall, 84 Ill. 162; Roeser *v.* Gartland, 75 Mich. 143; State *v.* Rose, 84 Mo. 198; State *v.* Meek, 129 Mo. 431; Dalby *v.* Hancock, 125 N. Car. 325; State *v.* Perkins, 13 Wis. 411. See State *v.* Harrison, 67 Ind. 71; State *v.* Board of Education, 3 Ohio Cir. Dec. 703, 7 Ohio Cir. Ct. 152. But see People *v.* Collins, (Supm. Ct. Spec. T.) 34 How. Pr. (N. Y.) 336.

Pilots. — Palmer *v.* Woodbury, 14 Cal. 43. *Contra*, Dean *v.* Healy, 66 Ga. 503. *Compare* State *v.* Jones, 16 Fla. 306, holding that although not officers, pilots hold franchises for which the writ lies.

Fire Commissioners. — People *v.* Martin, 19 Colo. 565.

Clerks. — State *v.* Dunlap, 5 Mart. (La.) 271; Bradford *v.* Territory, 2 Okla. 228; Williams *v.* State, 69 Tex. 368; State *v.* Pierpont, 29 Wis. 608; State *v.* Murray, 28 Wis. 96, 9 Am. Rep. 489; State *v.* Hilmantel, 21 Wis. 566; State *v.* Brunner, 20 Wis. 62; State *v.* Merri-man, 6 Wis. 14.

Mayor. — State *v.* Elliott, 117 Ala. 150; Londoner *v.* People, 15 Colo. 557, 13 Colo. 303; Parsons *v.* Durand, 150 Ind. 203; State *v.* Funck, 17 Iowa 365; Terry *v.* Stauffer, 17 La. Ann. 306.

President of Senate. — State *v.* Rogers, 56 N. J. L. 480.

Drainage Commissioners. — Smith *v.* People, 140 Ill. 355.

Chief of Police. — State *v.* Kennedy, 69 Conn. 220; State *v.* Pinkerman, 63 Conn. 176; Butner *v.* Boifeuillet, 100 Ga. 743; Ellis *v.* Lennon, 86 Mich. 468, *distinguishing* Atty.-Gen. *v.* Cain, 84 Mich. 223; State *v.* Hall, 111 N. Car. 369; Newport *v.* Horton, 22 R. I. 196.

Assistant Superintendent of Police. — Ptacek *v.* People, 94 Ill. App. 571, *affirmed* 194 Ill. 125.

Assessors and Tax Collectors. — Kelly *v.* State, 79 Miss. 168.

Coroner. — State *v.* Palmer, 24 Wis. 63.

County Auditor. — State *v.* Dousman, 28 Wis. 541.

County Supervisor. — State *v.* Douglas, 26 Wis. 428, 7 Am. Rep. 87; State *v.* Riordan, 24 Wis. 484.

County Treasurer. — State *v.* Wyman, 2 Chand. (Wis.) 5, 2 Pin. (Wis.) 360; State *v.*

been held that quo warranto will not lie because the position in question is not a public office.¹

c. **TRIAL OF RELATOR'S TITLE TO OFFICE.** — At common law and in the absence of statute changing the rule, the respondent's title to the office is the sole issue to be tried, and the relator's title is not in issue and is immaterial,² except so far as it may be necessary to show that he has sufficient interest to maintain the proceedings.³ Of course, in many cases the relator's title is incidentally and necessarily passed upon in determining the respondent's title, but if, having succeeded in ousting the incumbent, the relator is not voluntarily admitted to the office, he must resort to some other form of remedy to enforce his right to the office.⁴ In order to obviate the necessity of resorting to two proceedings, one to oust the incumbent, and another to seat the claimant, the remedy by quo warranto has been extended, in many states, so that the right to title both of the incumbent and of the relator or plaintiff may be determined in the same proceeding by quo warranto.⁵ Under such

Stumpf, 21 Wis. 579, 23 Wis. 630; State v. Southwick, 13 Wis. 365.

District Attorney. — State v. Button, 25 Wis. 109; State v. McKinney, 25 Wis. 416; Atty.-Gen. v. Elderkin, 5 Wis. 300; Atty.-Gen. v. Ely, 4 Wis. 420.

Public Administrator. — Trotter v. Mitchell, 115 N. Car. 190.

1. Policemen. — Atty.-Gen. v. Cain, 84 Mich. 223; Selby v. Portland, 14 Oregon 243, 58 Am. Rep. 307.

County Physicians. — Trainor v. Wayne County, 89 Mich. 162.

Members of a Committee of a Political Party. — Atty.-Gen. v. Drohan, 169 Mass. 534, 61 Am. St. Rep. 301.

Special Officers for Justice Courts. — Trainor v. Wayne County, 89 Mich. 162.

Captain of Magazine Guard — State v. Champlin, 2 Bailey L. (S. Car.) 221.

Chief Engineer of Quasi-private Railroad Corporation. — Eliason v. Coleman, 86 N. Car. 236.

Teacher of Common Schools. — Com. v. Frank, 4 Pa. Co. Ct. 618.

2. Respondent's Title the Sole Issue — *England*, — Rex v. Bedford Level Corp., 6 East 356.

Arkansas. — State v. McDiarmid, 27 Ark. 176.

California. — People v. Shorb, 100 Cal. 537, 38 Am. St. Rep. 310; People v. Bingham, 82 Cal. 238; People v. Abbott, 16 Cal. 358.

Colorado. — People v. Londoner, 13 Colo. 303; Darrow v. People, 8 Colo. 426.

Connecticut. — State v. Fowler, 66 Conn. 294.

Florida. — Simonton v. State, (Fla. 1902) 31 So. Rep. 821; Lake v. State, 18 Fla. 501; State v. Gleason, 12 Fla. 190.

Idaho. — People v. Green, 1 Idaho 238.

Illinois. — Place v. People, 192 Ill. 165; Snowball v. People, 147 Ill. 260; Chesshire v. People, 116 Ill. 493; Clark v. People, 15 Ill. 213; Allen v. Patterson, 85 Ill. App. 256.

Kansas. — See Bartlett v. State, 13 Kan. 99.

Kentucky. — Newcum v. Kirtley, 13 B. Mon. (Ky.) 518; Taylor v. Com., 3 J. J. Marsh. (Ky.) 406; Tillman v. Otter, 93 Ky. 600.

Louisiana. — State v. Dranguet, 23 La. Ann. 785.

Maine. — Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325.

Maryland. — Harwood v. Marshall, 9 Md. 83.

Massachusetts. — Com. v. Swasey, 133 Mass. 538.

Michigan. — People v. Howlett, 94 Mich.

165; Keeler v. Robertson, 27 Mich. 117; People v. Miles, 2 Mich. 349.

Minnesota. — State v. Sharp, 27 Minn. 38.

Missouri. — State v. Berkeley, 140 Mo. 184; State v. Meek, 129 Mo. 431; State v. Francis, 88 Mo. 557; State v. Rose, 84 Mo. 202; State v. Townsley, 56 Mo. 107; State v. Vail, 53 Mo. 97; Hunter v. Chandler, 45 Mo. 452; State v. Ralls County Ct., 45 Mo. 58.

Montana. — People v. McIntyre, 10 Mont. 166.

New Jersey. — Davis v. Davis, 57 N. J. L. 203; Edelstein v. Fraser, 56 N. J. L. 3. See Manahan v. Watts, 64 N. J. L. 465; State v. Hammer, 42 N. J. L. 435.

New York. — People v. Knox, 38 Hun (N. Y.) 238; People v. Thacher, 55 N. Y. 535, 14 Am. Rep. 312.

North Carolina. — Foard v. Hall, 111 N. Car. 369.

Ohio. — Gano v. State, 10 Ohio St. 237.

Oregon. — State v. Stevens, 29 Oregon 471.

Pennsylvania. — Com. v. Small, 26 Pa. St. 37.

Rhode Island. — State v. Lane, 16 R. I. 620.

Vermont. — State v. McGeary, 69 Vt. 467.

Wisconsin. — State v. Dousman, 28 Wis. 541.

State v. Palmer, 24 Wis. 63.

"The state is concerned only with the usurpation. It takes no part in the controversy further than to have the office declared vacant and the usurer ousted; and while this results in the installation of the person on whose relation the information is filed this is not the primary purpose of proceeding." Holmes v. Sikes, 113 Ga. 583.

3. Interest of Relator. — Collins v. Huff, 63 Ga. 207; State v. Miltenberger, 33 La. Ann. 263; State v. Vail, 53 Mo. 97; State v. Boal, 46 Mo. 528. See Manahan v. Watts, 64 N. J. L. 465. See *supra*, this title, *Parties—Who May Maintain Proceedings*.

4. Relator Not Installed by Quo Warranto. — Bonner v. State, 7 Ga. 480; Strong, Petitioner, 20 Pick. (Mass.) 497; State v. Vail, 53 Mo. 97; Com. v. Masonic Home, 20 Pa. Co. Ct. 465, 6 Pa. Dist. 732. See Prince v. Skillin, 71 Me. 361, 36 Am. Rep. 325; State v. Meek, 129 Mo. 431; People v. Londoner, 13 Colo. 303. See the title MANDAMUS, vol. 19, p. 709. As to remedies in election cases, see the title ELECTIONS, vol. 10, p. 552.

5. Statutory Extension of Remedy — *California.* — *Ex p.* Henshaw, 73 Cal. 486; People v.

statutes the judgment may be upon the rights of both relator and respondent or upon the right of the respondent alone, as circumstances and justice may require.¹ Certainly the respondent cannot complain if the court fails to pass upon the relator's claim to the office.² Sometimes it has been held that in an *ex officio* proceeding by the attorney-general on behalf of the state the rights of a third person claiming the office will not be determined, though the rule is otherwise where the information is prosecuted at the relation of the claimant.³ Under some statutes, if the claimant fails to establish his title, the proceeding must fail, although the incumbent has no right to continue in office. An information showing no title in the relator is bad on demurrer.⁴

2. Public or Municipal Corporations — *a. CORPORATE EXISTENCE.* — Quo warranto is the appropriate and exclusive remedy to test the legality of the organization of public or municipal corporations, such as cities, towns, school districts, and the like,⁵ except where another adequate or exclusive remedy

Banvard, 27 Cal. 470; *People v. Scannell*, 7 Cal. 432.

Colorado. — *People v. Londoner*, 13 Colo. 310; *People v. Boughton*, 5 Colo. 487.

Dakota — Territory *v. Hauxhurst*, 3 Dak. 205.

Florida. — *State v. Anderson*, 26 Fla. 240; *State v. Herndon*, 23 Fla. 287.

Georgia. — *Crovatt v. Mason*, 101 Ga. 246.

Indiana. — *Brown v. Gobin*, 122 Ind. 113; *State v. Bell*, 116 Ind. 1; *Mannix v. State*, 115 Ind. 245; *Jones v. State*, 112 Ind. 193; *Griebel v. State*, 111 Ind. 369; *State v. Shay*, 101 Ind. 38; *State v. Bieler*, 87 Ind. 320; *Yonkey v. State*, 27 Ind. 236.

Kansas. — *State v. Hamilton County*, 39 Kan. 85; *State v. Cobb*, 2 Kan. 32.

Louisiana. — *Guillotte v. Poincy*, 41 La. Ann. 333.

Maine. — See *Prince v. Skillin*, 71 Me. 366, 36 Am. Rep. 325.

Michigan. — *Vrooman v. Michie*, 69 Mich. 42; *People v. Knight*, 13 Mich. 231; *People v. Lord*, 9 Mich. 232; *People v. Miles*, 2 Mich. 349.

Minnesota. — *State v. Smith*, 3 Minn. 240, 74 Am. Dec. 749.

Nebraska. — *State v. Frantz*, 55 Neb. 167; *State v. Moores*, 52 Neb. 634; *State v. Stein*, 13 Neb. 529.

New Jersey. — *Manahan v. Watts*, 64 N. J. L. 465.

New York. — *People v. Conover*, (Supm. Ct.) 6 Abb. Pr. (N. Y.) 220; *Palmer v. Foley*, (N. Y. Super. Ct. Gen. T.) 45 How. Pr. (N. Y.) 110; *Welch v. Cook*, (Supm. Ct.) 7 How. Pr. (N. Y.) 282; *People v. Snedeker*, (Supm. Ct.) 3 Abb. Pr. (N. Y.) 233; *People v. Walker*, 23 Barb. (N. Y.) 304; *People v. Knox*, 38 Hun (N. Y.) 238; *People v. Nolan*, 101 N. Y. 543; *People v. Ryder*, 12 N. Y. 433. See *People v. Thacher*, 55 N. Y. 529, 14 Am. Rep. 312. Compare *People v. Tobey*, 153 N. Y. 381.

North Carolina. — *Patterson v. Hubbs*, 65 N. Car. 119.

Ohio. — *State v. Heinmiller*, 38 Ohio St. 110.

Pennsylvania. — *Com. v. Sparks*, 6 Whart. (Pa.) 416; *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

South Carolina. — *Alexander v. McKenzie*, 2 S. Car. 81.

Texas. — *Davis v. State*, 75 Tex. 426; *McAllen v. Rhodes*, 65 Tex. 348; *State v. Owens*, 63 Tex. 265; *Williamson v. Lane*, 52 Tex. 335; *Gray v. State*, 19 Tex. Civ. App. 521; *Hussey v. Heim*, 17 Tex. Civ. App. 153.

Utah. — *State v. Elliott*, 13 Utah 207; *People v. Cohn*, 7 Utah 352; *People v. Clayton*, 4 Utah 433.

Washington. — *Fawcett v. Superior Ct.*, 15 Wash. 342, 55 Am. St. Rep. 894; *State v. Superior Ct.*, 15 Wash. 376.

West Virginia. — *State v. Shank*, 36 W. Va. 223.

Wisconsin. — *State v. Pierce*, 35 Wis. 101; *State v. Pierpont*, 29 Wis. 608.

1. Judgment on Title of Either or Both — *Alabama.* — *Carter v. Price*, 50 Ala. 568.

Colorado. — *People v. Londoner*, 13 Colo. 303; *Benson v. People*, 10 Colo. App. 175.

Florida. — *Compare Lake v. State*, 18 Fla. 501.

Idaho. — *People v. Green*, 1 Idaho 238.

Michigan. — *Crawford v. Molitor*, 23 Mich. 341; *People v. Connor*, 13 Mich. 238; *People v. Knight*, 13 Mich. 231.

New Jersey. — But see *Manahan v. Watts*, 64 N. J. L. 465.

New York. — *People v. Ryder*, 16 Barb. (N. Y.) 370; *People v. Phillips*, 1 Den. (N. Y.) 388; *People v. Tobey*, 153 N. Y. 381.

North Carolina. — *Foard v. Hall*, 111 N. Car. 370.

Ohio. — *State v. Taylor*, 15 Ohio St. 137; *Gano v. State*, 10 Ohio St. 237.

2. *Gano v. State*, 10 Ohio St. 238.

3. Distinction Between Ex-officio and Private Proceedings. — *State v. Burnett*, 2 Ala. 140; *McAllister v. Com.*, 6 Bush (Ky.) 581; *Tillman v. Otter*, 93 Ky. 600; *Hunter v. Chandler*, 45 Mo. 452. See *Relender v. State*, 149 Ind. 283; *State v. Townsley*, 56 Mo. 107. See also *State v. Taylor*, 15 Ohio St. 144.

4. Good Title in Relator Necessary. — *State v. Bell*, 116 Ind. 1; *Jones v. State*, 112 Ind. 193; *McGee v. State*, 103 Ind. 444; *Weir v. State*, 96 Ind. 311; *State v. Foulkes*, 94 Ind. 493; *State v. Long*, 91 Ind. 351; *Smith v. Moore*, 90 Ind. 294; *State v. Bieler*, 87 Ind. 320; *State v. Miltenberger*, 33 La. Ann. 263; *Vrooman v. Michie*, 69 Mich. 42; *Andrews v. State*, 69 Miss. 740; *Stanford v. Ellington*, 117 N. Car. 158, 53 Am. St. Rep. 580. See also *supra*, this title, *Burden of Proof*.

5. Quo Warranto Lies to Try Corporate Existence — *Arkansas.* — *Beavers v. State*, 60 Ark. 124; *State v. Leatherman*, 38 Ark. 81.

California. — *People v. Reclamation Dist.* No. 556, 130 Cal. 607.

Dakota. — *Territory v. Armstrong*, 6 Dak. 226.

has been provided by statute.¹ The question of corporate existence cannot be raised collaterally.² Quo warranto is an appropriate remedy to forfeit the charter and franchises of a municipal corporation in case of abuse or misuser,³ but such forfeiture has usually been denied upon grounds independent of the form of remedy.⁴

b. TERRITORIAL JURISDICTION. — Quo warranto has been usually held to be an appropriate remedy to try the jurisdiction of a public or municipal corporation over a certain territory, as, for instance, in the case of an attempted extension of corporate limits.⁵ Other cases have taken a different view upon the ground that quo warranto is not the proper remedy to test the legality of official acts,⁶ and held that if an official attempts to exercise power in a territory within which he is not authorized to act, the remedy is by injunction.⁷

Florida. — *Enterprise v. State*, 29 Fla. 128.

Illinois. — *People v. Gary*, 196 Ill. 311; *McGahan v. People*, 191 Ill. 493; *Craig v. People*, 188 Ill. 416; *Kamp v. People*, 141 Ill. 9, 33 Am. St. Rep. 270; *Mason, etc., Special Drainage Dist. v. Griffin*, 134 Ill. 330; *People v. Spring Valley*, 129 Ill. 169; *Lees v. Drainage Com'rs*, 125 Ill. 47; *Evans v. Lewis*, 121 Ill. 478; *Keigwin v. Drainage Com'rs*, 115 Ill. 347; *Blake v. People*, 109 Ill. 504; *Osborn v. People*, 103 Ill. 224; *Alderman v. School Directors*, 91 Ill. 179; *Renwick v. Hall*, 84 Ill. 162; *Trumbo v. People*, 75 Ill. 561; *People v. Marquiss*, 192 Ill. 377. See also *Catlett v. People*, 151 Ill. 16.

Iowa. — *State v. Independent School Dist.*, 29 Iowa 264.

Kansas. — *State v. Ford County*, 12 Kan. 441.

Massachusetts. — *Atty.-Gen. v. Sullivan*, 163 Mass. 447.

Michigan. — *Atlee v. Wexford County*, 94 Mich. 562; *Roeser v. Gartland*, 75 Mich. 145; *Fractional School Dist. No. 1 v. School Inspectors*, 27 Mich. 3; *Atty.-Gen. v. Page*, 38 Mich. 286; *People v. Maynard*, 15 Mich. 463. But see *Scrafford v. Gladwin County*, 41 Mich. 648.

Minnesota. — *State v. Tracy*, 48 Minn. 497.

Missouri. — *State v. Fleming*, 158 Mo. 558; *State v. Westport*, 116 Mo. 582; *State v. McReynolds*, 61 Mo. 203; *State v. Weatherby*, 45 Mo. 17; *Kayser v. Bremen*, 16 Mo. 88.

Nebraska. — *State v. Uridil*, 37 Neb. 371. See also *State v. Mote*, 48 Neb. 683; *State v. Dimond*, 44 Neb. 154.

Nevada. — *State v. Osburn*, 24 Nev. 187.

New Jersey. — *Campbell v. Wainwright*, 50 N. J. L. 555; *State v. Brown*, 31 N. J. L. 356; *State v. Paterson, etc., Turnpike Co.*, 21 N. J. L. 9. See also *State v. Atlantic Highlands*, 50 N. J. L. 457.

Texas. — *Ewing v. State*, 81 Tex. 172. See also *State v. Wofford*, 90 Tex. 514.

Vermont. — *State v. Bradford*, 32 Vt. 50.

Wisconsin. — See also *State v. Tuttle*, 53 Wis. 45; *State v. Merriman*, 6 Wis. 14.

In Tennessee municipal corporations are not embraced within the provisions of the code for the dissolution of corporations by proceedings in the nature of quo warranto. The remedy is by legislative repeal of the charter. *State v. Waggoner*, 88 Tenn. 290.

1. Other Adequate Remedy. — See generally *supra*, this title. See also the following municipal corporation cases: *Lord v. Every*, 38 Mich. 405; *Com. v. Kennedy*, 5 Lack. Leg. N. (Pa.) 323.

2. Collateral Attack on Corporate Existence. — *People v. Newberry*, 87 Ill. 41; *Trumbo v. People*, 75 Ill. 561; *St. Louis v. Shields*, 62 Mo. 247; *State v. Ohio, etc., Mineral Land Co.*, 84 Mo. App. 32. See *South Platte Land Co. v. Buffalo County*, 15 Neb. 605; *McClay v. Lincoln*, 32 Neb. 412. But see *People v. Reclamation Dist. No. 556*, 130 Cal. 607. *Contra*, *Scrafford v. Gladwin County*, 41 Mich. 652. See also title MUNICIPAL CORPORATIONS, vol. 20, p. 1236, and cases there cited.

The rule is the same in regard to private corporations. See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 591.

3. Forfeiture of Municipal Charter. — *High Ex. Rem.* (2d ed.), § 678; *Dillon Mun. Corp.* (4th ed.), § 730; *Rex v. London*, 3 Harg. St. Tr. 545; *Atty.-Gen. v. Adonai Shomo Corp.*, 167 Mass. 424.

4. *Burnett v. Cahaba*, 30 Ala. 66; *Com. v. Pittsburgh*, 14 Pa. St. 177.

5. Quo Warranto Lies to Try Territorial Jurisdiction. — *California.* — *People v. Reclamation Dist. No. 556*, 130 Cal. 607; *People v. Oakland*, 92 Cal. 611.

Illinois. — *People v. Peoria*, 166 Ill. 522; *Mason, etc., Special Drainage Dist. v. Griffin*, 134 Ill. 330; *Evans v. Lewis*, 121 Ill. 478.

Michigan. — *Frey v. Michie*, 68 Mich. 323; *People v. Hatch*, 60 Mich. 229; *People v. Maynard*, 15 Mich. 463.

Minnesota. — *State v. Crow Wing County*, 66 Minn. 519.

Missouri. — *State v. Fleming*, 147 Mo. 1; *State v. Westport*, 116 Mo. 582; *State v. McMillan*, 108 Mo. 153; *State v. Ohio, etc., Mineral Land Co.*, 84 Mo. App. 32.

Nebraska. — *State v. Mote*, 48 Neb. 683; *State v. Dimond*, 44 Neb. 154.

Texas. — *East Dallas v. State*, 73 Tex. 371; *State v. Cram*, 16 Wis. 343.

Establishment of Public Park. — The right of a city to take possession of and improve as a public park lands lying outside of its limits comes only by sovereign grant, and, so far as concerns the city, is a public franchise. *Thompson v. Moran*, 44 Mich. 602.

The Boundary Line Between Two Municipal Corporations may be determined by quo warranto. *Frey v. Michie*, 68 Mich. 323; *People v. Hatch*, 60 Mich. 229.

6. See *supra*, this section, subdiv. 1. a. (3) *Official Misconduct or Illegal Action*.

7. Injunction. — *People v. Whitcomb*, 55 Ill. 172; *Stultz v. State*, 65 Ind. 402. See also

The validity of annexation proceedings is not open to collateral attack.¹

c. POWERS AND FRANCHISES NOT CONFERRED BY LAW. — Quo warranto lies to oust a public or municipal corporation from the enjoyment and exercise of particular franchises and powers not conferred upon it by law.² Quo warranto is not an appropriate remedy to try the right of a city to enact a particular ordinance,³ nor to compel the performance of a municipal duty or to punish its neglect,⁴ nor generally to try the validity of corporate action not amounting to the unlawful exercise of a public franchise.⁵

3. Private Corporations — *a. CORPORATE EXISTENCE.* — Quo warranto is the appropriate and exclusive remedy to oust persons from a corporate franchise in cases of illegal user, usurpation, or forfeiture of such franchise,⁶

Delphi v. Startzman, 104 Ind. 344; *Peru v. Bearss*, 55 Ind. 576.

1. Collateral Attack. — See the title MUNICIPAL CORPORATIONS, vol. 20, p. 1155.

2. Ouster from Particular Franchises and Powers. — *State v. Topeka*, 31 Kan. 452, 30 Kan. 653; *State v. Bingham*, 7 Ohio Cir. Dec. 522, 14 Ohio Cir. Ct. 245.

3. Power to Enact Ordinance. — *State v. Lyons*, 31 Iowa 432; *State v. Newark*, 57 Ohio St. 430.

4. Performance of Municipal Duties. — *Atty-Gen. v. Salem*, 103 Mass. 138.

5. Subscription in Aid of Railroad. — Quo warranto will not lie to question the validity of a subscription by a municipal corporation to railroad stock confirmed by legislative enactment. *State v. Charleston*, 10 Rich. L. (S. Car.) 491.

Exclusion of Colored Children from Public Schools. — But in *People v. Board of Education*, 101 Ill. 308, 40 Am. Rep. 196, it was held that under the *Illinois* statute, authorizing the remedy where any corporation "exercises powers not conferred by law," an information lay against a board of education to correct its illegal action in excluding colored children from the public schools.

Use of Particular Name. — As to whether a quo warranto information can be prosecuted, at the relation of a private citizen, to oust a municipality from using a particular name in the exercise of its corporate functions, see *State v. Vershire*, 52 Vt. 41.

6. Appropriate and Exclusive Remedy to try Corporate Existence — *England.* — *Reg. v. Pepper*, 7 Ad. & El. 745, 34 E. C. L. 212.

United States. — *Terrett v. Taylor*, 9 Cranch (U. S.) 51; *Washington, etc., Turnpike Co. v. State*, 3 Wall. (U. S.) 210; *Ames v. Kansas*, 111 U. S. 449.

Alabama. — *Capital City Water Co. v. State*, 105 Ala. 406; *State v. Moore*, 19 Ala. 514.

Arkansas. — *Darnell v. State*, 48 Ark. 321; *State v. Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109.

California. — *People v. Dashaway Assoc.*, 84 Cal. 114; *People v. Stanford*, 77 Cal. 372.

Colorado. — *Larimer County Reservoir Co. v. People*, 8 Colo. 614; *People v. Leadville City Bank*, 7 Colo. 226; *Humphrey v. Mooney*, 5 Colo. 282; *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

Connecticut. — *State v. Bull*, 16 Conn. 190.

Delaware. — *State v. Hancock*, 2 Penn. (Del.) 252.

Georgia. — *Young v. Harrison*, 6 Ga. 131.

Illinois. — *Ohio, etc., R. Co. v. People*, 120 Ill. 200; *Hudson v. Green Hill Seminary Corp.*,

113 Ill. 618; *Baker v. Backus*, 32 Ill. 110; *Greene v. People*, (Ill. 1889) 21 N. E. Rep. 605.

Indiana. — *Eel River R. Co. v. State*, 143 Ind. 231; *Smith v. State*, 140 Ind. 343; *Holman v. State*, 105 Ind. 569, 13 Am. & Eng. Corp. Cas. 22; *State v. Foulkes*, 94 Ind. 493; *State v. Beck*, 81 Ind. 500; *Lawrence County v. Hall*, 70 Ind. 469; *Albert v. State*, 65 Ind. 413; *Aurora, etc., R. Co. v. Lawrenceburgh*, 56 Ind. 80; *State v. Kingan*, 51 Ind. 142; *State v. Bethlehem, etc., Gravel Road Co.*, 32 Ind. 357; *Danville, etc., Plank-road Co. v. State*, 16 Ind. 456; *State v. Bailey*, 16 Ind. 46, 79 Am. Dec. 405; *McCulloch v. State*, 11 Ind. 424; *State v. Portland Natural Gas, etc., Co.*, 153 Ind. 483, 74 Am. St. Rep. 314; *Carmel Natural Gas, etc., Co. v. Small*, 150 Ind. 427.

Iowa. — *State v. Omaha, etc., R., etc., Co.*, 91 Iowa 517; *State v. Iowa Mut. Aid Assoc.*, 59 Iowa 125.

Kansas. — *State v. Pipher*, 28 Kan. 127; *State v. Martin*, 51 Kan. 462.

Kentucky. — *Com. v. Lexington, etc., Turnpike Road Co.*, 6 B. Mon. (Ky.) 397.

Maine. — *Reed v. Cumberland, etc., Canal Corp.*, 65 Me. 132.

Maryland. — *Regents of State University v. Williams*, 9 Gill & J. (Md.) 365, 31 Am. Dec. 72.

Massachusetts. — *Com. v. Tenth Massachusetts Turnpike Corp.*, 11 Cush. (Mass.) 171, 5 Cush. (Mass.) 509; *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Hartnett v. Plumbers' Supply Assoc.*, 169 Mass. 229, *Atty.-Gen. v. Adonai Shomo Corp.*, 167 Mass. 424; *Rice v. National Bank of Commonwealth*, 126 Mass. 300.

Michigan. — *Taggart v. Perkins*, 73 Mich. 303; *Atty.-Gen. v. Lorman*, 59 Mich. 161, 60 Am. Rep. 287; *Atty.-Gen. v. Hanchett*, 42 Mich. 436; *Maybury v. Mutual Gas-Light Co.*, 38 Mich. 154.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213.

Mississippi. — *Commercial Bank v. State*, 4 Smed. & M. (Miss.) 439; *State v. Washington Steam F. Co.*, No. 3, 76 Miss. 449.

Missouri. — *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 340; *State v. American Medical College*, 59 Mo. App. 264; *State v. Hannibal, etc., Gravel Road Co.*, 37 Mo. App. 406; *State v. Wood*, 13 Mo. App. 139, *affirmed* 84 Mo. 379.

New Jersey. — *Owen v. Whitaker*, 20 N. J. Eq. 122; *Miller v. American Tobacco Co.*, (N. J. 1898) 42 Atl. Rep. 1117, 56 N. J. Eq. 847; *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352.

New York. — *People v. Hudson Bank*, 6 Cow. (N. Y.) 217; *People v. Washington, etc.,*

except where another remedy has been provided by statute.¹ The question of corporate existence cannot be raised collaterally.²

b. RIGHT OF FOREIGN CORPORATION TO DO BUSINESS IN STATE. — Quo warranto lies to try the right of a foreign corporation to do business within the state.³

c. POWERS AND FRANCHISES NOT CONFERRED BY LAW. — A corporation may be ousted by quo warranto from the enjoyment and exercise of powers not conferred by law, but unlawfully assumed, and this may be done without affecting the corporation in regard to its proper franchises.⁴ But where the

Bank, 6 Cow. (N. Y.) 211; *People v. Tibbets*, 4 Cow. (N. Y.) 384; *People v. Broadway R. Co.*, 56 Hun (N. Y.) 45; *People v. Bristol, etc.*, Turnpike Road Co., 23 Wend. (N. Y.) 222; *People v. Kingston, etc.*, Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551; *People v. Thompson*, 21 Wend. (N. Y.) 235; *People v. Thompson*, 16 Wend. (N. Y.) 655; *People v. Manhattan Co.*, 9 Wend. (N. Y.) 351; *People v. Hall*, 80 N. Y. 117; *People v. Thacher*, 55 N. Y. 528, 14 Am. Rep. 312.

North Carolina. — *Atty.-Gen. v. Simonton*, 78 N. Car. 57; *Atty.-Gen. v. Petersburg, etc.*, R. Co., 6 Ired. L. (28 N. Car.) 456.

Ohio. — *State v. Capital City Dairy Co.*, 62 Ohio St. 350; *Society Perun v. Cleveland*, 43 Ohio St. 481; *State v. People's Mut. Ben. Assoc.*, 42 Ohio St. 579; *State v. Taylor*, 25 Ohio St. 279; *State v. Pennsylvania, etc.*, Canal Co., 23 Ohio St. 121; *State v. Buckland*, 5 Ohio St. 216; *Woods v. Equitable Debenture Co.*, 11 Ohio Dec. 154, 8 Ohio N. P. 125; *State v. Cincinnati Gas-Light, etc.*, Co., 18 Ohio St. 262; *State v. Ohio, etc.*, R. Co., 3 Ohio Cir. Dec. 516, 6 Ohio Cir. Ct. 412; *State v. Pittsburgh, etc.*, R. Co., 50 Ohio St. 239; *State v. Ackerman*, 51 Ohio St. 163.

Oregon. — *State v. Douglas County Road Co.*, 10 Oregon 198.

Pennsylvania. — *Com. v. Order of Solon*, 166 Pa. St. 33; *Com. v. Commercial Bank*, 28 Pa. St. 383; *Miller v. McCutchen*, 2 Pars. Eq. Cas. (Pa.) 205; *Birmingham, etc.*, Turnpike Road v. *Com.*, 1 Penny. (Pa.) 458.

South Carolina. — *State v. Charleston*, 1 Mill. (S. Car.) 36.

Texas. — *International, etc.*, R. Co. v. *State*, 75 Tex. 356; *State v. Goowin*, 69 Tex. 55; *Brennan v. Bradshaw*, 53 Tex. 330, 37 Am. Rep. 758; *State v. Southern Pac. R. Co.*, 24 Tex. 80.

Vermont. — *State v. Essex Bank*, 8 Vt. 489.

Virginia. — *Com. v. James River Co.*, 2 Va. Cas. 190.

Wisconsin. — *State v. Portage City Water Co.*, 107 Wis. 441; *State v. Madison St. R. Co.*, 72 Wis. 612; *State v. Milwaukee, etc.*, R. Co., 45 Wis. 579; *Atty.-Gen. v. Superior, etc.*, R. Co., 93 Wis. 604.

The validity of the organization of a corporation, the possession and user of corporate franchises, forfeiture, and dissolution have all been elsewhere fully considered. See the titles CORPORATIONS (PRIVATE), vol. 7, p. 620; DE FACTO CORPORATIONS, vol. 8, p. 747; DISSOLUTION OF CORPORATIONS, vol. 9, p. 544.

1. Generally, as to effect of creation of new remedies, see *supra*, this title, *Principles Governing Use of Remedy* — *Other Adequate Remedy*.

2. *Collateral Attack on Corporate Existence.* — *Denver, etc.*, R. Co. v. *Denver City R. Co.*, 2 Colo. 679; *Young v. Harrison*, 6 Ga. 131;

Hamilton v. Annapolis, etc., R. Co., 1 Md. Ch. 107, 1 Md. 553; *Brennan v. Bradshaw*, 53 Tex. 330, 37 Am. Rep. 758. See also the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 591.

3. *Right of Foreign Corporation to Do Business in State.* — *State v. Fidelity, etc., Co.*, 77 Iowa 648; *State v. Mutual L. Ins. Co.*, 59 Kan. 772, 51 Pac. Rep. 881; *State v. Fidelity, etc., Ins. Co.*, 39 Minn. 538; *State v. Standard Oil Co.*, 61 Neb. 28; *State v. Western Union Mut. L. Ins. Co.*, 47 Ohio St. 167; *State v. Fidelity, etc., Ins. Co.*, 49 Ohio St. 440, 34 Am. St. Rep. 573; *State v. Portage City Water Co.*, 107 Wis. 451; *State v. Somerby*, 42 Minn. 55; *State v. Ackerman*, 51 Ohio St. 163; *State v. Western Union Mut. L. Ins. Co.*, 47 Ohio St. 167.

4. *Ouster from Particular Powers and Franchises* — *Arkansas.* — *Darnell v. State*, 48 Ark. 321.

California. — *People v. Dashaway Assoc.*, 84 Cal. 118.

Colorado. — *Central, etc., Road Co. v. People*, 5 Colo. 39.

Connecticut. — *State v. Norwalk, etc.*, Turnpike Co., 10 Conn. 167.

Illinois. — *People v. Golden Rule*, 114 Ill. 34; *Illinois Midland R. Co. v. People*, 84 Ill. 426; *People v. Lake St. El. R. Co.*, 54 Ill. App. 348.

Indiana. — *Danville, etc., Plank-road Co. v. State*, 16 Ind. 456; *State v. Portland Natural Gas, etc., Co.*, 153 Ind. 483, 74 Am. St. Rep. 314.

Kansas. — *State v. Regents of State University*, 55 Kan. 389; *State v. Topeka*, 31 Kan. 454.

Massachusetts. — *Goddard v. Smithett*, 3 Gray (Mass.) 116; *Atty.-Gen. v. Sullivan*, 163 Mass. 446; *Boston Rubber Shoe Co. v. Boston Rubber Co.*, 149 Mass. 436; *Haupt v. Rogers*, 170 Mass. 71.

Michigan. — *Atty.-Gen. v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287; *Stewart v. Young Men's Father Mathew Total Abstinence Benev. Soc. No. 1*, 41 Mich. 67; *Atty.-Gen. v. Detroit Suburban R. Co.*, 96 Mich. 65.

Minnesota. — *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213; *State v. Somerby*, 42 Minn. 55.

Mississippi. — *State v. Commercial, etc., Bank*, 24 Miss. 144.

Missouri. — *State v. Equitable Loan, etc., Assoc.*, 142 Mo. 341; *State v. Lindell R. Co.*, 151 Mo. 162.

Nebraska. — *State v. Atchison, etc.*, R. Co., 38 Neb. 437.

New York. — *People v. Rensselaer, etc.*, R. Co., 15 Wend. (N. Y.) 113, 30 Am. Dec. 33; *People v. Geneva College*, 5 Wend. (N. Y.) 211.

Ohio. — *State v. Oberlin Bldg., etc., Assoc.*, 35 Ohio St. 258; *State v. Farmers' College*, 32 Ohio St. 487; *State v. Dayton Traction Co.*, 10 Ohio Cir. Dec. 212, 18 Ohio Cir. Ct. 490; *State*

unlawful acts of a corporation are grounds for forfeiture, it is proper to oust the corporation of all its franchises by quo warranto.¹ Quo warranto will not lie in the absence of statute merely to test the legality of acts of a corporation not amounting to the usurpation of a franchise,² such as the legality of its title or possession of property.³ There is a distinction between franchises and powers. Not every *ultra vires* act of a corporation is ground for quo warranto.⁴

4. Officers of Private Corporations — *a. IN GENERAL.* — Quo warranto is usually held to be an appropriate remedy to try an office in a private corporation, either at common law or under special statutory provisions.⁵ Some cases hold, however, that the proceeding to try the title to an office in a private corporation is purely statutory, and that quo warranto will not lie at common law for that purpose, because the office is not a public office.⁶ In *England* the statute of Anne authorizing informations to try title to corporate

v. Pittsburg, etc., R. Co., 53 Ohio St. 189; *State v. Standard Oil Co.,* 49 Ohio St. 137, 34 Am. St. Rep. 541.

Pennsylvania. — *Com. v. Sturtevant,* 182 Pa. St. 323; *Com. v. Delaware, etc., Canal Co.,* 43 Pa. St. 301.

Wisconsin. — *State v. Portage City Water Co.,* 107 Wis. 441.

1. *State v. Portland Natural Gas, etc., Co.,* 153 Ind. 483, 74 Am. St. Rep. 314; *State v. Minnesota Thresher Mfg. Co.,* 40 Minn. 213; *State v. Capital City Dairy Co.,* 62 Ohio St. 350; *State v. Oberlin Bldg., etc., Assoc.,* 35 Ohio St. 258; *State v. Pennsylvania, etc., Canal Co.,* 23 Ohio St. 121; *Com. v. Northeastern El. R. Co.,* 161 Pa. St. 409.

But where the abuse or misuser is in a particular which is not declared by statute to operate as a forfeiture, the court may in its discretion determine whether the corporation should be ousted of its franchise to be a corporation, or merely from the exercise of the franchise illegally assumed. *State v. Oberlin Bldg., etc., Assoc.,* 35 Ohio St. 264; *State v. Central Ohio Mut. Relief Assoc.,* 29 Ohio St. 399.

2. Acts Not Amounting to Exercise of Franchise. — *State v. Hannibal, etc., Gravel Road Co.,* 37 Mo. App. 496.

3. *State v. Pittsburgh, etc., R. Co.,* 50 Ohio St. 239; *Com. v. Bala, etc., Turnpike Co.,* 153 Pa. St. 47. But see *People v. Pullman's Palace Car Co.,* 175 Ill. 125.

4. *State v. Minnesota Thresher Mfg. Co.,* 40 Minn. 213.

5. Title to Office in Private Corporation — *United States.* — *Guntton v. Ingle,* 4 Cranch (C. C.) 438, 11 Fed. Cas. No. 5,870.

Connecticut. — *State v. Tudor,* 5 Day (Conn.) 335, 5 Am. Dec. 162.

Delaware. — *State v. Stewart,* 6 Houst. (Del.) 359.

Florida. — *Davidson v. State,* 20 Fla. 784; *State v. Jones,* 16 Fla. 306.

Georgia. — *Harris v. Pounds,* 66 Ga. 123; *Hussey v. Gallagher,* 61 Ga. 91; *Morris v. Underwood,* 19 Ga. 559.

Illinois. — *Place v. People,* 192 Ill. 160; *Nelson v. Benson,* 69 Ill. 27; *Lawson v. Kolben-son,* 61 Ill. 405; *Garmire v. American Min. Co.,* 93 Ill. App. 331; *Hayes v. Morgan,* 81 Ill. App. 665.

Indiana. — *Carmel Natural Gas, etc., Co. v. Small,* 150 Ind. 427; *Armington v. State,* 95

Ind. 421; *Creek v. State,* 77 Ind. 180; *Atherton v. Sugar Creek, etc., Turnpike Co.,* 67 Ind. 334; *Beckett v. Houston,* 32 Ind. 393; *Smith v. State Bank,* 18 Ind. 327.

Iowa. — *State v. Lyons,* 31 Iowa 433; *Cochran v. McCleary,* 22 Iowa 85.

Kansas. — *Hunt v. Pleasant Hill Cemetery Assoc.,* 27 Kan. 734.

Louisiana. — *Wiltz v. Peters,* 4 La. Ann. 339.

Michigan. — *Atty.-Gen. v. Looker,* 111 Mich. 498; *People v. Nappa,* 80 Mich. 487; *Frey v. Michie,* 68 Mich. 323.

Missouri. — *State v. Greer,* 78 Mo. 188; *State v. Stewart,* 32 Mo. 379.

Nevada. — *State v. Cronan,* 23 Nev. 437.

New Jersey. — *Owen v. Whitaker,* 20 N. J. Eq. 122; *State v. Crowell,* 9 N. J. L. 390.

New York. — *Morris v. Whelan,* (Supm. Ct.) 11 Abb. N. Cas. (N. Y.) 64; *People v. Tibbets,* 4 Cow. (N. Y.) 358; *People v. Kip,* 4 Cow. (N. Y.) 382, note; *People v. Hills,* 1 Lans. (N. Y.) 202.

Ohio. — *Crawford v. State,* 52 Ohio St. 62; *State v. McDaniel,* 22 Ohio St. 354; *Hullman v. Honcomp,* 5 Ohio St. 237; *Hooe v. Hall,* 4 Ohio Cir. Dec. 547.

Pennsylvania. — *Com. v. Arrison,* 15 S. & R. (Pa.) 127, 16 Am. Dec. 531; *Com. v. Yetter,* 190 Pa. St. 488; *Com. v. Stevens,* 168 Pa. St. 582; *Phillips v. Com.,* 98 Pa. St. 394; *Hays v. Com.,* 82 Pa. St. 518; *Com. v. Graham,* 64 Pa. St. 339; *Com. v. Smith,* 45 Pa. St. 59; *Com. v. Leisenring,* 15 Phila. (Pa.) 215, 39 Leg. Int. (Pa.) 402; *Com. v. Stevenson,* 200 Pa. St. 509; *Com. v. Filer,* 30 Pittsb. Leg. J. (Pa.) 286; *Nolde v. Madlem,* 4 Lanc. L. Rev. 347; *Miller v. McCutchen,* 2 Pars. Eq. Cas. (Pa.) 205. But see *Com. v. Murray,* 11 S. & R. (Pa.) 73, 14 Am. Dec. 614.

Rhode Island. — *Hoppin v. Buffum,* 9 R. I. 513, 11 Am. Rep. 291.

South Carolina. — *State v. Lehre,* 7 Rich. L. (S. Car.) 234.

Vermont. — *State v. McNaughton,* 56 Vt. 736.

Washington. — *State v. Horan,* 22 Wash. 197.

6. Contrary View. — *Haupt v. Rogers,* 170 Mass. 71; *Atty.-Gen. v. Drohan,* 169 Mass. 535, 61 Am. St. Rep. 301; *Com. v. Dearborn,* 15 Mass. 125; *Eliason v. Coleman,* 86 N. Car. 235, 9 Am. & Eng. R. Cas. 433. But see *Com. v. Union F. & M. Ins. Co.,* 5 Mass. 230, 4 Am. Dec. 50.

Who Is a Public Officer. — See the title PUBLIC OFFICERS, *ante*.

offices was confined to offices in municipal corporations,¹ and an information will not lie to try the title of an officer of a private corporation, unless the corporation has public duties.² But corresponding statutes in the *United States* have been given a broader construction.³

b. DISTINCTION BETWEEN OFFICE AND EMPLOYMENT. — Quo warranto will not lie to try the title of a mere employee as distinguished from an officer of a corporation.⁴ Thus, an information will not lie to remove officers of a corporation who hold office under an election by directors, as these are merely servants or agents of the company.⁵

c. EXPIRATION OF TERM. — Leave to file the information will generally be refused when the term of office in question has expired.⁶ Subsequent resignation is no defense.⁷ But the title of one assuming to act as a corporate officer cannot be tried in proceedings against his successor.⁸

d. OFFICIAL MISCONDUCT. — Quo warranto will not lie to redress a breach of trust or neglect of official duty.⁹

5. Franchises — *a. GENERAL RULES.* — Quo warranto lies to try the right to a public franchise.¹⁰ A public franchise in this sense is a privilege or immunity in which the public have an interest, as distinguished from mere private rights, and which cannot be exercised without authority derived from the sovereign power.¹¹ Quo warranto will not lie for a mere private franchise not connected with public government.¹² The writ will sometimes lie against a corporation when it would not lie against an individual, for a corporation has only such powers as have been granted to it, and the exercise of any other powers as a corporation may be said to be the usurpation of a franchise.¹³ But even in the case of corporations there is a distinction between franchises and powers, and it is not every *ultra vires* act that will amount to the usurpation of a franchise.¹⁴ Quo warranto will lie to forfeit the exclusiveness of

1. See *supra*, this section, *Public Officers*.

2. In *England*. — High Extraordinary Leg. Rem. (2d ed.), § 653; Reg. v. Mousley, 8 Q. B. 946, 55 E. C. L. 946; Rex v. Ogden, 10 B. & C. 230, 21 E. C. L. 61. Compare Eliason v. Coleman, 86 N. Car. 235.

3. See cases cited in first note in this section. See also *supra*, this section, *Public Officers*.

4. Will Not Lie Against Mere Employees or Agents. — Com. v. Dearborn, 15 Mass. 126; State v. Cronan, 23 Nev. 446; People v. Hills, 1 Lans. (N. Y.) 202; Phillips v. Com., 98 Pa. St. 394; Com. v. McBride, 4 Leg. Gaz. (Pa.) 338. See Rex v. Bedford Level Corp., 6 East 356; Eliason v. Coleman, 86 N. Car. 235.

5. State v. Cronan, 23 Nev. 446; People v. Hills, 1 Lans. (N. Y.) 202; Eliason v. Coleman, 86 N. Car. 235. See title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 836.

6. Expiration of Term. — Morris v. Underwood, 19 Ga. 563. For other cases upon the same principle, see *supra*, this section, *Public Officers* — *Expiration of Term*.

7. Subsequent Resignation. — State v. McDaniel, 22 Ohio St. 359.

8. Com. v. Smith, 45 Pa. St. 59.

9. Official Misconduct. — Dart v. Houston, 22 Ga. 507. See Haupt v. Rogers, 170 Mass. 71.

10. Lies to Try Right to Public Franchise — *England*. — Peter v. Kendal, 6 B. & C. 703, 13 E. C. L. 299.

California. — People v. Sutter St. R. Co., 117 Cal. 604.

Illinois. — Wilmington Water Power Co. v. Evans, 166 Ill. 548.

Kentucky. — Chambers v. Baptist Educational Soc., 1 B. Mon. (Ky.) 215; Com. v. Lexington, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 397; Com. v. Frankfort, 13 Bush (Ky.) 186.

New York. — People v. Bristol, etc., Turnpike Road Co., 23 Wend. (N. Y.) 227.

Pennsylvania. — Com. v. Pittsburg Illuminating Co., 180 Pa. St. 578.

Texas. — Bradley v. McCrabb, Dall. (Tex.) 504; Morris v. State, 62 Tex. 728.

Wisconsin. — State v. Portage City Water Co., 107 Wis. 441; State v. Madison St. R. Co., 72 Wis. 612; Atty.-Gen. v. Superior, etc., R. Co., 93 Wis. 604.

11. Public Franchise Defined. — Chicago City R. Co. v. People, 73 Ill. 547; State v. Minnesota Thresher Mfg. Co., 40 Minn. 213; People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243; Com. v. Arrison, 15 S. & R. (Pa.) 130, 16 Am. Dec. 531; State v. Portage City Water Co., 107 Wis. 441. See generally the title FRANCHISES, vol. 14, p. 4.

12. Private Franchises. — Rex v. Ogden, 10 B. & C. 233, 21 E. C. L. 62; Rex v. Williams, 1 Burr. 407.

13. Distinction between Corporations and Individuals as to Franchises. — People v. Utica Ins. Co., 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. See generally the titles CORPORATIONS (PRIVATE), vol. 7, p. 620; ULTRA VIRES.

14. State v. Minnesota Thresher Mfg. Co., 40 Minn. 213. See also *supra*, this section, *Private Corporations* — *Powers and Franchises Not Conferred by Law*.

a franchise without affecting the right to exercise the main franchise itself.¹ It will not lie, however, to suspend a franchise without forfeiting it.² In *England* the statute of Anne, authorizing informations by a private relator, extended only to corporate franchises and corporate officers, but corresponding *American* statutes extend to any franchise without regard to whether it is a corporate franchise or not.³

b. APPLICATION OF RULES—(1) *Tolls*.—The right to erect gates and collect tolls upon roads, bridges, canals, channels, or other highways is a franchise triable upon quo warranto.⁴

(2) *Ferries*.—The right to operate a ferry is a franchise triable by quo warranto.⁵

(3) *Dams*.—The right to maintain a dam across a stream is a franchise triable on quo warranto.⁶

(4) *Banking*.—The right to conduct a banking business is not a franchise, although regulated by law, and if individuals claim and exercise the right of banking, while they may be subject to the penalties of the statute, they are not subject to quo warranto.⁷ But if a corporation engages in banking as a corporation without authority of law, it usurps a franchise and may be ousted by quo warranto.⁸

(5) *Licenses*.—A license to engage in a particular business or occupation has been held to be such a franchise as will support quo warranto proceedings to try the right,⁹ but the better opinion seems to be to the contrary, in the absence of statute extending the remedy.¹⁰

(6) *Use of Streets and Highways*.—The right under a municipal ordinance or contract to operate a street railway or to lay pipes or string wires in or along a public street or highway has been held not a franchise and not triable by quo warranto. Any unlawful user must be redressed as other ordinary wrongs or breaches of contract.¹¹ But a contrary view has been taken, and it has been held that a grant by a city, by authority of its charter, of the right

1. *Exclusiveness of Franchise*.—*Com. v. Sturtevant*, 182 Pa. St. 324.

2. *Suspension of Franchise*.—*Morris v. Schooner Leona*, 67 Tex. 303.

3. *Rex v. Williams*, 1 Burr. 402; *Cochran v. McCleary*, 22 Iowa 87; *People v. Bristol*, etc., Turnpike Road Co., 23 Wend. (N. Y.) 227; *State v. Portage City Water Co.*, 107 Wis. 449. But see *State v. Smith*, 55 Tex. 447. See also *infra*, this section, *Application of Rules*.

4. *Tolls*.—*Alabama*.—*State v. Centreville Bridge Co.*, 18 Ala. 678.

Arkansas.—*Chandler v. Montgomery County*, 31 Ark. 25.

California.—*People v. Volcano Canyon Toll-Road Co.*, 100 Cal. 87.

Connecticut.—*State v. Norwalk*, etc., Turnpike Co., 10 Conn. 166.

Georgia.—*Whelchel v. State*, 76 Ga. 644.

Indiana.—But see *State v. Hare*, 121 Ind. 308.

Kentucky.—*Com. v. Lexington*, etc., Turnpike Road Co., 6 B. Mon. (Ky.) 398.

New Hampshire.—*State v. Olcott*, 6 N. H. 74; *State v. Barron*, 57 N. H. 498.

New York.—*People v. Hillsdale*, etc., Turnpike Road Co., 23 Wend. (N. Y.) 254; *Thompson v. People*, 23 Wend. (N. Y.) 537; *People v. Bristol*, etc., Turnpike Road Co., 23 Wend. (N. Y.) 222; *People v. Kingston*, etc., Turnpike Road Co., 23 Wend. (N. Y.) 193, 35 Am. Dec. 551.

Virginia.—*Pixley v. Roanoke Nav. Co.*, 75 Va. 320.

Compare *Morris v. Schooner Leona*, 67 Tex. 303.

5. *Ferry Franchises*.—*Darnell v. State*, 48 Ark. 321; *Young v. Harrison*, 6 Ga. 130; *Com. v. Sturtevant*, 182 Pa. St. 323.

6. *Dams*.—*Valentine v. Berrien Springs Water Power Co.*, (Mich. 1901) 87 N. W. Rep. 370, 8 Detroit Leg. N. 637.

7. *Banking*.—*People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243. *Contra*, *Atty.-Gen. v. Blossom*, 1 Wis. 317.

8. *State v. Brown*, 33 Miss. 500; *State v. Commercial*, etc., Bank, 12 Smed. & M. (Miss.) 276; *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

9. *Licenses*.—*State v. Jones*, 16 Fla. 306 (pilot license); *Swarth v. People*, 109 Ill. 621 (dramshop license); *Martens v. People*, 85 Ill. App. 66, affirmed 186 Ill. 314 (dramshop license); *Handy v. People*, 29 Ill. App. 99 (dramshop license).

10. *Dean v. Healy*, 66 Ga. 503 (pilots); *State v. Green*, 112 Ind. 462 (license to practice medicine). See *People v. Utica Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243 (banking).

11. *Right to Use Streets and Highways*.—*Belleville v. Citizens' Horse R. Co.*, 152 Ill. 171; *Chicago City R. Co. v. People*, 73 Ill. 547; *Atty.-Gen. v. Detroit Suburban R. Co.*, 96 Mich. 65; *Maybury v. Mutual Gas-Light Co.*, 38 Mich. 154; *People v. Ft. Wayne*, etc., R. Co., 92 Mich. 522. See also *People v. Lake St. El. R. Co.*, 54 Ill. App. 348; *Morris v. Schooner Leona*, 67 Tex. 303.

For encroachments upon the highway, quo warranto is not the proper remedy. *People v. Lake St. El. R. Co.*, 54 Ill. App. 369.

to use its streets and highways for the purpose of laying pipes, etc., is a franchise for which quo warranto will lie.¹

(7) *Private Contract with City*. — Quo warranto will not lie to enforce performance of a private contract with a city,² or to test the validity of such a contract.³

(8) *Rights Claimed Ex Officio*. — Quo warranto has been sometimes granted to try the right of one conceded to be a lawful officer to exercise or perform certain functions claimed as an incident of his office, upon the ground that the exercise of such functions constituted a franchise.⁴

6. **Miscellaneous Cases** — *a. TAXATION*. — The right to assess a public tax is not such a franchise as will support quo warranto.⁵

b. ADOPTION OF FENCE LAW. — The legality of an election held to determine whether the "fence law" should be adopted in a certain county cannot be tried by quo warranto.⁶

c. LOCATION OF COUNTY SEAT. — Quo warranto proceedings cannot be employed to contest an election upon the question of the location of a county seat.⁷

d. RECOVERY OF REAL ESTATE. — Quo warranto is not an appropriate remedy for the recovery of real estate except where it has escheated or been forfeited to the state.⁸

e. RIGHT OF CORPORATION IN PUBLIC LANDS. — Under the *Ohio* statute, quo warranto will lie against a railroad corporation to try its claim to occupy the canal lands of the state.⁹

R. — See note 10.

RACE MEETING. — See note 11.

1. *People v. Sutter St. R. Co.*, 117 Cal. 606; *State v. East Fifth St. R. Co.*, 140 Mo. 539, 62 Am. St. Rep. 742; *State v. Seattle Gas, etc., Co.*, (Wash. 1902) 68 Pac. Rep. 946; *State v. Portage City Water Co.*, 107 Wis. 441; *State v. Madison St. R. Co.*, 72 Wis. 612; *State v. Milwaukee Gas Light Co.*, 29 Wis. 454, 9 Am. Rep. 598.

2. *Contracts*. — *Maybury v. Mutual Gas-Light Co.*, 38 Mich. 154; *Morris v. Schooner Leona*, 67 Tex. 303. See also *supra*, this section, *Use of Streets and Highways*.

3. *People v. Springfield*, 61 Ill. App. 86.

4. *Rights Claimed Ex Officio*. — *Cochran v. McCleary*, 22 Iowa 75; *Reynolds v. Baldwin*, 1 La. Ann. 162; *Rex v. Williams*, 1 Burr. 402, 1 W. Bl. 93, 2 Ken. K. B. (pt. i.) 68; *Rex v. Hertford*, 1 Salk. 374, 1 Ld. Raym. 426. But see *supra*, this section, subd. 1. (3) *Official Misconduct or Illegal Action*.

In *McDonald v. Alcona County*, 91 Mich. 463, it was held that the action of the board of supervisors in selling a county poor farm was the exercise of a franchise, but as they had that power by law, quo warranto would not lie to set aside the sale because made to a member of the board.

In *Atty.-Gen. v. McDonald*, 3 Wis. 805, the right of a mayor to hold court as a justice of the peace under an unconstitutional statute was determined on quo warranto.

Contra. — A proceeding by quo warranto will not be allowed for the purpose of preventing a public officer from exercising any right or privilege incident to his office, and it cannot be used to restrain an officer from doing a particular act, the right to perform which is claimed as a part of his official functions.

State v. Smith, 55 Tex. 447, citing *State v. Evans*, 3 Ark. 585, 36 Am. Dec. 468; *High Ex. Rem.*, § 636.

5. *Right to Assess Tax*. — *State v. Smith*, 55 Tex. 447. But see *supra*, this section, *Rights Claimed Ex Officio*.

6. *Adoption of Fence Law*. — *Skrine v. Jackson*, 73 Ga. 377.

7. *Location of County Seat*. — *State v. Dortch*, 41 La. Ann. 846; *People v. Grand County*, 6 Colo. 202; *Leigh v. State*, 69 Ala. 261.

8. *Recovery of Real Estate*. — *State v. Shields*, 56 Ind. 521; *State v. Meyer*, 63 Ind. 33.

"Quo warranto was anciently employed by the king to question the title of individual proprietors to lands of the crown, as well as to nearly every other privilege or franchise that emanated from or was held by the crown. However, no modern instance of its exercise in England for the former purpose has been shown." *State v. Pittsburg, etc., R. Co.*, 53 Ohio St. 189, citing 2 Reeves Eng. Law 211; *People v. Bristol, etc., Turnpike Road Co.*, 23 Wend. (N. Y.) 240.

9. *Rights in Public Lands*. — *State v. Pittsburg, etc., R. Co.*, 53 Ohio St. 189.

10. **R.** — **R.** is sometimes used as an abbreviation for "range." *Kile v. Yellowhead*, 80 Ill. 208; *Hunt v. Smith*, 9 Kan. 153. And see the title **ABBREVIATIONS**, vol. 1, p. 101, note.

11. **Race Meeting**. — The term *race meeting*, as used in a statute regulating such meetings, was held to apply only to horse races, and not to extend to "races between cattle, men, reindeer, dogs, or other beings or animals." *State v. Roby*, 142 Ind. 182. See also the title **HORSE RACING**, vol. 15, p. 746.

RACEWAY. — See note 1.

RACING. — See the title HORSE RACING, vol. 15, p. 746.

RACKRENT. — See note 2.

RADIUS. — A radius is a straight line drawn from the centre of a circle to any point of the circumference. Its length is half the diameter of that circle, or is the space between the centre and the circumference.³

RAFFLE. (See also the title GAMING, vol. 14, p. 683.) — A raffle is a game of perfect chance, in which every participant is equal with every other in the proportion of his risk and prospect of gain. The prize is a common fund or that which is purchased by a common fund. Each is an equal actor in developing the chances in proportion to his risk. Whether they are developed with dice or with some other instrument is not material. The successful party takes the whole prize, and all the rest lose. The element of one against the many, the keeper against the bettors, either directly or indirectly, is not to be found in it. It has no keeper, dealer, or exhibitor.⁴

RAFT — RAFTING. (See also the titles BOOM COMPANIES, vol. 4, p. 707; LOGS AND LUMBER, vol. 19, p. 522.) — See note 5.

RAGS. — See note 6.

RAILROAD — RAILWAY. (See also the titles MECHANICS' LIENS, vol. 20, p. 255; RAILROADS, *post.*) — The words "railroad" and "railway" are synonymous, and in all ordinary circumstances they are to be treated without distinction of meaning, as including every species of road embraced in the

1. *Raceway.* — In *Wilder v. De Cou*, 26 Minn. 10, it was held that the technical meaning of the term *raceway*, as used to designate the mode of conducting water for hydraulic purposes, might be shown by the testimony of experts.

2. *Rackrent.* — See *Truman v. Kerslake*, (1894) 2 Q. B. 777.

3. *Radius.* — *State v. Berard*, 40 La. Ann. 172.

A Louisiana act prohibited private markets "within a radius of six squares" of any public market. In *State v. Barthe*, 41 La. Ann. 46, it was held that the words "within a radius of six squares" did not import that the distance was to be measured in an air line, but that the words were intended to mean a route or distance of six squares in all directions from a public market such as a human being could use. The court noted the definition of *radius* as given in *State v. Berard*, 40 La. Ann. 172, and quoted in the text, but held the definition to be *obiter*. From this decision *Bermudez, C. J.*, and *Fenner, J.*, *dissent*. See generally the title MARKETS, vol. 19, pp. 1149, 1150.

Restraint of Trade. — A dentist sold his business, contracting with the purchaser not to practice dentistry "within a radius of ten miles" of L. This was held to be a valid contract not to practice dentistry within ten miles of the centre of the village of L. *Cook v. Johnson*, 47 Conn. 175. See also the title RESTRAINT OF TRADE.

4. *Raffle.* — *Stearnes v. State*, 21 Tex. 699, in which case it was held that though an ordinary raffle for property not exceeding five hundred dollars in value was not illegal, a "grand raffle," so called, was an entirely different game, and was illegal.

In *Com. v. Manderfield*, 8 Phila. (Pa.) 459, it was said: "The disposal of any species of property, or, in the comprehensive language of the Act of Assembly, any 'other matters or things whatever,' by any of the schemes or games of chance popularly regarded as inno-

cent, come within the terms of the law. The *raffles* which occur daily at the street corners, in barrooms, at fairs, and at other places are as clearly violations of the criminal law as the most elaborate and carefully organized lotteries by which the ignorant and credulous are swindled out of their hard earnings."

Game Played with Dice. — See the title GAMING, vol. 14, p. 683, and see *Wetmore v. State*, 55 Ala. 200.

Lottery. — See the title LOTTERIES, vol. 19, p. 590, and see *State v. Kansas Mercantile Assoc.*, 45 Kan. 353.

Slot Machine — Keeper. — In *Prendergast v. State*, 41 Tex. Crim. 364, in holding that a slot machine was not a raffle, the court said: "In this machine it does not appear that there was no keeper or exhibitor. On the contrary, the owner of the saloon was the keeper, and all persons were not interested in the common fund."

5. **Raft of Logs — Vessel.** — In *The Annie S. Cooper*, 48 Fed. Rep. 704, it was said: "A raft of logs is a contrivance whereby the logs themselves are kept together, and thus made capable of being transported. They are not the means, and the whole structure is not a means, of transporting anything but the things which make up the structure. Therefore, a raft of logs might not be strictly a vessel."

Rafting. — A charter authorized a boom company to lay and maintain a boom across a river, and specified fees and tolls were allowed for rafting and securing logs and timber. It was held that the duty of sorting and rafting according to ownership was imposed by the charter under the term rafting. *Machias Boom v. Sullivan*, 85 Me. 343.

6. **Rags — Fire-insurance Policy.** — In *Mooney v. Howard Ins. Co.*, 138 Mass. 375, 52 Am. Rep. 277, it was held, in an action on a fire-insurance policy on a junk dealer's stock of rags, that evidence was competent to show that by usage in the trade rags included all

general sense of the term used.¹ But it may appear from the context or other circumstances that the words were used in different senses, and in such cases the courts have distinguished them.² The term "railroad" or "railway" in its broadest sense is very comprehensive, and has been held to include the franchise, easement or right of way, roadbed, superstructure, depot buildings, turnouts, rolling stock, shops, tools, materials, and all other property, real and personal, owned and used in connection with the road or its operation.³

articles used in the manufacture of paper. See also the title FIRE INSURANCE, vol. 13, p. 107 *et seq.*

1. "Railroad" Synonymous with "Railway." — Massachusetts L. & T. Co. v. Hamilton, (C. C. A.) 88 Fed. Rep. 588; Ferguson v. Sherman, 116 Cal. 169; State v. Brin, 30 Minn. 522; Funk v. St. Paul City R. Co., 61 Minn. 435; Hestonville, etc., Pass. R. Co. v. Philadelphia, 89 Pa. St. 210; Millvale v. Evergreen R. Co., 131 Pa. St. 1; Gyger v. Philadelphia, etc., R. Co., 136 Pa. St. 96; Rafferty v. Central Traction Co., 147 Pa. St. 589, 30 Am. St. Rep. 763; Old Colony Trust Co. v. Allentown, etc., Rapid Transit Co., 192 Pa. St. 596; Bammel v. Kirby, 19 Tex. Civ. App. 198; Galveston, etc., R. Co. v. Donahoe, 56 Tex. 162; Central, etc., R. Co. v. Morris, 68 Tex. 56; Houston, etc., R. Co. v. Weaver, (Tex. Civ. App. 1897) 41 S. W. Rep. 838.

No Variance. — In State v. Brin, 30 Minn. 522, it was held that a discrepancy between the name "St. Paul, Minneapolis & Manitoba Railroad Company" in an indictment and the name "St. Paul, Minneapolis & Manitoba Railway Company" in the evidence was unimportant.

2. "Railroad" and "Railway" Distinguished. — Railroad Com'rs v. Market St. R. Co., 132 Cal. 677; Shipley v. Continental R. Co., 13 Phila. (Pa.) 128, 36 Leg. Int. (Pa.) 450; Gyger v. Philadelphia, etc., R. Co., 136 Pa. St. 96; Front St. Cable R. Co. v. Johnson, 2 Wash. 114.

Thus, the term *railroad* is sometimes applied to steam *railroads*, and *railway* to street *railways*. Trust Co. v. State, 109 Ga. 736; Gyger v. Philadelphia, etc., R. Co., 136 Pa. St. 96.

Right of Way and Rails. — In Munkers v. Kansas City, etc., R. Co., 60 Mo. 338, it was said: "The word *railroad*, says a leading lexicographer, should be confined to the highway in which the *railway* is laid, and the word *railway* to the rails when laid, and this is declared to be a useful distinction. This distinction seems to have been observed in our statute in the third subdivision of the second section, relating to *railroad* corporations, where power is given to every such corporation to lay out its road not exceeding one hundred feet in width."

3. Broad Sense of Term. — Morgan v. Donovan, 58 Ala. 260; Pierce v. Emery, 32 N. H. 484.

"In a broader sense a *railroad* includes all the land, works, buildings, and machinery required for the support and use of the road or way with its rails." Chicago, etc., R. Co. v. Eisert, 127 Ind. 163.

In the popular sense of the term, *railway* means "a way upon which trains pass by means of rails." Doughty v. Fairbank, 10 Q. B. D. 359.

"The term *railroad* * * * may include all that is involved in the business of moving passengers and freight over a physical structure." Central Trust Co. v. Colorado Midland R. Co., 89 Fed. Rep. 561.

Appurtenances — Structures. — In Knevals v. Florida Cent., etc., R. Co., (C. C. A.) 66 Fed. Rep. 231, it was said: "The general term of a *railroad*, as ordinarily used, includes many kinds of property, both real and personal, and cannot, with any degree of propriety, be confined to the track, or the land, simply, necessary to lay the track upon. It is not necessary to consider whether the land can pass as appurtenant to land, for it is unquestionable that land may pass as appurtenant to a *railroad*."

In U. S. Trust Co. v. Atlantic, etc., R. Co., 8 N. Mex. 689, it was said: "In its ordinary acceptance, and large sense, the term *railroad* fairly includes all structures which are necessary and essential to its operation." And in U. S. v. Denver, etc., R. Co., 150 U. S. 12, it was held that all necessary appurtenances of a *railroad* might fairly be regarded as parts or portions of the *railroad*.

Same — Railroad Tracks. — Land held and in actual use by a *railroad* company for side tracks, switches, and turnouts, upon which shops, depots, roundhouses, and other superstructures are built, has been held to be within the term "*railroad track*." Ohio, etc., R. Co. v. Weber, 96 Ill. 443, 5 Am. & Eng. R. Cas. 101; Pfaff v. Terre Haute, etc., R. Co., 108 Ind. 145, 29 Am. & Eng. R. Cas. 181. See also Chicago, etc., R. Co. v. Paddock, 75 Ill. 616; Chicago, etc., R. Co. v. People, 195 Ill. 184; Oregon Short-Line R. Co. v. Gooding, (Idaho 1899) 59 Pac. Rep. 822. And see the title TAXATION.

Same — Siding — Platforms, Etc. — "The word *railroad ex vi termini* includes sidings." Black v. Philadelphia, etc., R. Co., 58 Pa. St. 252.

In London, etc., R. Co. v. Llandudno Imp. Com'rs, (1897) 1 Q. B. 287, it was held that a platform of a *railway* station and the roof covering the *railway*, the platform, and the sidings might be rated for taxation as land used only as a *railway*.

But in Williams v. London, etc., R. Co., (1900) 1 Q. B. 760, reversing (1899) 2 Q. B. 197, it was held that land used for a *railway* shed within which were a number of *railway* lines, comprising sidings and running alongside platforms, for the purpose of loading and unloading *railway* trucks with goods, the premises being situated at some distance from the company's main line, was not land used as a *railway*.

Same — Station. (See also the title STATIONS (RAILROAD); and see DEPOTS, vol. 9, p. 366.) — The term has been held to include a station. Richmond v. North London R. Co., L. R. 3 Ch. 679. See also Cother v. Midland R. Co.,

2 Phil. 469; *Midland R. Co. v. Ambergate*, etc., R. Co., 10 Hare 369.

In *State v. Railroad Com'rs*, 56 Conn. 313, it was held that a provision in the charter of a *railroad* company that land might be taken for the *railroad* implied that it might be taken for necessary passenger stations and freight depots. The court said: "Depots for passengers and freight are essential parts of *railroads*. A *railroad* is incomplete without them." See also the title EMINENT DOMAIN; vol. 10, p. 1043.

Branches.—That a *railway* includes branches, see *Bristol*, etc., R. Co. *v. Garton*, 8 H. L. Cas. 477.

Bridge. (See also the title BRIDGES, vol. 4, p. 918.)—The crossing of a river by a *railroad* track on piers, or what is known as a "*railroad bridge*," is neither a bridge, a ferry, nor any public means of crossing by any ordinary method of travel, such as is contemplated in ordinary legislation concerning toll roads and bridges. *Lake v. Virginia*, etc., R. Co., 7 Nev. 296. See also *Passaic*, etc., *River Bridge v. Hoboken Land*, etc., Co., 13 N. J. Eq. 81; *Bridge Proprietor v. Hoboken Co.*, 1 Wall. (U. S.) 116. Compare *Enfield Toll Bridge Co. v. Hartford*, etc., R. Co., 17 Conn. 40.

In *Louisville*, etc., R. Co. *v. Louisville City R. Co.*, 2 Duv. (Ky.) 178, it was said: "It has been authoritatively adjudged that the simple term 'bridge' means a viaduct in a road dedicated to common use, and that the qualified phrase '*railroad bridge*' means a viaduct constructed for the exclusive use of *railroad* transportation."

In *Anderson v. Chicago*, etc., R. Co., 117 Ill. 26, it was held that a bridge across a navigable stream forming the boundary between Illinois and another state, and constructed and used exclusively by a *railroad* company as part of its continuous line of *railroad*, came, for the purpose of taxation, within the denomination of *railroad* tracks.

Cars, Locomotives, Etc.—The term *railroad* includes cars, locomotives, etc. See *Elizabethtown*, etc., R. Co. *v. Elizabethtown*, 12 Bush (Ky.) 233; *Phillips v. Winslow*, 18 B. Mon. (Ky.) 448. Compare *Sangamon*, etc., R. Co. *v. Morgan County*, 14 Ill. 166.

Elevator.—See the title EXEMPTIONS (FROM TAXATION), vol. 12, p. 365.

Embankment.—It has been held that an embankment forming the roadbed and embankments forming the approaches to highways or street crossings, rendered necessary by the construction of a *railroad*, were a part of the *railroad* track. *Nicks v. Chicago*, etc., R. Co., 84 Iowa 27; *Farley v. Chicago*, etc., R. Co., 42 Iowa 234; *Newtown v. Chicago*, etc., R. Co., 66 Iowa 423; *Gates v. Chicago*, etc., R. Co., 82 Iowa 518.

Same—Interstate Commerce.—See the title INTERSTATE COMMERCE, vol. 17, p. 124.

Railroad Connections.—See CONNECT, CONNECTIONS, ETC., vol. 6, p. 600; and see *Black v. Delaware*, etc., Canal Co., 24 N. J. Eq. 455, reversing 22 N. J. Eq. 130. See also the title CONNECTING CARRIERS (OF GOODS), vol. 6, p. 603.

Railroad Crossing.—See the title CROSSINGS, vol. 8, p. 335.

Railway Cut.—In *Newton v. Louisville*, etc.,

R. Co., 110 Ala. 477, it was said: "The words '*railway cut*' have a certain and definite meaning, and comprise as well the sloping sides as the deepest part of the excavation." And in that case it was held that where the land conveyed in a deed was described as the portion of certain lots lying south of a *railway cut*, only the land lying adjacent to and south of the upper and outer edge of the cut was conveyed, and that the deed did not convey the sloping sides of the cut down to the lower and inner edge.

Railway Employees.—A policy of insurance provided that the policy should not cover injuries resulting from walking on or being on any *railroad* bridge or roadbed, *railway* employees excepted. It was held that a traveling salesman for a coal company was not within the exception. The court said: "Giving to the words '*railway employee*' the meaning which the context requires, no other person can be embraced within that term than one whose employment requires him to work on or about a *railroad*, and whose employer is one who operates a *railroad*, either as owner or otherwise." *Yancey v. Aetna L. Ins. Co.*, 108 Ga. 352.

In *Cotten v. Fidelity*, etc., Co., 41 Fed. Rep. 506, however, it was held that an agent of a transportation company which itself was employed by a *railroad* company to attend to transfers of baggage was an employee of the *railroad* company within the meaning of a similar policy.

Employment in or about Railway.—In *Milner v. Great Northern R. Co.*, (1900) 1 Q. B. 795, it was held that employment by a *railway* company in a *railway* refreshment room, to which the only entrance for the public was from the station platform, was not employment in or about a *railway* within the meaning of the English Workmen's Compensation Act of 1897.

Railroad Fences. (See also the title FENCES, vol. 12, p. 1061.)—In *Denver*, etc., R. Co. *v. Robinson*, 6 Colo. App. 432, it was said: "Some of the witnesses, in speaking of them, used the expression '*railroad fence*;' and counsel seem to think that an inference ought therefore to be indulged in that the fences belonged to the *railroad* company. But the expression had no special meaning beyond the identification of the particular fence of which the witness was speaking. The plaintiff used the term to distinguish the fence he referred to from the 'pasture fence;' and there is nothing to indicate that any witness intended to be understood as expressing an opinion concerning the ownership of the '*railroad fence*.'"

Railroad Property.—In *Northern Pac. R. Co. v. Walker*, 47 Fed. Rep. 685, it was said: "'*Railroad property*' and 'the property of a *railroad company*' are not equivalent terms. The term '*railroad property*' is commonly understood to mean the property which is essential to a *railroad* company to enable it to discharge its functions and duties as a common carrier by rail. It includes the roadbed, right of way, tracks, bridges, stations, rolling stock, and such like property. On the other hand, lands owned and held for sale or other disposition for profit, and in no way connected

But the term may be confined to the right of way¹ or to the physical structure alone,² and may sometimes mean the track or ground upon which the rails constituting the track are laid, or it may mean the right of way including the track and the land on either side of the track, according to the connection in which the word is used.³

Railroad and Street Railroad.—The word "railroad" or "railway," in its broadest signification, would undoubtedly include a street railroad, all railroads being more or less alike in their physical construction; and accordingly, in a number of cases the term has been held to include a street railroad.⁴ But whether the term includes a street railroad depends on the context and general intent of the instrument in which it is found,⁵ and it has often been confined to the ordinary steam railroad.⁶ The difference between railroads for general traffic and street

with the use or operation of the *railroad*, are not *railroad* property in the sense mentioned, but are property of the *railroad* company independently of its functions and duties as a common carrier."

Same—After-acquired Property.—A *railroad* company executed a mortgage upon the *railroad* then constructed and to be constructed, etc., and all other corporate property, real and personal, of said *railroad* company, belonging or appertaining to said *railroad*, whether then owned or thereafter to be acquired. It was held that the mortgage upon the *railroad* did not apply to after-acquired lands unless they were used in connection with the actual operations of the road as a part thereof. *Calhoun v. Memphis, etc., R. Co., 2 Flipp. (U. S.) 442, 4 Fed. Cas. No. 2,309.*

Railroad Tickets.—See the title TICKETS AND FARES.

Railroads Distinguished from Express Companies.—*Dinsmore v. Louisville, etc., R. Co., 2 Fed. Rep. 468, 2 Flipp. (U. S.) 672; and see the title EXPRESS COMPANIES, vol. 12, p. 542.*

1. Confined to Right of Way.—*Central R. Co. v. Hudson Terminal R. Co., 46 N. J. L. 289.*

Mechanic's Lien.—Thus, the term *railroad*, in a statute giving a mechanic's lien, has been confined to the limits of the right of way, the court refusing to extend it to include machine shops, workshops, roundhouses, etc. *National Bank v. Gulf, etc., R. Co., (Tex. 1902) 66 S. W. Rep. 203.*

2. Confined to Physical Structure.—*Central Trust Co. v. Colorado Midland R. Co., 89 Fed. Rep. 561; and see the next succeeding note.*

3. Track and Right of Way.—*St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 521. See Com. v. Haverhill, 7 Allen (Mass.) 524; Worcester v. Western R. Corp., 4 Met. (Mass.) 564.*

In *Peoria, etc., R. Co. v. Tamplin, 156 Ill. 294*, it was held that the word *railroad*, as used in a deed, referred to the *railroad* track or the road between the rails or under the rails, and did not refer to the *railroad* right of way. See also *Chicago, etc., R. Co. v. Eisert, 127 Ind. 163.*

Telegraph and Telephone. (See also the title TELEGRAPHS AND TELEPHONES.)—In *St. Louis, etc., R. Co. v. Postal Tel. Co., 173 Ill. 508*, it was held that where authority was conferred upon a company to erect telegraph lines along and upon a *railroad*, the term *railroad* must mean the right of way, and not the track. See also *Postal Tel. Cable Co. v. Morgan's Louisiana, etc., R., etc., Co., 49 La. Ann. 58; New*

Orleans, etc., R. Co. v. Southern, etc., Tel. Co., 53 Ala. 211; Postal Tel. Cable Co. v. Louisiana Western R. Co., 49 La. Ann. 1270. Compare Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 920.

4. Railroad Includes Street Railroad.—*Toronto R. Co. v. Reg. (1896) A. C. 551; Johnson v. Stewart, 62 Ark. 164; Bloxham v. Consumers' Electric Light, etc., R. Co., 36 Fla. 519; St. Louis Bolt, etc., Co. v. Donahoe, 3 Mo. App. 559; Com. v. Central Pass. R. Co., 52 Pa. St. 506; Hestonville, etc., Pass. R. Co. v. Philadelphia, 89 Pa. St. 219; Rafferty v. Central Traction Co., 147 Pa. St. 589, 30 Am. St. Rep. 763; Pennsylvania R. Co. v. Braddock Electric R. Co., 152 Pa. St. 116; Old Colony Trust Co. v. Allentown, etc., Rapid Transit Co., 192 Pa. St. 596.*

Stockholders' Individual Liability.—*Ferguson v. Sherman, 116 Cal. 169.*

Obstructions.—*Com. v. McCaully, 2 Pa. Dist. 63. See also Price v. State, 74 Ga. 378.*

Merger and Consolidation.—*Hestonville, etc., Pass. R. Co. v. Philadelphia, 89 Pa. St. 210.*

Any Railroad—Death by Wrongful Act.—*Bammel v. Kirby, 19 Tex. Civ. App. 198.*

Mechanics' Liens.—*New England Engineering Co. v. Oakwood St. R. Co., 75 Fed. Rep. 164.*

5. Meaning Depends on Context.—*Bloxham v. Consumers' Electric Light, etc., R. Co., 36 Fla. 539; Chicago v. Evans, 24 Ill. 52.*

6. Railroad Held Not to Include Street Railroad.—*Massachusetts L. & T. Co. v. Hamilton, (C. C. A.) 88 Fed. Rep. 588; Manhattan Trust Co. v. Sioux City Cable R. Co., 68 Fed. Rep. 82; Railroad Com'rs v. Market St. R. Co., 132 Cal. 677; Bloxham v. Consumers' Electric Light, etc., R. Co., 36 Fla. 519, 51 Am. St. Rep. 44; Sears v. Marshalltown St. R. Co., 65 Iowa 742; Fidelity L. & T. Co. v. Douglas, 104 Iowa 536; Baltimore v. Baltimore City Pass. R. Co., 57 Md. 31; Funk v. St. Paul City R. Co., 61 Minn. 435; Massillon Bridge Co. v. Cambria Iron Co., 59 Ohio St. 179; Shipley v. Continental R. Co., 13 Phila. (Pa.) 128, 36 Leg. Int. (Pa.) 450; Riley v. Galveston City R. Co., 13 Tex. Civ. App. 247; Front St. Cable R. Co. v. Johnson, 2 Wash. 112; Toronto R. Co. v. Reg., 4 Can. Exch. 262.*

Railroad Distinguished from Street Railroad.—In *Louisville, etc., R. Co. v. Louisville City R. Co., 2 Duv. (Ky.) 178*, it was said "A *railroad* and a street *railroad* or way are, in both their technical and popular import, as distinct

railroads consists in their use, and not in their motive power.¹

Belt Railroads, Dummy Lines, Construction Roads, Steam Roads, Underground Roads. — Belt railroads,² dummy lines,³ construction roads,⁴ steam railroads,⁵ and underground roads⁶ have been held to be railroads.

Railroad Company. — The word "railroad" may mean railroad company.⁷

RAILROAD CAR — RAIL CAR. (See also CAR, vol. 5, p. 144.) — See note 8.

and different things as a road and a street, or as a bridge and a *railroad* bridge. * * * A street *railway* is not, in either the popular or legislative sense, a *railroad*."

In *State v. Duluth Gas, etc., Co.*, 76 Minn. 107, it was said: "All through our statutes the legislature has uniformly, so far as we have discovered, used the word *railroad* or *railway*, when unqualified, as referring exclusively to ordinary commercial *railroads*, while, on the other hand, when they have intended to refer to street *railroads* they have qualified the word *railroad* by the prefix 'street.'" See also *Funk v. St. Paul City R. Co.*, 61 Minn. 435.

Fellow-servants. — Under an act defining who are fellow-servants it has been held that the term *railroad* did not include street *railways*. *Riley v. Galveston City R. Co.*, 13 Tex. Civ. App. 247. See also *Funk v. St. Paul City R. Co.*, 61 Minn. 435.

Railway Distinguished from Tramway. — *Swansea Imp., etc., Co. v. Swansea Urban Sanitary Authority*, (1892) 1 Q. B. 360.

1. *Williams v. City Electric St. R. Co.*, 41 Fed. Rep. 556.

2. **Belt Railroad.** — In *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 117 Ala. 412, it was said: "A belt *railroad*, as it is now commonly known, is a *railroad* encircling a city or other restricted territory, intersected by other *railroads* not having a common right of way into the territory, for the purpose of transferring and switching cars from one *railroad* to another with which it is not otherwise connected, or of transferring cars between such *railroads* and industrial plants located in the neighborhood of but not on such *railroads*. Such connections are usually made by the belt *railroad* in the suburbs, or near the outskirts, of the city."

3. **Dummy Line.** — *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681.

In *Birmingham Mineral R. Co. v. Jacobs*, 92 Ala. 187, it was held that the *railroad* of a company engaged in operating it with dummy engines between two cities was a *railroad* within the terms of a statute requiring trains on *railroads* which cross each other to stop within one hundred feet of such crossing.

4. **Construction Road.** — A temporary road built for the purpose of facilitating the grad-

ing of *railroad* tracks has been held to be a *railroad* within a fellow-servant act. *Roe v. Winston*, (Minn. 1902) 90 N. W. Rep. 124.

In *Doughty v. Firbank*, 10 Q. B. D. 358, it was held that the term *railway*, in the English Employer's Liability Act of 1880, was not confined to *railways* belonging to *railway* companies, but applied also to a temporary *railway* laid down by a contractor, for the purposes of construction work.

5. **Steam Railroad.** — A statute provided that "every franchise or privilege to erect or lay telegraph wires, to construct or operate *railroads* along or upon any public street or highway, or to exercise any other privilege whatever," to be granted by a municipality, should be advertised and granted to the highest bidder. In construing this statute, the court said: "The word *railroad* is certainly broad enough to cover a steam *railroad*, and the privilege of laying and operating a steam *railroad* through a city is clearly included in 'any privilege whatever.'" *People v. Craycroft*, 111 Cal. 546.

6. **Underground Road.** — In *Matter of New York Dist. R. Co.*, 42 Hun (N. Y.) 621, affirmed 107 N. Y. 42, an underground road was held to be a street *railroad*.

7. **Railroad Company.** (See also the title RAILROADS, *post*.) — *Calhoun v. Memphis, etc., R. Co.*, 2 Flipp. (U. S.) 445, 4 Fed. Cas. No. 2,309.

In *Union Trust Co. v. Kendall*, 20 Kan. 515, it was held that a corporation which had possession, control, and management of, and was engaged in the business of running and operating, a *railroad* in the state was a *railroad* corporation, although it was so engaged in the execution and discharge of a trust for the benefit of the bondholders and stockholders of the corporation which built and owned the road, and was not possessed of absolute ownership thereof.

8. **Rail Car — Box Car.** — See BOX CAR, vol. 4, p. 872.

Handcars. — In *Benson v. Chicago, etc., R. Co.*, 75 Minn. 166, it was said: "The words *railroad cars*, in their general sense, include handcars, for they are constructed and used for running on the lines of rails of a *railroad*, being propelled by hand by those riding on them, through the aid of cranks and gearing."

RAILROAD COMMISSIONERS.

BY WALTER CARRINGTON.

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CROSS-REFERENCE.

See the title RAILROADS, post, and references there given.

I. POWER TO CREATE COMMISSIONS. — Because of the nature of the privileges conferred upon railroad corporations and the character of the obligations assumed by them, their business is affected with a public use and is subject

to legislative regulation.¹ Such regulation may be carried on through the agency of a commission,² and the practical impossibility of direct legislative supervision of the multifold details of the railroad business has led, both in *England* and in most of the *United States*, to the appointment or creation of officers or commissions generally called railroad commissioners, but sometimes designated boards of transportation.³

II. EXTENT OF REGULATION THROUGH AGENCY OF COMMISSIONERS — 1. In General. — The state regulation of railroad companies through the agency of commissioners may extend to all measures deemed essential not merely to secure the safety of passengers and freight, but to promote the convenience of the public in the transaction of business with them, and to prevent abuses by extortionate charges and unjust discriminations.⁴ But the legislature cannot lawfully authorize a commission, by direct or indirect legislation intended to accomplish that end, or necessarily involving that result, to take entire control of the business and operations of railroad companies.⁵

2. Limitation of State Regulation under Constitution of United States. — As under the Constitution of the United States the power to regulate interstate commerce is vested in Congress, it follows that the legislature of a state, in regulating the business and operations of railroad companies in the state, through the agency of a commission, cannot make any regulation that amounts to a regulation of interstate commerce.⁶

3. Power to Invest Commissioners with Judicial Powers. — Under a state constitutional provision authorizing the establishment of such courts inferior to the Supreme Court as the legislature may deem proper, the legislature may confer judicial powers upon a railroad commission.⁷

III. APPOINTMENT AND TENURE OF OFFICE. — In the *United States* state rail-

1. For an exhaustive treatment of this subject see the title *RAILROADS*, *post*.

Police Power. — Some cases sustain the right of the legislature to regulate railroad corporations upon the ground that such regulation is within the scope of the police power. *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849. See also *Woodruff v. New York, etc., R. Co.*, 59 Conn. 63; *Stone v. Yazoo, etc., R. Co.*, 62 Miss. 607, 52 Am. Rep. 193.

Constitutional Sanction of Legislative Regulation. — In some states of the Union the right of the legislature to regulate such corporations is confirmed by express constitutional provisions. *Georgia R., etc., Co. v. Smith*, 70 Ga. 694; *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340.

Constitutional Restraints upon Legislative Regulation. — But no state legislature can, in the exercise of this power, make any regulation in contravention of either the state or the Federal Constitution. *Smyth v. Ames*, 169 U. S. 466, *affirming* 64 Fed. Rep. 165; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.

2. Regulation by Commission — United States. — *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866.

Connecticut. — *New York, etc., R. Co.'s Appeal*, 58 Conn. 532; *State v. Asylum St. Bridge Commission*, 63 Conn. 91.

Massachusetts. — *New London Northern R. Co. v. Boston, etc., R. Co.*, 102 Mass. 386.

Minnesota. — *State v. Chicago, etc., R. Co.*,

38 Minn. 281; *State v. St. Paul, etc., R. Co.*, 40 Minn. 353.

Mississippi. — *Stone v. Yazoo, etc., R. Co.*, 62 Miss. 607, 52 Am. Rep. 193.

New York. — *People v. Ulster, etc., R. Co.*, 58 Hun (N. Y.) 266, *affirming* 128 N. Y. 240.

North Carolina. — *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805.

The *Nebraska* Act of 1887 (Session Laws, c. 60), creating a board of transportation and defining its powers, is not in conflict with Const. Neb., art. 5, § 26, forbidding the legislature to create any executive state office, nor is it in conflict with art. 5, § 2, declaring that no executive state officer shall be eligible to any other state office. *Pacific Express Co. v. Cornell*, 59 Neb. 364; *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737. See also *In re Railroad Com'rs*, 15 Neb. 679.

The *New York* statute was held not to be unconstitutional as conferring judicial power upon the state board of railroad commissioners. *People v. Ulster, etc., R. Co.*, 58 Hun (N. Y.) 266.

3. See *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *State v. Chicago, etc., R. Co.*, 38 Minn. 281.

4. *Charlotte, etc., R. Co. v. Gibbes*, 142 U. S. 386.

5. *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.

6. See the title *INTERSTATE COMMERCE*, vol. 17, p. 34.

7. *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805; *State v. Wilmington, etc., R. Co.*, 122 N. Car. 877.

road commissions are usually merely the creatures of statute, created for the purpose of carrying into effect the legislative will. It follows that the legislature may, in the absence of a constitutional provision to the contrary, appoint them or prescribe the method of their appointment,¹ and may, in case a commissioner appointed refuses to act, provide for the appointment of a substitute and direct the manner of his appointment.² So, if not restrained by a constitutional provision, the legislature may abridge the term of office of a railroad commissioner, or specify an event upon the happening of which such term shall end,³ or may reserve to itself the right to remove the incumbent of the office, or to the governor the right to suspend him.⁴

IV. QUALIFICATIONS. — Under the constitutions and statutes of some of the *United States* certain qualifications are required of railroad commissioners. One of the most usual of these is that the commissioner shall not be or become interested in any wise in any railroad company.⁵

V. SALARIES AND EXPENSES. — In the *United States* the states which have created railroad commissions differ as to the manner of providing for the payment of their salaries and expenses. Under some of the statutes the state itself defrays the salaries and expenses of the commission directly out of the public treasury. Under other statutes different methods are adopted to apportion the salaries and expenses among the railroads regulated.⁶ The question of the constitutionality of some of the statutes of the latter class has been brought before the courts.⁷

VI. POWERS AND DUTIES — 1. In *England*. — In *England* the Railway and Canal Commission is a court of record, with supervisory powers over the general conduct of railroad companies. It possesses all such powers, rights, and privileges, necessary or proper for the due exercise of its jurisdiction, as are vested in a superior court. It may hear complaints, make orders, and restrain by injunction a disobedience of statutory regulations, and is authorized to enforce its orders and injunctions by penalties.⁸ It also has, under certain

1. In *Oregon* it has been held that the appointment of railroad commissioners by the legislature is not an unconstitutional exercise of power. *Biggs v. McBride*, 17 *Oregon* 640; *Eddy v. Kincaid*, 28 *Oregon* 537.

2. *Woodruff v. New York, etc., R. Co.*, 59 *Conn.* 63.

Failure to Elect. — Under the Constitution and statutes of *Oregon*, if there is a failure to elect a railroad commissioner at the time prescribed by statute the incumbent of the office under a prior election will hold over until his successor is elected and qualified. *Eddy v. Kincaid*, 28 *Oregon* 537.

3. **Abridgment of Term.** — *State v. Mitchell*, 50 *Kan.* 289; *People v. Burnside*, 3 *Lans. (N. Y.)* 74; *People v. Eddy*, 3 *Lans. (N. Y.)* 80, 57 *Barb. (N. Y.)* 593. *Contra*, *Abbott v. Beddingfield*, 125 *N. Car.* 256.

Commissioners Not Ousted by Statute Amending Act Creating Commission. — A state statute establishing a railroad commission is not repealed and the commissioners elected under it deprived of their offices by a statute changing the name of the commission, imposing some new duties upon it, and professing to repeal the creative act, but in reality merely amending it. *Abbott v. Beddingfield*, 125 *N. Car.* 256.

4. *State v. Wilson*, 121 *N. Car.* 425.

5. **Qualifications.** — *State v. Wilson*, 121 *N. Car.* 425. And see the statutes in the several states.

A Statute Requiring of Railroad Commissioners Qualifications in Addition to Those Prescribed in

the Constitution is not unconstitutional, where the purpose of the requirement is to secure the faithful and efficient performance of public duties and not to restrict the rights of the individual. *State v. Wilson*, 121 *N. Car.* 425.

Commissioner Interested as Shipper — Pre-election Pledge. — *Southern Pac. Co. v. Railroad Com'rs*, 78 *Fed. Rep.* 238.

Commission Held to Be Validly Constituted. — *Woodruff v. New York, etc., R. Co.*, 59 *Conn.* 63.

6. See the statutes of the several states.

New York Statute of 1882. — *People v. Chapin*, 106 *N. Y.* 265, 34 *Am. & Eng. R. Cas.* 136, *reversing* 42 *Hun (N. Y.)* 239.

Tennessee Statute Construed. — Salaries do not cease while commissioners are restrained by temporary injunction from performing their duties. *Savage v. Pickad*, 14 *Lea (Tenn.)* 46, 22 *Am. & Eng. R. Cas.* 490.

7. *Charlotte, etc., R. Co. v. Gibbes*, 142 *U. S.* 386, *affirming* 27 *S. Car.* 385, 31 *Am. & Eng. R. Cas.* 464, holding the *South Carolina* statute to be constitutional. See also *People v. Squire*, 145 *U. S.* 175; *Columbia, etc., R. Co. v. Gibbes*, 24 *S. Car.* 60. But see *Atchison, etc., R. Co. v. Howe*, 32 *Kan.* 737, holding the statute of *Kansas* to be unconstitutional because it charged the expenses of the commission, not upon all the common carriers which were to be regulated by the act, but only on the railroad companies.

8. **Powers of English Railway Commission.** — *Dover v. South Eastern R. Co.*, 1 *R. & Can.*

circumstances, the power to arbitrate any difference to which a railroad company is a party.¹

2. In United States — a. IN GENERAL — Commissions Usually Merely Administrative Boards. — In the *United States*, as a general rule, a state railroad commission is merely an administrative board created by the state for carrying into effect the will of the state, as expressed by its legislation.² Commissions of this character are purely creatures of statute, and possess no power except what the statutes expressly confer upon them,³ and in every case their authority must affirmatively appear from the commission under which they claim to act.⁴

Matters Submitted to Regulation of Commissions. — The principal purpose of most of the statutes creating such commissions is the regulation of freight and passenger rates. Generally, however, the commissions are invested with comprehensive powers of regulation over all matters relating to the safety of passengers and freight and to the convenience of the public in its business relations with railroads.⁵

Powers of Investigation. — As it is essential to the usefulness of these commissions that they should be able to ascertain the manner in which the rail-

T. Cas. 349; *Innes v. London, etc., R. Co.*, 2 R. & Can. T. Cas. 155; *Uckfield Local Board v. London, etc., R. Co.*, 2 R. & Can. T. Cas. 214; *Hole v. Digby*, 3 R. & Can. T. Cas. XVII, 27 W. R. 884; *Toomer v. London, etc., R. Co.*, 3 R. & Can. T. Cas. 79; *Watkinson v. Wrexham, etc., R. Co.*, 3 R. & Can. T. Cas. 164; *Swindon, etc., R. Co. v. Great Western R. Co.*, 4 R. & Can. T. Cas. 173; *Hammans v. Great Western R. Co.*, 4 R. & Can. T. Cas. 181; *Neston Colliery Co. v. London, etc., R. Co.*, 4 R. & Can. T. Cas. 257; *Toomer v. London, etc., R. Co.*, 2 Ex. D. 450, 26 W. R. 31, 37 L. T. N. S. 161; *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586, 50 L. J. Q. B. D. 201, 44 L. T. N. S. 203, 45 J. P. 388, *reversing* 5 Q. B. D. 217, 49 L. J. Q. B. D. 273, 41 L. T. N. S. 760, 28 W. R. 464; *Hall v. London, etc., R. Co.*, 15 Q. B. D. 505, 22 Am. & Eng. R. Cas. 446, 53 L. T. N. S. 345. See also *South Eastern R. Co. v. Railway Com'rs*, 6 Q. B. D. 586, 50 L. J. Q. B. D. 201, 44 L. T. N. S. 203, *reversing* 5 Q. B. D. 217, 49 L. J. Q. B. D. 273, 41 L. T. N. S. 760, 28 W. R. 464; *Reg. v. Railway Com'rs*, 22 Q. B. D. 642, 40 Am. & Eng. R. Cas. 59; *Great Western R. Co. v. Railway Com'rs*, 7 Q. B. D. 182, 50 L. J. Q. B. D. 483, 45 L. T. N. S. 206, 29 W. R. 901, *affirming* 45 L. T. N. S. 65; *Bennett v. Manchester, etc., R. Co.*, 6 C. B. N. S. 707, 95 E. C. L. 707.

Jurisdiction of Commissioners as to Costs under the Regulation of Railways Act 1873, § 28. *Foster v. Great Western R. Co.*, 8 Q. B. D. 515, 51 L. J. Q. B. D. 233, 4 R. & Can. T. Cas. 58, *reversing* 8 Q. B. D. 25, 51 L. J. Q. B. D. 51.

1. Powers as Arbitrators. — *Stokes Bay R., etc., Co. v. London, etc., R. Co.*, 2 R. & Can. T. Cas. 143; *Portpatrick R. Co. v. Caledonian R. Co.*, 3 R. & Can. T. Cas. 189; *Halesowen R. Co. v. Great Western R. Co.*, 4 R. & Can. T. Cas. 224.

Right of Appeal from Decisions of Commission. — 51 & 52 Vict., c. 25, §§ 17, 18. See also *Chatterley Iron Co. v. North Staffordshire R. Co.*, 3 R. & Can. T. Cas. 238; *Berry v. London, etc., R. Co.*, 4 R. & Can. T. Cas. 310; *Barret v. Great Northern R. Co.*, 1 C. B. N. S. 423, 87 E. C. L. 423, 26 L. J. C. Pl. 83.

2. Administrative Boards. — *Reagan v. Farm-*

ers' L. & T. Co., 154 U. S. 367. See also *In re Railroad Com'rs*, 15 Neb. 679.

3. Railroad Com'rs v. Oregon R., etc., Co., 17 Oregon 65. See also *Spofford v. Bucksport, etc., R. Co.*, 66 Me. 26; *Neal v. Mortland*, 85 Me. 62.

4. Railroad Com'rs v. Oregon R., etc., Co., 17 Oregon 65.

5. State v. Jacksonville Terminal Co., 41 Fla. 377; *State v. Chicago, etc., R. Co.*, 86 Iowa 641.

Construction of New York Statute Empowering Commissioners to Authorize Construction of Railroads. — See *Matter of New Hamburg, etc., R. Co.*, 76 Hun (N. Y.) 76; *Matter of Amsterdam, etc., R. Co.*, 86 Hun (N. Y.) 578; *Matter of Depew, etc., R. Co.*, 92 Hun (N. Y.) 406; *Matter of Auburn, etc., R. Co.*, 37 N. Y. App. Div. 162; *People v. Railroad Com'rs*, 53 N. Y. App. Div. 61, *affirmed* 164 N. Y. 572; *People v. Railroad Com'rs*, 160 N. Y. 202, *affirming* 40 N. Y. App. Div. 559.

As to the Powers of Railroad Commissioners under the peculiar provisions of certain statutes, see also the following cases:

United States. — *Matter of Pacific R. Commission*, 12 Sawy. (U. S.) 559; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

California. — *Moran v. Ross*, 79 Cal. 159.

Florida. — *State v. Jacksonville Terminal Co.*, 41 Fla. 377.

Iowa. — *State v. Chicago, etc., R. Co.*, 86 Iowa 641.

Maine. — *Spofford v. Bucksport, etc., R. Co.*, 66 Me. 26; *Neal v. Mortland*, 85 Me. 62.

Massachusetts. — *Lexington, etc., R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266; *Worcester v. Railroad Com'rs*, 113 Mass. 161.

Mississippi. — *Stone v. Yazoo, etc., R. Co.*, 62 Miss. 607, 52 Am. Rep. 193.

New Hampshire. — *Eastern R. Co. v. Concord, etc., R. Co.*, 47 N. H. 108.

New York. — *People v. Ulster, etc., R. Co.*, 58 Hun (N. Y.) 266, *affirmed* 128 N. Y. 240; *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179, *affirmed* 158 N. Y. 711.

Texas. — *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340; *Davis v. San Antonio, etc., R. Co.*, 92 Tex. 642, *reversing* (Tex. Civ. App. 1898) 44 S. W. Rep. 1012.

roads under their supervision are being conducted, they are usually given ample power to investigate that subject, and to compel railroad companies to furnish them with necessary information.¹

Power to Investigate Complaints and Make Orders or Render Decisions. — Generally such commissions are required to investigate complaints made against railroad corporations which are alleged to have violated the law, or to be acting in contravention thereof, and they are authorized to make orders or render decisions in reference thereto.² But railroad commissions, as usually constituted, are not courts, nor are they, as a rule, invested with judicial functions,³ though they are sometimes authorized to exercise powers and functions resembling those conferred upon and exercised by regular courts.⁴

Orders or Decisions Enforced by Judicial Proceedings. — Under most of the statutes, the action or conclusion of the commission upon matters of complaint brought before it for investigation is neither final nor conclusive, nor is the commission usually invested with authority to enforce its decision or order, subsequent judicial proceedings being provided for or contemplated as the remedy for the enforcement, either by itself or by the party interested, of its order or decision in all cases where the party complained of, or against whom its decision is rendered, does not yield voluntary obedience thereto.⁵

Effect Given in Judicial Proceedings to Findings and Orders of Commissioners. — The statutes generally provide that the report or findings of the commission shall,

1. Power to Investigate Manner in Which Railroads Are Being Conducted. — Railroad Commission Case, 116 U. S. 307; *State v. Jacksonville Terminal Co.*, 41 Fla. 377; *Stone v. Yazoo*, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193; *State v. Fremont*, etc., R. Co., 22 Neb. 313; *Atlantic Express Co. v. Wilmington*, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805. But see *Matter of Pacific R. Commission*, 12 Sawy. (U. S.) 559.

But the legislature of a state cannot, through the agency of a commission, require a partnership which is also a common carrier to give information as to its business and property outside of the state, or as to its interstate business, except in so far as such information is necessary to enable the commission to discharge its duty as to the defendant's business and property within the state. *State v. U. S. Express Co.*, 81 Minn. 87.

2. Investigation of Complaints. — *Chicago*, etc., R. Co. v. *Dey*, 38 Fed. Rep. 656; *State v. St. Paul*, etc., R. Co., 40 Minn. 355; *Minneapolis*, etc., R. Co. v. *Railroad*, etc., Commission, 44 Minn. 336; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353; *State v. Fremont*, etc., R. Co., 22 Neb. 313; *Atlantic Express Co. v. Wilmington*, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805; *Railroad Com'rs v. Oregon R.*, etc., Co., 17 Oregon 65; *Railroad Commission v. Houston*, etc., R. Co., 90 Tex. 340. See also *State v. Chicago*, etc., R. Co., 86 Iowa 641.

3. State v. Kansas Cent. R. Co., 47 Kan. 497; *In re Railroad Com'rs*, 15 Neb. 679.

In *North Carolina* the railroad commission is a court of record, with such powers as are inherent in all courts, as to punish for contempt, etc. *State v. Wilmington*, etc., R. Co., 122 N. Car. 877. But it is an administrative and not a judicial court. *State v. Wilson*, 121 N. Car. 425; *State v. Wilmington*, etc., R. Co., 122 N. Car. 877. See also *Mayo v. Western Union Tel. Co.*, 112 N. Car. 343; *State v. Western Union Tel. Co.*, 113 N. Car. 213.

In *New York* the board of railroad commissioners is, for some purposes, invested with judicial functions. *People v. Railroad Com'rs*, 32 N. Y. App. Div. 179, *affirmed* 158 N. Y. 711; *People v. Railroad Com'rs*, 158 N. Y. 421, *affirming* 32 N. Y. App. Div. 158; *People v. Railroad Com'rs*, 160 N. Y. 202, *affirming* 40 N. Y. App. Div. 559.

Whether the *Iowa* state board of railroad commissioners is a court, *quære*. *State v. Mason City*, etc., R. Co. 85 Iowa 516.

Powers of Commission under Constitution of California. — *Edson v. Southern Pac. Co.*, 133 Cal. 25.

4. Powers Resembling Those Exercised by Courts. — *State v. Jacksonville Terminal Co.*, 41 Fla. 377; *New London Northern R. Co. v. Boston*, etc., R. Co., 102 Mass. 386; *State v. Fremont*, etc., R. Co., 22 Neb. 313; *People v. New York*, etc., R. Co., 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480.

5. Orders or Decisions of Commission Enforced by Judicial Proceedings — *United States*. — *Chicago*, etc., R. Co. v. *Becker*, 32 Fed. Rep. 849. *Connecticut*. — *New York*, etc., R. Co.'s Appeal, 62 Conn. 527.

Florida. — *State v. Jacksonville Terminal Co.*, 41 Fla. 377.

Iowa. — *State v. Des Moines*, etc., R. Co., 84 Iowa 419; *State v. Mason City*, etc., R. Co., 85 Iowa 516; *Campbell v. Chicago*, etc., R. Co., 86 Iowa 587.

Minnesota. — *Minneapolis*, etc., R. Co. v. *Railroad*, etc., Commission, 44 Minn. 336; *State v. Minneapolis*, etc., R. Co., 80 Minn. 191.

New York. — *Matter of Amsterdam*, etc., R. Co., 86 Hun (N. Y.) 578.

Oregon. — *Railroad Com'rs v. Oregon R.*, etc., Co., 17 Oregon 65.

Texas. — *Railroad Commission v. Houston*, etc., R. Co., 90 Tex. 340.

See also *Eastern R. Co. v. Concord*, etc., R. Co., 47 N. H. 108, and see *infra*, this title, *Enforcement of Orders*.

in all judicial proceedings, be deemed *prima facie* evidence as to every fact found, and the orders or regulations of the commission shall be deemed *prima facie* reasonable and just.¹

In Some States Commissioners Merely Advisory Officers. — While the powers that have been enumerated are generally conferred upon railroad commissioners in the *United States*, there are a few states in which such commissioners are little else than advisory officers, and have no authority to make orders or decisions which are enforceable in the courts.²

Where Railroad Commissioners Act Judicially all must be present, though a majority may decide.³

b. REGULATION OF CHARGES — (1) *What Regulations Are Permissible* — (a) **In General.** — It is competent for the legislature of a state, through the agency of a commission, to limit and regulate the charges made by railroad companies for carrying passengers and freight, except where a company is protected from such regulation by a contract in its charter.⁴ To exempt a company from legislative interference in this respect, such exemption must appear in its charter in clear and unmistakable language, inconsistent with any reservation of power by the state.⁵

1. Effect Given in Judicial Proceedings to Findings and Orders of Commissioners. — *State v. Jacksonville Terminal Co.*, 41 Fla. 377; *Jacobson v. Wisconsin*, etc., R. Co., 71 Minn. 519, 70 Am. St. Rep. 358; *State v. Fremont*, etc., R. Co., 22 Neb. 313; *Railroad Commission v. Houston*, etc., R. Co., 90 Tex. 340.

2. See the statutes in the several states. See also *Matter of Pacific R. Commission*, 12 Sawy. (U. S.) 559; *People v. New York*, etc., R. Co., 104 N. Y. 58, 58 Am. Rep. 484, 29 Am. & Eng. R. Cas. 480.

Power as to Repairs. — Under the *Kansas* statute (Laws 1883, c. 124, § 5; Gen. Stat. 1889, par. 1328; Gen. Stat. 1897, c. 69, §§ 8, 9), the state board of railroad commissioners may examine and decide what repairs upon a railroad are proper or necessary, and give notice thereof to the railroad corporation, and report their proceedings to the governor. This is the limit of their power as to such repairs. *State v. Kansas Cent. R. Co.*, 47 Kan. 407.

3. *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. See also *Woodruff v. New York*, etc., R. Co., 59 Conn. 63.

4. Power to Regulate Charges — *United States*. — *Piek v. Chicago*, etc., R. Co., 6 Biss. (U. S.) 177; *Chicago*, etc., R. Co. *v. Iowa*, 94 U. S. 155; *Ruggles v. Illinois*, 108 U. S. 526; *Stone v. New Orleans*, etc., R. Co., 116 U. S. 352, 23 Am. & Eng. R. Cas. 606; *Dow v. Beidelman*, 125 U. S. 680; *Georgia R., etc., Co. v. Smith*, 128 U. S. 174; *Charlotte*, etc., R. Co. *v. Gibbs*, 142 U. S. 386; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466, 171 U. S. 361, *affirming* 64 Fed. Rep. 165; *Tilley v. Savannah*, etc., R. Co., 5 Fed. Rep. 641; *Chicago*, etc., R. Co. *v. Becker*, 32 Fed. Rep. 849; *Matthews v. Corporation Comm'rs*, 97 Fed. Rep. 400.

Florida — *Pensacola*, etc., R. Co. *v. State*, 25 Fla. 310; *Storrs v. Pensacola*, etc., R. Co., 29 Fla. 617.

Georgia. — *Georgia R., etc., Co. v. Smith*, 70 Ga. 694; *Partee v. Georgia R. Co.*, 72 Ga. 347, 27 Am. & Eng. R. Cas. 12; *Coyle v. Southern R. Co.*, 112 Ga. 121.

Illinois. — *Chicago*, etc., R. Co. *v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278.

Iowa. — *Burlington*, etc., R. Co. *v. Dev.*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.

Michigan. — *Railroad Com'r v. Wabash R. Co.*, 123 Mich. 669; *Railroad Com'r v. Wabash R. Co.*, 126 Mich. 113, 7 Detroit Leg. N. 748.

Minnesota. — *State v. Chicago*, etc., R. Co., 38 Minn. 281; *State v. U. S. Express Co.*, 81 Minn. 87.

Mississippi. — *Stone v. Yazoo*, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193; *Stone v. Natchez*, etc., R. Co., 62 Miss. 646; *Mississippi R. Commission v. Gulf*, etc., R. Co., 78 Miss. 750.

Nebraska. — *State v. Fremont*, etc., R. Co., 22 Neb. 313.

North Carolina. — *Atlantic Express Co. v. Wilmington*, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805; *Corporation Commission v. Seaboard Air Line System*, 127 N. Car. 283.

South Carolina. — *Railroad Com'rs v. Railroad Co.*, 22 S. Car. 220, 26 Am. & Eng. R. Cas. 29.

See also *Vermont*, etc., R. Co. *v. Fitchburg R. Co.*, 9 Cush. (Mass.) 369.

5. Charter Provisions Exempting from Regulation. — *Georgia R., etc., Co. v. Smith*, 128 U. S. 174; *Georgia R., etc., Co. v. Smith*, 70 Ga. 694; *Stone v. Yazoo*, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193.

Illustrations. — Such exemption does not result from a charter authorizing a company, in general terms, to fix and regulate charges for the transportation of persons and property. *Railroad Commission Cases*, 116 U. S. 307; *Stone v. New Orleans*, etc., R. Co., 116 U. S. 352, 23 Am. & Eng. R. Cas. 606; *Stone v. Yazoo*, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193; *Stone v. Natchez*, etc., R. Co., 62 Miss. 646; *Chicago*, etc., R. Co. *v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285. See also *Railroad Com'rs v. Railroad Co.*, 22 S. Car. 220, 26 Am. & Eng. R. Cas. 29; *Chicago*, etc., R. Co. *v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278.

But a provision in a company's charter authorizing it to fix, within maximum limits, the rates at which it will transport persons or property over its road vests the company with

(b) **Constitutional Limitations** — *aa. RATES FIXED MUST BE REASONABLE* — POWER OF COURTS. — From what has been said it is not to be inferred that this power of regulation through the agency of a commission is without limit, where a company is not protected therefrom by an express contract in its charter. It must be confined within constitutional bounds. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation.¹ The rates fixed must be reasonable, and whether they are so is a question to be determined by the courts.² It follows that a statute which attempts to make the findings of the commission as to what are equal and reasonable rates final, conclusive, and binding upon the courts is unconstitutional.³

Limitation upon Court's Power. — But the courts are not authorized to revise or exchange the body of rates imposed by the commission. They do not determine whether one rate is preferable to another, or what would, under all circumstances, be fair and reasonable as between carriers and shippers. Their power is confined to the determination of the question whether the rates

an unrestricted right to fix rates within the limits prescribed which cannot in any way be interfered with by the legislature, or by a commission acting under its authority. *Stone v. Yazoo, etc., R. Co.*, 62 Miss. 607, 52 Am. Rep. 193; *Mississippi R. Commission v. Gulf, etc., R. Co.*, 78 Miss. 750. But see *Georgia R., etc., Co. v. Smith*, 70 Ga. 694.

1. **May Not Confiscate or Destroy.** — *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep. 883; *Clyde v. Richmond, etc., R. Co.*, 57 Fed. Rep. 436; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236; *Pensacola, etc., R. Co. v. State*, 25 Fla. 310; *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617; *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285. See also *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849. But see *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep. 641.

2. **Rates Fixed Must Be Reasonable** — Reasonableness Question for Courts — *United States*. — *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 367; *Smyth v. Ames*, 169 U. S. 466, 171 U. S. 361, *affirming* 64 Fed. Rep. 165; *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep. 883; *Chicago, etc., R. Co. v. Dey*, 38 Fed. Rep. 656; *Mercantile Trust Co. v. Texas, etc., R. Co.*, 51 Fed. Rep. 529; *Richmond, etc., R. Co. v. Trammel*, 53 Fed. Rep. 196; *Clyde v. Richmond, etc., R. Co.*, 57 Fed. Rep. 436; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

Florida. — *Pensacola, etc., R. Co. v. State*, 25 Fla. 310.

Georgia. — *Partee v. Georgia R. Co.*, 72 Ga. 347, 27 Am. & Eng. R. Cas. 12.

Iowa. — *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *State v. Chicago, etc., R. Co.*, 88 Iowa 445, 55 Am. & Eng. R. Cas. 515.

Nebraska. — *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737; *Pacific Express Co. v. Cornell*, 59 Neb. 364.

See *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278.

Statute Held Unconstitutional. — A statute regulating the charges to be made by persons or corporations owning or operating railroads, and vesting in a railroad commission supervision thereof, which discriminates between railroad corporations and persons operating railroads, and also between railroad corporations themselves, is unconstitutional. *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679.

3. **Statute Attempting to Make Commission's Findings Conclusive Unconstitutional.** — *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 418, 42 Am. & Eng. R. Cas. 285 [*reversing* 38 Minn. 281, and in effect *overruling* *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep. 641]; *Railway Transfer Co. v. Railroad, etc., Commission*, 39 Minn. 231; *State v. Minneapolis Eastern R. Co.*, 40 Minn. 156; *Richmond, etc., R. Co. v. Trammel*, 53 Fed. Rep. 196. See also *State v. Kansas Cent. R. Co.*, 47 Kan. 497. But see *Edson v. Southern Pac. Co.*, 133 Cal. 25.

"**Sufficient Evidence.**" — In a statute providing that in all suits against railroad corporations involving the charges of such corporations for the transportation of passengers or freight, the schedule of rates established by the railroad commission shall be deemed "sufficient evidence" that the rates therein fixed are just and reasonable, the term "sufficient evidence" has been held not to be synonymous with the term "conclusive evidence." Such a provision does not have the effect of shutting off all judicial investigation into the justice and reasonableness of the rates fixed by the commission, and is not, therefore, unconstitutional on that ground. *Richmond, etc., R. Co. v. Trammel*, 53 Fed. Rep. 196; *Pensacola, etc., R. Co. v. State*, 25 Fla. 310.

The effect of such provision is to make the schedule fixed by the commission competent and adequate evidence of the correctness of the action of the commission in the absence of countervailing proof that it has exceeded its powers, or has abused its discretion and invaded some right of the railroad company. *Pensacola, etc., R. Co. v. State*, 25 Fla. 310.

prescribed are unjust and unreasonable, and such as to work a practical destruction to rights of property.¹ If they find that a body of rates prescribed by a commission will have this effect they have power to restrain its operation,² and this though the commission has taken no positive action to enforce such rates.³ But a court of equity cannot enjoin a commission which is authorized by statute to fix rates, and is charged with the duty of enforcing them, from fixing such rates.⁴

Jurisdiction of Federal Courts. — The federal courts have jurisdiction of a suit against the railroad commissioners of a state, brought by a citizen of another state, to restrain them from enforcing certain rates and regulations, provided the state has no direct pecuniary interest therein, as such a suit is not a suit against "one of the United States" within the meaning of that provision of the Federal Constitution⁵ which declares that the judicial power of the United States shall not be construed to extend to any suit brought against one of the United States by a citizen of another state.⁶

Statutes Authorizing Appeals to Courts. — In some of the states there are statutes expressly authorizing appeals to the courts by railroad companies or other interested persons dissatisfied with rates fixed by the railroad commission.

1. Limit of Power of Courts. — *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 367; *Chicago, etc., R. Co. v. Dey*, 38 Fed. Rep. 656; *Mercantile Trust Co. v. Texas, etc., R. Co.*, 51 Fed. Rep. 529; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236; *Steenerson v. Great Northern R. Co.*, 69 Minn. 353. See also *Chicago, etc., R. Co. v. Wellman*, 143 U. S. 339.

Where a tariff of freight and passenger rates has been established by the railroad commissioners, and the railroad company and the commissioners differ as to whether such rates, considered as a whole, will prove remunerative to the company, and there is room for a difference of intelligent opinion on the question, the courts cannot interfere or substitute their judgment for that of the commissioners; the tariffs as fixed by the commissioners must, in so far as the courts are concerned, be left to the test of experiment. *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617; *Pensacola, etc., R. Co. v. State*, 25 Fla. 310.

2. Enforcement of Unreasonable Rates May Be Restrained. — *Piek v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 177; *Smyth v. Ames*, 169 U. S. 466, 171 U. S. 361, *affirming* 64 Fed. Rep. 165; *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 367; *Chicago, etc., R. Co. v. Dey*, 38 Fed. Rep. 656; *Mercantile Trust Co. v. Texas, etc., R. Co.*, 51 Fed. Rep. 529, 50 Am. & Eng. R. Cas. 559; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236. See also *Richmond, etc., R. Co. v. Trammel*, 53 Fed. Rep. 196; *Higginson v. Chicago, etc., R. Co.*, 100 Fed. Rep. 235. But see *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566.

3. *Piek v. Chicago, etc., R. Co.*, 6 Biss. (U. S.) 177.

Schedule Advertised to Take Effect on Certain Day. — Where a railroad commission has advertised that a schedule of rates as prepared by it will be put in force on a certain day, a court of equity has jurisdiction before the day named, on the application of a railroad company to be affected by such schedule, to restrain the enforcement thereof, on the ground of preventing a multiplicity of suits. *Chicago,*

etc., R. Co. v. Dey, 35 Fed. Rep. 866. See also *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

4. Commission Cannot Be Enjoined from Fixing Rates. — *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483, *reversing* 103 Fed. Rep. 216; *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566. See also *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

In a suit to enjoin a board of commissioners from enforcing resolutions alleged to have been adopted by it, reducing the rates of transportation, the court will consider only resolutions that have been adopted by the board, and not what the board or its members intended or threatened to do in the future. *Southern Pac. Co. v. Railroad Com'rs*, 87 Fed. Rep. 21.

5. Const. U. S., Amendment 11.

6. Jurisdiction of Federal Courts of Suit by Citizen of Another State. — *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362; *Smyth v. Ames*, 169 U. S. 466, *affirming* 64 Fed. Rep. 165; *Chicago, etc., R. Co. v. Becker*, 35 Fed. Rep. 883; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Mercantile Trust Co. v. Texas, etc., R. Co.*, 51 Fed. Rep. 529, 50 Am. & Eng. R. Cas. 559; *Clyde v. Richmond, etc., R. Co.*, 57 Fed. Rep. 436; *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566.

The jurisdiction of the federal courts in such case is not ousted by the fact that the statute authorizing the commissioners to fix rates provides that actions for penalties prescribed for disregarding them shall be brought in the name of the state, and for its benefit. *Clyde v. Richmond, etc., R. Co.*, 57 Fed. Rep. 436.

But where the statute contains such a provision, an action to enjoin the commissioners from instituting an action in the name of the state to recover the prescribed penalties is a suit against the state within the meaning of the constitution. *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566.

Such statutes usually limit the jurisdiction of the court to the question of the justice and reasonableness of the rates.¹

Rates Fixed by Commission Effective until Appealed From. — Until an appeal has been made to the judiciary to declare the regulations made by the commission voidable for the reasons mentioned, the tariff of rates fixed by it is the law of the land, and must be submitted to, both by railroads and by the parties with whom they deal.²

bb. STATE COMMISSIONS CANNOT REGULATE INTERSTATE COMMERCE. — A state commission cannot, of course, make any regulation of charges that amounts to a regulation of interstate commerce.³ But such a commission may regulate the charge made by a railroad company for switching cars where such charge is not a part of a through rate, and has no reference to interstate shipment; and this though the cars switched contain interstate freights. Such a regulation is not a regulation of interstate commerce.⁴

cc. AUTHORITY TO FIX REASONABLE RATES NOT DELEGATION OF LEGISLATIVE POWER. — A statute which provides that the rate charged by railroad companies shall be just and reasonable, and which authorizes the railroad commission to make and put in effect a schedule of just and reasonable rates, does not delegate to the commission any legislative power, and is not, therefore, open to any constitutional objection on that ground.⁵

(2) *Powers Given to and Duties Imposed upon Commissioners* — (a) *In General.* — Almost universally the statutes authorize and require the railroad commissioners to fix or regulate the rates on railroads in the state,⁶ and to prevent unjust discrimination or partiality in the charges made by railroad companies.⁷

1. *Railroad Commission v. Weld*, (Tex. 1902) 66 S. W. Rep. 1095.

Under the Provision of a Minnesota Statute (Stat. 1894, § 393, subdiv. d) providing for an appeal from an order of the state railroad commission to the District Court, if the commission makes an order fixing a tariff rate such order is not conclusive as to the reasonableness of such rate in the absence of an appeal therefrom. *State v. Minneapolis, etc., R. Co.*, 80 Minn. 191.

2. *Chicago, etc., R. Co. v. Minnesota*, 134 U. S. 460, *per* Miller, J.; *Southern Pac. R. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

Express statutory sanction has been given to this rule in *Texas*. *Railroad Commission v. Weld*, (Tex. 1902) 66 S. W. Rep. 1095.

3. See the title INTERSTATE COMMERCE, vol. 17, p. 34.

4. *Chicago, etc., R. Co. v. Becker*, 32 Fed. Rep. 849.

5. *Statute Authorizing Commission to Fix Reasonable Rates.* — *Tilley v. Savannah, etc., R. Co.*, 5 Fed. Rep. 641; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566; *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617; *Georgia R., etc., Co. v. Smith*, 70 Ga. 694; *State v. Chicago, etc., R. Co.*, 38 Minn. 281.

6. *Commissioners Generally Authorized and Required to Regulate Rates* — *United States*. — *Pacific Coast Steam-Ship Co. v. Railroad Com'rs*, 9 Sawy. (U. S.) 253; *Chicago, etc., R. Co. v. Dey*, 38 Fed. Rep. 656; *Southern Pac. Co. v. Railroad Com'rs*, 78 Fed. Rep. 236.

Florida. — *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566; *Pensacola, etc., R. Co. v. State*, 25 Fla. 310; *Storrs v. Pensacola, etc.,*

R. Co., 29 Fla. 617; *State v. Jacksonville Terminal Co.*, 41 Fla. 377.

Illinois. — *St. Louis, etc., R. Co. v. Blackwood*, 14 Ill. App. 503.

Iowa. — *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 587.

Michigan. — *Railroad Com'rs v. Wabash R. Co.*, 126 Mich. 113, 7 Detroit Leg. N. 748.

Minnesota. — *Steenerson v. Great Northern R. Co.*, 69 Minn. 353.

Nebraska. — *State v. Fremont, etc., R. Co.*, 23 Neb. 117; *Nebraska Tel. Co. v. Cornell*, 59 Neb. 737.

New Hampshire. — *Merrill v. Boston, etc., R. Co.*, 63 N. H. 259.

New York. — *Matter of Amsterdam, etc., R. Co.*, 86 Hun (N. Y.) 578.

North Carolina. — *Corporation Commission v. Seaboard Air Line System*, 127 N. Car. 283.

Oregon. — *State v. Rogers*, 22 Oregon 348. The Oregon statute of Feb. 18, 1887, did not confer such authority. *Railroad Com'rs v. Oregon, etc., R. Co.*, 17 Oregon 65.

Texas. — *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340; *Railroad Commission v. Weld*, (Tex. 1902) 66 S. W. Rep. 1095.

Commission Cannot Sanction Continuance of Unreasonable Charges. — *State v. Fremont, etc., R. Co.*, 23 Neb. 117. See also *State v. Missouri Pac. R. Co.*, 29 Neb. 550.

7. *Prevention of Unjust Discrimination.* — *Storrs v. Pensacola, etc., R. Co.*, 29 Fla. 617; *Campbell v. Chicago, etc., R. Co.*, 86 Iowa 587; *Louisville, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 164; *Louisville, etc., R. Co. v. Com.*, (Ky. 1899) 51 S. W. Rep. 167; *Illinois Cent. R. Co. v. Com.*, (Ky. 1901) 64 S. W. Rep. 975; *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1; *Steenerson v. Great Northern R.*

Some of the peculiar provisions of such statutes have received the interpretation of the courts.¹

(b) **Power to Fix Joint Rates for Connecting Railroads.** — Some of the statutes invest the commissioners with power to fix reasonable joint rates² of freight charges for connecting lines of road.³ Statutes delegating such power to commissioners have been held to be constitutional.⁴

Power to Make Distribution of Joint Charges. — Sometimes the commissioners are authorized, where railroad companies whose roads connect fail to agree upon a fair and just division of joint freight or passenger charges, to fix the *pro rata* part of such charges to be received by each of the companies.⁵

(c) **Notice of Intention to Fix Rates.** — By some of the statutes the commissioners are required, before fixing rates, to give notice of the time when and place where they will fix such rates.⁶ Under such a statute a schedule of rates fixed without the required notice being given is void.⁷

(d) **Power to Obtain Necessary Information.** — Generally the statutes make ample provision to enable the commissioners to ascertain the facts necessary to be known in order to arrive at and fix just and reasonable rates.⁸

(e) **Publication of Rates.** — In some jurisdictions the commissioners are required to publish the schedule of rates when made.⁹

Co., 69 Minn. 353; *Stone v. Yazoo, etc., R. Co.*, 62 Miss. 607, 52 Am. Rep. 103; *Railroad Commission v. Houston, etc., R. Co.*, 90 Tex. 340.

1. **Reducing Rates.** — Under the *Minnesota* statute (now Stat. Minn. 1894, § 386, subdiv. e), the state railroad and warehouse commission, when reducing rates on a complaint that rates between certain points on a certain road are too high, may, for the purpose of preventing discrimination by its own acts, reduce the rates on the whole line or system. *Steenerson v. Great Northern R. Co.*, 69 Minn. 353.

For the Construction of the Peculiar Provisions of Certain Statutes relating to the rights and duties of railroad commissioners in fixing and regulating rates, see *Innes v. London, etc., R. Co.*, 2 R. & Can. T. Cas. 155; *Railroad Commission Cases*, 116 U. S. 307; *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483; *Ex p. Koehler*, 25 Fed. Rep. 73; *Chicago, etc., R. Co. v. Dey*, 38 Fed. Rep. 656; *Higginson v. Chicago, etc., R. Co.*, 100 Fed. Rep. 235; *McWhorter v. Pensacola, etc., R. Co.*, 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1; *Ross v. Kansas City, etc., R. Co.*, 111 Mo. 18; *Pugh v. Kansas City St., etc., R. Co.*, 118 Mo. 506; *State v. Fremont, etc., R. Co.*, 22 Neb. 313; *Pacific Express Co. v. Cornell*, 59 Neb. 364; *Nebraska Telephone Co. v. Cornell*, 59 Neb. 737; *Merrill v. Boston, etc., R. Co.*, 63 N. H. 259; *Atlantic Express Co. v. Wilmington, etc., R. Co.*, 111 N. Car. 463, 32 Am. St. Rep. 805; *Corporation Commission v. Seaboard Air Line System*, 127 N. Car. 283; *State v. Rogers*, 22 Oregon 348; *Railroad Com'rs v. Railroad Co.*, 22 S. Car. 220, 26 Am. & Eng. R. Cas. 29.

2. **As to What Constitutes a Joint Rate**, see *State v. Chicago, etc., R. Co.*, 90 Iowa 594.

3. **Power to Fix Joint Rates for Connecting Railroads.** — *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *State v. Chicago, etc., R.*

Co., 90 Iowa 594; *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676.

Effect of Provision that Joint Tariffs Be Filed with Commissioners. — A statute which provides that where common carriers establish joint tariffs of rates copies of such tariffs shall be filed with the railroad commissioners does not empower the commissioners to make joint rates. *State v. Chicago, etc., R. Co.*, 90 Iowa 594.

4. *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *Jacobson v. Wisconsin, etc., R. Co.*, 71 Minn. 519, 70 Am. St. Rep. 358; *State v. Minneapolis, etc., R. Co.*, 80 Minn. 191.

5. *Boston, etc., R. Corp. v. Nashua, etc., R. Corp.*, 157 Mass. 258; *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676. See also *Boston, etc., R. Corp. v. Western R. Corp.*, 14 Gray (Mass.) 253; *Lexington, etc., R. Co. v. Fitchburg R. Co.*, 14 Gray (Mass.) 266; *Eastern R. Co. v. Concord, etc., R. Co.*, 47 N. H. 108.

Compensation to Be Paid to Railroad Company for Transporting Another Company's Passengers and Freight. — *Vermont, etc., R. Co. v. Fitchburg R. Co.*, 9 Cush. (Mass.) 369.

6. **Notice.** — *Stone v. Farmers' Loan & Trust Co.*, 116 U. S. 307; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; *State v. Chicago, etc., R. Co.*, 90 Iowa 594.

7. *State v. Chicago, etc., R. Co.*, 90 Iowa 594.

8. *State v. Jacksonville Terminal Co.*, 41 Fla. 377; *State v. Fremont, etc., R. Co.*, 22 Neb. 313.

9. **Under the Illinois Statute** (Underwood's Stat., c. 114, § 19; Starr & Curt. Annot. Stat. Ill. 1896, c. 114, par. 173), requiring the railroad commissioners of that state to make for each railroad company doing business in the state a schedule of maximum rates, and to cause the publication of such schedule, the classifications of freights were held to be a part of the schedule and therefore to come within the requirement of publication. *St. Louis, etc., R. Co. v. Blackwood*, 14 Ill. App. 503.

(3) *Effect Given by Courts to Rates Fixed by Commission.* — Some of the statutes expressly provide that the tariff of rates made by the commission shall be taken by the courts as *prima facie* evidence that such tariff is equal and reasonable, and thus throw upon a railroad company complaining of the rates fixed by the commission the burden of proving that they are not equal or reasonable.¹

c. **POWERS IN REGARD TO STATIONS AND STATION HOUSES.** — Under the statutes of some of the states questions relating to the establishment, location, and discontinuance of stations and the erection or enlargement of station houses are, where the safety and convenience of the public are concerned, left very largely to the determination of the railroad commissioners, and they are authorized to make orders in reference thereto which, when found by the courts to be reasonable, are binding upon the railroad companies concerned.² Under some of the statutes railroad commissioners are authorized to inspect the station houses or depots of all railroads operated in the

1. **Effect of Rates Fixed by Commission as Evidence.** — Chicago, etc., R. Co. v. Dey, 38 Fed. Rep. 656; Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278; Burlington, etc., R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; Steenerson v. Great Northern R. Co., 69 Minn. 353; Jacobson v. Wisconsin, etc., R. Co., 71 Minn. 519, 70 Am. St. Rep. 358; State v. Minneapolis, etc., R. Co., 80 Minn. 191.

Such a Provision Simply Prescribes a Rule of Evidence, and does not prevent railroad companies from having the question of the reasonableness of rates fixed determined in the courts. Burlington, etc., R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.

It does not, therefore, deprive such companies of their property without due process of law, Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278; Burlington, etc., R. Co. v. Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; or infringe upon the right of trial by jury, Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278.

Nor is such a provision an attempted delegation of legislative power. Chicago, etc., R. Co. v. Jones, 149 Ill. 361, 41 Am. St. Rep. 278.

2. **Erection, Location, or Change of Station or Station House.** — As to the control of the Nebraska railroad commission, under Act Neb. June 6, 1885, over the erection, location, or change of stations or station houses, see State v. Chicago, etc., R. Co., 19 Neb. 476, *distinguishing* State v. Republican Valley R. Co., 17 Neb. 647, 52 Am. Rep. 424.

Under the *New York* statute (Laws 1882, c. 353) the railroad commissioners have no power to require a railroad corporation to erect a station house on the line of its road. *People v. New York, etc., R. Co.*, 104 N. Y. 58, 29 Am. & Eng. R. Cas. 480.

Whether the *South Carolina* statute in force in 1886 (Gen. Stat., § 1457) conferred upon the railroad commissioners power to require a railroad company to establish and maintain a station house to be placed under a competent agent, *quære*. *Railroad Com'rs v. Columbia, etc., R. Co.*, 26 S. Car. 353.

The *Maine* statute (Pub. Laws 1871, c. 204; Rev. Stat. Me. 1883, c. 51, § 122) empower-

ing the railroad commissioners of that state to direct a railroad corporation to erect and maintain a depot at a specified place on the line of its road is constitutional. *Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208.

Addition to Station. — Under a statute authorizing railroad commissioners to require a railroad company to make "any addition to or change of its stations or station houses" which the safety and convenience of the public may require, the commissioners have power to require such a company to construct a station house at a regular station already established by it, the only existing accommodation thereat being a platform and sidetrack. *State v. Chicago, etc., R. Co.*, 12 S. Dak. 305.

Re-establishment of Station. — In *Iowa* it has been held that the railroad commissioners have power to require a railroad company to re-establish a station abandoned by it, only where the patrons of the road are deprived by such abandonment of reasonable facilities for transacting business with the company. *State v. Des Moines, etc., R. Co.*, 87 Iowa 644.

Location of Depot. — Under the *Connecticut* statutes it was held to be the duty of the railroad commissioners to approve or disapprove of the location of a new site for a depot. *State v. Railroad Com'rs*, 56 Conn. 308, 36 Am. & Eng. R. Cas. 510.

Discontinuance of Station. — In *Chester v. Connecticut Valley R. Co.*, 41 Conn. 348, it was held that under Act Conn. 1866, c. 67 (Gen. Stat. Conn. 1888, § 3516), the railroad commissioners had power to discontinue any railroad station, however it might have been established, but they had no powers of arbitration. They acted in a judicial capacity, and their findings were required to be definite, and not to depend on any conditions to be performed by either party.

For the construction of the peculiar provisions of the *New York* statute (Laws 1890, c. 565, as amended by Laws 1892, c. 676, § 34) empowering the state board of railroad commissioners to authorize the discontinuance of railroad stations, see *People v. Railroad Com'rs*, 158 N. Y. 421, *affirming* 32 N. Y. App. Div. 158.

state and to require the railroad companies to provide suitable reception rooms,¹ and sometimes they are authorized to require the companies to have at their station houses bulletin boards announcing the times of the arrival and departure of trains.²

d. POWERS IN REGARD TO CROSSINGS — (1) In General. — To insure the safety of passengers and the public generally, and to prevent destruction of property, the statutes in some states expressly authorize the railroad commissioners to make certain regulations and orders relative to railroad crossings. The statutes conferring such authority usually provide for an appeal to the courts from the decisions or orders of the commissioners,³ and require such decisions and orders, in order to be enforceable, to be reasonable and just.⁴

(2) *Street and Highway Crossings.* — These statutory provisions generally have reference to street and highway crossings. They differ in the extent of the power which they confer upon the commissioners. Some of them authorize the commissioners to order the removal of grade crossings, and to determine what alterations shall be made, by whom, and at whose expense;⁵ while others have reference to railroads thereafter to be constructed and authorize the commissioners to direct the raising or lowering of highways at crossings, so as to avoid crossings at grade, and to require the construction and maintenance of bridges.⁶ But usually the authority conferred upon the commissioners is more limited, and they are merely authorized to require railroad companies to take certain precautions or to maintain certain devices at grade crossings in order to prevent accidents.⁷

(3) *Crossings at Intersection of Other Railroads.* — Some of the statutes authorize the commissioners to condemn crossings of one railroad over another and to fix the grade and manner of crossing.⁸

(4) *Private Crossings.* — In some jurisdictions commissioners have authority to order a railroad company to construct a private crossing where a person owns land on both sides of the road.⁹

1. Inspection — Reception Rooms. — Railroad Commission Cases, 116 U. S. 307; *Stone v. Yazoo*, etc., R. Co., 66 Miss. 607, 52 Am. Rep. 193.

2. Bulletin Boards. — *Stone v. Yazoo*, etc., R. Co., 62 Miss. 607, 52 Am. Rep. 193.

3. Crossings. — *Westbrook's Appeal*, 57 Conn. 95; *Fairfield's Appeal*, 57 Conn. 167, 39 Am. & Eng. R. Cas. 689; *Union Terminal R. Co. v. Railroad Com'rs*, 54 Kan. 352; *Matter of New York*, etc., R. Co., 35 Hun (N. Y.) 232.

4. Evidence Held Not to Warrant Commissioner's Order. — *State v. Chicago*, etc., R. Co., 86 Iowa 304.

It would seem that this latter requirement is always essential to the validity of the action of the commissioners, whether expressly enjoined or not, and this no matter how broad may be the language of the provision conferring the authority upon them. *Suffield v. New Haven*, etc., R. Co., 53 Conn. 367.

And see *supra*, this section, *Constitutional Limitations*.

5. Removal of Grade Crossings. — *Westbrook's Appeal*, 57 Conn. 95; *Fairfield's Appeal*, 57 Conn. 167.

Commissioners Must Act Reasonably. — *Suffield v. New Haven*, etc., R. Co., 53 Conn. 367.

Overhead Tracks — Discretion Not Subject to Mandamus. — *State v. Asylum St. Bridge Commission*, 63 Conn. 91. See also *Woodruff v. Catlin*, 54 Conn. 277; *Woodruff v. New York*, etc., R. Co., 59 Conn. 63.

Decision of Majority Given Full Force of Commission — Connecticut Statute. — *Woodruff v. New York*, etc., R. Co., 59 Conn. 63.

Constitutionality of Statutes. — Statutes authorizing railroad commissioners to order the removal of grade crossings have been held to be constitutional. *Westbrook's Appeal*, 57 Conn. 95, 37 Am. & Eng. R. Cas. 446; *New York*, etc., R. Co.'s Appeal, 62 Conn. 527. See also *New York*, etc., R. Co.'s Appeal, 58 Conn. 532.

6. Waterbury's Appeal, 57 Conn. 84.

Peculiar Provisions of Massachusetts Statute Construed. — *Worcester v. Railroad Com'rs*, 113 Mass. 161.

Laying of Public Way Across Railroad. — *In re Railroad Com'rs*, 83 Me. 273.

7. See the statutes in the several states.

In *Michigan* the railroad commissioner has power to interfere when a crossing shall have become dangerous by reason of the frequency of travel along the highway, and to order the erection of a safety gate or the employment of a watchman. *Parks*, etc., *Com'rs v. Chicago*, etc., R. Co., 91 Mich. 291.

8. See the statutes of the several states.

As to the power of the railroad commissioners under the *Kansas* statute (Laws 1887, c. 184, §§ 1, 2; Gen. Stat. Kan. 1897, c. 69, §§ 33, 34), see *Union Terminal R. Co. v. Railroad Com'rs*, 54 Kan. 352.

Report of Commissioners Held Too Indefinite and Uncertain to be capable of enforcement, *Matter of New York*, etc., R. Co., 35 Hun (N. Y.) 232.

9. Private Crossings. — *State v. Mason City*, etc., R. Co., 85 Iowa 516; *State v. Chicago*, etc., R. Co., 86 Iowa 304. And see the statutes in the several states.

c. POWER TO REQUIRE INTERSECTING ROADS TO INTERCHANGE CARS. — By some of the statutes railroad commissioners are given power to require railroad companies whose lines cross or intersect each other to put in connecting switches, and to transfer and interchange cars, where it is practicable and the interests of traffic require it.¹

VII. ENFORCEMENT OF ORDERS. — In England the railway commission is a court of record with power to enforce its own orders.²

In United States. — As has previously been stated, a railroad commission is, under the statutes of most of the United States, merely an administrative board and has no power to enforce its own orders. It cannot, therefore, compel a railroad company to conform its charges to the schedule of rates which it has established, or to obey any other order which it has promulgated. To compel such obedience an action in a court of competent jurisdiction must be brought.³ The usual and proper method of obtaining enforcement of such orders is by an application for a writ of mandamus,⁴ or by an action in equity to compel compliance therewith.⁵ Such methods of obtaining enforcement are usually prescribed by express statutory provision,⁶ but in a few states railroad commissioners are merely advisory officers and their orders cannot be enforced by the courts.⁷

VIII. LIABILITY FOR VIOLATION OF COMMISSIONERS' REGULATIONS — 1. Penal Liability. — Statutes in some of the United States make the violation of regulations established by the state railroad commissioners a penal offense.⁸

1. Interchange of Cars by Intersecting Roads. — State *v.* Wrightsville, etc., R. Co., 104 Ga. 437; Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; Smith *v.* Chicago, etc., R. Co., 86 Iowa 202; State *v.* St. Paul, etc., R. Co., 40 Minn. 353; Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 70 Am. St. Rep. 358; Houston, etc., R. Co. *v.* Lone Star Salt Co., 19 Tex. Civ. App. 676. See also Boston, etc., R. Corp. *v.* Nashua, etc., R. Corp., 157 Mass. 258; Lexington, etc., R. Co. *v.* Fitchburg R. Co., 14 Gray (Mass.) 266; Eastern R. Co. *v.* Concord, etc., R. Co., 47 N. H. 108.

Provisions Held Constitutional. — Burlington, etc., R. Co. *v.* Dey, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391; Jacobson *v.* Wisconsin, etc., R. Co., 71 Minn. 519, 70 Am. St. Rep. 358. See also State *v.* Minneapolis, etc., R. Co., 80 Minn. 191.

2. See supra, this title, Powers and Duties — In England.

3. See supra, this title, Powers and Duties — In United States — In General.

Under the California Constitution the railroad commission of that state has no power, by a conclusive order, to compel a railroad company to restore a rate which was adopted by it for the purpose of competition, and which it has raised without the consent of the commission. The restoration of such rate can be enforced only through the medium of the courts. *Edson v. Southern Pac. R. Co.*, 133 Cal. 25.

4. Mandamus — United States. — Chicago, etc., R. Co. *v.* Becker, 32 Fed. Rep. 849.

Connecticut. — Woodruff *v.* New York, etc., R. Co., 59 Conn. 63.

Florida. — State *v.* Jacksonville Terminal Co., 41 Fla. 377.

Maine. — Railroad Com'rs *v.* Portland, etc., R. Co., 63 Me. 269, 18 Am. Rep. 208.

Michigan. — Railroad Com'rs *v.* Wabash R. Co., 123 Mich. 669, 126 Mich. 113, 7 Detroit Leg. N. 748.

Minnesota. — State *v.* Minneapolis Eastern R. Co., 40 Minn. 156; State *v.* Minneapolis, etc., R. Co., 80 Minn. 191.

Nebraska. — State *v.* Fremont, etc., R. Co., 22 Neb. 313.

New York. — Matter of Amsterdam, etc., R. Co., 86 Hun (N. Y.) 578.

5. Equitable Action. — Campbell *v.* Chicago, etc., R. Co., 86 Iowa 587.

Jurisdiction to Enforce Order for Construction of Private Crossing — District Courts. — State *v.* Mason City, etc., R. Co., 85 Iowa 516; State *v.* Chicago, etc., R. Co., 86 Iowa 304.

When Mandatory Injunction Will Be Granted. — Under the express provisions of the Iowa statute (Laws 1884, c. 133; Code Iowa 1897, § 2119), the court will not enforce by mandatory injunction an order of the railroad commissioners unless such order is reasonable and just; and the reasonableness and justness of an order are to be determined from equitable considerations. *State v. Des Moines, etc., R. Co.*, 84 Iowa 419.

6. See the statutes of the several states, and see the cases cited in the preceding notes.

Statutory Remedy Not Exclusive. — State *v.* Mason City, etc., R. Co., 85 Iowa 516, 55 Am. & Eng. R. Cas. 73, explaining *Boggs v. Chicago, etc., R. Co.*, 54 Iowa 435.

7. See supra, this title, Powers and Duties — In United States — In General.

Order to Erect Station House Not Enforceable by Mandamus. — *People v. New York, etc., R. Co.*, 104 N. Y. 58.

8. Violation of Regulations Penal Offense. — McWhorter *v.* Pensacola, etc., R. Co., 24 Fla. 417, 12 Am. St. Rep. 220, 37 Am. & Eng. R. Cas. 566; Pensacola, etc., R. Co. *v.* State, 25 Fla. 310; Littlefield *v.* Fitchburg R. Co., 158 Mass. 1; Mississippi R. Commission *v.* Gulf, etc., R. Co., 78 Miss. 750; Atlantic Express Co. *v.* Wilmington, etc., R. Co., 111 N. Car. 463, 32 Am. St. Rep. 805; Houston, etc., R. Co. *v.* Lone Star Salt Co., 19 Tex. Civ. App.

Penalty for Charging or Receiving Unreasonable Compensation. — Though a statute making it a penal offense for a railroad corporation to charge or receive more than a just and reasonable rate of compensation for the transportation of passengers or freight is too uncertain for enforcement,¹ such uncertainty is obviated by a provision authorizing the railroad commission to make a schedule of reasonable and maximum rates, and by the making of such schedule by the commission,² as in such case the state, in a prosecution to recover the penalty prescribed for a violation of the statute, will be estopped to contend that any charge equal to or less than that prescribed in the schedule is unreasonable.³

2. Liability in Damages to Persons Injured. — Under statutes in some of the *United States*, railroad companies violating any of the regulations established by the state railroad commissioners are liable to persons injured thereby for the damages sustained by them in consequence of such violation.⁴

676. See also *Railroad Com'rs v. Columbia*, etc., R. Co., 26 S. Car. 353.

Right of Company to Notice and Hearing — Commission's Order Must Be Explicit. — *Littlefield v. Fitchburg R. Co.*, 158 Mass. 1.

Fine Held Not Excessive. — *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.

1. Statute Imposing Penalty for Unreasonable Charges Too Uncertain for Enforcement. — *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483; *Louisville, etc., R. Co. v. Railroad Commission*, 19 Fed. Rep. 679; *Tozer v. U. S.*, 52 Fed. Rep. 917, 53 Am. & Eng. R. Cas. 14; *Louisville, etc., R. Co. v. Com.*, 99 Ky. 132, 59 Am. St. Rep. 457.

2. Uncertainty Obviated by Authorized Schedule

Made by Commission. — *McChord v. Louisville, etc., R. Co.*, 183 U. S. 483; *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. People*, 77 Ill. 443; *Chicago, etc., R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. Rep. 278; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.

3. *Chicago, etc., R. Co. v. Dey*, 35 Fed. Rep. 866; *Chicago, etc., R. Co. v. People*, 77 Ill. 443; *Burlington, etc., R. Co. v. Dey*, 82 Iowa 312, 31 Am. St. Rep. 477, 45 Am. & Eng. R. Cas. 391.

4. *Minneapolis, etc., R. Co. v. Railroad, etc., Commission*, 44 Minn. 336; *Houston, etc., R. Co. v. Lone Star Salt Co.*, 19 Tex. Civ. App. 676.

RAILROAD POOLS.

By WALTER CARRINGTON.

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CROSS-REFERENCES.

See the title *MONOPOLIES AND CORPORATE TRUSTS*, vol. 20, p. 844, and references there given.

I. DEFINITION. — Railroad pools are contracts between rival railway companies whereby, in order to prevent competition, their business is united in one common total, from which the business or the money received therefor is divided among the combining companies in fixed percentages. They are of two kinds — traffic pools and money pools. A traffic pool is an agreement allotting a certain percentage of the total traffic to each road, and providing that if any road exceeds its share of the business, freight shall be diverted from it to the other roads until the agreed proportion is restored. A money pool is an agreement whereby the money received by all the combining roads for transportation is brought together into one total and divided among the roads in certain fixed percentages, which do not necessarily correspond to the proportion of the freight actually carried by each road.¹

II. LEGALITY — 1. *In England.* — It has been held in England that a *bona fide* contract or agreement between competing railroad corporations to divide their earnings in certain fixed proportions is not void as against public policy, provided such agreement is not injurious to the public or prejudicial to the shareholders in either company.²

But Where the Contract Amounts to an Amalgamation of the companies — a complete union and partnership — it can be entered into only under the express sanction of an Act of Parliament.³

Specific Performance. — Apart from the question of its legal validity, if a pooling contract proves to be one by which one of the contracting parties will gain considerable advantage at the expense of the other, while the other will receive no corresponding benefit, equity will not aid in enforcing it by a decree of specific performance.⁴

Line Not Authorized to Be Constructed. — A pooling contract entered into by a

1. *Railroad Pools Defined.* — Hudson, *The Railways and the Republic*, 196, 197.

2. *Legality of Pooling Contracts* — *Rule in England.* — *Hare v. London, etc., R. Co.*, 2 Johns. & H. 80, 7 Jur. N. S. 1145, 30 L. J. Ch. 817; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 17 Q. B. 652, 79 E. C. L. 652; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 2

Macn. & G. 324. But see the opinion of Lord Justice Turner in *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 4 De G. M. & G. 115.

3. *Charlton v. Newcastle, etc., R. Co.*, 5 Jur. N. S. 1096.

4. *Shrewsbury, etc., R. Co. v. Northwestern R. Co.*, 6 H. L. Cas 113; *Shrewsbury, etc., R. Co. v. London, etc., R. Co.*, 4 De G. M. & G. 115.

railroad company in reference to a line of road which it has not, at the time, been empowered to construct is *ultra vires*.¹

2. In United States — *a*. AT COMMON LAW. — In the United States the authorities are somewhat conflicting upon the question of the legality of pooling contracts. It seems to be well settled that all contracts which have a direct tendency to prevent healthy competition are invalid. Therefore, a contract between competing railroad companies to pool their earnings is invalid if from its terms it clearly appears that its object is not merely to avoid ruinous competition, but to stifle all competition, for the purpose of raising rates or preventing their reduction.² But where the object of the contract is to prevent unhealthy competition and at the same time to furnish the public with adequate facilities at fixed and reasonable rates, it would seem to be open to no objection upon grounds of public policy, and there would appear to be no sufficient reason why it should not be held valid and enforceable.³ In *Louisiana*, however, the rule would seem to be that any contract between competing railroad companies is unenforceable which has as its purpose the division of their traffic earnings between points where they were formerly competitors.⁴

Burden of Proof. — Whether or not its beneficent purpose can save from the condemnation of the law a contract between competing railroad corporations to pool their earnings, all such contracts are *prima facie* illegal. If such a contract can stand, it must be upon a complete affirmative showing that it was not formed to harm the public by repressing fair competition.⁵

Apportionment of Through Fares and Freight by Connecting Roads. — It is important to distinguish a pooling contract between competing companies from a contract between companies whose roads connect, but are not competing, for an apportionment of their earnings or of the sums received for through transportation. Contracts of the latter description are not open to objection on grounds of public policy, and, unless prohibited by statutory or charter restriction, are valid.⁶

b. UNDER STATUTES — (1) *Federal Statutes.* — By the Interstate Commerce Act,⁷ railroad companies subject to its provisions are forbidden to enter into pooling contracts.⁸

(2) *State Statutes.* — In some of the states contracts between railroad corporations to pool their earnings are prohibited by statute.⁹

c. DISPOSITION OF MONEY RECEIVED UNDER CONTRACT. — But whether a pooling contract is valid or not, if it has been executed and the receiver of one of the contracting companies has come into possession of money received

1. *Midland R. Co. v. London, etc., R. Co.*, L. R. 2 Eq. 524. See also *Maunsell v. Midland Great Western R. Co.*, 1 Hem. & M. 130.

2. *Invalid Pooling Contracts.* — *Chicago, etc., R. Co. v. Wabash, etc., R. Co.*, (C. C. A.) 61 Fed. Rep. 993, 58 Am. & Eng. R. Cas. 703; *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593. See also opinion of Sanborn, J., in *U. S. v. Trans-Missouri Freight Assoc.*, 58 Fed. Rep. 58, 56 Am. & Eng. R. Cas. 6; *Anderson v. Jett*, 89 Ky. 375; *Stanton v. Allen*, 5 Den. (N. Y.) 434, 49 Am. Dec. 282.

3. *Valid Pooling Contracts.* — See *Ex p. Koehler*, 23 Fed. Rep. 529, 21 Am. & Eng. R. Cas. 52; *U. S. v. Trans-Missouri Freight Assoc.*, 53 Fed. Rep. 440; *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582, 47 Am. & Eng. R. Cas. 359.

4. *Rule in Louisiana.* — *Texas, etc., R. Co. v. Southern Pac. R. Co.*, 41 La. Ann. 970, 17 Am. St. Rep. 445, 40 Am. & Eng. R. Cas. 475.

5. *Prima Facie Illegal.* — *Cleveland, etc., R. Co. v. Closser*, 126 Ind. 348, 22 Am. St. Rep. 593.

6. *Apportionment by Connecting Roads of Sums Received for Through Transportation.* — *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 30 Fed. Rep. 2, 28 Am. & Eng. R. Cas. 1; *Eclipse Towboat Co. v. Pontchartrain R. Co.*, 24 La. Ann. 1; *Stewart v. Erie, etc., Transp. Co.*, 17 Minn. 372; *Sussex R. Co. v. Morris, etc., R. Co.*, 19 N. J. Eq. 1; *Morris, etc., R. Co. v. Sussex R. Co.*, 20 N. J. Eq. 542; *Elkins v. Camden, etc., R. Co.*, 36 N. J. Eq. 241; *Cumberland Valley R. Co. v. Gettysburg, etc., R. Co.*, 177 Pa. St. 519. See also *Gass v. New York, etc., R. Co.*, 99 Mass. 220, 96 Am. Dec. 742.

7. See section 5 of the Act.

8. See the title INTERSTATE COMMERCE, vol. 17, p. 163.

9. *State Statutes Prohibiting Pooling Contracts.* — See the statutes of the several states. See also *Currier v. Concord R. Corp.*, 48 N. H. 321; *Morrill v. Boston, etc., R. Co.*, 55 N. H. 531; *Hooker v. Vandewater*, 4 Den. (N. Y.) 349, 47 Am. Dec. 258.

under it, he cannot set up its invalidity, but must account to the other contracting railroads for the money so received in accordance with the terms of the contract.¹

III. RESTRAINT BY INJUNCTION. — The performance of an unlawful pooling contract may be restrained by injunction at the suit of the state,² or of a non-assenting stockholder,³ or, where it is so provided by statute, at the suit of any citizen.⁴

RAILROAD RELIEF SOCIETY. — See the title **BENEVOLENT OR BENEFICIAL ASSOCIATIONS**, vol. 3, p. 1041.

1. *Central Trust Co. v. Ohio Cent. R. Co.*, 23 Fed. Rep. 306, 23 Am. & Eng. R. Cas. 666. See also *Manchester, etc., R. Co. v. Concord R. Co.*, 66 N. H. 100, 49 Am. St. Rep. 582.

2. *Injunction.* — *Gulf, etc., R. Co. v. State*, 72 Tex. 404, 13 Am. St. Rep. 815, 36 Am. & Eng. R. Cas. 481.

3. *Charlton v. Newcastle, &c., R. Co.*, 5 Jur. N. S. 1096.

Contract with Foreign Company Operating Railroads in State. — Under a *New Hampshire* statute, Act 1867, c. 8, the stockholders of a railroad corporation chartered by the legislature of that state might maintain a bill in equity for an in-

junction to restrain the performance of an unlawful pooling contract entered into by such corporation with another railroad corporation, not chartered by the legislature of the state, but controlling and operating other railroads so chartered. *Morrill v. Boston, etc., R. Co.*, 55 N. H. 531.

4. Under the *New Hampshire* statute, Act July 5, 1867, any citizen of that state could maintain a bill in equity for an injunction to restrain the performance of a pooling contract made in violation of the statute; and this though such citizen had no special pecuniary interest in enforcing the law. *Currier v. Concord R. Corp.*, 48 N. H. 321.

RAILROADS.

BY THE EDITORIAL STAFF.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 17, p. 493.

For the treatment of *Specific Branches of Railroad Law*, see the following titles in this work: *BAGGAGE*, vol. 3, p. 528; *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *CAR-TRUST ASSOCIATIONS*, vol. 5, p. 747; *CONNECTING CARRIERS (OF GOODS)*, vol. 6, p. 603; *COUPLING CARS (INJURIES BY)*, vol. 7, p. 1046; *CROSSINGS*, vol. 8, p. 335; *ELECTRIC RAILROADS*, vol. 10, p. 877; *ELEVATED RAILROADS*, vol. 10, p. 896; *FENCES*, vol. 12, p. 1035; *FIRES*, vol. 13, p. 404; *INJURIES TO ANIMALS BY RAILROADS*, vol. 16, p. 471; *LATERAL OR BRANCH RAILROADS*, vol. 18, p. 560; *RAILROAD COMMISSIONERS*, *ante*; *RAILROAD POOLS*, *ante*; *RAILROAD SECURITIES*, *post*; *RECEIVERS OF RAILROADS*; *ROLLING STOCK*; *SLEEPING-CAR COMPANIES*; *STATIONS (RAILROAD)*; *STREET RAILWAYS*; *TICKETS AND FARES*; *TIME TABLES*; *TURNTABLES*.

And for other matters of *SUBSTANTIVE LAW and EVIDENCE* related to this subject, see the following titles: *ABUTTING OWNERS*, vol. 1, p. 224; *BILLS OF LADING*, vol. 4, p. 507; *BRIDGES*, vol. 4, p. 918; *COMMON CARRIERS*, vol. 6, p. 236; *CONSOLIDATION OF CORPORATIONS*, vol. 6, p. 800; *CONTRIBUTORY NEGLIGENCE*, vol. 7, p. 368; *CORPORATIONS (PRIVATE)*, vol. 7, p. 620; *DEATH BY WRONGFUL ACT*, vol. 8, p. 851; *EMINENT DOMAIN*, vol. 10, p. 1043; *EXPRESS COMPANIES*, vol. 12, p. 542; *FELLOW SERVANTS*, vol. 12, p. 893; *FERRIES*, vol. 12, p. 1086; *HIGHWAYS*, vol. 15, p. 343; *INDEPENDENT CONTRACTORS*, vol. 16, p. 186; *INTERSTATE COMMERCE*, vol. 17, p. 34; *MASTER AND SERVANT*, vol. 20, p. 3; *MECHANICS' LIENS*, vol. 20, p. 255; *MUNICIPAL AID*, vol. 20, p. 1082; *MUNICIPAL CORPORATIONS*, vol. 20, p. 1123; *NEGLIGENCE*, vol. 21, p. 455; *NUISANCES*, vol. 21, p. 679; *ORDINANCES*, vol. 21, p. 943; *PARKS AND PUBLIC SQUARES*, vol. 21, p. 1065; *POLICE POWER*, vol. 22, p. 914; *POSTAL LAWS*, vol. 22, p. 1036; *STATE AND PUBLIC LANDS*; *STOCKYARDS*; *STREETS AND SIDEWALKS*; *TAXATION (CORPORATE)*; *TELEGRAPHS AND TELEPHONES*; *ULTRA VIRES*.

I. SCOPE OF ARTICLE. — The present article is designed to treat only those principles peculiar to the law of railroads which have not been treated elsewhere in this work. Particular branches of railroad law and many principles of general law intimately connected with the subject of railroads have been fully dealt with in other articles, as indicated in the cross-references immediately preceding. The law of street railroads forms the subject of a separate article.

II. GENERAL RIGHT TO BUILD AND OPERATE RAILROADS — 1. **Private Railroads.** — Private railroads are such as are built by individuals or corporations solely for their own use and benefit, as, for example, to aid in the working of mines or to convey the products of mines or manufactories from the lands of the owners. A private individual may build and operate such a railroad

over his own land without any grant of authority from the legislature.¹

2. **Public Railroads.** — The right to build and operate a railroad for public use is a franchise the right to which can be derived from the state alone.² Such franchise, however, is not necessarily a corporate one, as railroads may be owned by private individuals, although instances of such ownership are rare, and in the *United States* at the present time practically all railroads are owned by private corporations.³

3. **Government or Municipal Ownership.** — In *Canada* certain railways have been constructed and are owned by the government.⁴ In the *United States* the reports show at least one case of state ownership,⁵ and it has been held that, within constitutional limits, municipal corporations may also build and operate railroads.⁶

III. LEGAL STATUS OF RAILROADS AND RAILROAD CORPORATIONS — 1. Railroads Quasi-public Highways. — In several of the states railroads are declared by the constitutions or by statutes to be public highways,⁷ and while such constitutional or statutory declarations do not make them highways in the same sense as public wagon-roads, upon which every one may transact his own business with his own means of conveyance, but only in the sense of being compelled to accept of each and all and to take and carry to the extent of their ability,⁸ still it is generally agreed that they are at least *quasi*-public highways, and they are commonly spoken of as such in the decisions of the courts.⁹

1. **Private Railroads.** — *Moran v. Ross*, 79 Cal. 159; *Wilson v. Cunningham*, 3 Cal. 241, 58 Am. Dec. 407; *Hall v. Brown*, 54 N. H. 495.

No Right to Invaude Lands of Other Persons. — A private person cannot take, by transfer from a corporation organized to build a public railroad, the right to build a railroad for private purposes which will invade the premises of others. *Stewart's Appeal*, 56 Pa. St. 413; *Barker v. Hartman Steel Co.*, 6 Pa. Co. Ct. 183. And see *McCandless's Appeal*, 70 Pa. St. 210.

2. **Public Railroads.** — *Blake v. Winona*, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345; *McGregor v. Erie R. Co.*, 35 N. J. L. 89; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Raritan*, etc., R. Co. v. Delaware, etc., Canal Co., 18 N. J. Eq. 546; *Matter of Amsterdam*, etc., R. Co., 86 Hun (N. Y.) 578; *State v. Boston*, etc., R. Co., 25 Vt. 433.

3. **Right of Private Individual to Operate Public Railroad.** — *Moran v. Ross*, 79 Cal. 159; *Lawrence v. Morgan's Louisiana*, etc., R., etc., Co., 39 La. Ann. 427, 4 Am. St. Rep. 265; *Ogdensburgh*, etc., R. Co. v. Vermont, etc., R. Co., (Supm. Ct. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 249; *Coe v. Columbus*, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Middlebury Bank v. Edgerton*, 30 Vt. 182.

In *South Carolina* private individuals were at one time allowed to own and operate railroads, but this has since been changed by statute. *Jack v. Williams*, 113 Fed. Rep. 823.

4. **Railways Built and Owned by Government.** — *Jones v. Reg.*, 7 Can. Sup. Ct. 570; *Isbester v. Reg.*, 7 Can. Sup. Ct. 696.

5. **Railroad Owned by State.** — *East Tennessee*, etc., R. Co. v. Nashville, etc., R. Co., (Tenn. Ch. 1897) 51 S. W. Rep. 202.

6. **Municipal Corporations May Build and Operate.** — *Sun Printing*, etc., Assoc. v. New York, 152 N. Y. 257; *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24. But see *Taylor v. Ross County*, 23 Ohio St. 22.

7. **Railroads Declared Public Highways by Constitution or Statute.** — *Lake Superior*, etc., R. Co. v. U. S., 93 U. S. 442; *Kansas City*, etc., R. Co. v. St. Joseph Terminal R. Co., 97 Mo. 457; *Yates v. West Grafton*, 34 W. Va. 783. And see the constitutions and statutes of the several states.

8. **Railroads Not Highways in Ordinary Sense of Term.** — *Estes Park Toll Road Co. v. Edwards*, 3 Colo. App. 74; *Toledo*, etc., R. Co. v. Pence, 68 Ill. 524; *Central Military Track R. Co. v. Rockafellow*, 17 Ill. 541; *Cox v. Louisville*, etc., R. Co., 48 Ind. 178; *Clark v. Chicago*, etc., R. Co., 127 Mo. 197; *Murch v. Concord R. Corp.*, 29 N. H. 9, 61 Am. Dec. 631; *McGregor v. Erie R. Co.*, 35 N. J. L. 89.

Railroads Aided by Federal Government. — In *Lake Superior*, etc., R. Co. v. U. S., 93 U. S. 442, it was held that a provision in an act of Congress granting public lands in aid of a railroad, that such railroad should be a public highway for the use of the government, free from all tolls or other charges for transportation of its property or troops, gave to the government the free use of the road as a highway only, and did not entitle it to free transportation over such road in the cars of the railroad company.

No Easement of Light or Air over Right of Way. — Where a railroad is built through private property its right of way is not a public highway in the sense which entitles an adjoining lot-owner to an easement of light, air, or view over the same, and hence no damages are recoverable for an injury to light, air, or view resulting from the elevation of the company's tracks. *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578. And see the title LIGHT AND AIR, vol. 19, p. 112.

9. **Railroads Quasi-public Highways.** — *Chicago*, etc., R. Co. v. Chicago, 140 Ill. 309; *Railroad Com'rs v. Portland*, etc., Cent. R. Co., 63 Me. 269, 18 Am. Rep. 208; *Davidson v. Ramsey County*, 18 Minn. 482; *State v. Missouri Pac. R. Co.*, 149 Mo. 104; *McClellan v.*

They are not highways, however, within the meaning of criminal statutes for the punishment of offenses committed in or near public thoroughfares.¹ Nor are they highways in such sense as to authorize their use by pedestrians,² or to entitle persons to travel on the cars of the company without payment of fare,³ or to exempt the land which they cover from special assessments for local improvements.⁴ Finally, it may be said that a private railroad is not a public highway in any sense of the term.⁵

2. Railroad Companies Quasi-public Corporations. — Strictly speaking, railroad companies are private as distinguished from public corporations,⁶ but from the status of railroads as public highways it follows that railroad corporations, although in some respects private, are not entirely so. Being possessed of extraordinary and unusual powers, they also assume special obligations involving great public interests, and therefore are more properly designated as *quasi*-public corporations or corporations affected with a public interest.⁷

3. Railroad Companies Common Carriers. — It is well settled that public rail-

St. Louis, etc., R. Co., 103 Mo. 295; Pembroke v. Hannibal, etc., R. Co., 32 Mo. App. 61; Northern Pac. R. Co. v. Barnes, 2 N. Dak. 345; Sharpless v. Philadelphia, 21 Pa. St. 169; Sawyer v. Rutland, etc., R. Co., 27 Vt. 370.

Within Congressional Grants of Rights of Way for Highways. — An act of Congress giving a right of way across public lands of the United States for all highways embraces railroads. Flint, etc., R. Co. v. Gordon, 41 Mich. 420. Compare People v. Salem Tp., 20 Mich. 452, 4 Am. Rep. 400; Williams v. Michigan Cent. R. Co., 2 Mich. 259, 55 Am. Dec. 50.

Courts Take Judicial Notice of the Locality of Railroads, on the ground that they are public highways; but they will not take judicial notice that a particular railway belongs to a certain system of railroads, in the absence of proof of the contract on which the system is based. Miller v. Texas, etc., R. Co., 83 Tex. 518.

1. Not Highways Within Meaning of Criminal Statutes. — Comer v. State, 62 Ala. 320; State v. Johnson, Phil. L. (61 N. Car.) 140.

2. Not Highways for Pedestrians. — Hyde v. Missouri Pac. R. Co., 110 Mo. 272. And see *infra*, this title, *Operation of Road — Injuries to Persons On or Near Tracks*.

3. Passengers Not Exempted from Payment of Fare. — Farber v. Missouri Pac. R. Co., 116 Mo. 81.

4. Not Exempt from Special Assessment for Street Improvements. — Nevada v. Eddy, 123 Mo. 546.

See the title *SPECIAL OR LOCAL ASSESSMENTS*.
5. Private Railroad Not Public Highway. — Koelle v. Knecht, 99 Ill. 396.

6. Private as Distinguished from Public Corporations. — Cook v. North, etc., R. Co., 46 Ga. 618; Lake Erie, etc., R. Co. v. Whitham, 155 Ill. 514, 46 Am. St. Rep. 355; Cox v. Louisville, etc., R. Co., 48 Ind. 178; Logan v. North Carolina R. Co., 116 N. Car. 940; McCandless v. Richmond, etc., R. Co., 38 S. Car. 103.

7. Railroads Quasi-public Corporations — United States. — Pine Grove Tp. v. Talcott, 19 Wall. (U. S.) 666; Dinsmore v. Louisville, etc., R. Co., 2 Fed. Rep. 468, 2 Flipp. (U. S.) 672.

Alabama. — Kelly v. Alabama, etc., R. Co., 58 Ala. 489.

California. — Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300.

Colorado. — Pueblo, etc., R. Co. v. Taylor, 6 Colo. 1, 45 Am. Rep. 512.

Georgia. — Atlanta v. Georgia R., etc., Co., 40 Ga. 471.

Illinois. — Peoria, etc., R. Co. v. Coal Valley Min. Co., 68 Ill. 489.

Indiana. — Tippecanoe County v. Lafayette, etc., R. Co., 50 Ind. 85.

Iowa. — State v. Central Iowa R. Co., 71 Iowa 410, 60 Am. Rep. 806.

Kansas. — State v. Dodge City, etc., R. Co., 53 Kan. 377, 42 Am. St. Rep. 295; St. Joseph, etc., R. Co. v. Ryan, 11 Kan. 608.

Michigan. — Swan v. Williams, 2 Mich. 427.

Minnesota. — Stewart v. Erie, etc., Transp. Co., 17 Minn. 372.

Mississippi. — Brown v. Beatty, 34 Miss. 227, 69 Am. Dec. 389.

Missouri. — Pacific R. Co. v. Seely, 45 Mo. 212, 100 Am. Dec. 369.

Nevada. — Gibson v. Mason, 5 Nev. 283.

New Jersey. — Beseman v. Pennsylvania R. Co., 50 N. J. L. 240; Messenger v. Pennsylvania R. Co., 37 N. J. L. 531, 18 Am. Rep. 754; Black v. Delaware, etc., Canal Co., 24 N. J. Eq. 469.

North Carolina. — Logan v. North Carolina R. Co., 116 N. Car. 945.

South Carolina. — Moore v. Columbia, etc., R. Co., 38 S. Car. 1.

West Virginia. — Laurel Fork, etc., R. Co. v. West Virginia Transp. Co., 25 W. Va. 352; Hart v. Baltimore, etc., R. Co., 6 W. Va. 357.

Wisconsin. — Whiting v. Sheboygan, etc., R. Co., 25 Wis. 167.

Contrary View. — In Pierce v. Com., 104 Pa. St. 155, it was said: "We regard it as a misnomer to attach even the name *quasi*-public corporation to a railroad company, for it has none of the features of such corporations if we except its qualified right of eminent domain, and this it has because of the right reserved to the public to use its way for travel and transportation. Its officers are not public officers, and its business transactions are as private as those of a banking house. Its road may be called a *quasi*-public highway, but the company itself is a private corporation and nothing more."

road companies are common carriers.¹ Their duties as such have been fully discussed elsewhere, and do not fall within the scope of the present article.²

4. Railroad Public Use. — It is well established that a railroad is ordinarily a public use as regards the taking of private property by eminent domain,³ and also in the sense that a city may authorize it to use the public streets.⁴ That it is such a public use as to entitle it to other governmental aid has sometimes been questioned, but is now generally conceded.⁵

5. Railroads Not Ordinarily Legal Monopolies. — A railroad is not a legal monopoly unless it has been endowed with an exclusive franchise such as will prevent other persons and corporations from carrying on a similar business in the same territory.⁶

6. Railroads Not Agents or Representatives of State. — A railroad, although acting under an authority derived from the state, does not act, properly speaking, in behalf of the state or as its agent or representative.⁷

7. Railroads as Subjects of State and Federal Control. — As the construction and operation of a railroad is a business affected with a public interest, it follows that the legislatures of the several states may control and regulate railroad companies in the exercise of their franchises within the limits imposed by the state and federal constitutions.⁸ While the federal government has certain powers of control over what are known as the Pacific roads,⁹ it is held that the states are not deprived of their power to regulate railroads within their borders, as regards matters properly falling within the domain of state control, simply because of the fact that Congress aided in their construction.¹⁰

1. Railroad Companies Common Carriers. — *Barton v. South*, etc., Alabama R. Co., 77 Ala. 591, 54 Am. Rep. 80; *Evans v. Memphis*, etc., R. Co., 56 Ala. 252; *Bansemmer v. Toledo*, etc., R. Co., 25 Ind. 436; *Kansas City*, etc., R. Co. v. *St. Joseph Terminal R. Co.*, 97 Mo. 457; *Scotfield v. Lake Shore*, etc., R. Co., 43 Ohio St. 571, 54 Am. Rep. 846; *Thomson-Houston Electric Co. v. Simon*, 20 Oregon 63; *Laurel Fork*, etc., R. Co. v. *West Virginia Transp. Co.*, 25 W. Va. 351.

2. Duties of Railroads as Common Carriers. — See the titles *CARRIERS OF GOODS*, vol. 5, p. 154; *CARRIERS OF LIVE STOCK*, vol. 5, p. 427; *CARRIERS OF PASSENGERS*, vol. 5, p. 474; *COMMON CARRIERS*, vol. 6, p. 236.

3. Railroad Public Use as Regards Eminent Domain. — See the title *EMINENT DOMAIN*, vol. 10, p. 1043.

4. Railroad Public Use as Regards Use of Streets. — *Brown v. Chicago Great Western R. Co.*, 137 Mo. 529. And see the title *STREETS AND SIDEWALKS*.

5. Railroad Public Use as Regards Governmental Aid. — See the titles *COUNTIES*, vol. 7, p. 898; *MUNICIPAL AID*, vol. 20, p. 1082; *STATE AND PUBLIC LANDS*.

6. See *infra*, this title, *Railroad Corporations — Exclusiveness of Franchises*.

A Railroad Is Not a Monopoly in the Odious Sense of the term. — *Enfield Toll Bridge Co. v. Hartford*, etc., R. Co., 17 Conn. 55.

7. *Bradley v. New York*, etc., R. Co., 21 Conn. 306.

8. Railroad Companies Proper Subjects of Legislative Control — *United States*. — *Chicago*, etc., R. Co. v. *Nebraska*, 170 U. S. 57; *Peik v. Chicago*, etc., R. Co., 94 U. S. 164.

Illinois. — *Illinois Cent. R. Co. v. People*, 143 Ill. 434; *Chicago*, etc., R. Co. v. *Chicago*, 140 Ill. 309; *Chicago*, etc., R. Co. v. *People*, 105 Ill. 657; *Toledo*, etc., R. Co. v. *Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611.

Kansas. — *Kansas Pac. R. Co. v. Mower*, 16 Kan. 573.

Maine. — *State v. Noyes*, 47 Me. 189.

Minnesota. — *Blake v. Winona*, etc., R. Co., 19 Minn. 418, 18 Am. Rep. 345.

Missouri. — *Sloan v. Pacific R. Co.*, 61 Mo. 24, 21 Am. Rep. 397.

New York. — *People v. Boston*, etc., R. Co., 70 N. Y. 569; *Beekman v. Saratoga*, etc., R. Co., 3 Paige (N. Y.) 45.

Ohio. — *Lake Shore*, etc., R. Co. v. *Cincinnati*, etc., R. Co., 30 Ohio St. 604.

Pennsylvania. — *Railway*, etc., Maps, 12 Pa. Co. Ct. 33.

South Carolina. — *McCandless v. Richmond*, etc., R. Co., 38 S. Car. 103.

Vermont. — *Nelson v. Vermont*, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

Canada. — *Macdonald v. Riordon*, 30 Can. Sup. Ct. 619.

9. Federal Control over Pacific Roads. — *Union Pac. R. Co. v. U. S.*, 117 U. S. 355; *Pacific R. Removal Cases*, 115 U. S. 1; *Union Pac. R. Co. v. U. S.*, 104 U. S. 662; *Chicago*, etc., R. Co. v. *U. S.*, 104 U. S. 687; *Union Pac. R. Co. v. U. S.*, 99 U. S. 402; *U. S. v. Central Pac. R. Co.*, 99 U. S. 449; *U. S. v. Kansas Pac. R. Co.*, 99 U. S. 455; *U. S. v. Denver Pac. R. Co.*, 99 U. S. 460; *U. S. v. Sioux City*, etc., R. Co., 99 U. S. 491; *Sinking-Fund Cases*, 99 U. S. 700; *U. S. v. Union Pac. R. Co.*, 98 U. S. 569; *U. S. v. Union Pac. R. Co.*, 91 U. S. 72; *U. S. v. Western Union Tel. Co.*, 50 Fed. Rep. 28; *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 418; *Central Pac. R. Co. v. U. S.*, 24 Ct. Cl. 145; *Brewer v. Union Pac. R. Co.*, 31 Hun (N. Y.) 545.

10. Congressional Aid Not Bar to State Control. — *Central Pac. R. Co. v. California*, 162 U. S. 91; *Stone v. Farmers' L. & T. Co.*, 116 U. S. 307; *St. Louis*, etc., R. Co. v. *Gill*, 54 Ark. 101; *Cleveland*, etc., R. Co. v. *People*, 175 Ill. 359; *Illinois Cent. R. Co. v. People*, 143 Ill. 434.

IV. RAILROAD CORPORATIONS — 1. Scope of Section. — The status of railroad corporations as private or public corporations has been seen in a preceding section.¹ The doctrines applicable to the creation, organization, ordinary incidents, powers and liabilities,² consolidation,³ dissolution,⁴ and reorganization⁵ of corporations generally are fully discussed in other articles of this work. These doctrines apply equally to railroad corporations, and a repetition has been deemed unnecessary. This section will be confined to the presentation of the principles peculiarly applicable to railroad corporations.

2. Creation and Organization. — *a. IN GENERAL.* — At an early period railroad corporations were created by special acts of legislature, by which charters were granted in which were enumerated the powers, duties, and liabilities of the corporation. But in order to secure uniformity in the powers conferred, to prevent the grant of special and exclusive privileges, and to secure to the state the right to alter, amend, or repeal the charter at pleasure, it has become an almost universal rule that such corporations are created by general laws, this rule being provided for by the constitutions of many of the states and by the statutes of others.⁶

b. MODE OF CREATION — (1) In General. — In the main, railroad corporations are controlled by the same legal principles, as regards the mode of creation and organization, as are other corporations.⁷

(2) Finding of Public Necessity for Road. — In some jurisdictions the charter will not be granted until it has been adjudged by designated authorities that public necessity and convenience require that the road should be erected.⁸

(3) Designation of Route and Termini. — As a general rule it is required that the articles of association shall designate the places from and to which the road is to be constructed, maintained, or operated, the name of each county through or into which the road is to pass, and the length of the line.⁹

1. See *supra*, this title, *Legal Status of Railroads and Railroad Corporations*.

2. See the title CORPORATIONS (PRIVATE), vol. 7, p. 620.

3. See the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

4. See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 544.

5. See the title REORGANIZATION OF CORPORATIONS.

6. *Special or General Laws.* — For a full discussion of this question, see the title CORPORATIONS (PRIVATE), vol. 7, p. 642 *et seq.* See also the following cases:

United States. — *Southern Pac. R. Co. v. Orton*, 32 Fed. Rep. 457.

Colorado. — *Denver, etc., R. Co. v. Denver City R. Co.*, 2 Colo. 673.

Minnesota. — *First Division of St. Paul, etc., R. Co. v. Parcher*, 14 Minn. 297.

Missouri. — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

New Jersey. — *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475.

New York. — *Sun Printing, etc., Assoc. v. New York*, 152 N. Y. 257; *Farnham v. Benedict*, 107 N. Y. 159; *Matter of Brooklyn, etc., R. Co.*, 75 N. Y. 335; *People v. Long Island R. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 181; *Bohmer v. Haffen*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 565; *Matter of New York, etc., Bridge Co.*, 90 Hun (N. Y.) 312, *affirmed* 148 N. Y. 540; *Astor v. New York Arcade R. Co.*, 48 Hun (N. Y.) 562.

Ohio. — *State v. Sherman*, 22 Ohio St. 411.

Pennsylvania. — *Potts v. Quaker City El. R. Co.*, 161 Pa. St. 396.

7. See the title CORPORATIONS (PRIVATE), vol. 7, p. 639 *et seq.*

Railroad May Be Organized under General Act to Transact Business in One City Exclusively. — *Wiggins Ferry Co. v. East St. Louis Union R. Co.*, 107 Ill. 450; *National Docks, etc., Junction Connecting R. Co. v. State*, 53 N. J. L. 217; *National Docks R. Co. v. Central R. Co.*, 32 N. J. Eq. 755.

Duty to File Articles. — *Burt v. Farrar*, 24 Barb. (N. Y.) 518.

Duty to File Charter. — *Southern Kansas, etc., R. Co. v. Towner*, 41 Kan. 72.

Registration of Charter and Amendments. — *Anderson v. Middle, etc., R. Co.*, 91 Tenn. 44.

Payment of Proportion of Capital Stock. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 656. See also the following cases: *People v. Stockton, etc., R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *People v. Chambers*, 42 Cal. 201; *Holman v. State*, 105 Ind. 569; *Lake Ontario, etc., R. Co. v. Mason*, 16 N. Y. 451; *Buffalo, etc., R. Co. v. Hatch*, 20 N. Y. 157; *Farnham v. Benedict*, 107 N. Y. 159; *In re Brooklyn El. R. Co.*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 161, *affirmed* 125 N. Y. 434; *Beattys v. Solon*, 64 Hun (N. Y.) 120; *Matter of Kings, etc., R. Co.*, 6 N. Y. App. Div. 241.

8. **Public Necessity.** — *State v. Noyes*, 47 Me. 189; *Milford, etc., R. Co.'s Petition*, 68 N. H. 347, 570. See also *Matter of Kings, etc., R. Co.*, 6 N. Y. App. Div. 241.

Branch Road Must Be Adjudged Public Necessity. — *Hartford, etc., R. Co. v. Wagner*, 73 Conn. 506.

9. **Designation of Termini.** — *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548; *Central R. Co.*

This does not apply, however, to branch lines,¹ nor need switches, turnouts, or sidetracks be designated.²

Circular Road. — That the proposed road for which the charter is sought is to be a circular road, which, from its nature, cannot have termini, is not sufficient ground for refusing the charter.³

(4) *Duration and Extension of Corporate Existence.* — The duration and extension of the corporate existence of railroad corporations are subject to the same general rules applied to other corporations.⁴

c. ACCEPTANCE OF CHARTER. — The acceptance of the charter by the incorporators of a railroad company is as essential as in the case of corporations generally, and in both cases the legal principles controlling as to time, manner, place, and effect of acceptance are the same.⁵

Acceptance Presumed. — In the absence of provision that the charter shall be accepted in a particular manner,⁶ a railroad charter may be considered as presumptively accepted at its date, without any record evidence of the fact, when it appears that the grantees afterwards asked for and obtained amendments to their charter, and that they have constructed all of the road,⁷ or even where only a part has been constructed and operated.⁸

d. JUDICIAL NOTICE OF CHARTER. — The extent to which the courts will take judicial notice of the charters of railroad corporations has been fully treated elsewhere.⁹

e. AMENDMENT AND REPEAL — (1) *In General.* — A general treatment of the right to amend or repeal charters of corporations, the acceptance of the amendments and the manner of making them, has been given elsewhere in this work, and this section will be confined to a statement of such of the principles as are peculiarly applicable to railroad corporations.¹⁰

(2) *Where Right to Amend or Repeal Has Not Been Reserved.* — The legislature may regulate the mode in which railroad corporations shall transact

v. Pennsylvania R. Co., 31 N. J. Eq. 475; *Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466.

What Constitutes Sufficient Designation. — *Chicago, etc., R. Co. v. Chamberlain*, 84 Ill. 333; *Shelby County Ct. v. Cumberland, etc., R. Co.*, 8 Bush (Ky.) 209; *Central R. Co. v. Pennsylvania R. Co.*, 31 N. J. Eq. 475; *Warner v. Callender*, 20 Ohio St. 190; *Callender v. Painesville, etc., R. Co.*, 11 Ohio St. 516; *Atlantic, etc., R. Co. v. Sullivan*, 5 Ohio St. 276.

Failure to Designate Cannot Be Collaterally Attacked. — *Kansas City, etc., R. Co. v. Kansas City, etc., R. Co.*, 129 Mo. 62.

Defect Cured by Failure of State to Take Advantage Thereof. — *State v. Bailey*, 19 Ind. 452.

What Constitutes Sufficient Statement of Length of Road. — *Matter of New York, etc., R. Co.*, 35 Hun (N. Y.) 220; *Buffalo, etc., R. Co. v. Hatch*, 20 N. Y. 157.

Designation of Principal Office. — *Canon City, etc., R. Co. v. Denver, etc., R. Co.*, 5 Fed. Cas. No. 2,387.

1. **Branch Lines.** — *Trester v. Missouri Pac. R. Co.*, 33 Neb. 171.

2. **Sidetracks.** — *Southern Chicago R. Co. v. Dix*, 109 Ill. 237.

3. **Circular Road.** — *State v. Martin*, 51 Kan. 462.

4. **Duration.** — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 569. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 654, and the following cases: *Gere v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 19

Abb. N. Cas. (N. Y.) 193; *Matter of Brooklyn El. R. Co.*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 161, *affirmed* 125 N. Y. 434; *Beal v. New York Cent., etc., R. Co.*, 41 Hun (N. Y.) 172, *affirmed* 119 N. Y. 635.

5. **Acceptance of Charter.** — See the title CORPORATIONS (PRIVATE), vol. 7, p. 656 *et seq.* See also *Washington, etc., R. Co. v. Martin*, 7 D. C. 120.

Determination to Build Road as Acceptance of Charter. — *State v. Dawson*, 22 Ind. 272.

6. **Acceptance Presumed.** — *Roosa v. St. Joseph, etc., R. Co.*, 114 Mo. 508.

7. *Farnsworth v. Lime Rock R. Co.*, 83 Me. 440. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 658 *et seq.*

8. *Roosa v. St. Joseph, etc., R. Co.*, 114 Mo. 508.

9. **Judicial Notice.** — See the title JUDICIAL NOTICE, vol. 17, p. 942 *et seq.*

10. **Amendment.** — See the title CORPORATIONS (PRIVATE), vol. 7, p. 669 *et seq.*

Repeal of Remedy for Condemnation of Land Valid. — *Chattahoochee R. Co. v. Kinner*, 81 Ky. 221. See also the title CORPORATIONS (PRIVATE), vol. 7, p. 677.

Acceptance of Amendment. — *Hartford, etc., R. Co. v. Wagner*, 73 Conn. 506; *Alexander v. Atlanta, etc., R. Co.*, 108 Ga. 151; *Opinion of Justices*, 120 N. Car. 623.

Acceptance Shown by Acts. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 682. See also *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 2.

Acceptance Presumed. — *Astor v. New York Arcade R. Co.*, 48 Hun (N. Y.) 562.

their business, the price which they shall charge for the transportation of freight and passengers, the speed at which they may run their trains, and the way in which they may cross or run upon highways and turnpikes used for public travel. It may make all such regulations as are appropriate to protect the lives of persons carried upon railroads or passing upon highways crossed by railroads. To exercise this control it is not necessary that the power to alter and amend the charters of such corporations shall have been reserved.¹

(3) *Where Right to Amend or Repeal Has Been Reserved.* — Where, under the constitution or statutes, the power is reserved to alter or amend the charters of railroad corporations, the legislature may impose upon them such additional restrictions and burdens as the public good requires, short of confiscation of property.² Thus, under the power reserved to amend or repeal, the legislature may amend a charter provision allowing the corporation to select the location of its route, and may define the route to be followed;³ regulate the method of location;⁴ fix railroad charges for the transportation of passengers and freight within the state;⁵ require the railroads in a city to erect a union station and extend their tracks thereto;⁶ compel the making of suitable provision for passengers at a certain point;⁷ abolish grade crossings;⁸ compel the erection⁹ or widening¹⁰ of bridges over the right of way; enact statutes regulating the liability for the killing of stock,¹¹ and for injuries caused by fire.¹²

(4) *Amendment under Police Power.* — Though no power has been reserved to amend or repeal, the legislature may require railroad corporations to conform to such regulations of a police character as it may deem necessary to secure the rights of the citizens generally and most conducive to the quiet and good order and to the security of property.¹³ Thus, it may regulate the precautions to be exercised at crossings,¹⁴ the crossing of highways,¹⁵ the fencing of tracks,¹⁶ and make all similar regulations obviously pertaining to the police of railroad corporations and sensibly affecting the security of public travel.¹⁷

3. Domicil, Citizenship, and Residence. — The application of the general doctrine concerning the domicil, citizenship, and residence of corporations is the same where railroad corporations are involved as in the case of other corporations, and a full treatment of this subject has been presented elsewhere.¹⁸

The Residence of the Corporation is in the state where it was created,¹⁹ irrespective of the residence of the corporators.²⁰

For Purposes of Jurisdiction the corporation is deemed a resident of any county

1. Right Not Reserved. — *People v. Boston*, etc., R. Co., 70 N. Y. 569.

2. *People v. Boston*, etc., R. Co., 70 N. Y. 569.

3. Illustrations. — *Macon*, etc., R. Co. v. *Gibson*, 85 Ga. 1, 21 Am. St. Rep. 135.

4. *Bangor*, etc., R. Co. v. *Smith*, 47 Me. 34.

5. *Piek v. Chicago*, etc., R. Co., 6 Biss. (U. S.) 177.

6. *Worcester v. Norwich*, etc., R. Co., 109 Mass. 103.

7. *Com. v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555.

8. *Roxbury v. Boston*, etc., R. Corp., 6 Cush. (Mass.) 424.

9. *Montclair Tp. v. New York*, etc., R. Co., 45 N. J. Eq. 436.

10. *English v. New Haven*, etc., R. Co., 32 Conn. 243.

11. *Jeffersonville R. Co. v. Gabbert*, 25 Ind. 437.

Amendment Requiring Erection of Cattle Guards. — *Bulkley v. New York*, etc., R. Co., 27 Conn. 486.

12. *McCandless v. Richmond*, etc., R. Co., 38 S. Car. 103.

13. Under Police Power. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 676. See also the title POLICE POWER, vol. 22, p. 933 *et seq.*

14. *Galena*, etc., R. Co. v. *Appleby*, 28 Ill. 283; *Indianapolis*, etc., R. Co. v. *Blackman*, 63 Ill. 117.

15. *Nelson v. Vermont*, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

16. *Ohio*, etc., R. Co. v. *McClelland*, 25 Ill. 140.

17. *Nelson v. Vermont*, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

18. Domicil. — See the titles CORPORATIONS (PRIVATE), vol. 7, p. 694; FOREIGN CORPORATIONS, vol. 13, p. 837; UNITED STATES COURTS.

19. Resident of Incorporating State. — See the title FOREIGN CORPORATIONS, vol. 13, p. 837 *et seq.* See also *Central R.*, etc., Co. v. *Carr*, 76 Ala. 388, 52 Am. Rep. 339; *Fowler v. Des Moines*, etc., R. Co., 91 Iowa 533.

20. *Connecticut*, etc., R. Co. v. *Cooper*, 30 Vt. 476, 73 Am. Dec. 319.

where the road is operated or corporate powers exercised,¹ and in each county where it has an office, agency, or agent for services of process.²

4. Powers — a. IN GENERAL. — The powers of a railroad corporation are, like those of other corporations, measured by its charter, and it can lawfully exercise only those powers which are conferred upon it by its charter, either expressly or by implication.³ The rule that the corporation cannot engage in business other than that which it is authorized by its charter to conduct does not, however, prevent it from engaging in a business incidental to the carrying on of its principal business.⁴

b. CONSTRUCTION OF CHARTER. — The doctrine that the charter of the corporation is to be construed most strictly against the corporation and in favor of the public⁵ has been applied to railroads.⁶ In the case of railroads,⁷

1. Residence for Purposes of Jurisdiction. — *Davis v. Central R., etc., Co.*, 17 Ga. 323; *Bristol v. Chicago, etc., R. Co.*, 15 Ill. 436; *Baldwin v. Mississippi, etc., R. Co.*, 5 Iowa 518; *Richardson v. Burlington, etc., R. Co.*, 8 Iowa 260; *State v. Iowa Cent. R. Co.*, 91 Iowa 275; *Sherwood v. Saratoga, etc., R. Co.*, 15 Barb. (N. Y.) 650; *Belden v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 15 How. Pr. (N. Y.) 17.

Consolidated Corporations. — See the titles CONSOLIDATION OF CORPORATIONS, vol. 6, p. 824; FOREIGN CORPORATIONS, vol. 13, p. 887. See also *Ohio, etc., R. Co. v. People*, 123 Ill. 467; *Washington, etc., R. Co. v. Martin*, 7 D. C. 120.

Railroads Concurrently Chartered in Several States. — See the title UNITED STATES COURTS.

2. Resident in Each County Where Office or Agent Is Maintained. — *New Albany, etc., R. Co. v. Haskell*, 11 Ind. 301; *Schoch v. Winona, etc., R. Co.*, 55 Minn. 479; *Slavens v. South Pac. R. Co.*, 51 Mo. 308; *Tobin v. Chester, etc., Narrow Gauge R. Co.*, 47 S. Car. 387, 58 Am. St. Rep. 890.

Residence Not Necessarily Where Principal Office Is Located. — *Davis v. Central R., etc., Co.*, 17 Ga. 323; *Connecticut, etc., R. Co. v. Cooper*, 30 Vt. 476, 73 Am. Dec. 319.

What the Principal Office of Railway Company under English Statute. — *Garton v. Great Western R. Co.*, El. Bl. & El. 837, 96 E. C. L. 837, 4 Jur. N. S. 1036.

Place of Business under English Statutes. — As to where railway companies carry on their business, within the meaning of statutes fixing the jurisdiction of county courts and mayor's courts, see *Brown v. London, etc., R. Co.*, 10 Jur. N. S. 234; *Shields v. Great Western R. Co.*, 7 Jur. N. S. 631; *Le Talleur v. South Eastern R. Co.*, 3 C. P. D. 18; *Rogers v. L. C., etc., R. Co.*, 26 W. R. 192.

Citizenship for Purposes of Federal Jurisdiction. — See the title UNITED STATES COURTS. See also the title REMOVAL OF CAUSES, ENCYC. OF PL. AND PR., vol. 18, p. 150.

3. See the title CORPORATIONS (PRIVATE), vol. 7, p. 695. See also *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 581; *Chicago, etc., R. Co. v. Chicago*, 149 Ill. 457; *Canada Southern R. Co. v. Niagara Falls*, 22 Ont. 41.

Power to Loan Money. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 708.

Power to Engage in Banking Business. — See the title CORPORATIONS (PRIVATE), vol. 7, pp. 711, 782, 797. See also *Simmons v. Goodrich*,

68 Ga. 750; *People v. River Raisin, etc., R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

Contracts of Suretyship and Guaranty. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 788 *et seq.* See also the title RAILROAD SECURITIES, *ante*.

Power to Take Personal Property, Choses in Action, etc. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 726 *et seq.*

Powers as to Contracts of Partnership. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 794. See also the title RAILROAD POOLS, *ante*.

Cannot Act as General Warehouseman. — *State v. Southern Pac. Co.*, 52 La. Ann. 1822.

4. Business Incidental to Principal Business. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 706. See also *Central R. Co. v. Collins*, 40 Ga. 582.

Powers as to Running Steamboats. — See the title CORPORATIONS (PRIVATE), vol. 7, pp. 705, 706. See also the following cases: *Morgan v. Donovan*, 58 Ala. 241; *Gunn v. Central R. Co.*, 74 Ga. 509; *Hoagland v. Hannibal, etc., R. Co.*, 39 Mo. 451; *St. Joseph v. Saville*, 39 Mo. 460; *Freeman v. Panama R. Co.*, 7 Hun (N. Y.) 122; *Marietta, etc., R. Co. v. Elliott*, 10 Ohio St. 57; *Shawmut Bank v. Plattsburgh, etc., R. Co.*, 31 Vt. 491.

Power to Operate Ferry. — *Fitch v. New Haven, etc., R. Co.*, 30 Conn. 41; *McRoberts v. Southern Minnesota R. Co.*, 18 Minn. 108; *Starin v. New York*, 42 Hun (N. Y.) 549; *Pugh v. Raleigh, etc., R. Co.*, Phill. L. (61 N. Car.) 359.

Railroad May Erect and Maintain Docks, Wharves, and Piers. — *Indian River Steamboat Co. v. East Coast Transp. Co.*, 28 Fla. 387, 29 Am. St. Rep. 258.

Power to Erect and Maintain Telegraph Line. — *Marietta, etc., R. Co. v. Western Union Tel. Co.*, 38 Ohio St. 24. See also *Western Union Tel. Co. v. Union Pac. R. Co.*, 1 McCrary (U. S.) 419; *Western Union Tel. Co. v. Kansas Pac. R. Co.*, 4 Fed. Rep. 284. And see the title TELEGRAPHS AND TELEPHONES.

5. Construction of Charter. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 708.

6. Parker v. Great Western R. Co., 7 M. & G. 253, 49 E. C. L. 253, 3 R. & Can. Cas. 563, 13 L. J. C. Pl. 105; *Savannah, etc., R. Co. v. Shiels*, 33 Ga. 601; *Newhall v. Galena, etc., R. Co.*, 14 Ill. 273; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Deaderick v. Wilson*, 8 Baxt. (Tenn.) 108; *Western, etc., R. Co. v. McElwee*, 6 Heisk. (Tenn.) 209; *Tennessee, etc., R. Co. v. Adams*, 3 Head (Tenn.) 596.

7. Reasonable Construction. — *Railroad Com'rs*

as of other corporations, the construction of the charter must be reasonable.¹

c. **POWERS AS CARRIERS.** — The powers, duties, and liabilities of railroad corporations as carriers of express, goods, live stock, and passengers, and as common carriers, have been treated fully elsewhere in this work.²

d. **TRAFFIC AGREEMENTS WITH COMPETING LINES.** — The power of railroad corporations to enter into traffic agreements with rival companies has been discussed elsewhere.³

e. **POWER TO ISSUE NEGOTIABLE INSTRUMENTS.** — A full statement of the rule with regard to the issue of negotiable instruments by railroad corporations will be found elsewhere in this work.⁴

f. **POWER TO TAKE AND ALIENATE PROPERTY.** — A discussion of the power of railroad corporations to take and hold property⁵ and to alienate property and franchises⁶ will be found elsewhere.

g. **POWER TO TAKE AND HOLD STOCK IN ANOTHER CORPORATION.** — The application to railroad corporations of the rule prohibiting a corporation from taking and holding stock in another corporation will be found in the discussion of the powers of corporations generally in that regard.⁷

5. Exclusiveness of Franchises — *a.* **IN GENERAL.** — While railroad franchises are, in their nature, exclusive except as against the state, so that competing lines established without legislative authority may be enjoined,⁸ still the incorporation of a railroad company to build between certain points does not preclude the legislature from subsequently incorporating another company to build between the same points, unless an exclusive right was expressly conferred upon the first corporation.⁹ An exclusive franchise may

v. Portland, etc., Cent. R. Co., 63 Me. 269, 18 Am. Rep. 208.

1. See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 712.

2. **Powers as Carriers.** — See the titles **CARRIERS OF GOODS**, vol. 5, p. 154; **CARRIERS OF LIVE STOCK**, vol. 5, p. 427; **CARRIERS OF PASSENGERS**, vol. 5, p. 474; **COMMON CARRIERS**, vol. 6, p. 236; **CONNECTING CARRIERS**, vol. 6, p. 603; **EXPRESS COMPANIES**, vol. 12, p. 542.

3. See the title **RAILROAD POOLS**, *ante*.

4. **Negotiable Instruments.** — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 778 *et seq.* See generally the title **RAILROAD SECURITIES**, *ante*.

Power to Execute, Issue, and Pledge Bonds. — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 783 *et seq.* See generally the title **RAILROAD SECURITIES**, *ante*.

5. **Power to Take and Hold Property.** — See the title **CORPORATIONS (PRIVATE)**, vol. 7, pp. 705, 717. See also Boston, etc., R. Co. *v.* Greenbush, 5 Lans. (N. Y.) 461; Chicago, etc., R. Co. *v.* Chicago, 149 Ill. 457; Com. *v.* New York, etc., R. Co., 132 Pa. St. 591.

Cannot Acquire Land for Speculation. — McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373; Old Colony R. Corp. *v.* Evans, 6 Gray (Mass.) 25, 66 Am. Dec. 394; Pacific R. Co. *v.* Seely, 45 Mo. 212, 100 Am. Dec. 369; Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137.

Acquisition of Lands to Prevent Competition Is Ultra Vires. — Rensselaer, etc., R. Co. *v.* Davis, 43 N. Y. 137.

Purchase of Land for Picnic Purpose to Increase Traffic. — Chicago, etc., R. Co. *v.* Shelby, 42 Ill. App. 339, *affirmed* 143 Ill. 385.

Corporation May Receive and Sell Land to Aid in Construction of Line. — Georgia Pac. R. Co. *v.* Wilks, 86 Ala. 478; McClure *v.* Missouri River, etc., R. Co., 9 Kan. 373. See also Walsh *v.* Barton, 24 Ohio St. 28.

6. **Alienation of Property.** — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 747 *et seq.*

Corporation May Dedicate Land for Highway. — People *v.* Eel River, etc., R. Co., 98 Cal. 665; Green *v.* Canaan, 29 Conn. 157.

Lease of Wharf Preventing Competition Is Ultra Vires. — Indian River Steamboat Co. *v.* East Coast Transp. Co., 28 Fla. 387, 29 Am. St. Rep. 258.

Alienation of Franchises. — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 750 *et seq.*

7. **Power to Take Stock.** — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 812. See also Com. *v.* New York, etc., R. Co., 132 Pa. St. 591.

Purchase of Stock Authorized by Statute. — Matthews *v.* Murchison, 17 Fed. Rep. 760; Rogers *v.* Nashville, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299.

Purchase of Stock in Competing Line. — See the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 813. See also Pennsylvania R. Co. *v.* Com., (Pa. 1886) 7 Atl. Rep. 368.

Purchase of Stock of Other Roads to Effect Consolidation Authorized. — Hill *v.* Nisbet, 100 Ind. 341. See also the title **CORPORATIONS (PRIVATE)**, vol. 7, p. 815.

Purchase of Controlling Interest in Stock of Coal Company. — Hartwell *v.* Buffalo, etc., R. Co., 6 Pa. Dist. 212.

8. **Exclusive Franchises.** — Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475; Pennsylvania R. Co. *v.* National R. Co., 23 N. J. Eq. 441; Erie R. Co. *v.* Delaware, etc., R. Co., 21 N. J. Eq. 283; Raritan, etc., R. Co. *v.* Delaware, etc., Canal Co., 18 N. J. Eq. 546.

9. **Exclusive Grant Must Be Expressly Made.** — East St. Louis Connecting R. Co. *v.* East St. Louis Union R. Co., 108 Ill. 265; State *v.* Noyes, 47 Me. 189; Baltimore, etc., R. Co. *v.* State, 45 Md. 596.

be granted to a railroad company, however,¹ unless such grant is forbidden by the constitution of the state,² and when granted the grantees are entitled to the protection of a court of equity against an infringement by other companies.³

b. GRANTS STRICTLY CONSTRUED. — The rule that grants of exclusive franchises are to be strictly construed against the grantees and in favor of the public applies to exclusive franchises of this nature.⁴

c. ESTOPPEL TO INSIST ON EXCLUSIVE FRANCHISE. — A railroad company may debar itself from the right to object to the establishment of a rival and competing line by acquiescing or assisting in its construction.⁵

d. SUBJECT TO BE TAKEN BY EMINENT DOMAIN. — An exclusive franchise granted to a railroad company constitutes property which may be taken by the state for public use upon reasonable indemnification.⁶

6. Officers. — The powers, duties, and liabilities of officers and agents have been fully treated elsewhere.⁷

7. De Facto Corporations. — A railroad corporation may exist as a corporation *de facto*, subject to the general legal principles which control in the case of other *de facto* corporations.⁸

8. Foreign Corporations. — In the case of foreign railroad corporations the same general legal principles obtain, in the absence of special statutory provision, as in the case of other foreign corporations. The status and general powers of such corporations, their particular powers, the restrictions imposed by domestic statutes on their right to do business, the effect of noncompliance with these statutes, domestication, actions by and against them, and the dissolution of such corporations, have been accorded a full treatment elsewhere.⁹

Franchise Not Exclusive Per Se — State May Authorize Another Company to Build Across Tracks. — *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272.

1. Power to Grant Exclusive Franchise. — *Boston, etc., R. Corp. v. Salem, etc., R. Co.*, 2 Gray (Mass.) 1; *Raritan, etc., R. Co. v. Delaware, etc., Canal Co.*, 18 N. J. Eq. 546; *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 16 N. J. Eq. 321, *affirmed* 18 N. J. Eq. 546.

2. Extent of Grants Held Valid Within Constitution. — *People v. Long Island R. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 181; *Astor v. New York Arcade R. Co.*, 48 Hun (N. Y.) 562.

3. Validity Will Protect Exclusive Franchises. — *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 15 N. J. Eq. 13. But see *Delaware, etc., Canal Co. v. Raritan, etc., R. Co.*, 14 N. J. Eq. 445.

4. Grant of Exclusive Franchise Construed Strictly. — *Augusta, etc., R. Co. v. Augusta Southern R. Co.*, 96 Ga. 562; *Chicago, etc., R. Co. v. Louisville, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 799.

What Not a Violation of Charter Provision Against. — *Boston, etc., R. Corp. v. Boston, etc., R. Co.*, 5 Cush. (Mass.) 375; *Boston, etc., R. Corp. v. Salem, etc., R. Co.*, 2 Gray (Mass.) 1; *Michigan Cent. R. Co. v. Michigan Southern R. Co.*, 4 Mich. 361; *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 16 N. J. Eq. 321, *affirmed* 18 N. J. Eq. 546; *Delaware, etc., Canal Co. v. Camden, etc., R. Co.*, 15 N. J. Eq. 13.

5. Estoppel to Complain. — *Little Rock, etc., R. Co. v. Little Rock, etc., R. Co.*, 36 Ark. 663; *Erie R. Co. v. Delaware, etc., R. Co.*, 21 N. J. Eq. 283.

6. Exclusive Franchise Subject to Condemnation. — *Boston, etc., R. Corp. v. Salem, etc., R. Co.*, 2 Gray (Mass.) 1. And see *Raritan, etc., R. Co. v. Delaware, etc., Canal Co.*, 18 N. J. Eq. 546.

7. See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833.

8. De Facto Corporations. — See generally the title *DE FACTO CORPORATIONS*, vol. 8, p. 747.

Unauthorized Changes of Route as Affecting Validity of Organization. — *Matter of Riverhead, etc., R. Co.*, 36 N. Y. App. Div. 514.

9. Foreign Corporations. — See the title *FOREIGN CORPORATIONS*, vol. 13, p. 884 et seq.

Constitutional Provision Against Ownership and Operation of Railroad by Foreign Corporation cannot be evaded by making use of the services of a domestic corporation. *Koenig v. Chicago, etc., R. Co.*, 27 Neb. 699.

Constitutional Provision Against Operation of Railroad by Foreign Corporation Not Applicable to corporation created by consolidation of foreign and domestic corporations. *State v. Chicago, etc., R. Co.*, 25 Neb. 156.

Statute Authorizing Domestication of Foreign Railroad Company Does Not Infringe Constitutional Provisions Against License to Foreign Corporation to Operate Railroad. — *State v. Tompkins*, 48 S. Car. 49.

Statute Requiring Payment of Charter Fee Not Applicable to Domesticated Corporation. — *State v. Tompkins*, 48 S. Car. 49.

Foreign Railroad Corporation May Accept Domestication. — *St. Louis, etc., R. Co. v. James*, 161 U. S. 545.

Domestication of Foreign Corporation by Purchase of Road. — *Angier v. East Tennessee, etc., R. Co.*, 74 Ga. 634.

License to Operate in Foreign State. — *Chesa-*

9. Dissolution — a. IN GENERAL. — The various methods of dissolution and the effect of dissolution upon corporations, including railroad corporations, have been fully treated elsewhere.¹

b. JUDICIAL ASCERTAINMENT OF FORFEITURE. — In the case of railroad corporations, as of corporations generally, to determine whether a failure to comply with the conditions imposed by the act of incorporation *ipso facto* terminates the corporate existence or whether the forfeiture must be judicially ascertained, reference must be had to the terms of the particular statute.²

c. GROUNDS OF FORFEITURE — (1) In General. — Railroad corporations, like other corporations, are liable to forfeiture of their franchises for nonuse or abuse of their corporate franchises and powers, or for failure to perform corporate duties imposed upon them by their charters, either expressly or by implication.³

(2) Failure to Commence Construction Within Specified Time. — In some jurisdictions the statutes require that construction shall be commenced and a certain per cent. of the amount of the capital stock shall be expended thereon within a specified time.⁴

Where a Failure to Comply with This Provision entails a loss of corporate powers, construction and expenditure by a lessee of a portion of the route covered by the franchise cannot be considered in determining whether or not the statutory provisions have been complied with.⁵

(3) Failure to Complete Within Specified Time. — The act of incorporation generally contains a provision requiring that either the whole road or a certain portion thereof shall be completed in a specified time, the penalty for failure to comply therewith being a forfeiture of the charter. In some cases it has been held that under the terms of the particular act this provision was self-executing, and a failure to complete within the specified time worked a forfeiture without further proceedings.⁶ In others this has been held merely a ground for forfeiture.⁷

peake, etc., R. Co. v. Howard, 14 App. Cas. (D. C.) 262.

Powers of Foreign Railroad Corporations. — See State v. Boston, etc., R. Co., 25 Vt. 433; Com. v. New York, etc., R. Co., 132 Pa. St. 591.

1. See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 544.

Abandonment of Enterprise. — See the titles CORPORATIONS (PRIVATE), vol. 7, p. 702; DISSOLUTION OF CORPORATIONS, vol. 9, p. 563.

Quo Warranto to Forfeit Charter. — See the title QUO WARRANTO, ante, p. 594.

2. See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 553 *et seq.*

Effect of Failure to File Map or Survey. — Brown v. Wyandotte, etc., R. Co., 68 Ark. 134; Harris v. Mississippi Valley, etc., R. Co., 51 Miss. 602.

Failure to Expend Specified Per Cent. of Capital Stock Within Fixed Period Works Ipso Facto Forfeiture. — Ford v. Kansas City, etc., R. Co., 52 Mo. App. 439; Matter of Brooklyn, etc., R. Co., 75 N. Y. 335.

That Requisite Proportion of Stock Was Not Paid in Cash Is Ground of Forfeiture. — Brown v. Wyandotte, etc., R. Co., 68 Ark. 134.

3. **Nonuser.** — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 574.

Wilful or Intentional Nonuser or Misuser. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 578. See also State v. Rio Grande R. Co., 41 Tex. 217.

Mere Intent to Violate Provisions of Charter Not Sufficient Ground for Forfeiture. — Aurora, etc., R. Co. v. Lawrenceburgh, 56 Ind. 80; State v.

Kingan, 51 Ind. 142. And see also the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 579.

4. **Failure to Commence Construction.** — Ford v. Kansas City, etc., R. Co., 52 Mo. App. 439. See also the statutes of the several states.

Acts Held Sufficient to Constitute Commencement of Business. — Young v. Webster City, etc., R. Co., 75 Iowa 140; Com. v. New York, etc., Coal, etc., Co., 10 Pa. Co. Ct. 129.

5. Matter of Brooklyn, etc., R. Co., 81 N. Y. 69.

Burden of Proving Forfeiture for Failure to Begin Construction Within Time Provided by Statute. — Edwards v. Missouri, etc., R. Co., 82 Mo. App. 96.

6. **Provision Held Self-executing.** — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 553 *et seq.* See also the following cases: Maine Shore Line R. Co. v. Maine Cent. R. Co., 92 Me. 476; Matter of Brooklyn, etc., R. Co., 75 N. Y. 335; Greenwood Lake, etc., R. Co. v. New York, etc., R. Co., (Supm. Ct. Gen. T.) 28 N. Y. St. Rep. 739; Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., 2 Tex. Civ. App. 650.

Reorganized Corporation Subject to Forfeiture. — *In re Atty.-Gen.*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 684.

Forfeiture Restricted to Uncompleted Portion of Road. — State v. St. Paul, etc., R. Co., 35 Minn. 222; Sulphur Springs, etc., R. Co. v. St. Louis, etc., R. Co., 2 Tex. Civ. App. 650. See also Wheeling Bridge, etc., R. Co. v. Camden Consol. Oil Co., 35 W. Va. 205.

7. **Provisions Held Not Self-executing.** — See

(4) *Suspension of Operation for Specified Time.* — In some jurisdictions it is provided that the suspension by the corporation of its business for a specified time shall be ground for dissolution.¹ Where such provision exists, nonuser for a less period is not ground for forfeiture.² No explanation will avail to excuse a failure to exercise the corporate franchises where the suspension has continued for a period longer than that fixed by the statute.³

(5) *Transfer of Property and Franchises.* — The same general rule which applies to corporations generally, that a transfer of the corporate property does not *ipso facto* work the dissolution of the corporation,⁴ applies to railroad corporations.⁵ But the unauthorized sale of all,⁶ or a part, of the corporate franchises and property⁷ is ground for the dissolution of the corporation.

Nor Does a Lease of the Property and Franchises, though Unauthorized, work a dissolution⁸ of the corporation where such an act is sufficient ground to authorize a dissolution.⁹

d. FOREIGN CORPORATIONS. — While the franchises of a railroad corporation of a foreign state cannot be forfeited by the courts of another state, the latter may withdraw a franchise granting to the corporation the right to extend and operate its line in the state.¹⁰

e. COLLATERAL ATTACK. — A cause of forfeiture of the franchises of a railroad corporation cannot be taken advantage of collaterally,¹¹ but, in the absence of statutory provision to the contrary, must be enforced by the state in a direct proceeding instituted for that purpose.¹²

f. EFFECT OF DISSOLUTION. — The property of a railroad corporation and rights and privileges having the nature of property, such as its right of way, do not revert to the grantors of the corporation in case it forfeits its charter, but constitute assets to be administered for the benefit of its shareholders and creditors upon its dissolution.¹³

V. LOCATION OF ROAD — 1. In General — a. MEANING OF TERM. — The term "location," as used in railroad law, may refer to the line over which it is proposed to run the road after such line has been surveyed and fixed upon by the company, but before the acquisition of the land which it covers, or it may refer to the act of the company in selecting such line.¹⁴

the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 555 *et seq.* See also the following cases: Cincinnati, etc., R. Co. v. Clifford, 113 Ind. 460; Harris v. Mississippi Valley, etc., R. Co., 51 Miss. 602.

1. Suspension. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 576.

2. People v. Atlantic Ave. R. Co., 125 N. Y. 513; Com. v. New York, etc., Coal, etc., Co., 10 Pa. Co. Ct. 129. See also Trelford v. Coney Island, etc., R. Co., 6 N. Y. App. Div. 204.

3. People v. Northern R. Co., 53 Barb. (N. Y.) 98.

4. Transfer of Property. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 565.

Effect of Sale of Property and Franchises under Foreclosure. — Toledo, etc., R. Co. v. Continental Trust Co., (C. C. A.) 95 Fed. Rep. 497; Wilmington, etc., R. Co. v. Downward, (Del. 1888) 14 Atl. Rep. 720.

5. Bruffett v. Great Western R. Co., 25 Ill. 353; State v. St. Paul, etc., R. Co., 35 Minn. 222; Gulf, etc., R. Co. v. Morris, 67 Tex. 692.

6. Ground for Dissolution. — East Line, etc., R. Co. v. State, 75 Tex. 434. See also Arthur v. Commercial, etc., Bank, 9 Smed. & M. (Miss.) 394, 48 Am. Dec. 719.

7. State v. Minnesota Cent. R. Co., 36 Minn. 246.

8. Lease. — Troy, etc., R. Co. v. Kerr, 17 Barb. (N. Y.) 581.

9. Eel River R. Co. v. State, 155 Ind. 433; State v. Atchison, etc., R. Co., 24 Neb. 143, 8 Am. St. Rep. 164.

10. Foreign Corporations. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 584.

11. Collateral Attack. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 591. See also Brown v. Wyandotte, etc., R. Co., 68 Ark. 134; Matter of Brooklyn El. R. Co., 125 N. Y. 434.

12. Enforcement by State. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 594. See also Union St. R. Co. v. Hazleton, etc., R. Co., 7 Kulp (Pa.) 313; Trelford v. Coney Island, etc., R. Co., 6 N. Y. App. Div. 204.

13. Effect of Dissolution. — See the title DISSOLUTION OF CORPORATIONS, vol. 9, p. 610 *et seq.* See also Morrill v. Wabash, etc., R. Co., 96 Mo. 174; Galveston, etc., R. Co. v. Galveston, (Tex. Civ. App. 1896) 37 S. W. Rep. 27.

Right of Way Does Not Revert upon Expiration of Term of Charter. — Terry v. New York Cent., etc., R. Co., (Supm. Ct.) 67 How. Pr. (N. Y.) 439.

14. Meaning of Term "Location." — Hickey v. Chicago, etc., R. Co., 6 Ill. App. 172; Matter of Niagara Falls, etc., R. Co., 46 Hun (N. Y.)

b. HOW ADOPTED. — The selection of its proposed line is made by the railroad company itself, generally by action of its board of directors.¹ Where the method of procedure is prescribed by a general statute its provisions will prevail over those of a special charter previously granted.²

c. DISCRETION OF COMPANY AS TO ROUTE AND TERMINI — (1) *In General.* — The selection of the route and termini of the proposed road may be left entirely to the discretion of the company incorporated to build it,³ or the exact location of the road may be prescribed by the charter,⁴ or power may be given the company to elect between several designated routes.⁵ In a majority of cases, however, the general termini and route are required to be stated in the articles of association or incorporation, the company being allowed to choose its location in other respects, including the precise termini and intermediate points.⁶

Amendment of Charter Taking Away Discretion. — A charter which confers power upon a railroad company to choose its own route between designated points may be so amended as to take away this discretion, at any time before the road is constructed.⁷

(2) *Conformity to Prescribed Route.* — Where the general termini of the road are stated in the articles of incorporation, or in the charter, it must be located with reasonable directness between the points thus designated.⁸ But it has

94; Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 141 Pa. St. 407.

The Term "Located" May Mean Located and Constructed, as, for example, when it is used in an agreement providing that damages for a right of way shall be assessed when the road has been located. Hoffman v. Bloomsburg, etc., R. Co., 157 Pa. St. 174.

"Located" in Sense of Constructed. — In Jewett v. Lawrenceburgh, etc., R. Co., 10 Ind. 539, a provision in a contract for subscription to stock that a railroad should be located within a certain distance of a named place was held to mean that it should be actually constructed within that distance.

1. Line Adopted by Railroad Company through Board of Directors. — Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 141 Pa. St. 407; Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110.

Delegation of Power. — Where the duty of location is imposed by statute upon the president and directors of a railroad company they cannot delegate such duty to a committee of the corporation. Weidenfeld v. Sugar Run R. Co., 48 Fed. Rep. 615.

A Jury in Condemnation Proceedings has no power to determine the route of the railroad. New Orleans, etc., R. Co. v. Robertson, 34 La. Ann. 865.

2. Bangor, etc., R. Co. v. Smith, 47 Me. 34.

3. Route and Termini in Discretion of Company. — Chicago, etc., R. Co. v. Dunbar, 100 Ill. 110; Hickey v. Chicago, etc., R. Co., 6 Ill. App. 172.

The location of a railroad should be such as best to serve the interests both of the shareholders and of the public. Bestor v. Wathen, 60 Ill. 138.

4. Exact Location Prescribed by Charter. — Matter of Coney Island, etc., R. Co., 12 Hun (N. Y.) 451.

5. Louisville, etc., R. Co. v. Louisville City R. Co., 2 Duv. (Ky.) 175, holding that a railroad company empowered to choose between several routes could not complain that one of the routes which it had not adopted or had abandoned was used by another company.

6. See supra, IV. 2. b. (3) Designation of Route and Termini.

Feasibility of Route as Influencing Location. — Where the legislature authorizes the construction of a railroad between two designated points, no intermediate point being named, if the routes between said points are equally feasible, the most direct should be adopted, but where there is a difference in the feasibility of the routes some reasonable discretion must be allowed in the selection of that to be followed. Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464.

Under the General Railroad Law of New York the particular route of the proposed road is not left to the discretion of the corporation, but is to be determined by the proceedings and in the manner prescribed in the act. The filing of the profile and map required by the act is not the location of the route, but the proposal of one, which may or may not become the actual route as shall be determined by the subsequent proceedings. Matter of Long Island R. Co., 45 N. Y. 364; Rochester, etc., R. Co. v. New York, etc., R. Co., 44 Hun (N. Y.) 206.

7. Macon, etc., R. Co. v. Gibson, 85 Ga. 1, 21 Am. St. Rep. 135, holding that such right to amend existed notwithstanding the fact that the railroad company had entered into an executory contract for the construction of its road.

8. Reasonable Directness Between Termini Required. — Leverett v. Middle Georgia, etc., R. Co., 96 Ga. 385; Savannah, etc., R. Co. v. Shiels, 33 Ga. 601; People v. Louisville, etc., R. Co., 120 Ill. 48; Atty.-Gen. v. Erie, etc., R. Co., 55 Mich. 15; McRoberts v. Southern Minnesota R. Co., 18 Minn. 108; Warren, etc., R. Co. v. Clarion Land, etc., Co., 54 Pa. St. 28; Great Western R. Co. v. Preston, etc., R. Co., 17 U. C. Q. B. 477.

"Where the terminus of a railway is under the terms of its charter, there it necessarily ends, in fact as well as in law; and the fact that the company may be authorized to construct and operate a railway beyond that

been held that all railroad charters which do not directly express the contrary must be taken to allow the exercise of such a discretion in the location of the route as is incident to an ordinary practical survey of the same, made with reference to the nature of the country to be passed over and the obstacles to be encountered or avoided.¹ And where a railroad company acts in good faith, and within the limitations of the powers conferred upon it, the courts will not review its exercise of discretion in locating its road between the termini prescribed by law.²

Stock Subscriptions Released by Material Deviation. — A material deviation by a railroad from the route prescribed in its charter amounts to a breach of contract with subscribers to the stock of the company who have not consented thereto.³

A Variation in One Part of the Line from the route fixed by statute does not render void the entire location, so as to entitle a party through whose land the line is properly located to sue for damages.⁴

Who May Complain of Deviation. — One railroad company may not complain that another company, authorized to build a road between the same termini, has deviated from the route prescribed, unless it can show a particular injury to itself from such deviation.⁵

(3) **Construction of Charter Provisions.** — Charter provisions as to the route and termini of a proposed railroad are to be reasonably interpreted with due regard to the circumstances of each particular case.⁶ As a general rule, a

terminus cannot make the two one." *Per* Stayton, J., in *Texas, etc., R. Co. v. Gay*, 86 Tex. 571.

Penalty for Deviation from Charter Route. — See *State v. Baltimore, etc., R. Co.*, 12 Gill & J. (Md.) 399, 38 Am. Dec. 317.

Where a Number of Intermediate Points Are Designated, the road need not be located through such points in the order named. *Com. v. Fitchburg R. Co.*, 8 Cush. (Mass.) 240.

1. Deviation Necessitated by Nature of Country. — *Southern Minnesota R. Co. v. Stoddard*, 6 Minn. 150. And see *McRoberts v. Southern Minnesota R. Co.*, 18 Minn. 108.

2. Exercise of Discretion Not Reviewed unless Abused. — *Bonaparte v. Camden, etc., R. Co.*, *Baldw. (U. S.)* 205; *Hentz v. Long Island R. Co.*, 13 Barb. (N. Y.) 646; *Walker v. Mad River, etc., R. Co.*, 8 Ohio 38; *Pennsylvania R. Co.'s Appeal*, 116 Pa. St. 55; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282; *Parke's Appeal*, 64 Pa. St. 137; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Cleveland, etc., R. Co. v. Erie*, 27 Pa. St. 380; *Anspach v. Mahanoy, etc., R. Co.*, 5 Phila. (Pa.) 491, 21 Leg. Int. (Pa.) 212.

Where the Charter Fixes One Terminus At or Near a Certain Point, a considerable discretion is conferred upon the company. *Fall River Iron Works Co. v. Old Colony, etc., R. Co.*, 5 Allen (Mass.) 221; *Parke's Appeal*, 64 Pa. St. 137.

Track Built by City. — Where a city empowered to construct a track for the use of several railroad companies has built the same in a certain place, the court will not interfere with its exercise of discretion, nor determine whether or not a track in another place would be more convenient. *Rice, etc., Mach., etc., Co. v. Worcester*, 130 Mass. 575.

3. Champion v. Memphis, etc., R. Co., 35 Miss. 692.

A Slight Deviation from the charter route will not release a dissenting subscriber. Whether or not the deviation is material must

depend upon the circumstances of each particular case. *Champion v. Memphis, etc., R. Co.*, 35 Miss. 692.

Held No Defense to Action on Subscription Contract. — In *Mississippi, etc., R. Co. v. Cross*, 20 Ark. 443, it was held that while a departure from the charter route constituted a violation of the charter for which the company's franchises might be seized on quo warranto, or which a subscriber to stock might enjoin, it did not constitute a defense to an action by the company on the subscription contract.

4. Newton v. Agricultural Branch R. Corp., 15 Gray (Mass.) 27. And to the same effect see *Lee v. Milner*, 2 Y. & Coll. Exch. 611.

5. Erie R. Co. v. Delaware, etc., R. Co., 21 N. J. Eq. 283.

6. Use of Word "Shore." — Where the certificate of incorporation provided that the road should commence "at some convenient and eligible point upon the western shore of the Hudson river," it was held that the word "shore" was not used in its strictest sense to mean the land between the limits of ordinary high and low water, but in the more extended and popular sense. *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

"To the Place of Shipping Lumber." — In *Peavey v. Calais R. Co.*, 30 Me. 498, it was held that a charter authorizing the construction of a railroad "to the place of shipping lumber" authorized the company to build its road to a point of convenient shipment.

Provisions Relating to Terminus and Not to Route. — Where the charter of a railroad provided that one terminus of the road should be fixed at some point south of a named street, it was held that the company might locate its road through such street, as such charter provision did not relate to the route, but to the termination of the road. *McFarland v. Orange, etc., Horse Car R. Co.*, 13 N. J. Eq. 17.

Not Limited to Terminus of Another Road. — Where a statute authorized a railroad to build

railroad company authorized by its charter to build its road "from" or "to" a certain city or town may locate one terminus thereof within the limits of such city or town.¹ Similarly, a charter fixing the terminus of the road "at or near" a named avenue authorizes the company to extend its road to the centre of the avenue.² But while the right to cross a navigable stream lying between the termini designated in the charter will be implied where such crossing is essential to the construction of the railroad,³ it has been held that power to build a railroad to a river does not include power to cross the river.⁴

Terminus Indicated by Name of Company. — The name of the railroad company may be referred to for the purpose of determining its terminus.⁵

Conflict Between Charter and Map Filed. — The fact that the line of a railroad as designated on a map filed by the company stops short of the point named in the charter as the terminus of the road is not conclusive. While the map is decisive on a question of route, it cannot work a change of the termini or an abandonment of a portion of the authorized road.⁶

d. DESCRIPTION OF LOCATION — MAPS, PLANS, AND SURVEYS — (1) Necessity to File. — Railroad companies are generally required by statute to file written descriptions of their locations, together with maps, plans, and surveys thereof, with some designated public officer.⁷ In some jurisdictions the filing of such papers constitutes a condition precedent to the condemnation of land by the company,⁸ while in others condemnation proceedings may be commenced before such papers are filed.⁹ A railroad right of way

its road from a certain point to any point on the northern boundary of certain counties, and there to connect with any railroad constructed or to be constructed, it was held that the company had power to fix its terminus at any point in the boundary named which it might select, and that it was not limited to the terminus of another railroad. *Com. v. Cross Cut R. Co.*, 53 Pa. St. 62.

1. "From" or "To" Gives Authority to Enter Limits. — *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. Rep. 293; *Waycross Air-Line R. Co. v. Offerman, etc.*, R. Co., 109 Ga. 827; *Ligare v. Chicago, etc.*, R. Co., 166 Ill. 249; *Chicago, etc.*, R. Co. v. *Chicago, etc.*, R. Co., 112 Ill. 589; *Moses v. Pittsburgh, etc.*, R. Co., 21 Ill. 516; *St. Louis, etc.*, R. Co. v. *Han-nibal Union Depot Co.*, 125 Mo. 82; *Mason v. Brooklyn City, etc.*, R. Co., 35 Barb. (N. Y.) 373; *Mohawk Bridge Co. v. Utica, etc.*, R. Co., 6 Paige (N. Y.) 554; *Western Pennsylvania R. Co.'s Appeal*, 99 Pa. St. 155; *Rio Grande R. Co. v. Brownsville*, 45 Tex. 88. But to the contrary, see *Augusta v. Port Royal, etc.*, R. Co., 74 Ga. 658; *Macon v. Macon, etc.*, R. Co., 7 Ga. 221; *North-Eastern R. Co. v. Payne*, 8 Rich. L. (S. Car.) 177.

Where a railroad company has power, under its charter, to enter a city, the fact that it builds its road from a point on the city line, and for a time operates it from that point, does not prevent it from subsequently entering the city, if it appears that the original location was intended to be temporary merely. *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. Rep. 293.

2. *People v. Brooklyn, etc.*, R. Co., 89 N. Y. 75.

3. *Fall River Iron Works Co. v. Old Colony, etc.*, R. Co., 5 Allen (Mass.) 221.

4. *State v. Saline County Ct.*, 51 Mo. 350, 11 Am. Rep. 454.

5. *Cleveland, etc.*, R. Co. v. *Speer*, 56 Pa.

St. 325, 94 Am. Dec. 84, holding that the name "Cleveland and Pittsburgh Railroad Company" indicated that one terminus of the road was to be located at Pittsburgh.

6. **Charter Prevails over Map Filed by Company.** — *People v. Brooklyn, etc.*, R. Co., 89 N. Y. 75; *Mason v. Brooklyn City, etc.*, R. Co., 35 Barb. (N. Y.) 373.

7. **Filing of Location, Maps, Plans, and Surveys.** — *Housatonic R. Co. v. Lee, etc.*, R. Co., 118 Mass. 391; *Eastern R. Co. v. Boston, etc.*, R. Co., 111 Mass. 125, 15 Am. Rep. 13; *Matter of Niagara Falls, etc.*, R. Co., 46 Hun (N. Y.) 94; *Purifoy v. Richmond, etc.*, R. Co., 108 N. Car. 100; *Kingston, etc.*, R. Co. v. *Murphy*, 17 Can. Sup. Ct. 585.

Effect of Plans and Sections Deposited under English Statute. — *Reg. v. Wycombe R. Co.*, L. R. 2 Q. B. 310; *Bentinck v. Norfolk Estuary Co.*, 3 Jur. N. S. 204; *North British R. Co. v. Tod*, 4 R. & Can. Cas. 449; *Beardmer v. London, etc.*, R. Co., 5 R. & Can. Cas. 728.

Map Filed Without Authority. — A map filed by the president of the road without authority of the board of directors, and rejected by the officer with whom it is filed, is void. *Northern Pac. R. Co. v. Doherty*, 100 Wis. 39.

8. **Condition Precedent to Condemnation Proceedings.** — *Williams v. Hartford, etc.*, R. Co., 13 Conn. 397; *Matter of Long Island R. Co.*, 45 N. Y. 364; *New York, etc.*, R. Co. v. *Godwin*, (Supm. Ct. Spec. T.) 12 Abb. Pr. N. S. (N. Y.) 21; *New York, etc.*, R. Co. v. *New York, etc.*, R. Co., (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386; *Matter of Boston, etc.*, R. Co., (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 104; *Matter of Niagara Falls, etc.*, R. Co., 46 Hun (N. Y.) 94; *Williamsport, etc.*, R. Co. v. *Philadelphia, etc.*, R. Co., 141 Pa. St. 407.

9. **Not a Condition Precedent to Condemnation Proceedings.** — *Missouri River, etc.*, R. Co. v. *Shepard*, 9 Kan. 647; *Wheeling Bridge, etc.*, R. Co. v. *Camden Consol. Oil Co.*, 35 W. Va. 205.

over the public lands of the United States is not perfected until a plat of the location of the road is filed in the proper land office.¹

(2) *Requisites and Sufficiency.* — The description filed must, either by itself or in connection with the maps and plans, clearly show the lines and direction of the proposed road, the quantity of land to be taken, and the names of the owners.² Plans or maps filed with the written location may be referred to for the purpose of explaining but not for the purpose of varying or modifying it.³ Insufficiency of description may be cured by the subsequent building of the road with the acquiescence of the landowner.⁴

(3) *Effect of Failure to File.* — As a general rule, failure to file the required maps and plans does not constitute ground for a forfeiture of the company's charter.⁵

(4) *Where Location of Road Is Changed.* — Where the location of a railroad is changed in such a manner as to necessitate the condemnation of additional land, a plan of the alteration must also be filed.⁶

(5) *Duty of Purchasing Company to Refile Location.* — A company which purchases a railroad already constructed is not required to refile a map of the same.⁷

(6) *Approval by Public Officials.* — In some jurisdictions the location or plan filed must also be approved by the officers with whom it is filed.⁸

(7) *Notice to Landowners.* — In *New York* a railroad company, after filing the map and profile of its proposed road, must give written notice of such filing to all occupants of land over which the route of its road is designated, and which has not been purchased by or given to the company. Until this is done there can be no location of the route within the sense and meaning of the general railroad law.⁹

2. Contracts for Location — Validity of Contracts. — Contracts for the location

1. *Right of Way over Public Lands of United States.* — *Baker v. Gee*, 1 Wall. (U. S.) 333; *Western Pac. R. Co. v. Tevis*, 41 Cal. 489; *Hannibal, etc., R. Co. v. Smith*, 41 Mo. 310; *Pacific R. Co. v. McCombs*, 39 Mo. 329; *Hannibal, etc., R. Co. v. Moore*, 37 Mo. 338. And see the title STATE AND PUBLIC LANDS.

Contra — *Filing of Map Not Essential.* — It is not necessary for a railroad company which has filed its articles of incorporation and proofs of organization, and constructed a road over unsurveyed public lands, to file a map of definite location in order to entitle it to the benefit of an act of Congress granting it a right of way over the public lands of the United States. *Denver, etc., R. Co. v. Hanoum*, 19 Colo. 162.

2. *Requisites and Sufficiency of Papers Filed.* — *New York, etc., R. Co. v. New York, etc., R. Co.*, 52 Conn. 279; *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397; *Wilder v. Boston, etc., R. Co.*, 161 Mass. 387; *Housatonic R. Co. v. Lee, etc., R. Co.*, 118 Mass. 391; *Convers' Appeal*, 18 Mich. 459; *Hetfield v. Central R. Co.*, 29 N. J. L. 571, *reversing* *Central R. Co. v. Hetfield*, 29 N. J. L. 206; *Atty.-Gen. v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526; *People v. Brooklyn, etc., R. Co.*, 89 N. Y. 75; *New York, etc., R. Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386; *Matter of Boston, etc., R. Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 104; *Matter of Niagara Falls, etc., R. Co.*, 46 Hun (N. Y.) 94; *Nason v. Woonsocket Union R. Co.*, 4 R. I. 377.

Sufficiency of Plans under English Statutes, see *Weld v. South Western R. Co.*, 32 Beav. 340;

Wrigley v. Lancashire, etc., R. Co., 9 Jur. N. S. 710.

A Location Which Omits the Name of a Landowner may still be valid if the land can be otherwise identified. *Brock v. Old Colony R. Co.*, 146 Mass. 194.

3. *Reference to Plans and Maps.* — *Grand Junction R., etc., Co. v. Middlesex County*, 14 Gray (Mass.) 553; *Hazen v. Boston, etc., R. Co.*, 2 Gray (Mass.) 574. And see *Pinkerton v. Boston, etc., R. Co.*, 109 Mass. 527.

4. *Insufficiency of Description Cured.* — *New York, etc., R. Co. v. New York, etc., R. Co.*, 52 Conn. 279; *Harding v. Biggs*, 172 Mass. 590; *Drury v. Midland R. Co.*, 127 Mass. 571.

5. *Harris v. Mississippi Valley, etc., R. Co.* 51 Miss. 602.

6. *Where Location of Road Is Changed.* — *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430; *In re Riverhead, etc., R. Co.*, 36 N. Y. App. Div. 514; *Kingston, etc., R. Co. v. Murphy*, 17 Can. Sup. Ct. 585; *Matter of Toronto St. R. Co.*, 22 Ont. 401.

7. *People v. Brooklyn, etc., R. Co.*, 89 N. Y. 75.

8. *Approval by Public Officials.* — *Hartford, etc., R. Co. v. Wagner*, 73 Conn. 506; *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196; *Williams v. Hartford, etc., R. Co.*, 13 Conn. 397; *Boston, etc., R. Co. v. Lowell, etc., R. Co.*, 124 Mass. 368.

9. *Notice to Landowners.* — *Matter of Long Island R. Co.*, 45 N. Y. 364; *New York, etc., R. Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386; *Matter of Niagara Falls, etc., R. Co.*, 46 Hun (N. Y.) 94.

of railroad lines at particular places are not void *per se* as against public policy,¹ but they are illegal where calculated to prejudice the interests of the public, or of the shareholders of the road,² or where they provide for private emolument to the officers of the road who are intrusted with the duty of choosing its location.³

By Whom Made. — It has been held that the attorneys, agents, or managing officers of a railroad company cannot bind it by entering into agreements with landowners regarding the location of the road without notice to the directors of the company.⁴

Parol Evidence Not Admissible to Vary Contract. — The general rule that parol evidence is not admissible to explain or vary written contracts which are plain and unambiguous applies to contracts concerning the location of railroads.⁵

3. Parallel Locations. — Questions relating to the exclusiveness of railroad franchises and the impairment of vested rights by the incorporation of companies for the construction of competing or parallel lines have been considered in another part of the present article.⁶ Aside from questions of this nature, however, questions may also arise as to the right of railroad companies to locate their proposed roads in such a manner as to parallel existing roads or locations. Thus, in *Georgia* it is provided by statute that the general direction and location of a new railroad, except within ten miles of its terminal points, must be at least ten miles from any railroad already constructed or laid out between the same points.⁷ And in *New York* it has been held that the fact that a proposed road, for all practical purposes, parallels existing roads, and will have a tendency to destroy and impair vested property rights, without any material benefit resulting therefrom, justifies the railroad commissioners in refusing to grant a certificate as to the necessity of the road.⁸

4. Extensions — Power to Build. — Every railroad company has implied power to make such short extensions of its road beyond its terminal stations as may be reasonable and necessary for the transaction of its business and the accommodation of the public.⁹ Extensions, however, which materially change the route of the road cannot be made unless authorized by the general railroad law of the state,¹⁰ or by some special act of the legislature.¹¹ Power to build

1. Contracts for Location Not Void Per Se. — *Telford v. Chicago, etc., R. Co.*, 172 Ill. 559; *Cedar Rapids First Nat. Bank v. Hendrie*, 49 Iowa 403, 31 Am. Rep. 153; *McClure v. Missouri River, etc., R. Co.*, 9 Kan. 373; *Berryman v. Cincinnati Southern R. Co.*, 14 Bush (Ky.) 755; *Missouri Pac. R. Co. v. Tygard*, 84 Mo. 263, 54 Am. Rep. 97; *Baltimore, etc., R. Co. v. Ralston*, 41 Ohio St. 573; *Chapman v. Mad River, etc., R. Co.*, 6 Ohio St. 119; *Cumberland Valley R. Co. v. Baab*, 9 Watts (Pa.) 458.
2. Baltimore, etc., R. Co. v. Ralston, 41 Ohio St. 573.

3. Missouri Pac. R. Co. v. Tygard, 84 Mo. 263, 54 Am. Rep. 97; *Baltimore, etc., R. Co. v. Ralston*, 41 Ohio St. 573.

4. Central Mills Co. v. New York, etc., R. Co., 127 Mass. 537.

5. Chattanooga, etc., R. Co. v. Warthen, 98 Ga. 599.

6. See supra, this title, *Railroad Corporations — Exclusiveness of Franchises*.

7. Ga. Civ. Code, § 2176.

The Georgia Statute applies only where the termini of the main lines of the two roads are the same. *Hawkinsville, etc., R. Co. v. Waycross Air-Line R. Co.*, 114 Ga. 239.

It does not apply to private railroads, built by private corporations on their own land, and for their own use and benefit. *Waycross Air-Line R. Co. v. Southern Pine Co.*, 111 Ga. 233.

The statute formerly prohibited the paralleling of existing railroads only, and not those in process of construction. *Macon, etc., R. Co. v. Macon, etc., R. Co.*, 86 Ga. 83.

An Injunction Will Lie to restrain a railroad company from using the located line of another company contrary to the provisions of the statute. *Georgia Northern R. Co. v. Tifton, etc., R. Co.*, 109 Ga. 762.

8. Ground for Refusal of Certificate of Necessity. — *Matter of Kings, etc., R. Co.*, 6 N. Y. App. Div. 241.

The Contrary View. — In *People v. Railroad Com'rs*, 53 N. Y. App. Div. 61, it was held that the fact that a proposed road would parallel a terminal railroad for a distance of four miles was not worthy of consideration in view of the different purposes for which the roads were to be operated.

9. Implied Power to Make Short Extensions. — *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467, 68 Am. Dec. 650.

10. No Power to Extend in Absence of Statute. — See *Brigham v. Agricultural Branch R. Co.*, 1 Allen (Mass.) 316.

Extension Authorized by General Railroad Law. — *Florida Cent., etc., R. Co. v. Bell*, (Fla. 1901) 31 So. Rep. 259.

11. Compliance with Statute Essential. — Where a statute authorizing a railroad company to extend its road contains several provisos, the

branch roads has sometimes been construed as power to extend the main line,¹ while in other cases it has been held that power to extend a road can be exercised only by building the extension from one of the original termini.²

Consent of Stockholders. — As the building of an extension is an enterprise radically different from the building of the original road, it follows that the consent of the company's stockholders is essential thereto, even though the extension is authorized by statute; and where such consent is withheld the company may be restrained from acting under the statute, or from expending any money in extending the road.³

Time of Building. — While individuals may resist the condemnation of their lands for a right of way after the expiration of the time given by the charter for the completion of the road,⁴ they cannot interfere to prevent the company from extending its road, after the expiration of that time, over a right of way already acquired.⁵

5. Changes of Location — *a. POWER TO CHANGE* — **In General.** — It is generally held that where a railroad company to which has been given the power to choose its particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted,⁶ and it cannot subsequently change its location or route without express legislative authority.⁷ Thus, a change cannot be made for reasons of convenience, or expediency, or economy merely;⁸ nor is such change authorized by the mere fact that the use of the railroad, and also of a neighboring highway, has so increased since the building of the road as to make travel on the highway more dangerous.⁹

extension must be made in a manner consistent with all of these provisos unless they are repugnant. *Packer v. Sunbury, etc., R. Co., 19 Pa. St. 211.*

What a Sufficient Designation of Termini in Statute Authorizing Extension. — See *Newcastle, etc., R. Co. v. Peru, etc., R. Co., 3 Ind. 464.*

1. Power to Build Branches Construed as Power to Extend Road. — *Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228; Western Pennsylvania R. Co.'s Appeal, 99 Pa. St. 155; Canadian Pac. R. Co. v. Major, 13 Can. Sup. Ct. 233.*

2. Extension Must Proceed from Original Terminus. — *Works v. Junction R. Co., 5 McLean (U. S.) 425; Savannah, etc., R. Co. v. Shiels, 33 Ga. 601; Atty.-Gen. v. West Wisconsin R. Co., 36 Wis. 466.*

Power to Extend Construed as Power to Build Branch Road. — *Tyler v. Elizabethtown, etc., R. Co., 9 Bush (Ky.) 514.*

Extension from Point At or Near Terminus. — Where the authority conferred was to extend the road from a point at or near its present terminus, it was held that an extension starting at a point several hundred feet from the terminus was authorized. *Fall River Iron Works Co. v. Old Colony, etc., R. Co., 5 Allen (Mass.) 221.*

3. Consent of Stockholders Essential. — *Zabriskie v. Hackensack, etc., R. Co., 18 N. J. Eq. 178, 90 Am. Dec. 617.*

Right to Apply Specific Funds to Extension of Road. — In *Stevens v. Rutland, etc., R. Co., 29 Vt. 545*, a railroad company was enjoined from applying its present funds or its income and from pledging its credit for the purpose of extending the road, but the court refused to enjoin it from building the extension with any new funds which might be obtained for that specific purpose.

Subscriptions Made After Grant of Power to Extend. — Persons who subscribe to the stock of

a railroad company subsequently to the enactment of a statute authorizing the extension of the road, do so with notice of the statutory power of the company, and an extension afterwards built under authority of the statute does not invalidate their subscription. *Jewett v. Valley R. Co., 34 Ohio St. 601.*

4. Peavey v. Calais R. Co., 30 Me. 498.

5. Atlantic, etc., R. Co. v. St. Louis, 66 Mo. 228.

6. Discretion as to Location Exhausted by Exercise. — *State v. New Haven, etc., Co., 45 Conn. 346; Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272; Chicago, etc., R. Co. v. Chicago, 149 Ill. 457; Illinois Cent. R. Co. v. People, 143 Ill. 434; Allen v. Chosen Freeholders, 13 N. J. Eq. 70; Brooklyn Cent. R. Co. v. Brooklyn City R. Co., 32 Barb. (N. Y.) 358; Hudson, etc., Canal Co. v. New York, etc., R. Co., 9 Paige (N. Y.) 323.* But for exceptions to the general rule see *Thomas v. Milledgeville R. Co., 99 Ga. 714; Baldwin v. Hillsborough, etc., R. Co., 1 Ohio Dec. (Reprint) 546, 10 West L. J. 356; Philadelphia, etc., R. Co.'s Appeal, 102 Pa. St. 123; Northern Pac. R. Co. v. Doherty, 100 Wis. 39.*

7. No Power to Change in Absence of Statute. — *Leverett v. Middle Georgia, etc., R. Co., 96 Ga. 385; Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272; Chicago, etc., R. Co. v. Chicago, 149 Ill. 457; Lusby v. Kansas City, etc., R. Co., 73 Miss. 360 (overruling Mississippi, etc., R. Co. v. Devaney, 42 Miss. 555); Stewart v. Little Miami R. Co., 14 Ohio 353.*

Construction of Side Track or Parallel Road as Change of Location. — See *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272; Chapman v. Mad River, etc., R. Co., 6 Ohio St. 119.*

8. Lusby v. Kansas City, etc., R. Co., 73 Miss. 360.

9. State v. New Haven, etc., R. Co., 45 Conn. 346.

Authority to change the location may be given, however, by the charter of the company, or by other special enactment,¹ or by the general railroad law of the state;² or the authorities of counties, cities, and towns may be empowered by law to contract with railroad companies for changes in the location of railroads within their limits.³

In **Colorado** it has been held that a railroad company may change the termini of its road, after the same has been built, under the general law authorizing such companies to alter or amend their articles of association.⁴

In **Massachusetts** a railroad company may vary the location of its road at any time after the expiration of one year from the filing of such location with the county commissioners, and before the time prescribed for completion of the road has expired.⁵

In **New York** the general railroad law provides that after a railroad company has filed the required map and profile of its road any owner or occupant of land over which the designated route runs, who is aggrieved by the proposed location, may apply by petition to a justice of the supreme court for the appointment of commissioners to examine the route with a view to altering the same.⁶ And by another section of the same law it is provided that a railroad company may, by a vote of two-thirds of its directors, alter its route or termini, or locate such route or termini in a county adjoining any county named in its certificate of incorporation, if it shall appear that the line can be improved thereby.⁷ The route of a railroad cannot be changed, however, under that section of the general corporation law which authorizes the correction of mistakes and informalities in articles of incorporation.⁸

In **Ohio** changes in the route or termini of a railroad which will result in the abandonment of the road, either partly or completely built, are prohibited by statute.⁹

In **Pennsylvania** the weight of authority is to the effect that a railroad company may change the location of its road at any time before the damages in

1. **Authority to Change Given by Statute.**—*McCartney v. Chicago, etc., R. Co.*, 112 Ill. 611; *Hewitt v. St. Paul, etc., R. Co.*, 35 Minn. 226; *Alabama, etc., R. Co. v. Brandon*, (Miss. 1893) 14 So. Rep. 438; *Stewart v. Little Miami R. Co.*, 14 Ohio 353; *Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466.

2. See the statutes of the various states.

3. *Western Pennsylvania R. Co.'s Appeal*, 99 Pa. St. 155.

4. *Colorado Eastern R. Co. v. Union Pac. R. Co.*, 41 Fed. Rep. 293.

5. *Boston, etc., R. Corp. v. Midland R. Co.*, 1 Gray (Miss.) 340.

6. **Petition by Landowner for Change of Route under New York Statute.**—*New York, etc., R. Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386; *Norton v. Wallkill Valley R. Co.*, 61 Barb. (N. Y.) 476, 42 How. Pr. (N. Y.) 228; *People v. Tubbs*, 59 Barb. (N. Y.) 401; *Matter of Central R. Co.*, 1 Thomp. & C. (N. Y.) 419.

Statute Not Available to Contesting Railroad Company.—Where the proposed route of a railroad, as located by the filing of its map, crosses the tracks of an existing company, the latter cannot apply for the appointment of commissioners under section 22 of the General Railroad Act, but must proceed under section 28 of the same act. *Matter of New York, etc., R. Co.*, 110 N. Y. 374; *Matter of Lake Shore, etc., R. Co.*, 89 N. Y. 442.

As to the Procedure on a Petition under the Statute, including notice of the application,

powers of the commissioners, and review of their decision by certiorari or appeal, see the following cases: *Matter of New York, etc., R. Co.*, 99 N. Y. 388; *Matter of Lake Shore, etc., R. Co.*, 89 N. Y. 442; *Matter of Long Island R. Co.*, 45 N. Y. 364; *Matter of Hartman*, (Supm. Ct. Gen. T.) 9 Abb. Pr. N. S. (N. Y.) 124; *Norton v. Wallkill Valley R. Co.*, 63 Barb. (N. Y.) 79; *People v. Tubbs*, 59 Barb. (N. Y.) 401, 49 N. Y. 356; *Matter of Niagara Falls Hydraulic Power, etc., Co.*, 68 Hun (N. Y.) 391; *Matter of Niagara Falls, etc., R. Co.*, 46 Hun (N. Y.) 94; *Norton v. Wallkill Valley R. Co.*, (Supm. Ct.) 42 How. Pr. (N. Y.) 228; *People v. Lockport, etc., R. Co.*, 13 Hun (N. Y.) 211.

7. **Route Altered by Vote of Directors under New York Statute.**—*Matter of New York, etc., R. Co.*, 88 N. Y. 279; *Matter of Riverhead, etc., R. Co.*, 36 N. Y. App. Div. 514; *New York, etc., R. Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386; *Matter of New York, etc., R. Co.*, 13 N. Y. Wkly. Dig. 370; *People v. Brooklyn, etc., R. Co.*, 12 N. Y. Wkly. Dig. 375.

Where the Railroad Runs through a City or Village its route cannot be changed without the approval of the authorities. *Erie R. Co. v. Steward*, 170 N. Y. 172.

8. *In re Riverhead, etc., R. Co.*, 36 N. Y. App. Div. 514.

9. *Mercantile Trust Co. v. Columbus, etc., R. Co.*, 90 Fed. Rep. 148.

condemnation proceedings are assessed, and before the road is constructed.¹

b. STATUTES AUTHORIZING CHANGE STRICTLY CONSTRUED. — Statutes authorizing changes in the location of railroads are to be construed strictly.² Thus, a statute authorizing a railroad to change its route gives it no authority to change its termini.³ Likewise, where the charter specifies certain causes for which the route may be changed, it cannot be changed for any cause not specified.⁴ And where the authority conferred is to change its location on account of difficulty of construction, the change cannot be made after the road has been completed.⁵

c. BY WHOM MADE. — Power conferred upon a railroad company to change its location is generally to be exercised by vote of its board of directors.⁶

d. EFFECT OF CHANGE. — Variations in the route over which a railroad may run, when authorized by statute, do not affect the identity of the corporate body that builds the road so as to deprive it of a right to exemption from taxation granted in the original charter.⁷ But a company which has received donations of land or money with the understanding that it shall locate its road through certain points cannot change its location without making due compensation to the parties from whom such donations were received.⁸ Nor can a vested right to land damages, awarded in condemnation proceedings, be divested by a subsequent statute authorizing a railroad company to change its location.⁹

Release of Subscribers to Stock. — By the weight of authority a change in the termini of a road is such a fundamental alteration in the purposes of the incorporation as to release nonassenting subscribers to stock.¹⁰

e. CHANGE OF TRACK WITHIN LIMITS OF RIGHT OF WAY. — A railroad company may lay its track on any part of its right of way that it chooses,¹¹ and may, it seems, subsequently change its location within such limits without special grant of authority.¹²

6. Conflicting Locations. — Where grants of a definite location are inconsistent the earlier one will prevail,¹³ but where the grants are indefinite, leaving the exact routes to be selected by the companies, the prior right will

1. Change Allowed Before Assessment of Damages and Construction of Road. — *Hagner v. Pennsylvania Schuylkill Valley R. Co.*, 154 Pa. St. 475.

Right to Change After Assessment of Damages.

— See *Beale v. Pennsylvania R. Co.*, 86 Pa. St. 509; *Neal v. Pittsburgh, etc., R. Co.*, 31 Pa. St. 19; *Roberts v. Philadelphia, etc., R. Co.*, 1 Phila. (Pa.) 262, 8 Leg. Int. (Pa.) 230.

2. Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co., 149 Ill. 272.

3. Authority to Change Route Not Authority to Change Termini. — *Snook v. Georgia Imp. Co.*, 83 Ga. 61; *Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466.

4. Works v. Junction R. Co., 5 McLean (U. S.) 425; *McRoberts v. Southern Minnesota R. Co.*, 18 Minn. 108.

5. Moorhead v. Little Miami R. Co., 17 Ohio 340; *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio St. 21.

6. Snook v. Georgia Imp. Co., 83 Ga. 61; *Cincinnati, etc., Narrow Gauge R. Co. v. Fisher*, 39 Ohio St. 330.

7. Cheraw, etc., R. Co. v. Anson County, 88 N. Car. 519.

8. Chapman v. Mad River, etc., R. Co., 6 Ohio St. 119.

Grant of Lands Not Divested by Change. — In *Chicago, etc., R. Co. v. Grinnell*, 51 Iowa 476, it was held that an act authorizing a railroad

to change its route did not operate to divest the company of lands granted to it by a prior statute.

9. Smart v. Portsmouth, etc., R. Co., 20 N. H. 233. But see *Hayes v. Cincinnati, etc., R. Co.*, 17 Ohio St. 110.

10. Subscribers Released by Change of Termini. — *Snook v. Georgia Imp. Co.*, 83 Ga. 61; *Youngblood v. Georgia Imp. Co.*, 83 Ga. 797; *Hester v. Memphis, etc., R. Co.*, 32 Miss. 378; *Cincinnati, etc., Narrow Gauge R. Co. v. Fisher*, 39 Ohio St. 330; *Marietta, etc., R. Co. v. Elliott*, 10 Ohio St. 57; *Chartiers R. Co. v. Hodgkins*, 77 Pa. St. 187; *Perkins v. Port Washington*, 37 Wis. 177; *Kenosha, etc., R. Co. v. Marsh*, 17 Wis. 13.

When Change Does Not Release Subscribers. — See *Fry v. Lexington, etc., R. Co.*, 2 Met. (Ky.) 317; *Good v. Dean*, 1 W. N. C. (Pa.) 519, 32 Leg. Int. (Pa.) 320.

11. Location Within Right of Way in Discretion of Company. — *Stark v. Sioux City, etc., R. Co.*, 43 Iowa 501; *Dougherty v. Wabash, etc., R. Co.*, 19 Mo. App. 419.

12. Change of Track Within Limits of Right of Way. — See *Minneapolis, etc., R. Co. v. St. Paul, etc., R. Co.*, 35 Minn. 265.

13. Earlier Grant Prevails Where Grants Are Definite. — *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 1; *Morris, etc., R. Co. v. Blair*, 9 N. J. Eq. 635.

attach to the company which first locates its road.¹ Land once located by a company, which is proceeding in good faith and with reasonable diligence in the construction of its road, cannot be taken from it and appropriated by another company for railroad purposes, without the consent of the legislature.² But one railroad company may be authorized by statute to use a portion of the location of another company, either generally³ or with the consent of the latter company.⁴ Where the nature of the country is such that it is impracticable or impossible to lay down more than one track over a portion of the route followed by two companies, a court of equity, while recognizing the prior title of the company first locating its road, will compel it to allow the other company to make a reasonable use of its tracks.⁵

7. Connection with Other Railroads — *a. IN GENERAL.* — Railroads may make connection with other lines either by virtue of a contract entered into between them or under the provisions of statutes authorizing such connections. In the latter case the respective rights and obligations are to be ascertained from the statute conferring the right.⁶ Where general statutory

1. Priority of Location Gives Priority of Right.

— *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770; *Morris, etc., R. Co. v. Blair*, 9 N. J. Eq. 635; *People v. Adirondack R. Co.*, 160 N. Y. 225; *Waterbury v. Dry Dock, etc., R. Co.*, 54 Barb. (N. Y.) 388; *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 44 Hun (N. Y.) 206; *Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 159 Pa. St. 331; *Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co.*, 141 Pa. St. 407; *Wilkesbarre, etc., R. Co. v. Danville, etc., R. Co.*, 29 Lég. Int. (Pa.) 373; *Titusville, etc., R. Co. v. Warren, etc., R. Co.*, 4 Leg. Gaz. (Pa.) 117; *Barre R. Co. v. Montpelier, etc., R. Co.*, 61 Vt. 1, 15 Am. St. Rep. 877; *Kanawha, etc., R. Co. v. Glen Jean, etc., R. Co.*, 45 W. Va. 119.

Survey of Route Before Incorporation of Company Ineffectual. — See *New Brighton, etc., R. Co.'s Appeal*, 105 Pa. St. 13.

Location by Executive Committee Invalid as Against Rival Company. — *Weidenfeld v. Sugar Run R. Co.*, 48 Fed. Rep. 615.

When Filing of Map Does Not Give Priority. — Where one railroad company owns a certain tract of land another company cannot prevent it from constructing a railroad thereon by filing a map of its location covering the same tract. *New York, etc., R. Co. v. New York, etc., R. Co.* (Supm. Ct. Spec. T.) 11 Abb. N. Cas. (N. Y.) 386.

2. No Right to Take Land Located by Another Company. — *Contra Costa Coal Mines R. Co. v. Moss*, 23 Cal. 323; *Boston, etc., R. Co. v. Lowell, etc., R. Co.*, 124 Mass. 368; *Housatonic R. Co. v. Lee, etc., R. Co.*, 118 Mass. 391; *Rochester, etc., R. Co. v. New York, etc., R. Co.*, 110 N. Y. 128; *Warren, etc., R. Co. v. Clarion Land, etc., Co.*, 54 Pa. St. 28; *Titusville, etc., R. Co. v. Warren, etc., R. Co.*, 12 Phila. (Pa.) 642, 38 Leg. Int. (Pa.) 414; *Railroad Co. v. Railroad Co.*, 2 Leg. Rec. (Pa.) 253; *Canal Co. v. Railroad Co.*, 1 Lack. Jur. (Pa.) 97. But see *Raleigh, etc., R. Co. v. Glendon, etc., Min., etc., Co.*, 112 N. Car. 661.

A Railroad Company May Relinquish Its Right to Its Location by allowing another company to build thereon. *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

3. Lowell, etc., R. Co. v. Boston, etc., R. Corp., 7 Gray (Mass.) 27. And see *New York,*

etc., R. Co. v. Boston, etc., R. Co., 36 Conn. 199.

Right Granted on Conditions. — A railroad company using a part of the location of another company, by statutory authority, may be required to allow the latter company to use its tracks subject to reasonable regulations. *Providence, etc., R. Co. v. Norwich, etc., R. Co.*, 138 Mass. 277.

4. Greenville, etc., R. Co. v. Grey, 62 N. J. Eq. 768; *State v. Hudson Tunnel R. Co.*, 38 N. J. L. 548.

5. Priority of Right in Canons and Defiles. — *Denver, etc., R. Co. v. Alling*, 99 U. S. 463 (*reversing Canon City, etc., R. Co. v. Denver, etc., R. Co.*, 5 Fed. Cas. No. 2,387). And see *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 72; *Sioux City, etc., R. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 770; *Western North Carolina R. Co. v. Georgia, etc., R. Co.*, 88 N. Car. 79.

6. Connections Between Railroads. — *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

Statutes Construed. — *Augusta v. Port Royal, etc., R. Co.*, 74 Ga. 658; *Richmond v. Dubuque, etc., R. Co.*, 33 Iowa 422; *Delaware, etc., R. Co. v. Erie R. Co.*, 21 N. J. Eq. 298; *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566; *People v. Brooklyn, etc., R. Co.*, 89 N. Y. 75; *Com. v. Cross Cut R. Co.*, 53 Pa. St. 62; *Louisville, etc., R. Co. v. State*, 9 Baxt. (Tenn.) 522.

Power to Cross Street to Form Connection — Statutes Construed. — *Augusta v. Port Royal, etc., R. Co.*, 74 Ga. 658; *Louisville, etc., R. Co. v. State*, 9 Baxt. (Tenn.) 522.

Power to Authorize Connection Delegated to City. — *Augusta v. Port Royal, etc., R. Co.*, 74 Ga. 658.

Connection Between Surface and Elevated Roads Authorized. — *Beekman v. Brooklyn, etc., R. Co.*, 89 Hun (N. Y.) 14.

New York Statute Requiring Connection Between Roads applies to contiguous as well as intersecting roads. *New York, etc., R. Co. v. Erie R. Co.*, 31 N. Y. App. Div. 378; *Gallagher v. Keating*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 131.

Power to Acquire Land for Purpose of Making Connection. — *In re Brooklyn El. R. Co.*, (Supm.

authority is given for the formation of connections between railroads, the company cannot bind the state and those acting under the authority thereof by any agreement or covenant prohibiting the making of such connection, though it may possibly bind itself.¹

Connection Compelled under Police Power. — In a proper case the legislature may, by virtue of the police power, compel the formation of connection with railroads whose tracks cross or meet each other; and such a regulation will not be unconstitutional as a taking of property without the payment of due compensation.²

b. NATURE AND EXTENT OF RIGHT. — Where the statute merely grants authority to one road to connect with another, the right so granted is a revocable license,³ or a privilege, and not a contract. Its exercise is a matter of election, as is also the discontinuance of the connection.⁴ In some instances a general grant of power to connect with any other railroad is given.⁵ This does not, however, authorize connection with roads subsequently constructed.⁶ This authority to connect has reference to a physical union of the tracks of the two lines, and is not intended to provide for an interchange of business.⁷

When Right to Connect Vests. — Where the connection is authorized by statute the rights of the connecting line thereunder do not vest until the election to connect is made; and if the statute authorizing the connection is repealed before the acceptance of its terms a subsequent acceptance is of no effect.⁸ The mere fact that a railway company authorized by statute to connect at its option with one of two companies uses the line of one company while its line connecting with the other is in the course of construction is not sufficient to show that it has elected to connect with the former.⁹

c. ENFORCEMENT OF STATUTORY RIGHT. — Where the right to connect is granted by statute the railroad desiring the connection cannot simply enter on the right of way of the other, where they are unable to agree, but must pursue the methods prescribed by the statute.¹⁰ In some jurisdictions the right is enforceable by eminent domain proceedings.¹¹

d. ENFORCEMENT OF CONTRACT. — If the connection is made under and by force of a contract its continuance will in certain cases be enforced in equity, but equity will not aid if the contract for the connection has already been terminated.¹²

e. MANNER OF MAKING CONNECTION — In General. — In some jurisdictions the statute provides that the point, manner, and terms upon which the connection shall be made shall be determined by commissioners appointed for that purpose.¹³ In other jurisdictions these details are determined by a jury.

Ct. Gen. T.) 11 N. Y. Supp. 161, *affirmed* 125 N. Y. 434.

1. *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414.

2. *Atlantic, etc., R. Co. v. State*, 42 Fla. 358.

3. **Nature of Right.** — *Southwark R. Co. v. Philadelphia*, 47 Pa. St. 314.

4. *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

Power to "Unite" Not Power to Consolidate. — *Louisville, etc., R. Co. v. Kentucky*, 161 U. S. 677.

5. **General Grant of Power.** — *Belleville, etc., R. Co. v. Gregory*, 15 Ill. 20, 58 Am. Dec. 589.

6. *North Branch Pass. R. Co. v. City Pass. R. Co.*, 38 Pa. St. 361.

7. **Physical Union.** — *Atchison, etc., R. Co. v. Denver, etc., R. Co.*, 110 U. S. 667; *Kentucky, etc., Bridge Co. v. Louisville, etc., R. Co.*, 37 Fed. Rep. 567; *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

8. *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

What Constitutes Sufficient Acceptance of Act. — *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

9. *Purifoy v. Richmond, etc., R. Co.*, 108 N. Car. 100.

10. **Enforcement of Right.** — *Richmond, etc., R. Co. v. Durham, etc., R. Co.*, 104 N. Car. 658.

11. **Enforcement by Eminent Domain.** — *East St. Louis, etc., R. Co. v. Belleville City R. Co.*, 159 Ill. 541; *Richmond, etc., R. Co. v. Durham, etc., R. Co.*, 104 N. Car. 658.

12. *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

Verbal Agreement for Terminal Facilities Void under Statute of Frauds. — *Port Jervis, etc., R. Co. v. New York, etc., R. Co.*, 132 N. Y. 439.

13. **Manner of Connection.** — *Portland, etc., R. Co. v. Grand Trunk R. Co.*, 46 Me. 69; *New York, etc., R. Co. v. Erie R. Co.*, 31 N. Y. App.

This jury, however, has nothing to do with carrying out the purpose of the connection, nor can it order one road to transfer to the other any portion of its property or franchise.¹

Point of Connection. — Where the statute designates the point of connection it is not required that the connection shall be made at the exact point so designated, but a reasonable discretion may be exercised, and the connection may be placed at the nearest practicable point of connection.² The line seeking the connection cannot, in the absence of statutory provision, select its own point of connection, but this power rests with the road with which connection is sought.³

f. SEVERING CONNECTION. — Where the terms of the statute are such that a connecting road cannot, at its own election, withdraw a connection once made, it seems, nevertheless, that the legislature may authorize it to disconnect.⁴

8. Property in Location. — The mere filing of the survey of a railroad does not give the company title to the land covered thereby.⁵ In *New York* the effect of the map filed by the company is to give warning to other railroads that a certain route has been pre-empted, but such map establishes no right as against the state so as to entitle the company filing it to compensation if the land is subsequently taken for another public use.⁶

9. Abandonment or Forfeiture of Location. — In *Connecticut* a railroad location is forfeited where the company fails to pay for all land covered thereby within twelve months of the acceptance of the route by the railroad commissioners.⁷ In *Pennsylvania* it has been held that the question of abandonment or forfeiture can be raised by the state alone, and not by a rival railroad company.⁸

VI. RIGHT OF WAY—1. General Power of Railroad Companies to Acquire Land. — The general power of railroad companies, including foreign corporations, to acquire land, and the purposes for which they may acquire it, have been fully treated elsewhere.⁹

2. Methods of Acquisition in General — With Consent of Owner or by Condemnation. — The two general methods of acquiring the right to enter, use, and occupy lands for a railroad right of way are with the consent of the owner or by condemnation.¹⁰ Under the term "consent of the owner," in this connection, may be included acquisition by public grant from a state or from the United States,¹¹ by private grant¹² or donation,¹³ by adverse possession or

Div. 378; *Richmond, etc., R. Co. v. Durham, etc., R. Co.*, 104 N. Car. 658.

Manner of Making Connection Immaterial. — *Cleveland, etc., R. Co. v. Erie*, 27 Pa. St. 380.
1. *Altoona, etc., Connecting R. Co. v. Beech Creek R. Co.*, 177 Pa. St. 443.

2. *Parke's Appeal*, 64 Pa. St. 137; *Purifoy v. Richmond, etc., R. Co.*, 108 N. Car. 100.

Connection Not Limited to Town or City. — *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566.

3. *Shelbyville R. Co. v. Louisville, etc., R. Co.*, 82 Ky. 541.

4. *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

5. *Hetfield v. Central R. Co.*, 29 N. J. L. 571, reversing *Central R. Co. v. Hetfield*, 29 N. J. L. 206.

6. *People v. Adirondack R. Co.*, 160 N. Y. 225, affirmed as *Adirondack R. Co. v. New York*, 176 U. S. 335.

7. *New York, etc., R. Co. v. Boston, etc., R. Co.*, 36 Conn. 196.

8. **Who May Raise Question of Abandonment.** — *Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 159 Pa. St. 331.

As to Abandonment or Forfeiture of Right of Way, see *infra*, this title, *Right of Way*.

9. General Power of Railroad Companies to Acquire Land. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 620; EMINENT DOMAIN, vol. 10, p. 1043; FOREIGN CORPORATIONS, vol. 13, p. 834.

10. Consent of Owner or Condemnation Essential. — See *Perkins v. Maine Cent. R. Co.*, 72 Me. 95; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Livermon v. Roanoke, etc., R. Co.*, 109 N. Car. 52.

11. Acquisition by Public Grant. — See the title STATE AND PUBLIC LANDS, and also the following cases: *Macon v. East Tennessee, etc., R. Co.*, 82 Ga. 501; *State v. New Orleans, etc., R. Co.*, 104 La. 685; *Flint, etc., R. Co. v. Gordon*, 41 Mich. 420; *Archibald v. New York Cent., etc., R. Co.*, 157 N. Y. 574.

12. Acquisition by Private Grant. — See *infra*, this section, *Acquisition by Purchase*.

13. Acquisition by Donation. — *Bravard v. Cincinnati, etc., R. Co.*, 115 Ind. 1.

Donation by Recording Plat under Minnesota Statute. — As to what is insufficient to show intention to donate, see *Watson v. Chicago, etc., R. Co.*, 46 Minn. 321.

prescription,¹ by reservation in a deed by the company conveying other lands,² or by contract for the exchange of lands.³ The company is not obliged to procure its whole right of way by any one of these methods exclusively, but may acquire a part thereof by one method and the remainder by another.⁴

Rights Acquired under Lease. — The right to lay and maintain railroad tracks across a certain tract of land for a specified term may also arise under a lease.⁵

Acquisition by Dedication. — By the weight of authority, a railroad company cannot acquire a right of way by dedication in the proper sense of the term.⁶

3. Acquisition by Right of Eminent Domain. — The principles relating to the acquisition of rights of way by railroad companies through condemnation proceedings, in the exercise of the right of eminent domain, have been fully treated elsewhere.⁷

4. Acquisition by Purchase — a. IN GENERAL. — It is well settled that a railroad company may acquire its right of way by purchase as well as by exercise of the right of eminent domain.⁸ A grant of a right of way finds a valuable consideration in the benefit to the grantor's land arising from the

A Donation of a Right of Way Procured by Fraud or false pretenses is ineffectual, and the railroad company acquires no title or rights thereunder. *Provost v. Morgan's Louisiana, etc., R. Co.*, 42 La. Ann. 809; *Henderson v. San Antonio, etc., R. Co.*, 17 Tex. 560, 67 Am. Dec. 675.

Use of Land Other than That Donated. — Where the railroad company builds its road across a tract of land other than that donated to it by the owner, the latter may proceed for land damages under the statute. He is not estopped from such proceeding by representations and a tender of the land, made by a committee of citizens, with the understanding that he consented to the same, in the absence of proof that such committee was authorized to act as his agent. *Chicago, etc., R. Co. v. Estes*, 71 Iowa 603.

1. Acquisition by Prescription or Adverse Possession — United States. — *Texas, etc., R. Co. v. Scott*, 41 U. S. App. 624, 77 Fed. Rep. 726; *Scott v. Texas, etc., R. Co.*, (C. C. A.) 94 Fed. Rep. 340.

Colorado. — *Brinker v. Union Pac., etc., R. Co.*, 11 Colo. App. 166.

Illinois. — *Waggoner v. Wabash R. Co.*, 185 Ill. 154; *East St. Louis, etc., R. Co. v. Nugent*, 147 Ill. 254.

Indiana. — *Sherlock v. Louisville, etc., R. Co.*, 115 Ind. 22.

Kentucky. — *Fortune v. Chesapeake, etc., R. Co.*, (Ky. 1900) 58 S. W. Rep. 711, 22 Ky. L. Rep. 749.

Maine. — *Perkins v. Maine Cent. R. Co.*, 72 Me. 95.

Mississippi. — *Le Blanc v. Illinois Cent. R. Co.*, 72 Miss. 669.

Nebraska. — *Hanlon v. Union Pac. R. Co.*, 40 Neb. 52; *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627; *Omaha, etc., R. Co. v. Rickards*, 38 Neb. 847.

Pennsylvania. — *Lawrence's Appeal*, 78 Pa. St. 365.

Texas. — *Texas, etc., R. Co. v. Gaines*, (Tex. Civ. App. 1894) 27 S. W. Rep. 266.

Acquirement of Railroad Right of Way in Street by Prescription. — See *New Castle v. Lake Erie, etc., R. Co.*, 155 Ind. 18; *Indianapolis, etc., R. Co. v. Ross*, 47 Ind. 25; *St. Paul, etc., R.*

Co. v. Duluth, 73 Minn. 270; *St. Paul, etc., R. Co. v. Hinckley*, 53 Minn. 398.

In *North Carolina* it has been held that a railroad company cannot acquire its right of way by prescription. *Narron v. Wilmington, etc., R. Co.*, 122 N. Car. 856. But see *Purifoy v. Richmond, etc., R. Co.*, 108 N. Car. 100; *Carolina Cent. R. Co. v. McCaskill*, 94 N. Car. 747.

2. Acquirement by Reservation in Deed. — *Grennan v. McGregor*, 78 Cal. 258.

3. Exchange of Lands. — *Union Pac. R. Co. v. McAlpine*, 129 U. S. 305.

4. Company Not Confined to One Method Exclusively. — A railroad right of way may be acquired partly by deed and partly by condemnation, *Gray v. Burlington, etc., R. Co.*, 37 Iowa 119; or partly by grant from a city and partly by purchase from a private individual, *Morgan v. Des Moines Union R. Co.*, 113 Iowa 561.

5. Acquirement of Temporary Right by Lease. — *Hastings v. North Eastern R. Co.*, (1898) 2 Ch. 674, 67 L. J. Ch. 590, affirmed (1899) 1 Ch. 656, 68 L. J. Ch. 315; *Avery v. Kansas City, etc., R. Co.*, 113 Mo. 561; *Dunstan v. Northern Pac. R. Co.*, 2 N. Dak. 46; *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67.

Lease from Tenants in Common. — Where a railway company obtained a lease from five out of six tenants in common, an injunction to restrain the dissenting tenant from removing rails, laid by the company on the land, was refused. *Durham, etc., R. Co. v. Wawn*, 3 Beav. 119, 2 R. & Can. Cas. 395.

6. Cannot Acquire by Dedication. — *Lake Erie, etc., R. Co. v. Whitham*, 155 Ill. 514, 46 Am. St. Rep. 355; *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303; *Minneapolis, etc., R. Co. v. Marble*, 112 Mich. 4; *Currie v. Natchez, etc., R. Co.*, 61 Miss. 725. *Contra*, *Texas, etc., R. Co. v. Sutor*, 56 Tex. 496. See also the title DEDICATION, vol. 9, p. 20.

7. See the title EMINENT DOMAIN, vol. 10, p. 1043.

8. May Acquire Right of Way by Purchase. — *McClure v. Missouri River, etc., R. Co.*, 9 Kan. 373; *Munson v. Syracuse, etc., R. Co.*, 103 N. Y. 58; *Matter of Niagara Falls, etc., R.*

construction of the road,¹ or in the promise of the company to erect a depot,² or to give to the grantor a free pass over the road.³ In the absence of statute no one other than the owner of the fee can convey a right of way to a railroad. A deed from a mere intruder is void.⁴ Where the title acquired by purchase is defective, but the company has entered upon the land and constructed its road, a perfect title may subsequently be acquired by an exercise of the right of eminent domain.⁵

Construction of Grants. — A conveyance of a right of way to a railroad company is to be construed reasonably, and in the light of surrounding circumstances.⁶

Vendor's Lien. — A person who conveys a right of way to a railroad has a lien on the road for the purchase price,⁷ and also for the company's failure to comply with the provisions of the contract of sale.⁸

Contract Contrary to Public Policy. — A contract by a railroad company for a right of way, the plain purpose of which is to secure for itself the sole access to certain places to the exclusion of all other railroads, being contrary to the policy of the law, will not be upheld.⁹

b. CONTRACT FOR CONVEYANCE. — A railroad company may also enter into a contract or agreement for a conveyance of a right of way.¹⁰ Such a contract is binding upon the landowner where the company has acted there-

Co., 46 Hun (N. Y.) 94; Williamsport, etc., R. Co. v. Philadelphia, etc., R. Co., 141 Pa. St. 407; Chamberlain v. Northeastern R. Co., 41 S. Car. 399, 44 Am. St. Rep. 717; State v. Boston, etc., R. Co., 25 Vt. 433.

1. Construction of Road Valuable Consideration. — Charleston, etc., R. Co. v. Leech, 33 S. Car. 175, 26 Am. St. Rep. 667; Houston, etc., R. Co. v. McKinney, 55 Tex. 176; Matson v. Port Townsend Southern R. Co., 9 Wash. 449.

Cancellation of Deed for Failure of Consideration. — In Savannah, etc., R. Co. v. Atkinson, 94 Ga. 750, it was held that a landowner who had conveyed a right of way to a railroad company in consideration of the construction of the railroad was entitled to a cancellation of the deed on failure of the company to build the road as agreed. And see Atlanta, etc., R. Co. v. Hodnett, 36 Ga. 669. But to the contrary see Moseley v. Chicago, etc., R. Co., 57 Neb. 636.

2. Conveyance in Consideration of Erection of Depot. — Watterson v. Allegheny Valley R. Co., 74 Pa. St. 208.

3. Conveyance in Consideration of Free Pass. — Helton v. St. Louis, etc., R. Co., 25 Mo. App. 322.

4. No Valid Conveyance Except from Owner of Fee. — Tapert v. Detroit, etc., R. Co., 50 Mich. 267; Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456; Covert v. Pittsburgh, etc., R. Co., 18 Pa. Super. Ct. 541.

Conveyance by Tenant for Life held valid under Canadian statute. See Midland R. Co. v. Young, 22 Can. Sup. Ct. 190.

As to Power of Testamentary Trustees in England to convey lands to railroad company, see Peters v. Lewes, etc., R. Co., 16 Ch. D. 713, 18 Ch. D. 429.

A Conveyance by One Tenant in Common is valid as to his interest in the estate, but passes no fee, and confers no rights as against his cotenant. Draper v. Williams, 2 Mich. 536.

5. Imperfect Title Cured by Condemnation of Land. — Oregon R., etc., Co. v. Mosier, 14 Oregon 519, 58 Am. Rep. 321. And see Detroit, etc., R. Co. v. Brown, 37 Mich. 533.

6. Conveyance Construed Reasonably. — Newygo Mfg. Co. v. Chicago, etc., R. Co., 64 Mich. 114. And see the title INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

Agreement Prepared by Railroad Company construed adversely to such company in case of doubt. Lockwood v. Ohio River R. Co., (C. C. A.) 103 Fed. Rep. 243.

7. Lien for Purchase Price. — Central Trust Co. v. Bridges, 16 U. S. App. 115; Smith Bridge Co. v. Bowman, 41 Ohio St. 37, 52 Am. Rep. 67; Dayton, etc., R. Co. v. Lewton, 20 Ohio St. 401; Crosby v. Morristown, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 507.

Action at Law to Recover Purchase Price. — Where the company fails to pay the purchase price the owner of the land may have an action at law to recover it; he is not confined to the remedy by assessment of damages. Kansas Pac. R. Co. v. Hopkins, 18 Kan. 494.

8. Lien for Failure to Comply with Provisions of Contract. — Davies v. St. Louis, etc., R. Co., 56 Iowa 192; Varner v. St. Louis, etc., R. Co., 55 Iowa 677; Helton v. St. Louis, etc., R. Co., 25 Mo. App. 322.

9. Contract Excluding Other Railroads Illegal. — Kettle River R. Co. v. Eastern R. Co., 41 Minn. 461; Skrainka v. Scharringbausen, 8 Mo. App. 523; West Virginia Transp. Co. v. Ohio River Pipe Line Co., 22 W. Va. 626, 46 Am. Rep. 527.

10. Power to Contract for Purchase. — See Dayton, etc., R. Co. v. Lewton, 20 Ohio St. 401.

A Company Which Has Not Secured Its Charter, nor filed its articles of association, has no power to enter into such a contract. Gage v. Newmarket R. Co., 18 Q. B. 457, 83 E. C. L. 457; Boston, etc., R. Co. v. Babcock, 3 Cush. (Mass.) 228.

Statements by the Landowner to a Committee of Citizens, who are not acting as agents of the company, of the conditions upon which he will grant a right of way to the company, do not constitute a contract to convey such right of way. Chicago, etc., R. Co. v. Estes, 71 Iowa 603.

upon by entering and constructing its road,¹ and, in a proper case, may be specifically enforced in equity.² In case of a breach of the contract by the railroad company the remedy of the landowner is by an action at law for damages.³

c. RESERVATIONS IN GRANTS. — Reservations embodied in conveyances of rights of way to railroad companies are to be construed in accordance with the general rules governing the construction of exceptions and reservations in deeds.⁴

d. CONDITIONS AND COVENANTS IN GRANTS. — A grant of a right of way to a railroad company may be upon condition, either precedent or subsequent,⁵ or may contain certain covenants and agreements on the part of the company, those most frequently met with being covenants to make and maintain crossings,⁶ or to erect and maintain depots.⁷ Such conditions are binding upon the railroad company as long as it retains and uses the land granted,⁸ and in the case of covenants running with the land the successors of

1. Executed Contract Binding on Landowner. — *Sands v. Kagey*, 150 Ill. 109; *Sands v. Wacaser*, 149 Ill. 530; *Conwell v. Springfield*, etc., R. Co., 81 Ill. 232; *Cherokee*, etc., R. Co. v. *Renken*, 77 Iowa 316; *Ross v. Chicago*, etc., R. Co., 77 Ill. 127. And see *Macon*, etc., R. Co. v. *Bowen*, 45 Ga. 531.

An Executory Contract for the Conveyance of a Right of Way does not constitute a bar to a petition by the landowner for the assessment of damages resulting from the appropriation of his land by the railroad company. *Whitman v. Boston*, etc., R. Co., 3 Allen (Mass.) 133.

Contract Procured by Assignment After Construction of Road. — Where a railroad company appropriates land under the power of eminent domain, and builds its road thereon without reference to any contract for the conveyance of a right of way, it cannot defeat the landowner's right to the assessed damages by setting up a contract for conveyance which it has obtained by assignment from another company since the building of its road. *Oregon R.*, etc., Co. v. *Day*, 3 Wash. Ter. 252.

2. Contract May Be Specifically Enforced. — *Telford v. Chicago*, etc., R. Co., 172 Ill. 559; *Purinton v. Northern Illinois R. Co.*, 46 Ill. 297; *Minneapolis*, etc., R. Co. v. *Cox*, 76 Iowa 306, 14 Am. St. Rep. 216; *Ottumwa*, etc., R. Co. v. *McWilliams*, 71 Iowa 164; *Chicago*, etc., R. Co. v. *Swinney*, 38 Iowa 182; *Paterson v. Buffalo*, etc., R. Co., 17 Grant Ch. (U. C.) 521. And see the title SPECIFIC PERFORMANCE.

Specific Performance Refused Where Contract Was Procured by Fraud. — *Grand Tower*, etc., R. Co. v. *Walton*, 150 Ill. 428.

3. Landowner Entitled to Damages for Breach of Contract by Company. — *Minneapolis*, etc., R. Co. v. *Cox*, 76 Iowa 306, 14 Am. St. Rep. 216; *Gallagher v. Fayette County R. Co.*, 38 Pa. St. 102.

4. Construction and Effect of Reservations in Conveyances to Railroads. — See *C.*, etc., R. Co. v. *Barnett*, 7 Ky. L. Rep. 455; *Newaygo Mfg. Co. v. Chicago*, etc., R. Co., 64 Mich. 114; *Montana Ore Purchasing Co. v. Boston*, etc., Consol. Copper, etc., Min. Co., 20 Mont. 533; *Phillips v. Pittsburgh*, etc., R. Co., 189 Pa. St. 309; *Troy*, etc., R. Co. v. *Potter*, 42 Vt. 265, 1 Am. Rep. 325.

5. Grant May Be on Condition Precedent or Subsequent. — *Gray v. Chicago*, etc., R. Co., 189 Ill. 400; *Cleveland*, etc., R. Co. v. *Coburn*, 91 Ind. 557; *Waldron v. Toledo*, etc., R. Co., 55 Mich. 420; *Hannibal*, etc., R. Co. v. *Frowein*, 163 Mo. 1; *Tinkham v. Erie R. Co.*, 53 Barb. (N. Y.) 393; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *New York*, etc., R. Co. v. *Providence*, 16 R. I. 746; *Mouat v. Seattle*, etc., R. Co., 16 Wash. 84.

For the Construction and Effect of Conditions and Covenants in General see the titles CONDITIONS, vol. 6, p. 499; COVENANTS, vol. 8, p. 43; INTERPRETATION AND CONSTRUCTION, vol. 17, p. 1.

6. Covenants to Construct and Maintain Crossings. — *Elizabethtown*, etc., R. Co. v. *Killen*, Ky. (1899) 50 S. W. Rep. 1108; *Hall v. Clearfield*, etc., R. Co., 168 Pa. St. 64. And see the title CROSSINGS, vol. 8, p. 335.

7. Covenants to Erect and Maintain Depots. — *Texas*, etc., R. Co. v. *Scott*, 41 U. S. App. 624; *Little Rock*, etc., R. Co. v. *Birnie*, 59 Ark. 66; *Goyeau v. Great Western R. Co.*, 25 Grant Ch. (U. C.) 62.

8. Conditions Binding upon Railroad Company — *Georgia*. — *Chattanooga*, etc., R. Co. v. *Davis*, 89 Ga. 708; *Georgia R.*, etc., Co. v. *Macon*, 86 Ga. 585.

Illinois. — *Lyman v. Suburban R. Co.*, 190 Ill. 320; *Gray v. Chicago*, etc., R. Co., 189 Ill. 400.

Indiana. — *Louisville*, etc., R. Co. v. *Power*, 119 Ind. 269; *Indiana*, etc., R. Co. v. *Finnell*, 116 Ind. 414; *Indiana*, etc., R. Co. v. *Adamson*, 114 Ind. 282.

Iowa. — *Gray v. Burlington*, etc., R. Co., 37 Iowa 119.

Pennsylvania. — *Semple v. Cleveland*, etc., R. Co., 172 Pa. St. 369.

Tennessee. — *Kansas City*, etc., R. Co. v. *Beeler*, 90 Tenn. 548.

Texas. — *Howe v. Harding*, 84 Tex. 74; *Galveston*, etc., R. Co. v. *Haas*, (Tex. Civ. App. 1896) 37 S. W. Rep. 167.

As to What Constitutes a Sufficient Compliance with Conditions. — See *Union Pac. R. Co. v. Cook*, (C. C. A.) 98 Fed. Rep. 281; *Behlow v. Southern Pac. R. Co.*, 130 Cal. 16; *Lester v. Georgia*, etc., R. Co., 90 Ga. 802; *Perry v. Lehigh Valley R. Co.*, (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 515.

the original company are also bound thereby.¹ Whether or not a certain covenant runs with the land is to be decided by the general rules governing the construction of such agreements.² Breach of a condition subsequent by the company will defeat the grant,³ but breach of a mere covenant or stipulation does not work a forfeiture of the estate,⁴ the remedy of the landowner in such case being by an action at law for damages,⁵ or, according to some authorities, by a suit in equity for specific performance.⁶

5. Acquisition by License. — A railroad company may enter upon lands and construct its road under a license from the owner.⁷ Such license constitutes a defense to an action of trespass against the company for acts properly performed thereunder, while it is in force,⁸ but it may be revoked at the

1. Successors of Railroad Company Bound by Covenants. — *Chappell v. New York, etc., R. Co.*, 62 Conn. 195; *Toledo, etc., R. Co. v. Cosand*, 6 Ind. App. 222; *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494; *Ecton v. Lexington, etc., R. Co.*, (Ky. 1900) 59 S. W. Rep. 864; *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 38 Am. St. Rep. 570.

2. As to What Covenants Do or Do Not Run with the Land, see in general the title COVENANTS, vol. 8, p. 43, and also the following railroad cases: *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422; *Lyford v. North Pac. Coast R. Co.*, 92 Cal. 93; *Midland R. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189; *Lake Erie, etc., R. Co. v. Lee*, 14 Ind. App. 328; *Elizabethtown, etc., R. Co. v. Killen*, (Ky. 1899) 50 S. W. Rep. 1108; *Elizabethtown, etc., R. Co. v. Wright*, (Ky. 1899) 50 S. W. Rep. 1105; *Kettle River R. Co. v. Eastern R. Co.*, 41 Minn. 461; *Kelly v. Nypano R. Co.*, 23 Pa. Co. Ct. 177; *Hammond v. Port Royal, etc., R. Co.*, 15 S. Car. 573.

3. Grant Defeated by Breach of Condition Subsequent. — *Ingalls v. Byers*, 94 Ind. 134; *Cleveland, etc., R. Co. v. Coburn*, 91 Ind. 557; *Gratz v. Highland Scenic R. Co.*, 165 Mo. 211; *Morrill v. Wabash, etc., R. Co.*, 96 Mo. 174. And see the title CONDITIONS, vol. 6, p. 499.

Qualification of Rule. — In *McClellan v. St. Louis, etc., R. Co.*, 103 Mo. 295, the court said "A landowner cannot, by his deed or acquiescence or license, induce a railroad to build its road, make permanent and costly improvements upon the strength of his conduct, and then, for the breach of some condition subsequent, such as the erection of fences, constructing cattle guards, or making, as in this case, an underground passway, maintain ejectment."

4. No Forfeiture for Breach of Covenant. — *Louisville, etc., R. Co. v. Taylor*, 96 Ky. 241; *Gratz v. Highland Scenic R. Co.*, 165 Mo. 211; *Roanoke Invest. Co. v. Kansas City, etc., R. Co.*, 108 Mo. 50; *Hornback v. Cincinnati, etc., R. Co.*, 20 Ohio St. 81; *Chicago, etc., R. Co. v. Titterington*, 84 Tex. 218, 31 Am. St. Rep. 39; *Beaumont Pasture Co. v. Sabine, etc., R. Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 543. And see the title COVENANTS, vol. 8, p. 43.

5. Breach of Covenant Remediable by Action for Damages. — *Sappington v. Little Rock, etc., R. Co.*, 37 Ark. 23; *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719; *Lake Erie, etc., R. Co. v. Lee*, 14 Ind. App. 328; *Ecton v. Lexington, etc., R. Co.*, (Ky. 1900) 59 S. W. Rep. 864; *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480; *Kemble v. Phila-*

delphia, etc., R. Co., 140 Pa. St. 14; *Pusey v. Wright*, 31 Pa. St. 387.

As to the Measure of Damages in such cases, see *Mobile, etc., R. Co. v. Gilmer*, 85 Ala. 422; *Lake Erie, etc., R. Co. v. Griffin*, 25 Ind. App. 138; *Hull v. Chicago, etc., R. Co.*, 65 Iowa 713; *Louisville, etc., R. Co. v. Neafus*, 93 Ky. 53; *Cincinnati Southern R. Co. v. Hudson*, 88 Ky. 480; *Oursler v. Baltimore, etc., R. Co.*, 60 Md. 358; *Griswold v. St. Louis, etc., R. Co.*, 8 Mo. App. 582.

6. Covenants May Be Specifically Enforced in Equity. — *Windham Cotton Mfg. Co. v. Hartford, etc., R. Co.*, 23 Conn. 373; *Gray v. Burlington, etc., R. Co.*, 37 Iowa 119; *Hubbard v. Kansas City, etc., R. Co.*, 63 Mo. 68.

For Cases in Which Specific Performance Was Refused, see *Cook v. North, etc., R. Co.*, 50 Ga. 211; *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Dimmick v. Delaware, etc., R. Co.*, 180 Pa. St. 468; *Dickson v. Covert*, 17 Grant Ch. (U. C.) 321; *Hill v. Buffalo, etc., R. Co.*, 10 Grant Ch. (U. C.) 506.

7. Right to Enter upon Land May Be Acquired by License. — *Campbell v. Indianapolis, etc., R. Co.*, 110 Ind. 490; *Louisville, etc., R. Co. v. Thompson*, 18 B. Mon. (Ky.) 735; *Harlow v. Marquette, etc., R. Co.*, 41 Mich. 336; *Mathews v. St. Paul, etc., R. Co.*, 18 Minn. 434; *Hargis v. Kansas City, etc., R. Co.*, 100 Mo. 210; *Blaisdell v. Portsmouth, etc., R. Co.*, 51 N. H. 483; *Miller v. Auburn, etc., R. Co.*, 6 Hill (N. Y.) 63; *Cayuga R. Co. v. Niles*, 13 Hun (N. Y.) 170; *Tompkins v. Augusta, etc., R. Co.*, 21 S. Car. 420; *Tutt v. Port Royal, etc., R. Co.*, 16 S. Car. 369; *State v. Boston, etc., R. Co.*, 25 Vt. 433.

Parol Evidence Not Admissible to Vary License in Writing. — *Burch v. Augusta, etc., R. Co.*, 80 Ga. 296.

A Landlord Cannot License the Building of a Railroad across lands in the possession of his tenant, without the consent of the latter. *Crowell v. New Orleans, etc., R. Co.*, 61 Miss. 631.

Where the License Is Conditional the railroad company must observe the conditions imposed. *Unangst's Appeal*, 55 Pa. St. 128.

A License Is Not to Be Inferred from the mere fact that a landowner, who has knowledge that a railroad company has entered upon his land, does not object to such entry. *Baker v. Chicago, etc., R. Co.*, 57 Mo. 265.

8. License a Defense to Action of Trespass. — *Currie v. Natchez, etc., R. Co.*, 61 Miss. 725; *New Orleans, etc., R. Co. v. Moye*, 39 Miss. 374; *Blaisdell v. Portsmouth, etc., R. Co.*, 51

pleasure of the licensor,¹ unless coupled with an interest.² Where the railroad company has made expensive improvements of a permanent character, so that a revocation would act as a fraud upon it, equity will enforce the license against the landowner,³ or will at least restrain the revocation until condemnation proceedings can be had.⁴

6. Acquisition by Implied Grant. — The accepted doctrine, in most jurisdictions, now is that where a railroad company proceeds to build its road upon land to which it has not acquired title by condemnation or conveyance, the owner may have his action for damages or for the value of the land,⁵ or may maintain ejectment or other possessory action,⁶ or may enjoin the company from appropriating or using such land, provided he proceeds with reasonable

N. H. 483. But to the contrary see *Baltimore*, etc., R. Co. v. *Algire*, 63 Md. 319.

1. License Revocable When Not Coupled with Interest. — *Minneapolis*, etc., R. Co. v. *Marble*, 112 Mich. 4; *Minneapolis Western R. Co. v. Minneapolis*, etc., R. Co., 58 Minn. 128; *Minneapolis Mill Co. v. Minneapolis*, etc., R. Co., 51 Minn. 304; *Kremer v. Chicago*, etc., R. Co., 51 Minn. 15, 38 Am. St. Rep. 468; *Currie v. Natchez*, etc., R. Co., 61 Miss. 725; *Blaisdell v. Portsmouth*, etc., R. Co., 51 N. H. 483; *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Richmond*, etc., R. Co. v. *Durham*, etc., R. Co., 104 N. Car. 658.

License from State Revocable for Delay of Railroad Company. — *San Pedro v. Southern Pac. R. Co.*, 101 Cal. 333.

Parol License Not Revocable Where Assessed Damages Have Also Been Paid. — *Slocumb v. Chicago*, etc., R. Co., 57 Iowa 675.

Breach of Conditions Subsequent by Company Not Ground for Revocation. — *Morris v. Indianapolis*, etc., R. Co., 76 Ill. 522.

2. License Coupled with Interest Not Revocable. — *New Jersey Midland R. Co. v. Van Syckle*, 37 N. J. L. 496; *Williamstown*, etc., R. Co. v. *Battle*, 66 N. Car. 540.

3. License Enforced Where Revocation Would Operate as a Fraud. — *Campbell v. Indianapolis*, etc., R. Co., 110 Ind. 490; *New Orleans*, etc., R. Co. v. *Moye*, 39 Miss. 374; *Texas*, etc., R. Co. v. *Jarrell*, 60 Tex. 267; *Ft. Worth*, etc., R. Co. v. *Sweatt*, 20 Tex. Civ. App. 543; *Taylor v. Chicago*, etc., R. Co., 63 Wis. 327.

Compensation a Condition Precedent to Specific Performance. — Where the license was granted with the understanding that the landowner should receive compensation for the use of his land, the railroad company cannot insist upon specific performance without making such compensation. *Rome*, etc., R. Co. v. *Gleason*, 42 N. Y. App. Div. 530.

4. Action by Landowner Enjoined until Land Can Be Condemned. — *Baltimore*, etc., R. Co. v. *Algire*, 63 Md. 319. And see *Texas*, etc., R. Co. v. *Sutor*, 56 Tex. 496.

5. Landowner Entitled to Damages or Value of Land — *Illinois*. — *Chicago*, etc., R. Co. v. *Davis*, 86 Ill. 20.

Indiana. — *Midland R. Co. v. Smith*, 125 Ind. 509; *Bloomfield R. Co. v. Grace*, 112 Ind. 128.

Kentucky. — *Evansville*, etc., R. Co. v. *Grady*, 6 Bush (Ky.) 145.

Louisiana. — *Lawrence v. Morgan's Louisiana*, etc., R., etc., Co., 39 La. Ann. 427; *St. Julien v. Morgan*, etc., R. Co., 35 La. Ann. 924.

Maine. — *Hall v. Pickering*, 40 Me. 548.

Michigan. — *Grand Rapids*, etc., R. Co. v. *Chesebro*, 74 Mich. 466.

Mississippi. — *Natchez*, etc., R. Co. v. *Currie*, 62 Miss. 506.

Missouri. — *Baker v. Chicago*, etc., R. Co., 57 Mo. 265; *McReynolds v. Kansas City*, etc., R. Co., 34 Mo. App. 581.

Pennsylvania. — *Oliver v. Pittsburgh*, etc., R. Co., 131 Pa. St. 408, 17 Am. St. Rep. 814; *McClinton v. Pittsburgh*, etc., R. Co., 66 Pa. St. 404.

South Carolina. — *Tompkins v. Augusta*, etc., R. Co., 21 S. Car. 420.

Texas. — *Rio Grande*, etc., R. Co. v. *Ortiz*, 75 Tex. 602; *International*, etc., R. Co. v. *Benitos*, 59 Tex. 326; *Galveston*, etc., R. Co. v. *Pfeuffer*, 56 Tex. 66.

Wisconsin. — *Lyon v. Green Bay*, etc., R. Co., 42 Wis. 538; *Sherman v. Milwaukee*, etc., R. Co., 40 Wis. 645.

Canada. — *Martini v. Gzowski*, 13 U. C. Q. B. 298.

As to the Measure of Damages in such cases, see *Houston*, etc., R. Co. v. *Adams*, 63 Tex. 200; *Texas*, etc., R. Co. v. *Matthews*, 60 Tex. 215.

The Right to Damages May Be Lost by long continued acquiescence in the use of the land. *Texas*, etc., R. Co. v. *Sutor*, 59 Tex. 20.

The Company Cannot Escape Its Liability for Damages by abandoning the land, after it has used it for a number of years. *Ragan v. Kansas City*, etc., R. Co., 144 Mo. 623.

6. Ejectment or Other Possessory Action Lies — *Indiana*. — *Bravard v. Cincinnati*, etc., R. Co., 115 Ind. 1.

Iowa. — *Conger v. Burlington*, etc., R. Co., 41 Iowa 419.

Missouri. — *Dodd v. St. Louis*, etc., R. Co., 108 Mo. 581; *Walker v. Chicago*, etc., R. Co., 57 Mo. 275.

Nebraska. — *Hull v. Chicago*, etc., R. Co., 21 Neb. 371.

Pennsylvania. — *Allegheny Valley R. Co. v. Colwell*, (Pa. 1888) 15 Atl. Rep. 927; *Richards v. Buffalo*, etc., R. Co., 137 Pa. St. 524, 21 Am. St. Rep. 892; *Oliver v. Pittsburgh*, etc., R. Co., 131 Pa. St. 408, 17 Am. St. Rep. 814; *McClinton v. Pittsburgh*, etc., R. Co., 66 Pa. St. 404.

Texas. — *Hays v. Texas*, etc., R. Co., 62 Tex. 397; *Galveston*, etc., R. Co. v. *Pfeuffer*, 56 Tex. 66; *Texas*, etc., R. Co. v. *Hays*, 3 Tex. App. Civ. Cas., § 58.

Wisconsin. — *Lyon v. Green Bay*, etc., R. Co., 42 Wis. 538; *Sherman v. Milwaukee*, etc., R. Co., 40 Wis. 645.

promptitude;¹ but that if the owner stands by and acquiesces, until the company has expended its money and constructed its road across his land, and until the road at that point has become a part of its railroad line, whereby the public, as well as the company, has acquired an interest in the maintenance of the enterprise, he forfeits every remedy except that of an action for compensation or damages. In such a case the railroad company is said to acquire its right of way by implied grant.²

7. Width and Location of Right of Way. — The width of the right of way which a railroad company may acquire by condemnation proceedings is generally fixed by statute.³ Where the land is acquired by purchase, the deed or agreement may definitely fix the width of the strip conveyed, in which case the company will not be allowed to take a greater width,⁴ or the extent of the land to be taken, within certain limits, may be left to the discretion of the company.⁵ According to some decisions, where no width is

Execution Stayed to Permit Condemnation of Land. — Where judgment is rendered against the company in an action of ejectment, execution will be stayed until the land can be condemned. *Allegheny Valley R. Co. v. Colwell*, (Pa. 1888) 15 Atl. Rep. 927; *Richards v. Buffalo, etc., R. Co.*, 137 Pa. St. 524, 21 Am. St. Rep. 892; *Owensboro, etc., R. Co. v. Harrison*, 94 Ky. 408.

1. Owner May Enjoin Use of Land. — *Imlay v. Union Branch R. Co.*, 26 Conn. 259; *Bravard v. Cincinnati, etc., R. Co.*, 115 Ind. 1; *Morris, etc., R. Co. v. Hudson Tunnel R. Co.*, 25 N. J. Eq. 384; *Lyon v. Green Bay, etc., R. Co.*, 42 Wis. 538; *Vilas v. Milwaukee, etc., R. Co.*, 15 Wis. 233; *Davis v. La Crosse, etc., R. Co.*, 12 Wis. 16.

For Instances in Which Injunctions Were Refused, see the following cases: *Deere v. Guest*, 1 Myl. & C. 516, 6 L. J. Ch. 69; *Midland R. Co. v. Smith*, 135 Ind. 348; *Bentley v. Wabash, etc., R. Co.*, 61 Iowa 229; *Dillon v. Chicago, etc., R. Co.*, 58 Neb. 472; *Erie R. Co. v. Delaware, etc., R. Co.*, 21 N. J. Eq. 283; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Andrews v. Farmers' L. & T. Co.*, 22 Wis. 288; *Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443.

2. Estoppel to Maintain Ejectment or Enjoin Use of Land — *United States*. — *Pryzbylowicz v. Missouri River R. Co.*, 3 McCreary (U. S.) 586, 17 Fed. Rep. 492.

Arkansas. — *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491.

Georgia. — See *Atlanta, etc., R. Co. v. Barker*, 105 Ga. 534.

Indiana. — *Louisville, etc., R. Co. v. Berkey*, 136 Ind. 591; *Bravard v. Cincinnati, etc., R. Co.*, 115 Ind. 1; *Midland R. Co. v. Smith*, 113 Ind. 233; *Indiana, etc., R. Co. v. Allen*, 113 Ind. 581; *Evansville, etc., R. Co. v. Nye*, 113 Ind. 223.

Iowa — *Des Moines, etc., R. Co. v. Lynd*, 91 Iowa 368.

Kentucky. — *Louisville, etc., R. Co. v. Stephens*, 96 Ky. 401, 49 Am. St. Rep. 303.

Louisiana. — *Lawrence v. Morgan's Louisiana, etc., R. Co.*, 39 La. Ann. 427; *St. Julien v. Morgan, etc., R. Co.*, 35 La. Ann. 924; *Bourdier v. Morgan's Louisiana, etc., R. Co.*, 35 La. Ann. 947.

Missouri. — *Scarritt v. Kansas City, etc., R. Co.*, 127 Mo. 298; *Webster v. Kansas City, etc., R. Co.*, 116 Mo. 114; *Planet Property, etc., Co.*

v. St. Louis, etc., R. Co., 115 Mo. 613; *Avery v. Kansas City, etc., R. Co.*, 113 Mo. 561; *Dodd v. St. Louis, etc., R. Co.*, 108 Mo. 581; *McClellan v. St. Louis, etc., R. Co.*, 103 Mo. 295; *Provolt v. Chicago, etc., R. Co.*, 57 Mo. 256.

Ohio. — *Goodin v. Cincinnati, etc., Canal Co.*, 18 Ohio St. 169, 98 Am. Dec. 95; *Cleveland, etc., R. Co. v. Reid*, 6 Ohio Dec. 273.

South Carolina. — *Tompkins v. Augusta, etc., R. Co.*, 21 S. Car. 420.

Vermont. — See *Austin v. Rutland R. Co.*, 45 Vt. 215.

Wisconsin. — *Pettibone v. La Crosse, etc., R. Co.*, 14 Wis. 443.

What Conduct Does Not Amount to an Estoppel. — See *Holloway v. Louisville, etc., R. Co.*, 92 Ky. 244; *Louisville, etc., R. Co. v. Hess*, 92 Ky. 407; *Walker v. Chicago, etc., R. Co.*, 57 Mo. 275.

When Rule as to Estoppel Does Not Operate. — See *Scarritt v. Kansas City, etc., R. Co.*, 148 Mo. 676; *Bradley v. Missouri Pac. R. Co.*, 91 Mo. 493; *Maginnis v. Knickerbocker Ice Co.*, 112 Wis. 385.

3. Width Which May Be Condemned Fixed by Statute. — *Nashville, etc., R. Co. v. Hammond*, 104 Ala. 191; *Lower v. Chicago, etc., R. Co.*, 59 Iowa 563; *Stark v. Sioux City, etc., R. Co.*, 43 Iowa 501; *State v. Hudson Terminal R. Co.*, 46 N. J. L. 289; *Childs v. Central R. Co.*, 33 N. J. L. 323.

Company Not Obligated to Take Maximum Width Permitted by Statute. — *Jones v. Erie, etc., R. Co.*, 169 Pa. St. 333, 47 Am. St. Rep. 916.

Width Limited Strictly to That Shown by Record in Condemnation Proceedings. — *State v. Armell*, 8 Kan. 288.

A Special Charter Provision as to the width of the way which a railroad company may acquire will prevail over a provision of the general law limiting the company to a lesser width. *Eaton v. European, etc., R. Co.*, 59 Me. 520, 8 Am. Rep. 430.

4. Width Determined by Conveyance or Agreement. — *Lake Erie, etc., R. Co. v. Michener*, 117 Ind. 465; *Dargan v. Carolina Cent. R. Co.*, 113 N. Car. 596.

5. Width, Not Exceeding Charter Limits, in Discretion of Company. — *Indianapolis, etc., R. Co. v. Rayl*, 69 Ind. 424.

Grant of Way with Right to Use Additional Land if Necessary. — *Gulf, etc., R. Co. v. Richards*, 83 Tex. 203. And see *Day v. Atlantic, etc., R. Co.*, 41 Ohio St. 392.

specified in the conveyance, it will be presumed that the strip conveyed is of the statutory width, which might have been acquired under the right of eminent domain.¹

Parol Evidence of the contemporaneous acts and declarations of the parties is admissible to fix the width of a right of way where the deed conveying the same is ambiguous or uncertain.²

Where the Land Is Acquired by Adverse Possession its width is limited to that occupied by the company during the prescriptive period.³

Location of Right of Way. — Where the deed conveying a right of way is indefinite as regards the location of the strip conveyed, the question is to be determined by an application of the general rules governing the construction of such instruments, due regard being had to the intent of the parties.⁴ In case of a deed conveying a strip through a certain tract of land, with no further description, the company has the right to choose its exact location,⁵ and no established right of way is acquired until the road is so located.⁶ The charter of the company may be referred to for the purpose of determining the location of its right of way.⁷ Boundaries fixed by a deed conveying the right of way do not shift with subsequent changes in the location of the track.⁸

8. Estate or Interest Acquired — *a.* **BY EMINENT DOMAIN.** — As a general rule a railroad company which acquires its right of way under the right of eminent domain takes an easement only, although in the absence of constitutional provisions to the contrary it may be authorized by statute to acquire a title in fee simple.⁹

b. **BY PURCHASE OR AGREEMENT.** — Likewise, where the land is obtained by purchase or agreement, the company generally takes an easement only,¹⁰

Grant of Right to Take As Much Land As Is Necessary. — *Nashville, etc., R. Co. v. Central Land Co.,* (Tenn. Ch. 1897) 48 S. W. Rep. 110; *Nashville, etc., R. Co. v. McReynolds,* (Tenn. Ch. 1898) 48 S. W. Rep. 258.

Grant of Land "Not Exceeding One Hundred Feet in Width." — Where a company, acting under a grant of a right of way not to exceed one hundred feet in width, occupies a narrower strip for a number of years, it cannot subsequently eject persons who have occupied land adjoining such strip with its acquiescence and under another deed from the landowner. *Vicksburg, etc., R. Co. v. Barrett,* 67 Miss. 579.

1. Statutory Width Presumed. — *Prather v. Western Union Tel. Co.,* 89 Ind. 501; *Jones v. Erie, etc., R. Co.,* 144 Pa. St. 629; *Delaware, etc., R. Co. v. Newton Coal Min. Co.,* 6 Kulp (Pa.) 21; *Nashville, etc., R. Co. v. McReynolds,* (Tenn. Ch. 1898) 48 S. W. Rep. 258. But to the contrary see *Nashville, etc., R. Co. v. Hammond,* 104 Ala. 191; *Ft. Wayne, etc., R. Co. v. Sherry,* 126 Ind. 334.

A Company Which Elects to Take Less than the Statutory Width cannot subsequently condemn a greater quantity as against a rival company which has purchased the land in question. *Joplin, etc., R. Co. v. Kansas City, etc., R. Co.,* 135 Mo. 549. And see *Mooney v. Rome R. Co.,* 76 Ga. 749.

2. Parol Evidence Admissible to Determine Width. — *Indianapolis, etc., R. Co. v. Lewis,* 119 Ind. 218; *Indianapolis, etc., R. Co. v. Reynolds,* 116 Ind. 356.

3. Width of Way Acquired by Adverse Possession. — *Brinker v. Union Pac., etc., R. Co.,* 11 Colo. App. 166; *Zahn v. Pittsburgh, etc., R. Co.,* 184 Pa. St. 66. And see *Purifoy v. Richmond, etc., R. Co.,* 108 N. Car. 100.

4. Indefinite Grants Construed. — *Owensboro, etc., R. Co. v. Barker,* (Ky. 1896) 37 S. W. Rep. 848; *Wood v. Michigan Air Line R. Co.,* 90 Mich. 334; *Jasper County Electric R. Co. v. Curtis,* 154 Mo., 10; *Belmer v. C., etc., R. Co.,* 9 Ohio Dec. (Reprint) 45, 10 Cinc. L. Bul. 232.

Parol Evidence Admissible to Determine Location. — *Pennsylvania R. Co. v. Holcroft,* 173 Pa. St. 496.

Construction of Road Not Enjoined Pending Controversy as to Location. — *Rainey v. Baltimore, etc., R. Co.,* 15 Fed. Rep. 767.

Conveyance After Construction of Road. — A conveyance which does not definitely locate the land conveyed is not void for uncertainty where the road has already been built on a certain line. *Olive v. Sabine, etc., R. Co.,* 11 Tex. Civ. App. 208.

5. Burrow v. Terre Haute, etc., R. Co., 107 Ind. 432.

6. Detroit, etc., R. Co. v. Forbes, 30 Mich. 165; *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.,* 126 N. Car. 254.

7. Reference to Charter to Determine Location of Right of Way. — *Jackson v. Dines,* 13 Colo. 90; *Waycross Air Line R. Co. v. Southern Pine Co.,* 111 Ga. 233.

8. King v. Norfolk, etc., R. Co., 90 Va. 210.

9. Estate or Interest Acquired by Eminent Domain. — For a full discussion of this subject with citation of authorities, see the title **EMINENT DOMAIN**, vol. 10, p. 1043.

10. Generally an Easement Where Acquired by Purchase. — *Chouteau v. Missouri Pac. R. Co.,* 122 Mo. 375; *McCutcheon v. Missouri Pac. R. Co.,* 72 Mo. App. 271; *Myers v. McGavock,* 30 Neb. 843, 42 Am. St. Rep. 627; *Nashville R. Co. v. McReynolds,* (Tenn. Ch. 1898) 48 S. W.

though it may acquire a title in fee when authorized by statute.¹ Whether it acquires a fee or simply an easement generally depends upon the terms of the conveyance or contract.² Thus, a deed which in terms conveys a "right of way" will be held to pass an easement;³ and the same is true of a deed which conveys the land for railroad purposes only and provides for reverter to the grantor in case it is not used for such purposes.⁴ In some cases, however, it has been held that the company only acquires an easement, even though the deed purports to convey a fee,⁵ or though the agreement to convey provides for the execution of such a deed by the grantor.⁶

Easement a Perpetual One. — The easement acquired for a right of way is generally unlimited as to time, and continues until terminated by release or abandonment.⁷

Right Exclusive as to Possession and Use. — A railroad company is entitled to the exclusive possession and use of its roadbed and right of way,⁸ and interference with this right, either by individuals or by other railroad corporations, may be restrained in equity.⁹ The owner of the fee may use his land in any manner which is not inconsistent with the rights of the railroad company,¹⁰ but any acts of his which tend to embarrass the company in the operation of the road will render him liable as a trespasser.¹¹

Purposes for Which Right of Way May Be Used. — Where the company has title in fee to its right of way, it may use the same in any manner which a private

Rep. 258; *East Tennessee, etc., R. Co. v. Telford*, 89 Tenn. 293; *Hill v. Western Vermont R. Co.*, 32 Vt. 68; *Williams v. Western Union R. Co.*, 50 Wis. 71.

Interest the Same Whether Acquired by Condemnation or Purchase. — *Smith v. Hall*, 103 Iowa 95.

1. May Acquire Fee. — *Norton v. London, etc., R. Co.*, 47 L. J. Ch. 859 (*affirmed* 13 Ch. D. 268); *Breckinridge v. Delaware, etc., R. Co.*, (N. J. 1895) 33 Atl. Rep. 800; *U. S. Pipe Line Co. v. Delaware, etc., R. Co.*, 62 N. J. L. 254; *Yates v. Van De Bogert*, 56 N. Y. 526; *Buffalo Pipe Line Co. v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 10 Abb. N. Cas. (N. Y.) 107; *Haislip v. Wilmington, etc., R. Co.*, 102 N. Car. 376; *Page v. Heineberg*, 40 Vt. 81. 94 Am. Dec. 378; *Atty.-Gen. v. Smith*, 109 Wis. 532.

Effect of Conveyance in Fee to Road Only Authorized to Acquire Easement. — *Atty.-Gen. v. Smith*, 109 Wis. 532.

Title Subsequently Acquired by Grantor Enures to Benefit of Company. — *Indianapolis, etc., R. Co. v. Rayl*, 69 Ind. 424.

2. Cincinnati, etc., R. Co. v. Geisel, 119 Ind. 77.

3. Deed Conveying "Right of Way" Passes Easement. — *Cincinnati, etc., R. Co. v. Geisel*, 119 Ind. 77; *Brown v. Young*, 69 Iowa 625; *Blakely v. Chicago, etc., R. Co.*, 46 Neb. 272; *Uhl v. Ohio River R. Co.*, (W. Va. 1902) 41 S. E. Rep. 340. But see *Louisville, etc., R. Co. v. Ballard*, 85 Ky. 307. 7 Am. St. Rep. 600.

4. Deed for Railway Purposes Only Conveys Easement. — *Douglass v. Thomas*, 103 Ind. 187; *Lake Erie, etc., R. Co. v. Ziebarth*, 6 Ind. App. 228. Compare *Rice v. Clear Spring Coal Co.*, 186 Pa. St. 49.

5. Chouteau v. Missouri Pac. R. Co., 122 Mo. 375.

6. Lockwood v. Ohio River R. Co., (C. C. A.) 103 Fed. Rep. 243; *Ottumwa, etc., R. Co. v.*

McWilliams, 71 Iowa 164; *Uhl v. Ohio River R. Co.*, (W. Va. 1902) 41 S. E. Rep. 340.

7. Easement Perpetual. — *Fitch v. New York, etc., R. Co.*, 57 Conn. 419; *Miner v. New York Cent., etc., R. Co.*, 46 Hun (N. Y.) 612; *Junction R. Co. v. Ruggles*, 7 Ohio St. 1; *Heise v. Pennsylvania R. Co.*, 62 Pa. St. 67. Compare *Strong v. Brooklyn*, 68 N. Y. 1.

8. Company Entitled to Exclusive Possession and Use. — *Tennessee, etc., R. Co. v. East Alabama R. Co.*, 75 Ala. 516, 51 Am. Rep. 475; *South, etc., Alabama R. Co. v. Pilgreen*, 62 Ala. 305; *Fuker v. Georgia R., etc., Co.*, 81 Ga. 461, 12 Am. St. Rep. 328; *Williams v. New Albany, etc., R. Co.*, 5 Ind. 111; *Hayden v. Skillings*, 78 Me. 413; *Lake Superior, etc., R. Co. v. Greve*, 17 Minn. 322; *Breckinridge v. Delaware, etc., R. Co.*, (N. J. 1895) 33 Atl. Rep. 800; *Philadelphia, etc., R. Co. v. Philadelphia, etc., Pass. R. Co.*, 6 Pa. Dist. 269; *Junction R. Co. v. Boyd*, 8 Phila. (Pa.) 224.

9. Acts Hindering Use Enjoined. — *Cunningham v. Rome R. Co.*, 27 Ga. 499; *Kansas City, etc., R. Co. v. Kansas City, etc., R. Co.*, 129 Mo. 62. But see *Maysville, etc., R. Co. v. Beyersdorfer*, (Ky. 1897) 43 S. W. Rep. 254.

10. Landowner May Use Land Subject to Right of Way. — *Smith v. Holloway*, 124 Ind. 329; *Vermilya v. Chicago, etc., R. Co.*, 66 Iowa 606, 55 Am. Rep. 279; *Hasson v. Oil Creek, etc., R. Co.*, 8 Phila. (Pa.) 556; *East Tennessee, etc., R. Co. v. Telford*, 89 Tenn. 293; *Olive v. Sabine, etc., R. Co.*, 11 Tex. Civ. App. 208.

11. Landowner Must Not Interfere with Railroad. — *St. Onge v. Day*, 11 Colo. 368; *Heskett v. Wabash, etc., R. Co.*, 61 Iowa 467; *Paxton v. Yazoo, etc., R. Co.*, 76 Miss. 536; *Lawrence's Appeal*, 78 Pa. St. 365; *Olive v. Sabine, etc., R. Co.*, 11 Tex. Civ. App. 208; *Troy, etc., R. Co. v. Potter*, 42 Vt. 265, 1 Am. Rep. 325; *Connecticut, etc., R. Co. v. Holton*, 32 Vt. 47; *Hurd v. Rutland, etc., R. Co.*, 25 Vt. 121; *Jackson v. Rutland, etc., R. Co.*, 25 Vt. 159.

individual could use his own land.¹ And in general it may be stated that a railroad right of way acquired by grant may be put to any use which is essential or convenient to the proper operation of the road,² but that it cannot be used for other than railroad purposes,³ or in any manner inconsistent with the terms of the grant.⁴

Land Acquired Subject to Inchoate Interests and Liens. — The company takes the land subject to all inchoate interests and liens existing at the time of the conveyance.⁵

c. BY PRESCRIPTION. — Where the right of way is acquired by prescription, the company takes an easement only.⁶

d. BY LICENSE. — Where the road is built under a mere license from the landowner, the company does not even acquire an easement.⁷

9. Alienation by Company. — The general power of *quasi*-public corporations to alienate their property has been treated to some extent in other connections.⁸ When authorized by the legislature one railroad company may assign or convey its right of way to another;⁹ and in some cases conveyances to private persons¹⁰ or to corporations other than railroad companies have been upheld.¹¹ But if the consideration for the grant of the right of way was the construction of a road running in a certain direction, such right of way cannot be transferred to a company which proposes to build a line in a different direction.¹² Nor can a railroad company which is operating a road upon a portion of its right of way convey the remainder to another company so as to authorize the operation of two independent roads thereon, without the consent of the landowner, or without compensation to him for the additional burden.¹³

1. Company Owning Fee Has Same Rights as Private Person. — *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578; *Cassidy v. Old Colony R. Co.*, 141 Mass. 174; *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18.

2. Any Use Essential to Proper Operation of Road. — *Illinois Cent. R. Co. v. Anderson*, 73 Ill. App. 621; *Abraham v. Oregon, etc., R. Co.*, 37 Oregon 495; *Louisville, etc., R. Co. v. French*, 100 Tenn. 209, 66 Am. St. Rep. 752; *Olive v. Sabine, etc., R. Co.*, 11 Tex. Civ. App. 208.

3. No Right to Use for Other than Railway Purposes. — *Illinois Cent. R. Co. v. Chicago*, 141 Ill. 509; *Calcasieu Lumber Co. v. Harris*, 77 Tex. 18.

4. Way Granted for Transfer Track Cannot Be Used for Main Line. — *Wysor v. Lake Erie, etc., R. Co.*, 143 Ind. 6.

Road Running in Different Direction. — A right of way granted for a road running in a certain direction cannot be used for a road running in a different direction. *Crosbie v. Chicago, etc., R. Co.*, 62 Iowa 189.

5. Acquired Subject to Inchoate Interests and Liens. — *Gadsden First Nat. Bank v. Thompson*, 116 Ala. 166; *Farrow v. Nashville, etc., R. Co.*, 109 Ala. 448; *Wade v. Hennessy*, 55 Vt. 207; *Hope v. Norfolk, etc., R. Co.*, 79 Va. 283.

6. Easement Only When Acquired by Prescription. — *Capps v. Texas, etc., R. Co.*, 21 Tex. Civ. App. 84. And see *Raleigh, etc., Air-Line R. Co. v. Sturgeon*, 120 N. Car. 225.

7. No Easement Acquired by License. — *Minneapolis Western R. Co. v. Minneapolis, etc., R. Co.*, 58 Minn. 128. See also the title LICENSE (REAL PROPERTY), vol. 18, p. 1127; and *supra*, this section, *Acquisition by License*.

8. Alienation by Quasi-Public Corporations. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 620. And also see *infra*, this title, *Sales, Leases, and Consolidation*.

9. Conveyance to Another Company Valid. — *Columbus, etc., R. Co. v. Braden*, 110 Ind. 558; *Miner v. New York Cent., etc., R. Co.*, 46 Hun (N. Y.) 612.

Deed Held Sufficiently Definite in Its Description of Property Conveyed. — *Fordyce v. Rapp*, 131 Mo. 354.

Reservations in Deeds by Railroad Companies Construed. — *Grennan v. McGregor*, 78 Cal. 258; *St. Paul Union Depot Co. v. St. Paul, etc., R. Co.*, 35 Minn. 320.

Sale of Lands Granted to Company by Act of Congress. — See *Baldwin v. Morgan*, 50 Cal. 585; *Southern Pac. R. Co. v. Terry*, 70 Cal. 484.

The Right to Build a Railroad in a Public Alley, granted to a railroad company by a city, may be transferred by the grantee to another company. *Morgan v. Des Moines Union R. Co.*, 113 Iowa 561.

10. Conveyance of Part of Right of Way to Private Individual held valid as against the company. *McDonald v. Grand Trunk R. Co.*, 28 U. C. Q. B. 320.

Release to Owner of Land. — A railroad corporation, having an easement for right of way, when no longer needed for its purposes, can release the same to the owner of the land. *Flaten v. Moorhead City*, 58 Minn. 324.

11. Lease of Part of Right of Way to Manufacturing Corporation held valid. *Michigan Cent. R. Co. v. Bullard*, 120 Mich. 416.

12. Crosbie v. Chicago, etc., R. Co., 62 Iowa 189.

13. Blakely v. Chicago, etc., R. Co., 46 Neb.

10. Abandonment or Forfeiture — In General. — The question of abandonment of a railroad right of way is always one of intent. Nonuser alone does not constitute abandonment, although it may furnish evidence thereof. In the absence of adverse possession by the servient owner, or acts of such unequivocal nature on the part of the railroad company as evince a clear intention to abandon the easement, nonuser will not work an extinguishment of the right.¹ Abandonment is usually and properly shown by acts which do not appear of record, and it need not appear of record in order to be effectual.² Whether or not an abandonment has occurred in a given case is a question for the jury in an action of ejectment against the company.³

Misuse of Its Easement by the railroad company does not operate as an abandonment, although it may give the landowner a right to damages.⁴

A Transfer of the Rights of the Original Railroad Company to another company does not amount to an abandonment of the right of way of which the landowner can take advantage.⁵

Permissive Occupancy of Land by Original Owner. — A railroad does not lose its right of way by permitting the landowner to occupy a part of the same, for a time, while it is not needed for the purposes of the road.⁶

Forfeiture for Failure to Complete Road on Time. — A forfeiture of a railroad right of way may take place on failure of the company to complete its road within the time limited by statute.⁷

272, affirming 34 Neb. 284; Ft. Worth, etc., R. Co. v. Jennings, 76 Tex. 373. And see Carleton, etc., Branch R. Co. v. Grand Southern R. Co., 21 N. Bruns. 339.

1. Abandonment a Question of Intent — Nonuser Alone Not Sufficient — United States. — Townsend v. Michigan Cent. R. Co., (C. C. A.) 101 Fed. Rep. 757.

Georgia. — Brunswick, etc., R. Co. v. Waycross, 91 Ga. 573.

Illinois. — Durfee v. Peoria, etc., R. Co., 140 Ill. 435.

Iowa. — McClain v. Chicago, etc., R. Co., 90 Iowa 646; Stocumb v. Chicago, etc., R. Co., 57 Iowa 675; Noll v. Dubuque, etc., R. Co., 32 Iowa 66; Barlow v. Chicago, etc., R. Co., 29 Iowa 276.

Missouri. — Scarritt v. Kansas City, etc., R. Co., 148 Mo. 676; Kansas City, etc., R. Co. v. Kansas City, etc., R. Co., 129 Mo. 62.

New York. — Conabeer v. New York Cent., etc., R. Co., 156 N. Y. 474; Buttery v. Rome, etc., R. Co., Supm. Ct. (Gen. T.) 14 N. Y. St. Rep. 131.

Ohio. — Junction R. Co. v. Ruggles, 7 Ohio St. 1.

Pennsylvania. — Hummel v. Cumberland Valley R. Co., 175 Pa. St. 537; Mt. Pleasant Coal Co. v. Delaware, etc., R. Co., 6 Lack. Leg. N. (Pa.) 1.

Vermont. — Rutland R. Co. v. Chaffee, 71 Vt. 84.

Facts Held Insufficient to Show Abandonment. — See Memphis, etc., R. Co. v. Humphreys, 65 Ark. 631; Columbus v. Columbus, etc., R. Co., 37 Ind. 295; Kansas City, etc., R. Co. v. Kansas City, etc., R. Co., 129 Mo. 62.

Facts Held Sufficient to Show Abandonment. — See New York, etc., R. Co. v. Benedict, 169 Mass. 262; Hannibal, etc., R. Co. v. Frowein, 163 Mo. 1; Beattie v. Carolina Cent. R. Co., 108 N. Car. 425.

Evidence of Nonuser Admissible to Show Abandonment. — McClain v. Chicago, etc., R. Co., 90 Iowa 646.

As to When Evidence of Intent Is Not Admissible. — See Hickox v. Chicago, etc., R. Co., 94 Mich. 237.

2. Abandonment Need Not Appear of Record. — Westcott v. New York, etc., R. Co., 152 Mass. 465.

What Evidence Inadmissible to Prove Abandonment of Part of Location. — Smith v. New York, etc., R. Co., 163 Mass. 569.

3. Question of Abandonment for the Jury. — Tennessee, etc., R. Co. v. Taylor, 102 Ala. 224; Ft. Worth, etc., R. Co. v. Sweatt, 20 Tex. Civ. App. 543.

4. Misuse Not Abandonment. — Merrimack River Locks, etc., v. Nashua, etc., R. Co., 104 Mass. 1, 6 Am. Rep. 181; Gurney v. Minneapolis Union Elevator Co., 63 Minn. 70; Reichert v. Keller, 58 Neb. 178. But to the contrary see Lyon v. McDonald, 78 Tex. 71.

5. Transfer of Rights to Another Company Not Abandonment. — Marling v. Burlington, etc., R. Co., 67 Iowa 331; Crolley v. Minneapolis, etc., R. Co., 30 Minn. 541. But see Blakely v. Chicago, etc., R. Co., 46 Neb. 272.

6. Effect of Permissive Occupancy by Original Owner. — Graham v. St. Louis, etc., R. Co., 69 Ark. 562; Carolina Cent. R. Co. v. McCaskill, 94 N. Car. 747.

In North Carolina it is provided by statute that railroad companies shall not lose their rights of way by adverse occupancy. Beattie v. Carolina Cent. R. Co., 108 N. Car. 425. And see Carolina Cent. R. Co. v. McCaskill, 94 N. Car. 747.

But the statute does not apply in a case where a railroad which has acquired its right of way by an unrecorded agreement abandons work on its road for a long time. Beattie v. Carolina Cent. R. Co., 108 N. Car. 425.

7. Forfeiture for Failure to Complete Road on Time. — McGregor, etc., R. Co. v. Sioux City, etc., R. Co., 49 Iowa 604.

The Forfeiture May Be Limited to that portion of the road which is not completed. State v. International, etc., R. Co., 57 Tex. 534.

Statutory Provisions. — In some of the states statutes have been enacted providing that land taken by a railroad shall revert to the original owner on failure of the company to use such land or to operate its road for a certain period of time.¹

Effect of Abandonment. — Where the road is abandoned or removed from the strip of land over which the railroad has a right of way the land is discharged of the burden,² and, as a general rule, reverts to its original owner.³ A temporary abandonment, however, does not entitle the landowner to a second payment of land damages when the company finally builds its road.⁴ On abandonment of its right of way a railroad company has the right to remove its rails,⁵ or stone piers built by it as a part of its road.⁶

11. Use of Highways and Streets — *a. RURAL HIGHWAYS* — **In General.** — The legislature may authorize a railroad company to occupy a public highway longitudinally,⁷ or power to authorize such use may be conferred by statute upon some court of competent jurisdiction.⁸ The power, however, must be given expressly or by necessary implication,⁹ and does not exist in the absence of legislative grant.¹⁰

Diversion of Highways. — Railroad companies are sometimes empowered by law

The United States Alone Can Enforce a Forfeiture of lands granted by act of Congress for failure to complete the road within the time limited by the act. *C., etc., R. Co. v. Grinnell*, 51 Iowa 476.

Implied Obligation to Build Within Reasonable Time. — An obligation to construct the road within a reasonable time may be implied from a deed which provides for reverter of the land granted to the grantor in case the company ceases to use it for railroad purposes, and in such a case the right of way may be forfeited for delay in building the road. *Pollock v. Maysville, etc., R. Co.*, 103 Ky. 84.

1. Statutory Provisions as to Abandonment or Forfeiture. — *Behlow v. Southern Pac. R. Co.*, 130 Cal. 16; *Morgan v. Des Moines Union R. Co.*, 113 Iowa 561; *McClain v. Chicago, etc., R. Co.*, 90 Iowa 646; *Skillman v. Chicago, etc., R. Co.*, 78 Iowa 401, 16 Am. St. Rep. 452; *Fernow v. Chicago, etc., R. Co.*, 75 Iowa 526; *Central Iowa R. Co. v. Moulton, etc., R. Co.*, 57 Iowa 249.

2. Land Discharged of Easement on Abandonment. — *California, etc., R. Co. v. McCartney*, 104 Cal. 616.

3. Land Reverts to Original Owner. — *Matter of Flint, etc., R. Co.*, 105 Mich. 289; *Flint, etc., R. Co. v. Rich*, 91 Mich. 293; *Hannibal, etc., R. Co. v. Frowein*, 163 Mo. 1; *Kellogg v. Malin*, 50 Mo. 496, 11 Am. Rep. 426.

For a Case in Which It Was Held that the Land Did Not Revert, see *McConihay v. Wright*, 121 U. S. 201.

A Right of Way Lost by Nonuser Reverts to the Present Owner of the land of which it forms a part, and not to the original owner. *Smith v. Hall*, 103 Iowa 95.

Where the Company Has Purchased the Fee in its right of way the land does not revert on abandonment. *Chamberlain v. Northeastern R. Co.*, 41 S. Car. 399, 44 Am. St. Rep. 717.

A Deviation from the Right of Way Granted, in building the road, does not cause the land to revert to the grantor under a deed providing for reverter in case the "enterprise" fails or is abandoned. *Dickson v. St. Louis, etc., R. Co.*, 168 Mo. 90.

4. Chicago, etc., R. Co. v. Bean, 69 Iowa 257.

5. McNair v. Rochester, etc., R. Co., (Supm. Ct. Gen. T.) 14 N. Y. Supp. 39.

6. Wagner v. Cleveland, etc., R. Co., 22 Ohio St. 563, 10 Am. Rep. 770.

7. Legislature May Authorize Use of Highway by Railroad. — *Southern Pac. R. Co. v. Ferris*, 93 Cal. 263; *Wayzata v. Great Northern R. Co.*, 67 Minn. 385; *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352; *Burt v. Lima, etc., R. Co.*, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 482; *Matter of Prospect Park, etc., R. Co.*, 8 Hun (N. Y.) 30, *affirmed* 67 N. Y. 371; *Simpson v. Philadelphia, etc., R. Co.*, 4 Montg. Co. Rep. (Pa.) 102; *Yates v. West Grafton*, 34 W. Va. 783.

As to the Right of Railroads to Cross Highways, see the title **CROSSINGS**, vol. 8, p. 335.

Use Authorized by Charter. — A railroad company may use a highway when authorized by its charter expressly or inferentially. *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84; *Struthers v. Dunkirk, etc., R. Co.*, 87 Pa. St. 282.

8. Consent of Court Essential. — *St. Louis, etc., R. Co. v. St. Louis*, 92 Mo. 160; *State v. St. Louis, etc., R. Co.*, 86 Mo. 288; *Baxter v. Spuyten Duyvil, etc., R. Co.*, 61 Barb. (N. Y.) 428; *Osborne v. Jersey City, etc., R. Co.*, 27 Hun (N. Y.) 589; *Texarkana, etc., R. Co. v. Texas, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 525.

9. Power Must Be Given Expressly or by Necessary Implication. — *Louisville, etc., R. Co. v. Whitley County Ct.*, 95 Ky. 215, 44 Am. St. Rep. 220; *Bangor, etc., R. Co. v. Smith*, 47 Me. 34; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.) 63; *Tallon v. Hoboken*, 60 N. J. L. 212; *Raritan Tp. v. Port Reading R. Co.*, 49 N. J. Eq. 11; *Jersey City v. Central R. Co.*, 40 N. J. Eq. 417; *State v. Hoboken*, 35 N. J. L. 205; *Long Branch Com'rs v. West End R. Co.*, 29 N. J. Eq. 566; *Morris, etc., R. Co. v. Newark*, 10 N. J. Eq. 352; *Pennsylvania R. Co.'s Appeal*, 115 Pa. St. 514.

10. No Power in Absence of Statute. — *Pittsburg, etc., R. Co. v. Hood*, (C. C. A.) 94 Fed. Rep. 618; *Western R. Co. v. Alabama Grand Trunk R. Co.*, 96 Ala. 272; *Cook County v. Great Western R. Co.*, 119 Ill. 218; *Springfield v. Connecticut River R. Co.*, 4 Cush. (Mass.)

to change the location of highways where such change is essential to the construction of their roads.¹

Manner of Use. — Power conferred upon a railroad company to use a public highway for its road is not power to destroy the public easement therein,² and the railroad must be so constructed as not to obstruct public travel unnecessarily.³ As a general rule, the right granted to the company is that of passing and repassing over the highway with its trains, and does not include the right to store cars therein, or to use the highway for its freight or passenger depots.⁴

Restoration to Former State of Usefulness. — Statutes authorizing the use of highways by railroads generally provide that such highways shall be restored to their former state or to such state as not to impair unnecessarily their usefulness,⁵ or that a substitute road shall be provided by the company where the original highway is destroyed.⁶ Whether or not the company is bound to keep the highway in repair, after its restoration, depends upon the terms of the particular statute imposing the obligation.⁷

Right of Abutting Owner to Compensation or Damages. — In some jurisdictions it is held that the appropriation of a highway by a steam railroad company is the imposition of an additional servitude for which abutting owners are entitled to compensation or damages, while in others a contrary doctrine prevails.⁸

63; *Stearns County v. St. Cloud, etc., R. Co.*, 36 Minn. 425.

1. Power to Change Location of Highway. — *Phillips v. London, etc., R. Co.*, 4 Giff. 46, 9 Jur. N. S. 348; *Pugh v. Golden Valley R. Co.*, 15 Ch. D. 330; *Waterbury v. Hartford, etc., R. Co.*, 27 Conn. 154; *Norwich, etc., R. Co. v. Killingly*, 25 Conn. 406; *Illinois Cent. R. Co. v. Bentley*, 64 Ill. 438; *Easton, etc., R. Co. v. Greenwich Tp.*, 25 N. J. Eq. 565; *Buchholz v. New York, etc., R. Co.*, 148 N. Y. 640; *Pennsylvania R. Co.'s Appeal*, 128 Pa. St. 509; *Fredricksburgh Tp. v. Grand Trunk R. Co.*, 6 Grant Ch. (U. C.) 555.

2. Public Easement Not Destroyed. — *Louisville, etc., R. Co. v. Downey*, 18 Ind. App. 140; *Central Branch Union Pac. R. Co. v. Twine*, 23 Kan. 589; *St. Louis v. Missouri Pac. R. Co.*, 114 Mo. 13; *State v. Hannibal, etc., R. Co.*, 86 Mo. 13; *Laing v. United New Jersey R. Co., etc., R. Co.*, 54 N. J. L. 576, 33 Am. St. Rep. 682; *Lehigh Valley R. Co. v. Orange Water Co.*, 42 N. J. Eq. 205; *Jones v. Erie, etc., R. Co.*, 169 Pa. St. 333, 47 Am. St. Rep. 916; *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325.

3. Must Not Obstruct Highway Unnecessarily. — *Chicago, etc., R. Co. v. Jefferson*, 14 Ill. App. 615; *Wellcome v. Leeds*, 51 Me. 313; *Vezzie v. Penobscot R. Co.*, 49 Me. 119.

4. Right Generally Limited to Passing and Repassing with Trains. — *Mathews v. Kelsey*, 58 Me. 56, 4 Am. Rep. 248; *Gahagan v. Boston, etc., R. Co.*, 1 Allen (Mass.) 187, 79 Am. Dec. 724; *State v. Morris, etc., R. Co.*, 25 N. J. L. 437; *State v. Vermont Cent. R. Co.*, 27 Vt. 103; *Bussian v. Milwaukee, etc., R. Co.*, 56 Wis. 325.

As to Obstruction of Highways by Standing Cars, etc., see the title HIGHWAYS, vol. 15, p. 343.

5. Must Restore Highway to Former State of Usefulness. — *Connecticut.* — *State v. New Haven, etc., Co.*, 45 Conn. 344; *Hamden v. New Haven, etc., Co.*, 27 Conn. 158.

Indiana. — *New York, etc., R. Co. v. Hamlet Hay Co.*, 149 Ind. 344; *Seybold v. Terre Haute, etc., R. Co.*, 18 Ind. App. 367.

Iowa. — *Gear v. Chicago, etc., R. Co.*, 43 Iowa 83.

Massachusetts. — *Woburn v. Boston, etc., R. Corp.*, 109 Mass. 283.

New York. — *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434; *Post v. West Shore R. Co.*, 123 N. Y. 580; *People v. Dutchess, etc., R. Co.*, 58 N. Y. 152; *Barse v. Herkimer, etc., R. Co.*, (Supm. Ct. Gen. T.) 13 N. Y. St. Rep. 215.

Ohio. — *Pittsburgh, etc., R. Co. v. Maurer*, 21 Ohio St. 421.

West Virginia. — *Yates v. West Grafton*, 34 W. Va. 783.

Wisconsin. — *Oshkosh v. Milwaukee, etc., R. Co.*, 74 Wis. 534, 17 Am. St. Rep. 175; *Jamestown v. Chicago, etc., R. Co.*, 69 Wis. 648.

Canada. — *Grand Trunk R. Co. v. Sibbald*, 20 Can. Sup. Ct. 259.

6. Must Provide Substitute Highway. — *Atty.-Gen. v. Barry Docks, etc., Co.*, 35 Ch. D. 573; *Atty.-Gen. v. Widnes R. Co.*, 30 L. T. N. S. 449; *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434; *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637; *Pittsburgh, etc., R. Co. v. Com.*, 101 Pa. St. 196; *Danville, etc., R. Co. v. Com.*, 73 Pa. St. 29; *Stroudsburg v. Wilkes-Barre, etc., R. Co.*, 12 Pa. Co. Ct. 395.

7. Duty to Keep in Repair After Restoration. — *See Rutland v. Chicago, etc., R. Co.*, 71 Ill. App. 442; *Wayzata v. Great Northern R. Co.*, 50 Minn. 438; *Allen v. Buffalo, etc., R. Co.*, 151 N. Y. 434; *Pittsburgh, etc., R. Co. v. Maurer*, 21 Ohio St. 421; *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637; *Com. v. Allegheny Valley R. Co.*, 14 Pa. Super. Ct. 336; *Chesapeake, etc., R. Co. v. State*, 16 Lea (Tenn.) 300.

8. As to Right of Abutter to Compensation or Damages, see the following cases:

United States. — *Burlington Gas Light Co. v. Burlington, etc., R. Co.*, 165 U. S. 370.

Arkansas. — *Reichert v. St. Louis, etc., R. Co.*, 51 Ark. 491.

Connecticut. — *Imlay v. Union Branch R. Co.*, 26 Conn. 259.

Georgia. — *Kavanagh v. Mobile, etc., R. Co.*, 78 Ga. 271; *Floyd County v. Rome St. R. Co.*, 77 Ga. 615.

b. STREETS IN CITIES AND TOWNS. — The law in regard to the occupation of streets in cities and towns by railroad companies, and the right of abutting owners to compensation or damages in such cases, are treated elsewhere.¹

12. Use of Rights of Way of Other Companies — *a. UNDER RIGHT OF EMINENT DOMAIN.* — Elsewhere in this work there has been a full discussion of the power of one railroad company to condemn the property of another,² the allotment of compensation therefor,³ the estate acquired,⁴ and the effect of abandonment.⁵

b. UNDER CHARTERS AND STATUTORY PROVISIONS — *In General.* — In some jurisdictions, by charter or statutory provisions, permission is given railway companies to cross, unite with, or make use of the right of way of other companies for certain purposes and within defined limits, or the obligation is imposed on all railway companies of allowing other companies to make such use of their property.⁶ In the absence of such a statute the mere fact that a railroad company has constructed its track without authority does not justify its use by another company.⁷

Nature of Right. — Where the power of compelling a railroad to permit the

Illinois. — Chicago, etc., R. Co. *v.* Ayres, 106 Ill. 511.

Indiana. — Cox *v.* Louisville, etc., R. Co., 48 Ind. 178.

Maine. — Whittier *v.* Portland, etc., R. Co., 38 Me. 26.

Minnesota. — Molitor *v.* First Div. St. Paul, etc., R. Co., 14 Minn. 285; Gray *v.* First Div. St. Paul, etc., R. Co., 13 Minn. 315; Schurmeier *v.* St. Paul, etc., R. Co., 10 Minn. 82, 88 Am. Dec. 59.

Nebraska. — Hastings, etc., R. Co. *v.* Ingalls, 15 Neb. 123.

New Jersey. — Thompson *v.* Pennsylvania R. Co., 51 N. J. L. 42; Morris, etc., R. Co. *v.* Hudson Tunnel R. Co., 25 N. J. Eq. 384.

Ohio. — Lawrence R. Co. *v.* Mahoning County, 35 Ohio St. 1; Lawrence R. Co. *v.* Cobb, 35 Ohio St. 94; Lawrence R. Co. *v.* Williams, 35 Ohio St. 168.

Pennsylvania. — Thompson *v.* Citizens Traction Co., 181 Pa. St. 131.

Vermont. — Richardson *v.* Vermont Cent. R. Co., 25 Vt. 465, 60 Am. Dec. 283; Hatch *v.* Vermont Cent. R. Co., 25 Vt. 49.

Wisconsin. — Buchner *v.* Chicago, etc., R. Co., 56 Wis. 403, 60 Wis. 264; Sherman *v.* Milwaukee, etc., R. Co., 40 Wis. 645.

1. Use of Streets in Cities and Towns. — See the title STREETS AND SIDEWALKS.

2. Power to Condemn. — See the title EMINENT DOMAIN, vol. 10, p. 1094 *et seq.* See also Southern Pac. R. Co. *v.* Southern California R. Co., 111 Cal. 221; State *v.* National Docks, etc., Junction R. Co., 57 N. J. L. 86; State *v.* Hudson Tunnel R. Co., 38 N. J. L. 548; Potts *v.* Quaker City El. R. Co., 161 Pa. St. 396.

Right of One Railroad to Cross Right of Way of Another. — See the title CROSSINGS, vol. 8, p. 338 *et seq.* See also Louisville, etc., R. Co. *v.* Illinois Cent. R. Co., 174 Ill. 448.

Property of Railroad in Hands of Receiver May Be Condemned. — Central R. Co. *v.* Pennsylvania R. Co., 31 N. J. Eq. 475. See also the title EMINENT DOMAIN, vol. 10, p. 1092.

Condemnation of Property of Abandoned Line. — Central Iowa R. Co. *v.* Moulton, etc., R. Co., 57 Iowa 249.

Sufficiency of Notice of Proceedings to Purchaser of Land. — New York, etc., R. Co. *v.* New York, etc., R. Co., 52 Conn. 274.

3. See the title EMINENT DOMAIN, vol. 10, p. 1174 *et seq.*

Method of Determining Compensation. — Orleans, etc., R. Co. *v.* Jefferson, etc., R. Co., 51 La. Ann. 1005.

Compensation Payable to Lessee of Road Condemned. — Matter of New York Cent. R. Co., 49 N. Y. 414.

4. See the title EMINENT DOMAIN, vol. 10, p. 1200.

Railroad Acquires Fee under Massachusetts Statute of 1866, c. 278, § 3. — Googins *v.* Boston, etc., R. Co., 155 Mass. 505.

5. See the title EMINENT DOMAIN, vol. 10, p. 1203.

State May Transfer Easement upon Failure of Company to Comply with Grant. — Central Iowa R. Co. *v.* Moulton, etc., R. Co., 57 Iowa 249; Noll *v.* Dubuque, etc., R. Co., 32 Iowa 56. But see Sulphur Springs, etc., R. Co. *v.* St. Louis, etc., R. Co., 2 Tex. Civ. App. 650.

6. Statutory Provisions. — Waycross Air Line R. Co. *v.* Offerman, etc., R. Co., 109 Ga. 827; Delaware, etc., R. Co. *v.* Erie R. Co., 21 N. J. Eq. 298; Cogswell *v.* New York, etc., R. Co., 103 N. Y. 10, 57 Am. Rep. 701. See also the statutes of the several states and the cases cited in the following notes.

Statute Unconstitutional. — Where no right to amend or repeal the charter of a railroad company has been reserved, a statute requiring all railroad companies to allow the use of their tracks by other companies for a specified distance, is unconstitutional as being an impairment of contract obligation, even though the state had, in the particular charter, reserved the right to allow any other roads in the state to connect with the road of the defendant. Pennsylvania R. Co. *v.* Baltimore, etc., R. Co., 60 Md. 263.

7. Coe *v.* New Jersey Midland R. Co., 28 N. J. Eq. 100, *affirmed* 28 N. J. Eq. 593; Texarkana, etc., R. Co. *v.* Texas, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 525.

use of its right of way by other companies is reserved in the charter, such right is in the nature of a servitude, which is to be exercised only upon the payment of reasonable compensation. The consent of the servient company is not essential, however, and no obligation to continue to make use of the road is imposed upon the company exercising the right. Such right is more in the nature of a privilege granted than of a contract between the companies.¹ The company exercising the right must adhere to the conditions under which it is granted;² and where the statute is special the company cannot use the right of way of any company not named therein.³

Applies to Branch Roads. — Such a right reserved in the charter of a company extends also to a branch road purchased by it, though a similar reservation was not contained in the charter under which the latter was created.⁴

Manner of Exercise and Compensation. — The statute generally provides for the appointment of commissioners to determine the manner in which the companies are to use the right of way, and the compensation to be paid for such use.⁵

Judicial Control. — Where a statute gives to two roads community of interest in a right of way, the court will exercise judicial control over their conduct towards each other, in order to protect their respective rights, and where it is shown that one of the companies is being unlawfully interfered with in the enjoyment of the right, the courts will intervene.⁶

c. UNDER RESERVATION IN GRANT OF RIGHT OF WAY. — It is sometimes provided in the deed granting a right of way that certain companies shall have the right to run a parallel track upon the same right of way. This stipulation creates an equitable easement or right to the parallel track in favor of such other companies as come within the provision, and the grantee, upon the acceptance of the deed, becomes bound thereby.⁷ Where specific performance of the covenant is sought it must be shown that there is sufficient unoccupied space on the grantee's right of way for the location of another road, and that the road which it is sought to construct comes within the provisions of the grant.⁸

d. UNDER CONTRACT, LEASE, OR LICENSE — In General. — One company may acquire the right to use the right of way of another by contract, lease, or permission from the latter.⁹ This permission need not be by express grant, but may be by such acts or acquiescence as to give rise to a presumption of a grant, sufficient in equity to estop the denial thereof.¹⁰

License Strictly Construed. — A license to use the right of way of another com-

1. Boston, etc., R. Corp. v. Boston, etc., R. Co., 5 Cush. (Mass.) 375.

2. Augusta v. Port Royal, etc., R. Co., 74 Ga. 658.

3. Alexander v. Atlanta, etc., R. Co., 108 Ga. 151.

4. Lexington, etc., R. Co. v. Fitchburg R. Co., 14 Gray (Mass.) 266.

5. **Manner of Use and Compensation Fixed by Commissioners.** — Lexington, etc., R. Co. v. Fitchburg R. Co., 14 Gray (Mass.) 266; Worcester, etc., R. Co. v. Railroad Com'rs, 118 Mass. 561; Concord, etc., R. Co. v. Boston, etc., R. Co., 68 N. H. 519.

Statutes Authorizing Commissioners to Fix Compensation Constitutional. — Worcester, etc., R. Co. v. Railroad Com'rs, 118 Mass. 561. Compare Pennsylvania R. Co. v. Baltimore, etc., R. Co., 60 Md. 263.

6. Delaware, etc., R. Co. v. Erie R. Co., 21 N. J. Eq. 298.

7. Joy v. St. Louis, 138 U. S. 1; South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., 117 Ala. 395.

8. South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co., 117 Ala. 395.

9. **Under Contract.** — Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468; Chicago, etc., R. Co. v. Cincinnati, etc., R. Co., 126 Ind. 513; Hall v. Brown, 54 N. H. 495; Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265.

Contracts for Use of Right of Way Construed. — Joy v. St. Louis, 138 U. S. 1; Central Trust Co. v. Wabash, etc., R. Co., 29 Fed. Rep. 546; Chicago, etc., R. Co. v. Cincinnati, etc., R. Co., 126 Ind. 513; Delaware, etc., R. Co. v. Erie R. Co., 21 N. J. Eq. 298.

Donor Cannot Enjoin Lease. — Holbert v. St. Louis, etc., R. Co., 38 Iowa 315.

Lease Passes to Assignee. — Minneapolis, etc., R. Co. v. St. Paul, etc., R. Co., 35 Minn. 265.

Who May License. — Texarkana, etc., R. Co. v. Texas, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 525.

10. **Express Grant Not Necessary.** — Pennsylvania R. Co.'s Appeal, 80 Pa. St. 265. See also Chicago, etc., R. Co. v. Cincinnati, etc., R. Co., 126 Ind. 513.

pany is strictly construed, and where the licensee is authorized to use the way for a track of a certain gauge it has no power to operate a road of a broader gauge thereon.¹

Specific Performance of Agreement. — Where a contract for such use has been made, equity will compel a specific performance of the agreement.²

Rescission of Agreement. — The state has no concern in an agreement between two railroads whereby one leases to the other the right to construct over the route which it has located, as long as only one railroad is constructed on the route, and the agreement may be released, abandoned, or rescinded by the subsequent act or consent of the two railroads.³

Parol License Revocable at Will. — A parol agreement to allow one railway company to extend its track on the right of way of another for the purpose of connecting therewith is a mere license, revocable at the will of the licensor, and will not operate as an estoppel although the licensee has entered and made valuable improvements.⁴

Change of Location. — The location of the track of a railway company, built on the right of way of another company under a lease, may be changed by a verbal agreement between the parties.⁵

VII. CONSTRUCTION, EQUIPMENT, AND MAINTENANCE — 1. Construction. —

a. AUTHORITY AND DUTY TO CONSTRUCT. — The authority to construct railways is conferred by statute. The general power to construct a road includes the power to construct the necessary side tracks, switches, terminals, etc.⁶ The company, in accepting the franchise to construct its railway, must accept the same *in toto*, and such authority does not authorize the construction of a part of the road only.⁷ Before the company can properly enter upon the construction of the road it must comply with all conditions precedent in the grant of its authority.⁸

Duty to Construct. — Where a railroad company is chartered with power to take private property under the right of eminent domain and construct its road, this authority is in the first instance permissive only, and though the company may forfeit its franchise for failure to construct its road,⁹ still, it will not be compelled by mandamus to construct its road.¹⁰

b. TIME OF COMMENCEMENT AND COMPLETION OF ROAD. — In the

1. License Strictly Construed. — *Augusta, etc., R. Co. v. Augusta Southern R. Co.*, 96 Ga. 562.

2. Specific Performance. — *Joy v. St. Louis*, 138 U. S. 1; *Central Trust Co. v. Wabash, etc., R. Co.*, 29 Fed. Rep. 546; *South, etc., Alabama R. Co. v. Highland Ave., etc., R. Co.*, 117 Ala. 395; *Coe v. Delaware, etc., R. Co.*, 34 N. J. Eq. 266.

3. *Gray v. Greenville, etc., R. Co.*, 60 N. J. Eq. 153.

4. License Revocable. — *Richmond, etc., R. Co. v. Durham, etc., R. Co.*, 104 N. Car. 658.

5. *Minneapolis, etc., R. Co. v. St. Paul, etc., R. Co.*, 35 Minn. 265, holding that a verbal agreement for such change might become binding on the company owning the right of way, by its acquiescence, even though such agreement was originally made by a person not authorized to bind the company.

6. Authority to Construct. — *Lake Shore, etc., R. Co. v. Baltimore, etc., R. Co.*, 149 Ill. 272; *Protzman v. Indianapolis, etc., R. Co.*, 9 Ind. 467, 68 Am. Dec. 650; *Bangor, etc., R. Co. v. Smith*, 47 Me. 34; *Philadelphia, etc., R. Co. v. Williams*, 54 Pa. St. 103; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84.

7. *Central R., etc., Co. v. New York, etc.,*

R. Co., 72 Conn. 36; *Matter of Metropolitan Transit Co.*, 111 N. Y. 588.

A railroad company will not be enjoined from constructing a part of its road on the ground that it fraudulently intends to build only that part. *Aurora, etc., R. Co. v. Lawrenceburgh*, 56 Ind. 80.

8. Conditions Precedent. — *Bonaparte v. Camden, etc., R. Co.*, Baldw. (U. S.) 205; *Bailey v. New York Arcade R. Co.*, (Supm. Ct. Gen. T.) 1 N. Y. Supp. 304; *Astor v. New York Arcade R. Co.*, 48 Hun (N. Y.) 562. See also *Boston, etc., R. Corp. v. Midland R. Co.*, 1 Gray (Mass.) 340.

Furnishing Plan to Landowner — Failure Cured by Lapse of Time. — *Abbott v. New York, etc., R. Co.*, 145 Mass. 450; *Brock v. Old Colony R. Co.*, 146 Mass. 194.

9. *State v. Hazelton, etc., R. Co.*, 40 Ohio St. 504. See *supra*, this title, *Railroad Corporations*.

10. *Kansas v. Southern Kansas R. Co.*, 24 Fed. Rep. 179; *State v. Southern Minnesota R. Co.*, 18 Minn. 40; *People v. Albany, etc., R. Co.*, 24 N. Y. 261, 82 Am. Dec. 295. See also *Gates v. Boston, etc., R. Co.*, 53 Conn. 342. Compare *Com. v. Erie, etc., R. Co.*, 27 Pa. St. 339, 67 Am. Dec. 471. See the title *MANDAMUS*, vol. 19, p. 709.

absence of some provision in the charter of the railway company, it does not seem that there is any general requirement that the road should be completed within a particular time, though the failure of the company to take steps to construct its road may be ground for the forfeiture of its charter as for a nonuser.¹

c. GENERAL PLAN OF CONSTRUCTION — Gauge. — A railroad company which contains no restrictions in its charter as to the gauge of its tracks has the right to adopt any gauge in ordinary use,² and its adoption and use of a certain gauge does not preclude it from afterwards making a change therein.³ Of course, railway companies may be restricted by provisions in their charters as to the gauge to be adopted.⁴

Character of Rail. — In the absence of provisions in the charter, the company may adopt and use any character of rail in common use,⁵ and after it has adopted and used one character of rail it is not precluded from making a change therein.⁶

Location of Track on Right of Way. — A railway company is not required to locate its tracks in the centre of the right of way,⁷ and the places where the connection of switches, etc., with the main track should be is in the absolute discretion of the company,⁸ and a location of its tracks upon one part of its right of way does not deprive it of the right to relocate them.⁹

d. CONSTRUCTION CONTRACTS. — Contracts for the construction of railroads have naturally given rise to a great deal of litigation; the law relating to such contracts is in no sense peculiar as distinguished from the law relating to other working contracts, and the reader is referred to another place in this work for a general discussion of the principles relating to such contracts.¹⁰

Construction of Particular Contracts and Clauses. — The rules with regard to the construction of contracts in general apply, of course, to the kind of contracts now under consideration.¹¹ Particular words and phrases occurring in such contracts, and which are in their nature technical, have been construed by the courts; such as "filling in,"¹² "surfaced,"¹³ "grading,"¹⁴ "build and complete road,"¹⁵ to construct railroad for consideration "per mile,"¹⁶ "hailed by wagon,"¹⁷ "hard pan,"¹⁸ "loose rock,"¹⁹ "between termini." ²⁰

1. See *supra*, this title, *Railroad Corporations*.

2. *Gauge.* — *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1.

3. *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1. See also *Androscoggin, etc., R. Co. v. Androscoggin R. Co.*, 52 Me. 417.

4. *Walker v. Denver*, 40 U. S. App. 464, 76 Fed. Rep. 670; *Western New York, etc., R. Co. v. Buffalo, etc., R. Co.*, 193 Pa. St. 127.

5. *Rails.* — Thus, a railway company, under a charter authorizing the use of steam as a motive power and the carriage of passengers and freight, may adopt and lay in streets and highways over which the right of way is conferred, "T" rails, though the use of such rails be not expressly authorized and though such rails obstruct travel more than those generally used by horse railways. *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1.

6. *Millvale v. Evergreen R. Co.*, 131 Pa. St. 1.

7. *Stark v. Sioux City, etc., R. Co.*, 43 Iowa 501; *Munkers v. Kansas City, etc., R. Co.*, 60 Mo. 334; *Dougherty v. Wabash, etc., R. Co.*, 19 Mo. App. 419.

8. *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84.

9. *Dougherty v. Wabash, etc., R. Co.*, 19 Mo. App. 419; *Cleveland, etc., R. Co. v. Speer*, 56 Pa. St. 325, 94 Am. Dec. 84.

10. See the title *WORKING CONTRACTS*.

11. *Orman v. Ryan*, 25 Colo. 383; *Williams v. Chicago, etc., R. Co.*, 153 Mo. 487; *Baltimore, etc., R. Co. v. Resley*, 7 Md. 297; *Lord v. Belknap*, 1 Cush. (Mass.) 279; *Knapp v. New York, etc., R. Co.*, 2 Bosw. (N. Y.) 297; *Wolff v. McGavock*, 29 Wis. 290.

12. *Where a Contract Is for Filling In a Trestle* at so much per cubic yard of earth, the contractor is not to be allowed for space occupied by a culvert. *East Tennessee, etc., R. Co. v. Matthews*, 85 Ga. 457.

13. *Western Union R. Co. v. Smith*, 75 Ill. 496.

14. *Snell v. Cottingham*, 72 Ill. 161.

15. *Central Trust Co. v. Condon*, 31 U. S. App. 387, 67 Fed. Rep. 84.

16. *Barker v. Troy, etc., R. Co.*, 27 Vt. 766.

17. *Campbell v. Cincinnati Southern R. Co.*, (Ky. 1888) 6 S. W. Rep. 337.

18. *Mansfield, etc., R. Co. v. Veeder*, 17 Ohio 385.

19. *Lewis v. Chicago, etc., R. Co.*, 49 Fed. Rep. 708.

20. *A Contract for Grading the Roadbed of a railroad between two municipalities will include all the grading between the termini of the road at the points indicated by the depot grounds, and is not performed by completing the work to the corporate limits of the places named.* *Western Union R. Co. v. Smith*, 75 Ill. 496.

Where the company is required to furnish the ground from which earth for an embankment is to be taken, ground within a reasonably convenient distance of the embankment must be furnished.¹

Arbitration of Disputes. — Stipulations requiring the submission to arbitration of disputes and differences between the parties are generally inserted in such contracts,² and neither party can arbitrarily in the first instance ignore such stipulation and resort to the courts for the settlement of such disputes.³

Estimation of Engineers as to Quantity of Work. — Stipulations for the estimation by engineers of the quantity and character of work done, which shall be final and conclusive, are valid and binding.⁴ The estimates may, of course, be impeached for fraud,⁵ and also, it seems, for gross mistake,⁶ or for a mistake arising out of the engineers' misconstruction of the contract.⁷ The fact that the engineer is also a stockholder in the railroad company does not render invalid a stipulation for admeasurement by him of the amount of work done.⁸ Where payments for work done are to be made periodically as the work progresses, upon estimates by the engineer of the amount of work, it has been held that a final and accurate estimate and measurement for each period should be made, and not a mere proximate conjectural estimate.⁹ The necessity for an estimate by the engineer is dispensed with where he refuses after reasonable demand to make one.¹⁰

Provision for Payment in Stock and Bonds of Company. — Frequently such contracts provide for payment in part or in whole in the bonds and stock of the company, and such agreements are unobjectionable.¹¹

1. Chicago, etc., R. Co. v. Vosburgh, 45 Ill. 311.

2. **Arbitration.** — Jemison v. Gray, 29 Iowa 537; O'Donnell v. Henry, 44 La. Ann. 845; Malone v. Philadelphia, etc., R. Co., 157 Pa. St. 430; McDonald v. Charleston, etc., R. Co., 93 Tenn. 281; Condon v. South Side R. Co., 14 Gratt. (Va.) 302; Good v. Toronto, etc., R. Co., 26 Ont. App. 133. See the title ARBITRATION, vol. 2, p. 533.

A provision for the arbitration of disputes arising out of the execution of a railroad construction contract does not require the submission of a claim for damages for refusal to permit the contractor to perform his contract. Lauman v. Young, 31 Pa. St. 306.

Where a contract provided for the submission of disputes to the chief engineer of the company, it was held that the person who was the chief engineer at the time a dispute arose, and a judgment thereon was called for, was the person to make the award. North Lebanon R. Co. v. McGrann, 33 Pa. St. 530, 75 Am. Dec. 624.

3. Denver, etc., Constr. Co. v. Stout, 8 Colo. 65; Grant v. Savannah, etc., R. Co., 51 Ga. 348.

4. **Estimates of Engineers** — *United States*. — Lewis v. Chicago, etc., R. Co., 49 Fed. Rep. 708; Summers v. Chicago, etc., R. Co., 49 Fed. Rep. 714; Martinsburg, etc., R. Co. v. March, 114 U. S. 549.

Illinois. — Central Military Track R. Co. v. Spruck, 24 Ill. 587; Scoville v. Miller, 40 Ill. App. 237, reversed on other grounds 140 Ill. 504.

Iowa. — Mitchell v. Kavanagh, 38 Iowa 286; Ross v. McArthur, 85 Iowa 263.

Missouri. — Williams v. Chicago, etc., R. Co., 112 Mo. 463, 34 Am. St. Rep. 403; Williams v. Chicago, etc., R. Co., 153 Mo. 487; St. Joseph Iron Co. v. Halverson, 48 Mo. App. 383.

New York. — Reilly v. Lee, 61 Hun (N. Y.) 627, 16 N. Y. Supp. 313, Dorwin v. Westbrook, 71 Hun (N. Y.) 405; McMahon v. New York, etc., R. Co., 20 N. Y. 463.

Ohio. — Mansfield, etc., R. Co. v. Veeder, 17 Ohio 385.

Pennsylvania. — Memphis, etc., R. Co. v. Wilcox, 48 Pa. St. 161.

Tennessee. — McDonald v. Charleston, etc., R. Co., 93 Tenn. 281.

Texas. — Ricker v. Collins, 81 Tex. 662.

Vermont. — Herrick v. Belknap, 27 Vt. 673; Vanderwerker v. Vermont Cent. R. Co., 27 Vt. 130.

Virginia. — Baltimore, etc., R. Co. v. Polly, 14 Gratt. (Va.) 447; Kidwell v. Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

Canada. — Guilbault v. McGreevy, 18 Can. Sup. Ct. 609.

Right of Parties to Notice and to Be Present When Estimation Is Made. — McMahon v. New York, etc., R. Co., 20 N. Y. 463.

5. **Fraud.** — St. Louis, etc., R. Co. v. Kerr, 48 Ill. App. 476, affirmed 153 Ill. 182; Williams v. Chicago, etc., R. Co., 112 Mo. 463, 34 Am. St. Rep. 403; Baltimore, etc., R. Co. v. Polly, 14 Gratt. (Va.) 447.

6. Lewis v. Chicago, etc., R. Co., 49 Fed. Rep. 708; Williams v. Chicago, etc., R. Co., 112 Mo. 463, 34 Am. St. Rep. 403.

7. Lewis v. Chicago, etc., R. Co., 49 Fed. Rep. 708; Mansfield, etc., R. Co. v. Veeder, 17 Ohio 385.

8. Williams v. Chicago, etc., R. Co., 112 Mo. 463, 34 Am. St. Rep. 403. See also Ranger v. Great Western R. Co., 5 H. L. Cas. 88.

9. Herrick v. Belknap, 27 Vt. 673.

10. St. Louis, etc., R. Co. v. Kerr, 153 Ill. 182.

11. **Payment in Stocks or Bonds** — *United States*. — Myers v. York, etc., R. Co., 2 Curt. (U. S.) 28.

Option to Terminate Contract. — Where the option is given the railway company to terminate the contract, the exercise of such option does not deprive the contractor of the right to compensation for work theretofore done.¹

Performance and Breach — By Contractor. — The contractor is, of course, liable in damages to the railway company for failure on his part to perform his agreements,² such as his failure to perform the work in the required time.³ And where the contractor fails to complete his contract the company may retain, from the compensation agreed to be paid, a sum reasonably sufficient to finish the work.⁴ So, also, where the contractor has broken his agreement, the company may terminate the contract and take the work out of his hands.⁵

Dependent and Independent Agreements. — While the contractor must perform all dependent agreements on his part to entitle him to recover upon the contract for work done, his failure to perform independent agreements does not have the effect of defeating a recovery upon the contract.⁶

Performance to Satisfaction of Engineers or Inspectors. — A stipulation that the work shall be done to the satisfaction of the engineers of the railway company is an appropriate engagement, which will be enforced and carried into effect by the courts.⁷ And similarly a stipulation for the inspection of materials to be furnished, by the inspector of the company, is valid.⁸

Certificate of Engineers as to Performance. — Railway construction contracts frequently require, as a condition precedent to a recovery for work done, that there should be a certificate from the engineer that the work has been performed.⁹

Subcontracting. — In the absence of restrictions in the contract, there does not seem to be any rule prohibiting the contractor from subletting his

Illinois. — Wells v. Northern Trust Co., 195 Ill. 288.

Maryland. — Orange, etc., R. Co. v. Placide, 35 Md. 315.

Minnesota. — Hatch v. Minnesota R. Constr. Co., 26 Minn. 451.

New Hampshire. — Jones v. Portsmouth, etc., R. Co., 32 N. H. 544.

New York. — Moore v. Hudson River R. Co., 12 Barb. (N. Y.) 156; McMahon v. New York, etc., R. Co., 20 N. Y. 463; Barr v. New York, etc., R. Co., 125 N. Y. 263.

Ohio. — Four Mile Valley R. Co. v. Bailey, 18 Ohio St. 208; Cleveland, etc., R. Co. v. Kelley, 5 Ohio St. 180.

Pennsylvania. — McElrath v. Pittsburg, etc., R. Co., 55 Pa. St. 189; Hart's Appeal, 96 Pa. St. 355.

Vermont. — Boody v. Rutland, etc., R. Co., 24 Vt. 660; Barker v. Troy, etc., R. Co., 27 Vt. 766.

Virginia. — Kidwell v. Baltimore, etc., R. Co., 11 Gratt. (Va.) 676.

Damages for Breach. — Porter v. Buckfield Branch R. Co., 32 Me. 539.

1. Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307; Sorette v. Nova Scotia Development Co., 31 Nova Scotia 427.

2. Breach of Contract. — Merritt v. Peninsular Constr. Co., 91 Md. 453; Langdon v. Northfield, 42 Minn. 464.

3. Time of Performance — England. — Alcoy, etc., R., etc., Co. v. Greenhill, 79 L. T. N. S. 257.

Connecticut. — Cannon v. Wildman, 28 Conn. 472.

Illinois. — Snell v. Cottingham, 72 Ill. 161.

Vermont. — Barker v. Troy, etc., R. Co., 27 Vt. 766.

Wisconsin. — Jackson v. Cleveland, 19 Wis. 400.

Waiver of Right to Recover. — Grant v. Savannah, etc., R. Co., 51 Ga. 348.

Provision for Forfeiture. — Florida Northern R. Co. v. Southern Supply Co., 112 Ga. 1; Elizabethtown, etc., R. Co. v. Geoghegan, 9 Bush (Ky.) 56; Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307. See the title LIQUIDATED DAMAGES, vol. 19, p. 394.

4. Western Union R. Co. v. Smith, 75 Ill. 496.

5. Waco Tap R. Co. v. Shirley, 45 Tex. 355.

6. Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 307.

7. Satisfaction of Engineer. — Finegan v. L'Engle, 8 Fla. 413; Hazlehurst v. Savannah, etc., R. Co., 43 Ga. 13; Hobart v. Beers, 26 Kan. 329; Jones v. Gilchrist, 88 Tex. 88; Barker v. Troy, etc., R. Co., 27 Vt. 766.

Notice to Subcontractor. — Where the contractor sublet a section of the road under a stipulation that if the work should not be prosecuted with sufficient energy the chief engineer might, upon written notice to the subcontractor, declare the contract forfeited or carry it forward at the expense and for the benefit of the subcontractor, it was held that the engineer could not be compelled to give the notice, and that a written notice by the contractor to the subcontractor was sufficient, it appearing that the engineer had previously orally notified both that the work was not progressing satisfactorily. Hendrie v. Canadian Bank of Commerce, 49 Mich. 401.

8. Chapman v. Kansas City, etc., R. Co., 114 Mo. 542.

9. Engineers' Certificate. — Kansas City, etc., R. Co. v. Perkins, 88 Tex. 66; Sorette v. Nova

contract;¹ but in such cases the remedy of the subcontractor, in the absence of statutory provision, is against the contractor, and not against the railway company.²

Extra Work. — A railway contractor cannot claim extra compensation for work not included in his contract, and which was done without any agreement between himself and the railway company;³ but he may, of course, recover for extra work done at the request of the company.⁴ The engineers of the company whose duty it is merely to see that the contract is properly executed cannot bind the company to pay therefor.⁵

e. **INJURIES FROM CONSTRUCTION OF ROAD** — **General Rule.** — A railway company, after acquisition of its right of way, either by condemnation proceedings or voluntary conveyances, is not liable for injuries to adjoining land-owners incidental to the construction of its road, where due diligence has been used in the planning and construction of the road; the presumption being that such injuries were either allowed for in the condemnation proceedings or were taken into consideration by the parties, where the conveyance of the right of way to the company was voluntary, and as to other persons such consequential injuries are *damnum absque injuria*.⁶

Scotia Development Co., 31 Nova Scotia 427; McCarron v. McGreevy, 13 Can. Sup. Ct. 383.

1. Lauman v. Young, 31 Pa. St. 306.

What Provisions Binding on Subcontractor. — Sherwood v. Saginaw, etc., R. Co., 53 Mich. 317.

2. Powrie v. Kansas Pac. R. Co., 1 Colo. 529; Kelly's Appeal, (Pa. 1888) 12 Atl. Rep. 256; Thayer v. Vermont Cent. R. Co., 24 Vt. 440; Vanderwerker v. Vermont Cent. R. Co., 27 Vt. 125. Compare O'Brien v. Champlain Constr. Co., 107 Fed. Rep. 338; Blair v. Corby, 29 Mo. 480.

3. Williams v. Chicago, etc., R. Co., 153 Mo. 487.

4. Chicago, etc., R. Co. v. Vosburgh, 45 Ill. 311; Western Union R. Co. v. Smith, 75 Ill. 496; Orange, etc., R. Co. v. Placide, 35 Md. 315.

Requirement for Written Order of Engineer for Extra Work. — Merritt v. Peninsular Constr. Co., 91 Md. 453.

5. Thayer v. Vermont Cent. R. Co., 24 Vt. 440; Alexander v. Robertson, 86 Tex. 511, reversing (Tex. Civ. App. 1893) 24 S. W. Rep. 680. Compare Philadelphia, etc., R. Co. v. Howard, 13 How. (U. S.) 337.

Where the construction contract provides that no deviation from the terms of the contract shall be permitted unless with the written sanction of the engineer, and that no claim for extra work will be allowed under any pretense unless on a written order for the same by the engineer, a party doing the work cannot recover without showing such written order, even though there is another clause in the contract providing that the engineer may direct alterations, additions, etc. White v. San Rafael, etc., R. Co., 50 Cal. 417.

6. **Injuries from Construction** — *Arkansas.* — St. Louis, etc., R. Co. v. Morris, 35 Ark. 622; St. Louis, etc., R. Co. v. Walbrink, 47 Ark. 330.

Georgia. — Gilbert v. Savannah, etc., R. Co., 69 Ga. 396; Georgia R. Co. v. Berry, 78 Ga. 744.

Illinois. — Kotz v. Illinois Cent. R. Co., 188 Ill. 578; Chicago, etc., R. Co. v. Smith, 111 Ill. 363; Wylie v. Elwood, 134 Ill. 281, 23 Am.

St. Rep. 673; Tinker v. Rockford, 137 Ill. 123; Illinois Cent. R. Co. v. Anderson, 73 Ill. App. 621.

Indiana. — Burrow v. Terre Haute, etc., R. Co., 107 Ind. 432; Terre Haute, etc., R. Co. v. McKinley, 33 Ind. 274.

Iowa. — Hileman v. Chicago G. W. R. Co., 113 Iowa 591.

Kentucky. — E., etc., R. Co. v. Dillon, 7 Ky. L. Rep. 606.

Louisiana. — Kirk v. Kansas City, etc., R. Co., 51 La. Ann. 667.

Maine. — Rogers v. Kennebec, etc., R. Co., 35 Me. 319; Whittier v. Portland, etc., R. Co., 38 Me. 26.

Massachusetts. — Proprietors of Locks, etc., v. Nashua, etc., R. Corp., 10 Cush. (Mass.) 385.

Missouri. — Harrelson v. Kansas City, etc., R. Co., 151 Mo. 482.

Nebraska. — Moseley v. Chicago, etc., R. Co., 57 Neb. 636.

New Jersey. — New Jersey Midland R. Co. v. Van Syckle, 37 N. J. L. 496.

New York. — Perry v. Lehigh Valley R. Co., (Supm. Ct. Spec. T.) 9 Misc. (N. Y.) 515.

North Carolina. — Adams v. Durham, etc., R. Co., 110 N. Car. 325; Fleming v. Wilmington, etc., R. Co., 115 N. Car. 676; Waters v. Greenleaf-Johnson Lumber Co., 115 N. Car. 648; Parker v. Norfolk, etc., R. Co., 119 N. Car. 677.

Pennsylvania. — New York, etc., R. Co. v. Young, 33 Pa. St. 175; Edmundson v. Pittsburgh, etc., R. Co., 111 Pa. St. 316; Pennsylvania R. Co. v. Lippincott, 116 Pa. St. 472, 2 Am. St. Rep. 618; Nalley v. Pennsylvania R. Co., 177 Pa. St. 117.

Texas. — International, etc., R. Co. v. Pape, 62 Tex. 313; Faires v. San Antonio, etc., R. Co., 80 Tex. 43; Houston, etc., R. Co. v. McKinney, 55 Tex. 176; International, etc., R. Co. v. Bost, 2 Tex. App. Civ. Cas., § 385; Gulf, etc., R. Co. v. Doran, 2 Tex. Unrep. Cas. 442.

Vermont. — Norris v. Vermont Cent. R. Co., 28 Vt. 99; Henry v. Vermont Cent. R. Co., 30 Vt. 638, 73 Am. Dec. 329.

Canada. — L'Esperance v. Great Western R. Co., 14 U. C. Q. B. 173; Knapp v. Great Western R. Co., 6 U. C. C. P. 187.

Convenience of Landowners. — The company is not bound to construct the road with reference to the greatest convenience to the adjoining landowners, but is authorized to build in accordance with its general plan with reference to cost and its own advantage in making a safe and good road.¹

Unnecessary Injuries. — But the company is not allowed to adopt a plan for construction which will unnecessarily injure the adjoining landowners.²

Trespass. — The company, in constructing its road, has no authority, of course, to commit trespasses upon adjoining lands outside of its right of way.³ Thus, the company is liable in case it deposits waste earth upon lands of third persons outside of its right of way.⁴

Reasonable Diligence. — The company is bound to use reasonable diligence in the construction of the railway so as to avoid injury to third persons.⁵

Engineering Skill. — It must use, in planning the work, the engineering knowledge and skill ordinarily practiced in such work.⁶

Embankments, Cuts, Culverts, Bridges, etc. — The company must construct its embankments of such material as will prevent the washing of matter upon adjoining lands;⁷ in case of cuts, when it is found necessary to protect adjoining lands, retaining walls must be built;⁸ in crossing watercourses, proper bridges and culverts must be constructed, so as to allow of the free passage of water;⁹ and in case of embankments over natural drains for surface

Elevation of Roadbed. — Where the right of way was acquired by a railroad company for the purpose of constructing, maintaining and operating its road, the amount of damages to which the owner was entitled settled, and the road built upon substantially the surface level of the ground, the owner will not be entitled to additional damages on account of the subsequent elevation of its roadbed by the company. *Chicago, etc., R. Co. v. Cogswell*, 94 Ill. App. 127; *Kotz v. Illinois Cent. R. Co.*, 188 Ill. 578.

Unforeseen Damages. — The assessment of compensation for land taken for a railway covers all damages, whether foreseen or not, which result from a proper construction of the road. *Gilbert v. Savannah, etc., R. Co.*, 69 Ga. 396.

1. *International, etc., R. Co. v. Pape*, 62 Tex. 313; *Gulf, etc., R. Co. v. Richards*, 11 Tex. Civ. App. 95.

2. *E., etc., R. Co. v. Watts*, 9 Ky. L. Rep. 289; *Gulf, etc., R. Co. v. Hutcheson*, 3 Tex. App. Civ. Cas., § 95. See also *International, etc., R. Co. v. Pape*, 62 Tex. 313.

3. **Trespass.** — *Georgetown, etc., R. Co. v. Eagles*, 9 Colo. 544; *Waltemeyer v. Wisconsin, etc., R. Co.*, 71 Iowa 626; *Chicago, etc., R. Co. v. Willits*, 45 Kan. 110; *Sweetser v. Boston, etc., R. Co.*, 66 Me. 583; *Ryan v. Mississippi Valley, etc., R. Co.*, 62 Miss. 162.

4. *Chicago, etc., R. Co. v. Robbins*, 159 Ill. 598; *McCord v. Doniphan Branch R. Co.*, 21 Mo. App. 92; *Norfolk, etc., R. Co. v. Carter*, 91 Va. 587.

5. **Reasonable Diligence** — *Connecticut*. — *Driscoll v. Norwich, etc., R. Co.*, 65 Conn. 230.

Georgia. — *Gilbert v. Savannah, etc., R. Co.*, 69 Ga. 396.

Illinois. — *Indiana, etc., R. Co. v. Patchette*, 59 Ill. App. 251; *Cleveland, etc., R. Co. v. Patison*, 67 Ill. App. 351; *Ohio, etc., R. Co. v. Wachter*, 123 Ill. 440, 5 Am. St. Rep. 532.

Louisiana. — *Kirk v. Kansas City, etc., R. Co.*, 51 La. Ann. 667.

Massachusetts. — *Salem v. Eastern R. Co.*, 98

Mass. 431, 96 Am. Dec. 650; *Curtis v. Eastern R. Co.*, 14 Allen (Mass.) 55.

Minnesota. — *Jungblum v. Minneapolis, etc., R. Co.*, 70 Minn. 153.

Missouri. — *McCormick v. Kansas City, etc., R. Co.*, 57 Mo. 433.

Nebraska. — *Freemont, etc., R. Co. v. Harlin*, 50 Neb. 608, 61 Am. St. Rep. 578.

North Carolina. — *Winkler v. Carolina, etc., R. Co.*, 126 N. Car. 370, 78 Am. St. Rep. 663; *Carson v. Norfolk, etc., R. Co.*, 128 N. Car. 95.

Pennsylvania. — *Pittsburg, etc., R. Co. v. Gilleland*, 56 Pa. St. 445, 94 Am. Dec. 97.

Texas. — *Houston, etc., R. Co. v. Parker*, 50 Tex. 330; *Houston, etc., R. Co. v. Chaffin*, 60 Tex. 553.

Virginia. — *Atlantic, etc., R. Co. v. Peake*, 87 Va. 130; *Southside R. Co. v. Daniel*, 20 Gratt. (Va.) 344.

Canada. — *Vanhorn v. Grand Trunk R. Co.*, 9 U. C. C. P. 264.

Negligent Blasting. — *Georgetown, etc., R. Co. v. Eagles*, 9 Colo. 544. See also *Blackwell v. Lynchburg, etc., R. Co.*, 111 N. Car. 151, 32 Am. St. Rep. 786.

6. *Ohio, etc., R. Co. v. Thillman*, 143 Ill. 127, 36 Am. St. Rep. 359; *Illinois Cent. R. Co. v. Bethel*, 11 Ill. App. 17; *Omaha, etc., R. Co. v. Brown*, 14 Neb. 170.

7. **Embankments.** — *Wabash, etc., R. Co. v. Sanders*, 58 Ill. App. 213; *Egener v. New York, etc., R. Co.*, 3 N. Y. App. Div. 157; *Sims v. Ohio River, etc., R. Co.*, 56 S. Car. 30.

8. **Cuts.** — *Mosier v. Oregon R., etc., Co.*, 39 Oregon 256; *Ludlow v. Hudson River R. Co.*, 6 Lans. (N. Y.) 128; *Nading v. Denison, etc., R. Co.*, (Tex. Civ. App. 1901) 62 S. W. Rep. 97; *Richardson v. Vermont Cent. R. Co.*, 25 Vt. 465, 60 Am. Dec. 283; *Thompson v. Milwaukee, etc., R. Co.*, 27 Wis. 93. See also *Costigan v. Pennsylvania R. Co.*, 54 N. J. L. 233. Compare *Hortzman v. Covington, etc., R. Co.*, 18 B. Mon. (Ky.) 218. See the title LATERAL AND SUBJACENT SUPPORT, vol. 18, p. 541 *et seq.*

9. **Bridges and Culverts** — *United States*. — Van

waters the company should, it seems (though there is great conflict in the decisions), provide sufficient culverts to prevent the flooding of adjoining lands by the retention and backing up of waters.¹ In crossing highways, if

Wert County *v.* Peirce, 90 Fed. Rep. 764. See also Hodge *v.* Lehigh Valley R. Co., 56 Fed. Rep. 195.

Arkansas. — St. Louis, etc., R. Co. *v.* Morris, 35 Ark. 622; St. Louis, etc., R. Co. *v.* Harris, 47 Ark. 340.

Georgia. — Gilbert *v.* Savannah, etc., R. Co., 69 Ga. 396; Georgia R., etc., Co. *v.* Bohler, 98 Ga. 185; O'Connell *v.* East Tennessee, etc., R. Co., 87 Ga. 246, 27 Am. St. Rep. 246.

Illinois. — Chicago, etc., R. Co. *v.* Moffitt, 75 Ill. 524; Kankakee, etc., R. Co. *v.* Horan, 131 Ill. 288; Ohio, etc., R. Co. *v.* Ramey, 139 Ill. 9, 32 Am. St. Rep. 176; Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670; Rock Island, etc., R. Co. *v.* Krapp, 173 Ill. 219; Illinois, etc., R. Co. *v.* Bethel, 11 Ill. App. 17; Ohio, etc., R. Co. *v.* Wachter, 23 Ill. App. 415, *affirmed* 123 Ill. 440, 5 Am. St. Rep. 532; Ohio, etc., R. Co. *v.* Singletary, 34 Ill. App. 425; Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, 36 Am. St. Rep. 359, *reversing* 43 Ill. App. 78; St. Louis, etc., R. Co. *v.* Brown, 34 Ill. App. 552; St. Louis, etc., R. Co. *v.* Winkleman, 47 Ill. App. 276; Peoria, etc., R. Co. *v.* Barton, 38 Ill. App. 469; Illinois Cent. R. Co. *v.* Heisner, 45 Ill. App. 143.

Indiana. — New York, etc., R. Co. *v.* Hamlet Hay Co., 149 Ind. 344.

Iowa. — Cornish *v.* Chicago, etc., R. Co., 49 Iowa 378; Hunt *v.* Iowa Cent. R. Co., 86 Iowa 15, 41 Am. St. Rep. 473; Willits *v.* Chicago, etc., R. Co., 88 Iowa 281.

Kansas. — Union Trust Co. *v.* Cuppy, 26 Kan. 754.

Kentucky. — West *v.* Louisville, etc., R. Co., 8 Bush (Ky.) 404.

Louisiana. — Kirk *v.* Kansas City, etc., R. Co., 51 La. Ann. 667.

Maine. — Penley *v.* Maine Cent. R. Co., 92 Me. 59.

Maryland. — Philadelphia, etc., R. Co. *v.* Davis, 68 Md. 281, 76 Am. St. Rep. 440.

Massachusetts. — Mellen *v.* Western R. Corp., 4 Gray (Mass.) 301; Bryant *v.* Bigelow Carpet Co., 131 Mass. 491.

Mississippi. — Mississippi Cent. R. Co. *v.* Caruth, 51 Miss. 77; Mississippi Cent. R. Co. *v.* Mason, 51 Miss. 234.

Missouri. — McPherson *v.* St. Louis, etc., R. Co., 97 Mo. 253; Payne *v.* Kansas City, etc., R. Co., 112 Mo. 6; Brink *v.* Kansas City, etc., R. Co., 17 Mo. App. 177; George *v.* Wabash Western R. Co., 40 Mo. App. 433; Kenney *v.* Kansas City, etc., R. Co., 74 Mo. App. 301.

Nebraska. — Omaha, etc., R. Co. *v.* Brown, 14 Neb. 170, 16 Neb. 161; Omaha, etc., R. Co. *v.* Standen, 22 Neb. 343; McCleneghan *v.* Omaha, etc., R. Co., 25 Neb. 533; Chicago, etc., R. Co. *v.* Andreesen, 62 Neb. 456.

New Hampshire. — Eaton *v.* Boston, etc., R. Co., 51 N. H. 504, 12 Am. Rep. 147.

New York. — Brown *v.* Cayuga, etc., R. Co., 12 N. Y. 486; Higgins *v.* New York, etc., R. Co., 78 Hun (N. Y.) 567; Drake *v.* New York, etc., R. Co., 75 Hun (N. Y.) 422.

North Carolina. — Emery *v.* Raleigh, etc., R. Co., 102 N. Car. 209 11 Am. St. Rep. 727;

Ridley *v.* Seaboard, etc., R. Co., 118 N. Car. 996.

Pennsylvania. — Pittsburg, etc., R. Co. *v.* Gilleland, 56 Pa. St. 445, 94 Am. Dec. 97; Baltimore, etc., R. Co. *v.* Sulphur Spring Independent School Dist., 96 Pa. St. 65, 42 Am. Rep. 529; Fick *v.* Pennsylvania R. Co., 157 Pa. St. 622; Brown *v.* Pine Creek R. Co., 183 Pa. St. 38.

Rhode Island. — Spencer *v.* Hartford, etc., R. Co., 10 R. I. 14.

Texas. — Gulf, etc., R. Co. *v.* Holliday, 65 Tex. 512; Sabine, etc., R. Co. *v.* Hadnot, 67 Tex. 503; Gulf, etc., R. Co. *v.* Pomeroy, 67 Tex. 498; Rosenthal *v.* Taylor, etc., R. Co., 79 Tex. 325.

Vermont. — Norris *v.* Vermont Cent. R. Co., 28 Vt. 99; Henry *v.* Vermont Cent. R. Co., 30 Vt. 638, 73 Am. Dec. 329.

Virginia. — Atlantic, etc., R. Co. *v.* Peake, 87 Va. 130.

West Virginia. — Taylor *v.* Baltimore, etc., R. Co., 33 W. Va. 39; Neal *v.* Ohio River R. Co., 47 W. Va. 316.

Canada. — Robitaille *v.* Canadian Pac. R. Co., 15 Quebec Super. Ct. 248.

See also the title FLOODS, vol. 13, p. 685 *et seq.*

1. **Surface Waters** — *Arkansas.* — Bentonville, etc., R. Co. *v.* Baker, 45 Ark. 252; Little Rock, etc., R. Co. *v.* Chapman, 39 Ark. 463, 43 Am. Rep. 280; St. Louis, etc., R. Co. *v.* Morris, 35 Ark. 622; Springfield, etc., R. Co. *v.* Henry, 44 Ark. 360.

Dakota. — Hannaher *v.* St. Paul, etc., R. Co., 5 Dak. 1.

Georgia. — Gilbert *v.* Savannah, etc., R. Co., 69 Ga. 396.

Illinois. — Toledo, etc., R. Co. *v.* Morrison, 71 Ill. 616; St. Louis, etc., R. Co. *v.* Capps, 72 Ill. 188; Jacksonville, etc., R. Co. *v.* Cox, 31 Ill. 500; St. Louis, etc., R. Co. *v.* Hurst, 14 Ill. App. 419; Kawkakee, etc., R. Co. *v.* Horan, 22 Ill. App. 145; Chicago, etc., R. Co. *v.* Riley, 25 Ill. App. 569; Nevins *v.* Peoria, 41 Ill. 502, 89 Am. Dec. 392; Gillham *v.* Madison County R. Co., 49 Ill. 484, 95 Am. Dec. 627; Chicago, etc., R. Co. *v.* Glenney, 116 Ill. 487; Ohio, etc., R. Co. *v.* Wachter, 123 Ill. 440, 5 Am. St. Rep. 532; Ohio, etc., R. Co. *v.* Thillman, 143 Ill. 127, 36 Am. St. Rep. 359; Ohio, etc., R. Co. *v.* Dooley, 32 Ill. App. 228; East St. Louis, etc., R. Co. *v.* Eisentraut, 34 Ill. App. 563, *affirmed* 134 Ill. 96; Chicago, etc., R. Co. *v.* Connors, 25 Ill. App. 561; Ohio, etc., R. Co. *v.* Ramey, 39 Ill. App. 409; Ohio, etc., R. Co. *v.* Nuetzel, 43 Ill. App. 108; Ohio, etc., R. Co. *v.* Thillman, 43 Ill. App. 78; Chicago, etc., R. Co. *v.* Henneberry, 42 Ill. App. 126, *affirmed* 153 Ill. 354; Illinois Cent. R. Co. *v.* Heisner, 45 Ill. App. 143; Ohio, etc., R. Co. *v.* Long, 52 Ill. App. 670; Chicago, etc., R. Co. *v.* Will, 53 Ill. App. 603; St. Louis, etc., R. Co. *v.* Ellis, 58 Ill. App. 110; Cleveland, etc., R. Co. *v.* Nuttall, 59 Ill. App. 639; Illinois Cent. R. Co. *v.* Heisner, 93 Ill. App. 469, *affirmed* 192 Ill. 571; Indiana, etc., R. Co. *v.* Patchette, 59 Ill. App. 251.

excavations are necessary, they must be so protected as to prevent injury to persons passing and exercising ordinary care.¹

Duty to Employees — Passengers. — The duty of the company in the construction of its road, with regard to its employees² or its passengers,³ has been treated in other places.

Licenseses — Trespassers. — The subject of personal injuries to licensees or trespassers upon railway tracks from defects in construction has been treated elsewhere under this title.⁴

Diversion of Watercourses. — The railway company, in constructing its road, has no greater right than individuals permanently to divert watercourses to the injury of riparian owners.⁵

Indiana. — Louisville, etc., R. Co. v. McAfee, 30 Ind. 291; Cairo, etc., R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139.

Iowa. — Drake v. Chicago, etc., R. Co., 63 Iowa 302, 50 Am. Rep. 746.

Kansas. — Atchison, etc., R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; Kansas City, etc., R. Co. v. Riley, 33 Kan. 374.

Louisiana. — Payne v. Morgan's Louisiana, etc., R., etc., Co., 38 La. Ann. 164, 58 Am. Rep. 174.

Massachusetts. — Curtis v. Eastern R. Co., 98 Mass. 428; Cassidy v. Old Colony R. Co., 141 Mass. 174; Walker v. Old Colony, etc., R. Co., 103 Mass. 10, 4 Am. Rep. 509.

Maine. — Greeley v. Maine Cent. R. Co., 53 Me. 200; Morrison v. Bucksport, etc., R. Co., 67 Me. 353.

Minnesota. — Pfelegar v. Hastings, etc., R. Co., 28 Minn. 510; Jungblum v. Minneapolis, etc., R. Co., 70 Minn. 153.

Missouri. — Hoshier v. Kansas City, etc., R. Co., 60 Mo. 329; McCormick v. Kansas City, etc., R. Co., 70 Mo. 359, 35 Am. Rep. 431; Shane v. Kansas City, etc., R. Co., 71 Mo. 237, 36 Am. Rep. 480; Munkres v. Kansas City, etc., R. Co., 72 Mo. 514; Field v. Chicago, etc., R. Co., 76 Mo. 614; Ellet v. St. Louis, etc., R. Co., 76 Mo. 518; Abbott v. Kansas City, etc., R. Co., 83 Mo. 271, 53 Am. Rep. 581; Jones v. St. Louis, etc., R. Co., 84 Mo. 151; Moss v. St. Louis, etc., R. Co., 85 Mo. 86; Harrelson v. Kansas City, etc., R. Co., 151 Mo. 482; Byrne v. Keokuk, etc., R. Co., 47 Mo. App. 383; Collier v. Chicago, etc., R. Co., 48 Mo. App. 398; Field v. Chicago, etc., R. Co., 21 Mo. App. 600; Graves v. Kansas City, etc., R. Co., 69 Mo. App. 574; Kenney v. Kansas City, etc., R. Co., 69 Mo. App. 569; Kenney v. Kansas City, etc., R. Co., 74 Mo. App. 301.

Nebraska. — Morrissey v. Chicago, etc., R. Co., 38 Neb. 406, 58 Am. & Eng. R. Cas. 622; Chicago, etc., R. Co. v. Shaw, (Neb. 1901) 88 N. W. Rep. 508.

New Hampshire. — Johnson v. Atlantic, etc., R. Co., 35 N. H. 569, 69 Am. Dec. 560.

New York. — Deigleman v. New York, etc., R. Co., (Buffalo Super. Ct. Eq. T.) 12 N. Y. Supp. 83; Waffle v. New York Cent. R. Co., 58 Barb. (N. Y.) 413; Egner v. New York, etc., R. Co., 3 N. Y. App. Div. 157; Wagner v. Long Island R. Co., 2 Hun (N. Y.) 633; Ft. Covington v. United States, etc., R. Co., 156 N. Y. 702.

North Carolina. — Raleigh, etc., R. Co. v. Wicker, 74 N. Car. 220; Beel v. Norfolk Southern R. Co., 101 N. Car. 21; Emery v. Raleigh, etc., R. Co., 102 N. Car. 209, 11 Am.

St. Rep. 727; Knight v. Albemarle, etc., R. Co., 111 N. Car. 80; Staton v. Norfolk, etc., R. Co., 109 N. Car. 337; Jenkins v. Wilmington, etc., R. Co., 110 N. Car. 438; Parker v. Norfolk, etc., R. Co., 119 N. Car. 677; Beach v. Wilmington, etc., R. Co., 120 N. Car. 498.

Ohio. — Madden v. Cincinnati, etc., R. Co., 36 Ohio St. 46.

Tennessee. — Carriger v. East Tennessee, etc., R. Co., 7 Lea (Tenn.) 388.

Texas. — Houston, etc., R. Co. v. Parker, 50 Tex. 330; Houston, etc., R. Co. v. Knapp, 51 Tex. 592; Texas, etc., R. Co. v. Sutor, 56 Tex. 496; Owens v. Missouri Pac. R. Co., 67 Tex. 679; Gulf, etc., R. Co. v. Pomeroy, 67 Tex. 498; Austin, etc., R. Co. v. Anderson, 79 Tex. 427, 23 Am. St. Rep. 350; Dobbins v. Missouri, etc., R. Co., 91 Tex. 60, 66 Am. St. Rep. 856; International, etc., R. Co. v. Malone, 1 Tex. App. Civ. Cas., § 234; Ft. Worth, etc., R. Co. v. Scott, 2 Tex. App. Civ. Cas., § 140; Texas, etc., R. Co. v. Meaddox, (Tex. Civ. App. 1901) 63 S. W. Rep. 134.

Vermont. — Waterman v. Connecticut, etc., R. Co., 30 Vt. 610, 73 Am. Dec. 326.

Wisconsin. — O'Connor v. Fond du Lac, etc., R. Co., 52 Wis. 526, 38 Am. Rep. 753; Johnson v. Chicago, etc., R. Co., 80 Wis. 641, 27 Am. St. Rep. 76.

Canada. — Alton v. Hamilton, etc., R. Co., 13 U. C. Q. B. 595; Carron v. Great Western R. Co., 14 U. C. Q. B. 192; Wallace v. Grand Trunk R. Co., 16 U. C. Q. B. 551; Hornby v. New Westminster Southern R. Co., 6 British Columbia 588; Utter v. Great Western R. Co., 17 U. C. Q. B. 392; McGillivray v. Great Western R. Co., 25 U. C. Q. B. 69; Nichol v. Canada Southern R. Co., 40 U. C. Q. B. 583; Crewson v. Grand Trunk R. Co., 27 U. C. Q. B. 68; Grand Trunk R. Co. v. Landing, 11 Rev. Leg. 590.

See also the title **WATERS AND WATERCOURSES.**

1. Shonhoff v. Jackson Branch R. Co., 97 Mo. 151. See the titles **HIGHWAYS**, vol. 15, p. 243 *et seq.*; **STREETS AND SIDEWALKS.**

2. See the title **MASTER AND SERVANT**, vol. 20, p. 3.

3. See the title **CARRIERS OF PASSENGERS**, vol. 5, p. 519.

4. See *infra*, this title, **Operation of Road.**

5. **Diversion of Watercourses** — *Illinois.* — Chicago, etc., R. Co. v. Moffitt, 75 Ill. 524; Ohio, etc., R. Co. v. Thillman, 143 Ill. 127, 36 Am. St. Rep. 359; Toledo, etc., R. Co. v. Chicago, etc., R. Co., 155 Ill. 9; Ohio, etc., R. Co. v. Wachter, 23 Ill. App. 415, *affirmed* 123 Ill. 440, 5 Am. St. Rep. 532; Lake Erie, etc., R. Co. v. Purcell, 75 Ill. App. 573.

Fences and Crossings. — The duty of the railway company in the construction of its road to build fences and cattle guards¹ or private crossings² for the benefit of adjoining landowners has already been fully treated in the appropriate places in this work.

Liability for Acts of Contractor. — A full discussion of the liability of independent contractors will be found elsewhere in this work.³

f. CONSTRUCTION LIENS — (1) *In General.* — At common law no lien, in the absence of express contract, existed against railways for claims arising out of their construction.⁴ And on grounds of public policy it has been held that the statutes providing generally for liens in favor of persons performing labor or furnishing materials in the construction of buildings, structures, etc., would not be construed so as to subject railways to liens for claims arising out of their construction.⁵

Iowa. — *Stodghill v. Chicago, etc., R. Co.*, 43 Iowa 26, 22 Am. Rep. 211; *Van Orsdol v. Burlington, etc., R. Co.*, 56 Iowa 470.

Maine. — *Rogers v. Kennebec, etc., R. Co.*, 35 Me. 319.

Maryland. — *Baltimore, etc., R. Co. v. Magruder*, 34 Md. 79, 6 Am. Rep. 310.

Massachusetts. — *Estabrooks v. Peterborough, etc., R. Co.*, 12 Cush. (Mass.) 224.

New York. — *Cott v. Lewiston R. Co.*, 36 N. Y. 214; *Lefurgy v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 302; *Robinson v. New York, etc., R. Co.*, 27 Barb. (N. Y.) 512.

North Carolina. — *Adams v. Durham, etc., R. Co.*, 110 N. Car. 325; *Fleming v. Wilmington, etc., R. Co.*, 115 N. Car. 676.

Ohio. — *Valley R. Co. v. Bohm*, 34 Ohio St. 114; *Valley R. Co. v. Franz*, 43 Ohio St. 623.

Vermont. — *Hatch v. Vermont Cent. R. Co.*, 25 Vt. 49.

Wisconsin. — *Young v. Chicago, etc., R. Co.*, 28 Wis. 171.

Canada. — *Glen v. Grand Trunk R. Co.*, 2 Ont. Pr. 377; *Tingwick v. Grand Trunk R. Co.*, 9 Rev. Leg. 346, 3 Quebec 111; *Graham v. Northern R. Co.*, 10 Grant Ch. (U. C.) 259; *Anderson v. Great Western R. Co.*, 11 U. C. Q. B. 126.

See the title **WATERS AND WATERCOURSES.**

Grant of Right of Way authorizing change of watercourse. *Little Rock Junction R. Co. v. Woodruff*, 49 Ark. 381, 4 Am. St. Rep. 51; *St. Louis, etc., R. Co. v. Harris*, 47 Ark. 340.

1. See the title **FENCES**, vol. 12, p. 1035 *et seq.*

2. See the title **CROSSINGS**, vol. 8, p. 335 *et seq.*

3. See the title **INDEPENDENT CONTRACTORS**, vol. 16, p. 186.

4. **Liens at Common Law.** — *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Wright v. Kentucky, etc., R. Co.*, 117 U. S. 72; *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 301; *Myer v. Dupont*, 79 Ky. 416.

5. **Statutes Giving Liens Generally** — *United States.* — *Bancombe County Com'rs v. Tommey*, 115 U. S. 122 (N. Car. Stat., giving lien on "building, * * * lot, farm, or vessel, or any kind of property"); *Pennsylvania Steel Co. v. J. E. Potts Salt, etc., Co.*, 63 Fed. Rep. 11, 22 U. S. App. 537 (Mich. Act 1885, giving lien on "building, machinery, wharf, or structure"); *Industrial, etc., Guaranty Co. v. Electrical Supply Co.*, (C. C. A.) 58 Fed. Rep. 732; *Greenwood, etc., R. Co. v. Strang*, 77 Fed. Rep. 498 (S. Car. Stat.); *Cleveland, etc., R. Co. v. Knickerbocker Trust Co.*, 86 Fed. Rep.

73 (Ohio Stat.). See also *Toledo, etc., R. Co. v. Hamilton*, 134 U. S. 301 (Ohio Stat.). *Compare* *Giant-Powder Co. v. Oregon Pac. R. Co.*, 42 Fed. Rep. 470 (Oregon Stat., giving lien on "structures").

Arkansas. — *Dano v. Mississippi Ouachita, etc., R. Co.*, 27 Ark. 564.

Illinois. — *Huntley Mfg. Co. v. Michigan Cent. R. Co.*, 76 Ill. App. 387.

Kentucky. — *Graham v. Mt. Sterling Coal-road Co.*, 14 Bush (Ky.) 425, 29 Am. Rep. 412 (statute giving lien on "any house, building, or other structure").

Missouri. — *Dunn v. North Missouri R. Co.*, 24 Mo. 493; *Schulenburg v. Memphis, etc., R. Co.*, 67 Mo. 443; *Skrainka v. Rohan*, 18 Mo. App. 340; *Bethune v. Cleveland, etc., R. Co.*, 149 Mo. 587.

New York. — *Fowler v. Buffalo, etc., R. Co.*, *Sheld.* (N. Y.) 525.

Ohio. — *Rutherford v. Cincinnati, etc., R. Co.*, 35 Ohio St. 559 (statute giving lien on "any house, mill, * * * or other building, appurtenance, fixture, bridge, or other structure").

Pennsylvania. — *Esterley's Appeal*, 54 Pa. St. 192.

Texas. — *Tyler Tap R. Co. v. Driscoll*, 52 Tex. 13 ("house or improvement").

Wisconsin. — *La Crosse, etc., R. Co. v. Vanderpool*, 11 Wis. 119, 78 Am. Dec. 691; *Pittsburg Testing Laboratory v. Milwaukee Electric R., etc., Co.*, 110 Wis. 633.

Canada. — *Ring v. Alford*, 9 Ont. 643; *Breeze v. Midland R. Co.*, 26 Grant Ch. (U. C.) 225; *Larsen v. Nelson, etc., R. Co.*, 4 British Columbia 151.

Compare *Dunavant v. Caldwell, etc., R. Co.*, 122 N. Car. 999.

Buildings. — But there is no reason for denying the lien of such statutes as regards buildings erected for railway companies. *Botsford v. New Haven, etc., R. Co.*, 41 Conn. 454; *McIlvain v. Hestonville, etc., R. Co.*, 5 Phila. (Pa.) 13, 19 Leg. Int. (Pa.) 44; *Hill v. La Crosse, etc., R. Co.*, 11 Wis. 214. *Compare* *Skrainka v. Rohan*, 18 Mo. App. 340, *King v. Alford*, 9 Ont. 643.

Bridges. — Where the statute expressly gives a lien for claims arising out of the construction of bridges, this has been held to include railway bridges. *Smith Bridge Co. v. Bowman*, 41 Ohio St. 37, 52 Am. Rep. 67, *Purtell v. Chicago Forge, etc., Co.*, 74 Wis. 132. See also *Rutherford v. Cincinnati, etc., R. Co.*, 35 Ohio St. 559.

Statutes. — In many jurisdictions the statutes expressly provide for liens upon railroads for claims arising out of their construction.¹ Statutes giving liens for claims arising out of the construction of railways are not retroactive so as to apply to claims theretofore accrued.² Under these statutes, liens are generally given to contractors,³ subcontractors,⁴ laborers or persons performing work or labor⁵ either for a contractor⁶ or for a subcontractor,⁷ or

1. **Express Provisions for Liens Against Railroads** — *United States*. — Fox *v.* Seal, 22 Wall. (U. S.) 424 (Pa. Stat. Jan. 21, 1843); Brooks *v.* Burlington, etc., R. Co., 101 U. S. 443 (Iowa Stat.); Central Trust Co. *v.* Condon, (C. C. A.) 67 Fed. Rep. 84 (Tenn. Stat.); Pacific Rolling Mills Co. *v.* James St. Constr. Co., (C. C. A.) 68 Fed. Rep. 966 (Wash. Stat.); Richmond, etc., Constr. Co. *v.* Richmond, etc., R. Co., (C. C. A.) 68 Fed. Rep. 105 (Ky. Stat.); Central Trust Co. *v.* Richmond, etc., R. Co., (C. C. A.) 68 Fed. Rep. 90 (Ky. Stat.); Couper *v.* Gaboury, (C. C. A.) 69 Fed. Rep. 7 (Fla. Act June 3, 1887); Ban *v.* Columbia Southern R. Co., 109 Fed. Rep. 499 (Oregon Stat.); Taylor *v.* Burlington, etc., R. Co., 4 Dill. (U. S.) 570, 23 Fed. Cas. No. 13,783 (Iowa Stat.).

Arkansas. — Little Rock, etc., R. Co. *v.* Spencer, 65 Ark. 183.

Iowa. — Neilson *v.* Iowa Eastern R. Co., 44 Iowa 71.

Kentucky. — Knoxville, etc., R. Co. *v.* Hoge, (Ky. 1894) 26 S. W. Rep. 534, 16 Ky. L. Rep. 9.

Missouri. — Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87; Van Frank *v.* St. Louis, etc., R. Co., 93 Mo. App. 412.

Nebraska. — Stewart-Chute Lumber Co. *v.* Missouri Pac. R. Co., 28 Neb. 39.

New York. — Wick *v.* Ft. Plain, etc., R. Co., 27 N. Y. App. Div. 577.

Pennsylvania. — Tyrone, etc., R. Co. *v.* Jones, 79 Pa. St. 60; Shamokin Valley, etc., R. Co. *v.* Malone, 85 Pa. St. 25.

Texas. — Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas. § 567; National Bank *v.* Gulf, etc., R. Co., (Tex. 1902) 66 S. W. Rep. 203.

Washington. — Seattle, etc., R. Co. *v.* Ah Kow, 2 Wash. Ter. 36.

Canada. — King *v.* Alford, 9 Ont. 643, 24 Am. & Eng. R. Cas. 331.

Railroad Owned by Individuals. — In *Arkansas* it has been held that the statute creating a lien in favor of one who furnished material to build "any railroad" upon the roadbed, equipments, and appurtenances of the road, was broad enough to embrace every railroad, whether owned by an incorporated company or not, and that the lien might therefore exist where the railroad was constructed by individuals who owned the road as a copartnership or in common, without incorporation. Brown *v.* Buck, 54 Ark. 453.

Terminal Company incorporated to construct connecting railroads and a union depot. Beach *v.* Wakefield, 107 Iowa 567.

2. **Statutes Not Retrospective.** — Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429; Central, etc., R. Co. *v.* Henning, 52 Tex. 466; Vanderpool *v.* La Crosse, etc., R. Co., 44 Wis. 652. See also Parker *v.* Massachusetts, etc., R. Co., 115 Mass. 580.

3. **Contractors.** — New Castle Northern R. Co. *v.* Simpson, 26 Fed. Rep. 133 (Pa. Act Jan. 21, 1845); Pensacola R. Co. *v.* Schaffer, 76 Ala.

233; Farmers' L. & T. Co. *v.* Candler, 87 Ga. 241; Midland R. Co. *v.* Wilcox, 122 Ind. 84; Williams *v.* Chicago, etc., R. Co., 112 Mo. 464, 34 Am. St. Rep. 403; Sweem *v.* Atchison, etc., R. Co., 85 Mo. App. 87; Rousculp *v.* Ohio Southern R. Co., 10 Ohio Cir. Dec. 621, 19 Ohio Cir. Ct. 436.

4. **Subcontractors** — *Illinois*. — Cairo, etc., R. Co. *v.* Cauble, 85 Ill. 555; St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182; Arbuckle *v.* Illinois Midland R. Co., 81 Ill. 429; Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316.

Minnesota. — Spafford *v.* Duluth, etc., R. Co., 48 Minn. 515.

Ohio. — Bartlett *v.* Patterson, 9 Ohio Dec. (Reprint) 73, 10 Cinc. L. Bul. 367.

Virginia. — Shenandoah Valley R. Co. *v.* Miller, 80 Va. 821; Norfolk, etc., R. Co. *v.* Howison, 81 Va. 125.

Compare Cartter *v.* Rome, etc., Constr. Co., 89 Ga. 158; Blanding *v.* Davenport, etc., R. Co., 88 Iowa 228; Horton *v.* St. Louis, etc., R. Co., 84 Mo. 602; McGugin *v.* Ohio River R. Co., 33 W. Va. 63; Richardson *v.* Norfolk, etc., R. Co., 37 W. Va. 641.

Who Are Subcontractors. — Templin *v.* Chicago, etc., R. Co., 73 Iowa 548.

Sub-subcontractor. — Under the *Minnesota* statute giving a lien upon railways in favor of "whoever furnishes any labor, skill, or material * * * by virtue of any contract with the owner * * * or by virtue of any subcontract with the original contractor," a sub-subcontractor is entitled to a lien, and the benefit of the statute is not to be restricted to subcontractors under the original contract. Spafford *v.* Duluth, etc., R. Co., 48 Minn. 515.

5. As to who are "laborers," see the title LABOR — LABORER, vol. 18, p. 71.

"**Railroad.**" — Labor performed in constructing roundhouses, workshops, etc., adjoining the right of way is not performed in construction of a "railroad." (Rev. Stat. Tex., § 3312). National Bank *v.* Gulf, etc., R. Co., (Tex. 1902) 66 S. W. Rep. 203.

Labor Performed Out of State. — St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664.

6. **Labor for Contractors.** — Farmers' L. & T. Co. *v.* Canada, etc., R. Co., 127 Ind. 250; Wabash R. Co. *v.* Achemire, 19 Ind. App. 482; Indiana, etc., R. Co. *v.* Larrew, 130 Ind. 368; Gulf, etc., R. Co. *v.* Winder, (Tex. Civ. App. 901) 63 S. W. Rep. 1043.

7. **Labor for Subcontractor.** — Reynolds *v.* Manhattan Trust Co., (C. C. A.) 83 Fed. Rep. 593 (Neb. Stat.); Solomon *v.* Nicholas, 113 Ill. 351; Ferguson *v.* Despo, 8 Ind. App. 523; Sampson *v.* Buffalo, etc., R. Co., 13 Hun (N. Y.) 280, 4 Thomp. & C. (N. Y.) 600; Eccleston *v.* Hetting, 17 Mont. 88; Texas, etc., R. Co. *v.* Dorman, (Tex. Civ. App. 1901) 62 S. W. Rep. 1086. See also Peters *v.* St. Louis, etc., R. Co., 24 Mo. 586. *Compare* Central Trust

for materials furnished.¹ The statute giving a lien upon the railroad in favor of subcontractors does not impose, of itself, any personal liability upon the railway company for the claims of such persons,² and the extent of the lien in favor of such persons is generally limited to the amount of the indebtedness on the part of the railway company to the original contractor.³

"Construction." — The statutes giving a lien upon the railway for materials or labor furnished for its construction should be limited to materials and labor which go into the construction of the railroad, so as to be, in a sense, incorporated therein,⁴ and does not entitle a person to a lien for board, groceries, money, etc., furnished to laborers of a contractor or subcontractor,⁵ or for labor or materials used for the erection of temporary sheds or houses for the horses or laborers of the contractor,⁶ though the statutes have been held to include blasting powder furnished for and used in preparing the right of way.⁷

(2) *Property Subject to Lien.* — Where the lien is given upon the railroad, it should be claimed and enforced against the entire road, and not merely against a section of the road.⁸ The rolling stock of a railroad is not to be

Co. v. Richmond, etc., R. Co., 54 Fed. Rep. 723 (Ky. Stat.); Howard v. Moore, 20 Fla. 163; Hart's Appeal, 96 Pa. St. 355.

Under the Ark. Act, March 19, 1887, a subcontractor is not entitled to a lien. Tucker v. St. Louis, etc., R. Co., 59 Ark. 81.

1. **Materials** — *United States.* — Tod v. Kentucky Union R. Co., (C. C. A.) 52 Fed. Rep. 241 (Ky. Stat.); Chicago, etc., R. Co. v. Union Rolling Mill Co., 109 U. S. 702.

Arkansas. — Brown v. Buck, 54 Ark. 453.

California. — Bringham v. Knox, 127 Cal. 40.

Indiana. — Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 250.

Missouri. — Knapp v. St. Louis, etc., R. Co., 74 Mo. 374; Heltzell v. Chicago, etc., R. Co., 20 Mo. App. 435; Rapauno Chemical Co. v. Greenfield, etc., R. Co., 59 Mo. App. 6.

The term "material" does not include the right of way. Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., (C. C. A.) 68 Fed. Rep. 105.

Materials Furnished to Contractor. — Heltzell v. Chicago, etc., R. Co., 77 Mo. 315; Hart v. Boston, etc., R. Co., 121 Mass. 510.

Materials Furnished to Subcontractors. — Central Trust Co. v. Richmond, etc., R. Co., 54 Fed. Rep. 723; Cairo, etc., R. Co. v. Watson, 85 Ill. 531.

Materials Furnished to Materialman. — Where the lien is given to materialmen who furnish materials at the instance of the railway company or furnish material to its contractors, one who sells materials to a person who resells them to the railway company is not entitled to a lien. Pacific Rolling Mills Co. v. James St. Constr. Co., (C. C. A.) 68 Fed. Rep. 966. See also Woodward v. American Exposition R. Co., 39 La. Ann. 566.

Materials Sold Out of State. — Thompson v. St. Paul City R. Co., 45 Minn. 13.

Loan of Money, not materials, for which lien can be claimed. Mellon v. Morristown, etc., R. Co. (Tenn. Ch. 1895) 35 S. W. Rep. 464; Brown v. Buck, 54 Ark. 453.

Materials Furnished under Implied Contract. — Where the lien for materials is for materials furnished "under or by virtue of a contract," a lien exists for materials furnished under an implied contract. Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124.

2. Morgan v. Chicago, etc., R. Co., 76 Mo. 161; Bethune v. Cleveland, etc., R. Co., 149 Mo. 587.

3. Central Trust Co. v. Bridges, (C. C. A.) 57 Fed. Rep. 753; Roland v. Centerville, etc., R. Co., 61 Iowa 380; Adams v. Grand Island, etc., R. Co., 10 S. Dak. 239.

4. Central Trust Co. v. Texas, etc., R. Co., 23 Fed. Rep. 703, 27 Fed. Rep. 178; Richmond, etc., Constr. Co. v. Richmond, etc., R. Co., (C. C. A.) 68 Fed. Rep. 105; Gordon Hardware Co. v. San Francisco, etc., R. Co., (Cal. 1889) 22 Pac. Rep. 406; Ferguson v. Despo, 8 Ind. App. 523; Basshor v. Baltimore, etc., R. Co., 65 Md. 99. See also Heltzell v. Chicago, etc., R. Co., 20 Mo. App. 435.

"Work of Any Kind" in the construction of a railroad includes work in digging a well in the stockyards of a railroad company. Wabash R. Co. v. Achemire, 19 Ind. App. 482.

Materials Furnished for but Not Used. — Stewart-Chute Lumber Co. v. Missouri Pac. R. Co., 28 Neb. 39; Central Trust Co. v. Chicago, etc., R. Co., 54 Fed. Rep. 598.

Materials Partly Used. — Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124.

5. Ferguson v. Despo, 8 Ind. App. 523.

6. Stewart-Chute Lumber Co. v. Missouri Pac. R. Co., 33 Neb. 29, *overruling* 28 Neb. 39; Knapp v. St. Louis, etc., R. Co., 6 Mo. App. 205, *affirmed* on another point 74 Mo. 374. See also Andrews v. St. Louis Tunnel R. Co., 16 Mo. App. 299.

7. Giant Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470; Rapauno Chemical Co. v. Greenfield, etc., R. Co., 59 Mo. App. 6.

8. **General Rule** — **Property Subject to Lien** — *United States.* — Giant-Powder Co. v. Oregon Pac. R. Co., 42 Fed. Rep. 470; Meyer v. Hornby, 101 U. S. 723 (Iowa Stat.).

California. — Cox v. Western Pac. R. Co., 44 Cal. 18; Bringham v. Knox, 127 Cal. 40.

Georgia. — Farmers' L. & T. Co. v. Candler, 87 Ga. 241, 92 Ga. 249.

Indiana. — Midland R. Co. v. Wilcox, 122 Ind. 84; Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 250. *Compare* Louisville, etc., R. Co. v. Boney, 117 Ind. 501.

Iowa. — Beach v. Wakefield, 107 Iowa 567; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124.

considered as constituting a part of its real estate so that a lien upon the railroad would embrace such property.¹ Where the lien is given upon the "railroad," it will not cover buildings not situated on the right of way.²

(3) *Perfection of Right to Lien.* — The right to a lien for labor performed or materials furnished for the construction of a railway being a matter of statutory right, the requirement of statutes with regard to the perfection of such right must be complied with,³ such as requirements as to notice to the railway company of the filing of a claim for a lien,⁴ and as to the time

Missouri. — Knapp *v.* St. Louis, etc., R. Co., 74 Mo. 374; Cranston *v.* Union Trust Co., 75 Mo. 29; Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587; Lyons *v.* Carter, 84 Mo. App. 483.

Ohio. — Smith Bridge Co. *v.* Bowman, 41 Ohio St. 37, 52 Am. Rep. 67.

Compare Bowman *v.* Springfield, etc., R. Co., 14 Cinc. L. Bul. 55; Adams *v.* Grand Island, etc., R. Co., 12 S. Dak. 424.

As the Right of Way is one of the inherent and a necessary constituent of the railroad, and within the terms of the statutory description of those constituents, the lien includes the right of way. Bethune *v.* Cleveland, etc., R. Co., 149 Mo. 587.

If Part of a Railroad Lies Within and Part Without the State a lien may be enforced against that part within the state. St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664; Ireland *v.* Atchison, etc., R. Co., 79 Mo. 572.

1. *Rolling Stock.* — Neilson *v.* Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124.

"Roadbed and Equipments." — "The lien given by the statute is confined to the roadbed and its equipments. The judgment foreclosed the lien upon the rolling stock and all other movable property of appellant. The movable property of appellant which was not included in the equipments of the road was certainly not subject to the lien, and the court had no authority to adjudge an enforcement of the lien upon it." Texas, etc., R. Co. *v.* Allen, 1 Tex. App. Civ. Cas., § 572.

2. *Pacific Rolling Mills Co. v. James St. Constr. Co.*, 68 Fed. Rep. 966, 29 U. S. App. 698.

3. *Requirements of Statute* — *United States.* — Tod *v.* Kentucky Union R. Co., (C. C. A.) 52 Fed. Rep. 241 (Ky. Stat.); Houston First Nat. Bank *v.* Ewing, (C. C. A.) 103 Fed. Rep. 168.

Arkansas. — Dano *v.* Mississippi Ouachita, etc., R. Co., 27 Ark. 564; Arkansas Cent. R. Co. *v.* McKay, 30 Ark. 682.

Indiana. — Ferguson *v.* Despo, 8 Ind. App. 523.

Iowa. — Bundy *v.* Keokuk, etc., R. Co., 49 Iowa 207; Templin *v.* Chicago, etc., R. Co., 73 Iowa 548.

Kentucky. — Frailey *v.* Winchester, etc., R. Co., 96 Ky. 570.

Missouri. — Koken Iron Works *v.* Robertson Ave. R. Co., 141 Mo. 228.

Oregon. — Coleman *v.* Oregonian R. Co., 25 Oregon 286.

Failure of Clerk of Court to forward to secretary of state copy of claim for lien. St. Louis Bridge, etc., Co. *v.* Memphis, etc., R. Co., 72 Mo. 664.

4. *Notice to Company* — *United States.* — Richmond, etc., Constr. Co. *v.* Richmond, etc., R.

Co., (C. C. A.) 68 Fed. Rep. 105 (Ky. Stat.); Cleveland, etc., R. Co. *v.* Knickerbocker Trust Co., 86 Fed. Rep. 73.

California. — Cox *v.* Western Pac. R. Co., 44 Cal. 18; Bringham *v.* Knox, 127 Cal. 40.

Georgia. — Pou *v.* Covington, etc., R. Co., 84 Ga. 311.

Illinois. — Cairo, etc., R. Co. *v.* Cauble, 85 Ill. 555.

Iowa. — Lounsbury *v.* Iowa, etc., R. Co., 49 Iowa 255.

Minnesota. — Fleming *v.* St. Paul City R. Co., 47 Minn. 124.

Missouri. — Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161; Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6.

North Carolina. — Moore *v.* Cape Fear, etc., R. Co., 112 N. Car. 236.

New York. — Mahley *v.* German Bank, 52 N. Y. App. Div. 131.

Ohio. — Scioto Valley R. Co. *v.* Cronin, 38 Ohio St. 122.

South Dakota. — Congdon, etc., Hardware Co. *v.* Grand Island, etc., R. Co., 14 S. Dak. 575.

Virginia. — Boston *v.* Chesapeake, etc., R. Co., 76 Va. 180.

Surplusage in Notice. — Where improper words in a notice can be stricken out as surplusage and leave the notice complete, the notice is sufficient. St. Louis, etc., R. Co. *v.* Kerr, 153 Ill. 182.

Including in Claim for Lien Unlienable Items. — Gordon Hardware Co. *v.* San Francisco, etc., R. Co., 86 Cal. 620; Stubbs *v.* Clarinda, etc., R. Co., 65 Iowa 513; Kling *v.* Railway Constr. Co., 7 Mo. App. 410.

Time for Filing or Giving Notice of Lien. — Sandval *v.* Ford, 55 Iowa 461; Norfolk, etc., R. Co. *v.* Howison, 81 Va. 125; Newgass *v.* Atlantic, etc., R. Co., 56 Fed. Rep. 676 (Va. Stat.).

"Completion" of Contract. — Chicago, etc., R. Co. *v.* Moran, 187 Ill. 316, affirming 85 Ill. App. 543; Smith Bridge Co. *v.* Bowman, 41 Ohio St. 37, 52 Am. Rep. 67; Gordon Hardware Co. *v.* San Francisco, etc., R. Co., 86 Cal. 620.

Materials Furnished under One Contract but Delivered at Different Times. — Heltzell *v.* Chicago, etc., R. Co., 20 Mo. App. 435; Central Trust Co. *v.* Texas, etc., R. Co., 23 Fed. Rep. 673.

Materials Furnished and Work Performed under Several Contracts. — Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315; Central Trust Co. *v.* Chicago, etc., R. Co., 54 Fed. Rep. 598 (Mo. Stat.); O'Connor *v.* Current River R. Co., 111 Mo. 185.

Serving Notice — On Whom Served. — Morgan *v.* Chicago, etc., R. Co., 76 Mo. 161; Heltzell *v.* Chicago, etc., R. Co., 77 Mo. 315; Rapauno Chemical Co. *v.* Greenfield, etc., R. Co., 59 Mo. App. 6; Cairo, etc., R. Co. *v.* Cauble, 85

within which suit must be brought.¹

(4) *Assignment of Lien.* — After a lien for a claim arising out of the construction of a railroad has been perfected, there does not seem to be any reason for prohibiting its assignment and the enforcement of the lien by the assignee;² but before the lien has been perfected the claim cannot be assigned so as to enable the assignee to perfect the lien.³

(5) *Priorities.* — The question with regard to the priority of construction liens over railway mortgages has been already discussed.⁴ A purchaser of the railroad takes subject to all liens.⁵

g. LIABILITY OF RAILROAD COMPANY FOR CONSTRUCTION CLAIMS. — At Common Law, a railway company was under no liability for the wages of laborers employed by a contractor or subcontractor in the construction of the railway,⁶ nor for materials furnished to such persons.⁷

Statutes. — In some jurisdictions statutes have been enacted which impose upon the company a personal liability for the wages of laborers employed by contractors in the construction of the railway. Thus, in *Kansas* and *Maine* a company in contracting for the construction of its road must take a bond or security from the contractor to pay particular indebtedness incurred in the work under penalty, on failure to do so, of being personally liable therefor.⁸ In other jurisdictions the liability of the railway company for such indebtedness is more absolute,⁹ while under other statutes the liability of the company is limited in amount to its indebtedness to its contractor for whom the labor was performed.¹⁰

How Construed. — Though these statutes are to be construed so as to advance the remedy intended by the legislature, they should not be extended beyond the fair import of their terms for the purpose of imposing additional liability upon the railway company.¹¹

Ill. 555; Heltzel v. Kansas City, etc., R. Co., 77 Mo. 482; Scioto Valley R. Co. v. McCoy, 42 Ohio St. 251.

Necessity of Filing Notice of Claim in Each County through Which Railroad Passes. — *Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 250; Boston v. Chesapeake, etc., R. Co., 76 Va. 180.*

1. Central Trust Co. v. Condon, (C. C. A.) 67 Fed. Rep. 84 (Tenn. Stat.); Reynolds v. Manhattan Trust Co., (C. C. A.) 83 Fed. Rep. 593; Cherry v. North, etc., R. Co., 65 Ga. 633.

2. Assignment. — *Midland R. Co. v. Wilcox, 122 Ind. 84; Kent v. Muscatine, etc., R. Co., (Iowa 1902) 88 N. W. Rep. 935; Texas, etc., R. Co. v. Allen, 1 Tex. App. Civ. Cas., § 570. See also Austin, etc., R. Co. v. Rucker, 59 Tex. 587; Moore v. Cape Fear, etc., R. Co., 112 N. Car. 236; Chicago, etc., R. Co. v. Sturgis, 44 Mich. 538.*

3. Frailey v. Winchester, etc., R. Co., 96 Ky. 570; O'Connor v. Current River R. Co., 111 Mo. 185; Brown v. Chicago, etc., R. Co., 36 Mo. App. 458; Griswold v. Carthage, etc., R. Co., 18 Mo. App. 52; Brown v. Chicago, etc., R. Co., 36 Mo. App. 458; Texas, etc., R. Co. v. Dorman, (Tex. Civ. App. 1901) 62 S. W. Rep. 1086 (purchaser of time check).

4. See the title RAILROAD SECURITIES, post.

5. Brown v. Buck, 54 Ark. 453.

6. Common-law Liability. — *Indianapolis, etc., R. Co. v. O'Reilly, 38 Ind. 140; Marks v. Indianapolis, etc., R. Co., 38 Ind. 440; Ferguson v. Despo, 8 Ind. App. 523; Atchison, etc., R. Co. v. Cuthbert, 14 Kan. 212; Morgan v. Chicago, etc., R. Co., 76 Mo. 161. See also Atty.-Gen. v. Macdonald, 6 Manitoba 372.*

7. Moore v. Cape Fear, etc., R. Co., 112 N. Car. 236.

8. Statutes. — Act of Kansas, 1872, c. 136 (Comp. Laws 1879, p. 785); Missouri, etc., R. Co. v. Brown, 14 Kan. 557; St. Louis, etc., R. Co. v. Ritz, 30 Kan. 30; Maine Rev. Stat., c. 51, § 141; Rogers v. Dexter, etc., R. Co., 85 Me. 372.

Form of Bond — Oblige. — The railroad company is the proper obligee in the bond required by the *Kansas* statute. *Atchison, etc., R. Co. v. Cuthbert, 14 Kan. 212.*

Additional Stipulations in the bond which are not inconsistent with the statutory requirements do not render the bond insufficient. *Atchison, etc., R. Co. v. Cuthbert, 14 Kan. 212.*

Necessity of Filing Bond. — *Mann v. Burt, 35 Kan. 10.*

9. Mass. Stat. 1873, c. 353, § 1; Hart v. Boston, etc., R. Co., 121 Mass. 510; Groves v. Kansas City, etc., R. Co., 57 Mo. 304; Moore v. Cape Fear, etc., R. Co., 112 N. Car. 236; Redmond v. Galena, etc., R. Co., 39 Wis. 426; French v. Langdon, 76 Wis. 29.

10. Bottomley v. Port Huron, etc., R. Co., 44 Mich. 542; Dudley v. Toledo, etc., R. Co., 65 Mich. 655; Dawson v. Iron Range, etc., R. Co., 97 Mich. 33; Schneider v. Cincinnati, etc., R. Co., 10 Ohio Dec. (Reprint) 364, 20 Cinc. L. Bul. 457.

11. Missouri, etc., R. Co. v. Baker, 14 Kan. 563; Mann v. Burt, 35 Kan. 10; Rogers v. Dexter, etc., R. Co., 85 Me. 372; Blanchard v. Portland, etc., R. Co., 87 Me. 241; Dudley v. Toledo, etc., R. Co., 65 Mich. 655.

Lumber Company Not Railroad Company. — A lumber company organized under Rev. Stat.

Constitutionality. — Such statutes are not unconstitutional as an alteration of the charter of the companies theretofore incorporated,¹ nor as binding the companies by contracts to which they were not parties.²

Territorial Operation. — Statutes of this class have no extraterritorial force, and are inapplicable to a foreign railway company contracting in another state for the construction of the part of its road lying therein.³

Who Entitled to Benefit of Statutes. — Only the persons who come within the terms of the statute are entitled to the benefits of it.⁴ Where the liability of the company is generally to laborers, mechanics, etc., employed upon the work, this includes laborers and mechanics employed by subcontractors as well as by contractors.⁵

Assignees of Claims of Laborers, Etc. — Assignees of the claims of laborers employed by a contractor may enforce such statutory liability of the railway company to such laborers, which had become complete at the time of the assignment.⁶

"Construction" of Road. — The phrase "construction of its road or any part thereof," as used in a statute imposing personal liability on the company for particular indebtedness incurred by its contractors, is not restricted merely to the first and original construction, but has been held to include additions and extensions to the road as originally built, such as the building of side-tracks,⁷ or the replacing of an old bridge by a new one.⁸

Perfection of Claim Against Railway Company. — Those seeking to avail themselves of the benefit of the statute must comply with all the requirements of the statutes imposing such liability upon the company. Thus, the requirement as to notice to the company of the claim of the laborer or materialman must be complied with.⁹

Me., c. 48, § 16, as a manufacturing corporation, having constructed a railroad on its own land to facilitate its own lumbering operations, is not a railroad company within the meaning of the statute (c. 51, § 141) making a railway company liable to pay the laborers employed by contractors in the construction of their road in case they fail to take the required security. *Palangio v. Wild River Lumber Co.*, 86 Me. 315.

Such Statutes Are Not to Be Given a Retroactive Effect so as to impose liability upon a railway company which, prior to its enactment, contracted for the construction of its road, though the work of construction was afterwards performed. *Parker v. Massachusetts R. Co.*, 115 Mass. 580. See also *Branin v. Connecticut, etc.*, R. Co., 31 Vt. 214. Compare *Grannahan v. Hannibal, etc.*, R. Co., 30 Mo. 546.

1. Constitutionality of Statutes. — *Peters v. St. Louis, etc.*, R. Co., 23 Mo. 107; *Grannahan v. Hannibal, etc.*, R. Co., 30 Mo. 546; *Branin v. Connecticut, etc.*, R. Co., 31 Vt. 214.

2. Branin v. Connecticut, etc., R. Co., 31 Vt. 214.

3. Cartwright v. New York, etc., R. Co., 59 Vt. 675.

4. Moore v. Cape Fear, etc., R. Co., 112 N. Car. 236.

Implied Contracts. — One who performs labor for a contractor or subcontractor in the construction of a railroad under an implied contract is entitled to the benefit of the New York statute rendering the railway company personally liable for indebtedness to laborers. *Chapman v. Utica, etc.*, R. Co., 4 Lans. (N. Y.) 96.

As to Who Are Laborers, see LABOR — LABORER, vol. 18, p. 71.

5. Kansas. — *Mann v. Corrigan*, 28 Kan. 194.

Maine. — *George v. Washington County R. Co.*, 93 Me. 134.

Missouri. — *Peters v. St. Louis, etc.*, R. Co., 23 Mo. 107, 24 Mo. 586; *Grannahan v. Hannibal, etc.*, R. Co., 30 Mo. 546.

New York. — *Kent v. New York Cent. R. Co.*, 12 N. Y. 628; *Cummings v. New York, etc.*, R. Co., 1 Lans. (N. Y.) 168. See also *Warner v. Hudson River R. Co.*, (Supm. Ct.) 5 How. Pr. (N. Y.) 454. Compare *McCluskey v. Cromwell*, 11 N. Y. 593; *Miller v. Lake Ontario, etc.*, R. Co., (Supm. Ct. Gen. T.) 9 How. Pr. (N. Y.) 238.

Vermont. — *Branin v. Connecticut, etc.*, R. Co., 31 Vt. 214.

Wisconsin. — *Mundt v. Sheboygan, etc.*, R. Co., 31 Wis. 451.

See also *Hart v. Boston, etc.*, R. Co., 121 Mass. 511.

6. Assignment. — *Missouri, etc.*, R. Co. v. *Brown*, 14 Kan. 557; *Chicago, etc.*, R. Co. v. *Sturgis*, 44 Mich. 538.

But Orders Drawn by Contractors or Subcontractors in favor of laborers, upon a third party, payable by the latter in money or goods, and accepted and paid by him, do not operate as an assignment to him of the laborers' claims for labor, etc., so as to enable him to sue the company. *Martin v. Michigan, etc.*, R. Co., 62 Mich. 458; *Dudley v. Toledo, etc.*, R. Co., 65 Mich. 655; *Peters v. St. Louis, etc.*, R. Co., 24 Mo. 586; *Moore v. Cape Fear, etc.*, R. Co., 112 N. Car. 236. See also *Schuster v. Kansas City, etc.*, R. Co., 60 Mo. 290.

7. Missouri, etc., R. Co. v. *Brown*, 14 Kan. 557.

8. Atchison, etc., R. Co. v. *McConnell*, 25 Kan. 370.

9. Notice of Claim. — *Lyon v. New York, etc.*,

Evidence. — Time checks given by a contractor to his laborers are not admissible as evidence against the railway company in an action to enforce the statutory liability of a railway company for labor performed for a contractor.¹

h. LIABILITY OF STOCKHOLDERS FOR CONSTRUCTION CLAIMS. — Some statutes have imposed upon the stockholders of a railway company liability for the claims of persons performing labor or furnishing materials for the road.²

2. Equipment and Maintenance — *a. GENERAL STATEMENT.* — The duty of railroad companies in the equipment and operation of their roads, as regards their employees,³ or passengers,⁴ or persons at crossings,⁵ or animals upon their tracks,⁶ or fires communicated,⁷ has been treated under appropriate titles in this work, and the liability for injuries to persons at or near their tracks is discussed in another place in this title.⁸

b. MOTIVE POWER. — Where authority is by the charter given to a railway company to use either steam or horse power upon its road, this confers a continuing option which may be exercised from time to time, and under it, the use of either motive power may be changed and the other substituted as the company may see fit.⁹ Public policy prohibits a railway company from contracting with private individuals not to use a particular motive power, as such an agreement might prevent it from performing its duties to the public as occasion might require.¹⁰

c. NATURE OF EQUIPMENT AS PROPERTY — WHETHER REAL OR PERSONAL. — There is a conflict of authority upon the question whether the rolling stock of a railroad corporation is to be regarded as personal property or real property. By the weight of authority, such property, in the absence of constitutional or statutory provision, is recognized as personal property.¹¹

R. Co., 127 Mass. 101; Chicago, etc., R. Co. v. Sturgis, 44 Mich. 538; Martin v. Michigan, etc., R. Co., 62 Mich. 458; Dudley v. Toledo, etc., R. Co., 65 Mich. 655; Cosgrove v. Tebo, etc., R. Co., 54 Mo. 495; Morgan v. Chicago, etc., R. Co., 76 Mo. 161; Moore v. Cape Fear, etc., R. Co., 112 N. Car. 236.

A notice which gives the company information sufficient to prevent any misapprehension on any of the points specified in the statutes is a practical compliance with the statute. Cosgrove v. Tebo, etc., R. Co., 54 Mo. 495. — See also Scioto Valley R. Co. v. Cronin, 38 Ohio St. 122.

In Mundt v. Sheboygan, etc., R. Co., 31 Wis. 451, a notice to the company that the plaintiff had a claim against it to a specified amount of labor in the construction of the road between specified dates was held to be sufficient, although it did not name the contractor by whom he was employed.

On Whom Served. — Chapman v. Utica, etc., R. Co., 4 Lans. (N. Y.) 96.

Bill of Items. — Quackenbush v. Chicago, etc., R. Co., 91 Mich. 308.

Time of Giving Notice. — Where notice of the claim of laborers is required to be given within a certain time after the completion of the labor, the fact that laborers are paid monthly does not require notice to be given within the required time after each pay day, but a notice given within the specified time after the entire employment is ended is sufficient. George v. Washington County R. Co., 93 Me. 134.

1. Chicago, etc., R. Co. v. Sturgis, 44 Mich. 538.

2. Tilden v. Young, 39 Mich. 58; Peck v. Miller, 39 Mich. 594; Gallagher v. Ashby, 26

Barb. (N. Y.) 143; Boutwell v. Townsend, 37 Barb. (N. Y.) 205; Aikin v. Wasson, 24 N. Y. 482. See the titles STOCK; STOCKHOLDERS.

3. See the title MASTER AND SERVANT, vol. 5, p. 3.

4. See the title CARRIERS OF PASSENGERS, vol. 5, p. 474.

5. See the title CROSSINGS, vol. 8, p. 335.

6. See the title INJURIES TO ANIMALS BY RAILROADS, vol. 16, p. 471.

7. See the title FIRES, vol. 13, p. 404.

8. See *infra*, this title, Operation of Road.

9. Option as to Motive Power. — McCartney v. Chicago, etc., R. Co., 112 Ill. 611.

10. People v. Long Island R. Co., (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 181.

11. **Rolling Stock as Property** — *United States.* — Heryford v. Davis, 102 U. S. 235; Union L. & T. Co. v. Southern California Motor Road Co., 51 Fed. Rep. 840. *Compare* Farmers' L. & T. Co. v. St. Joseph, etc., R. Co., 3 Dill. (U. S.) 412.

Alabama. — Meyer v. Johnston, 53 Ala. 237.

California. — Bishop v. McKillican, 124 Cal. 321, 71 Am. St. Rep. 68.

Iowa. — Dubuque v. Illinois Cent. R. Co., 39 Iowa 56; Neilson v. Iowa Eastern R. Co., 51 Iowa 184, 33 Am. Rep. 124. *Compare* Davenport v. Mississippi, etc., R. Co., 16 Iowa 348.

New Hampshire. — Boston, etc., R. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

New Jersey. — State Treasurer v. Somerville, etc., R. Co., 28 N. J. L. 21; Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 337, reversing 28 N. J. Eq. 277.

New York. — Hoyle v. Plattsburgh, etc., R.

In a few cases, however, rolling stock has been held to be real estate, on account of its constructive annexation to the roadbed.¹ In some jurisdictions, by statutory or constitutional provision, the nature of the property, whether real or personal, is provided for.² Office furniture, fuel, and similar detached properties are unquestionably personal property.³ On the other hand, the roadbed, including rails, sleepers, ties, etc., attached to the soil on which the roadbed is built, is real estate.⁴

d. ATTACHMENTS AND EXECUTIONS AGAINST EQUIPMENT. — The general rule, based on the ground of public policy, that the property of quasi-public corporations essential to the discharge of their public duties is exempt from seizure and sale on attachments and executions⁵ has been applied so as to exempt from seizure and sale on such writs the roadbed, including bridges and structures, of a railway company.⁶ The rolling stock of a railway company not in actual use is not, it seems, by the better doctrine,

Co., 54 N. Y. 314, 13 Am. Rep. 595, reversing 51 Barb. (N. Y.) 46, 47 Barb. (N. Y.) 104; Randall v. Elwell, 52 N. Y. 521; Bement v. Plattsburgh, etc., R. Co., 47 Barb. (N. Y.) 104; Stevens v. Buffalo, etc., R. Co., 31 Barb. (N. Y.) 590; Beardsley v. Ontario Bank, 31 Barb. (N. Y.) 619. Compare Farmers' L. & T. Co. v. Hendrickson, 25 Barb. (N. Y.) 484.

Ohio. — Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

Washington. — Radebaugh v. Tacoma, etc., R. Co., 8 Wash. 570.

Wisconsin. — Chicago, etc., R. Co. v. Ft. Howard, 21 Wis. 44, 91 Am. Dec. 458.

See also Texas, etc., R. Co. v. Gay, 86 Tex. 571.

In Hoyle v. Plattsburgh, etc., R. Co., 54 N. Y. 314, 13 Am. Rep. 595, it was said that the "want of the element of localization in use is a controlling and conclusive reason why the character of realty should not be given to rolling stock of a railroad."

1. Palmer v. Forbes, 23 Ill. 301; Michigan Cent. R. Co. v. Chicago, etc., R. Co., 1 Ill. App. 399; Titus v. Mabee, 25 Ill. 257.

Such property becomes personal only when detached by the owner; it cannot be dissevered and its character thereby changed by an act of an execution creditor or of an officer. Titus v. Mabee, 25 Ill. 257. See also Elizabethtown, etc., R. Co. v. Elizabethtown, 12 Bush (Ky.) 238.

A Freight Car anywhere on the premises of the company, whether on a sidetrack, a turntable, or elsewhere, is to be regarded as real estate. Titus v. Mabee, 25 Ill. 257.

2. Milwaukee, etc., R. Co. v. James, 6 Wall. (U. S.) 750, explained in Williamson v. New Jersey Southern R. Co., 29 N. J. Eq. 326. See also the local constitutions and statutes.

3. Hunt v. Bullock, 23 Ill. 258; Palmer v. Forbes, 23 Ill. 301.

4. **Roadbed** — Alabama. — Tennessee, etc., R. Co. v. East Alabama R. Co., 75 Ala. 516, 51 Am. Rep. 475.

Connecticut. — New Haven v. Fair Haven etc., R. Co., 38 Conn. 430.

Illinois. — Palmer v. Forbes, 23 Ill. 301.

Massachusetts. — Hunt v. Bay State Iron Co., 97 Mass. 279; Meriam v. Brown, 128 Mass. 391.

Missouri. — Hart v. Benton-Bellefontaine R. Co., 7 Mo. App. 446.

Texas. — Texas, etc., R. Co. v. Gay, 86

Tex. 571; Texas, etc., R. Co. v. McMillen, 1 Tex. App. Civ. Cas., § 163.

See also Washburn Flouring Mills Co. v. Minneapolis, etc., R. Co., 56 Minn. 200.

Where a Company Owns Both the Roadbed and the Iron Attached to it, the iron is a part of the realty. Likewise, where a trespasser not owning the roadbed attaches his own iron thereto, the iron immediately becomes a part of the realty and belongs to the owner of the roadbed. But this rule does not apply where a railroad attaches iron belonging to a construction company to a roadbed owned by a third person, without the consent of the construction company. In such a case the iron does not become a part of the realty. Shoemaker v. Simpson, 16 Kan. 49; Palmer v. Forbes, 23 Ill. 301.

A Railway Track or Other Improvement Wrongfully Placed upon Land by a railway company, and not abandoned to the owner of the premises, cannot be treated as a part of the realty for the purpose of increasing its value in estimating the damages due to the owner in subsequent proceedings to condemn the land for the use of the company. Toledo, etc., R. Co. v. Dunlap, 47 Mich. 456; Oregon R., etc., Co. v. Mosier, 14 Oregon 519, 58 Am. Rep. 321; Lyon v. Green Bay, etc., R. Co., 42 Wis. 538. See also Northern Cent. R. Co. v. Canton Co., 30 Md. 347.

Material for Track, including rails, ties, chains, spikes, etc., brought upon the ground and designed to be attached to the realty, but not yet attached, is realty.

5. See the title CORPORATIONS (PRIVATE), vol. 7, p. 854.

6. **Exemptions — Roadbed, Bridges, Etc.** — United States. — East Alabama R. Co. v. Doe, 114 U. S. 340.

Alabama. — Gardner v. Mobile, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

Indiana. — Louisville, etc., R. Co. v. Boney, 117 Ind. 501.

Michigan. — Hackley v. Mack, 60 Mich. 591.

North Carolina. — Gooch v. McGee, 83 N. Car. 59, 35 Am. Rep. 558. Compare State v. Rives, 5 Ired. L. (27 N. Car.) 297.

Pennsylvania. — Oakland R. Co. v. Keenan, 56 Pa. St. 198; Western Pennsylvania R. Co. v. Johnston, 59 Pa. St. 290; Youngman v. Elmira, etc., R. Co., 65 Pa. St. 278.

Compare Atlanta v. Grant, 57 Ga. 340; Arthur v. Commercial, etc., Bank, 9 Smed. & M.

so exempt; ¹ and this is equally true as to other personal property not attached to the roadbed, ² or other real estate not a legitimate incident to the railroad. ³

e. OPERATION LIENS. — In many jurisdictions liens upon railways are given by statute for supplies furnished for the operation of a railway ⁴ and also in favor of particular employees of the company who render services in the operation of the road. ⁵

Perfecting Lien. — The statutory provisions as to the perfection of liens for operating claims must, of course, be complied with. ⁶ Where the notice of

(Miss.) 394, 48 Am. Dec. 719; Redfield *v.* Wickham, 13 App. Cas. 467; Wason Mfg. Co. *v.* Levis, etc., R. Co., 7 Quebec 330; Drummond County *v.* South Eastern R. Co., 22 L. C. Jur. 25.

A Portion of the Roadbed Abandoned by the company has been held subject to sale on execution. Benedict *v.* Heineberg, 43 Vt. 231. See also Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

Statutes Authorizing Executions. — McKee *v.* Grand Rapids, etc., St. R. Co., 41 Mich. 274; Stevenson *v.* Texas R. Co., 105 U. S. 703 (Texas statute).

Statutory Exemption. — Carson *v.* Memphis, etc., R. Co., 88 Tenn. 646, 17 Am. St. Rep. 921; Midland Waggon Co. *v.* Potteries, etc., R. Co., 6 Q. B. D. 36; Great Northern R. Co. *v.* Tahourdin, 13 Q. B. D. 320.

1. Rolling Stock — *Indiana.* — Louisville, etc., R. Co. *v.* Boney, 117 Ind. 501; Midland R. Co. *v.* Stevenson, 130 Ind. 97.

Massachusetts. — Hall *v.* Carney, 140 Mass. 131.

New Hampshire. — Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

New York. — Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619.

Ohio. — Coe *v.* Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Coe *v.* Peacock, 14 Ohio St. 187.

Wisconsin. — Chicago, etc., R. Co. *v.* Ft. Howard, 21 Wis. 44.

Compare Michigan Cent. R. Co. v. Chicago, etc., R. Co., 1 Ill. App. 399; Phillips v. Winslow, 18 B. Mon. (Ky.) 448; Elizabethtown, etc., R. Co. v. Elizabethtown, 12 Bush (Ky.) 238; Covey v. Pittsburg, etc., R. Co., 3 Phila. (Pa.) 173, 15 Leg. Int. (Pa.) 228; Longstreth v. Railroad Co., 11 W. N. C. (Pa.) 94.

2. Personality Not Attached to Roadbed — *United States.* — St. Johnsbury First Nat. Bank *v.* Portland, etc., R. Co., 2 Fed. Rep. 831.

Alabama. — Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635, 48 Am. St. Rep. 84.

California. — Humphreys *v.* Hopkins, 81 Cal. 551, 15 Am. St. Rep. 76.

Georgia. — South Carolina R. Co. *v.* McDonald, 5 Ga. 531.

Iowa. — Hetherington *v.* Hayden, 11 Iowa 335.

Massachusetts. — Ocean Ins. Co. *v.* Portsmouth Marine R. Co., 3 Met. (Mass.) 420.

New Hampshire. — Boston, etc., R. Co. *v.* Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

New York. — Beardsley *v.* Ontario Bank, 31 Barb. (N. Y.) 619.

Pennsylvania. — Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526.

Compare Northern Pac. R. Co. v. Shimmell,

6 Mont. 161 (wherein an office safe was held not to be subject to execution).

Fuel and Coal in Yards. — Louisville, etc., R. Co. *v.* Noel, 15 Ky. L. Rep. 493. *Compare Carey v. Pittsburgh, etc., R. Co., 2 Ohio Dec. (Reprint) 85, 1 West. L. Month. 338.*

Money and Credits. — Bouch *v.* Sevenoaks, etc., R. Co., 4 Ex. D. 133; Ruel *v.* Consolidated European, etc., R. Co., 16 N. Bruns. 481; Milwaukee, etc., R. Co. *v.* Brooks Locomotive Works, 121 U. S. 430; Gregg *v.* Farmers, etc., Bank, 80 Mo. 251; Everdell *v.* Sheboygan, etc., R. Co., 41 Wis. 395.

3. Plymouth R. Co. *v.* Colwell, 39 Pa. St. 337, 80 Am. Dec. 526 (such as a canal basin); Philadelphia, etc., R. Co.'s Appeal, (Pa. 1886) 3 Atl. Rep. 838.

4. Supplies for Operation of Road. — Newgass *v.* Atlantic, etc., R. Co., 56 Fed. Rep. 676; Chattanooga, etc., R. Co. *v.* Evans, (C. C. A.) 66 Fed. Rep. 809; Frick Co. *v.* Norfolk, etc., R. Co., (C. C. A.) 86 Fed. Rep. 725; Tod *v.* Kentucky Union R. Co., (C. C. A.) 52 Fed. Rep. 241 (Kentucky statute).

Conditional Sale of Cars — "Furnished." — Cars conditionally sold to a railway company are supplies "furnished" so as to entitle the vender to a lien under Code Va., § 2485. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. Rep. 676.

Medical Services and Board. — The term "supplies necessary to the operation of the road" (Code Va., § 2485) does not include medical services and board rendered to an employee of the railroad company who has been injured and disabled in its service. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. Rep. 676.

Money Loaned is not supplies for operation. U. S. Trust Co. *v.* Western Contract Co., (C. C. A.) 81 Fed. Rep. 454. See also Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

5. Services of Employees. — Gilchrist *v.* Helena, etc., R. Co., 58 Fed. Rep. 708 (Comp. Stat. Mont., c. 25, § 707); Frick Co. *v.* Norfolk, etc., R. Co., (C. C. A.) 86 Fed. Rep. 725; Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116; Delaware, etc., R. Co. *v.* Oxford Iron Co., 33 N. J. Eq. 192. See also the title MASTER AND SERVANT, vol. 20, p. 3 *et seq.*

Work Done "On" Railroad. — Act Tenn. 1877, providing for a lien for work done on a railroad, does not include work in repair of locomotives done at the shop of the machinist. Chattanooga, etc., R. Co. *v.* Evans, (C. C. A.) 66 Fed. Rep. 809.

Assignment of Lien. — Cairo, etc., R. Co. *v.* Fackney, 78 Ill. 116.

Clerks do not perform work and labor (Comp. Stat. Mont., c. 25, § 707). Gilchrist *v.* Helena, etc., R. Co., 58 Fed. Rep. 708.

6. Newgass *v.* Atlantic, etc., R. Co., 56 Fed. Rep. 676.

lien for supplies furnished is required to be filed within a certain time after the accrual of the claim, such claim, in case supplies are sold on credit, accrues when payment is due, and not when the supplies are delivered.¹

VIII. OPERATION OF ROAD — 1. Railroads as Highways — Power to Operate. — Originally railroads seem to have been constructed as public highways, open to the use of the public with their own vehicles subject to the payment of toll. In modern times they are, as a general thing, operated by the persons owning them or by those with whom the owners make permanent arrangements, and, for the most part, by corporations; a result due to the great expense involved in the construction and operation of such improvements as they have actually developed. In practice a franchise to equip and operate the road, as well as to construct it, is invariably given and is probably necessary to confer the power.²

2. Rights and Liabilities — a. IN GENERAL. — Upon general principles, applicable to all corporations, the legislature may impose upon a corporation operating a railroad, as the law of its creation, the obligation to exercise the powers which are granted, to their fullest extent; and by virtue of the police power, a reserved power to alter charters, or the public character of the improvement, many acts which involve expense may be required of the corporation in the operation of its road, or new liabilities imposed upon it, which it might not undertake or assume if left to itself. A corporation operating a railroad may also owe certain duties to the public which arise by implication of law and are subject to reasonable regulation by the state. Aside from its duties as a common carrier, however, no well-defined rule has been laid down by the decisions for guidance in determining what implied duties are assumed by the acceptance of the charter.³

b. MAINTENANCE AND OPERATION OF ROAD. — Thus, a railroad corporation may be obligated by statute to operate all or any portion of its road; to erect stations; stop its trains at stations; run trains of a designated number or character; make switch-track connections, and perform other and similar duties which the state may deem necessary for the public convenience and welfare and make mandatory.⁴ Where there are no special circumstances

1. *Newgass v. Atlantic, etc., R. Co.*, 56 Fed. Rep. 676.

2. **Railroads as Highways — Power to Operate.** — *Lake Superior, etc., R. Co. v. U. S.*, 93 U. S. 442, cited in *Union Pac. R. Co. v. Chicago, etc., R. Co.*, 163 U. S. 585; *McGregor v. Erie R. Co.*, 35 N. J. L. 89. See also *supra*, this title, III. 1. *Railroads Quasi-public Highways*.

3. **Rights and Liabilities in General.** — *Brownell v. Old Colony R. Co.*, 164 Mass. 29, 49 Am. St. Rep. 442; *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103; *San Antonio St. R. Co. v. State*, 90 Tex. 520, 59 Am. St. Rep. 834. See generally cases cited in this subdivision.

Under Municipal Ordinances. — See the title *MANDAMUS*, vol. 19, p. 876.

Fellow Servants. — For the statutory liability of railroad corporations for injuries resulting to its employees from the negligent acts or omissions of other employees, see the title *FELLOW SERVANTS*, vol. 12, pp. 977 *et seq.*

Fires. — For the statutory liability of railroad companies for property destroyed by fire communicated in the course of the operation of the railroad, see the title *FIRES*, vol. 13, pp. 419 *et seq.*, 499 *et seq.*

Corporation as Public Agency. — A corporation in constructing and making such a highway as a railroad, under public sanction, really per-

forms a function of the state. Therefore it accepts its charter subject necessarily to the condition that it will conform, in operating the road, to such reasonable regulations as the state will from time to time establish that are not in violation of the supreme law of the land. *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285.

While the Law Affords Railroad Corporations Adequate and Complete Protection in the exercise of their chartered rights, it also holds them to a strict performance of the public duties enjoined upon them as a consideration for the rights and powers thus granted. In cases of apparent conflict between the rights and powers conferred and the duties imposed, the solution may oftentimes be rendered easy by regarding the admitted right of public use as the touchstone of judicial interpretation. *Railroad Com'rs v. Portland, etc., R. Co.*, 63 Me. 269, 18 Am. Rep. 208, quoted in *Scofield v. Lake Shore, etc., R. Co.*, 43 Ohio St. 571, 54 Am. Rep. 846.

4. **Statutory Duties — Illinois.** — *Hoyt v. Chicago, etc., R. Co.*, 93 Ill. 601, affirming 1 Ill. App. 374; *Chicago, etc., R. Co. v. People*, 105 Ill. 657; *People v. Louisville, etc., R. Co.*, 120 Ill. 48; *Chicago, etc., R. Co. v. Suffern*, 129 Ill. 274, affirming 27 Ill. App. 404; *Ohio, etc., R. Co. v. People*, 29 Ill. App. 561.

or direct statutory requirements, however, the decisions are at variance on the question of an implied duty to continue the operation of the road, or to equip and operate it in such manner as will best accommodate the general public; but by the weight of authority the determination of such matters is within the discretionary power of the corporation, and its action is subject only to legislative control, or, in a proper case, to a forfeiture of the franchise.¹ The application of these principles to specific instances will be found discussed in other titles in this work.²

c. AS COMMON CARRIERS. — Corporations and other persons operating railroads for the general carriage of goods for hire are subject to the provisions of the common law applicable to other common carriers, and to reasonable statutory regulation as to the manner of the discharge of the duties thus implied from the public character of the business.³

Massachusetts. — *Brownell v. Old Colony R. Co.*, 164 Mass. 29, 49 Am. St. Rep. 442.

Michigan. — *Flint, etc., R. Co. v. Rich*, 91 Mich. 293; *Matter of Flint, etc., R. Co.*, 105 Mich. 289; *Williams v. Flint, etc., R. Co.*, 116 Mich. 392.

Missouri. — *State v. Kansas City, etc., R. Co.*, 77 Mo. 143; *St. Louis, etc., R. Co. v. Fowler*, 142 Mo. 670.

Canada. — *Ex p. Atty.-Gen.*, 17 N. Bruns. 667.

Statutory Regulations as an Interference with Interstate Commerce and Transportation of the Mails. — *Illinois Cent. R. Co. v. Illinois*, 163 U. S. 142, *reversing* 143 Ill. 434; *Gladson v. Minnesota*, 166 U. S. 427, *affirming* 57 Minn. 390; *Lake Shore, etc., R. Co. v. Ohio*, 173 U. S. 285, four justices *dissenting*; *Cleveland, etc., R. Co. v. Illinois*, 177 U. S. 514, *reversing* 175 Ill. 364. See the title INTERSTATE COMMERCE, vol. 17, p. 99.

1. Implied Duties. — *United States.* — *Jones v. Newport News, etc., Co.*, (C. C. A.) 65 Fed. Rep. 736; *Mercantile Trust Co. v. Columbus, etc., R. Co.*, 90 Fed. Rep. 149; *Jack v. Williams*, 113 Fed. Rep. 823.

Illinois. — *People v. Chicago, etc., R. Co.*, 57 Ill. 436, *citing* *Vincent v. Chicago, etc., R. Co.*, 49 Ill. 33.

Kansas. — *State v. Dodge City, etc., R. Co.*, 53 Kan. 329.

Massachusetts. — *Com. v. Fitchburg R. Co.*, 12 Gray (Mass.) 180.

New York. — *People v. New York, etc., R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484, *reversing* 40 Hun (N. Y.) 570, which *affirmed* 17 Abb. N. Cas. (N. Y.) 304; *People v. Brooklyn Heights R. Co.*, 69 N. Y. App. Div. 549.

Ohio. — *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Texas. — *San Antonio St. R. Co. v. State*, 90 Tex. 520, 59 Am. St. Rep. 834, *reversing* (Tex. Civ. App. 1896) 38 S. W. Rep. 54, and 10 Tex. Civ. App. 12.

Virginia. — *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

See generally the title MANDAMUS, vol. 19, p. 872 *et seq.*

Corporations Aided by Public Land Grants. — *State v. Sioux City, etc., R. Co.*, 7 Neb. 357; *Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466. See also *State v. Des Moines, etc., R. Co.*, 84 Iowa 419.

Road Operated at a Loss. — "If a railroad can be operated profitably, the interest of those

concerned will rarely, if ever, fail to keep it in operation, so as to subserve the public use. If it cannot, we know of no mode by which the state can compel those by whom it was constructed to operate it at a loss; and certainly there is no mode provided by which it can be operated at the expense and risk of the state." *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

If the loss is the result of improvident and unthrifty management, the court may, at the suit of those interested, take charge of it for the benefit of all concerned and run it through the instrumentality of a receiver, but if the traffic of the road is really insufficient to support a wise and economical administration of its affairs there would seem to be no escape from its ultimate abandonment. *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

Dismantling Road. — It has been held that a railroad when constructed becomes a public instrumentality, and the roadbed, superstructure, and other permanent property of the corporation become devoted to the public use; so that, although the corporation cannot be compelled to operate it, the road cannot be dismantled and destroyed and the property disposed of without the sanction of the state. *State v. Dodge City, etc., R. Co.*, 53 Kan. 377, 42 Am. St. Rep. 295. See also *Gates v. Boston, etc., R. Co.*, 53 Conn. 333.

2. See the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; DISSOLUTION OF CORPORATIONS, vol. 9, p. 544; LATERAL OR BRANCH RAILROADS, vol. 18, p. 560; MANDAMUS, vol. 19, pp. 872 *et seq.*; TICKETS AND FARES; TIME TABLES; STATIONS.

3. See the titles BAGGAGE, vol. 3, p. 528; CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; COMMON CARRIERS, vol. 6, p. 236; CONNECTING CARRIERS, vol. 6, p. 603; FORWARDERS, vol. 13, p. 1165; WAREHOUSEMEN.

The Common Law imposes some duties upon companies chartered as common carriers, irrespective of any mention of such duties in their charters. All carriers who undertake to transport goods or passengers for the public assume certain duties to the public. *San Antonio St. R. Co. v. State*, 90 Tex. 520, 59 Am. St. Rep. 834.

Power to Make Rules and Contracts. — A railroad company can make such rules and contracts, and establish such customs, as it pleases, relative to the operation of its road

d. NEGLIGENCE IN OPERATING — POLICE POWER. — Apart from their rights and liabilities as common carriers,¹ railroad corporations are bound to conduct their business with a care and skill commensurate with its dangerous character, without any special legislation on the subject, and their liability for injuries to person or property in the absence of such legislation is governed by the general law of negligence. It is a universal principle not applicable alone to such companies that the care to be exercised in the conduct of any business must be proportionate to its dangerous character.² Railroad corporations, like individuals, are also amenable to the police power of the state, and laws conducing to the safety and welfare of the public, which prescribe extraordinary vigilance, skill, exertion, and other precautions in the operation of railroads are numerous, and, although entailing expense upon the owners of the roads, are a valid exercise of the power.³ A full treatment of the rights and liabilities of railroad corporations in this connection will be found elsewhere in this work.⁴

e. CONTRACTUAL OBLIGATIONS. — Obligations relating to the operation

and the conduct of its business, if they are not inconsistent with its duties as a common carrier; but it can go no further, and any general language which its charter may contain must necessarily be construed with that limitation. *Chicago, etc., R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690. See the title CARRIERS OF PASSENGERS, vol. 5, p. 482.

1. See *supra*, this section, *As Common Carriers*.

2. *Negligence in Operating Road.* — *Nashville, etc., R. Co. v. Comans*, 45 Ala. 437; *Nolan v. New York, etc., R. Co.*, 70 Conn. 159; *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1; *Gorman v. Pacific R. Co.*, 26 Mo. 441, 72 Am. Dec. 220; *Kennedy v. North Missouri R. Co.*, 36 Mo. 352; *Karle v. Kansas City, etc., R. Co.*, 55 Mo. 476; *Burger v. Missouri Pac. R. Co.*, 112 Mo. 238, 34 Am. St. Rep. 379; *Cook v. New York Cent. R. Co.*, 1 Abb. App. Dec. (N. Y.) 432; *Colpitts v. Reg.*, 6 Can. Exch. 254.

The Obligation of Care on the part of a railroad company extends to all the accessories of its business. *Toledo, etc., R. Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618.

3. *Police Power Generally* — *United States.* — *Gladson v. Minnesota*, 166 U. S. 427, *affirming* 57 Minn. 390; *Erb v. Morasch*, 177 U. S. 584.

Illinois. — *Galena, etc., R. Co. v. Loomis*, 13 Ill. 548, 56 Am. Dec. 471; *Galena, etc., R. Co. v. Dill*, 22 Ill. 264; *Galena, etc., R. Co. v. Appleby*, 28 Ill. 283; *Toledo, etc., R. Co. v. Deacon*, 63 Ill. 91; *Chicago, etc., R. Co. v. Reid*, 66 Ill. 43; *Toledo, etc., R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 105 Ill. 388, 44 Am. Rep. 799; *Illinois Cent. R. Co. v. Slater*, 129 Ill. 91, 16 Am. St. Rep. 242; *Chicago, etc., R. Co. v. Chicago*, 140 Ill. 309.

Indiana. — *New Albany, etc., R. Co. v. Tilton*, 12 Ind. 3, 74 Am. Dec. 195; *Indianapolis, etc., R. Co. v. Kercheval*, 16 Ind. 84; *Cleveland, etc., R. Co. v. Harrington*, 131 Ind. 426.

Mississippi. — *Donnaher v. State*, 8 Smed. & M. (Miss.) 649, *cited in* *Mobile, etc., R. Co. v. State*, 51 Miss. 137.

Missouri. — *State v. Missouri Pac. R. Co.*, 149 Mo. 104.

New Jersey. — *Morris, etc., R. Co. v. Orange*, 63 N. J. L. 252, *overruling* *Paterson, etc., R.*

Co. v. Newark, 61 N. J. L. 80; *Delaware, etc., R. Co. v. East Orange*, 41 N. J. L. 127.

New York. — *People v. Boston, etc., R. Co.*, 70 N. Y. 569.

Ohio. — *Cincinnati, etc., R. Co. v. Sullivan*, 32 Ohio St. 152.

Tennessee. — *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 45.

Vermont. — *Thorpe v. Rutland, etc., R. Co.*, 27 Vt. 140, 62 Am. Dec. 625.

Wisconsin. — *Horn v. Chicago, etc., R. Co.*, 38 Wis. 463.

Municipal Regulations — *Illinois.* — *Chicago, etc., R. Co. v. Haggerty*, 67 Ill. 113; *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354; *Chicago, etc., R. Co. v. Dougherty*, 12 Ill. App. 181; *Duggan v. Peoria, etc., R. Co.*, 42 Ill. App. 536.

Indiana. — *Whitson v. Franklin*, 34 Ind. 392; *Pittsburgh, etc., R. Co. v. Moore*, 152 Ind. 345; *Baltimore, etc., R. Co. v. Peterson*, 156 Ind. 364.

Missouri. — *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672, *affirming* 14 Mo. App. 459; *Grube v. Missouri Pac. R. Co.*, 98 Mo. 330, 14 Am. St. Rep. 645; *Bluedorn v. Missouri Pac. R. Co.*, 108 Mo. 439, 32 Am. St. Rep. 615.

New Jersey. — *State v. Jersey City*, 29 N. J. L. 170.

Texas. — *Texas, etc., R. Co. v. Nelson*, (C. C. A.) 50 Fed. Rep. 814; *Texas, etc., R. Co. v. Nelson*, 9 Tex. Civ. App. 156; *Missouri, etc., R. Co. v. McGlamory*, (Tex. Civ. App. 1896) 34 S. W. Rep. 359.

Wisconsin. — *Horn v. Chicago, etc., R. Co.*, 38 Wis. 463.

Police Power and Interstate Commerce. — See the title INTERSTATE COMMERCE, vol. 17, pp. 94 *et seq.*

4. See *infra*, this section, *Injuries to Persons On or Near Tracks*; and the titles CARRIERS OF PASSENGERS, vol. 5, p. 474; CONTRIBUTORY NEGLIGENCE, vol. 7, p. 365; COUPLING CARS (INJURIES BY), vol. 7, p. 1046; CROSSINGS, vol. 8, p. 334; FENCES, vol. 12, p. 1035; FIRES, vol. 13, p. 404; INJURIES TO ANIMALS BY RAILROADS, vol. 16, p. 470; MASTER AND SERVANT, vol. 20, p. 3; NEGLIGENCE, vol. 21, p. 455; ORDINANCES, vol. 21, pp. 952 *et seq.*; POLICE POWER, vol. 22, pp. 914, 917, 933, 934; STATIONS; TURN TABLES.

of the road, the erection of stations and the like, arising out of contract, may be invalid on grounds of public policy in so far as to be incapable of specific performance; but only where they tend to prevent the corporation from discharging its duties to the public efficiently.¹

3. Corporations and Persons Liable for Injuries — *a. IN GENERAL.* — It is often a matter of considerable difficulty to place the responsibility for injuries arising from the operation of railroads, owing to the use of rolling stock and tracks in common by several companies, traffic arrangements between connecting lines, operation of switch tracks for the convenience of individual shippers, and like relations growing out of the modern development of such highways; the operation of roads by courts through the instrumentality of receivers and trustees; the character of the injury, and various other considerations. Elsewhere in this work the responsibility is discussed from different points of view.²

b. CORPORATIONS MAKING COMMON USE OF TRACKS AND SERVICES OF EMPLOYEES. — As a general rule a corporation engaged in operating a road for its own purposes at the time will be liable for an injury due to its negligence or that of the servants conducting the business, whatever relations it may have with reference to the use of tracks and the services of employees in common with other such corporations.³ For an injury caused by a cor-

1. Contractual Obligations — *England.* — *Raphael v. Thames Valley R. Co.*, L. R. 2 Eq. 37.

United States. — *Texas, etc.*, *R. Co. v. Marshall*, 136 U. S. 393; *Jones v. Newport News, etc., Co.*, (C. C. A.) 65 Fed. Rep. 736; *Mercantile Trust Co. v. Columbus, etc., R. Co.*, 90 Fed. Rep. 148.

Illinois. — *Marsh v. Fairbury, etc., R. Co.*, 64 Ill. 414, 16 Am. Rep. 564; *St. Louis, etc., R. Co. v. Mathers*, 71 Ill. 592, 22 Am. Rep. 122, 104 Ill. 257; *Snell v. Pells*, 113 Ill. 145; *People v. Chicago, etc., R. Co.*, 130 Ill. 175; *Mobile, etc., R. Co. v. People*, 132 Ill. 559, 22 Am. St. Rep. 556; *Gray v. Chicago, etc., R. Co.*, 189 Ill. 400; *Lyman v. Suburban R. Co.*, 190 Ill. 320.

Indiana. — *Louisville, etc., R. Co. v. Sumner*, 106 Ind. 55, 55 Am. Rep. 719.

Iowa. — *Williamson v. Chicago, etc., R. Co.*, 53 Iowa 126, 36 Am. Rep. 206.

Kansas. — *St. Joseph, etc., R. Co. v. Ryan*, 11 Kan. 608; *Tucker v. Allen*, 16 Kan. 312; *Atchison, etc., R. Co. v. Jefferson County*, 21 Kan. 309.

Massachusetts. — *Fuller v. Dame*, 18 Pick. (Mass.) 472.

Missouri. — *Pacific R. Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Workman v. Campbell*, 46 Mo. 305.

Ohio. — *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544.

Pennsylvania. — *Heyl v. Philadelphia, etc., R. Co.*, 51 Pa. St. 469.

Virginia. — *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

2. See cases and titles to which reference is made, *infra*, this subdivision.

Operation of Road by Receivers or Trustees. — *Naglee v. Alexandria, etc., R. Co.*, 83 Va. 707, 5 Am. St. Rep. 308. See generally the titles RAILROAD SECURITIES, *post*; RECEIVERS (OF RAILROADS).

Liability on Consolidation of Corporations. — See *infra*, this title, *Sales, Leases, and Consolidation*; and the title CONSOLIDATION OF CORPORATIONS, vol. 6, pp. 818, 819.

Liability as Between Railroad Corporations and Construction Contractors. — See the titles INDEPENDENT CONTRACTORS, vol. 16, pp. 199, 206, 208, 209; FELLOW SERVANTS, vol. 12, pp. 995, 996; FIRES, vol. 13, pp. 441 *et seq.*

3. Accident to Strangers On or Near Tracks and Injuries to Property. — *Byrne v. Kansas City, etc., R. Co.*, (C. C. A.) 61 Fed. Rep. 605, *affirming* 55 Fed. Rep. 44; *Jacksonville, etc., R. Co. v. Peninsular Land, etc., Co.*, 27 Fla. 1; *Chicago City R. Co. v. Volk*, 45 Ill. 175; *Chicago, etc., R. Co. v. Conners*, 30 Ill. App. 307; *McGrath v. New York Cent., etc., R. Co.*, 63 N. Y. 522; *Leonard v. New York Cent., etc., R. Co.*, 42 N. Y. Super. Ct. 225; *Mississippi, etc., R. Co. v. Wilson*, 10 Heisk. (Tenn.) 496.

Injuries to Passengers on Trains of Other Corporations. — *Clark v. Geer*, (C. C. A.) 86 Fed. Rep. 447; *Chicago, etc., R. Co. v. Groves*, 56 Kan. 601; *Chicago, etc., R. Co. v. Martin*, 59 Kan. 437; *Stodder v. New York, etc., R. Co.*, 50 Hun (N. Y.) 221, *affirmed* without opinion 121 N. Y. 655.

Injuries to Employees of Other Railroad Companies — *United States.* — *Lockhart v. Little Rock, etc., R. Co.*, 40 Fed. Rep. 631. See also *Central Trust Co. v. Denver, etc., R. Co.*, (C. C. A.) 97 Fed. Rep. 239. *Compare Atwood v. Chicago, etc., R. Co.*, 72 Fed. Rep. 447.

California. — *Taylor v. Western Pac. R. Co.*, 45 Cal. 323.

District of Columbia. — *Mills v. Orange, etc., R. Co.*, 1 MacArthur (D. C.) 285.

Illinois. — *Wagner v. Union Stock Yards, etc., Co.*, 41 Ill. App. 408.

Indiana. — *Cleveland, etc., R. Co. v. Berry*, 152 Ind. 607.

Iowa. — *McMarshall v. Chicago, etc., R. Co.*, 80 Iowa 757, 20 Am. St. Rep. 445.

Maine. — *Nugent v. Boston, etc., R. Co.*, 80 Me. 62, 6 Am. St. Rep. 151.

Massachusetts. — *Snow v. Housatonic R. Co.*, 8 Allen (Mass.) 441, 85 Am. Dec. 720, *citing* *Farwell v. Boston, etc., R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339.

New York. — *Smith v. New York, etc., R.*

poration while operating its trains over tracks not owned by it the owner of the tracks is also liable, unless exempt by force of legislative enactment, whether the arrangement between them is a mere license, a lease, or a sale.¹

c. **USE BY ONE CORPORATION OF ROLLING STOCK OWNED BY ANOTHER.** — A railroad corporation using rolling stock belonging to another company for its own purposes, and not the owner or corporation from which it received it, is generally liable for injuries caused by its defects.²

d. **LIABILITY OF CORPORATIONS AS CARRIERS — AS MASTERS.** — A railroad corporation is generally liable for injuries to its own passengers or ship-pers due to the negligence of corporations with which it makes common use of tracks, services of employees, and the like, as well as for injuries attributable directly to its own negligent acts or omissions. This results from the absolute character of the duty with which common carriers and carriers of passengers are charged by law.³ Its relation to its own employees, on the other hand, and its liabilities for injuries to them, are governed by the relative duties imposed by law upon master and servant. Employees, like other persons, may recover of those who are guilty of the negligence; but the master is liable only for injuries which result from its failure to discharge those duties to its servants which are absolute in law.⁴

Co., 19 N. Y. 127, 75 Am. Dec. 305; Sullivan v. Tioga R. Co., 112 N. Y. 643, 8 Am. St. Rep. 793.

Vermont. — Sawyer v. Rutland, etc., R. Co., 27 Vt. 370; Matter of Merrill, 54 Vt. 200.

See the title FELLOW SERVANTS, vol. 12, p. 993 *et seq.*

1. **Liability of Corporation Owning Road.** — Macon, etc., R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678; Palmer v. Utah, etc., R. Co., 2 Idaho 350; Pennsylvania Co. v. Ellett, 132 Ill. 654; Cleveland, etc., R. Co. v. Bender, 69 Ill. App. 262; Pennsylvania Co. v. Greso, 79 Ill. App. 127; McCoy v. Kansas City, etc., R. Co., 36 Mo. App. 445; Aycock v. Raleigh, etc., R. Co., 89 N. Car. 321. *Contra*, Fletcher v. Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695. See generally *infra*, this title, *Sales, Leases, and Consolidation*; and the titles FENCES, vol. 12, pp. 1067 *et seq.*; FIRES, vol. 13, pp. 438 *et seq.*; INJURIES TO ANIMALS BY RAILROADS, vol. 16, pp. 487 *et seq.*

By Asking for and Receiving the Franchise, the corporation comes under the obligation to answer in damages to every one who may be injured by any negligence in the use of the privilege it has so received. And public policy will not permit the corporation to relieve itself from this obligation by any contract with others. Murray v. Lehigh Valley R. Co., 66 Conn. 512.

Evidence of Ownership or Operation of Road — Colorado. — Union Pac. R. Co. v. Jones, 21 Colo. 340.

District of Columbia. — Jones v. Pennsylvania R. Co., 19 D. C. 178.

Georgia. — Dunlap v. Richmond, etc., R. Co., 81 Ga. 136.

Illinois. — Illinois Cent. R. Co. v. Mills, 42 Ill. 407; Pittsburgh, etc., R. Co. v. Knutson, 69 Ill. 103; Pittsburgh, etc., R. Co. v. Callaghan, 157 Ill. 406, *affirming* 50 Ill. App. 676; Ryan v. Baltimore, etc., R. Co., 60 Ill. App. 612; Chicago Gen. St. R. Co. v. Capek, 68 Ill. App. 500.

Kansas. — Atchison, etc., R. Co. v. Davis, 34 Kan. 199, *cited in* Mathews v. Atchison, etc.,

R. Co., 60 Kan. 11; Atchison, etc., R. Co. v. Cochran, 43 Kan. 225, 19 Am. St. Rep. 129.

Michigan. — Williams v. Cleveland, etc., R. Co., 102 Mich. 537.

Missouri. — State v. St. Joseph, etc., R. Co., 46 Mo. App. 466.

Pennsylvania. — Pennsylvania R. Co. v. Sellers, 127 Pa. St. 406.

Texas. — Calhoun v. Gulf, etc., R. Co., 84 Tex. 226; San Jacinto, etc., R. Co. v. McLin, (Tex. Civ. App. 1901) 64 S. W. Rep. 314.

2. **Use by One Corporation of Rolling Stock Owned by Another.** — Sykes v. St. Louis, etc., R. Co., 88 Mo. App. 193; Fletcher v. Boston, etc., R. Co., 1 Allen (Mass.) 9, 79 Am. Dec. 695; Jetter v. New York, etc., R. Co., 2 Abb. App. Dec. (N. Y.) 458, 2 Keyes (N. Y.) 154; Weyant v. New York, etc., R. Co., 3 Duer (N. Y.) 360. See also the titles CARRIERS OF PASSENGERS, vol. 5, p. 530; MASTER AND SERVANT, vol. 20, pp. 80, 81.

3. **Liability of Corporations as Carriers.** — Brady v. Chicago, etc., R. Co., (C. C. A.) 114 Fed. Rep. 100; Murray v. Lehigh Valley R. Co., 66 Conn. 512. *Compare* Smith v. St. Louis, etc., R. Co., 85 Mo. 418, 55 Am. Rep. 380 (*doubted in* Cherry v. Kansas City, etc., R. Co., 61 Mo. App. 303). See generally the titles CARRIERS OF GOODS, vol. 5, p. 154; CARRIERS OF LIVE STOCK, vol. 5, p. 427; CARRIERS OF PASSENGERS, vol. 5, p. 474; COMMON CARRIERS, vol. 6, p. 236; CONNECTING CARRIERS (OF GOODS), vol. 6, p. 603; FORWARDERS, vol. 13, p. 1165.

4. **Liability of Corporation as Master.** — Brady v. Chicago, etc., R. Co., (C. C. A.) 114 Fed. Rep. 100; Central R., etc., Co. v. Grant, 46 Ga. 417; Dunlap v. Richmond, etc., R. Co., 81 Ga. 136; Clark v. Chicago, etc., R. Co., 92 Ill. 43; Vary v. Burlington, etc., R. Co., 42 Iowa 248; Engel v. New York, etc., R. Co., 160 Mass. 260; Hurlbut v. Wabash R. Co., 130 Mo. 657; Burton v. Galveston, etc., R. Co., 61 Tex. 526; Missouri Pac. R. Co. v. Jones, 75 Tex. 151, 16 Am. St. Rep. 879. See generally the titles FELLOW SERVANTS, vol. 12, p. 893; MASTER AND SERVANT, vol. 20, p. 3.

e. OPERATION OF SWITCH TRACKS. — A railroad corporation is generally liable for injuries due to negligence in operating switch tracks, irrespective of whether they are used for general purposes or merely for the convenience of individual shippers.¹

f. NEGLIGENCE OF POSTAL CLERKS AND NEWS AGENTS. — A railroad corporation is liable for injuries due to negligent or dangerous practices followed by persons, such as postal clerks and news agents, employed upon its trains but in the service of others rightfully using them, where it is cognizant or must be presumed to have knowledge of such practices.²

g. JOINT AND SEVERAL LIABILITY — CONCURRENT NEGLIGENCE. — Where two or more railroad companies are engaged in joint operations and the negligent conduct of the business results in injury to persons or property, or the injury is caused by the concurrent negligence of two or more corporations, they are jointly and severally liable for the damage.³

4. Injuries to Persons On or Near Tracks — *a.* LIABILITY IN GENERAL. — The liability of a railroad company for injuries sustained by a person on or near its tracks, from some act or omission alleged to constitute negligence, depends upon the legal duty of the railroad company in respect to the person injured. If there is no duty there is no negligence. Even if the company owes a duty to some one else, the failure to perform it does not create a liability to a person injured by such nonperformance if the duty was not one which the company owed to him.⁴ The measure of diligence, therefore, due by a railroad company to any person is a relative one, and what is or is not due diligence must be arrived at in every case with reference to the surrounding circumstances, and the relation which for the time being the company and the person occupied in respect to each other.⁵

b. OBLIGATION OF RAILROAD IN RESPECT TO ROADBED, YARDS, AND TRACKS — (1) *In General.* — A railroad company is under no legal obligation to keep its roadbed, yards, and tracks free from pitfalls or obstructions for the safety of trespassers⁶ or persons who go there merely for their own convenience or pleasure.⁷ If a person goes upon the premises of a railroad com-

1. Operation of Switch Tracks. — *St. Louis Bolt, etc., Co. v. Burke*, 12 Ill. App. 369; *Smith v. Atchison, etc., R. Co.*, 25 Kan. 739, 28 Kan. 541; *Harding v. Railway Transfer Co.*, 80 Minn. 504; *Roddy v. Missouri Pac. R. Co.*, 104 Mo. 234, 24 Am. St. Rep. 333; *Gulf, etc., R. Co. v. Bryant*, (Tex. Civ. App. 1902) 66 S. W. Rep. 804; *Canada Atlantic R. Co. v. Hurdman*, 25 Can. Sup. Ct. 205, *affirming* 22 Ont. App. 292, which *affirmed* 25 Ont. 209. See also *Com. v. Boston, etc., R. Corp.*, 126 Mass. 61.

Exception. — *Lake Erie, etc., R. Co. v. Gaughan*, 26 Ind. App. 1.

Negligence of Shipper in Loading Car. — *Washington v. Texas, etc., R. Co.*, 22 Tex. Civ. App. 189.

2. Ejection of Mail Sacks or Packages from Moving Trains. — *Ohio, etc., R. Co. v. Simms*, 43 Ill. App. 260; *St. Louis, etc., R. Co. v. Waggoner*, 90 Ill. App. 556; *Snow v. Fitchburg R. Co.*, 136 Mass. 552, 49 Am. Rep. 40; *Bradford v. Boston, etc., R. Co.*, 160 Mass. 392; *Galloway v. Chicago, etc., R. Co.*, 56 Minn. 346, 45 Am. St. Rep. 468; *McGrath v. Eastern R. Co.*, 74 Minn. 363; *Carpenter v. Boston, etc., R. Co.*, 97 N. Y. 494, 49 Am. Rep. 540; *Muster v. Chicago, etc., R. Co.*, 61 Wis. 325, 50 Am. Rep. 141.

Obstructing Station Platforms with Mail Sacks. — *Sargent v. St. Louis, etc., R. Co.*, 114 Mo. 348.

3. Two or More Corporations Operating Jointly. — *Jones v. Pennsylvania R. Co.*, 19 D. C. 178; *Wisconsin Cent. R. Co. v. Ross*, 142 Ill. 9, 34 Am. St. Rep. 49, *affirming* 43 Ill. App. 454, 53 Am. & Eng. R. Cas. 73; *Vary v. Burlington, etc., R. Co.*, 42 Iowa 248; *Chesapeake, etc., R. Co. v. Davis*, (Ky. 1900) 58 S. W. Rep. 698, 22 Ky. L. Rep. 748, (Ky. 1900) 60 S. W. Rep. 14, 22 Ky. L. Rep. 1156; *Baltimore, etc., R. Co. v. McPeck*, 8 Ohio Cir. Dec. 742; *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347; *Gulf, etc., R. Co. v. Dorsey*, 66 Tex. 148, *cited* *Dillingham v. Crank*, 87 Tex. 104; *Missouri Pac. R. Co. v. Bond*, 2 Tex. Civ. App. 104. See the title FIRES, vol. 13, p. 437.

Concurrent Negligence of Two or More Corporations. — See the titles CARRIERS OF PASSENGERS, vol. 5, pp. 591, 592; NEGLIGENCE, vol. 21, p. 496.

4. Liability for Injuries to Persons On or Near Tracks. — *Akers v. Chicago, etc., R. Co.*, 58 Minn. 540. And see the title NEGLIGENCE, vol. 21, p. 455.

5. Holland v. Sparks, 92 Ga. 753.

6. Obligation in Respect to Roadbeds, Yards, and Tracks — To Trespassers. — *Bledsoe v. Grand Trunk R. Co.*, 126 Mich. 312. See also *Lary v. Cleveland, etc., R. Co.*, 78 Ind. 323, 41 Am. Rep. 572.

7. To Bare Licensees — United States. — *Morgan v. Pennsylvania R. Co.*, 19 Blatchf. (U. S.) 239 (falling into unprotected pit); *Cleveland,*

pany without any inducement or invitation being held out to him by the company or its agents, he accepts the use of the premises subject to all dangers incident thereto, and cannot recover for injuries caused by obstructions or pitfalls thereon.¹ But in respect to persons who come upon the premises of a railroad company by its invitation, expressed² or implied,³ the company is bound to keep places where such persons may ordinarily be expected to go, in reasonably safe condition, and is liable for negligence if it fails to do so.

(2) *Duty to Block Frogs and Guard Rails.* — A statute requiring railroad companies to block the frogs and switches in their tracks is intended for the protection of employees, and an omission of this duty is not such negligence in respect to a trespasser as to render a railroad company liable for his death from being run over by a train while his foot was held by an unblocked frog.⁴ But, independently of statute, ordinary care requires that where railroad tracks are laid along a public street guard rails should be properly blocked for the protection of persons walking along or crossing the tracks, and a failure to do so renders the company liable for an injury attributable to its negligence.⁵

(3) *Duty to Fence In Tracks.* — In the **Absence of Statutory Requirement**, a railroad company is under no legal obligation to fence in its tracks, and hence the omission to do so does not constitute such negligence as to render the company liable for the death or injury of a child who may wander upon them.⁶

Under Statutes Requiring Erection of Fences. — Whether or not negligence is predicable upon the omission under statutes requiring railroad companies to erect and maintain fences along their right of way depends largely upon the construction of the particular statute. If the statute is merely intended for the

etc., R. Co. v. Ballentine, (C. C. A.) 84 Fed. Rep. 935 (explosion of car of petroleum).

Indiana. — Evansville, etc., R. Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783 (falling into unprotected pit); Lingenfelter v. Baltimore, etc., R. Co., 154 Ind. 49 (falling into unprotected pit).

Massachusetts. — Redigan v. Boston, etc., R. Co., 155 Mass. 44, 31 Am. St. Rep. 520 (falling through trap door).

Michigan. — Clark v. Michigan Cent. R. Co., 113 Mich. 24, 67 Am. St. Rep. 442 (falling over semaphore wire).

Mississippi. — Illinois Cent. R. Co. v. Arnola, 78 Miss. 787 (injury by negligence of company's servant).

Texas. — Houston, etc., R. Co. v. Sgalinski, 19 Tex. Civ. App. 107 (falling off bridge abutment).

Virginia. — Norfolk, etc., R. Co. v. De Board, 91 Va. 700 (falling into hole in path).

Canada. — Spence v. Grand Trunk R. Co., 27 Ont. 303 (falling over stake in ground); Faucher v. North Shore R. Co., 9 Montreal Leg. N. 75 (falling over plank on track).

1. Lingenfelter v. Baltimore, etc., R. Co., 154 Ind. 49.

2. *Duty to Person Invited upon Premises.* — Flynn v. Central R. Co., 142 N. Y. 439; Curtis v. De Coursey, 176 Pa. St. 446. See also Murch v. Concord R. Corp., 29 N. H. 9, 61 Am. Dec. 631.

3. *Implied Invitation.* — If a railroad company permits its right of way to be used by the public for purposes of travel, it becomes liable to one injured by an obstruction or dangerous contrivance while availing himself of the implied invitation. Hansen v. Southern Pac.

Co., 105 Cal. 379; Burton v. Western, etc., R. Co., 98 Ga. 783.

It may be otherwise, however, where a town has converted this part of the right of way into a public street, and has repaired it as such. Neal v. Southern R. Co., 128 N. Car. 143.

A Railroad Company, in Constructing Its Bridge over a River and making lateral embankments adjoining a highway, is bound to so construct such embankments as not to render the approach to the bridge along the highway dangerous for passengers by day or night; and a failure to perform this duty subjects it to liability for the consequences, provided the party thereby injured has used reasonable and ordinary care to avoid the danger. Baltimore, etc., R. Co. v. Boteler, 38 Md. 568. Compare Hooper v. Johnstown, etc., Horse R. Co., 128 N. Y. 613.

4. *Failure to Block Frog Not Negligence in Respect to Trespasser.* — Akers v. Chicago, etc., R. Co., 58 Minn. 540; International, etc., R. Co. v. Lee, (Tex. Civ. App. 1896) 34 S. W. Rep. 160.

5. *Failure to Block Guard Rail of Track in Public Street Negligence.* — Louisville, etc., R. Co. v. Phillips, 112 Ind. 59, 2 Am. St. Rep. 155; Goodrich v. Burlington, etc., R. Co., 103 Iowa 412; Gulf, etc., R. Co. v. Walker, 70 Tex. 126, 8 Am. St. Rep. 582.

Liability to Employee of Another Railroad a Question for the Jury. — Turner v. Boston, etc., R. Co., 158 Mass. 261.

6. *Failure to Fence In Tracks — At Common Law.* — Nolan v. New York, etc., R. Co., 53 Conn. 472; Jackson v. Louisville, etc., R. Co. (Ky. 1898) 46 S. W. Rep. 5.

Hence it is proper to exclude evidence that

protection of the cattle of the owners or occupants of adjoining lands,¹ or of passengers whose safety would be jeopardized by the presence of such cattle on the track,² or if the obligation to fence is not made absolute by the statute, but the failure merely makes the company liable for all damages arising from the injury or killing of cattle on its unfenced tracks,³ the omission to erect and maintain such fences is not negligence in respect to children or other trespassers, or bare licensees who may be killed or injured on the track, for the reason that the obligation imposed by the statute is not created for their security.⁴ If, on the other hand, the duty to erect and maintain fences is made absolute,⁵ or if the omission subjects the company to liability "for all damages sustained by any person in consequence of such failure or neglect,"⁶ or if the statute, though primarily designed for the protection of cattle, can, by any legitimate construction, be given a larger scope,⁷ the courts have not been loath to extend its protection to children incapable of exercising intelligence sufficient to avoid going upon the tracks, and to sustain judgments in their favor whenever noncompliance can properly be regarded as the proximate cause of their injuries.⁸ The courts have not, however, extended such statutes for the protection of adult persons voluntarily upon the tracks for their own convenience.⁹

c. OBLIGATION IN RESPECT TO DANGEROUS INSTRUMENTALITIES. — A railroad company is not liable to a trespasser who finds a signal torpedo upon the track and is injured by its explosion while examining it.¹⁰ But it has been held to be negligence for the servant of a railroad company to place a signal torpedo upon the track, exposed to observation, at a point where the public, including children, are and have been permitted by the company to travel and pass; and if a child is attracted by and is killed by handling such torpedo the company is liable.¹¹

the track was unfenced. *Reynolds v. Great Northern R. Co.*, 32 U. S. App. 577.

1. *Under Statutes.* — *Casista v. Boston, etc.*, R. Co., 69 N. H. 649.

2. *Prendegast v. New York Cent., etc.*, R. Co., 58 N. Y. 652; *Ditchett v. Spuyten Duyvil, etc.*, R. Co., 67 N. Y. 425; *Robertson v. New York, (C. Pl. Gen. T.)* 7 Misc. (N. Y.) 645.

3. *Walkenhauer v. Chicago, etc.*, R. Co., 3 McCrary (U. S.) 553 (construing Iowa statute); *Baltimore, etc.*, R. Co. *v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252.

4. *Morrissey v. Providence, etc.*, R. Co., 15 R. I. 271.

5. *Hayes v. Michigan Cent. R. Co.*, 111 U. S. 228.

6. *Rosse v. St. Paul, etc.*, R. Co., 68 Minn. 216, 64 Am. St. Rep. 472, *overruling Fitzgerald v. St. Paul, etc.*, R. Co., 29 Minn. 336, 43 Am. Rep. 212; *Nickolson v. Northern Pac. R. Co.*, 80 Minn. 508.

7. *Keyser v. Chicago, etc.*, R. Co., 56 Mich. 559, 66 Mich. 390, 56 Am. Rep. 405; *Isabel v. Hannibal, etc.*, R. Co., 60 Mo. 475; *Chicago, etc.*, R. Co. *v. Grablin*, 38 Neb. 90; *Schmidt v. Milwaukee, etc.*, R. Co., 23 Wis. 186, 99 Am. Dec. 158; *Schrier v. Milwaukee, etc.*, R. Co., 65 Wis. 457; *Stuettgen v. Wisconsin Cent. R. Co.*, 80 Wis. 498.

8. *Failure to Fence Must Be Proximate Cause of Injury.* — *Fezler v. Willmar, etc.*, R. Co., 85 Minn. 252; *Wickham v. Chicago, etc.*, R. Co., 95 Wis. 23. See also *Singleton v. Eastern Counties R. Co.*, 7 C. B. N. S. 287, 97 E. C. L. 287.

9. *Schreiner v. Great Northern R. Co.*, (Minn. 1902) 90 N. W. Rep. 400.

Station Grounds. — The statute does not require station grounds to be enclosed, as it is necessary for these to be kept open for the convenience of the public. *Houston, etc.*, R. Co. *v. Boozer*, 2 Tex. Unrep. Cas. 452.

A place where it is customary to unload freight is a place "where the convenient use of the road would be thereby obstructed" within the exception in the *Massachusetts* statute. (Pub. Stat., c. 112, § 115). *McCarty v. Fitchburg R. Co.*, 154 Mass. 17.

But the mere fact that the point where the plaintiff was killed was within the yard limits of the defendant company did not relieve it of the statutory duty to fence its tracks. *Nickolson v. Northern Pac. R. Co.*, 80 Minn. 508.

Ordinance Requiring Tracts Approximately Even with Surface to Be Fenced. — Under a city ordinance requiring that "whenever the grade of a street railway track is approximately even with the adjacent surface the line of the road shall be securely closed on both sides with a substantial fence," etc., it should be left to the jury to say whether or not a track elevated two feet two inches above the surface of the street is approximately even with the surface within the contemplation of the ordinance. *Baltimore, etc.*, R. Co. *v. Cumberland*, 176 U. S. 232.

10. *Injury from Signal Torpedo.* — *Carter v. Columbia, etc.*, R. Co., 19 S. Car. 20, 45 Am. Rep. 754.

11. *When Placed Where It Will Attract Attention of Children.* — *Harriman v. Pittsburgh, etc.*, R. Co., 45 Ohio St. 11, 4 Am. St. Rep. 507. See also *Cleveland, etc.*, R. Co. *v. Marsh*, 63 Ohio St. 236. But the company is not liable for

d. OBLIGATION IN RESPECT TO MOVEMENT OF TRAINS — (1) Obligation to Trespassers. — The only duty which a railroad company owes to a trespasser upon its tracks is to abstain from wantonly and wilfully injuring him, and no liability to such person arises from the want of ordinary care.¹ A railroad track is itself a warning of danger,² and trespassers thereon are charged with knowledge of the peril, and if they go there voluntarily are to be regarded as assuming the risk of the situation. Their own negligence precludes a recovery for any injury which they may receive from moving trains, unless the negligence of the railroad company was so gross as to show wantonness.³

injury to a boy twelve years old from the explosion of a torpedo which he takes from a box on a handcar standing beside the highway. *McShane v. Toronto, etc., R. Co.,* 31 Ont. 185.

1. Liability of Railroad Company to Trespassers on Its Tracks — England. — *Harrison v. North Eastern R. Co.,* 29 L. T. N. S. 844.

United States. — *Kansas City, etc., R. Co. v. Cook,* 66 Fed. Rep. 115, 31 U. S. App. 277.

Alabama. — *Nave v. Alabama G. S. R. Co.,* 96 Ala. 264; *Alabama G. S. R. Co. v. Moorer,* 116 Ala. 642.

Connecticut. — *Nolan v. New York, etc., R. Co.,* 53 Conn. 461.

Georgia. — *Atlanta, etc., R. Co. v. Gravit,* 93 Ga. 369, 44 Am. St. Rep. 145; *Grady v. Georgia R., etc., Co.,* 112 Ga. 668.

Illinois. — *Galena, etc., R. Co. v. Jacobs,* 20 Ill. 478; *Illinois Cent. R. Co. v. Godfrey,* 71 Ill. 500, 22 Am. Rep. 112; *Lake Erie, etc., R. Co. v. Zoffinger,* 10 Ill. App. 252; *Eggmann v. St. Louis, etc., R. Co.,* 47 Ill. App. 507; *Illinois Cent. R. Co. v. Beard,* 49 Ill. App. 232; *Chicago, etc., R. Co. v. Bednorz,* 57 Ill. App. 309; *Baltimore, etc., R. Co. v. Pletz,* 61 Ill. App. 161; *Meehan v. Chicago, etc., R. Co.,* 67 Ill. App. 39; *O'Connor v. Illinois Cent. R. Co.,* 77 Ill. App. 22; *Illinois Cent. R. Co. v. Oberhoefer,* 76 Ill. App. 672; *Union Stock-Yard, etc., Co. v. Goodman,* 91 Ill. App. 426.

Indiana. — *McClaren v. Indianapolis, etc., R. Co.,* 83 Ind. 319; *Terre Haute, etc., R. Co. v. Graham,* 95 Ind. 286, 48 Am. Rep. 719; *Ivens v. Cincinnati, etc., R. Co.,* 103 Ind. 27; *Palmer v. Chicago, etc., R. Co.,* 112 Ind. 250; *Gregory v. Cleveland, etc., R. Co.,* 112 Ind. 385; *Brooks v. Pittsburgh, etc., R. Co.,* (Ind. 1902) 62 N. E. Rep. 694; *Cleveland, etc., R. Co. v. Stephenson,* 139 Ind. 641; *Terre Haute, etc., R. Co. v. Graham,* 46 Ind. 239.

Iowa. — *Richards v. Chicago, etc., R. Co.,* 81 Iowa 426.

Kansas. — *Mason v. Missouri Pac. R. Co.,* 27 Kan. 83, 41 Am. Rep. 405.

Kentucky. — *Brown v. Louisville, etc., R. Co.,* 97 Ky. 228; *Lyter v. L., etc., R. Co.,* 6 Ky. L. Rep. 223; *Louisville, etc., R. Co. v. Vittitoe,* (Ky. 1897) 41 S. W. Rep. 269; *Lyons v. Illinois Cent. R. Co.,* (Ky. 1900) 59 S. W. Rep. 507.

Maryland. — *State v. Baltimore, etc., R. Co.,* 69 Md. 494, 9 Am. St. Rep. 436.

Massachusetts. — *Dillon v. Connecticut River R. Co.,* 154 Mass. 478.

Michigan. — *Sturgis v. Detroit, etc., R. Co.,* 72 Mich. 619; *Trudell v. Grand Trunk R. Co.,* 126 Mich. 73.

Minnesota. — *Studley v. St. Paul, etc., R. Co.,* 48 Minn. 249; *Lando v. Chicago, etc., R. Co.,* 81 Minn. 279.

Mississippi. — *Dooley v. Mobile, etc., R. Co.,* 69 Miss. 648; *Richmond, etc., R. Co. v. Burnsed,* 70 Miss. 437, 35 Am. St. Rep. 656.

Missouri. — *Yarnall v. St. Louis, etc., R. Co.,* 75 Mo. 575; *Heiter v. East St. Louis Connecting R. Co.,* 53 Mo. App. 331; *Riley v. Missouri Pac. R. Co.,* 68 Mo. App. 652; *Hyde v. Missouri Pac. R. Co.,* 110 Mo. 272.

New York. — *McKenna v. New York Cent., etc., R. Co.,* 8 Daly (N. Y.) 304.

North Carolina. — *Herring v. Wilmington, etc., R. Co.,* 10 Ired. L. (32 N. Car.) 402, 51 Am. Dec. 395.

Oregon. — *Ward v. Southern Pac. Co.,* 25 Oregon 433.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Hummell,* 44 Pa. St. 375, 84 Am. Dec. 457.

Texas. — *Houston, etc., R. Co. v. Boozer,* 2 Tex. Unrep. Cas. 452.

West Virginia. — *Davidson v. Pittsburg, etc., R. Co.,* 41 W. Va. 407.

Trespasser Using Handcar. — *Eastern Kentucky R. Co. v. Powell,* (Ky. 1895) 33 S. W. Rep. 629.

Trespasser Stricken with Epileptic Fit. — *Tyler v. Kelley,* 89 Va. 282.

Statutes. — In some of the states there are statutes prohibiting persons from going upon the tracks of a railroad company, and exempting the company from liability for the loss of life by a person while walking or being upon its road contrary to law. *Dillon v. Connecticut River R. Co.,* 154 Mass. 478; *McCreary v. Boston, etc., R. Co.,* 156 Mass. 316; *Diebold v. Pennsylvania R. Co.,* 50 N. J. L. 478. See also *Morgan v. Wabash R. Co.,* 159 Mo. 262.

Failure to Observe Statute or Ordinance. — The fact that a railroad company is not complying with the provisions of some statute or municipal ordinance in the operation of the train at the time a trespasser is killed does not render the company liable. *Savannah, etc., R. Co. v. Meadors,* 95 Ala. 137; *Illinois Cent. R. Co. v. O'Connor,* 189 Ill. 559.

2. Railroad Track Itself a Warning of Danger. — *Warner v. Baltimore, etc., R. Co.,* 7 App. Cas. (D. C.) 79. This rule applies as well to a side track as to the main line. *Mynning v. Detroit, etc., R. Co.,* 59 Mich. 257.

3. Trespasser Assumes Risk — United States. — *Brennan v. Delaware, etc., R. Co.,* 55 U. S. App. 51.

Alabama. — *Savannah, etc., R. Co. v. Meadors,* 95 Ala. 137.

Colorado. — *Kennedy v. Denver, etc., R. Co.,* 10 Colo. 493.

Illinois. — *Illinois Cent. R. Co. v. Hall,* 72 Ill. 222; *Illinois Cent. R. Co. v. Hammer,* 72 Ill. 347; *Roden v. Chicago, etc., R. Co.,* 133 Ill. 72, 23 Am. St. Rep. 585.

Infant Trespassers. — The fact that a person is an infant does not affect his relation as a trespasser,¹ but it is material upon the question of his negligence in being upon the track,² and imposes upon the company a higher degree of care to avoid injuring him.³

(2) *Obligation to Bare Licensees.* — The rule in respect to trespassers applies also to mere licensees. The fact that a railroad company passively submits to the trespass does not impose upon it any greater obligation. The licensee accepts the use of the premises subject to its risks and cannot recover for an injury not wantonly or wilfully inflicted upon him.⁴

(3) *Obligation to Persons on Premises by Invitation.* — But to persons who come upon the property of a railroad company by its express or implied invitation or consent the company owes the duty to exercise reasonable care, and will be held liable for its ordinary negligence.⁵

(4) *Obligation to Persons on Public Streets.* — Where the tracks of a railroad company are laid through a public street, persons crossing or walking along such tracks are not trespassers,⁶ although such tracks may be elevated

Iowa. — *McAllister v. Burlington, etc., R. Co.*, 64 Iowa 395.

Michigan. — *Bouwmeester v. Grand Rapids, etc., R. Co.*, 67 Mich. 87.

New York. — *McCarty v. Delaware, etc., Canal Co.*, 17 Hun (N. Y.) 74.

Texas. — *Galveston, etc., R. Co. v. Ryon*, 70 Tex. 56; *Texas, etc., R. Co. v. Breadow*, 90 Tex. 26; *Texas, etc., R. Co. v. Staggs*, 90 Tex. 458; *St. Louis, etc., R. Co. v. Herrin*, 6 Tex. Civ. App. 718; *Tucker v. International, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 914; *Houston, etc., R. Co. v. Boozer*, 2 Tex. Unrep. Cas. 452.

Virginia. — *Baltimore, etc., R. Co. v. Sherman*, 30 Gratt. (Va.) 602.

Canada. — *Wilson v. Grand Trunk R. Co.*, 2 Montreal Leg. N. 45.

Walking on Right of Way. — It is not negligence *per se* to walk on a railroad right of way in a town or city where passing and repassing are frequent, but it is a question for the jury. *Alabama G. S. R. Co. v. Chapman*, 80 Ala. 615.

1. Infant Trespassers — *Indiana.* — *Baltimore, etc., R. Co. v. Bradford*, 20 Ind. App. 348, 67 Am. St. Rep. 252.

Iowa. — *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169.

Kentucky. — *Jackson v. Louisville, etc., R. Co.*, (Ky. 1898) 46 S. W. Rep. 5. Compare *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

Massachusetts. — *Morrissey v. Eastern R. Co.*, 126 Mass. 377, 30 Am. Rep. 686.

Michigan. — *Trudell v. Grand Trunk R. Co.*, 126 Mich. 73.

Mississippi. — *Louisville, etc., R. Co. v. Williams*, 69 Miss. 641.

Missouri. — *Donahoe v. Wabash, etc., R. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *Williams v. Kansas City, etc., R. Co.*, 96 Mo. 275.

North Carolina. — *Manly v. Wilmington, etc., R. Co.*, 74 N. Car. 655.

Pennsylvania. — *Baltimore, etc., R. Co. v. Schwindling*, 101 Pa. St. 258, 47 Am. Rep. 706; *Mitchell v. Philadelphia, etc., R. Co.*, 132 Pa. St. 226; *Brague v. Northern Cent. R. Co.*, 192 Pa. St. 242.

Texas. — *Sabine, etc., R. Co. v. Hanks*, 73 Tex. 323.

West Virginia. — *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 32 Am. St. Rep. 842.

2. See the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 405.

3. See *infra*, this title.

4. Duty to Bare Licensees — *Illinois.* — *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Illinois Cent. R. Co. v. James*, 67 Ill. App. 649.

Indiana. — *Pennsylvania Co. v. Meyers*, 136 Ind. 242; *Cleveland, etc., R. Co. v. Stephenson*, 139 Ind. 641; *Cleveland, etc., R. Co. v. Adair*, 12 Ind. App. 569.

Massachusetts. — *June v. Boston, etc., R. Co.*, 153 Mass. 79.

Minnesota. — *Schreiner v. Great Northern R. Co.*, (Minn. 1902) 90 N. W. Rep. 400.

Mississippi. — *Illinois Cent. R. Co. v. Lee*, 71 Miss. 895.

New York. — *Matze v. New York Cent., etc., R. Co.*, 3 Thomp. & C. (N. Y.) 513, 1 Hun (N. Y.) 417.

North Carolina. — *Norwood v. Raleigh, etc., R. Co.*, 111 N. Car. 236.

Wisconsin. — *Hogan v. Chicago, etc., R. Co.*, 59 Wis. 139; *McCabe v. Chicago, etc., R. Co.*, 88 Wis. 531.

5. Obligation to Persons on Premises by Invitation. — *Tutt v. Illinois Cent. R. Co.*, (C. C. A.) 104 Fed. Rep. 741; *Hansen v. Southern Pac. R. Co.*, 105 Cal. 379; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *McDermott v. New York Cent., etc., R. Co.*, 28 Hun (N. Y.) 325.

6. Persons on Tracks Laid through Public Streets Not Trespassers — *United States.* — *Baltimore, etc., R. Co. v. Cumberland*, 176 U. S. 232; *Toledo, etc., R. Co. v. Chisholm*, 83 Fed. Rep. 652, 49 U. S. App. 700.

Alabama. — *Montgomery v. Alabama G. S. R. Co.*, 97 Ala. 305.

Florida. — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Indiana. — *Louisville, etc., R. Co. v. Downey*, 18 Ind. App. 140.

Iowa. — *Bryson v. Chicago, etc., R. Co.*, 89 Iowa 677; *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412.

Louisiana. — *Lampkin v. McCormick*, 105 La. 418.

Michigan. — *Kelly v. Michigan Cent. R. Co.*,

upon an embankment,¹ or the railroad company has posted notices forbidding the use of the tracks for foot passengers,² unless the municipal grant under which the tracks were laid gives to the company the exclusive right of the use of the street.³ Yet in respect to such tracks the rights of the public are subordinate to those of the railroad company;⁴ and while it is the duty of its servants to exercise ordinary care in the management of trains,⁵ it is also incumbent upon persons going upon the tracks to exercise ordinary care for their own safety.⁶

(5) *Who Are Trespassers, Licensees, or Persons Present by Invitation* — (a) *Employees of Railroad Company.* — It has been held that an employee of a railroad company who uses its tracks as a footpath while going to and returning from his work is a bare licensee,⁷ but there are decisions which seem to regard him as being there of right, and which hold the company in respect to him to the exercise of ordinary care.⁸

Person Learning Duties of Employment. — A person who enters a railroad yard under proper authority to learn the duties of a certain employment, with the understanding that he will be employed on becoming competent, is not a bare licensee, but is there by invitation.⁹ But one that comes there merely at the request of an employee to assist him in the work is a trespasser, unless the employee had authority to employ an assistant.¹⁰

(b) *Employees of Associated Corporations or Independent Contractors* — *Employees of Associated Corporations.* — Where two railroad companies by agreement use the same station, the employees of each are upon the common property of right and are entitled to demand the exercise of ordinary care from the employees of the other company.¹¹ And the same principle applies where the tracks of two companies lie adjacent and parallel, and the employees of each company are licensed in making signals to go upon the tracks of the other.¹²

Employees of Parlor Car Company. — The employee of a parlor car company who is obliged in the performance of his duties to cross the tracks of the railroad

65 Mich. 186, cited in *Fehnrich v. Michigan Cent. R. Co.*, 87 Mich. 606.

Missouri. — *Lloyd v. St. Louis, etc., R. Co.*, 128 Mo. 595.

Texas. — *Galveston, etc., R. Co. v. Lewis*, 5 Tex. Civ. App. 638.

1. *Pittsburgh, etc., R. Co. v. Bennett*, 9 Ind. App. 92.

2. *Louisville, etc., R. Co. v. Downey*, 18 Ind. App. 140.

3. *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783.

Exclusive Use of Street. — A city ordinance is admissible in evidence, in an action for an injury sustained by a person on a railroad track through a public street, to show that the railroad company is not entitled to the exclusive use of the street. *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412.

4. *Zimmerman v. Hannibal, etc., R. Co.*, 71 Mo. 476; *Otto v. St. Louis, etc., R. Co.*, 12 Mo. App. 168.

5. *East St. Louis Connecting R. Co. v. Reames*, 173 Ill. 582; *Brand v. Schenectady, etc., R. Co.*, 8 Barb. (N. Y.) 368.

6. *Vogg v. Missouri Pac. R. Co.*, 138 Mo. 172.

It Is Contributory Negligence for a person to voluntarily walk along a track in a public thoroughfare used as a switchyard if the walking on either side is good. *Louisville, etc., R. Co. v. Yniestra*, 21 Fla. 700.

But it is not necessarily negligence to walk between tracks eight feet apart in a yard in a

public street, although there is a sidewalk on either side of the street. *East St. Louis Connecting R. Co. v. Reames*, 173 Ill. 582.

A Person, in Walking upon Tracks Laid through a Public Street has a right to presume that the railroad company will obey the city ordinance regulating the management of trains. *Jennings v. St. Louis, etc., R. Co.*, 112 Mo. 268.

7. *Employees Going to or Returning from Work.* — *Baker v. Chicago, etc., R. Co.*, 95 Iowa 163; *Schlereth v. Missouri Pac. R. Co.*, (Mo. 1892) 19 S. W. Rep. 1134.

8. *International, etc., R. Co. v. Brooks*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1056.

A Track Repairer, Walking on the Right of Way of a railroad company with his foreman and other members of the gang, after work hours, to take a train for the next working place, is not a trespasser. *Swadley v. Missouri Pac. R. Co.*, 118 Mo. 268, 40 Am. St. Rep. 366.

9. *Person Learning Duties of Employment.* — *Collier v. Michigan Cent. R. Co.*, 27 Ont. App. 630.

10. *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

11. *Employees of Railroads Using Same Station.* — *Illinois Cent. R. Co. v. Frelka*, 110 Ill. 498.

12. *Employees of Railroads Using Adjacent Tracks.* — *McMarshall v. Chicago, etc., R. Co.*, 80 Iowa 757, 20 Am. St. Rep. 445. See also *Watts v. Richmond, etc., R. Co.*, 89 Ga. 277; *Jordan v. Chicago, etc., R. Co.*, 58 Minn. 8, 49 Am. St. Rep. 486.

An employee of a railroad company engaged

company operating the cars is upon such premises by implied invitation.¹

Mail Clerks. — And the same is true of mail clerks engaged in transferring mail bags at a station.²

Employees of Independent Contractor. — Employees of an independent contractor employed by a railroad company upon its right of way,³ or to repair bridges and trestles⁴ or a station building,⁵ come upon the railroad premises by express invitation, and the company owes to them the duty of exercising ordinary care.

(c) **Persons Guarding Premises.** — A militiaman who is posted during a strike as a sentinel in a railroad company's freight yard for its protection is there by express invitation, and the company owes to him the duty of exercising ordinary care.⁶ But though a policeman may be authorized to patrol railroad tracks in a city, he may become a trespasser by walking thereon for his own convenience, on his way to enter on the discharge of his duties on his beat elsewhere.⁷

(d) **Persons Transacting Business at Stations** — *aa. IN GENERAL.* — Where a railroad company so locates its passenger station as to require persons coming from it to cross the tracks to reach the main business portion of a town,⁸ or to pass along the tracks to reach a highway,⁹ or *vice versa*, this is tantamount to an invitation to such persons to cross or pass along the tracks, and imposes upon the company the exercise of ordinary care, not only in respect to those who have been or intend to be passengers upon its trains, but also to those who come to meet passengers expected to pass through on a train.¹⁰ So, persons who enter a railroad freight yard in the necessary prosecution of business connected with the railroad company come there by implied invitation and are entitled to demand the exercise of ordinary care.¹¹

bb. PERSONS RECEIVING OR DELIVERING GOODS. — Thus, a person receiving or

in delivering a car on to the track of another railroad company is there of right. *Turner v. Boston, etc., R. Co.*, 158 Mass. 261.

1. Employees of Parlor Car Company. — *Young v. New York Cent., etc., R. Co.*, 13 Daly (N. Y.) 294; *Harold v. New York Cent., etc., R. Co.*, 13 Daly (N. Y.) 89. *Compare O'Day v. Chicago, etc., R. Co.*, 97 Ill. App. 632.

2. Mail Clerk. — *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267.

3. Employees of Contractor Repairing Right of Way. — *Chicago, etc., R. Co. v. Goebel*, 20 Ill. App. 163; *Erickson v. St. Paul, etc., R. Co.*, 41 Minn. 500; *White v. Atchison, etc., R. Co.*, 84 Mo. App. 411; *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413; *Garteiser v. Galveston, etc., R. Co.*, 2 Tex. Civ. App. 230; *Johnson v. Richmond, etc., R. Co.*, 86 Va. 975.

4. Employees of Contractor Repairing Bridges and Trestles. — *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 132; *Inter-State Consol. Rapid Transit R. Co. v. Fox*, 41 Kan. 715; *Young v. New York Cent. R. Co.*, 30 Barb. (N. Y.) 229. *Compare Sweeney v. Boston, etc., R. Co.*, 128 Mass. 5.

5. Where a Contractor Engaged in Repairing a Railroad Station Building keeps his tools and materials in a car on one of the tracks with the knowledge and assent of the railroad company, an employee of the contractor crossing the tracks in going to and fro between the car and the station building does so by implied invitation of the railroad company. *Dempsey v. New York Cent., etc., R. Co.*, 81 Hun (N. Y.) 156. But see *Furey v. New York Cent., etc., R. Co.*, (N. J. 1902) 51 Atl. Rep. 505.

6. Militiaman on Guard. — *O'Harra v. New York Cent., etc., R. Co.*, 92 Hun (N. Y.) 56, 153 N. Y. 691.

7. Policeman Using Tracks for His Own Convenience. — *Pennsylvania Co. v. Meyers*, 136 Ind. 242.

8. Persons Crossing Tracks to Reach Passenger Train. — *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Louisville, etc., R. Co. v. Thompson*, 64 Miss. 584; *Louisville, etc., R. Co. v. Hirsch*, 69 Miss. 126.

9. Persons Walking on Track Between Station and Highway. — *Anderson v. Grand Trunk R. Co.*, 27 Ont. 441; *Grand Trunk R. Co. v. Anderson*, 28 Can. Sup. Ct. 541; *Reid v. New York, etc., R. Co.*, 63 Hun (N. Y.) 630, 17 N. Y. Supp. 80r.

10. Illinois Cent. R. Co. v. Wall, 53 Ill. App. 588.

11. Persons Entering Freight Yard on Business. — *Ominger v. New York Cent., etc., R. Co.*, 4 Hun (N. Y.) 159; *Mason v. Chicago, etc., R. Co.*, 89 Wis. 151.

But where a railroad company provides offices for the transaction of its business, accessible from the street, a person who goes into the freight yard unnecessarily is at best a mere licensee. *Diebold v. Pennsylvania R. Co.*, 50 N. J. L. 478.

Whether a person becomes a trespasser by deviating from a path across a freight yard, is a question of fact for the jury. *Scott v. St. Louis, etc., R. Co.*, 112 Iowa 54.

Person Having Business with Associated Company. — *Connell v. Southern R. Co.*, (C. C. A.) 91 Fed. Rep. 466.

delivering goods at a freight station,¹ or at a point selected by agreement between such person and the railroad company,² has a right in doing so to occupy a position designated by the agent of the company, even if such a position be hazardous, and has a right to rely upon the diligence of the company to protect him from harm.³ Mere convenience, not amounting to necessity, will not protect him, however, if he, of his own volition, selects a hazardous place at which to transact his business, and the company will not be liable for any injury not wilfully or wantonly inflicted upon him.⁴

cc. PERSONS LOADING OR UNLOADING CARS. — A person rightfully engaged in loading or unloading goods from a freight car is upon the railroad company's premises by its implied invitation, and the company owes to him the duty of exercising ordinary care.⁵ The fact that no agent of the company pointed out the car⁶ or knew that it was being loaded or unloaded at the time⁷ is immaterial if the car had been placed upon the side track for that purpose and the person injured was at the time rightfully engaged in the work.

(e) *Persons Crossing Tracks.* — Persons who for their own convenience cross the tracks of a railroad company at places other than crossings are trespassers.⁸ And the mere fact that people have frequently trespassed upon the track at this point, and that the company has not resorted to any means to stop the same, will not imply its consent to such use of the track, nor create any right in the public by such user.⁹ But where the public have for a long time notoriously and constantly been in the habit of crossing a railroad track at a

Person Seeking Employment from Shipper of Stock. — *Shelby v. Cincinnati, etc., R. Co.*, 85 Ky. 224.

1. *Persons Receiving or Delivering Goods.* — *Toledo, etc., R. Co. v. Hauck*, 8 Ind. App. 367; *Ward v. Maine Cent. R. Co.*, 96 Me. 136.

2. *St. Louis, etc., R. Co. v. Ridge*, 20 Ind. App. 547; *Newson v. New York Cent. R. Co.*, 29 N. Y. 383.

3. *Pittsburgh, etc., R. Co. v. Ives*, 12 Ind. App. 602.

4. *Heiter v. East St. Louis Connecting R. Co.*, 53 Mo. App. 331.

5. *Persons Loading or Unloading Cars.* — *Wabash, etc., R. Co. v. Locke*, 112 Ind. 404, 2 Am. St. Rep. 193; *Conlan v. New York Cent., etc., R. Co.*, 74 Hun (N. Y.) 115; *Missouri, etc., R. Co. v. Holman*, 15 Tex. Civ. App. 16.

6. *Gulf, etc., R. Co. v. Bryant*, (Tex. Civ. App. 1902) 66 S. W. Rep. 804.

7. *Watson v. Wabash, etc., R. Co.*, 66 Iowa 164.

8. *Persons Crossing Tracks — England.* — *Wilby v. Midland R. Co.*, 35 L. T. N. S. 244; *Falkiner v. Great Southern, etc., R. Co., Ir.* R. 5 C. L. 213; *Newman v. L., etc., R. Co.*, 55 J. P. 375.

Georgia. — *Rome R. Co. v. Tolbert*, 85 Ga. 447.

Illinois. — *Jelinski v. Belt R. Co.*, 86 Ill. App. 535.

Indiana. — *Cannon v. Cleveland, etc., R. Co.*, 157 Ind. 682; *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 27.

Iowa. — *Heiss v. Chicago, etc., R. Co.*, 103 Iowa 590.

Kentucky. — *Carter v. L., etc., R. Co.*, 4 Ky. L. Rep. 325.

Massachusetts. — *Wright v. Boston, etc., R. Co.*, 129 Mass. 440.

Missouri. — *Dahlstrom v. St. Louis, etc., R. Co.*, 96 Mo. 99.

New York. — *Adams v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 681,

66 Hun (N. Y.) 634; *Kent v. New York, etc., R. Co.*, 51 N. Y. App. Div. 508.

Pennsylvania. — *Comly v. Pennsylvania R. Co.*, (Pa. 1888) 12 Atl. Rep. 496.

Texas. — *Bradley v. San Antonio, etc., R. Co.*, 80 Tex. 84.

When Public Crossing Is Blocked. — The fact that a railroad crossing happens to be blocked by cars at a time when a person wishes to cross the tracks, does not give him a right to cross the tracks at some other point. *Chicago, etc., R. Co. v. Bednorz*, 57 Ill. App. 309.

But it may be otherwise where the company blocks the crossing for an unreasonably long time. *Mayer v. Chicago, etc., R. Co.*, 63 Ill. App. 309.

This will not, however, justify a person in attempting to climb between the cars at some point other than a street crossing. *Thompson v. Missouri, etc., R. Co.*, 93 Mo. App. 548.

Person Going on Track to Save Child. — A person going upon the track of a railroad company in an attempt to rescue a child, which had wandered there, is not a trespasser. *Spooner v. Delaware, etc., R. Co.*, 115 N. Y. 22; *San Antonio, etc., R. Co. v. Gray*, (Tex. Civ. App. 1901) 66 S. W. Rep. 229. And the fact that the person was wrongfully on the track when he discovered the child's peril, does not make him a trespasser in a subsequent effort to save the child. *San Antonio, etc., R. Co. v. Gray*, (Tex. 1902) 67 S. W. Rep. 763.

Going upon Track to Save Wife. — But in *Mischke v. Chicago, etc., R. Co.*, 56 Ill. App. 472, where a trackman who, while going over the road in a handcar with his wife for his own purposes, was surprised by an approaching train, and was injured, after having himself got out of the way, while returning to help his wife, it was held that he had no right of action against the company.

9. *Crossing by Mere Sufferance — England.* — *Harrison v. North Eastern R. Co.*, 29 L. T. N. S. 844.

point not in a traveled public highway, with the acquiescence of the railroad company, such acquiescence amounts to a license and imposes upon the company the duty to exercise reasonable care to protect such persons from injury.¹ For stronger reasons, if a railroad company erects and maintains a private way across its tracks in such a manner as to offer an inducement and invitation to persons to use the same, it is bound to exercise ordinary care to protect such persons from harm.²

(f) **Persons Walking on Right of Way.** — As a general rule, persons who walk along the right of way of a railroad company for their own convenience are to be regarded as trespassers, and the only duty which their presence imposed upon the company is to abstain from wilfully and wantonly injuring them.³ Yet if the company has for a long time permitted the public to travel and

Georgia. — *Central R. Co. v. Brinson*, 70 Ga. 207.

Iowa. — *Thomas v. Chicago, etc.*, R. Co., 93 Iowa 248; *Pulley v. Chicago, etc.*, R. Co., 94 Iowa 565.

Massachusetts. — *Wright v. Boston, etc.*, R. Co., 142 Mass. 296.

New Jersey. — *Devoe v. New York, etc.*, R. Co., 63 N. J. L. 276.

New York. — *Nicholson v. Erie R. Co.*, 41 N. Y. 525; *Sutton v. New York Cent., etc.*, R. Co., 66 N. Y. 243.

1. **Use of Customary Crossing** — *Illinois.* — *Pittsburg, etc.*, R. Co. v. *Bumstead*, 48 Ill. 221, 95 Am. Dec. 539

Iowa. — *Clampit v. Chicago, etc.*, R. Co., 84 Iowa 71.

Kentucky. — *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434.

New York. — *Barry v. New York Cent., etc.*, R. Co., 92 N. Y. 289, 44 Am. Rep. 377; *Swift v. Staten Island Rapid Transit R. Co.*, 123 N. Y. 645; *Larkin v. New York, etc.*, R. Co., (C. Pl. Gen. T.) 19 N. Y. Supp. 479.

North Carolina. — *Troy v. Cape Fear, etc.*, R. Co., 99 N. Car. 298, 6 Am. St. Rep. 521.

Pennsylvania. — *Taylor v. Delaware, etc.*, Canal Co., 113 Pa. St. 162, 57 Am. Rep. 446.

Tennessee. — *Fleming v. Louisville, etc.*, R. Co., 106 Tenn. 374.

Texas. — *St. Louis, etc.*, R. Co. v. *Crosnoe*, 72 Tex. 79; *Texas, etc.*, R. Co. v. *Roberts*, (Tex. Civ. App. 1897) 45 S. W. Rep. 218.

Virginia. — *Norfolk, etc.*, R. Co. v. *Wilson*, 90 Va. 263, 44 Am. St. Rep. 906; *Norfolk, etc.*, R. Co. v. *De Board*, 91 Va. 700.

Wisconsin. — *Delaney v. Milwaukee, etc.*, R. Co., 33 Wis. 67.

Acquiescence a Question of Fact. — Whether the acquiescence of a railroad company is to be implied from certain circumstances is a question of fact for the jury. *Tutt v. Illinois Cent. R. Co.*, (C. C. A.) 104 Fed. Rep. 741; *Chicago, etc.*, R. Co. v. *Murowski*, 179 Ill. 77.

A license may be implied for the public to pass over a track which a railroad company occupies with its cars only a few times a day, when it would not be implied over tracks which are in continuous use for the purposes of storing and switching cars, making up trains, and the like. *Central R., etc.*, Co. v. *Rylee*, 87 Ga. 491; *Grady v. Georgia R., etc.*, Co., 112 Ga. 668.

2. *Pomponio v. New York, etc.*, R. Co., 66 Conn. 528, 50 Am. St. Rep. 124; *Murphy v. Boston, etc.*, R. Co., 133 Mass. 121.

Farm Crossings — **Duty to Exercise Care at.** — *Atchison, etc.*, R. Co. v. *Parsons*, 42 Ill. App. 93.

3. **Persons Walking on the Right of Way** — *United States.* — *Grethen v. Chicago, etc.*, R. Co., 22 Fed. Rep. 609; *Cleveland, etc.*, R. Co. v. *Taritt*, 64 Fed. Rep. 823, 24 U. S. App. 489.

Alabama. — *Mobile, etc.*, R. Co. v. *Blakely*, 59 Ala. 471; *South, etc.*, Alabama R. Co. v. *Pilgreen*, 62 Ala. 305; *Louisville, etc.*, R. Co. v. *Black*, 89 Ala. 313; *Louisville, etc.*, R. Co. v. *Hairston*, 97 Ala. 351; *Verner v. Alabama G. S. R. Co.*, 103 Ala. 574.

Arkansas. — *Little Rock, etc.*, R. Co. v. *Haynes*, 47 Ark. 497.

California. — *Toomey v. Southern Pac. R. Co.*, 86 Cal. 374.

Illinois. — *Illinois Cent. R. Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112; *Blanchard v. Lake Shore, etc.*, R. Co., 126 Ill. 416, 9 Am. St. Rep. 630; *Roden v. Chicago, etc.*, R. Co., 133 Ill. 72, 23 Am. St. Rep. 585; *James v. Illinois Cent. R. Co.*, 195 Ill. 327; *Lake Shore, etc.*, R. Co. v. *Clark*, 41 Ill. App. 343; *Eggmann v. St. Louis, etc.*, R. Co., 47 Ill. App. 507; *Smith v. Chicago, etc.*, R. Co., 99 Ill. App. 296.

Indiana. — *Jeffersonville, etc.*, R. Co. v. *Goldsmith*, 47 Ind. 48; *McClaren v. Indianapolis, etc.*, R. Co., 83 Ind. 319; *Cleveland, etc.*, R. Co. v. *Adair*, 12 Ind. App. 569.

Kansas. — *Tennis v. Inter-State Consol. Rapid-Transit R. Co.*, 45 Kan. 505.

Kentucky. — *Oatts v. Cincinnati, etc.*, R. Co., (Ky. 1893) 22 S. W. Rep. 330, 15 Ky. L. Rep. 87.

Louisiana. — *Sertoon v. Texas, etc.*, R. Co., 48 La. Ann. 807.

Missouri. — *Isabel v. Hannibal, etc.*, R. Co., 60 Mo. 475; *Hyde v. Missouri Pac. R. Co.*, 110 Mo. 272.

New Mexico. — *Candelaria v. Atchison, etc.*, R. Co., 6 N. Mex. 266.

New York. — *Mills v. New York Cent., etc.*, R. Co., 5 N. Y. App. Div. 11.

Ohio. — *Paine v. Columbus, etc.*, R. Co., 2 Ohio Dec. 264, 7 Ohio N. P. 327.

Tennessee. — *Patton v. East Tennessee, etc.*, R. Co., 89 Tenn. 370.

Texas. — *Texas, etc.*, R. Co. v. *Nicholson*, (Tex. Civ. App. 1893) 22 S. W. Rep. 770; *St. Louis, etc.*, R. Co. v. *Herrin*, 6 Tex. Civ. App. 718; *Louisiana Western Extension R. Co. v. McDonald*, (Tex. Civ. App. 1899) 52 S. W. Rep. 649.

Virginia. — *Tyler v. Kelley*, 89 Va. 282.

habitually to pass along its right of way between certain points, without objection or hindrance, it cannot treat those who avail themselves of the license as trespassers, but so long as it acquiesces in such use of its premises it is bound to anticipate the continuance thereof and to exercise in the operation of its trains ordinary care to prevent injury to such licensees.¹ Whether a railroad company has by its conduct acquiesced in such use of its property by the public is a question of fact for the jury.² It is not shown by proof merely that these trespasses have been permitted without objection from the company;³ but to establish an implied license it has been held that there

West Virginia. — *Spicer v. Chesapeake, etc.*, R. Co., 34 W. Va. 514; *Huff v. Chesapeake, etc.*, R. Co., 48 W. Va. 45.

The mere fact that a person walking upon a railroad company's right of way for his own convenience happens to be at a street crossing at the time he is injured, does not render him any less a trespasser. *Robards v. Wabash R. Co.*, 84 Ill. App. 477, 194 Ill. 361; *Cleveland, etc., R. Co. v. Hibbsman*, 99 Ill. App. 405; *Kelly v. Michigan Cent. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876. Compare *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996.

Passenger Ejected from Train. — A passenger ejected from a train becomes a trespasser by walking on the track (*McClelland v. Louisville, etc., R. Co.*, 94 Ind. 276), even though he may have been wrongfully ejected, if there is any other safe and convenient route to his destination. *Verner v. Alabama G. S. R. Co.*, 103 Ala. 574. But he is not guilty of contributory negligence unless he failed to get off the track at the earliest practicable opportunity that a reasonably prudent man would have discovered and seized. *Ham v. Delaware, etc., Canal Co.*, 155 Pa. St. 548.

The Declaration in the Missouri Constitution that railroads are public highways is to be taken in the sense that the companies operating them are compellable to accept goods for transportation from every person, and does not authorize the use of the railroad tracks by pedestrians. *Hyde v. Missouri Pac. R. Co.*, 110 Mo. 272; *Clark v. Chicago, etc., R. Co.*, 127 Mo. 197.

1. Implied License to Use Roadbed as a Footpath — *California.* — *Hansen v. Southern Pac. Co.*, 105 Cal. 379.

Illinois. — *Chicago, etc., R. Co. v. O'Neil*, 64 Ill. App. 623, affirmed 172 Ill. 527.

Indiana. — *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250; *Cleveland, etc., R. Co. v. Adair*, 12 Ind. App. 569.

Iowa. — *Murphy v. Chicago, etc., R. Co.*, 38 Iowa 539; *Thomas v. Chicago, etc., R. Co.*, 103 Iowa 649.

Kentucky. — *Shelby v. Cincinnati, etc., R. Co.*, 85 Ky. 224; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434; *N. etc., R. Co. v. Dauser*, 13 Ky. L. Rep. 734.

Missouri. — *Guenther v. St. Louis, etc., R. Co.*, 108 Mo. 18; *Lynch v. St. Joseph, etc., R. Co.*, 111 Mo. 601.

New York. — *Sutton v. New York Cent., etc., R. Co.*, 66 N. Y. 243.

North Carolina. — *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629.

Ohio. — *Harriman v. Pittsburgh, etc., R. Co.*, 45 Ohio St. 11, 4 Am. St. Rep. 507; *Cleveland Terminal, etc., R. Co. v. Marsh*, 9 Ohio Cir. Dec. 584.

Pennsylvania. — *Taylor v. Delaware, etc., Canal Co.*, 113 Pa. St. 162, 57 Am. Rep. 446; *Roth v. Union Depot Co.*, 13 Wash. 535.

Texas. — *Law v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1025; *Gulf, etc., R. Co. v. Matthews*, (Tex. Civ. App. 1902) 66 S. W. Rep. 588; *International, etc., R. Co. v. Woodward*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1051; *Texas, etc., R. Co. v. Phillips*, (Tex. Civ. App. 1897) 40 S. W. Rep. 344; *Texas, etc., R. Co. v. Watkins*, (Tex. Civ. App. 1894) 26 S. W. Rep. 760; *Texas, etc., R. Co. v. Phillips*, (Tex. Civ. App. 1896) 37 S. W. Rep. 620. See also *St. Louis, etc., R. Co. v. Shifflet*, (Tex. Civ. App. 1900) 56 S. W. Rep. 697; *Texas, etc., R. Co. v. Barrett*, 23 Tex. Civ. App. 545.

Virginia. — *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874; *Norfolk, etc., R. Co. v. Carper*, 88 Va. 556.

West Virginia. — *Nuzum v. Pittsburgh, etc., R. Co.*, 30 W. Va. 228; *Raines v. Chesapeake, etc., R. Co.*, 39 W. Va. 50.

Wisconsin. — *Delaney v. Milwaukee, etc., R. Co.*, 33 Wis. 67; *Davis v. Chicago, etc., R. Co.*, 58 Wis. 646, 46 Am. Rep. 667.

A Statute or Ordinance making it unlawful for persons, not connected with or employed upon a railroad, to walk along the track thereof, does not preclude a recovery where the person injured is walking on a part of the railroad track habitually used by the public as a foot-way with the knowledge of the railroad company. *Le May v. Missouri Pac. R. Co.*, 105 Mo. 361; *Gulf, etc., R. Co. v. Matthews*, (Tex. Civ. App. 1902) 66 S. W. Rep. 588; *Townley v. Chicago, etc., R. Co.*, 53 Wis. 626; *Davis v. Chicago, etc., R. Co.*, 58 Wis. 646, 46 Am. Rep. 667.

2. Acquiescence a Question of Fact. — *Garner v. Trumbull*, (C. C. A.) 94 Fed. Rep. 321; *Hansen v. Southern Pac. R. Co.*, 105 Cal. 379; *Chenery v. Fitchburg R. Co.*, 160 Mass. 211; *Cederson v. Oregon R., etc., Co.*, 38 Oregon 343; *Johnson v. Lake Superior Terminal, etc., Co.*, 86 Wis. 64; *Mason v. Chicago, etc., R. Co.*, 89 Wis. 151.

Evidence Admissible to Show User. — *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149; *Hansen v. Southern Pac. R. Co.*, 105 Cal. 379; *Western, etc., R. Co. v. Meigs*, 74 Ga. 857; *O'Connor v. Illinois Cent. R. Co.*, 77 Ill. App. 22; *Illinois Cent. R. Co. v. O'Connor*, 90 Ill. App. 142, reversed 189 Ill. 559; *Hoskins v. Louisville, etc., R. Co.*, (Ky. 1895) 30 S. W. Rep. 643; *Eckert v. St. Louis, etc., R. Co.*, 13 Mo. App. 352.

3. Mere Sufferance Does Not Constitute an Invitation — *Alabama.* — *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581.

Illinois. — *Blanchard v. Lake Shore, etc., R.*

must be a path so well defined as to be an invitation to the public to use it, and this use must be so continuous as to apprise the company of the fact.¹ Any inference of acquiescence which may be drawn from the continuous use of a path is, of course, strengthened by proof of the erection of steps, gates, or turnstiles by the company to facilitate the use of its property by the public.²

(g) **Persons Crossing Bridges and Trestles.**—A person injured or killed while attempting to cross a railroad bridge or trestle is a trespasser, and the company owes to him no duty to anticipate his presence.³ Where, however, the public have been accustomed for a considerable length of time to use a railroad bridge as a footbridge without objection from the company, a license will be implied, and an obligation to exercise ordinary care is imposed.⁴

(6) **Application of Principles to Injuries from Particular Causes**—(a) **Injuries from Things Thrown from Trains.**—A railroad company is not liable to a trespasser or bare licensee who, while standing beside the track, is injured by an object thrown or falling from a passing train, if the injury be not wantonly committed.⁵ But if the person injured is rightfully beside the track,⁶ or is standing in a public street through which such track is laid,⁷ the railroad is liable if the injury is caused by its negligence.

Co., 126 Ill. 416, 9 Am. St. Rep. 630; Lake Shore, etc., R. Co. v. Bodemer, 139 Ill. 596, 32 Am. St. Rep. 218; Wabash R. Co. v. Jones, 163 Ill. 167; Eggmann v. St. Louis, etc., R. Co., 47 Ill. App. 507.

Indiana.—Lingenfelter v. Baltimore, etc., R. Co., 154 Ind. 49; Cleveland, etc., R. Co. v. Adair, 12 Ind. App. 569.

Iowa.—Richards v. Chicago, etc., R. Co., 81 Iowa 426; Burg v. Chicago, etc., R. Co., 90 Iowa 106.

Kentucky.—Brown v. Louisville, etc., R. Co., 97 Ky. 228; Chesapeake, etc., R. Co. v. Perkins, (Ky. 1898) 47 S. W. Rep. 259.

Missouri.—Ostertag v. Pacific R. Co., 64 Mo. 421; O'Donnell v. Missouri Pac. R. Co., 7 Mo. App. 190.

Montana.—Egan v. Montana Cent. R. Co., 24 Mont. 569.

Oregon.—Cassida v. Oregon R., etc., Co., 14 Oregon 551; Ward v. Southern Pac. Co., 25 Oregon 433.

Pennsylvania.—Culp v. Delaware, etc., R. Co., 9 Kulp (Pa.) 174.

Texas.—Smith v. Fordyce, (Tex. 1891) 18 S. W. Rep. 663; Missouri Pac. R. Co. v. Brown, (Tex. 1891) 18 S. W. Rep. 670.

Wisconsin.—Schug v. Chicago, etc., R. Co., 102 Wis. 515.

1. Atchison, etc., R. Co. v. Potter, 64 Kan. 13.

2. **Erection of Facilities by Company.**—Hansen v. Southern Pac. R. Co., 105 Cal. 379; Williams v. Kansas City, etc., R. Co., 96 Mo. 275; Lynch v. St. Joseph, etc., R. Co., 111 Mo. 601; International, etc., R. Co. v. Brooks, (Tex. Civ. App. 1899) 54 S. W. Rep. 1056.

3. **Trespassers upon Railroad Bridges and Trestles.**—Glass v. Memphis, etc., R. Co., 94 Ala. 581; Comer v. Hill, 101 Ga. 340; Coatney v. St. Louis, etc., R. Co., 151 Mo. 35; Smalley v. Southern R. Co., 57 S. Car. 243; Anderson v. Chicago, etc., R. Co., 87 Wis. 195.

But Where an Employee of the Company Is Compelled to Cross a Trestle in going to and coming from work with the knowledge of the company, those in charge of an engine passing over the trestle are bound to exercise ordinary care not to injure him. Hammill v. Louisville, etc., R. Co., 93 Ky. 343.

Duty to Person Thrown from Trestle.—Although a railroad company may not be liable in the first instance for an injury to a trespasser whom its train knocks from a trestle, yet, if those in charge of the train, knowing that the accident has happened, fail to stop the train and render whatever assistance is necessary to the wounded trespasser, the company becomes liable if the person dies of exposure. Whitesides v. Southern R. Co., 128 N. Car. 229.

4. **Customary Use of Railroad Bridge.**—Troy v. Cape Fear, etc., R. Co., 99 N. Car. 298, 6 Am. St. Rep. 521; Young v. Clark, 16 Utah 42; Hooker v. Chicago, etc., R. Co., 76 Wis. 542.

5. **Injury from Objects Thrown from Trains—Trespassers and Bare Licensees.**—Lucas v. Richmond, etc., R. Co., 40 Fed. Rep. 566 (stick of wood falling from tender); Pennsylvania R. Co. v. Martin, (C. C. A.) 111 Fed. Rep. 586 (piece of brake shoe thrown from car wheel); Clardy v. Southern R. Co., 112 Ga. 37 (ballast disturbed by passing train); St. Louis, etc., R. Co. v. Sharp, 3 Tex. App. Civ. Cas., § 328 (hot water ejected from engine).

6. **Persons Rightfully Beside Track.**—St. Louis, etc., R. Co. v. Neely, 63 Ark. 636 (door falling from passing train); Holtzinger v. Pennsylvania R. Co., 6 Pa. Dist. 430 (lumber falling from car).

Personal Injury from Cow Negligently Struck by Engine.—Alabama G. S. R. Co. v. Chapman, 80 Ala. 615; Marchand v. Gulf, etc., R. Co., 20 Tex. Civ. App. 1.

Mail Bags and Bundles.—If a railroad company knowingly permits mail bags and bundles to be thrown from its trains by mail clerks and news agents, it is liable for injuries from such causes to persons rightfully beside the track. Ohio, etc., R. Co. v. Simms, 43 Ill. App. 260; Bradford v. Boston, etc., R. Co., 160 Mass. 392; Shaw v. Chicago, etc., R. Co., 123 Mich. 629; McGrath v. Eastern R. Co., 74 Minn. 363.

7. **Persons Standing in Street.**—Fletcher v. Baltimore, etc., R. Co., 168 U. S. 135; Jeffersonville, etc., R. Co. v. Riley, 39 Ind. 568 (wood thrown from train).

Sparks and Cinders.—A railroad company is liable for its negligence to a person, upon

(b) **Injuries from Things Projecting from Cars.** — On like principle, a railroad company is not liable to a trespasser or bare licensee who, while standing beside the track, is injured by an object projecting from a passing car.¹ But if the person injured is standing at a place where the public are used to cross the track with the knowledge and implied consent of the railroad company, its negligence has been held to be a question of fact for the jury;² and for stronger reasons, if the servants of the company operating the trains have knowledge of the projecting object, and, seeing the plaintiff's danger, neglect to warn him of it, the company is liable.³

(c) **Injuries from Derailment of Cars.** — It has been held that a railroad company is not liable for the death of a trespasser or bare licensee who was killed, while walking beside the track at a place where pedestrians seldom went, by the derailment of a car which was being hauled over a defective track at too great speed, for the reason that in respect to such person there was no duty, and consequently no negligence.⁴ But for the death or injury from this cause of a track repairer who was standing beside the track,⁵ or of a person lawfully present in a building against which the car was thrown,⁶ or who injured himself in endeavoring to escape from a car which was negligently driven across a public street,⁷ the company has been held liable.

(d) **Injuries from Horses Taking Fright** — *aa. AT STANDING CARS.* — A railroad company is not liable for personal injuries resulting from a horse taking fright at the appearance of a car standing in a freight yard.⁸ But it has been held to be negligence for a railroad company to leave a car standing on or near a public highway, and damages have been recovered for personal injuries attributable to this cause.⁹

bb. AT MOVING TRAINS. — The fact that horses are frightened by the sight of moving cars, locomotives, or trains, or by the noise naturally incident to their ordinary operation, does not render the railroad company liable for personal injuries resulting therefrom.¹⁰ And the fact that the track is laid along a

premises adjacent to the railroad track, who has the sight of his eye destroyed by a cinder (Texarkana, etc., R. Co. v. O'Kelleher, 21 Tex. Civ. App. 96), or whose child is injured by the ignition of its clothing by a spark. Gulf, etc., R. Co. v. Johnson, (Tex. Civ. App. 1899) 51 S. W. Rep. 531.

1. **Injuries from Things Projecting from Cars.** — Central R. Co. v. Brinson, 70 Ga. 207, Louisville, etc., R. Co. v. Wade, (Ky. 1896) 36 S. W. Rep. 1125.

2. **When Person Injured Is Standing Where Public Is Permitted to Go.** — Kansas Pac. R. Co. v. Ward, 4 Colo. 30 (beam projecting from side of car); Chicago, etc., R. Co. v. O'Neil, 172 Ill. 527 (car door swinging outward); Chesapeake, etc., R. Co. v. Davis, (Ky. 1900) 60 S. W. Rep. 14, 22 Ky. L. Rep. 1156 (piece of iron swinging from car).

3. **Failure to Notify Party Injured of Peril.** — Sullivan v. Vicksburg, etc., R. Co., 39 La. Ann. 800, 4 Am. St. Rep. 239 (extraordinary projection of brake); L., etc., R. Co. v. Montgomery, 14 Ky. L. Rep. 477 (handles of tool chest projecting beyond car).

4. **Derailment of Cars — No Liability to Trespasser.** — Holland v. Sparks, 92 Ga. 753.

5. **Liable for Death of Track Repairer.** — Swadley v. Missouri Pac. R. Co., 118 Mo. 268, 40 Am. St. Rep. 366. But recovery cannot be had under a complaint drawn under a statute making the company liable for the negligence of those in charge of the train, if the proximate cause of the accident was the defective track.

McKenna v. Missouri Pac. R. Co., 54 Mo. App. 161.

6. Mahan v. Union Depot, etc., Co., 34 Minn. 29; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15.

7. Tuttle v. Atlantic City R. Co., 66 N. J. L. 327.

8. **Horses Taking Fright — Car Standing in Freight Yard.** — O'Donnell v. Chicago, etc., R. Co., 69 Iowa 102.

9. **Car Standing Near Highway.** — Bussian v. Milwaukee, etc., R. Co., 56 Wis. 325. See also Denver, etc., R. Co. v. Robbins, 2 Colo. App. 313.

Leaving Handcar Beside Highway — Negligence. — Atchison, etc., R. Co. v. Morrow, 4 Kan. App. 199.

Derrick Overhanging Highway — Negligence. — Jones v. Housatonic R. Co., 107 Mass. 261.

10. **Horse Taking Fright at Moving Train — England.** — Simkin v. London, etc., R. Co., 21 Q. B. D. 453.

Delaware. — Burton v. Philadelphia, etc., R. Co., 4 Harr. (Del.) 252.

Illinois. — Chicago, etc., R. Co. v. Oswald, 94 Ill. App. 638.

Iowa. — Beatty v. Central Iowa R. Co., 58 Iowa 242.

Kentucky. — N., etc., R. Co. v. Howard, 14 Ky. L. Rep. 476; Ohio Valley R. Co. v. Young, (Ky. 1897) 39 S. W. Rep. 415.

Massachusetts. — Lamb v. Old Colony R. Co., 140 Mass. 79, 54 Am. Rep. 449.

public street does not affect the liability of the company,¹ unless the injury results from the manner in which the track is laid,² or the train is being operated during prohibited hours.³

cc. AT STARTLING AND UNUSUAL NOISES. — So the fact that a horse is frightened by the whistle or escaping steam of a locomotive does not render a railroad company liable for personal injuries resulting therefrom, if the whistle was sounded⁴ or the steam emitted⁵ in the necessary and proper operation of the railroad. But if the acts were wantonly and maliciously,⁶ or negligently,⁷ or unnecessarily⁸ done, the railroad company is liable. Whether the sounding of the whistle or the emitting of the steam was necessary and proper or not is a question of fact for the jury.⁹

dd. FAILURE TO STOP TRAIN OR CEASE NOISE. — Although there is no obligation upon those in charge of a train to keep a lookout on adjacent premises or streets to observe the effect of the movement or noise of the train upon teams,¹⁰ yet, if the engineer sees that a team has been frightened, and that

Mississippi. — *McCerrin v. Alabama, etc., R. Co.*, 72 Miss. 1013.

North Carolina. — *Morgan v. Norfolk Southern R. Co.*, 98 N. Car. 247.

Pennsylvania. — *Joyce v. Pennsylvania R. Co.*, 5 Pa. Co. Ct. 392.

Wisconsin. — *Dewey v. Chicago, etc., R. Co.*, 99 Wis. 455; *Walters v. Chicago, etc., R. Co.*, 104 Wis. 251.

No Liability for Horse Taking Fright at Train Crossing Bridge over Highway. — *Favor v. Boston, etc., R. Corp.*, 114 Mass. 350, 19 Am. Rep. 364.

The Omission to Erect a Fence, screen, or guard between a railroad and a highway contiguous thereto is not negligence. *Coy v. Utica, etc., R. Co.*, 23 Barb. (N. Y.) 643.

Horse Frightened by Train Running at Illegal Speed through City. — *Chicago, etc., R. Co. v. People*, 120 Ill. 667.

1. *Howard v. Union Freight R. Co.*, 156 Mass. 159.

2. *Wasmer v. Delaware, etc., R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608.

3. *Pittsburg, etc., R. Co. v. Hood*, (C. C. A.) 94 Fed. Rep. 618.

4. **Horse Frightened by Locomotive Whistle.** — *Grogan v. Big Muddy Coal, etc., Co.*, 58 Ill. App. 154; *Schaefer v. Chicago, etc., R. Co.*, 62 Iowa 624; *Ochiltree v. Chicago, etc., R. Co.*, 93 Iowa 628, 94 Iowa 732; *Hudson v. Louisville, etc., R. Co.*, 14 Bush (Ky.) 303; *Prewitt v. Missouri, etc., R. Co.*, 134 Mo. 615; *Van Inwegen v. New York, etc., R. Co.*, 76 Hun (N. Y.) 53; *East Tennessee, etc., R. Co. v. Feathers*, 10 Lea (Tenn.) 103; *Hargis v. St. Louis, etc., R. Co.*, 75 Tex. 19.

Sounding Whistle under Highway Bridge. — Whether the act of sounding a whistle under a highway bridge is such an act of negligence as to render the company liable for personal injuries resulting from a horse upon the bridge taking fright is a disputed question. In *Pennsylvania R. Co. v. Barnett*, 59 Pa. St. 259, 98 Am. Dec. 346, it was held to be an act of gross negligence; in *Mitchell v. Nashville, etc., R. Co.*, 100 Tenn. 329, the act was held to be *prima facie* negligence; in *Kelsey v. New York, etc., R. Co.*, (Mass. 1902) 63 N. E. Rep. 8, and *Phillips v. New York Cent., etc., R. Co.*, 84 Hun (N. Y.) 422, the fact was held to be not sufficient proof of negligence.

5. *Hahn v. Southern Pac. R. Co.*, 51 Cal. 606.

6. **Wanton and Malicious Sounding of Whistle.** — *Georgia R. Co. v. Newsome*, 60 Ga. 492; *Chicago, etc., R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Brendle v. Spencer*, 125 N. Car. 474; *Nashville, etc., R. Co. v. Starnes*, 9 Heisk. (Tenn.) 52, 24 Am. Rep. 296; *Gulf, etc., R. Co. v. Spence*, (Tex. Civ. App. 1895) 32 S. W. Rep. 329; *Texas, etc., R. Co. v. Hamilton*, (Tex. Civ. App. 1901) 66 S. W. Rep. 797.

7. **Negligently Sounding Whistle.** — *Chicago, etc., R. Co. v. Yorty*, 56 Ill. App. 242, *affirmed* 158 Ill. 321; *Gibbs v. Chicago, etc., R. Co.*, 26 Minn. 427.

Negligently Emitting Steam from Engine. — *Hahn v. Southern Pac. R. Co.*, 51 Cal. 606; *Toledo, etc., R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489; *Terre Haute, etc., R. Co. v. Doyle*, 56 Ill. App. 78; *Brown v. Missouri Pac. R. Co.*, 89 Mo. App. 192; *Keech v. Rome, etc., R. Co.*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 149; *Wilson v. New York Cent., etc., R. Co.*, 41 N. Y. App. Div. 36; *Stamm v. Southern R. Co.*, (Brooklyn City Ct. Gen. T.) 1 Abb. N. Cas. (N. Y.) 438; *Texas, etc., R. Co. v. Syfan*, (Tex. Civ. App. 1897) 43 S. W. Rep. 551; *Houston, etc., R. Co. v. Taylor*, 20 Tex. Civ. App. 654.

8. **Unnecessary Sounding of Whistle.** — *Georgia R. Co. v. Thomas*, 73 Ga. 350; *Georgia R. Co. v. Carr*, 73 Ga. 557; *Akridge v. Atlanta, etc., R. Co.*, 90 Ga. 232; *Chicago, etc., R. Co. v. Dickson*, 88 Ill. 431; *Billman v. Indianapolis, etc., R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; *Rodgers v. Baltimore, etc., R. Co.*, 150 Ind. 397.

9. **Necessity a Question of Fact.** — *Weil v. St. Louis Southwestern R. Co.*, 64 Ark. 535; *Toledo, etc., R. Co. v. Crittenden*, 42 Ill. App. 469; *Flynn v. Boston, etc., R. Co.*, 169 Mass. 305; *Bell v. New York Cent., etc., R. Co.*, 29 Hun (N. Y.) 560; *Dunn v. Wilmington, etc., R. Co.*, 124 N. Car. 252; *Philadelphia, etc., R. Co. v. Killips*, 88 Pa. St. 405; *Pennsylvania R. Co. v. Horst*, 110 Pa. St. 226; *Petersburg R. Co. v. Hite*, 81 Va. 767.

10. **No Obligation to Observe Conduct of Teams on Adjacent Highway.** — *Louisville, etc., R. Co. v. Smith*, (Ky. 1899) 53 S. W. Rep. 269; *Louisville, etc., R. Co. v. Penrod*, (Ky. 1900) 56 S. W. Rep. 1. This rule does not apply, it

an accident is imminent, it is his duty to cease the noise,¹ and, if necessary, to stop the train,² and a failure to do so constitutes negligence.

(e) **Putting Detached Cars in Motion.** — It has been held to be negligence for the servants of a railroad company to put a detached car in motion without placing a brakeman upon it to give warning of its approach or to control its movement.³ And irrespective of the presence of a brakeman, it has been held to be negligence for those having the charge of trains to make flying switches within towns or cities,⁴ especially upon tracks running through public streets,⁵ or station grounds,⁶ or along a wharf at which a steamboat is discharging its passengers,⁷ or along a track intersected by public crossings,⁸ or at points where the public are accustomed to cross the track⁹ or to use it as a footpath.¹⁰ But it has been held not to be negligence *per se* to move cars in this way in a switch yard from which the public are excluded.¹¹

(f) **Running Trains or Engines Backwards.** — Whether it is negligence or not for the servants of a railroad company to run an engine backwards or push cars ahead of an engine without stationing some one on the tender or foremost car to signal its approach to a person who may be on the track, is a question which is controlled by the circumstances under which the engine or train is operated. Under some circumstances the act has been held to be negligence as a matter of law,¹² but in most cases it has been held to be a question of

seems, to teams upon a road upon the defendant's right of way, used by the public for more than ten years without protest from the defendant. *Missouri, etc., R. Co. v. Belew*, 22 Tex. Civ. App. 265. Nor to a toll bridge which the company maintains adjacent to its railroad bridge. *Kentucky, etc., Bridge Co. v. Montgomery, (Ky. 1902)* 67 S. W. Rep. 1008.

1. **Duty to Cease Sounding Whistle.** — *Akridge v. Atlanta, etc., R. Co.*, 90 Ga. 232.

In approaching a public crossing, the ringing of the bell should be substituted for the further blowing of the whistle if it has become apparent that a team on the highway has become frightened. *Louisville, etc., R. Co. v. Smith, (Ky. 1899)* 53 S. W. Rep. 269.

2. **Duty to Stop Train.** — *Ward v. Maine Cent. R. Co.*, 96 Me. 136.

Where the plaintiff's danger was not imminent it was for the jury to say whether under the circumstances it was negligence in the engineer not to stop a train when he saw that a horse had been frightened by its motion. *L., etc., R. Co. v. Pipes*, 10 Ky. L. Rep. 590; *Hanlon v. Philadelphia, etc., Turnpike Road Co.*, 182 Pa. St. 115.

3. **Setting Detached Cars in Motion Unattended.** — *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412; *Shelby v. Cincinnati, etc., R. Co.*, 85 Ky. 224.

4. **Making Flying Switches in Towns and Cities.** — *Chicago, etc., R. Co. v. McArthur, (C. C. A.)* 53 Fed. Rep. 464; *Georgia Pac. R. Co. v. O'Shields*, 90 Ala. 29; *Conley v. Cincinnati, etc., R. Co.*, 89 Ky. 402; *Louisville, etc., R. Co. v. Schmetzer*, 94 Ky. 424.

5. **On Tracks along Public Streets.** — *Smith v. Pittsburgh, etc., R. Co.*, 90 Fed. Rep. 783; *Chicago, etc., R. Co. v. Gomes*, 153 Ill. 208; *O'Connor v. Missouri Pac. R. Co.*, 94 Mo. 150, 4 Am. St. Rep. 364; *Galveston, etc., R. Co. v. Lewis*, 5 Tex. Civ. App. 638, 73 Tex. 504.

6. **On Tracks through Station Grounds.** — *Chicago, etc., R. Co. v. Dignan*, 56 Ill. 487; *Illinois Cent. R. Co. v. Hammer*, 72 Ill. 347; *Merz v. Missouri Pac. R. Co.*, 88 Mo. 672.

7. **On Tracks along Steamboat Wharf.** — *Malmsten v. Marquette, etc., R. Co.*, 49 Mich. 94.

8. **On Tracks Crossing Public Streets.** — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1; *Illinois Cent. R. Co. v. Baches*, 55 Ill. 379; *Peltier v. Louisville, etc., R. Co.*, (Ky. 1895) 29 S. W. Rep. 30, 16 Ky. L. Rep. 500; *Alabama, etc., R. Co. v. Summers*, 68 Miss. 566.

9. **On Tracks Which Public Are Accustomed to Cross.** — *Lake Shore, etc., R. Co. v. Hundt*, 140 Ill. 525; *Pittsburgh, etc., R. Co. v. Callaghan*, 157 Ill. 406; *Chicago, etc., R. Co. v. O'Neil*, 172 Ill. 527; *Cincinnati, etc., R. Co. v. Shelby*, 11 Ky. L. Rep. 527; *Alabama, etc., R. Co. v. Summers*, 68 Miss. 566; *Kay v. Pennsylvania R. Co.*, 65 Pa. St. 269, 3 Am. Rep. 628; *St. Louis, etc., R. Co. v. Crosnoe*, 72 Tex. 79. But see *Illinois Cent. R. Co. v. Beard*, 49 Ill. App. 232.

10. **On Tracks Used by Public as Footpath.** — *Roth v. Union Depot Co.*, 13 Wash. 525.

Giving Signals. — The fact that those in charge of the locomotive give signals does not relieve the company from liability. The only effect of such signals would be to charge the injured party with contributory negligence if he heard the signals and failed to heed them. *Cincinnati, etc., R. Co. v. Shelby*, 11 Ky. L. Rep. 527.

11. **Flying Switches in Private Switching Yard Not Negligence Per Se.** — *Kelley v. Chicago, etc., R. Co.*, 53 Wis. 74.

12. **Running Cars or Engines Backwards Held Negligence.** — *Little Rock, etc., R. Co. v. Pankhurst*, 36 Ark. 371; *Toledo, etc., R. Co. v. O'Connor*, 77 Ill. 391 (going around curve at speed prohibited by ordinance at a time when workmen may be expected to be upon the track); *Chicago, etc., R. Co. v. Olson*, 12 Ill. App. 245; *Indianapolis, etc., R. Co. v. Carr*, 35 Ind. 510; *Downing v. Morgan's Louisiana, etc., R., etc., Co.*, 104 La. 508; *Hamilton v. Morgan's Louisiana, etc., R., etc., Co.*, 42 La. Ann. 824; *Com. v. Boston, etc., R. Corp.*, 126 Mass. 61 (backing cars in the dark on pier upon which passengers are disem-

fact to be submitted to the jury.¹

(g) **Coupling Up to Cars Which Are Being Loaded or Unloaded.** — When a railroad company places freight cars upon a side track for the purpose of being loaded or unloaded by the owners of the freight, and such owners, their agents or servants, with the express or implied consent of the company, proceed to load or unload the freight, the company in such case has no right to run or back a train in upon the side track so as to move the car which is being loaded or unloaded, without special notice or warning to those so engaged;² and the same principle applies to the movement of trains upon adjacent tracks upon which such servants or agents are required to stand in prosecuting the work.³

(h) **Ordinary Operation of Trains** — *aa. GENERAL STATEMENT.* — Though a railroad company is the absolute owner of its track, and has the right to its full and unmolested use, it is nevertheless liable for injury resulting from the ordinary movements of its trains to a person on or near its track, though a trespasser, where the injury is wilfully or wantonly inflicted; and the rule is often stated that a railroad owes no duty to one wrongfully on its tracks, except to refrain from wantonness or wilfulness, or such gross negligence as amounts to wantonness.⁴

barking from steamboat); *Virginia Midland R. Co. v. White*, 84 Va. 498, 10 Am. St. Rep. 874 (backing yard engine around curve at speed prohibited by ordinance); *Whalen v. Chicago, etc., R. Co.*, 75 Wis. 654.

1. **Question of Fact for Jury.** — *Brunswick, etc., R. Co. v. Gibson*, 97 Ga. 489; *Green v. Chicago, etc., R. Co.*, 110 Mich. 648; *Swindell v. Chicago, etc., R. Co.*, 44 Neb. 841; *Casey v. New York Cent., etc., R. Co.*, 78 N. Y. 518; *Purnell v. Raleigh, etc., R. Co.*, 122 N. Car. 832.

There Is No Negligence in Running a Train Backwards along a city street at the rate of four miles an hour, if the bell is rung continuously and there is a brakeman stationed on the foremost car keeping a lookout ahead, and another on the car next to the engine to give signals to the engineer. *Chicago, etc., R. Co. v. Stumps*, 55 Ill. 367. Nor in moving a train backwards where a switchman walks along the track sixty feet or more in advance of the train and the bell is rung continuously. *Chicago, etc., R. Co. v. Sweeney*, 52 Ill. 325.

2. **Moving Cars Which Are Being Loaded or Unloaded** — *Illinois.* — *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Chicago, etc., R. Co. v. Goebel*, 119 Ill. 515; *Pennsylvania Co. v. Backes*, 133 Ill. 255.

Indiana. — *Toledo, etc., R. Co. v. Hauck*, 8 Ind. App. 367.

Iowa. — *Watson v. Wabash, etc., R. Co.*, 66 Iowa 164.

Kentucky. — *L., etc., R. Co. v. Turner*, 12 Ky. L. Rep. 606.

Maryland. — *Baltimore, etc., Co. v. Charvat*, 94 Md. 569.

Minnesota. — *Jacobson v. St. Paul, etc., R. Co.*, 41 Minn. 206.

Mississippi. — *New Orleans, etc., R. Co. v. Bailey*, 40 Miss. 395.

Missouri. — *Gessley v. Missouri Pac. R. Co.*, 32 Mo. App. 413.

New York. — *Barton v. New York Cent., etc., R. Co.*, 1 Thomp. & C. (N. Y.) 297, *affirmed* 56 N. Y. 660.

Texas. — *Weatherford, etc., R. Co. v. Duncan*, 88 Tex. 611; *International, etc., R. Co. v. Hall*, (Tex. Civ. App. 1894) 25 S. W. Rep. 52.

A person unloading a car which has been placed by the railroad company on a side track for that purpose has a right to assume that the car will not be moved without warning, and his failure to maintain a lookout is not negligence. *Illinois Cent. R. Co. v. Shultz*, 64 Ill. 172; *Chicago, etc., R. Co. v. Goebel*, 119 Ill. 515.

But whether such person, when he sees that the car is about to be moved, is guilty of contributory negligence in not exercising care for his own safety, is a question of fact for the jury. *Christman v. Philadelphia, etc., R. Co.*, 141 Pa. St. 604; *St. Louis, etc., R. Co. v. Holmes*, (Tex. Civ. App. 1899) 49 S. W. Rep. 658.

Car Blown by Wind Against One Being Loaded — **Failure to Set Brakes Negligence.** — *Union Pac. R. Co. v. Harwood*, 31 Kan. 388.

3. **Running Cars into Track Adjacent to One on Which Car Is Being Loaded or Unloaded.** — *Spotts v. Wabash Western R. Co.*, 111 Mo. 380, 33 Am. St. Rep. 531; *Congdon v. Delaware, etc., Canal Co.*, 15 N. Y. Wkly. Dig. 24; *Christman v. Philadelphia, etc., R. Co.*, 141 Pa. St. 604. See also *St. Louis, etc., R. Co. v. Brown*, 49 U. S. App. 101.

4. **General Statement of Liability for Injury from Ordinary Movement of Trains** — *Alabama.* — *Memphis, etc., R. Co. v. Womack*, 84 Ala. 149; *Ensley R. Co. v. Chewing*, 93 Ala. 24; *Glass v. Memphis, etc., R. Co.*, 94 Ala. 588; *Nave v. Alabama G. S. R. Co.*, 96 Ala. 264.

Illinois. — *O'Connor v. Illinois Cent. R. Co.*, 77 Ill. App. 22, 189 Ill. 559; *Pittsburg, etc., R. Co. v. Bumstead*, 48 Ill. 221, 95 Am. Dec. 539; *Chicago, etc., R. Co. v. Payne*, 49 Ill. 499; *Lake Shore, etc., R. Co. v. Bodemer*, 139 Ill. 596, 32 Am. St. Rep. 218; *Wabash R. Co. v. Jones*, 163 Ill. 167.

Iowa. — *Clampit v. Chicago, etc., R. Co.*, 84 Iowa 76.

Kansas. — *Kansas City, etc., R. Co. v. Kelly*, 36 Kan. 658, 59 Am. Rep. 596.

Kentucky. — *Hammill v. Louisville, etc., R. Co.*, 93 Ky. 343.

Michigan. — *Finnegan v. Michigan Cent. R. Co.*, 127 Mich. 15.

Missouri. — *Brown v. Hannibal, etc., R. Co.*

66. CARE BEFORE DISCOVERY OF PERSON ON TRACK — (aa) *In General*. — This latter proposition as interpreted by the majority of the decisions, however, is but equivalent to saying that a railroad is not required to anticipate the presence of a trespasser on or near its tracks, and is under no duty to exercise care and diligence, until his presence and peril are discovered.¹ The duty of exercising reasonable care to avoid injuring a trespasser does not necessarily arise at the moment he is seen by the railroad's employees, but at the moment the peril of his position becomes known, or at least should become known by the exercise of reasonable care after the discovery of the person's presence on the track.²

(bb) *Application of Rule to Children*. — The general rule declaring that a railroad company owes to a trespasser no duty, except to use ordinary care to avoid injuring him after the discovery of his presence and peril, has been held to apply to infants, as well as adults,³ but the authorities are not harmonious

50 Mo. 461, 11 Am. Rep. 420; *Isabel v. Hannibal*, etc., R. Co., 60 Mo. 475; *Jackson v. Kansas City*, etc., R. Co., 157 Mo. 621.

New York. — *Sutton v. New York Cent.*, etc., R. Co., 66 N. Y. 243; *Remer v. Long Island R. Co.*, 36 Hun (N. Y.) 253.

Oregon. — *Rathbone v. Oregon R. Co.*, 40 Oregon 225.

West Virginia. — *Raines v. Chesapeake*, etc., R. Co., 39 W. Va. 50.

Intentional Injury Unnecessary. — *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943; *Christian v. Illinois Cent. R. Co.*, 71 Miss. 237.

Doctrine as to Necessity of Wantonness Repudiated in Texas. — *Houston*, etc., R. Co. v. *Sympkins*, 54 Tex. 618, 38 Am. Rep. 632; *Galveston City R. Co. v. Hewitt*, 67 Tex. 479, 60 Am. Rep. 32; *Missouri Pac. R. Co. v. Brown*, 75 Tex. 267; *Texas*, etc., R. Co. v. *Watkins*, 88 Tex. 20.

For further authorities on this question, see *infra*, this subdivision, *Lookout*.

1. Care Before Discovery of Person on Track —

Alabama. — *Bentley v. Georgia Pac. R. Co.*, 86 Ala. 484; *Central R.*, etc., Co. v. *Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50; *Glass v. Memphis*, etc., R. Co., 94 Ala. 581; *Montgomery v. Alabama G. S. R. Co.*, 97 Ala. 305; *Alabama G. S. R. Co. v. Burgess*, 119 Ala. 555, 72 Am. St. Rep. 943; *Southern R. Co. v. Bush*, 122 Ala. 470.

Connecticut. — *Nolan v. New York*, etc., R. Co., 53 Conn. 461.

Georgia. — *Savannah*, etc., R. Co. v. *Stewart*, 71 Ga. 427; *Atlanta*, etc., R. Co. v. *Leach*, 91 Ga. 419, 44 Am. St. Rep. 47; *Atlanta*, etc., R. Co. v. *Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145; *Comer v. Hill*, 101 Ga. 340; *Hambright v. Western*, etc., R. Co., 112 Ga. 36.

Illinois. — *James v. Illinois Cent. R. Co.*, 195 Ill. 327.

Iowa. — *Thomas v. Chicago*, etc., R. Co., 103 Iowa 649.

Kentucky. — *Louisville*, etc., R. Co. v. *Howard*, 82 Ky. 212; *Shackleford v. Louisville*, etc., R. Co., 84 Ky. 43, 4 Am. St. Rep. 189; *Vertess v. Newport News*, etc., R. Co., 95 Ky. 314; *John v. Louisville*, etc., R. Co., (Ky. 1889) 10 S. W. Rep. 417; *France v. Louisville*, etc., R. Co., (Ky. 1893) 22 S. W. Rep. 851; *Gherkins v. Louisville*, etc., R. Co., (Ky. 1895) 30 S. W. Rep. 651; *Jackson v. Louisville*, etc., R. Co., (Ky. 1898) 46 S. W. Rep. 5; *Chesapeake*, etc.,

R. Co. v. *Perkins*, (Ky. 1898) 47 S. W. Rep. 259; *L.*, etc., R. Co. v. *Cooper*, 7 Ky. L. Rep. 102; *Givens v. Kentucky Cent. R. Co.*, (Ky. 1891) 15 S. W. Rep. 1057, 12 Ky. L. Rep. 950; *L.*, etc., R. Co. v. *Dolph*, 13 Ky. L. Rep. 432; *L.*, etc., R. Co. v. *Thompson*, 14 Ky. L. Rep. 815; *Oatts v. Cincinnati*, etc., R. Co., (Ky. 1893) 22 S. W. Rep. 330.

Maryland. — *Western Maryland R. Co. v. Kehoe*, 83 Md. 434.

Massachusetts. — *Hayes v. Hyde Park*, 153 Mass. 514; *Chenery v. Fitchburg R. Co.*, 160 Mass. 213.

Michigan. — *Chicago*, etc., R. Co. v. *Smith*, 46 Mich. 504, 41 Am. Rep. 177; *Kelly v. Michigan Cent. R. Co.*, 65 Mich. 186, 8 Am. St. Rep. 876.

Missouri. — *Powell v. Missouri Pac. R. Co.*, 59 Mo. App. 636; *Frick v. St. Louis*, etc., R. Co., 75 Mo. 595; *Dunkman v. Wabash*, etc., R. Co., 95 Mo. 232; *Williams v. Kansas City*, etc., R. Co., 96 Mo. 275; *Rine v. Chicago*, etc., R. Co., 100 Mo. 228; *Le May v. Missouri Pac. R. Co.*, 105 Mo. 361; *Fiedler v. St. Louis*, etc., R. Co., 107 Mo. 645; *Guenther v. St. Louis*, etc., R. Co., 108 Mo. 18; *Lynch v. St. Joseph*, etc., R. Co., 111 Mo. 601.

New Hampshire. — *Shea v. Concord*, etc., R. Co., 69 N. H. 361 (*distinguishing* *Felch v. Concord R. Co.*, 66 N. H. 318; *Mitchell v. Boston*, etc., R. Co., 68 N. H. 96).

Virginia. — *Norfolk*, etc., R. Co. v. *Harman*, 83 Va. 553; *Seaboard*, etc., R. Co. v. *Joyner*, 92 Va. 354; *Tucker v. Norfolk*, etc., R. Co., 92 Va. 549.

Rule Not Altered by Sudden Sickness of Trespasser. — *L.*, etc., R. Co. v. *Thompson*, 14 Ky. L. Rep. 815.

2. *Southern R. Co. v. Bush*, 122 Ala. 470; *Orr v. Cedar Rapids*, etc., R. Co., 94 Iowa 423; *Sutzin v. Chicago*, etc., R. Co., 95 Iowa 304; *L.*, etc., R. Co. v. *Cooper*, 3 Ky. L. Rep. 624; *Isabel v. Hannibal*, etc., R. Co., 60 Mo. 475; *German v. Bennington*, etc., R. Co., 71 Vt. 70; *Seaboard*, etc., R. Co. v. *Joyner*, 92 Va. 354; *Tucker v. Norfolk*, etc., R. Co., 92 Va. 549.

3. **Rule Making No Distinction in Favor of Children** — *United States*. — *Felton v. Aubrey*, (C. A.) 74 Fed. Rep. 350.

Alabama. — *Alabama G. S. R. Co. v. Moorer*, 116 Ala. 642.

Connecticut. — *Nolan v. New York*, etc., R. Co., 53 Conn. 474.

upon this question.¹

(cc) *Effect of Reasonable Apprehension of Presence on Track.* — Where a railroad company has reason to apprehend that its tracks may not be clear at a certain point, as is often true in cities and populous districts, it will be actionable negligence for the railroad's servants to act on the assumption that the track is clear, and its liability will not be limited to want of care after the actual discovery of the dangerous position of a person on the track; especially is this so if there has been such use of the tracks as to amount to a license.² But it has been held that as against a bare license a railroad company has a right to run its trains in the usual way, without special precautions, if the circumstances do not of themselves give warning of his probable presence, and he is not seen until it is too late.³

cc. CARE AFTER DISCOVERY OF PERSON. — When persons in charge of a train discover the presence and perilous condition of one on the track, though a trespasser, or though guilty of contributory negligence, it becomes their duty to use reasonable care to prevent injury, and if the injury could have been prevented by the exercise of such care, the company will be liable.⁴

Illinois. — Le Beau v. Pittsburg, etc., R. Co., 69 Ill. App. 557; Lake Shore, etc., R. Co. v. Clark, 41 Ill. App. 343; Wabash R. Co. v. Jones, 163 Ill. 167.

Indiana. — Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571; Baltimore, etc., R. Co. v. Bradford, 20 Ind. App. 355, 67 Am. St. Rep. 252; Pennsylvania Co. v. Meyers, 136 Ind. 242.

New York. — Chrystal v. Troy, etc., R. Co., 105 N. Y. 164; Burnes v. Staten Island Rapid Transit R. Co., (Supm. Ct. Gen. T.) 17 N. Y. Supp. 741.

Ohio. — Compare Ludden v. Columbus, etc., R. Co., 9 Ohio Dec. 793, 7 Ohio N. P. 106.

Pennsylvania. — Philadelphia, etc., R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457; Cauley v. Pittsburgh, etc., R. Co., 95 Pa. St. 398, 40 Am. Rep. 664; Moore v. Pennsylvania R. Co., 99 Pa. St. 305; McMullen v. Pennsylvania R. Co., 132 Pa. St. 107, 19 Am. St. Rep. 591; Mitchell v. Philadelphia, etc., R. Co., 132 Pa. St. 226.

Washington. — Matson v. Port Townsend Southern R. Co., 9 Wash. 449.

1. See *infra*, this subdivision, *Lookout*.

2. *Effect of Reasonable Apprehension of Presence of Person on Track* — *United States.* — Kiriley v. Chicago, etc., R. Co., 65 Fed. Rep. 386; Connell v. Southern R. Co., (C. C. A.) 91 Fed. Rep. 466.

Florida. — Florida Cent., etc., R. Co. v. Foxworth, 41 Fla. 1.

Illinois. — Springfield City R. Co. v. De Camp, 11 Ill. App. 475.

Missouri. — Frick v. St. Louis, etc., R. Co., 75 Mo. 595; Dunkman v. Wabash, etc., R. Co., 95 Mo. 232; Guenther v. St. Louis, etc., R. Co., 95 Mo. 286; Williams v. Kansas City, etc., R. Co., 96 Mo. 275; Le May v. Missouri Pac. R. Co., 105 Mo. 361; Fiedler v. St. Louis, etc., R. Co., 107 Mo. 645; Guenther v. St. Louis, etc., R. Co., 108 Mo. 18; Kreis v. Missouri Pac. R. Co., 131 Mo. 533; Powell v. Missouri Pac. R. Co., 59 Mo. App. 634. See also Dahlstrom v. St. Louis, etc., R. Co., 96 Mo. 99.

Nebraska. — Chicago, etc., R. Co. v. Wy-more, 40 Neb. 645.

New Hampshire. — Mitchell v. Boston, etc., R. Co., 68 N. H. 96.

New Jersey. — Hammill v. Pennsylvania R. Co., 56 N. J. L. 370.

North Carolina. — McIlhane v. Southern R. Co., 122 N. Car. 995.

Oregon. — Cassida v. Oregon R., etc., Co., 14 Oregon 551.

Virginia. — Blankenship v. Chesapeake, etc., R. Co., 94 Va. 449.

Where Children Are Likely to Be on Track. — Lindsay v. Canadian Pac. R. Co., 68 Vt. 556. See also Ficker v. Cleveland, etc., R. Co., 9 Ohio Dec. 804, 6 Ohio N. P. 36.

Uncinlosed Premises Likely to Attract Children — In Louisville, etc., R. Co. v. Popp, 96 Ky. 99, it was held that if defendant elected to keep uncinlosed its passenger depot and adjacent premises so that children might go there, and, tempted by curiosity or thirst, wander upon its railway tracks and into its cars, which were left open, it was the duty of its employees to know the plaintiff's position and danger, and to be in a position at the proper time to protect him from injury from its running trains, especially as it was improper to couple cars on that track and at that place. See also the title NEGLIGENCE, vol. 21, p. 473.

3. Hanks v. Boston, etc., R. Co., 147 Mass. 496; June v. Boston, etc., R. Co., 153 Mass. 82; Chenery v. Fitchburg R. Co., 160 Mass. 213.

4. *Care Required After Discovery of Person's Peril* — *Alabama.* — Tanner v. Louisville, etc., R. Co., 60 Ala. 621; Gothard v. Alabama G. S. R. Co., 67 Ala. 114; Cook v. Central R., etc., Co., 67 Ala. 533; Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145; Memphis, etc., R. Co. v. Womack, 84 Ala. 149; Ensley R. Co. v. Chewing, 93 Ala. 31; Alabama G. S. R. Co. v. Burgess, 114 Ala. 587; Alabama G. S. R. Co. v. Moorer, 116 Ala. 642.

Arkansas. — St. Louis, etc., R. Co. v. Wilkerson, 46 Ark. 513; St. Louis, etc., R. Co. v. Townsend, 63 Ark. 380.

California. — Esrey v. Southern Pac. R. Co., 103 Cal. 541.

Connecticut. — Nolan v. New York, etc., R. Co., 53 Conn. 472.

Georgia. — Central R., etc., Co. v. Denson, 84 Ga. 774.

Illinois. — Peirce v. Walters, 164 Ill. 560;

dd. CARE REQUIRED IN TOWNS AND CITIES. — A railroad company is chargeable with a greater degree of diligence in the operation and management of its trains in towns and cities than is required in less populous districts.¹ But it has been held, when a railroad company has an exclusive right of way running parallel with and adjoining a public street through a populous town, that although the tracks be used by the public habitually as a footpath, the same degree of care to avoid injury to persons using the tracks is not required as would be required if the tracks were upon the public street or highway.²

ee. CARE REQUIRED AT CROSSINGS. — A full discussion of the care required of railroads at crossings will be found elsewhere in this work.³

ff. PRESUMPTION THAT PERSON ON OR NEAR TRACK WILL AVOID COLLISION. — The law presumes that a person walking upon a railroad will leave the track in time to avoid injury from an approaching train of which he has knowledge, or should have by the ordinary use of the senses of hearing and seeing, or, if not on the track, that he will not get thereon; and the managers of the train may, after seeing such person, act upon this presumption,⁴ unless there is reason

Chicago, etc., *R. Co. v. Anderson*, 166 Ill. 572.

Iowa. — *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106; *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412; *Purcell v. Chicago, etc., R. Co.*, 109 Iowa 628, 77 Am. St. Rep. 557.

Kentucky. — *Shelby v. Cincinnati, etc., R. Co.*, 85 Ky. 224; *Louisville, etc., R. Co. v. Coleman*, 86 Ky. 556; *Hammill v. Louisville, etc., R. Co.*, 93 Ky. 343; *Louisville, etc., R. Co. v. Vittitoe*, (Ky. 1897) 41 S. W. Rep. 269; *Louisville, etc., R. Co. v. Chism*, (Ky. 1898) 47 S. W. Rep. 251; *Vanarsdell v. Louisville, etc., R. Co.*, (Ky. 1901) 65 S. W. Rep. 858; *L., etc., R. Co. v. Green*, 5 Ky. L. Rep. 694.

Minnesota. — *Locke v. First Div. St. Paul, etc., R. Co.*, 15 Minn. 350.

Mississippi. — *Mobile, etc., R. Co. v. Watly*, 69 Miss. 145; *Christian v. Illinois Cent. R. Co.*, 71 Miss. 237.

Missouri. — *Mathews v. Chicago, etc., R. Co.*, 63 Mo. App. 569; *Neier v. Missouri Pac. R. Co.*, 12 Mo. App. 35; *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996; *Rine v. Chicago, etc., R. Co.*, 100 Mo. 228; *Kelly v. Union R., etc. Co.*, 95 Mo. 279; *Gurley v. Missouri Pac. R. Co.*, 104 Mo. 211; *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384.

Nebraska. — *Burnett v. Burlington, etc., R. Co.*, 16 Neb. 332; *Union Pac. R. Co. v. Mertes*, 39 Neb. 448; *Omaha, etc., R. Co. v. Cook*, 42 Neb. 577.

New Mexico. — *Candelaria v. Atchison, etc., R. Co.*, 6 N. Mex. 266.

North Carolina. — *Smith v. Norfolk, etc., R. Co.*, 114 N. Car. 728; *Baker v. Wilmington, etc., R. Co.*, 118 N. Car. 1015.

Texas. — *Houston, etc., R. Co. v. Smith*, 52 Tex. 178; *Missouri Pac. R. Co. v. Weisen*, 65 Tex. 443; *Rozwadoskie v. International, etc., R. Co.*, 1 Tex. Civ. App. 487; *St. Louis, etc., R. Co. v. Christian*, 8 Tex. Civ. App. 246; *International, etc., R. Co. v. Tabor*, 12 Tex. Civ. App. 283; *Gulf, etc., R. Co. v. Lankford*, 9 Tex. Civ. App. 593, 88 Tex. 499; *Houston, etc., R. Co. v. Wallace*, 21 Tex. Civ. App. 394; *Houston, etc., R. Co. v. Harvin*, (Tex. Civ. App. 1899) 54 S. W. Rep. 629; *Law v. Missouri, etc., R. Co.*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1025.

Virginia. — *Seaboard, etc., R. Co. v. Joyner*, 92 Va. 354.

Highest Degree of Diligence After Discovery Unnecessary. — *Williams v. Southern Pac. R. Co.*, 72 Cal. 123.

1. Care Required in Towns and Cities — Alabama. — *South, etc., Alabama R. Co. v. Sullivan*, 59 Ala. 272; *Savannah, etc., R. Co. v. Shearer*, 58 Ala. 672.

California. — *Wilson v. Cunningham*, 3 Cal. 241, 58 Am. Dec. 407.

Florida. — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Illinois. — *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408; *Chicago, etc., R. Co. v. Stumps*, 69 Ill. 409; *Lake Shore, etc., R. Co. v. Johnsen*, 135 Ill. 641; *Lake Shore, etc., R. Co. v. Ouska*, 51 Ill. App. 334.

Kentucky. — *John v. Louisville, etc., R. Co.*, (Ky. 1889) 10 S. W. Rep. 417, 10 Ky. L. Rep. 757; *Louisville, etc., R. Co. v. Morris*, (Ky. 1892) 20 S. W. Rep. 539, 14 Ky. L. Rep. 466; *Louisville, etc., R. Co. v. Howard*, 82 Ky. 218; *Illinois Cent. R. Co. v. Dick*, 91 Ky. 434.

Mississippi. — *Louisville, etc., R. Co. v. French*, 69 Miss. 121; *Alabama, etc., R. Co. v. Lowe*, 73 Miss. 203.

Missouri. — *Brown v. Hannibal, etc., R. Co.*, 50 Mo. 461, 11 Am. Rep. 420; *Powell v. Missouri Pac. R. Co.*, 59 Mo. App. 626; *Karle v. Kansas City, etc., R. Co.*, 55 Mo. 476; *Powell v. Missouri Pac. R. Co.*, 59 Mo. App. 626; *Hicks v. Pacific R. Co.*, 64 Mo. 430; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595.

North Carolina. — *Troy v. Cape Fear, etc., R. Co.*, 99 N. Car. 298, 6 Am. St. Rep. 521; *McAdoo v. Richmond, etc., R. Co.*, 105 N. Car. 140.

Tennessee. — *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681.

Texas. — *Hughes v. Galveston, etc., R. Co.*, 67 Tex. 595; *Gulf, etc., R. Co. v. Walker*, 70 Tex. 126, 8 Am. St. Rep. 582.

Virginia. — *Norfolk, etc., R. Co. v. Carper*, 88 Va. 556; *Norfolk, etc., R. Co. v. Ormsby*, 27 Gratt. (Va.) 455.

West Virginia. — *McVey v. Chesapeake, etc., R. Co.*, 46 W. Va. 111.

2. *McVey v. Chesapeake, etc., R. Co.*, 46 W. Va. 111.

3. See the title **CROSSINGS**, vol. 8, p. 386 *et seq.*

4. **Presumption that Person on Track Will Avoid Collision** — *United States*. — *Finlayson v. Chi-*

to believe from his condition and circumstances beyond his control that he is unaware of or unable to avoid the impending danger.¹ But where a person is seen on a bridge or trestle of such height as to preclude a reasonably safe way of escape,² or there is reason to believe from the appearance or conduct of such person, or from other circumstances, that he is in a helpless condition

cago, etc., R. Co., 1 Dill. (U. S.) 579; Central Trust Co. v. Wabash, etc., R. Co., 26 Fed. Rep. 896.

Alabama. — Tanner v. Louisville, etc., R. Co., 60 Ala. 621; Memphis, etc., R. Co. v. Lyon, 62 Ala. 71; Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145; Louisville, etc., R. Co. v. Black, 89 Ala. 313.

Arkansas. — St. Louis, etc., R. Co. v. Monday, 49 Ark. 257.

California. — Holmes v. South Pac. Coast R. Co., 97 Cal. 161.

Florida. — Florida Cent. etc., R. Co. v. Williams, 37 Fla. 406.

Illinois. — Chicago, etc., R. Co. v. Thompson, 99 Ill. App. 277.

Indiana. — Pittsburg, etc., R. Co. v. Judd, 10 Ind. App. 213; Louisville, etc., R. Co. v. Cronbach, 12 Ind. App. 666; Palmer v. Chicago, etc., R. Co., 112 Ind. 250; Indianapolis, etc., R. Co. v. McClaren, 62 Ind. 566; Ohio, etc., R. Co. v. Walker, 113 Ind. 196, 3 Am. St. Rep. 638; Pennsylvania Co. v. Meyers, 136 Ind. 242; Ullrich v. Cleveland, etc., R. Co., 151 Ind. 358.

Kansas. — Missouri Pac. R. Co. v. Prewitt, 59 Kan. 734; Campbell v. Kansas City, etc., R. Co., 55 Kan. 536.

Kentucky. — Wren v. Louisville, etc., R. Co., (Ky. 1892) 20 S. W. Rep. 215; Shittenhelm v. L., etc., R. Co., 5 Ky. L. Rep. 325; Lingenfelter v. Louisville, etc., R. Co., (Ky. 1887) 4 S. W. Rep. 185, 9 Ky. L. Rep. 116.

Louisiana. — Hebert v. Louisiana Western R. Co., 104 La. 483.

Michigan. — Bouwmeester v. Grand Rapids, etc., R. Co., 67 Mich. 87; Starbard v. Detroit, etc., R. Co., 122 Mich. 23.

Mississippi. — Mobile, etc., R. Co. v. Stroud, 64 Miss. 784.

Missouri. — Rine v. Chicago, etc., R. Co., 88 Mo. 392.

New York. — Chrystal v. Troy, etc., R. Co., 105 N. Y. 164.

North Carolina. — Norwood v. Raleigh, etc., R. Co., 111 N. Car. 236; High v. Carolina Cent. R. Co., 112 N. Car. 385, *distinguishing* Deans v. Wilmington, etc., R. Co., 107 N. Car. 686, 22 Am. St. Rep. 902; Bullock v. Wilmington, etc., R. Co., 105 N. Car. 180; Clark v. Wilmington, etc., R. Co., 109 N. Car. 430; Smith v. Norfolk, etc., R. Co., 114 N. Car. 728; Matthews v. Atlantic, etc., R. Co., 117 N. Car. 640; Lloyd v. Albemarle, etc., R. Co., 118 N. Car. 1010, 54 Am. St. Rep. 764; Markham v. Raleigh, etc., R. Co., 119 N. Car. 715; McAdoo v. Richmond, etc., R. Co., 105 N. Car. 140; Meredith v. Richmond, etc., R. Co., 108 N. Car. 616.

Ohio. — Ludden v. Columbus, etc., R. Co., 9 Ohio Dec. 793, 7 Ohio N. P. 106.

Texas. — St. Louis, etc., R. Co. v. Herrin, 6 Tex. Civ. App. 718; St. Louis, etc., R. Co. v. Christian, 8 Tex. Civ. App. 246; Houston, etc., R. Co. v. Smith, 52 Tex. 178; Artusy v. Mis-

souri Pac. R. Co., 73 Tex. 191; International, etc., R. Co. v. Garcia, 75 Tex. 583.

Virginia. — Virginia Midland R. Co. v. Boswell, 82 Va. 932.

West Virginia. — Raines v. Chesapeake, etc., R. Co., 39 W. Va. 50.

Person Sitting on Track. — Hebert v. Louisiana Western R. Co., 104 La. 483; Norwood v. Raleigh, etc., R. Co., 111 N. Car. 236.

Switchman on Track. — Cincinnati, etc., R. Co. v. Long, 112 Ind. 166.

Noise from Train on Adjoining Track Held Immaterial. — Syme v. Richmond, etc., R. Co., 113 N. Car. 558.

Perilous Position Held a Question for Jury. — White v. New York Cent., etc., R. Co., (Supm. Ct. Gen. T.) 20 N. Y. Supp. 6.

Presumption Held Not to Arise unless Warning Is Given. — Houston, etc., R. Co. v. Harvin, (Tex. Civ. App. 1899) 54 S. W. Rep. 629.

No Presumption Held to Arise Where Crossing Law as to Speed of Train Is Violated. — Georgia R., etc., Co. v. Daniel, 89 Ga. 463.

Presumption that Person Near Track Will Not Go Thereon. — Chicago, etc., R. Co. v. Austin, 69 Ill. 426; Fisk v. Chicago, etc., R. Co., 111 Iowa 392; Kreis v. Missouri Pac. R. Co., 148 Mo. 321; Jackson v. Kansas City, etc., R. Co., 157 Mo. 621; International, etc., R. Co. v. Kuehn, 70 Tex. 582; Johnson v. Rio Grande Western R. Co., 19 Utah 77.

Person on Footpath Parallel with Road. — Matthews v. Atlantic, etc., R. Co., 117 N. Car. 640.

Person Approaching Track in Wagon. — Louisville, etc., R. Co. v. Howard, 90 Tenn. 144.

Person Riding Horse Near Track. — L., etc., R. Co. v. Murphy, 6 Ky. L. Rep. 664.

Person Lying Near Track. — McKenna v. New York Cent., etc., R. Co., 8 Daly (N. Y.) 304, *affirmed* 9 Daly (N. Y.) 262.

Person Working on Street Near Track. — Louisville, etc., R. Co. v. Morlay, (C. C. A.) 86 Fed. Rep. 240.

Presumption that Person Stepping Off at Sound of Warning Will Stay Off. — Springfield City R. Co. v. De Camp, 11 Ill. App. 475.

1. Cleveland, etc., R. Co. v. Tartt, (C. C. A.) 99 Fed. Rep. 371; St. Louis, etc., R. Co. v. Monday, 49 Ark. 257; Sibley v. Ratliffe, 50 Ark. 477; France v. Louisville, etc., R. Co., (Ky. 1893) 22 S. W. Rep. 851; Ward v. Illinois Cent. R. Co., (Ky. 1900) 56 S. W. Rep. 807. See also Texas, etc., R. Co. v. Roberts, 2 Tex. Civ. App. 111.

2. Central R., etc., Co. v. Vaughan, 93 Ala. 209, 30 Am. St. Rep. 50; Atlanta, etc., R. Co. v. Graviatt, 93 Ga. 369, 44 Am. St. Rep. 145; Callaway v. Walters, 63 Ill. App. 562; Callaway v. Spurgeon, 63 Ill. App. 571, *affirmed* in Peirce v. Walters, 164 Ill. 560.

But the rule is otherwise if, when the trespasser was seen on the trestle and the warning was given, he could have readily gotten off and out of danger. Southern R. Co. v. Bush, 122 Ala. 470.

or is incapable of exercising discretion, as, for instance, where he is insane, deaf, drunk, or a child of tender years, no such presumption will arise.¹

gg. LOOKOUT — (aa) *In General* — **Jurisdictions Requiring Lookout.** — In some jurisdictions the duty of keeping a reasonable lookout is imposed upon those having charge of railway trains, and a failure of duty in this respect will constitute negligence for which the company will be liable, even to a trespasser, unless such liability is defeated by his contributory negligence.² Such lookout as

1. Circumstances Indicating that Person Will Not Avoid Collision — *Arkansas*. — *St. Louis, etc., R. Co. v. Wilkerson*, 46 Ark. 513.

Colorado. — *Compare Kennedy v. Denver, etc., R. Co.*, 10 Colo. 493.

Indiana. — *Lake Erie, etc., R. Co. v. Braf-ford*, 15 Ind. App. 655.

North Carolina. — *Fulp v. Roanoke, etc., R. Co.*, 120 N. Car. 525.

Ohio. — *Cincinnati, etc., R. Co. v. Murphy*, 9 Ohio Cir. Dec. 703, 17 Ohio Cir. Ct. 223.

Texas. — *International, etc., R. Co. v. Smith*, 62 Tex. 252; *Texas, etc., R. Co. v. Robinson*, 4 Tex. Civ. App. 121.

West Virginia. — *Raines v. Chesapeake, etc., R. Co.*, 39 W. Va. 50.

Child of Tender Age — *United States*. — *Ross v. Texas, etc., R. Co.*, 44 Fed. Rep. 44.

Arkansas. — *Little Rock, etc., R. Co. v. Barker*, 39 Ark. 491.

Indiana. — *Indianapolis, etc., R. Co. v. Pitzer*, 109 Ind. 179, 58 Am. St. Rep. 387.

Iowa. — *Thomas v. Chicago, etc., R. Co.*, 114 Iowa 169; *Walters v. Chicago, etc., R. Co.*, 41 Iowa 71; *Burg v. Chicago, etc., R. Co.*, 90 Iowa 106; *Sutzin v. Chicago, etc., R. Co.*, 95 Iowa 304.

Kansas. — See *Kansas Pac. R. Co. v. Whip-ple*, 39 Kan. 531.

Kentucky. — *L., etc., R. Co. v. Cooper*, 3 Ky. L. Rep. 624.

Maryland. — *Compare Baltimore, etc., R. Co. v. State*, 71 Md. 590.

Michigan. — *Compare Trudell v. Grand Trunk R. Co.*, 126 Mich. 73.

Mississippi. — *Jamison v. Illinois Cent. R. Co.*, 63 Miss. 33.

Missouri. — *Riley v. Missouri Pac. R. Co.*, 68 Mo. App. 652.

New York. — *Schwieb v. New York Cent., etc., R. Co.*, 90 N. Y. 558; *Spooner v. Delaware, etc., R. Co.*, 115 N. Y. 22. *Compare Foley v. New York Cent., etc., R. Co.*, 78 Hun (N. Y.) 248.

North Carolina. — *Bottoms v. Seaboard, etc., R. Co.*, 114 N. Car. 699.

Ohio. — *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793, 7 Ohio N. P. 106.

West Virginia. — *Gunn v. Ohio River R. Co.*, 42 W. Va. 676.

But a different rule has been applied in the case of a boy thirteen years old, who was apparently capable of appreciating the peril of his situation. *Meredith v. Richmond, etc., R. Co.*, 108 N. Car. 616.

In New York the rule is laid down that if all that the engineer can see is that a young child is on the track, he has the right to assume that it will leave the track, and he is required to stop the train only when he sees that the child is too young to be conscious of the danger, or is otherwise incapable of avoiding the danger. *Chrystal v. Troy, etc., R. Co.*, 105 N. Y. 164;

Spooner v. Delaware, etc., R. Co., 115 N. Y. 22, *Compare Kenyon v. New York Cent., etc., R. Co.*, 76 N. Y. 607. To the same effect see *Pennsylvania R. Co. v. Morgan*, 82 Pa. St. 134, *distinguishing Philadelphia, etc., R. Co. v. Spearen*, 47 Pa. St. 300, 86 Am. Dec. 544.

Infirmary Immaterial unless Known or a Matter of Reasonable Belief — *United States*. — *Finlayson v. Chicago, etc., R. Co.*, 1 Dill. (U. S.) 579.

Florida. — *Florida Cent., etc., R. Co. v. Williams*, 37 Fla. 406.

Kentucky. — *Nichols v. Louisville, etc., R. Co.*, (Ky. 1888) 6 S. W. Rep. 339; *Johnson v. Louisville, etc., R. Co.*, 91 Ky. 651.

Louisiana. — *Hebert v. Louisiana Western R. Co.*, 104 La. 483.

Michigan. — *Piskowski v. Detroit, etc., R. Co.*, 121 Mich. 498.

Missouri. — *Riley v. Missouri Pac. R. Co.*, 68 Mo. App. 652; *Candee v. Kansas City, etc., R. Co.*, 130 Mo. 142; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621.

South Carolina. — *Smalley v. Southern R. Co.*, 57 S. Car. 243.

Texas. — *International, etc., R. Co. v. Garcia*, 75 Tex. 583; *Gulf, etc., R. Co. v. Hill*, (Tex. Civ. App. 1900) 58 S. W. Rep. 255.

Virginia. — *Tyler v. Sites*, 90 Va. 539.

West Virginia. — *Gunn v. Ohio River R. Co.*, 42 W. Va. 676; *Teel v. Ohio River R. Co.*, 49 W. Va. 85.

2. Jurisdictions Requiring Lookout. — *Troy v. Cape Fear, etc., R. Co.*, 99 N. Car. 295, 6 Am. St. Rep. 521; *Deans v. Wilmington, etc., R. Co.*, 107 N. Car. 686, 22 Am. St. Rep. 902; *High v. Carolina Cent. R. Co.*, 112 N. Car. 385; *Smith v. Norfolk, etc., R. Co.*, 114 N. Car. 728; *Lloyd v. Albemarle, etc., R. Co.*, 118 N. Car. 1010, 54 Am. St. Rep. 764; *Powell v. Southern R. Co.*, 125 N. Car. 370; *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629; *Upton v. South Carolina, etc., R. Co.*, 128 N. Car. 173; *Jeffries v. Seaboard Air Line R. Co.*, 129 N. Car. 236, *Houston, etc., R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632; *Texas, etc., R. Co. v. O'Donnell*, 58 Tex. 27; *Texas, etc., R. Co. v. Watkins*, 88 Tex. 20; *San Antonio, etc., R. Co. v. Vaughn*, 5 Tex. Civ. App. 195; *Gulf, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1902) 67 S. W. Rep. 1040; *Houston, etc., R. Co. v. Harvin*, (Tex. Civ. App. 1899) 54 S. W. Rep. 629; *International, etc., R. Co. v. Brooks*, (Tex. Civ. App. 1899) 54 S. W. Rep. 1056. See also *Ludden v. Columbus, etc., R. Co.*, 9 Ohio Dec. 793, 7 Ohio N. P. 106.

Duty Applies All Along the Line. — *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616, 53 Am. St. Rep. 611.

Person on Trestle. — In *Whitesides v. Southern R. Co.*, 128 N. Car. 229, it was held that if the intestate was on the trestle, and struck by the train while on the trestle, and the defendant

an engineer may be incidentally able to give will not, it is held, relieve the company, if that lookout is not a proper and reasonable lookout.¹ And if, by reason of their duties, either the fireman or the engineer, or both, are so hindered that a proper lookout cannot be kept, then it is the duty of the defendant to have a third person employed for that duty.²

Duty under Statute. — And in some jurisdictions the duty of maintaining a lookout is expressly imposed by statute.³

did not see him when struck, this was negligence, because the defendant must have seen him if the engineer had kept a proper lookout, and that this negligence would make the defendant liable for the injury resulting from such negligence.

Person Becoming Insensible on Track from Sudden Illness. — *Houston, etc., R. Co. v. Symptkins*, 54 Tex. 615, 38 Am. Rep. 632.

Constant Watch Unnecessary. — *Houston, etc., R. Co. v. Smith*, 77 Tex. 179.

Contributory Negligence as Defense. — *Smith v. Norfolk, etc., R. Co.*, 114 N. Car. 728; *Neal v. Carolina Cent. R. Co.*, 126 N. Car. 634; *Texas, etc., R. Co. v. Staggs*, (Tex. Civ. App. 1896) 37 S. W. Rep. 609. See also *Atchison, etc., R. Co. v. Smith*, 28 Kan. 541; *Bradley v. San Antonio, etc., R. Co.*, 80 Tex. 84.

Drunken Person Lying Asleep on Track Held to Be Guilty of Contributory Negligence. — *Sullivan v. St. Louis Southwestern R. Co.*, (Tex. Civ. App. 1896) 36 S. W. Rep. 1020. Compare *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616, 53 Am. St. Rep. 611.

No Liability for Injury to Boy Playing under One of a String of Cars Against Which Engine Is Driven. — *Flores v. Atchison, etc., R. Co.*, 24 Tex. Civ. App. 328; *Texas-Mexican R. Co. v. Baldez*, (Tex. Civ. App. 1897) 43 S. W. Rep. 564.

Use of Headlight as Aiding Proper Lookout. — It has been held that where an engine was run at night without a headlight, and a person lying on the track was injured, if the jury found that a headlight would have enabled the defendant, by due diligence on the part of its servant, to see the intestate in time to stop the train before reaching him, then the failure to provide a headlight and have it at the front was a continuing negligent omission of duty, the performance of which would have given the defendant the last clear chance to prevent the injury, and therefore made its negligence the proximate cause of the injury. *Lloyd v. Albemarle, etc., R. Co.*, 118 N. Car. 1010, 54 Am. St. Rep. 764. To the same effect see *Stanley v. Durham, etc., R. Co.*, 120 N. Car. 514. See also *Gammage v. Atlanta, etc., R. Co.*, 97 Ga. 62. Compare *Collins v. Dillingham*, 7 Tex. Civ. App. 93.

1. *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629; *Jeffries v. Seaboard Air-Line R. Co.*, 129 N. Car. 236.

2. *Arrowood v. South Carolina, etc., R. Co.*, 126 N. Car. 629.

3. In *Tennessee*, (Shannon's Code, § 1574) it is provided that every railroad shall keep the engineer, fireman, or some other person upon the locomotive always upon the lookout ahead. *Nashville, etc., R. Co. v. Nowlin*, 1 Lea (Tenn.) 523; *Nashville, etc., R. Co. v. Anthony*, 1 Lea (Tenn.) 516; *East Tennessee, etc., R. Co. v. White*, 5 Lea (Tenn.) 542; *East Tennessee, etc., R. Co. v. Selcer*, 7 Lea (Tenn.) 557; *Horne*

v. Memphis, etc., R. Co., 1 Coldw. (Tenn.) 73; *Louisville, etc., R. Co. v. Burke*, 6 Coldw. (Tenn.) 47; *Hill v. Louisville, etc., R. Co.*, 9 Heisk. (Tenn.) 823; *Memphis, etc., R. Co. v. Smith*, 9 Heisk. (Tenn.) 860; *East Tennessee, etc., R. Co. v. Pratt*, 85 Tenn. 9; *East Tennessee, etc., R. Co. v. Winters*, 85 Tenn. 240; *Katzenberger v. Lawo*, 90 Tenn. 235, 25 Am. St. Rep. 681; *Little Rock, etc., R. Co. v. Wilson*, 90 Tenn. 271, 25 Am. St. Rep. 693. This duty is imposed in favor of trespassers. *Felton v. Newport*, (C. C. A.) 92 Fed. Rep. 470.

The mere fact that the company maintained a lookout will not relieve it from responsibility for an injury in the absence of proof that the person injured could not have been seen by the exercise of due care. *Felton v. Newport*, 105 Fed. Rep. 332, 44 C. C. A. 530; *East Tennessee, etc., R. Co. v. White*, 5 Lea (Tenn.) 540.

But the statute does not apply whenever obedience is impossible, as where the employees of a railway company are engaged in the distribution of detached cars in the making up of trains, and in their necessary switching in and upon its yards, depot grounds, and side-tracks, *Southern R. Co. v. Pugh*, 95 Tenn. 419; or if the impossibility arises from the sudden appearance of a person on the track, *East Tennessee, etc., R. Co. v. Scales*, 2 Lea (Tenn.) 688.

And it has been held that this principle of emancipation from the operation of the statute is not confined to any locality known as yards, station grounds, or depot grounds, but applied as well to adjacent grounds and to any place where the company must inevitably engage in movements and manœuvres that practically force it to move trains or cuts of cars by pushing instead of pulling with the engine in front as contemplated by the statute. *Towles v. Southern R. Co.*, 103 Fed. Rep. 405.

The common law and not the statute, it has been held, prescribes the rule of action for railway companies in such situations. *Southern R. Co. v. Pugh*, 95 Tenn. 419; *Towles v. Southern R. Co.*, 103 Fed. Rep. 405.

Arkansas Statute — Contributory Negligence as Defense. — Under the statute in Arkansas requiring railroads to keep a constant lookout for persons upon their tracks, it has been held that where a person is struck while upon or near the tracks and he is not seen by the employees in charge of the train, there is sufficient evidence to support a finding that they were negligent in not keeping a proper lookout; but if he was walking along the track and knew that it was about the hour for a train to pass along, and made no reasonable effort by looking or listening to inform himself of the train's approach, these were circumstances showing that he was guilty of contributory negligence which would defeat a recovery.

Jurisdictions Holding Lookout Unnecessary. — But according to the prevailing rule, founded on the principle that there is no duty devolving upon the servants of a railroad to anticipate or expect an unlawful trespass on its right of way, no duty exists to keep a vigilant lookout for a trespasser in the absence of some special fact or reason which calls for diligence in this particular.¹

(bb) *For Children.* — According to some of the authorities the rule is that if

St. Louis Southwestern R. Co. *v.* Dingman, 62 Ark. 245; St. Louis, etc., R. Co. *v.* Leathers, 62 Ark. 235; Little Rock, etc., R. Co. *v.* Smith, 64 Ark. 662, 43 S. W. Rep. 969; Texarkana, etc., R. Co. *v.* Bullington, 65 Ark. 632, 47 S. W. Rep. 560; St. Louis, etc., R. Co. *v.* Ross, 61 Ark. 617. Before the passage of the Act of April 8, 1891, however, it was not negligent for railroads to fail to keep a lookout for persons on their tracks, but they were only liable for failure to use proper care to avoid the injury after the trespasser's presence was known. St. Louis, etc., R. Co. *v.* Monday, 49 Ark. 257; Sitley *v.* Ratliffe, 50 Ark. 477; Brown *v.* St. Louis, etc., R. Co., 52 Ark. 120; St. Louis, etc., R. Co. *v.* Ross, 61 Ark. 617.

1. Jurisdictions Not Requiring a Lookout — United States. — Woodruff *v.* Northern Pac. R. Co., 47 Fed. Rep. 689; Sheehan *v.* St. Paul, etc., R. Co., 76 Fed. Rep. 201, 46 U. S. App. 498.

Alabama. — Frazer *v.* South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145; South, etc., Alabama R. Co. *v.* Donovan, 84 Ala. 141; Memphis, etc., R. Co. *v.* Womack, 84 Ala. 149; Georgia Pac. R. Co. *v.* Blanton, 84 Ala. 154; Bentley *v.* Georgia Pac. R. Co., 86 Ala. 484; Carrington *v.* Louisville, etc., R. Co., 88 Ala. 472; Louisville, etc., R. Co. *v.* Black, 89 Ala. 313; Ensley R. Co. *v.* Chewing, 93 Ala. 24; Georgia Pac. R. Co. *v.* Ross, 100 Ala. 490; Alabama G. S. R. Co. *v.* Mooror, 116 Ala. 642; Southern R. Co. *v.* Bush, 122 Ala. 470.

California. — Williams *v.* Southern Pac. R. Co., 72 Cal. 120; Benson *v.* Central Pac. R. Co., 98 Cal. 45.

Connecticut. — Nolan *v.* New York, etc., R. Co., 53 Conn. 461.

Illinois. — Illinois Cent. R. Co. *v.* Frelka, 9 Ill. App. 605; Lake Shore, etc., R. Co. *v.* Clark, 41 Ill. App. 343; Chicago, etc., R. Co. *v.* Sanders, 55 Ill. App. 87, *affirmed* 154 Ill. 532; Chicago, etc., R. Co. *v.* Maney, 55 Ill. App. 588; Cleveland, etc., R. Co. *v.* Hibsman, 99 Ill. App. 405; Illinois Cent. R. Co. *v.* Godfrey, 71 Ill. App. 500, 22 Am. Rep. 112, *followed* in Illinois Cent. R. Co. *v.* Hetherington, 83 Ill. 510; Wabash R. Co. *v.* Jones, 163 Ill. 167; James *v.* Illinois Cent. R. Co., 195 Ill. 327.

Iowa. — Thomas *v.* Chicago, etc., R. Co., 93 Iowa 248, 103 Iowa 657, 114 Iowa 169; McAllister *v.* Burlington, etc., R. Co., 64 Iowa 395; Masser *v.* Chicago, etc., R. Co., 68 Iowa 602; Burg *v.* Chicago, etc., R. Co., 90 Iowa 106; Baker *v.* Chicago, etc., R. Co., 95 Iowa 163.

Kansas. — See Atchison, etc., R. Co. *v.* Smith, 28 Kan. 541.

Kentucky. — Louisville, etc., R. Co. *v.* Coleman, 86 Ky. 556; Vanarsdell *v.* Louisville, etc., R. Co., (Ky. 1901) 65 S. W. Rep. 858; France *v.* Louisville, etc., R. Co., (Ky. 1893) 22 S. W. Rep. 851; Louisville, etc., R. Co. *v.* Vittitoe, (Ky. 1897) 41 S. W. Rep. 269; L., etc., R. Co. *v.* Cooper, 7 Ky. L. Rep. 102; Louis-

ville, etc., R. Co. *v.* Kellem, (Ky. 1893) 21 S. W. Rep. 230, 14 Ky. L. Rep. 734. *Compare* East Tennessee Coal Co. *v.* Harshaw, (Ky. 1895) 29 S. W. Rep. 289, 16 Ky. L. Rep. 526.

Maryland. — Baltimore, etc., R. Co. *v.* State, 62 Md. 479, 50 Am. Rep. 233; Western Maryland R. Co. *v.* Kehoe, 83 Md. 434.

Minnesota. — Scheffler *v.* Minneapolis, etc., R. Co., 32 Minn. 518.

Mississippi. — Mobile, etc., R. Co. *v.* Stroud, 64 Miss. 784; Louisville, etc., R. Co. *v.* Cooper, 68 Miss. 368; Louisville, etc., R. Co. *v.* Williams, 69 Miss. 631; Mobile, etc., R. Co. *v.* Watly, 69 Miss. 145; Christian *v.* Illinois Cent. R. Co., 71 Miss. 237. See also Vicksburg, etc., R. Co. *v.* McGowan, 62 Miss. 682, 52 Am. Rep. 205; Dooley *v.* Mobile, etc., R. Co., 69 Miss. 648.

Missouri. — Williams *v.* Kansas City, etc., R. Co., 96 Mo. 275; Barker *v.* Hannibal, etc., R. Co., 98 Mo. 50; Powell *v.* Missouri Pac. R. Co., 59 Mo. App. 626.

Montana. — Egan *v.* Montana Cent. R. Co., 24 Mont. 569.

Oregon. — Rathbone *v.* Oregon R. Co., 40 Oregon 225.

Pennsylvania. — Philadelphia, etc., R. Co. *v.* Hummell, 44 Pa. St. 375, 84 Am. Dec. 457.

Trespassers in Yard. — As moving engines and cars to and fro in the yard of a railroad company is indispensable to safe and proper conduct of its business, it should be no more obliged to look out especially for the presence of those who may go there without right than for trespassers on the main track away from the yard. McDermott *v.* Kentucky Cent. R. Co., 93 Ky. 412.

Failure of Fireman Not on Duty to Keep Lookout. — If a fireman of the company who is not on duty, but is being transported from one place to another on the company's engine, and whose presence upon the engine is simply for the purpose of being transported, fails to keep a lookout for persons on the track, his failing so to do is not negligence upon the part of the company where there was also a regular fireman on the engine. Middle Georgia, etc., R. Co. *v.* Reynolds, 99 Ga. 638.

Failure to See Servant as Evidence of Negligence. — Craft *v.* Northern Pac. R. Co., 62 Fed. Rep. 735.

Licenseses. — If a person injured went upon the tracks with the license and invitation of the defendant, then its employees were bound to keep a lookout for him; and if, by the exercise of ordinary care, he might have been discovered in his perilous situation in time to have avoided the injury, the defendant is liable. Murphy *v.* Chicago, etc., R. Co., 38 Iowa 542; Clainpit *v.* Chicago, etc., R. Co., 84 Iowa 71; Heiss *v.* Chicago, etc., R. Co., 103 Iowa 502; Louisville, etc., R. Co. *v.* Schuster, (Ky. 1888) 7 S. W. Rep. 874.

the direct and proximate cause of an infant's death is the negligence of the defendant in failing to keep a reasonable lookout and to discover the child in time to have prevented the injury, it is as much liable in damages as if the proximate cause of the injury had been its negligence after discovering the child upon its tracks.¹ But in other jurisdictions no duty to maintain a lookout is required, even to discover children.²

(cc) *Place of Apprehended Danger.* — Where there is reason to apprehend that the track may not be clear, as in the case of tracks running through cities or other populous districts where persons are in the habit of crossing or walking on the tracks, the persons operating the train cannot act on the presumption that the track is clear, and so fail to maintain a proper lookout, without making the company responsible for the consequences.³ Especially is this true, according to some authorities, where the trespassers are children,⁴ or where there is such a custom established on the part of the public of going upon the tracks, as to amount to a license.⁵ In such cases a failure to see is not alone sufficient to give rise to liability, but there must be a failure to see after the exercise of ordinary care.⁶

hh. SIGNALS AND WARNINGS — (aa) *In General.* — As a general rule, in the absence of statutes, a railroad company owes no duty to a trespasser to give notice of the approach of its trains by whistle, bell, or otherwise,⁷ and a failure to give

1. Lookout Required for Children — *Kentucky.* — Cincinnati, etc., R. Co. v. Dickerson, 102 Ky. 560, distinguishing McDermott v. Kentucky Cent. R. Co., 93 Ky. 408.

Missouri. — Frick v. St. Louis, etc., R. Co., 75 Mo. 595.

Nebraska. — Chicago, etc., R. Co. v. Grablin, 38 Neb. 90.

North Carolina. — Bottoms v. Seaboard, etc., R. Co., 114 N. Car. 699, 41 Am. St. Rep. 799.

South Carolina. — Mason v. Southern R. Co., 58 S. Car. 70, 582.

Texas. — San Antonio, etc., R. Co. v. Vaughn, 5 Tex. Civ. App. 195; Texas, etc., R. Co. v. O'Donnell, 58 Tex. 27; St. Louis, etc., R. Co. v. Shifflet, (Tex. Civ. App. 1900) 56 S. W. Rep. 697; Texas, etc., R. Co. v. Harby, (Tex. Civ. App. 1902) 67 S. W. Rep. 541.

West Virginia. — Gunn v. Ohio River R. Co., 36 W. Va. 165, 32 Am. St. Rep. 842; Gunn v. Ohio River R. Co., 37 W. Va. 421; Gunn v. Ohio River R. Co., 42 W. Va. 676; Bias v. Chesapeake, etc., R. Co., 46 W. Va. 349.

2. Jurisdictions Holding Lookout for Children Unnecessary. — Alabama G. S. R. Co. v. Burgess, 114 Ala. 587; Alabama G. S. R. Co. v. Moorer, 116 Ala. 642; Union Stock Yard, etc., Co. v. Butler, 92 Ill. App. 166; Thomas v. Chicago, etc., R. Co., 93 Iowa 248, 114 Iowa 169; Malone v. Boston, etc., R. Co., 51 Hun (N. Y.) 532; Matson v. Port Townsend Southern R. Co., 9 Wash. 449.

3. Iowa. — McMarshall v. Chicago, etc., R. Co., 80 Iowa 757, 20 Am. St. Rep. 445.

Kentucky. — John v. Louisville, etc., R. Co., (Ky. 1889) 10 S. W. Rep. 417.

Michigan. — Marcott v. Marquette, etc., R. Co., 47 Mich. 1; Battishill v. Humphreys, 64 Mich. 514.

Missouri. — Powell v. Missouri Pac. R. Co., 59 Mo. App. 626; Kelley v. Hannibal, etc., R. Co., 75 Mo. 138; Eswin v. St. Louis, etc., R. Co., 96 Mo. 290; Barker v. Hannibal, etc., R. Co., 98 Mo. 50; Fiedler v. St. Louis, etc.,

R. Co., 107 Mo. 645; Chamberlain v. Missouri Pac. R. Co., 133 Mo. 587; Morgan v. Wabash R. Co., 159 Mo. 262.

Virginia. — Virginia Midland R. Co. v. White, 84 Va. 498, 10 Am. St. Rep. 874.

See also Wabash R. Co. v. Jones, 163 Ill. 167.

Person Walking Along Track. — Chesapeake, etc., R. Co. v. Perkins, (Ky. 1898) 47 S. W. Rep. 259. Compare Glass v. Memphis, etc., R. Co., 94 Ala. 581; South, etc., Alabama R. Co. v. Donovan, 84 Ala. 141.

Boy Asleep in Track Yard. — Gunn v. Felton, (Ky. 1900) 57 S. W. Rep. 15.

Person Crossing Track. — Savannah, etc., R. Co. v. Meadors, 95 Ala. 137; Conley v. Cincinnati, etc., R. Co., 89 Ky. 402; Louisville, etc., R. Co. v. Schuster, (Ky. 1888) 7 S. W. Rep. 874. See also Shelby v. Cincinnati, etc., R. Co., 85 Ky. 224.

Train of Cars Permitted to Move in City Without Lookout to Give Warning and Control Movement. — Louisville, etc., R. Co. v. Potts, 92 Ky. 30.

No Liability Where Failure to Keep Lookout Is Not Proximate Cause of Injury. — Wickham v. Chicago, etc., R. Co., 95 Wis. 23; Finnegan v. Michigan Cent. R. Co., 127 Mich. 15, distinguishing Battishill v. Humphreys, 64 Mich. 514.

4. Lindsay v. Canadian Pac. R. Co., 68 Vt. 556; Townley v. Chicago, etc., R. Co., 53 Wis. 626; Whalen v. Chicago, etc., R. Co., 75 Wis. 654.

5. Guenther v. St. Louis, etc., R. Co., 108 Mo. 18; Lynch v. St. Joseph, etc., R. Co., 111 Mo. 601; Virginia Midland R. Co. v. White, 84 Va. 498, 10 Am. St. Rep. 874.

6. Chamberlain v. Missouri Pac. R. Co., 133 Mo. 587.

7. No Duty to Give Warning in General. — Illinois Cent. R. Co. v. Oberhoefer, 76 Ill. App. 672; Roden v. Chicago, etc., R. Co., 133 Ill. 72, 23 Am. St. Rep. 585; Louisville, etc., R. Co. v. Howard, 82 Ky. 212; McDermott v. Kentucky Cent. R. Co., 93 Ky. 408; Lyons v.

such warning will not amount to negligence, unless the trespasser was discovered in time to give it.¹ But when a trespasser is seen upon the track, a different rule is to be applied. It is evident, however, that there can be no exact rule laid down as to the precise distance at which it becomes the duty of the servants of the railroad to give the danger signal, and it may be stated generally that it is the duty of the engineer or other person in charge of a moving train who sees the peril of a person upon the track to give timely warning of its approach.²

Failure to Give Signal Must Be Proximate Cause of Injury. — But no liability will arise from the failure to give a signal, if such failure is not the proximate cause of the injury,³ as where the approach of the train was known to the person injured in time to have avoided the injury.⁴

(bb) *Place of Apprehended Danger.* — It has been held that independently of

Illinois Cent. R. Co., (Ky. 1900) 59 S. W. Rep. 507; Stillson v. Hannibal, etc., R. Co., 67 Mo. 671; Collis v. New York Cent., etc., R. Co., 71 Hun (N. Y.) 504. See also Dahlstrom v. St. Louis, etc., R. Co., 96 Mo. 99.

Signal Held Unnecessary at Abrupt Curve. — Louisville, etc., R. Co. v. Howard, 82 Ky. 212.

No Duty to Sound Whistle at Siding. — New Brunswick R. Co. v. Vanwart, 17 Can. Sup. Ct. 35; Enk v. Brooklyn City R. Co., (Supm. Ct. Gen. T.) 19 N. Y. Supp. 130.

No Duty to Give Signals at Private Crossings. — Lyons v. Illinois Cent. R. Co., (Ky. 1900) 59 S. W. Rep. 507. And see the title CROSSINGS, vol. 8, p. 414.

But in Chicago, etc., R. Co. v. Sanders, 154 Ill. 531, it was held that it could not be said, as a matter of law, not to be negligence to speed an extra train at a rapid rate over a private crossing without ringing a bell or giving some warning, when the approach of the train was concealed from view by the presence of hedges or bushes or other obstructions, but that the question of negligence in such a case was one for the jury.

Train Behind Time. — Whether an engineer of a train which is behind time is negligent in not giving notice of its approach to a point where a highway runs parallel to the track and close to it, is a question for the jury. Hudson v. Louisville, etc., R. Co., 14 Bush (Ky.) 303.

Failure to Give Signal Not Negligence Where It Could Not Have Been Heard. — Johnson v. Rio Grande Western R. Co., 19 Utah 77.

Failure to Warn Licensee. — In Collier v. Michigan Cent. R. Co., 27 Ont. App. 630, it was held that the failure of a railroad to ring the bell of an engine in running through its yards, in violation of the company rules, was evidence of want of reasonable care as to a person who was in the yard by the express permission of the defendant.

1. Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145; Weaver v. Baltimore, etc., R. Co., 3 App. Cas. (D. C.) 436; Stearman v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 46.

Failure to Ring or Whistle Not Negligence Where Safer or Equally Safe Signal Is Employed. — Speed v. Atlantic, etc., R. Co., 71 Mo. 303; Skipton v. St. Joseph, etc., R. Co., 82 Mo. App. 134.

Whether Signal Is Given a Question for Jury. — McMarshall v. Chicago etc., R. Co., 80 Iowa 757, 20 Am. St. Rep. 445; Kelly v. Union R.,

etc., Co., 95 Mo. 279; Wall v. Delaware, etc., R. Co., 54 Hun (N. Y.) 454.

2. Timely Warning Necessary Where Person Is Seen — *United States.* — Finlayson v. Chicago, etc., R. Co., 1 Dill. (U. S.) 579.

Alabama. — Frazer v. South, etc., Alabama R. Co., 81 Ala. 185, 60 Am. Rep. 145.

Georgia. — Central R., etc., Co. v. Denson, 84 Ga. 774.

Illinois. — Illinois Cent. R. Co. v. Modglin, 85 Ill. 481.

Kentucky. — Louisville, etc., R. Co. v. Tinkham, (Ky. 1898) 44 S. W. Rep. 439; Wren v. Louisville, etc., R. Co., (Ky. 1892) 20 S. W. Rep. 215, 14 Ky. L. Rep. 324; Barber v. Cincinnati, etc., R. Co., (Ky. 1893) 21 S. W. Rep. 340, 14 Ky. L. Rep. 869.

Oregon. — Cogswell v. Oregon, etc., R. Co., 6 Oregon 417.

West Virginia. — Teel v. Ohio River R. Co., 49 W. Va. 90.

Whistle in Time to Enable Person to Leave Track Sufficient. — Where no conditions intervene to confuse, or to prevent hearing a signal and knowing its object, it will be sufficient if given in time for the trespasser to leave the track safely. Sinclair v. Chicago, etc., R. Co., 133 Mo. 242.

Timely Warning a Question for Jury. — Illinois Cent. R. Co. v. Hocker, (Ky. 1900) 55 S. W. Rep. 438.

Statute in Tennessee Requiring Signal When Person Appears on Road. — Katzenberger v. Lawo, 90 Tenn. 235, 25 Am. St. Rep. 681. In Hill v. Louisville, etc., R. Co., 9 Heisk. (Tenn.) 823, it was held that the engineer was required to give the alarm whistle the instant he saw a person on the track.

3. No Liability Where Failure to Give Signal Is Not Proximate Cause of Injury. — Bryant v. Illinois Cent. R. Co., (La. 1897) 22 So. Rep. 799; Barklev v. Missouri Pac. R. Co., 96 Mo. 367; Missouri, etc., R. Co. v. Cardena, 22 Tex. Civ. App. 300; Gulf, etc., R. Co. v. Riordan, (Tex. Civ. App. 1893) 22 S. W. Rep. 519. This has been held even in the case of a licensee. Mobile, etc., R. Co. v. Roberts, (Miss. 1898) 23 So. Rep. 393.

4. Where Person Had Notice of Approach of Train. — Louisville, etc., R. Co. v. Penrod, (Ky. 1900) 56 S. W. Rep. 1; McManamee v. Missouri Pac. R. Co., 135 Mo. 440; Glenn v. Norfolk, etc., R. Co., 128 N. Car. 184; McDonald v. International, etc., R. Co., 86 Tex. 1, 40 Am. St. Rep. 803; Texas, etc., R. Co. v. Short,

statute, it is the duty of those in charge of a train to give notice of its approach at all points of known or reasonably apprehended danger. And accordingly, if a railway company has notice that a large number of persons are in the habit of using its track at a particular place for the purpose of a crossing or footpath, and it takes no steps to prevent this use, a failure to give warning of the approach of a train to such place will amount to actionable negligence.¹

Person Standing Idly on Track. — But it has been held that there is no duty on the part of the railroad to give warning to a person idly standing on the tracks at a place in the company's yards where the public are in the habit of crossing.²

Backing Train. — As a general rule, the mere fact that a train is being backed does not impose upon the servants of a railroad the duty to give signals of its approach at points on the track not frequented by the public, and where persons cannot reasonably be expected to be.³ But negligence may be inferred from the backing of a train in a populous locality where persons are at all times crossing the tracks, if no bell is rung or other signal given.⁴

(cc) **Crossing Signals.** — The prevailing rule is that the statutory signals required by the various statutes to be given at public crossings are intended for the benefit of those using the crossing as a highway and not for mere trespassers on other parts of the track, and a failure to give such warning cannot be taken advantage of by the trespasser.⁵ And the same rule has been applied

(Tex. Civ. App. 1900) 58 S. W. Rep. 56; Houston, etc., R. Co. v. Nixon, 52 Tex. 19.

1. Signals Required at Place of Apprehended Danger. — Georgia Pac. R. Co. v. Lee, 92 Ala. 271; Florida, etc., R. Co. v. Foxworth, 41 Fla. 1; Chicago, etc., R. Co. v. Sanders, 55 Ill. App. 87, affirmed 154 Ill. 532; Pennsylvania R. Co. v. Barnett, 59 Pa. St. 259, 98 Am. Dec. 346; Texas, etc., R. Co. v. Watkins, 88 Tex. 20; Nuzum v. Pittsburgh, etc., R. Co., 30 W. Va. 228. See also Larkin v. New York, etc., R. Co., (C. Pl. Gen. T.) 19 N. Y. Supp. 479. Compare Philadelphia, etc., R. Co. v. Hummell, 44 Pa. St. 375, 84 Am. Dec. 457.

Signal of Approach to Station. — Louisville, etc., R. Co. v. Taaffe, 106 Ky. 535.

Statute Requiring Signal at "Traveled Place." — Risinger v. Southern R. Co., 59 S. Car. 429.

Tennessee Statute Requiring Signal on Approaching Town or City. — Felton v. Newport, (C. C. A.) 92 Fed. Rep. 470; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442.

Starting Train at Depot. — Where a train has been standing for some time near a depot at a village or town over an approach to the depot, it has been intimated that it is the duty of those in charge of the train to give a proper signal before starting, and that a failure to do so will render the company liable to a person injured, unless the starting of the train did not contribute directly to the injury. Barkley v. Missouri Pac. R. Co., 96 Mo. 367.

But under statute in *Illinois*, making it unlawful for any engineer on a railroad to start his train at any station or within any city, incorporated town or village, without ringing the bell or sounding the whistle a reasonable time before starting, it was held that the question whether the person injured was a trespasser, and whether the defendant was guilty of wilful or wanton conduct against such trespasser, were questions for the jury. Chicago, etc., R. Co. v. Murowski, 179 Ill. 77.

2. Missouri, etc., R. Co. v. Cowles, (Tex. Civ. App. 1902) 67 S. W. Rep. 1078.

3. Woodyard v. Kentucky Cent. R. Co., (Ky. 1891) 15 S. W. Rep. 178.

Ordinance Requiring Man on Backing Train to Give Signals. — An ordinance which requires a man to be stationed on a backing train to give danger signals does not apply where the employees are simply engaged in setting cars in a car yard. Rafferty v. Missouri Pac. R. Co., 91 Mo. 33.

4. Barry v. New York Cent., etc., R. Co., 92 N. Y. 289, 44 Am. Rep. 377; Texas Midland R. Co. v. Crowder, (Tex. Civ. App. 1901) 64 S. W. Rep. 90. See also Casey v. New York Cent., etc., R. Co., 78 N. Y. 518.

Where the Depot Building and Grounds of a Railroad Company in a City Were Not Inclosed, it was the duty of the company, in backing a train for the purpose of coupling it to cars standing near the passenger platform, to have a servant on the platform or on the standing cars to warn trespassers or intruders on the tracks or on the cars of the danger, and its failure to do so was gross negligence, rendering it liable to plaintiff, an infant between five and six years old, who was on the platform of one of the standing cars, and who by the sudden movement of the cars was caught between the car and the "bumper" at the end of the track. Louisville, etc., R. Co. v. Popp, 96 Ky. 99.

5. Crossing Signals Held Not Intended for Trespassers — *California*. — Toomey v. Southern Pac. R. Co., 86 Cal. 374.

Illinois. — Eggmann v. St. Louis, etc., R. Co., 47 Ill. App. 507; Maney v. Chicago, etc., R. Co., 49 Ill. App. 105; Chicago, etc., R. Co. v. Eininger, 114 Ill. 79; Roden v. Chicago, etc., R. Co., 133 Ill. 72, 23 Am. St. Rep. 585.

Indiana. — Baltimore, etc., R. Co. v. Bradford, 20 Ind. App. 348.

Kentucky. — Louisville, etc., R. Co. v. Vit-

where there was a failure to give the statutory warning to a person walking along a railroad track, though the injury occurred at the intersection of the track and public highway.¹ In some jurisdictions, however, it has been held that though the failure to give the statutory signal is not negligence, as a matter of law, relatively to a trespasser, it may be a fact to which the jury may look in determining the question of negligence.² But if the failure to give a signal has no influence in producing the injury, no liability will arise therefrom.³

(*dd*) *Violation of Statute or Municipal Ordinance.* — The disobedience of a statute⁴ or ordinance⁵ requiring the giving of signals within the limits of cities, towns, etc., is frequently held to be negligence. But in *Illinois* it has been held that a railroad company in the operation of its trains owes no duty to a trespasser upon its right of way or tracks, except that of not wantonly or wilfully inflicting injury upon him, and that the mere fact that the signals required by statutes and ordinances are not given, even though those operating its trains may have knowledge of the fact that persons have been in the habit of crossing its tracks or walking upon them, at places other than public crossings or public places, will not amount to proof of wilful or wanton disregard of the duty towards such trespasser.⁶

(*ee*) *Running Train Without Headlight.* — It has been held to be a high degree of negligence for a railroad company to run a train on a dark night without a headlight.⁷ On the other hand, it has been held that a trespasser cannot

tito, (Ky. 1897) 41 S. W. Rep. 269; Louisville, etc., R. Co. v. Howard, 82 Ky. 212; Shackelford v. Louisville, etc., R. Co., 84 Ky. 43, 4 Am. St. Rep. 189.

New York. — Harty v. Central R. Co., 42 N. Y. 468.

South Carolina. — Hale v. Columbia, etc., R. Co., 34 S. Car. 292; Risinger v. Southern R. Co., 59 S. Car. 429; Neely v. Charlotte, etc., R. Co., 33 S. Car. 136.

Texas. — St. Louis Southwestern R. Co. v. Bishop, 14 Tex. Civ. App. 504.

West Virginia. — Spicer v. Chesapeake, etc., R. Co., 34 W. Va. 514; Huff v. Chesapeake, etc., R. Co., 48 W. Va. 45.

See also the title **CROSSINGS**, vol. 8, p. 410.

Duty to Persons Lawfully on the Track. — It has been held that the failure to give signals may be taken into consideration, together with other facts, to show want of reasonable care on the part of the company as to persons lawfully upon the tracks. *International, etc., R. Co. v. Gray*, 65 Tex. 32; *Galveston, etc., R. Co. v. Garteiser*, 9 Tex. Civ. App. 456.

Persons Lawfully in Vicinity of Crossing. — As to duty to give signals to persons not using the crossing as a highway and not trespassing on the railroad tracks, but are lawfully in the vicinity of the crossing, see the title **CROSSINGS**, vol. 8, p. 410. And see *Reynolds v. Great Northern R. Co.*, 32 U. S. App. 577; *Williams v. Chicago, etc., R. Co.*, 135 Ill. 491, 25 Am. St. Rep. 397; *Lonergan v. Illinois Cent. R. Co.*, 87 Iowa 755; *Louisville, etc., R. Co. v. Penrod*, (Ky. 1900) 56 S. W. Rep. 1.

No Duty to Continue Signal Beyond Crossing. — *Zimmerman v. Hannibal, etc., R. Co.*, 71 Mo. 476.

1. *Chicago, etc., R. Co. v. Eininger*, 114 Ill. 79.

2. **Failure to Give Signal a Fact Tending to Show Negligence.** — *Georgia R. Co. v. Williams*, 74 Ga. 723; *Atlanta, etc., R. Co. v. Gravitt*, 93

Ga. 369, 44 Am. St. Rep. 145; *Central R., etc., Co. v. Golden*, 93 Ga. 510; *East Tennessee, etc., R. Co. v. Smith*, 94 Ga. 580; *St. Louis Southwestern R. Co. v. Bishop*, 14 Tex. Civ. App. 504; *International, etc., R. Co. v. Woodward*, (Tex. Civ. App. 1901) 63 S. W. Rep. 1051; *Williams v. Cross*, 19 Tex. Civ. App. 426.

3. *San Antonio, etc., R. Co. v. Gray*, (Tex. 1902) 67 S. W. Rep. 763.

4. *Georgia Pac. R. Co. v. Blanton*, 84 Ala. 154, in which a trespassing child was injured. See also *Carrington v. Louisville, etc., R. Co.*, 88 Ala. 475.

5. **Injury to Person Unloading Cars.** — *Dunkman v. Wabash, etc., R. Co.*, 95 Mo. 232.

Injury to Station Agent Attempting to Pass Between Cars. — *Gulf, etc., R. Co. v. Calvert*, 11 Tex. Civ. App. 297.

Injury to Servants of Road. — *Pennsylvania Co. v. Backes*, 133 Ill. 255; *Illinois Cent. R. Co. v. Gilbert*, 157 Ill. 354. See also *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 132.

Contributory Negligence as Defense. — *Schmitt v. Missouri Pac. R. Co.*, 160 Mo. 43.

6. *Illinois Cent. R. Co. v. O'Connor*, 189 Ill. 559; *Smith v. Chicago, etc., R. Co.*, 99 Ill. App. 296.

7. **Running Engine Without Headlight.** — *Baltimore, etc., R. Co. v. Alsop*, 71 Ill. App. 54, *affirmed* 176 Ill. 471; *Burling v. Illinois Cent. R. Co.*, 85 Ill. 18. See also *Indianapolis, etc., R. Co. v. Galbreath*, 63 Ill. 436; *East St. Louis Connecting R. Co. v. O'Hara*, 150 Ill. 585; *Lloyd v. Albemarle, etc., R. Co.*, 118 N. Car. 1010, 54 Am. St. Rep. 764; *Stanley v. Durham, etc., R. Co.*, 120 N. Car. 514.

No Liability Where Absence of Headlight Was Not Cause of Accident. — *Chicago, etc., R. Co. v. Bednorz*, 57 Ill. App. 309; *Daniels v. Staten Island Rapid Transit R. Co.*, 125 N. Y. 407. See also *Bryant v. Illinois Cent. R. Co.*, (La. 1897) 22 So. Rep. 799.

complain that there was no headlight on an engine, on the principle that a railroad company is not required to use care to anticipate the peril of a trespasser.¹

(ff) *Mode of Giving Signals.* — The parties in charge of a railroad train do not perform their whole duty, under all circumstances, by pursuing the regulation method of giving notice by the ringing of a bell or following out any prescribed mode of giving warning. The precautions to be adopted and the steps to be taken in aid of safety increase as the danger of accident and injury is increased, and their sufficiency is to be gauged by what is called for by the circumstances of each case.²

(gg) *Duty to Heed Signal of Stranger.* — The rule has been laid down that an engineer is not required to heed a signal to stop his train given by a stranger, when no danger is in sight or may reasonably be apprehended.³ On the other hand, it has been held that an instruction that "in the due and proper management of its trains and the movement thereof the defendant's employees were not required, as a matter of law, to notice and obey signals given by persons not in the employ of the defendant company," is erroneous.⁴ And it has been held that a railroad company is liable for the failure of its engineer to heed the warning of a third person, where he had already seen children near the track, though not on it, if by heeding the warning he could have stopped the train in time to avoid the injury.⁵

ii. RATE OF SPEED — (aa) *In General.* — As a matter of law, in the absence of statutory or municipal regulation, no rate of speed at which a railroad train may be run constitutes negligence *per se*, so far as persons on or near the track are concerned.⁶ But a railroad is not, even in the absence of statute or municipal ordinance on the subject, absolved from all duty to the public in this respect, and the rate of speed of trains may be taken into consideration by the jury along with other circumstances in determining the question of

1. *Eastern Kentucky R. Co. v. Powell*, (Ky. 1895) 33 S. W. Rep. 629.

2. *Mode of Giving Signals.* — *Downing v. Morgan's Louisiana, etc., R., etc., Co.*, 104 La. 508. See also *Swift v. Staten Island Rapid Transit R. Co.*, 123 N. Y. 645.

3. *Blair v. Grand Rapids, etc., R. Co.*, 60 Mich. 124.

4. *St. Louis, etc., R. Co. v. Waren*, 65 Ark. 619.

5. *Donahoe v. Wabash, etc., R. Co.*, 83 Mo. 543.

And the same rule has been applied where the engineer saw a person lying near the track whom he mistook for an abandoned tie, and disobeyed signals in violation of a rule of the company prescribing that "a flag or lamp swung across the track, a hat or any object waived violently by any person on the track, signifies danger, and is a signal to stop." *Seaboard, etc., R. Co. v. Joyner*, 92 Va. 354.

6. *High Rate of Speed Not Negligence Per Se — United States.* — *Farve v. Louisville, etc., R. Co.*, 42 Fed. Rep. 441.

California. — *Benson v. Central Pac. R. Co.*, 98 Cal. 45.

Kentucky. — *L., etc., R. Co. v. Cox*, 8 Ky. L. Rep. 961; *Louisville, etc., R. Co. v. Howard*, 82 Ky. 212; *Shackleford v. Louisville, etc., R. Co.*, 84 Ky. 43, 4 Am. St. Rep. 189.

Illinois. — *Partlow v. Illinois Cent. R. Co.*, 51 Ill. App. 597, affirmed 150 Ill. 321; *Chicago, etc., R. Co. v. Lee*, 68 Ill. 576; *Chicago, etc., R. Co. v. Bunker*, 81 Ill. App. 616.

Indiana. — *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250.

Iowa. — *Latty v. Burlington, etc., R. Co.*, 38 Iowa 250; *Edson v. Central R. Co.*, 40 Iowa 47; *McKonkey v. Chicago, etc., R. Co.*, 40 Iowa 205; *Artz v. Chicago, etc., R. Co.*, 44 Iowa 284; *Cohoon v. Chicago, etc., R. Co.*, 90 Iowa 169.

Michigan. — *Grand Rapids, etc., R. Co. v. Huntley*, 38 Mich. 537, 31 Am. Rep. 321.

Missouri. — *Wallace v. St. Louis, etc., R. Co.*, 74 Mo. 594; *Powell v. Missouri Pac. R. Co.*, 76 Mo. 80; *Young v. Hannibal, etc., R. Co.*, 79 Mo. 336; *Stepp v. Chicago, etc., R. Co.*, 85 Mo. 229; *Kreis v. Missouri Pac. R. Co.*, 148 Mo. 321; *Main v. Hannibal, etc., R. Co.*, 18 Mo. App. 388; *Potter v. Hannibal, etc., R. Co.*, 18 Mo. App. 694; *Nutter v. Chicago, etc., R. Co.*, 22 Mo. App. 328; *Sloop v. St. Louis, etc., R. Co.*, 22 Mo. App. 593; *Wason v. McCook*, 80 Mo. App. 483.

Nebraska. — *Omaha, etc., R. Co. v. Krayenbuhl*, 48 Neb. 553.

Pennsylvania. — *Eply v. Lehigh Valley R. Co.*, 3 Pa. Super. Ct. 509; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33.

Texas. — *Texas, etc., R. Co. v. Short*, (Tex. Civ. App. 1900) 58 S. W. Rep. 56.

Rate of Speed Consistent with Safety of Passengers Held Not to Be Negligence. — *Houston v. Vicksburg, etc., R. Co.*, 39 La. Ann. 796.

Approaching Depot Grounds. — *Ensley R. Co. v. Chewning*, 93 Ala. 24; *Cohoon v. Chicago, etc., R. Co.*, 90 Iowa 169; *Heiss v. Chicago, etc., R. Co.*, 103 Iowa 590.

actionable negligence.¹

In Towns and Cities. — Thus, an exception to the general rule allowing railroads to regulate their rate of speed exists in the case of trains running through towns and cities or other populous districts generally, where persons may be expected to be on the track, the question of negligence in such case being one for the jury.²

Passing Station When Train Is Receiving or Discharging Passengers. — So, negligence has been inferred where a railroad company runs a train at a high rate of speed past a station where a passenger train is receiving or discharging passengers or is pulling into the station, especially when the track on which the train is moving is between the station and the track on which the passenger train is standing or moving.³ And this rule has been applied though the person injured did not sustain the relation of passenger to the defendant company.⁴

(bb) **Violation of Statute or Ordinance Regulating Speed.** — In some cases it is held that the running of railroad trains within the limits of a town or city or village at a rate of speed greater than is allowed by ordinances of such town or city or village, or by statute, is negligence *per se*.⁵ In *Illinois*, under statute, such

1. *Lake Shore, etc., R. Co. v. Foster*, 74 Ill. App. 387; *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 132; *Frick v. St. Louis, etc., R. Co.*, 75 Mo. 595.

2. **High Speed in Towns and Cities** — *Alabama*. — *Nave v. Alabama G. S. R. Co.*, 96 Ala. 264. *Connecticut*. — *Compare Nolan v. New York, etc., R. Co.*, 53 Conn. 472.

Illinois. — *Garland v. Chicago, etc., R. Co.*, 8 Ill. App. 571; *Wabash, etc., R. Co. v. Hicks*, 13 Ill. App. 407; *Chicago, etc., R. Co. v. Dunleavy*, 129 Ill. 132; *Pittsburgh, etc., R. Co. v. Knutson*, 69 Ill. 103; *Partlow v. Illinois Cent. R. Co.*, 150 Ill. 321.

Indiana. — *Chicago, etc., R. Co. v. Spilker*, 134 Ind. 380.

Iowa. — *Pratt v. Chicago, etc., R. Co.*, 98 Iowa 563.

Kentucky. — *Louisville, etc., R. Co. v. McCombs*, (Ky. 1899) 54 S. W. Rep. 179; *L., etc., R. Co. v. Trenby*, 6 Ky. L. Rep. 95. See also *Givens v. Kentucky Cent. R. Co.*, (Ky. 1891) 15 S. W. Rep. 1057.

Louisiana. — *Sundmaker v. Yazoo, etc., R. Co.*, 106 La. 111.

Mississippi. — *Alabama, etc., R. Co. v. Lowe*, 73 Miss. 203.

Missouri. — *Stepp v. Chicago, etc., R. Co.*, 85 Mo. 229; *Reilly v. Hannibal, etc., R. Co.*, 94 Mo. 600.

Nebraska. — *Burlington, etc., R. Co. v. Wendt*, 12 Neb. 76.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Long*, 75 Pa. St. 257; *Pennsylvania R. Co. v. Lewis*, 79 Pa. St. 33; *Hagan v. Railroad Co.*, 5 Phila. (Pa.) 179, 20 Leg. Int. (Pa.) 316. *Compare Ogden v. Pennsylvania R. Co.*, (Pa. 1889) 16 Atl. Rep. 353.

South Carolina. — *Risinger v. Southern R. Co.*, 59 S. Car. 429.

Wisconsin. — *Kearney v. Chicago, etc., R. Co.*, 47 Wis. 144. See also *Wickham v. Chicago, etc., R. Co.*, 95 Wis. 23.

3. *Robostelli v. New York, etc., R. Co.*, 33 Fed. Rep. 796; *Pennsylvania R. Co. v. Reidy*, 99 Ill. App. 477; *Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88; *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267; *Peyton v. Texas, etc., R. Co.*, 41 La. Ann. 861, 17 Am. St. Rep. 430; *Terry v. Jewett*, 78 N. Y. 338. *Compare Edger-*

ton v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 516.

4. **Person by Invitation Crossing Track to Receive Mail or Express.** — *Chicago, etc., R. Co. v. Kelly*, 182 Ill. 267; *Tubbs v. Michigan Cent. R. Co.*, 107 Mich. 108, 61 Am. St. Rep. 320.

Where Train to Which Plaintiff Is Crossing Belongs to Another Company. — *Chicago, etc., R. Co. v. Ryan*, 165 Ill. 88.

Person Assisting Passenger to Train. — *Nichols v. Chesapeake, etc., R. Co.*, (Ky. 1886) 2 S. W. Rep. 181.

5. **Violation of Statute or Ordinance Regulating Speed as Negligence Per Se** — *Alabama*. — *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114; *South, etc., Alabama R. Co. v. Donovan*, 84 Ala. 141.

Georgia. — *Barfield v. Southern R. Co.*, 108 Ga. 744; *Central of Georgia R. Co. v. Bond*, 111 Ga. 13.

Iowa. — *Correll v. Burlington, etc., R. Co.*, 38 Iowa 120, 18 Am. Rep. 22. See also *Fell v. Burlington, etc., R. Co.*, 43 Iowa 177.

Kansas. — *Kansas City Suburban Belt R. Co. v. Herman*, (Kan. 1900) 62 Pac. Rep. 543.

Mississippi. — *Alabama, etc., R. Co. v. Phillips*, 70 Miss. 14.

Missouri. — *Robertson v. Wabash, etc., R. Co.*, 84 Mo. 119; *Keim v. Union R., etc., Co.*, 90 Mo. 314; *Kellny v. Missouri Pac. R. Co.*, 101 Mo. 67; *Jackson v. Kansas City, etc., R. Co.*, 157 Mo. 621; *Tobin v. Missouri Pac. R. Co.*, (Mo. 1891) 18 S. W. Rep. 996; *Edwards v. Chicago, etc., R. Co.*, (Mo. App. 1902) 67 S. W. Rep. 950. See also *Backenstoe v. Wabash, etc., R. Co.*, 23 Mo. App. 148.

Wisconsin. — *Hooker v. Chicago, etc., R. Co.*, 76 Wis. 542; *Schneider v. Chicago, etc., R. Co.*, 99 Wis. 378; *Schug v. Chicago, etc., R. Co.*, 102 Wis. 515.

See generally on this subject, the title NEGLIGENCE, vol. 21, p. 478.

For the rule as applied to street crossings, see the title CROSSINGS, vol. 8, p. 406.

Negligence as to Employee. — *Houston, etc., R. Co. v. Powell*, (Tex. Civ. App. 1897) 41 S. W. Rep. 695.

Negligence as to Licensee. — *Gulf, etc., R. Co. v. Matthews*, (Tex. Civ. App. 1902) 66 S. W. Rep. 589.

evidence is regarded as *prima facie* proof of negligence.¹ In other cases the rule is that such an act on the part of the railroad company is always to be considered by the jury as, at least, a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence.²

In Kentucky, the running of trains at a rate of speed in violation of a municipal ordinance is not negligence, and such ordinance is inadmissible for the purpose of showing negligence.³

Contributory Negligence as Defense.— But it must appear, even where the violation of the ordinance is regarded as negligence *per se*, that the injury complained of was occasioned by such unauthorized speed of the train, without any direct contributory negligence on the part of the plaintiff himself.⁴ And the fact that the person injured was a trespasser has been held to amount to contributory negligence, within the meaning of the rule.⁵ On the other hand, it has been held that the mere fact that the person injured is a trespasser is

Maximum Rate of Speed Allowable Not Proper Care Under All Circumstances.— Louisville, etc., R. Co. v. French, 69 Miss. 121; Alabama, etc., R. Co. v. Phillips, 70 Miss. 14. See also Wickham v. Chicago, etc., R. Co., 95 Wis. 23.

As to the Power of a Municipality to Enact Speed Ordinances, see the title ORDINANCES, vol. 21, p. 954.

1. Presumption of Negligence under Illinois Statute.— Lake Shore, etc., R. Co. v. Berlink, 2 Ill. App. 427; Wabash, etc., R. Co. v. Weisbeck, 14 Ill. App. 525; Terre Haute, etc., R. Co. v. Voelker, 31 Ill. App. 314, *affirmed* 129 Ill. 540; Chicago, etc., R. Co. v. Carpenter, 45 Ill. App. 294; Atchison, etc., R. Co. v. Feehan, 47 Ill. App. 66, *affirmed* 149 Ill. 202; Illinois Cent. R. Co. v. Murphy, 52 Ill. App. 65; Cleveland, etc., R. Co. v. Baddeley, 52 Ill. App. 94, *affirmed* 150 Ill. 328; Louisville, etc., R. Co. v. Gobin, 52 Ill. App. 565; Lake Erie, etc., R. Co. v. Norris, 60 Ill. App. 112; Chicago, etc., R. Co. v. Winters, 65 Ill. App. 435; Chicago, etc., R. Co. v. Smedley, 65 Ill. App. 644, *affirmed* 175 Ill. 293; Illinois Cent. R. Co. v. Crawford, 68 Ill. App. 355, *affirmed* 169 Ill. 554; Chicago, etc., R. Co. v. Gunderson, 74 Ill. App. 356, *affirmed* 174 Ill. 496; Wabash R. Co. v. Zerwick, 74 Ill. App. 670; Chicago, etc., R. Co. v. Smith, 77 Ill. App. 492, *affirmed* 180 Ill. 453; Illinois Cent. R. Co. v. Bartle, 94 Ill. App. 57; Chicago, etc., R. Co. v. Gregory, 58 Ill. 226; Pittsburgh, etc., R. Co. v. Knutson, 69 Ill. 103; Toledo, etc., R. Co. v. O'Connor, 77 Ill. 391; Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Chicago, etc., R. Co. v. Becker, 84 Ill. 483; Indianapolis, etc., R. Co. v. Hall, 106 Ill. 371; Illinois Cent. R. Co. v. Ashline, 171 Ill. 313; Chicago, etc., R. Co. v. Mochell, 193 Ill. 203.

It has been held, however, that speed ordinances are not intended for the protection of trespassers, and that the violation of a speed ordinance does not show wanton or wilful disregard of duty. Smith v. Chicago, etc., R. Co., 99 Ill. App. 296. See also Illinois Cent. R. Co. v. Hetherington, 83 Ill. 510; Blanchard v. Lake Shore, etc., R. Co., 126 Ill. 416, 9 Am. St. Rep. 630.

2. A Circumstance Showing Negligence.— Baltimore, etc., R. Co. v. Golway, 6 App. Cas. (D. C.) 143; Mahan v. Union Depot, etc., Co., 34 Minn. 29; Massoth v. Delaware, etc., Canal

Co., 64 N. Y. 524; Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Syme v. Richmond, etc., R. Co., 113 N. Car. 558; Meek v. Pennsylvania Co., 38 Ohio St. 632, *cited in* Hart v. Devereux, 41 Ohio St. 565. See Grand Trunk R. Co. v. Ives, 144 U. S. 408.

3. Louisville, etc., R. Co. v. Dalton, 102 Ky. 290; Dolfinger v. Fishback, 12 Bush (Ky.) 474; Ward v. Illinois Cent. R. Co., (Ky. 1900) 56 S. W. Rep. 807.

4. Contributory Negligence as Defense — Illinois.— Chicago, etc., R. Co. v. Gunderson, 65 Ill. App. 638.

Indiana.— Brooks v. Pittsburgh, etc., R. Co., (Ind. 1902) 62 N. E. Rep. 694.

Iowa.— Masser v. Chicago, etc., R. Co., 68 Iowa 602.

Kansas.— Kansas City Suburban Belt R. Co. v. Herman, 64 Kan. 546.

Maryland.— Philadelphia, etc., R. Co. v. Stebbing, 62 Md. 504; Baltimore, etc., R. Co. v. State, 69 Md. 551; Reidel v. Philadelphia, etc., R. Co., 87 Md. 153, 67 Am. St. Rep. 328.

Michigan.— Pzolla v. Michigan Cent. R. Co., 54 Mich. 273.

Mississippi.— Strong v. Canton, etc., R. Co., (Miss. 1888) 3 So. Rep. 465; Vicksburg, etc., R. Co. v. McGowan, 62 Miss. 682, 52 Am. Rep. 205; Mobile, etc., R. Co. v. Stroud, 64 Miss. 784; Crawley v. Richmond, etc., R. Co., 70 Miss. 340; Collins v. Illinois Cent. R. Co., 77 Miss. 855; Alabama, etc., R. Co. v. Carter, 77 Miss. 511.

Missouri.— Neier v. Missouri Pac. R. Co., 12 Mo. App. 25; Prewitt v. Eddy, 115 Mo. 283; Graney v. St. Louis, etc., R. Co., 157 Mo. 666; Jackson v. Kansas City, etc., R. Co., 157 Mo. 621; Tanner v. Missouri Pac. R. Co., 161 Mo. 497.

Texas.— Hoover v. Texas, etc., R. Co., 61 Tex. 503. See also Gulf, etc., R. Co. v. Wagley, 15 Tex. Civ. App. 308.

Wisconsin.— Schneider v. Chicago, etc., R. Co., 99 Wis. 378; Schug v. Chicago, etc., R. Co., 102 Wis. 515.

5. Blanchard v. Lake Shore, etc., R. Co., 126 Ill. 416, 9 Am. St. Rep. 630; Parker v. Pennsylvania Co., 134 Ind. 673. See also Cleveland, etc., R. Co. v. Tarrt, (C. C. A.) 99 Fed. Rep. 369.

immaterial, where the excessive rate of speed was the proximate cause of the injury.¹

jj. FREQUENT OR SPECIAL TRAINS — Frequency of Trains. — The rules which regulate the distance at which trains shall run from each other on a railroad are, it has been held, intended solely for the protection of the property of the company and the safety of the employees and passengers, and not for persons who may be traveling along the highway; and no inference of negligence can be drawn from the proximity of trains in an action to recover damages for an injury done to a person while crossing the railroad track at a place not known or used as a public crossing.²

Special Trains. — So, it has been held that a railroad company has the right to run special trains at such times, on such terms, and at such increased rates of speed, within the limits of prudence and safety to its passengers, as the necessities or convenience of its business may require; and hence a charge of the court is erroneous which assumes or implies that the running of trains off schedule time or at increased rates of speed is, *per se*, negligence.³

kk. DUTY TO STOP TRAIN. — A person managing a locomotive is not required to check the speed of his train or to take measures to stop it whenever any one is seen on or near the track, since to stop for every mere possibility of danger would not only hinder public travel, but would endanger the safety of passengers in view of the necessity of making time to avoid collisions; but he is required to do so only when the perilous position of such person has been discovered and the circumstances are such that no presumption arises that such person will leave the track or otherwise avoid the collision.⁴

1. Vicksburg, etc., R. Co. *v.* McGowan, 62 Miss. 682, 52 Am. Rep. 205; Alabama, etc., R. Co. *v.* Carter, 77 Miss. 511; Jackson *v.* Kansas City, etc., R. Co., 157 Mo. 622.

2. Philadelphia, etc., R. Co. *v.* Spearen, 47 Pa. St. 300, 86 Am. Dec. 544. Compare *Mobile, etc., R. Co. v. Roberts*, (Miss. 1898) 23 So. Rep. 393.

3. East Tennessee, etc., R. Co. *v.* Winters, 85 Tenn. 240.

4. *Duty to Stop Train — United States.* — *Saladana v. Galveston, etc., R. Co.*, 43 Fed. Rep. 862; *Atlantic, etc., R. Co.'s Case*, 4 Hughes (U. S.) 157.

Alabama. — *Cook v. Central R., etc., Co.*, 67 Ala. 533; *Central R., etc., Co. v. Vaughan*, 93 Ala. 209, 30 Am. St. Rep. 50; *Goodwin v. Central R., etc., Co.*, 96 Ala. 445; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Louisville, etc., R. Co. v. Black*, 89 Ala. 313; *Alabama G. S. R. Co. v. Moorner*, 116 Ala. 642.

California. — *Esrey v. Southern Pac. R. Co.*, 88 Cal. 399.

Connecticut. — *Nolan v. New York, etc., R. Co.*, 53 Conn. 461.

Florida. — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Georgia. — *Central R., etc., Co. v. Denson*, 84 Ga. 774; *Atlanta, etc., R. Co. v. Gravitt*, 93 Ga. 369, 44 Am. St. Rep. 145; *Gammage v. Atlanta, etc., R. Co.*, 97 Ga. 62.

Illinois. — *Illinois Cent. R. Co. v. Frelka*, 9 Ill. App. 605; *Callaway v. Walters*, 63 Ill. App. 562; *Callaway v. Spurgeon*, 63 Ill. App. 571, *affirmed* *Peirce v. Walters*, 164 Ill. 560; *Chicago, etc., R. Co. v. Austin*, 69 Ill. 426; *Illinois Cent. R. Co. v. Modglin*, 85 Ill. 481; *Chicago, etc., R. Co. v. Thompson*, 99 Ill. App. 277.

Indiana. — *Barr v. Chicago, etc., R. Co.*, 10

Ind. App. 433; *Evansville, etc., R. Co. v. Hiatt*, 17 Ind. 102; *Terre Haute, etc., R. Co. v. Graham*, 46 Ind. 239; *Palmer v. Chicago, etc., R. Co.*, 112 Ind. 250; *Pennsylvania Co. v. Meyers*, 136 Ind. 242.

Indian Territory. — *Gulf, etc., R. Co. v. Bolton*, 2 Indian Ter. 463.

Iowa. — *Moore v. Central R. Co.*, 47 Iowa 688; *Vreeland v. Chicago, etc., R. Co.*, 92 Iowa 279; *Baker v. Chicago, etc., R. Co.*, 95 Iowa 163.

Kansas. — *Tennis v. Inter-State Consol. Rapid Transit R. Co.*, 45 Kan. 503.

Kentucky. — *Shittenhelm v. L., etc., R. Co.*, 5 Ky. L. Rep. 325; *Louisville, etc., R. Co. v. Tinkham*, (Ky. 1898) 44 S. W. Rep. 439; *Louisville, etc., R. Co. v. Taaffe*, 106 Ky. 535; *Ward v. Illinois Cent. R. Co.*, (Ky. 1900) 56 S. W. Rep. 807; *Becker v. Louisville, etc., R. Co.*, (Ky. 1901) 61 S. W. Rep. 997; *Wren v. Louisville, etc., R. Co.*, (Ky. 1892) 20 S. W. Rep. 215, 14 Ky. L. Rep. 324; *Barber v. Cincinnati, etc., R. Co.*, (Ky. 1893) 21 S. W. Rep. 340, 14 Ky. L. Rep. 869; *Louisville, etc., R. Co. v. Coleman*, 86 Ky. 556.

Massachusetts. — *June v. Boston, etc., R. Co.*, 153 Mass. 79.

Michigan. — *Bouwmeester v. Grand Rapids, etc., R. Co.*, 63 Mich. 557; *Redson v. Michigan Cent. R. Co.*, 120 Mich. 671; *Starbard v. Detroit, etc., R. Co.*, 122 Mich. 23.

Minnesota. — *Erickson v. St. Paul, etc., R. Co.*, 41 Minn. 500; *Johnson v. Truesdale*, 46 Minn. 345.

Mississippi. — *Jamieson v. Illinois Cent. R. Co.*, 63 Miss. 33; *Mobile, etc., R. Co. v. Stroud*, 64 Miss. 784; *Hasie v. Alabama, etc., R. Co.*, 78 Miss. 413.

Missouri. — *Bell v. Hannibal, etc., R. Co.*, 72 Mo. 50; *Maloy v. Wabash, etc., R. Co.*, 84

Effect of Giving Signal as Dispensing with Necessity of Stopping Train. — The mere fact that an engineer fails to stop the train after a person is seen on or near the

Mo. 270; *Shaw v. Missouri Pac. R. Co.*, 104 Mo. 648; *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384.

Nebraska. — *Union Pac. R. Co. v. Mertes*, 35 Neb. 204; *Omaha, etc., R. Co. v. Cook*, 42 Neb. 905.

New Hampshire. — *Shannon v. Boston, etc., R. Co.*, (N. H. 1902) 51 Atl. Rep. 1074.

New Mexico. — *Candelaria v. Atchison, etc., R. Co.*, 6 N. Mex. 266.

New York. — *Remer v. Long Island R. Co.*, 36 Hun (N. Y.) 253; *White v. New York Cent., etc., R. Co.*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 6, 65 Hun (N. Y.) 621; *Meagher v. Coopers-town, etc., R. Co.*, 75 Hun (N. Y.) 455; *McKenna v. New York Cent., etc., R. Co.*, 8 Daly (N. Y.) 304, *affirmed* 9 Daly (N. Y.) 262; *Swift v. Staten Island Rapid Transit R. Co.*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 316; *Burnes v. Staten Island Rapid Transit R. Co.*, (Supm. Ct. Gen. T.) 17 N. Y. Supp. 741; *Bernhard v. Rensselaer, etc., R. Co.*, 1 Abb. App. Dec. (N. Y.) 131; *Chrystal v. Troy, etc., R. Co.*, 105 N. Y. 164; *Spooner v. Delaware, etc., R. Co.*, 115 N. Y. 22.

North Carolina. — *Parker v. Wilmington, etc., R. Co.*, 86 N. Car. 221; *Clark v. Wilmington, etc., R. Co.*, 109 N. Car. 430; *Smith v. Norfolk, etc., R. Co.*, 114 N. Car. 728; *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616, 53 Am. St. Rep. 611; *Pharr v. Southern R. Co.*, 119 N. Car. 751; *Little v. Carolina Cent. R. Co.*, 119 N. Car. 771; *McLamb v. Wilmington, etc., R. Co.*, 122 N. Car. 862; *Upton v. South Carolina, etc., R. Co.*, 128 N. Car. 173.

Oregon. — *Cogswell v. Oregon, etc., R. Co.*, 6 Oregon 417.

Rhode Island. — *Chaffee v. Old Colony R. Co.*, (R. I. 1896) 35 Atl. Rep. 47.

Tennessee. — *Louisville, etc., R. Co. v. Howard*, 90 Tenn. 144.

Texas. — *Gregory v. Southern Pac. R. Co.*, 2 Tex. Civ. App. 279; *International, etc., R. Co. v. Garcia*, 75 Tex. 583; *Houston, etc., R. Co. v. Smith*, 77 Tex. 179; *Missouri, etc., R. Co. v. Richie*, (Tex. Civ. App. 1896) 37 S. W. Rep. 868; *Texas, etc., R. Co. v. Nicholson*, (Tex. Civ. App. 1893) 22 S. W. Rep. 770; *Texas, etc., R. Co. v. Roberts*, 14 Tex. Civ. App. 532; *St. Louis Southwestern R. Co. v. Bishop*, 14 Tex. Civ. App. 504; *Texas, etc., R. Co. v. Brown*, 14 Tex. Civ. App. 697; *Houston, etc., R. Co. v. Hartnett*, (Tex. Civ. App. 1898) 48 S. W. Rep. 773; *Houston, etc., R. Co. v. Wallace*, 21 Tex. Civ. App. 394; *Houston, etc., R. Co. v. Harvin*, (Tex. Civ. App. 1899) 54 S. W. Rep. 629; *Gulf, etc., R. Co. v. Hill*, (Tex. Civ. App. 1900) 58 S. W. Rep. 255; *San Antonio, etc., R. Co. v. Gray*, (Tex. Civ. App. 1901) 66 S. W. Rep. 229; *Missouri Pac. R. Co. v. Weisen*, 65 Tex. 443.

Virginia. — *Richmond, etc., R. Co. v. Anderson*, 31 Gratt. (Va.) 812, 31 Am. Rep. 750; *Farley v. Richmond, etc., R. Co.*, 81 Va. 783; *Norfolk, etc., R. Co. v. Carper*, 88 Va. 556; *Seaboard, etc., R. Co. v. Joyner*, 92 Va. 354.

West Virginia. — *Teel v. Ohio River R. Co.*, 49 W. Va. 85.

Wisconsin. — *Friend v. Chicago, etc., R. Co.*, 104 Wis. 663.

A Question for Jury. — Whether the railroad company used all proper efforts to stop the train and avoid the injury after discovering a trespasser on the track is, as a general rule, a question for the jury.

United States. — *Baltimore, etc., R. Co. v. Hellenthal*, (C. C. A.) 88 Fed. Rep. 116.

Alabama. — *Glass v. Memphis, etc., R. Co.*, 94 Ala. 581.

Arkansas. — *Memphis, etc., R. Co. v. Sanders*, 43 Ark. 225.

Georgia. — *Clay v. Macon, etc., R. Co.*, 111 Ga. 839.

Illinois. — *Martin v. Chicago, etc., R. Co.*, 194 Ill. 138.

Iowa. — *Payne v. Humeston, etc., R. Co.*, 70 Iowa 584; *Goodrich v. Burlington, etc., R. Co.*, 103 Iowa 412.

Kentucky. — *Newport News, etc., R. Co. v. Deuser*, 97 Ky. 92; *Becker v. Louisville, etc., R. Co.*, (Ky. 1901) 61 S. W. Rep. 997. 22 Ky. L. Rep. 1893; *Vanarsdell v. Louisville, etc., R. Co.*, (Ky. 1901) 65 S. W. Rep. 858.

Mississippi. — *Watley v. Mobile, etc., R. Co.*, (Miss. 1891) 9 So. Rep. 445; *Christian v. Illinois Cent. R. Co.*, 71 Miss. 237.

Missouri. — *Reardon v. Missouri Pac. R. Co.*, 114 Mo. 384.

Nebraska. — *Swindell v. Chicago, etc., R. Co.*, 44 Neb. 841.

Gross Negligence Required under Massachusetts Statute — Injury to Servant of Independent Contractor. — *Chisholm v. Old Colony R. Co.*, 159 Mass. 3.

For the Rule under the Tennessee Statute, see *Louisville, etc., R. Co. v. Colman*, 86 Ky. 556; *Louisville, etc., R. Co. v. Connor*, 9 Heisk. (Tenn.) 19; *East Tennessee, etc., R. Co. v. Swaney*, 5 Lea (Tenn.) 119; *East Tennessee, etc., R. Co. v. Pratt*, 85 Tenn. 9; *Chesapeake, etc., R. Co. v. Foster*, 88 Tenn. 672; *Patton v. East Tennessee R. Co.*, 89 Tenn. 370; *Knoxville, etc., R. Co. v. Acuff*, 92 Tenn. 27; *East Tennessee, etc., R. Co. v. Humphreys*, 12 Lea (Tenn.) 200.

Duty of Fireman to Notify Engineer of Danger. — *Purcell v. Chicago, etc., R. Co.*, 109 Iowa 628, 77 Am. St. Rep. 557.

When Exercise of Care in Stopping Cars No Defense. — In *Chicago, etc., R. Co. v. Anderson*, 166 Ill. 572, it was held that where a railroad company was negligent in moving its cars on a coal company's track, as a result of which an employee of the coal company was killed, the use of due care in stopping the moving cars after the danger was discovered was held to constitute no defense.

Failure to Attempt to Stop Train Immaterial if It Would Have Been Unsuccessful. — *Dull v. Cleveland, etc., R. Co.*, 21 Ind. App. 571; *Sinclair v. Chicago, etc., R. Co.*, 133 Mo. 233.

A Statutory Regulation Requiring Trains to Stop Before Crossing the Track of Another Road has been held to be intended to secure the safety of trains at crossings, and not to protect trespassers using the track without right. *Gresham v. Louisville, etc., R. Co.*, (Ky. 1894) 24 S. W. Rep. 869, 15 Ky. L. Rep. 599.

track, and, indeed, to some extent after his dangerous position is realized, even if there was time to stop the train, will not render the company liable, provided the proper signals of warning have been given.¹

Indistinguishable Object On or Near Track. — There is no duty resting upon the men in charge of a train to stop or slow up at the sight of every object upon the track the precise nature of which cannot be understood, unless it be such as from its appearance and the surrounding circumstances is of a character to indicate danger either to the object or to the train. Hence, if the engineer or other person in charge of the train honestly mistakes a child or other helpless person for some inanimate object, or animal other than a human being, until it is too late to avoid the injury, the company will not be liable.² On the other hand, it has been held that the railroad company will be liable if, after discovering an object on or near its track, the trainmen fail to exercise the requisite degree of care in discovering that it was a child or other helpless person or to endeavor to avoid injury after such discovery.³

(7) *Contributory Negligence* — (a) **Voluntarily Occupying Place of Danger** — *aa. IN GENERAL.* — If a person without any reasonable necessity therefor occupies a place on or near a railroad track which he knows to be dangerous, or which, by the exercise of ordinary observation or forethought, he might have known to be so, he cannot complain of any injury of which his negligence was thus the proximate cause.⁴

bb. SLEEPING ON TRACK. — To go to sleep upon a railroad track is an act of

1. Illinois Cent. R. Co. v. Hocker, (Ky. 1900) 55 S. W. Rep. 438; June v. Boston, etc., R. Co., 153 Mass. 79; Erickson v. St. Paul, etc., R. Co., 41 Minn. 500. See also Williams v. Southern Pac. R. Co., 72 Cal. 120.

Under Statute in Tennessee it has been held that where an object appears on a railroad track in front of a train, and so near as to make it impossible for all the precautions to be observed before the collision, it is the duty of the engineer first to use those precautions most likely to prevent an accident, such, for instance, as blowing the whistle to frighten the object off. Memphis, etc., R. Co. v. Scott, 87 Tenn. 494.

2. **Duty to Stop When Unknown Object Is Seen on Track** — *United States.* — New York, etc., R. Co. v. Kelly, (C. C. A.) 93 Fed. Rep. 745.

Alabama. — Columbus, etc., R. Co. v. Wood, 86 Ala. 164.

Arkansas. — Little Rock, etc., R. Co. v. Haynes, 47 Ark. 497.

California. — Compare Meeks v. Southern Pac. R. Co., 56 Cal. 513, 38 Am. Rep. 67.

Kansas. — Missouri Pac. R. Co. v. Prewitt, 59 Kan. 734.

Michigan. — Compare Keyser v. Chicago, etc., R. Co., 56 Mich. 559, 66 Mich. 390, 56 Am. Rep. 405, in which it was held to be negligence, as a matter of law, for the engineer not to slow down the speed of his engine to such a rate that in approaching it he could have stopped his train if necessary to prevent injury before reaching the objective danger.

Mississippi. — Louisville, etc., R. Co. v. Williams, 69 Miss. 631.

New York. — Murch v. Western New York, etc., R. Co., 78 Hun (N. Y.) 601.

Virginia. — Tucker v. Norfolk, etc., R. Co., 92 Va. 549; Norfolk, etc., R. Co. v. Dunaway, 93 Va. 29.

3. Isabel v. Hannibal, etc., R. Co., 60 Mo. 475; German v. Bennington, etc., R. Co., 71 Vt. 70.

Failure to Stop on Discovery of Wagon Box in Neighborhood of Decedent. — McDonald v. Chicago, etc., R. Co., 75 Wis. 121.

Place Frequented by Children. — In Hyde v. Union Pac. R. Co., 7 Utah 356, it was held that when the servants of a railroad company saw an object, which later proved to be a child, on the track in a place frequented by children and others, and failed to slacken the speed of the engine so as to be able to stop the train before striking the child, it was negligence, and that the child was not such a trespasser as to prevent a recovery against the railroad.

4. **Voluntarily Occupying Place of Danger** — *Alabama.* — East Tennessee, etc., R. Co. v. King, 81 Ala. 177 (standing on track between two cars).

Arkansas. — Little Rock, etc., R. Co. v. Cavenesse, 48 Ark. 106 (standing between platform and track).

California. — Ryall v. Central Pac. R. Co., 76 Cal. 474 (standing between tracks on which trains are approaching); Esrey v. Southern Pac. R. Co., 88 Cal. 399 (standing between track and platform).

Georgia. — Georgia Southern, etc., R. Co. v. George, 92 Ga. 760 (attempting to board moving train).

Illinois. — Burling v. Illinois Cent. R. Co., 85 Ill. 18 (going over road on hand car at night when train is expected); Borg v. Chicago, etc., R. Co., 162 Ill. 348 (catching hold of ladder of passing freight car); Chicago, etc., R. Co. v. Reichert, 69 Ill. App. 91 (standing on platform too close to track).

Indiana. — Ream v. Pittsburgh, etc., R. Co., 49 Ind. 93 (riding on hand car at night for amusement); Parker v. Pennsylvania R. Co., 134 Ind. 673 (going into narrow archway through which track ran); Hadley v. Lake Erie, etc., R. Co., (Ind. App. 1897) 46 N. E. Rep. 935 (attempting to unload goods from car in train).

Iowa. — Mabbott v. Illinois Cent. R. Co.,

gross negligence,¹ and the fact that the sleeper was intoxicated and was thus oblivious to the danger to which he exposed himself does not affect the matter.²

cc. GOING UNDER OR BETWEEN CARS. — To pass under³ or between⁴ the cars of a train which one knows, or ought to know, is liable to move at any moment, or between cars to one of which a train in full view is about to couple,⁵ is an act of gross negligence, unless the person attempting it is assured by some one in authority that it is safe to do so.⁶

dd. PERSONS OF DEFECTIVE SENSES WALKING ON TRACK. — It has been held to be contributory negligence for a deaf person,⁷ or one with defective eyesight,⁸ to walk along a railroad track.

ee. CROSSING RAILROAD BRIDGE OR TRESTLE. — It has been held to be negligence for a person to attempt to cross a railroad bridge or trestle,⁹ especially at a

(Iowa 1902) 89 N. W. Rep. 1076 (placing mail cart close to train which has stopped momentarily only).

Kansas. — *Atchison, etc., R. Co. v. Todd*, 54 Kan. 551 (sitting down under car).

Massachusetts. — *Sonier v. Boston, etc., R. Co.*, 141 Mass. 10 (standing on platform too close to track); *Rigg v. Boston, etc., R. Co.*, 158 Mass. 309 (standing too close to track); *Martyn v. New York, etc., Express Co.*, 176 Mass. 401 (carrying tricycle across tracks to express car).

Minnesota. — *Lando v. Chicago, etc., R. Co.*, 81 Minn. 279 (driving horse too close to track); *Fezler v. Willmar, etc., R. Co.*, 85 Minn. 252 (running beside moving train).

Missouri. — *Skipton v. St. Joseph, etc., R. Co.*, 82 Mo. App. 134 (standing too close to track); *Loeffler v. Missouri Pac. R. Co.*, 96 Mo. 267 (walking through tunnel).

Pennsylvania. — *McGeehan v. Lehigh Valley R. Co.*, 149 Pa. St. 188; *Loughrey v. Pennsylvania R. Co.*, 201 Pa. St. 297; *Moore v. Philadelphia, etc., R. Co.*, 108 Pa. St. 349 (standing too close to track).

Tennessee. — *Nashville, etc., R. Co. v. Smith*, 9 Lea (Tenn.) 470 (standing between track and platform).

Texas. — *Texas, etc., R. Co. v. Roberts*, 2 Tex. Civ. App. 111 (riding mule on track).

Wisconsin. — *McDonald v. Chicago, etc., R. Co.*, 75 Wis. 121 (driving team along railroad track).

Negligence Question of Fact for Jury. — *St. Louis, etc., R. Co. v. Bennett*, (C. C. A.) 69 Fed. Rep. 525; *Chadderdon v. Michigan Cent. R. Co.*, 100 Mich. 203.

1. Sleeping on Railroad Track — *California.* — *Williams v. Southern Pac. R. Co.*, (Cal. 1886) 11 Pac. Rep. 849.

Georgia. — *Sims v. Macon, etc., R. Co.*, 28 Ga. 93; *Central R. Co. v. Brinson*, 70 Ga. 207; *Raden v. Georgia R. Co.*, 78 Ga. 47; *Parish v. Western, etc., R. Co.*, 102 Ga. 285.

Indiana. — *Krenzer v. Pittsburg, etc., R. Co.*, 151 Ind. 587, 68 Am. St. Rep. 252.

Kentucky. — *Roseberry v. Newport News, etc., R. Co.*, (Ky. 1897) 39 S. W. Rep. 407.

North Carolina. — *Pickett v. Wilmington, etc., R. Co.*, 117 N. Car. 616, 53 Am. St. Rep. 611.

Texas. — *Houston, etc., R. Co. v. Smith*, 77 Tex. 179.

Virginia. — *Rudd v. Richmond, etc., R. Co.*, 80 Va. 546.

West Virginia. — *Teel v. Ohio River R. Co.*, 49 W. Va. 85.

2. While Intoxicated — *Arkansas.* — *Little Rock, etc., R. Co. v. Haynes*, 47 Ark. 497.

Georgia. — *Southwestern R. Co. v. Hankerson*, 61 Ga. 114.

Illinois. — *Illinois Cent. R. Co. v. Hutchinson*, 47 Ill. 408.

Kentucky. — *Embry v. Louisville, etc., R. Co.*, (Ky. 1896) 36 S. W. Rep. 1123.

Maryland. — *Price v. Philadelphia, etc., R. Co.*, 84 Md. 506.

Minnesota. — *Denman v. St. Paul, etc., R. Co.*, 26 Minn. 357.

North Carolina. — *Norwood v. Raleigh, etc., R. Co.*, 111 N. Car. 236; *Lloyd v. Albemarle, etc., R. Co.*, 118 N. Car. 1010, 54 Am. St. Rep. 764; *Baker v. Wilmington, etc., R. Co.*, 118 N. Car. 1015.

Texas. — *Smith v. Fordyce*, (Tex. 1891) 18 S. W. Rep. 663; *Missouri Pac. R. Co. v. Brown*, (Tex. 1891) 18 S. W. Rep. 670.

Virginia. — *Virginia Midland R. Co. v. Boswell*, 82 Va. 932.

3. Passing under Cars of Train. — *Memphis, etc., R. Co. v. Copeland*, 61 Ala. 376; *Central R., etc., Co. v. Dixon*, 42 Ga. 327.

4. Passing Between Cars of Train. — *Chicago, etc., R. Co. v. Dewey*, 26 Ill. 255, 79 Am. Dec. 374; *Chicago, etc., R. Co. v. Coss*, 73 Ill. 394; *Lewis v. Baltimore, etc., R. Co.*, 38 Md. 588, 17 Am. Rep. 521; *O'Mara v. Delaware, etc., Canal Co.*, 18 Hun (N. Y.) 192; *Rodriguez v. International, etc., R. Co.*, (Tex. Civ. App. 1901) 64 S. W. Rep. 1005.

Circumstances Making Negligence of Act Question of Fact. — *Murray v. Fitchburg R. Co.*, 165 Mass. 448; *Mahar v. Grand Trunk R. Co.*, 19 Hun (N. Y.) 32.

5. Bertelson v. Chicago, etc., R. Co., 5 Dak. 313.

6. Chicago, etc., R. Co. v. Sykes, 96 Ill. 162.

7. Contributory Negligence for Deaf Person to Walk on Track. — *Laicher v. New Orleans, etc., R. Co.*, 28 La. Ann. 320; *Schexnaydre v. Texas, etc., R. Co.*, 46 La. Ann. 248, 49 Am. St. Rep. 321.

8. Person with Defective Eyesight. — *Maloy v. Wabash, etc., R. Co.*, 84 Mo. 270.

9. Attempt to Cross Railroad Bridges or Trestles. — *Tennenbrock v. South Pac. Coast R. Co.*, 59 Cal. 269.

It is not contributory negligence for a child to go upon a railroad trestle to escape from

time when a train is known to be due,¹ or where approaching trains are concealed from view by a curve in the track.²

(b) **Failure to Look and Listen for Approaching Trains** — *aa. IN GENERAL.* — As a general rule, any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains;³ and if, in disregard of this duty to his own safety, he steps upon the track without looking or listening,⁴ or

cattle of which she is afraid. *Cassida v. Oregon R., etc., Co.*, 14 Oregon 551.

1. *Bentley v. Georgia Pac. R. Co.*, 86 Ala. 484; *Phillips v. East Tennessee, etc., R. Co.*, 87 Ga. 272.

2. *May v. Central R., etc., Co.*, 80 Ga. 363; *Virginia Midland R. Co. v. Barksdale*, 82 Va. 330.

Where a Railroad Bridge Has Been Customarily Used by the Public as a footway with the knowledge and acquiescence of the company, a person, as a matter of law, is not guilty of contributory negligence in crossing it, but his negligence is a question of fact for the jury. *Thompson v. Northern Pac. R. Co.*, (C. C. A.) 93 Fed. Rep. 384.

3. **The Fact that a Person Is upon the Track by Right does not relieve him of the obligation to exercise reasonable care for his own safety.** *Louisville, etc., R. Co. v. Hairston*, 97 Ala. 351; *Illinois Cent. R. Co. v. Hetherington*, 83 Ill. 510; *Carlin v. Chicago, etc., R. Co.*, 37 Iowa 316; *Johnson v. Chicago, etc., R. Co.*, 91 Iowa 248; *Cole v. New York, etc., R. Co.*, 174 Mass. 537; *Rogstad v. St. Paul, etc., R. Co.*, 31 Minn. 208; *Meredith v. Richmond, etc., R. Co.*, 108 N. Car. 616.

4. **Stepping upon Railroad Track Without Looking or Listening** — *England.* — *Davey v. London, etc., R. Co.*, 12 Q. B. D. 70.

Alabama. — *Gothard v. Alabama G. S. R. Co.*, 67 Ala. 114; *Ensley R. Co. v. Chewning*, 93 Ala. 24.

Colorado. — *Denver, etc., R. Co. v. Ryan*, 17 Colo. 98.

Florida. — *Florida Cent., etc., R. Co. v. Foxworth*, 41 Fla. 1.

Georgia. — *Dowdy v. Georgia R. Co.*, 88 Ga. 726; *Jenkins v. Central R., etc., Co.*, 89 Ga. 756.

Illinois. — *East St. Louis Connecting R. Co. v. O'Hara*, 150 Ill. 580.

Indiana. — *Ohio, etc., R. Co. v. Hill*, 117 Ind. 56.

Iowa. — *Buelow v. Chicago, etc., R. Co.*, 92 Iowa 240; *Baker v. Chicago, etc., R. Co.*, 95 Iowa 163.

Kansas. — *Bess v. Atchison, etc., R. Co.*, 62 Kan. 299.

Massachusetts. — *Tully v. Fitchburg R. Co.*, 134 Mass. 499.

Michigan. — *Braudy v. Detroit, etc., R. Co.*, 107 Mich. 100; *Spavin v. Lake Shore, etc., R. Co.*, (Mich. 1902) 90 N. W. Rep. 325.

Minnesota. — *Smith v. Minneapolis, etc., R. Co.*, 26 Minn. 419.

Missouri. — *Lenix v. Missouri Pac. R. Co.*, 76 Mo. 86; *Guenther v. St. Louis, etc., R. Co.*, 95 Mo. 296; *Lien v. Chicago, etc., R. Co.*, 79 Mo. App. 475.

New Jersey. — *Hamilton v. Delaware, etc., R. Co.*, 50 N. J. L. 263.

New York. — *Smith v. New York Cent., etc.,*

R. Co., 63 Hun (N. Y.) 624, 17 N. Y. Supp. 400. *Henavie v. New York Cent., etc., R. Co.*, 10 N. Y. App. Div. 64; *Riester v. New York Cent., etc., R. Co.*, 16 N. Y. App. Div. 216; *White v. New York Cent., etc., R. Co.*, 68 N. Y. App. Div. 561; *Kilbride v. New York Cent., etc., R. Co.*, 17 N. Y. App. Div. 177.

North Carolina. — *Smith v. Norfolk, etc., R. Co.*, 114 N. Car. 728; *Markham v. Raleigh, etc., R. Co.*, 119 N. Car. 715.

Ohio. — *Cincinnati, etc., R. Co. v. Lally*, 7 Ohio Cir. Dec. 711, 14 Ohio Cir. Ct. 333.

Pennsylvania. — *Aiken v. Pennsylvania R. Co.*, 130 Pa. St. 380, 17 Am. St. Rep. 775.

Tennessee. — *Patton v. East Tennessee, etc., R. Co.*, 89 Tenn. 370.

Texas. — *Sanchez v. San Antonio, etc., R. Co.*, (Tex. Civ. App. 1894) 27 S. W. Rep. 922.

Wisconsin. — *Noian v. Milwaukee, etc., R. Co.*, 91 Wis. 16.

The plaintiff's own testimony that he looked both ways and saw no train will be disregarded when it was daylight at the time and there was no physical obstacle to his seeing the train had he looked. *Marland v. Pittsburgh, etc., R. Co.*, 123 Pa. St. 487, 10 Am. St. Rep. 541.

The fact that a person who stepped upon the track immediately in front of a moving train thought that it was standing still does not excuse his negligence when he might, by the exercise of proper care, have observed its motion. *Conway v. Troy, etc., R. Co.*, (Supm. Ct. Gen. T.) 1 N. Y. St. Rep. 587.

Going on Track Between Detached Portions of Train. — If a person, without looking or listening, steps upon a railroad track immediately after a train has passed over it, upon the assumption that all of the train has passed, and is injured or killed by the coming up of the rear portion, which has become detached from the part which has passed, he is guilty of such negligence as to bar a recovery. *Central R. etc., Co. v. Raiford*, 82 Ga. 400; *Martin v. Georgia R., etc., Co.*, 95 Ga. 361; *Louisville, etc., R. Co. v. Schmetzer*, 94 Ky. 424; *John v. Louisville, etc., R. Co.*, (Ky. 1889) 10 S. W. Rep. 417; *Donaldson v. Milwaukee, etc., R. Co.*, 21 Minn. 293; *Patton v. East Tennessee, etc., R. Co.*, 89 Tenn. 370; *Galveston, etc., R. Co. v. Chambers*, 73 Tex. 296; *Texas, etc., R. Co. v. Hare*, 4 Tex. Civ. App. 18. See also *Ellerbe v. Carolina Cent. R. Co.*, 118 N. Car. 1024.

Stepping upon One Track to Avoid Train on Another. — If a person, to avoid a train approaching on a track upon which he has been walking, or which he is about to cross, stands upon a parallel track to allow such train to pass him, without exercising reasonable vigilance to observe the approach of a train on the track upon which he is standing, he is guilty of such negligence as to preclude a recovery.

Arkansas. — *St. Louis, etc., R. Co. v. Ross*,

if he stands upon the track¹ or walks along it² in such a state of mental

56 Ark. 271; St. Louis, etc., R. Co. v. Taylor, 64 Ark. 364.

Georgia. — Southern R. Co. v. Barfield, 112 Ga. 181.

Illinois. — Austin v. Chicago, etc., R. Co., 91 Ill. 35; Chicago, etc., R. Co. v. Flint, 22 Ill. App. 502.

Indiana. — Pennsylvania R. Co. v. Meyers, 136 Ind. 242.

Kansas. — Atchison, etc., R. Co. v. Priest, 50 Kan. 16.

Kentucky. — Jacobs v. Ohio, etc., R. Co., (Ky. 1898) 45 S. W. Rep. 509.

Michigan. — Michigan Cent. R. Co. v. Campau, 35 Mich. 468; Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410.

New York. — Hudson v. Erie R. Co., 61 N. Y. App. Div. 134.

North Carolina. — Meredith v. Richmond, etc., R. Co., 108 N. Car. 616.

Virginia. — Norfolk, etc., R. Co. v. Wilson, 90 Va. 263, 44 Am. St. Rep. 906.

Passing Under, Over, or Between Standing Cars and Stepping upon Track Beyond. — Southeast, etc., R. Co. v. Stotlar, 43 Ill. App. 94; Illinois Cent. R. Co. v. Beard, 49 Ill. App. 232; Ryan v. New York Cent., etc., R. Co., 17 N. Y. App. Div. 221.

Passing Around End of Train and Stepping upon Track Beyond. — East Tennessee, etc., R. Co. v. Kornegay, 92 Ala. 228; Chicago, etc., R. Co. v. Bednorz, 57 Ill. App. 309; Pzolla v. Michigan Cent. R. Co., 54 Mich. 273.

Waiting for Train to Pass on Near Track and Immediately Crossing Behind It and Stepping upon Track Beyond. — Holland v. Chicago, etc., R. Co., 18 Fed. Rep. 243; Comby v. New York Cent., etc., R. Co., 25 N. Y. App. Div. 309.

Stepping from Mill Door Directly on to Track. — Sabine, etc., R. Co. v. Dean, 76 Tex. 73.

Knowledge that Train Is Due or Approaching. — The obligation to look and listen for approaching trains before going upon a railroad track is increased when the person knows that a train is due, St. Louis Southwestern R. Co. v. Dingman, 62 Ark. 245; Hinken v. Iowa Cent. R. Co., 97 Iowa 603; Barker v. Hannibal, etc., R. Co., 98 Mo. 50; Scott v. Pennsylvania R. Co., 130 N. Y. 679, or has been expressly warned that it is approaching, Banning v. Chicago, etc., R. Co., 89 Iowa 74.

1. Standing On or Beside Railroad Track — California. — Trouslair v. Pacific Coast Steamship Co., 80 Cal. 521.

Georgia. — Rome R. Co. v. Barnett, 89 Ga. 718.

Indiana. — Dull v. Cleveland, etc., R. Co., 21 Ind. App. 571.

Massachusetts. — Moore v. Boston, etc., R. Co., 159 Mass. 399.

Michigan. — Mahlen v. Lake Shore, etc., R. Co., 49 Mich. 585; Farmer v. Michigan Cent. R. Co., 99 Mich. 131.

Missouri. — Bell v. Hannibal, etc., R. Co., 86 Mo. 599; Tanner v. Missouri Pac. R. Co., 161 Mo. 497; White v. Atchison, etc., R. Co., 84 Mo. App. 411.

New Jersey. — Diebold v. Pennsylvania R. Co., 50 N. J. L. 478.

New York. — Lagerman v. New York Cent., etc., R. Co., 53 N. Y. App. Div. 283.

Pennsylvania. — Dell v. Phillips Glass Co., 169 Pa. St. 549.

Texas. — Galveston, etc., R. Co. v. Ryon, 80 Tex. 59.

Wisconsin. — Lofdahl v. Minneapolis, etc., R. Co., 88 Wis. 421.

2. Walking On or Beside Track — United States. — Kirtley v. Chicago, etc., R. Co., 65 Fed. Rep. 386; Missouri Pac. R. Co. v. Moseley, 12 U. S. App. 601; Kansas City, etc., R. Co. v. Cook, 31 U. S. App. 277.

Alabama. — Mizzell v. Southern R. Co., (Ala. 1901) 31 So. Rep. 86.

California. — Holmes v. South Pac. Coast R. Co., 97 Cal. 161; Kenna v. Central Pac. R. Co., 101 Cal. 26.

Colorado. — Colorado Cent. R. Co. v. Holmes, 5 Colo. 516.

District of Columbia. — Stearman v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 46.

Georgia. — White v. Central R., etc., Co., 83 Ga. 595.

Illinois. — Illinois Cent. R. Co. v. Godfrey, 71 Ill. 500, 22 Am. Rep. 112; Austin v. Chicago, etc., R. Co., 91 Ill. 35; Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Chicago, etc., R. Co. v. Olson, 12 Ill. App. 245; Southeast, etc., R. Co. v. Stotlar, 43 Ill. App. 94.

Indiana. — Terre Haute, etc., R. Co. v. Graham, 46 Ind. 239.

Iowa. — Lang v. Holiday Creek R. Co., 42 Iowa 677; Richards v. Chicago, etc., R. Co., 81 Iowa 426; Yeager v. Atchison, etc., R. Co., 94 Iowa 46.

Maryland. — Baltimore, etc., R. Co. v. State, 54 Md. 648.

Massachusetts. — Barstow v. Old Colony R. Co., 143 Mass. 535.

Michigan. — Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410.

Minnesota. — Johnson v. Truesdale, 46 Minn. 345.

Mississippi. — Illinois Cent. R. Co. v. Crockett, 78 Miss. 407.

New Mexico. — Candelaria v. Atchison, etc., R. Co., 6 N. Mex. 266.

New York. — Enk v. Brooklyn City R. Co., (Supm. Ct. Gen. T.) 19 N. Y. Supp. 130; Winn v. New York Cent., etc., R. Co., 65 N. Y. App. Div. 572.

North Carolina. — McAdoo v. Richmond, etc., R. Co., 105 N. Car. 140; Smith v. Norfolk, etc., R. Co., 114 N. Car. 728.

Texas. — Gulf, etc., R. Co. v. York, 74 Tex. 364.

Wisconsin. — Schmolze v. Chicago, etc., R. Co., 83 Wis. 659.

Knowledge that Train Is Behind Him. — The duty of one walking upon a railroad track to maintain a vigilant scrutiny of the track behind him is increased when he knows that there is a train there likely at any moment to move in his direction and overtake him.

District of Columbia. — Mills v. Orange, etc., R. Co., 2 MacArthur (D. C.) 314.

Indiana. — Louisville, etc., R. Co. v. Cronbach, 12 Ind. App. 666.

Iowa. — Richards v. Chicago, etc., R. Co., 81 Iowa 426; Bryson v. Chicago, etc., R. Co., 89 Iowa 677.

Kentucky. — Illinois Cent. R. Co. v. Dick, 91

abstraction,¹ or so absorbed in conversation,² or in the contemplation of some object near the track,³ as to fail to note an approaching train, or hear its warning signal,⁴ or the calls of those who would apprise him of his peril,⁵ he is guilty of such negligence as to bar an action for the injury, and the fact that the track in the direction whence the train came was obscured by smoke,⁶ or that the sound of the approaching train was drowned by some nearer and louder noise,⁷ is immaterial; for any impediment to the use of either sense, instead of being an excuse for his want of care, ought

Ky. 434; Louisville, etc., R. Co. v. Taaife, 106 Ky. 535.

Minnesota. — Carroll v. Minnesota Valley R. Co., 13 Minn. 30, 97 Am. Dec. 221.

Mississippi. — Illinois Cent. R. Co. v. Lee, 71 Miss. 895.

New Hampshire. — Davis v. Boston, etc., R. Co., 70 N. H. 519.

New York. — Ellis v. Houston, (Supm. Ct. Gen. T.) 4 N. Y. Supp. 732.

Pennsylvania. — Culp v. Delaware, etc., R. Co., 9 Kulp (Pa.) 174; Craven v. Philadelphia, etc., R. Co., 9 Pa. Co. Ct. 157.

Texas. — Houston, etc., R. Co. v. Richards, 59 Tex. 373; Eddy v. Sedgwick, (Tex. 1892) 18 S. W. Rep. 564; Gulf, etc., R. Co. v. Wilkins, (Tex. Civ. App. 1895) 32 S. W. Rep. 351.

Reliance on Expectation that Signal Will Be Given. — The fact that a person walking on the track relied upon the expectation that an approaching train would give a signal does not excuse his failure to exercise care for his own safety. Mizzell v. Southern R. Co., (Ala. 1901) 31 So. Rep. 86; Baltimore, etc., R. Co. v. Depew, 40 Ohio St. 121; Norfolk, etc., R. Co. v. Harman, 83 Va. 553.

Movement of Train in Direction Opposite to Custom. — The fact that the track on which a person is walking northward is the south-bound track does not excuse his failure to look backward from time to time. Lake Shore, etc., R. Co. v. Hart, 87 Ill. 529; Kinnare v. Chicago, etc., R. Co., 57 Ill. App. 153.

Attempting to Cross Trestle Without Listening or Watching for Approaching Train. — Provost v. Yazoo, etc., R. Co., 52 La. Ann. 1894; Mobile, etc., R. Co. v. Roberts, (Miss. 1898) 23 So. Rep. 393; Texas, etc., R. Co. v. Zachery, (Tex. Civ. App. 1894) 27 S. W. Rep. 221.

Negligence Question of Fact. — In some cases it has been held that a failure to look or listen for an approaching train was not negligence *per se*, but was a question of fact for the jury. Chicago, etc., R. Co. v. Dunleavy, 129 Ill. 132; Chicago, etc., R. Co. v. Kelly, 182 Ill. 267; Lake Shore, etc., R. Co. v. Foster, 74 Ill. App. 387; Kingma v. Chicago, etc., R. Co., 85 Ill. App. 138; Chicago, etc., R. Co. v. Jennings, 89 Ill. App. 335, reversed 190 Ill. 478; Collins v. Dillingham, 7 Tex. Civ. App. 93.

1. Finlayson v. Chicago, etc., R. Co., 1 Dill. (U. S.) 579.

Intoxication of Person Injured. — It is no excuse that the negligence of the person injured arose from intoxication.

Alabama. — Memphis, etc., R. Co. v. Womack, 84 Ala. 149.

Arkansas. — Little Rock, etc., R. Co. v. Pankhurst, 36 Ark. 371; St. Louis, etc., R. Co. v. Jordan, 65 Ark. 429.

Georgia. — Wilds v. Brunswick, etc., R. Co., 82 Ga. 667.

Michigan. — Marquette, etc., R. Co. v. Handford, 39 Mich. 537.

North Carolina. — Smith v. Norfolk, etc., R. Co., 114 N. Car. 728.

Texas. — Houston, etc., R. Co. v. Smith, 52 Tex. 178.

Virginia. — Norfolk, etc., R. Co. v. Harman, 83 Va. 553.

Wisconsin. — Anderson v. Chicago, etc., R. Co., 87 Wis. 195.

2. Tennessee Coal, etc., R. Co. v. Hansford, 125 Ala. 349; Moore v. Norfolk, etc., R. Co., 87 Va. 489; Rangeley v. Southern R. Co., 95 Va. 715.

3. **Allowing Attention to Be Absorbed in Watching Something Else** — Alabama. — Chewning v. Ensley R. Co., 100 Ala. 493.

California. — Trousdale v. Pacific Coast Steamship Co., 80 Cal. 521.

District of Columbia. — Edgerton v. Baltimore, etc., R. Co., 6 App. Cas. (D. C.) 516.

Illinois. — Chicago, etc., R. Co. v. Johnson, 53 Ill. App. 478.

Michigan. — Farmer v. Michigan Cent. R. Co., 99 Mich. 131.

Minnesota. — Heffinger v. Minneapolis, etc., R. Co., 43 Minn. 503; Johnson v. Truesdale, 46 Minn. 345.

New York. — Redmond v. Rome, etc., R. Co., (Supm. Ct. Gen. T.) 10 N. Y. Supp. 330.

Texas. — Wilson v. Ft. Worth, etc., Co., (Tex. Civ. App. 1894) 26 S. W. Rep. 753; Missouri, etc., R. Co. v. Cowles, (Tex. Civ. App. 1902) 67 S. W. Rep. 1078.

4. Lake Shore, etc., R. Co. v. Hart, 87 Ill. 529.

5. Lake Shore, etc., R. Co. v. Hart, 87 Ill. 529; Southern R. Co. v. Bruce, 97 Va. 93.

6. **Track Obscured by Smoke.** — Mills v. New York Cent., etc., R. Co., 5 N. Y. App. Div. 11; Mixsell v. New York, etc., R. Co., (Supm. Ct. Tr. T.) 22 Misc. (N. Y.) 73, 27 Civ. Pro. (N. Y.) 56.

7. **Sound of Approaching Train Drowned by Nearer Noise.** — Finlayson v. Chicago, etc., R. Co., 1 Dill. (U. S.) 579 (noise of other trains); Schmolze v. Chicago, etc., R. Co., 83 Wis. 659 (noise of sawmill near by).

Deaf Persons. — The fact that a person is deaf does not excuse his failure to detect the approach of a train, but imposes upon him the duty to exercise greater care in the use of his remaining senses.

Colorado. — Kennedy v. Denver, etc., R. Co., 10 Colo. 493.

Georgia. — McIver v. Georgia Southern, etc., R. Co., 108 Ga. 306.

Kentucky. — Louisville, etc., R. Co. v. McCombs, (Ky. 1899) 54 S. W. Rep. 179.

Mississippi. — Mobile, etc., R. Co. v. Stroud, 64 Miss. 784.

Texas. — Artusy v. Missouri Pac. R. Co., 73 Tex. 191; International, etc., R. Co. v. Garcia,

rather to have warned him of the necessity of exercising a higher diligence in the use of the other. *A fortiori* this is true when the impediment to the use of his senses is produced by the act of the person himself.¹

bb. CROSSING TRACKS AT STATIONS. — But this principle does not apply to persons alighting from or intending to take a train at a station, and who are compelled to cross a track between the train and the station. Persons in such a situation have a right to assume that trains will not be run upon the intervening track at such a time at a high rate of speed, or without giving proper warning of their approach, and it is not contributory negligence to act upon this assumption and to cross such track without stopping to look or listen.²

cc. EMPLOYEES WHOSE DUTIES REQUIRE THEIR PRESENCE UPON TRACK. — Nor does the principle apply to employees whose duties require their presence upon the track, the performance of which duties necessarily precludes their paying the strictest attention to the approach of trains.³ Whether a person in such a situation is guilty of negligence in failing to note the approach of a train is generally a question of fact to be determined by the jury, in view of all the circumstances.⁴

(c) *Attempting to Cross Track in Front of Approaching Train.* — One who attempts to cross a railroad track in front of a train which he sees approaching is guilty of negligence and cannot recover damages for an injury sustained,⁵ although the train was running at a higher rate of speed than was customary⁶ or per-

75 Tex. 583; Galveston, etc., R. Co. v. Ryon, 80 Tex. 59.

Virginia. — Tyler v. Sites, 88 Va. 470.

1. *View of Track Hindered by Bundle Carried on Shoulder.* — Rothe v. Milwaukee, etc., R. Co., 21 Wis. 256.

Track Obscured from View by Umbrella. — Yancey v. Wabash, etc., R. Co., 93 Mo. 433; Foreman v. Pennsylvania R. Co., 159 Pa. St. 541.

Cap Pulled Down Over Eyes as Protection from Storm. — Nicholson v. Erie R. Co., 41 N. Y. 525; Gulf, etc., R. Co. v. York, 74 Tex. 364.

View Obscured by Sunbonnet. — Illinois Cent. R. Co. v. Lee, 71 Miss. 895.

Cap Pulled Down Over Ears. — Chicago, etc., R. Co. v. Sweeney, 52 Ill. 325; Lake Shore, etc., R. Co. v. Blanchard, 15 Ill. App. 582. See also High v. Carolina Cent. R. Co., 112 N. Car. 385; Law v. Missouri, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 1025.

Ulster Collar Turned Up About Ears. — Scott v. Pennsylvania R. Co., 130 N. Y. 679.

2. *Crossing Tracks at Stations.* — Chicago, etc., R. Co. v. Ryan, 165 Ill. 88; Pennsylvania Co. v. Keane, 41 Ill. App. 317.

But this does not excuse the negligence of a person in going upon an intervening track directly in front of a locomotive which is moving slowly with the bell ringing. Chicago, etc., R. Co. v. Chancellor, 165 Ill. 438.

Nor does it excuse the negligence of a person who crosses the track, not at the station, but at a crossing or point near it. Lake Shore, etc., R. Co. v. Hart, 87 Ill. 529; Debbins v. Old Colony R. Co., 154 Mass. 402.

Whether a person employed about the station to get mail and express matter from the trains is guilty of contributory negligence in crossing an intervening track without stopping to look or listen has been held to be a question for the jury. Tubbs v. Michigan Cent. R. Co., 107 Mich. 108, 61 Am. St. Rep. 320.

3. *Employees Whose Duties Require Their Presence on Track.* — Chicago, etc., R. Co. v.

Woolridge, 72 Ill. App. 551, reversed 174 Ill. 330; McMarshall v. Chicago, etc., R. Co., 80 Iowa 757, 20 Am. St. Rep. 445; Tobey v. Burlington, etc., R. Co., 94 Iowa 256; Erickson v. St. Paul, etc., R. Co., 41 Minn. 500; Jordan v. Chicago, etc., R. Co., 58 Minn. 8, 49 Am. St. Rep. 486; Noonan v. New York Cent., etc., R. Co., 62 Hun (N. Y.) 618, 16 N. Y. Supp. 678.

4. *Negligence Question of Fact.* — Watts v. Richmond, etc., R. Co., 89 Ga. 277; Goodall v. New York Cent., etc., R. Co., 89 Hun (N. Y.) 559; Collins v. New York, etc., R. Co., 55 N. Y. Super. Ct. 31, affirmed 112 N. Y. 665.

A Flagman at a Crossing cannot complain of an injury from being struck by a train when it was his duty to see and give warning of its approach. Clark v. Boston, etc., R. Co., 128 Mass. 1.

5. *Attempting to Cross Track in Front of Approaching Train* — United States. — Farve v. Louisville, etc., R. Co., 42 Fed. Rep. 441.

California. — Noyes v. Southern Pac. R. Co., 92 Cal. 285.

Illinois. — Chicago, etc., R. Co. v. Dewey, 26 Ill. 255, 79 Am. Dec. 374.

Maine. — Grows v. Maine Cent. R. Co., 69 Me. 412; State v. Maine Cent. R. Co., 76 Me. 357, 49 Am. Rep. 622.

Massachusetts. — Sullivan v. New York, etc., R. Co., 154 Mass. 524; Young v. Old Colony R. Co., 156 Mass. 178.

Pennsylvania. — Irely v. Pennsylvania R. Co., 132 Pa. St. 563.

Washington. — Lewis v. Puget Sound Shore R. Co., 4 Wash. 188.

Wisconsin. — Langhoff v. Milwaukee, etc., R. Co., 23 Wis. 43.

And the plaintiff's negligence is all the more gross when he attempts to cross in defiance of a warning not to attempt it. Aiken v. Pennsylvania R. Co., 130 Pa. St. 380, 17 Am. St. Rep. 775; Galveston, etc., R. Co. v. Haas, 19 Tex. Civ. App. 645.

6. *Detroit, etc., R. Co. v. Van Steinburg*, 17 Mich. 99.

mitted by ordinance,¹ and although the engineer failed to blow the whistle² or stop the train at a railroad crossing just before,³ since the plaintiff's own negligence, and not that of the railroad company, is the proximate cause of the injury.

(d) **Remaining on Track with Knowledge of Approaching Train.** — If a person, knowing that a train is approaching, remains upon the track until it is too late for him to escape injury, he is guilty of such negligence as to bar his action for damages,⁴ even though the train was running at an illegal speed.⁵

(e) **Mismanagement of Horses Frightened by Train.** — It has been held to be negligence to leave a team of horses unhitched near a railroad track at a time when a train may reasonably be expected, and no damages can be recovered for personal injuries sustained in an endeavor to avoid the consequence of such negligence.⁶ So it has been held to be negligence to drive a horse too near to a track at a crossing before stopping to look or listen for an approaching train,⁷ or to attempt to hold a frightened horse near a train,⁸ or to lead him up to it,⁹ when he might as easily have been driven away. Whether it is negligence in a person to drive a skittish team into a railroad freight yard¹⁰ has been held to be a question of fact for the jury.

(f) **Acts Done or Omitted in Emergencies.** — A person rightfully on or near a railroad track is not precluded from recovering for an injury received from passing trains because he may, when confronted with the sudden peril to which the negligence of the company exposed him, have acted imprudently or have omitted some act which would have saved him from injury,¹¹ but his

1. *Craddock v. Louisville, etc., R. Co.*, (Ky. 1891) 16 S. W. Rep. 125, 13 Ky. L. Rep. 18; *Mobile, etc., R. Co. v. Stroud*, 64 Miss. 784; *Crowley v. Richmond, etc., R. Co.*, 70 Miss. 340.

2. *Helm v. Louisville, etc., R. Co.*, (Ky. 1895) 33 S. W. Rep. 396.

3. *Gresham v. Louisville, etc., R. Co.*, (Ky. 1894) 24 S. W. Rep. 860.

4. **Remaining on Track with Knowledge of Approaching Train.** — *Chicago, etc., R. Co. v. White*, 26 Ill. App. 586; *Houston v. Vicksburg, etc., R. Co.*, 39 La. Ann. 796; *McNulty v. New Orleans City, etc., R. Co.*, 52 La. Ann. 1034; *Irving v. Minneapolis, etc., R. Co.*, 71 Minn. 9; *Donnelly v. Brooklyn City R. Co.*, 109 N. Y. 16; *Pennsylvania R. Co. v. Bell*, 122 Pa. St. 58.

Waiting to Reach Dry Place to Get Off. — *Green v. Louisville, etc., R. Co.*, (Miss. 1893) 12 So. Rep. 826.

Failure to Lie Down When Overtaken in Cut. — *Beck v. Portland, etc., R. Co.*, 25 Oregon 32.

Workmen Repairing Track. — *Kelly v. Union R., etc., Co.*, 11 Mo. App. 1; *Baltimore, etc., R. Co. v. Whittington*, 30 Gratt. (Va.) 805.

Remaining on Track to Save Child. — It is not contributory negligence to remain on the track in an endeavor to save the life of a child. *Donahoe v. Wabash, etc., R. Co.*, 83 Mo. 560, 53 Am. Rep. 594; *San Antonio, etc., R. Co. v. Gray*, (Tex. 1902) 67 S. W. Rep. 763. See also *Becker v. Louisville, etc., R. Co.*, (Ky. 1901) 61 S. W. Rep. 997.

5. *Pittsburgh, etc., R. Co. v. Bennett*, 9 Ind. App. 92.

6. **Leaving Team Unhitched Near Track.** — *Denville v. Southern Pac. R. Co.*, 50 Cal. 383; *Louisville, etc., R. Co. v. Penrod*, (Ky. 1900) 56 S. W. Rep. 1; *Collins v. Illinois Cent. R. Co.*, 77 Miss. 855; *McManamee v. Missouri Pac. R. Co.*, 135 Mo. 440; *Olson v. Chicago, etc., R. Co.*, 81 Wis. 41.

7. **Going Too Near Tracks at Crossing Before Stopping Horse.** — *Allen v. New York Cent., etc., R. Co.*, 92 Hun (N. Y.) 589. See also *Cowen v. Watson*, 91 Md. 344.

In some cases it has been held to be a question of fact for the jury. *McCullough v. Minneapolis, etc., R. Co.*, 101 Mich. 234; *Vallee v. Grand Trunk R. Co.*, 1 Ont. L. Rep. 224.

8. **Attempting to Hold Horse Frightened by Approaching Train.** — *Flagg v. Chicago, etc., R. Co.*, 96 Mich. 30.

9. **Leading Frightened Horse up to Locomotive.** — *Louisville, etc., R. Co. v. Schmidt*, 81 Ind. 264.

10. **Taking Skittish Horse into Freight Yard.** — *Kalenbach v. Michigan Cent. R. Co.*, 87 Mich. 509.

Retaining Hold of Reins. — Whether the deceased, when his horse took fright, was guilty of contributory negligence in retaining his hold on the reins and permitting himself to be dragged in front of the engine and killed is a question of fact for the jury. *Doll v. Lehigh Valley R. Co.*, 52 N. Y. App. Div. 575.

11. **Acts Done or Omitted in Emergencies** — *Alabama*. — *Mobile, etc., R. Co. v. Ashcraft*, 48 Ala. 15; *Cook v. Central R., etc., Co.*, 67 Ala. 533.

Kansas. — *Chicago, etc., R. Co. v. Parkinson*, 56 Kan. 652.

Massachusetts. — *Sullivan v. New York, etc., R. Co.*, 154 Mass. 524.

Minnesota. — *Mark v. St. Paul, etc., R. Co.*, 30 Minn. 493.

New York. — *Collins v. New York, etc., R. Co.*, 55 N. Y. Super. Ct. 31, affirmed 112 N. Y. 665.

Pennsylvania. — *Pennsylvania R. Co. v. Werner*, 89 Pa. St. 59.

Texas. — *Texas, etc., R. Co. v. Watkins*, (Tex. Civ. App. 1894) 26 S. W. Rep. 760; *Gulf, etc., R. Co. v. Bryant*, (Tex. Civ. App. 1902) 66 S. W. Rep. 804.

negligence under the circumstances is a question of fact for the jury.¹

(8) *Presumption of Negligence*. — In the absence of statute, the fact that a person is injured by being struck by a railroad train,² or that his dead body was found beside the track,³ raises no presumption of negligence on the part of the railroad company; but in some of the states statutes have been enacted providing that proof of an injury inflicted by the movement of trains shall be *prima facie* evidence of negligence on the part of the company.⁴

IX. SALES, LEASES, AND CONSOLIDATION — 1. **General Principles**. — Since a railroad company is a *quasi*-public corporation⁵ it may not make any contract by which its power to perform its public functions will be impaired.⁶

2. **Sales** — a **POWER TO BUY OR SELL IN GENERAL** — (1) *Rule Stated* — (a) **Power to Sell**. — In accordance with the principle which has just been stated, a railroad company, in the absence of statutory authority, cannot sell either its franchises, or its tracks, right of way, or other real estate which is necessary to the exercise of its franchises and corporate functions,⁷ and the fact that

1. **Negligence Question of Fact for Jury** — *Illinois*. — Chicago, etc., R. Co. v. Smith, 180 Ill. 453; Chicago, etc., R. Co. v. Gunderson, 74 Ill. App. 356, *affirmed* 174 Ill. 495.

Mississippi. — Christina v. Illinois Cent. R. Co., (Miss. 1893) 12 So. Rep. 710.

Missouri. — Neier v. Missouri Pac. R. Co., (Mo. 1888) 6 S. W. Rep. 695.

New York. — Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608; Remer v. Long Island R. Co., 48 Hun (N. Y.) 352; Bernhard v. Rensselaer, etc., R. Co., 1 Abb. App. Dec. (N. Y.) 131.

Tennessee. — Southern R. Co. v. Pugh, 97 Tenn. 624

For cases in which the plaintiff was held to be negligent see Louisville, etc., R. Co. v. Cooper, 68 Miss. 368; De Bolt v. Kansas City, etc., R. Co., 123 Mo. 496; Texas, etc., R. Co. v. Walker, (Tex. Civ. App. 1898) 49 S. W. Rep. 642.

A Person Wrongfully on the Track cannot recover for injuries received by stepping on the track in front of a moving train on the ground that he was compelled to do so by the approach of a train on an adjacent track. *Briscoe v. Southern R. Co.*, 103 Ga. 224.

2. **Proof of Injury Does Not Raise Presumption of Negligence** — *Illinois*. — Cowley v. Chicago, etc., R. Co., 87 Ill. App. 123.

Iowa. — Case v. Chicago, etc., R. Co., 64 Iowa 762.

Kansas. — Union Pac. R. Co. v. Young, 57 Kan. 168.

Kentucky. — Vanderpool v. Lexington, etc., R. Co., (Ky. 1898) 46 S. W. Rep. 699.

Maryland. — Northern Cent. R. Co. v. State, 54 Md. 113; Price v. Philadelphia, etc., R. Co., 84 Md. 506.

Massachusetts. — Hinckley v. Cape Cod R. Co., 120 Mass. 257.

Texas. — Tucker v. International, etc., R. Co., (Tex. Civ. App. 1902) 67 S. W. Rep. 914.

Wisconsin. — Miller v. Chicago, etc., R. Co., 68 Wis. 184.

3. **Finding Dead Body Beside Track No Evidence of Negligence**. — Louisville, etc., R. Co. v. Humphrey, (Ky. 1898) 45 S. W. Rep. 503; Louisville, etc., R. Co. v. Terry, (Ky. 1898) 47 S. W. Rep. 588; Hughes v. Louisville, etc., R. Co., (Ky. 1902) 67 S. W. Rep. 984; Bryant v. Illinois Cent. R. Co., (La. 1897) 22 So. Rep. 799; State v. Baltimore, etc., R. Co., 58 Md.

221; Spears v. Chicago, etc., R. Co., 43 Neb. 720.

4. **Statutory Presumption of Negligence**. — Morris v. Florida Cent., etc., R. Co., (Fla. 1901) 29 So. Rep. 541; Parish v. Western, etc., R. Co., 102 Ga. 285; Vicksburg, etc., R. Co. v. Phillips, 64 Miss. 693.

5. **Quasi-Public Corporations**. — See *supra*, this title, *Legal Status of Railroads and Railroad Corporations*.

6. **Limitations of Power to Contract**. — See *supra*, this title, *Railroad Corporations—Powers*. See also the title *ULTRA VIRES*.

7. **May Not Sell Franchise or Property Without Statutory Authority** — *England*. — Reg. v. South Wales R. Co., 14 Q. B. 902, 68 E. C. L. 902.

Canada. — Bourgoin v. Montreal, etc., R. Co., 3 Montreal Leg. N. 185, 24 L. C. Jur. 193

United States. — Central Transp. Co. v. Pullman's Palace Car Co., 139 U. S. 29; Branch v. Jesup, 106 U. S. 468; Thomas v. West Jersey R. Co., 101 U. S. 71; Mackintosh v. Flint, etc., R. Co., 34 Fed. Rep. 582; Hamilton v. Savannah, etc., R. Co., 49 Fed. Rep. 412.

Georgia. — Singleton v. Southwestern R. Co., 70 Ga. 464.

Illinois. — Hays v. Ottawa, etc., R. Co., 61 Ill. 422.

Indiana. — Tippecanoe County v. Lafayette, etc., R. Co., 50 Ind. 85.

Louisiana. — State v. Morgan, 28 La. Ann. 482.

Mississippi. — Arthur v. Commercial, etc., Bank, 9 Smed. & M. (Miss.) 394, 48 Am. Dec. 719.

Nebraska. — Clarke v. Omaha, etc., R. Co., 4 Neb. 458.

New Hampshire. — Pierce v. Emery, 32 N. H. 484; Boston, etc., R. Co. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336

New Jersey. — Black v. Delaware, etc., Canal Co., 24 N. J. Eq. 455.

New York. — Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co., (Supm. Ct. Spec. T.) 16 Ab. Pr. N. S. (N. Y.) 249, *affirmed* 4 Hun (N. Y.) 712.

North Carolina. — Logan v. North Carolina R. Co., 116 N. Car. 945.

Ohio. — Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Toledo, etc., R. Co. v. Hinsdale, 45 Ohio St. 566.

Pennsylvania. — Stewart's Appeal, 56 Pa. St. 413; Philadelphia v. Philadelphia, etc., R. Co.,

the purpose or motive of the sale is lawful is immaterial.¹ But any property which is not necessary to the exercise of the corporate franchise, a railroad company may sell and transfer like a private corporation.² In determining what property a railroad company may sell without special statutory authority, it is necessary to observe the distinction between property which is necessary to the exercise of the corporate franchise and property which is required for the transaction of the business of the company. The right of way, with the tracks, station buildings, etc., cannot be separated from the corporate franchise, but the rolling stock and other items of personal property, while necessary to the transaction of the business of the company, are not in any way connected with the franchise.³

(b) **Power to Buy.** — The correlative of the proposition that a railroad company has no power, except by legislative grant, to sell its franchise and the property connected therewith is that such a corporation cannot buy the franchise and property of another company. This is obviously true, because, if a railroad company cannot divest itself of its rights and title by such a transaction, then it follows that another company cannot so acquire any rights.⁴

Statutory Authority to Buy. — In some jurisdictions there are general statutes which authorize railroads to purchase the property and franchises of other companies.⁵

Connecting or Branch Roads. — It has been held that the plain intent of such statutes is to improve transportation facilities for the benefit of the public and not prevent competition between railroads, and that therefore the authority to purchase does not give to a railroad company the right to purchase a parallel or competing line, but extends only to connecting or branch roads.⁶

Parallel or Competing Lines. — In some states by statute or constitutional pro-

177 Pa. St. 292; *Wood v. Bedford, etc., R. Co.*, 8 Phila. (Pa.) 94.

Texas. — *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692; *East Line, etc., R. Co. v. State*, 75 Tex. 434; *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 385.

West Virginia. — *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901.

Property Acquired under Right of Eminent Domain Not Alienable. — *Singleton v. Southwestern R. Co.*, 70 Ga. 464.

Sale of Part of Road. — Since a railroad company cannot sell its franchise and corporate rights, it cannot sell a division of its road with the franchise pertaining thereto and thus create another company. Furthermore, this would be the creation of a corporation by a corporation. *State v. Morgan*, 28 La. Ann. 482.

Sale of Part of Franchise. — It has also been held that a railroad company has no power to sell a part of its franchise, as, for instance, the exclusive right to carry passengers and freight over a part of its road. *Tippacanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85. See also *State v. Minnesota Cent. R. Co.*, 36 Minn. 246.

1. Purpose or Motive of Sale Not Material. — *Arthur v. Commercial, etc., Bank*, 9 Smed. & M. (Miss.) 394, 48 Am. Dec. 719, in which the purpose of the sale was to raise money to complete the road within the time limited by the vendor's charter, and thus avoid a forfeiture.

2. Property Not Necessary to Franchise. — *Pierce v. Emery*, 32 N. H. 484.

3. Distinctions Noted. — *Boston, etc., R. Co. v. Gilmore*, 37 N. H. 410.

4. No Authority to Buy in Absence of Statute.

— *Branch v. Jesup*, 106 U. S. 468; *Branch v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 481; *Mackintosh v. Flint, etc., R. Co.*, 34 Fed. Rep. 582; *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692; *East Line, etc., R. Co. v. Rushing*, 69 Tex. 306.

5. Statutory Authority to Buy. — *Venner v. Atchison, etc., R. Co.*, 28 Fed. Rep. 581; *Louisville, etc., R. Co. v. Com.*, 97 Ky. 675, affirmed 161 U. S. 677. And see the statutes of the several states.

To authorize a sale, the power to sell and the power of the purchaser to acquire title by the sale must both exist. *East Line, etc., R. Co. v. State*, 75 Tex. 434.

The Power to Build a Railroad does not include the power to buy one. *Campbell v. Marietta, etc., R. Co.*, 23 Ohio St. 168. See also *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692. But see *Branch v. Jesup*, 106 U. S. 468, in which it was held that the power granted to a railroad company to construct a particular line of railroad carried with it by implication the right to purchase such line of railroad subsequently built by another company.

The power to buy, however, has been said to be dependent on and involved in the right to build a road, and therefore it was held that where a railroad company, authorized by its charter to build a branch road within a time limited, had forfeited such right by nonuser within the time specified, it could not buy a branch road afterwards built by another concern. *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530.

6. Statute Held Applicable Only to Branch or Connecting Roads. — *Louisville, etc., R. Co. v. Com.*, 97 Ky. 675, affirmed 161 U. S. 677.

vision railroad companies are expressly prohibited from purchasing parallel or competing lines.¹

(2) *Effect of Unauthorized Sale.* — An unauthorized sale of its property by a railroad company is ineffectual for any purpose. It does not either divest the vendor of any rights or vest any rights in the purchaser.² Neither does such a transaction relieve the vendor of any of the duties and responsibilities imposed by its charter.³

Ground of Forfeiture. — But it may constitute a ground of forfeiture of the charter of the vendor and of the purchaser also, when the conveyance is to another railroad company.⁴

b. STATUTORY AUTHORITY TO SELL — (1) *In General.* — It is competent for the legislature to confer on a railroad company the power to sell its franchise or any of its property, and this is often done. When the authority has been so given, the company may sell, regardless of the distinction between property essential to the exercise of the franchise and the property which is used merely for the transaction of the company's business.⁵ Under such

1. Purchase of Parallel or Competing Lines Expressly Prohibited. — *Hamilton v. Savannah*, etc., R. Co., 49 Fed. Rep. 412; *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *Kimball v. Atchison*, etc., R. Co., 46 Fed. Rep. 888; *Louisville*, etc., R. Co. v. *Com.*, 97 Ky. 675, affirmed 161 U. S. 677; *Catawissa R. Co. v. Philadelphia*, etc., R. Co., 14 Pa. Co. Ct. 280, 3 Pa. Dist. 111, 34 W. N. C. (Pa.) 11; *East Line*, etc., R. Co. v. *Rushing*, 69 Tex. 306. See also the statutes and constitutions of the several states.

What Are Competing Lines. — If only a small amount of the traffic of one road will in any event pass over the other road, so that the rates of transportation are not appreciably affected, they are not competing lines. *Kimball v. Atchison*, etc., R. Co., 46 Fed. Rep. 888; *Dady v. Georgia*, etc., R. Co., 112 Fed. Rep. 838. See also *Burke v. Cleveland*, etc., R. Co., 10 Ohio Dec. (Reprint) 525, 21 Cinc. L. Bul. 11. And see *infra*, this section, *Leases*.

Connection May Be by Means of Third Road. — *Hafer v. Cincinnati*, etc., R. Co., 11 Ohio Dec. (Reprint) 760, 29 Cinc. L. Bul. 68, 4 Ohio Dec. 487.

Competing Character Not Established by Fact of Intersection. — *East Line*, etc., R. Co. v. *Rushing*, 69 Tex. 306.

Judicial Notice of Competing Character. — *Gulf*, etc., R. Co. v. *State*, 72 Tex. 404, 13 Am. St. Rep. 815.

"Parallel" Distinguished from "Competing." — The proper construction of the phrase a "parallel or competing line" is that it includes a projected road, surveyed, laid out, and in process of construction, if such road, when completed and in operation, would actually compete with the road seeking control. Before completion it is "parallel;" when completed it becomes "competing." *Pennsylvania R. Co. v. Com.*, (Pa. 1886) 7 Atl. Rep. 368.

For a Further Discussion as to what constitutes competing lines, see the title CONSOLIDATION OF CORPORATIONS, vol. 6, pp. 804, 826.

2. Unauthorized Sale Ineffectual for Any Purpose. — Thus, it has been held that the purchaser cannot hold a stockholder liable on his subscription to the stock of the vendor company, though such stockholder assented to the

sale. *New Orleans*, etc., R. Co. v. *Harris*, 27 Miss. 517. But the stockholder is still liable to the vendor on his subscription. *Hays v. Ottawa*, etc., R. Co., 61 Ill. 422.

3. Vendor Not Relieved of Any Duties or Responsibilities. — *Gulf*, etc., R. Co. v. *Morris*, 67 Tex. 692; *East Line*, etc., R. Co. v. *Rushing*, 69 Tex. 306; *Naglee v. Alexandria*, etc., R. Co., 83 Va. 707, 5 Am. St. Rep. 308; *Acker v. Alexandria*, etc., R. Co., 84 Va. 648; *Fisher v. West Virginia*, etc., R. Co., 39 W. Va. 366.

4. Forfeiture of Charter. — *State v. Minnesota Cent. R. Co.*, 36 Minn. 246.

5. Authority to Sell Conferred by Statute. — *Hill v. Nisbet*, 100 Ind. 341; *Harrison v. Lexington*, etc., R. Co., 9 B. Mon. (Ky.) 470; *Powell v. North Missouri R. Co.*, 42 Mo. 63; *Kean v. Johnson*, 9 N. J. Eq. 401; *Miner v. New York Cent.*, etc., R. Co., 46 Hun (N. Y.) 612; *Toledo*, etc., R. Co. v. *Hinsdale*, 45 Ohio St. 556. And see the statutes of the several states.

In *Texas* there is no statutory provision authorizing the sale or transfer of the franchise of a railroad corporation, except under deed of trust, order of sale, or execution for the payment of debts. *Missouri Pac. R. Co. v. Owens*, 1 Tex. App. Civ. Cas., § 385.

The Obligations of the Vendor to the Public are not released by a mere grant of authority to sell. There must be a legislative release from the obligations of the vendor to the public. *Chollette v. Omaha*, etc., R. Co., 26 Neb. 159.

Power to Mortgage Does Not Include Power to Sell. — *Southern Pac. R. Co. v. Esquibel*, 4 N. Mex. 337.

Power to Buy Held Not to Include Power to Sell. — *Southern Pac. R. Co. v. Esquibel*, 4 N. Mex. 337.

What Constitutes Grant of Power to Sell. — Authority to sell the road is not given by a provision in the charter that the company and its successors "shall be capable of purchasing, holding, and conveying any lands, tenements, goods, and chattels whatever, necessary and expedient to the objects of this incorporation." Such a provision authorized property to be sold and conveyed away only when such a transaction is necessary or expedient to the objects of the incorporation, and those objects cannot require that the necessary source of the

power the company may sell the line of railroad constructed by it and build a new line for the purpose of continuing the object of its incorporation.¹

Implied Authority to Sell. — A provision in the charter of a railroad company authorizing it to buy the property and franchise of a certain other company impliedly gives to such other company authority to sell.²

Extent of Power of Sale. — The power to sell may be given in respect to all the property and franchises of the company, or it may be limited to a part only, and the fact that the exercise of the power given results in a suspension of business of the vendor as a railroad company has been held not to forfeit the charter.³ And since the legislature has the power to grant or withhold such authority at pleasure, it may couple with the grant such conditions and limitations as it may choose to impose.⁴ Thus the power to sell may be limited to the case of a company which, after beginning the construction of its road, becomes unable to complete it,⁵ while, on the other hand, it is sometimes provided that no railroad company shall sell its property or franchise until its road has been constructed.⁶ So, too, a sale may be permitted only when the purchaser owns a road running in the same general direction as the road of the selling company,⁷ or when all the debts of the selling company shall have been paid or arranged for,⁸ or a sale may be forbidden where the purchaser is the owner of a parallel or competing line,⁹ or is a foreign corporation.¹⁰

The Effect of a Sale by a railroad company of its corporate franchise, pursuant to legislative authority, operates as a surrender of the charter and a grant by the legislature of a similar charter to the purchasers, so that the franchise in the hands of the purchasers is subject to all the provisions of the constitution existing at the time of their purchase.¹¹

(2) *Rights and Liabilities of Purchasers* — (a) **Rights of Purchasers.** — **The General Rule** is that the purchaser of a railroad succeeds by the purchase to all the rights which the vendor company had,¹² and is also subject to any equities in

company's profitable existence should be sold and conveyed away. *Kean v. Johnson*, 9 N. J. Eq. 401. See also *Branch v. Jesup*, 106 U. S. 478.

What Constitutes Sale. — A lease for nine hundred and ninety-nine years, reserving rent payable quarterly, is not a sale within the meaning of a deed conveying the right of way to the lessor company on condition that if the company should sell the right of way, the grantor in the deed should receive half the proceeds. *Morrison v. St. Paul, etc.*, R. Co., 63 Minn. 75.

But a grant or demise by a railroad company in perpetuity of all its property, real and personal, and all the privileges and franchises which it had under its charter, is equivalent to an absolute conveyance. *Chicago, etc.*, R. Co. v. *Boyd*, 118 Ill. 73.

1. **Construction of New Line After Sale.** — *Ma-haska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437.

2. **Implied Authority to Sell.** — *New York, etc.*, R. Co. v. *New York, etc.*, R. Co., 52 Conn. 274.

3. **Sale of Part of Franchise Authorized by Statute.** — *State v. St. Paul, etc.*, R. Co., 35 Minn. 222.

Stock Subscriptions. — Under the *Ohio* statute authorizing any railroad company under certain circumstances to sell its property, including "all work done, together with all rights, privileges, and easements," does not confer authority to sell or transfer subscriptions to the capital stock, to be paid when the road should be completed. *Toledo, etc.*, R. Co. v. *Hinsdale*, 45 Ohio St. 556.

4. **Power of Legislature to Impose Conditions.** — *State v. Chicago, etc.*, R. Co., 89 Mo. 523; *Frazier v. East Tennessee, etc.*, R. Co., 88 Tenn. 138. See also *infra*, this section, *Liabilities of Purchasers*.

5. **Inability to Complete Road.** — *Young v. Toledo, etc.*, R. Co., 76 Mich. 485. Under such a statute it has been held that one railroad company may purchase the stock of another company which has become unable to complete the construction of its road. *Dewey v. Toledo, etc.*, R. Co., 91 Mich. 351.

6. **Sale Before Construction of Road Forbidden.** — *Clarke v. Omaha, etc.*, R. Co., 4 Neb. 458.

7. **Purchaser Having Road Running in Same Direction as Vendor's Road.** — *East Line, etc.*, R. Co. v. *State*, 75 Tex. 434.

8. **Payment of Vendor's Debts as Condition Precedent.** — *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437, holding, however, that where the debts, if any, were insignificant in amount and the purchaser was ready to pay any that might be established, the sale was valid.

9. **Parallel or Competing Lines.** — The statutes authorizing railroad companies to purchase the lines of other companies generally restrict the right to connecting or branch roads and forbid the purchase of parallel or competing lines. See *supra*, this section, *Power to Buy*.

10. **Sale to Foreign Railroad Company Forbidden.** — *East Line, etc.*, R. Co. v. *State*, 75 Tex. 434.

11. **Effect of Sale of Franchise.** — *State v. Sherman*, 22 Ohio St. 411.

12. **Rights of Purchaser in General.** — *Pollard v. Maddox*, 28 Ala. 321; *Columbus, etc.*, R.

favor of third persons where the purchaser was chargeable with notice thereof.¹

Special Privileges and Exemptions. — A special statutory privilege or exemption granted to a railroad company, such as immunity from taxation and the like, does not pass by sale of the property and franchises of such company, unless it is expressly provided by statute that a sale shall have that effect.² So, too, it has been held that the right of a railroad company to a particular mode of assessment of damages for the appropriation of its property does not pass to a purchaser of the road.³

(b) **Liabilities of Purchasers** — *aa. LIABILITIES TO PUBLIC.* — The purchaser cannot hold and exercise the franchise of the vendor discharged of the duty to the public which was imposed as a condition of the grant.⁴

Liability for Taxes Assessed Before Sale. — Where the statute authorizing the sale provides that it shall be subject to all the duties and obligations prescribed by the railroad laws of the state, the purchaser is liable for taxes assessed against the vendor.⁵

Restriction as to Rates of Transportation. — In the absence of a statutory provision to the contrary, a railroad company which purchases the property and franchises of another company is subject to the same restrictions and limitations as to rates of transportation as was the vendor.⁶

Restoration of Highway at Crossing. — Where railroad companies are required by law to restore as near as may be any highway crossed by the railroad, and it is provided that on the sale by one company to another, of its property and franchises, the purchaser shall hold subject to all duties and obligations prescribed by the general railroad laws of the state, the duty of restoring a highway at a crossing devolves on the purchaser.⁷

bb. LIABILITIES TO INDIVIDUALS — (*au*) *Contracts of Vendor in General.* — The purchaser does not, in consequence of the purchase, become bound by the personal obligations of the vendor company,⁸ unless such obligations had become liens on

Co. v. Braden, 110 Ind. 558; *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228; *Williams v. Texas Midland R. Co.*, 22 Tex. Civ. App. 278.

Right to Lease Another Road. — Where the vendor had the right to lease another road, such right passes to the purchaser in a conveyance of all the rights, franchises, and property of the vendor. *Atlantic, etc., R. Co. v. St. Louis*, 66 Mo. 228.

Right to Connect with Other Roads. — *Portland, etc., R. Co. v. Grand Trunk R. Co.*, 46 Me. 69.

Continuing Business in Vendor's Name. — *Acres v. Moyne*, 59 Tex. 623.

Exemption from Operation of Corporation Damage Law. — *Daniels v. St. Louis, etc., R. Co.*, 62 Mo. 43.

1. Equities in Favor of Third Persons. — In *Rock Island, etc., R. Co. v. Dimick*, 144 Ill. 628, the purchaser of a railway was held to be chargeable with notice of a right of way through an opening under the track, where there were fences leading to the opening on either side and user of the opening by the landowner in passing from one part of his farm to another.

2. Special Privileges and Exemptions. — *St. Louis, etc., R. Co. v. Gill*, 156 U. S. 649. See also *Matthews v. Corporation Com'rs*, 97 Fed. Rep. 400; *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17. Compare *Louisville, etc., R. Co. v. Gaines*, 2 Flipp. (U. S.) 621; *Daniels v. S. Louis, etc., R. Co.*, 62 Mo. 43.

Statute Held Sufficient to Pass Exemption. — *Atlantic, etc., R. Co. v. Allen*, 15 Fla. 637.

3. Mode of Assessing Damages. — *Little Rock, etc., R. Co. v. McGehee*, 41 Ark. 202.

4. Duty to Public. — *Chicago, etc., R. Co. v. Chicago*, 83 Ill. App. 233, affirmed 183 Ill. 341. *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788; *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

Purchaser Bound by Decree Compelling Operation of Road. — *State v. Iowa Cent. R. Co.*, 83 Iowa 720.

5. Taxes Assessed Before Sale. — *Stevens v. Lake George, etc., R. Co.*, 82 Mich. 426.

6. Restriction as to Rates of Transportation. — *Campbell v. Marietta, etc., R. Co.*, 23 Ohio St. 168.

7. Restoration of Highway at Crossing. — *Thayer v. Flint, etc., R. Co.*, 93 Mich. 150.

8. Purchaser Not Bound by Vendor's Contracts. — *Sappington v. Little Rock, etc., R. Co.*, 37 Ark. 23; *Lake Erie, etc., R. Co. v. Griffin*, 107 Ind. 464; *Mariudale v. Western New York, etc., R. Co.*, 45 N. Y. App. Div. 328, 47 N. Y. App. Div. 634; *Elizabethtown v. Chesapeake, etc., R. Co.*, 94 Ky. 377; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125; *Gulf, etc., R. Co. v. Newell*, 73 Tex. 334, 15 Am. St. Rep. 788; *Texas Cent. R. Co. v. Lyons*, (Tex. Civ. App. 1896) 34 S. W. Rep. 362; *Williams v. Texas Midland R. Co.*, 22 Tex. Civ. App. 278; *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 497; *Smith v. Chicago, etc., R. Co.*, 18 Wis. 17; *Wright v. Milwaukee, etc., R. Co.*, 25 Wis. 46; *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414.

Pass Given in Consideration of Release of Right of Way. — A railroad company which purchased the road of another company is not bound to honor a pass issued by the vendor in consideration of a release of the right of way,

the property sold,¹ or the purchaser adopted the contract or assumed the liabilities under it, and thus became bound by its terms,² or the statute authorizing the sale imposed on the purchaser liability for the obligations of the vendor.³

(bb) *Torts of Vendor in General.* — A claim against a railroad company for a personal injury or other tort is not enforceable against a purchaser of the property and franchises of such company,⁴ unless the liability has been assumed by the contract of purchase⁵ or imposed by the statute authorizing the sale,⁶ or unless judgment on such claim was recovered before the sale and thus made a lien on the property.⁷ If the liability has not been thus assumed or made a lien on the property, the only remedy of the injured party after the dissolution of the vendor company is by an action against its stockholders.⁸

Maintenance of Nuisances. — According to the rule that the purchaser of a railroad is not liable for the torts of the vendor committed in the operation of the road, such purchaser is not liable for the original act constituting a nuisance, but if the act is continuing in its effects, the purchaser may become liable for injuries resulting after the purchase. The liability in this respect depends on the adoption or ratification by the purchaser of the original act. In the case of structures on the right of way, which obviously are dangerous or have a tendency to injure others, the purchaser will be liable for any injury resulting therefrom while he is operating the road,⁹ but the liability attaches only in the case of knowingly using a structure which is a nuisance.¹⁰ In the case,

where the purchaser did not assume any of the obligations of the vendor, and did not use such right of way. *Dickey v. Kansas City, etc., R. Co.*, 122 Mo. 223.

Sale Held Fraudulent as Against Creditors of Vendor. — *Chattanooga, etc., R. Co. v. Evans, (C. C. A.)* 66 Fed. Rep. 809.

1. Liens on Property Sold. — *Sappington v. Little Rock, etc., R. Co.*, 37 Ark. 23; *Vilas v. Page*, 106 N. Y. 439.

2. Assumption of Liability by Purchaser. — *Chicago, etc., R. Co. v. Chicago, etc., Coal Co.*, 79 Ill. 121; *Kentucky Cent. R. Co. v. Clark*, 5 Ky. L. Rep. 184; *C., etc., R. Co. v. McLean*, 12 Ky. L. Rep. 989; *Welsh v. First Div. St. Paul, etc., R. Co.*, 25 Minn. 314; *Western Union Tel. Co. v. Atlantic, etc., Tel. Co.*, 5 Ohio Dec. (Reprint) 407, 5 Am. L. Rec. 429, 7 Ohio Dec. (Reprint) 163, 1 Cinc. L. Bul. 201; *South Carolina R. Co. v. Wilmington, etc., R. Co.*, 7 S. Car. 410.

As to the right of a person not a party to the contract to sue on a provision therein made for his benefit, see the title *CONTRACTS*, vol. 7, p. 104 *et seq.*

Where the Deed Recites the "Assumption" of the vendor's debts, liabilities, and obligations as the consideration of the sale and transfer, it operates as a promise by the purchaser to pay such debts, etc. *Lenz v. Chicago, etc., R. Co.*, 111 Wis. 198.

Assumption of Contract to Pay for Right of Way. — *Kansas Pac. R. Co. v. Hopkins*, 18 Kan. 494.

Assumption of Liabilities Held to Include Superseas Bond Given by Vendor. — *Missouri, etc., R. Co. v. Lacy*, 13 Tex. Civ. App. 391.

3. Liability Imposed by Statute. — *Plainview v. Winona, etc., R. Co.*, 36 Minn. 505; *Chicago, etc., R. Co. v. Lundstrom*, 16 Neb. 254, 49 Am. Rep. 718. See also the railroad laws of the several states. In *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397, the statute authorizing the sale declared that the purchaser

should "be subject to all the duties, liabilities, obligations, and restrictions" to which the vendor was subject.

As to the Power of the legislature to impose such terms, see *supra*, this section, *Statutory Authority to Sell*.

4. Purchaser Not Liable for Torts of Vendor. — *Burlington, etc., R. Co. v. Verry*, 48 Iowa 458; *White v. Keokuk, etc., R. Co.*, 52 Iowa 97; *Chesapeake, etc., R. Co. v. Griest*, 85 Ky. 619; *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109.

5. Assumption of Liability for Torts. — *Knott v. Dubuque, etc., R. Co.*, 84 Iowa 462, in which case the purchaser assumed all the "debts and liabilities" of the vendor.

What Constitutes Assumption of Liability. — The assumption of "all current indebtedness incurred in the operation of said railroad" does not embrace liability for torts. *C., etc., R. Co. v. McLean*, 12 Ky. L. Rep. 989.

6. Liability Imposed by Statute Authorizing Sale. — *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 397. See also the railroad laws of the several states.

7. Claim for Tort Reduced to Judgment. — *Burlington, etc., R. Co. v. Verry*, 48 Iowa 458; *White v. Keokuk, etc., R. Co.*, 52 Iowa 97.

8. Action Against Stockholders of Vendor. — *Chesapeake, etc., R. Co. v. Griest*, 85 Ky. 619. And see generally the titles *STOCK*; *STOCKHOLDERS*.

9. Maintenance of Nuisance. — *Willits v. Chicago, etc., R. Co.*, 88 Iowa 281 (embankment causing overflow of land); *Culver v. Chicago, etc., R. Co.*, 38 Mo. App. 130 (negligently constructed bridge causing overflow of plaintiff's land).

No Liability for Past Damages. — *Post v. West Shore R. Co.*, 123 N. Y. 580; *Coyle v. Pittsburgh, etc., R. Co.*, 18 Pa. Super. Ct. 235.

10. Knowledge that Structure Is a Nuisance. — *McDonald v. Southern California R. Co.*, 101 Cal. 206.

however, of structures not on the right of way, some positive act adopting them is necessary to charge the purchaser with liability.¹

(cc) *Appropriation of or Injury to Private Property in Construction or Operation of Road.* — A purchaser of the property and franchises of a railroad company is not liable for the value of land appropriated by the vendor for the construction of the road, in the absence of any assumption of such liability or use under the purchase of the land taken.² But by taking possession of the land and asserting a right to use it, the purchaser elects to adopt the original appropriation and to receive the benefit thereof, and by so doing becomes liable for the value of the land taken.³

Injury to Abutting Owners. — The purchaser of a railroad in a public street does not become liable, in consequence of the acquisition of ownership, for the injury to abutting property, but does become liable by continuing the operation of the road.⁴

c. **REQUISITES AND VALIDITY OF CONTRACT.** — The statutes authorizing the sale of the property and franchises of railroad companies generally prescribe, with more or less particularity, the mode of exercising such authority,⁵ and a sale made otherwise than as provided by the statute may be enjoined at the instance of the stockholders.⁶

Consent of Stockholders. — A usual provision of the statute authorizing the sale of railroad property and franchises is that the stockholders shall consent to the proposed sale or that they shall ratify the contract.⁷

Filing or Recording Certificate of Sale. — A certificate of sale is sometimes required to be filed in a public office of the state.⁸

3. Leases — a. **POWER TO MAKE OR TAKE LEASES** — (1) *No Power unless Given by Statute.* — It is not one of the general powers of a railroad company to make a lease of its own property or franchises, or to take a lease from another company, but such power can exist only pursuant to a legislative

1. Structures Not on Right of Way. — Thus, the purchaser of a railroad from a company which had constructed jetties in a river to protect a bridge over the river was held not liable for the overflow of adjacent lands in consequence of the failure to repair or remove the jetties, where they were not on the railroad property or right of way, and the purchaser had never adopted or assumed control of them. The mere failure to repair or remove the jetties was held not to create any liability. *Fordyce v. Russell*, 59 Ark. 312.

2. Land Taken by Vendor — Purchaser Not Liable Merely by Virtue of Purchase. — *Pfeifer v. Sheboygan*, etc., R. Co., 18 Wis. 155, 86 Am. Dec. 751, in which case the landowner had obtained a judgment against the vendor company for the land taken.

3. Liability Imposed by Use of Road. — *Lake Erie*, etc., R. Co. v. *Griffin*, 92 Ind. 487, 107 Ind. 464; *Indiana*, etc., R. Co. v. *Allen*, 113 Ind. 308, 3 Am. St. Rep. 650; *Stickley v. Chesapeake*, etc., R. Co., 93 Ky. 323; *Drury v. Midland R. Co.*, 127 Mass. 571; *Rio Grande*, etc., Pass. R. Co. v. *Ortiz*, 75 Tex. 602; *Pfeifer v. Sheboygan R. Co.*, 18 Wis. 155, 86 Am. Dec. 751.

Since the liability of the purchaser rests on the adoption of the original appropriation, an action at law on a judgment recovered by the landowner against the vendor company cannot be maintained against the purchaser. *Gilman v. Sheboygan*, etc., R. Co., 37 Wis. 317.

Liability for Costs of Condemnation Proceeding. — *Frankel v. Chicago*, etc., R. Co., 70 Iowa 424.

4. Injury to Abutting Property. — *Penn. Mut.*

L. Ins. Co. v. Heiss, 141 Ill. 35, 33 Am. St. Rep. 273; *Louisville*, etc., R. Co. v. *Orr*, 91 Ky. 109.

5. See generally the statutes of the several states on this subject.

6. Sale Not in Accordance with Statutory Authority — Injunction. — Thus, where a railroad company was authorized by its charter to sell its road and franchises as an entirety, it was held that a proposed sale of the iron separately from the roadbed would be enjoined at the suit of the stockholders. *Upton County R. Co. v. Sharman*, 37 Ga. 644.

7. Consent of Stockholders. — *Rogers v. Nashville*, etc., R. Co., (C. C. A.) 91 Fed. Rep. 299; *Young v. Toledo*, etc., R. Co., 76 Mich. 485. And see generally the titles *Stock*; *Stockholders*.

A Majority of the Stockholders have the right to sell notwithstanding the objection of the others, provided the action of the majority was not fraudulent or oppressive. *Waldoborough v. Knox*, etc., R. Co., 84 Me. 469.

Notice of Stockholders' Meeting. — *Shelby R. Co. v. Louisville*, etc., R. Co., 12 Bush (Ky.) 63.

Estoppel to Deny Validity of Sale. — *Mahaska County R. Co. v. Des Moines Valley R. Co.*, 28 Iowa 437.

8. Filing Certificate of Sale. — In New York, etc., R. Co. v. New York, etc., R. Co., 52 Conn. 274, it was held that under a statute requiring a certificate of sale to be filed in the office of the secretary of state, and providing that title should vest on filing of such certificate, it was not necessary to record the transaction like an ordinary transfer of real estate.

grant thereof, either in express terms or by necessary implication.¹ It has been said, however, that this principle does not apply as to any surplus use that a railroad company may have in its property, but that it may make a contract for the disposition of such surplus use in any manner not inconsistent with the purposes of its creation.²

Even the Consent of All the Stockholders, it is said, will not authorize such a lease in the absence of an enabling statute.³

Effect of Unauthorized Lease. — A lease made by a railroad company without the authority either express or implied of an enabling statute is *ultra vires* and void,⁴ and therefore it cannot be validated by occupancy on the part of the lessee and the acceptance of rent by the lessor on the theory that these circumstances make it an executed contract so as to estop the parties to deny its validity,⁵ unless authority to lease was conferred after the lease was made,

1. No General Power to Make Leases — England. — *Shrewsbury, etc., R. Co. v. Shrewsbury, etc., R. Co.*, 1 Sim. N. S. 410; *Beman v. Rufford*, 1 Sim. N. S. 550, 6 Eng. L. & Eq. 106; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, 73 E. C. L. 775, 7 Eng. L. & Eq. 506; *Great Northern R. Co. v. Eastern Counties R. Co.*, 9 Hare 306, 12 Eng. L. & Eq. 224; *Winch v. Birkenhead, etc., R. Co.*, 5 De G. & Sm. 562, 13 Eng. L. & Eq. 506; *M'Gregor v. Dover, etc., R. Co.*, 17 Jur. 21, 16 Eng. L. & Eq. 180; *London, etc., R. Co. v. South Eastern R. Co.*, 8 Exch. 584; *Ware v. Grand Junction Water Works Co.*, 2 Russ. & M. 470.

Canada. — *Hinckley v. Gildersleeve*, 19 Grant Ch. (U. C.) 212.

United States. — *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30; *Thomas v. West Jersey R. Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *Peters v. Lincoln, etc., R. Co.*, 2 McCrary (U. S.) 275; *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. (U. S.) 35; *Atlantic, etc., Tel. Co. v. Union Pac. R. Co.*, 1 Fed. Rep. 745.

Alabama. — *Memphis, etc., R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 43 Am. & Eng. R. Cas. 681.

Indiana. — *Tippecanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85.

Massachusetts. — *Middlesex R. Co. v. Boston, etc., R. Co.*, 115 Mass. 347.

Minnesota. — *Freeman v. Minneapolis, etc., R. Co.*, 28 Minn. 443.

Montana. — *State v. Montana R. Co.*, 21 Mont. 221.

Nebraska. — *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

New Jersey. — *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455.

New York. — *Abbott v. Johnstown, etc., Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Wasmer v. Delaware, etc., R. Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Troy, etc., R. Co. v. Boston, etc., R. Co.*, 86 N. Y. 107; *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, (Supm. Ct. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 249, *affirmed* 4 Hun (N. Y.) 712; *Dinsmore v. Atlantic, etc., R. Co.*, (Supm. Ct. Spec. T.) 46 How. Pr. (N. Y.) 193.

North Carolina. — *Logan v. North Carolina R. Co.*, 116 N. Car. 940.

Pennsylvania. — *Pittsburg, etc., R. Co. v. Allegheny County*, 63 Pa. St. 126; *Pittsburgh,*

etc., R. Co. v. Bedford, etc., R. Co., 81* Pa. St. 104; *Van Steuben v. Central R. Co.*, 178 Pa. St. 367; *Barker v. Hartman Steel Co.*, 6 Pa. Co. Ct. 183.

Tennessee. — *State v. McMinnville, etc., R. Co.*, 6 Lea (Tenn.) 369; *Frazier v. East Tennessee, etc., R. Co.*, 88 Tenn. 138.

Texas. — *Gulf, etc., R. Co. v. Morris*, 67 Tex. 692; *International, etc., R. Co. v. Underwood*, 67 Tex. 589; *Central, etc., R. Co. v. Morris*, 68 Tex. 49; *International, etc., R. Co. v. Eckford*, 71 Tex. 274.

West Virginia. — *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901.

No Power to Take Leases. — *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *State v. Montana R. Co.*, 21 Mont. 221.

2. Power to Lease Surplus Property. — *Chicago, etc., R. Co. v. Union Pac. R. Co.*, 47 Fed. Rep. 15, *affirmed* (C. C. A.) 51 Fed. Rep. 309. In this case a contract by which one railroad company granted to another the right for a certain term to run its trains over the grantor's road, was held valid where it appeared that the track accommodations were ample for the business of both companies.

3. Consent of All Stockholders Not Authority for Lease. — *Ashbury Railway Carriage, etc., Co. v. Riche, L. R.* 7 H. L. 653; *East Anglian R. Co. v. Eastern Counties R. Co.*, 11 C. B. 775, 73 E. C. L. 775, 7 Eng. L. & Eq. 506; *Marie v. Garrison*, (N. Y. Super. Ct.) 13 Abb. N. Cas. (N. Y.) 210; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *Troy, etc., R. Co. v. Kerr*, 17 Barb. (N. Y.) 581.

4. Unauthorized Lease Held Void. — *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 309; *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1, *followed* in *Oregon R., etc., Co. v. Oregonian R. Co.*, 145 U. S. 52; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 29; *Hamilton v. Savannah, etc., R. Co.*, 49 Fed. Rep. 412; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 165; *Hays v. Ottawa, etc., R. Co.*, 61 Ill. 422. As to who may question the validity of a lease, see *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 2.

The lessee cannot be compelled to operate the road if the lease is illegal. *People v. Colorado Cent. R. Co.*, 42 Fed. Rep. 638.

5. Parties Not Estopped by Conduct to Deny Validity. — *Oregon R., etc., Co. v. Oregonian R. Co.*, 130 U. S. 1; *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, 63 N. Y. 176.

and the parties thereafter continued to recognize it as a subsisting contract.¹

Liability for Acts of Lessee. — Since a lease made without authority of law is void, the lessor is liable for the acts of the lessee in the operation of the railroad because the lessee, under such circumstances, is, in legal contemplation, the agent of the lessor.² The lessee also is liable. The fact that the lease is void does not prevent such liability from attaching.³

Forfeiture of Charter. — In case a railroad company leases its entire property and franchises to another company, such act constitutes an abandonment by the lessor of the operation of its road⁴ and subjects the lessor to forfeiture of its charter on the ground of nonuser.⁵

(2) *Lease Authorized by Statute* — (a) **In General.** — Authority to make or take leases is very frequently conferred on railroad companies by the legislature, either by the charter of particular companies or by general laws,⁶

1. Enabling Act Passed After Making of Lease. — *Terre Haute, etc., R. Co. v. Cox*, (C. C. A.) 102 Fed. Rep. 825.

2. Lessor Liable for Lessee's Act — *United States*. — *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445; *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; *Arrowsmith v. Nashville, etc., R. Co.*, 57 Fed. Rep. 165; *Welden Nat. Bank v. Smith*, (C. C. A.) 86 Fed. Rep. 398.

Alabama. — *Rome, etc., R. Co. v. Chasteen*, 88 Ala. 591.

California. — *Fontaine v. Southern Pac. R. Co.*, 54 Cal. 645; *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 58 Am. St. Rep. 140.

District of Columbia. — *Chesapeake, etc., R. Co. v. Howard*, 14 App. Cas. (D. C.) 262.

Georgia. — *Singleton v. Southwestern R. Co.*, 70 Ga. 464, 48 Am. Rep. 574; *Chattanooga, etc., R. Co. v. Liddell*, 85 Ga. 482, 21 Am. St. Rep. 169.

Illinois. — *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291; *Ottawa, etc., R. Co. v. Black*, 79 Ill. 262; *Wabash, etc., R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705; *Pennsylvania R. Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337.

Minnesota. — *Freeman v. Minneapolis, etc., R. Co.*, 28 Minn. 443.

New York. — *Abbott v. Johnstown, etc., Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Durfee v. Johnstown, etc., Horse R. Co.*, 71 Hun (N. Y.) 279.

Oregon. — *Lakin v. Willamette Valley, etc., R. Co.*, 13 Oregon 436, 37 Am. Rep. 25.

Pennsylvania. — *Von Steuben v. Central R. Co.*, 4 Pa. Dist. 153.

Tennessee. — *Nashville, etc., R. Co. v. Carroll*, 6 Heisk. (Tenn.) 347.

Texas. — *International, etc., R. Co. v. Underwood*, 67 Tex. 589; *Central, etc., R. Co. v. Morris*, 68 Tex. 49; *International, etc., R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484; *International, etc., R. Co. v. Kuehn*, 70 Tex. 582; *International, etc., R. Co. v. Eckford*, 71 Tex. 274; *East Line, etc., R. Co. v. Lee*, 71 Tex. 538; *International, etc., R. Co. v. Moody*, 71 Tex. 614; *East Line, etc., R. Co. v. Culbertson*, 72 Tex. 375, 13 Am. St. Rep. 805.

Vermont. — *Nelson v. Vermont, etc., R. Co.*, 26 Vt. 717, 62 Am. Dec. 614.

West Virginia. — *Ricketts v. Chesapeake, etc., R. Co.*, 33 W. Va. 433, 25 Am. St. Rep. 901; *Fisher v. West Virginia, etc., R. Co.*, 39 W. Va. 366.

But an Employee of the Lessee cannot recover against the lessor for personal injuries. *Hukill v. Maysville, etc., R. Co.*, 72 Fed. Rep. 745; *Virginia, etc., R. Co. v. Washington*, 86 Va. 629.

3. Liability of Lessee. — *Feital v. Middlesex R. Co.*, 109 Mass. 398, 12 Am. Rep. 720; *International, etc., R. Co. v. Dunham*, 68 Tex. 231, 2 Am. St. Rep. 484.

4. Duty to Public Abandoned by Lease. — *Hamilton v. Savannah, etc., R. Co.*, 49 Fed. Rep. 412.

5. Unauthorized Lease as Ground of Forfeiture. — *Eel River R. Co. v. State*, 155 Ind. 433; *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

6. Leases Authorized by Statute — *United States*. — *Southern R. Co. v. North Carolina R. Co.*, 81 Fed. Rep. 595; *U. S. Trust Co. v. Mercantile Trust Co.*, (C. C. A.) 88 Fed. Rep. 140.

Connecticut. — *Middletown v. Boston, etc., R. Co.*, 53 Conn. 359.

Georgia. — *Central R., etc., Co. v. Macon*, 43 Ga. 605.

Illinois. — *St. Louis, etc., R. Co. v. East St. Louis, etc., R. Co.*, 39 Ill. App. 354, *affirmed* 139 Ill. 402.

Minnesota. — *Pence v. St. Paul, etc., R. Co.*, 28 Minn. 488.

New Hampshire. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650. See also *Dow v. Northern R. Co.*, 67 N. H. 1.

New Jersey. — *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

New York. — *Woodruff v. Erie R. Co.*, 93 N. Y. 616; *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433; *Prospect Park, etc., R. Co. v. Brooklyn, etc., R. Co.*, 84 Hun (N. Y.) 516; *Prospect Park, etc., R. Co. v. Atlantic Ave. R. Co.*, 84 Hun (N. Y.) 609; *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, *affirmed* 158 N. Y. 493.

North Carolina. — *State v. Richmond, etc., R. Co.*, 72 N. Car. 634.

Pennsylvania. — *Gratz v. Pennsylvania R. Co.*, 41 Pa. St. 447; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

Canada. — *Michigan Cent. R. Co. v. Wealeans*, 24 Can. Sup. Ct. 309. See also the statutes of the several states.

Power to Make or Take Lease. — *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393. Power to make a lease is not conferred by a provision in a railroad charter that the company may purchase, lease, or operate

subject, however, as a general rule to certain limitations and restrictions.¹

(b) **Implied Authority to Lease.** — Ordinarily the authority in respect to leases is conferred in express terms by the enabling statutes, but in some instances it is implied.²

(c) **Limitations and Restrictions** — *aa.* **CONTINUOUS OR CONNECTING LINES.** — The statutes authorizing leases of railroad property and franchises are not ordinarily absolute and unrestricted, but they usually provide that a lease may be made when the roads of the lessor and lessee together form a continuous, connecting, or intersecting line,³ and this by implication is held to prohibit a lease to a parallel or competing line.⁴

"Continuous" Lines. — Two railroads are said to form a continuous line within the meaning of the statutes in question when there is a direct connection of their tracks and rails so that a train may pass from one to the other,⁵ while, on the other hand, the statutes have been construed as not requiring the passage of trains from one road to the other, but merely admitting the convenient interchange of passengers and cargo at the point of connection.⁶ It is not essential, however, that the leased line be an extension from either terminus of the lessee's road. The statutes permit a railroad company to take a lease

any connecting railroad. *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

Power to Lease Held Dependent on Power to Build. — *Camden, etc., R. Co. v. May's Landing, etc., R. Co.*, 48 N. J. L. 530.

1. See *infra*, this division of this section, *Limitations and Restrictions*.

2. **Implied Power to Lease.** — *Gere v. New York Cent., etc., R. Co.*, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 193; *State v. Richmond, etc., R. Co.*, 72 N. Car. 634; *Hampe v. Pittsburg, etc., Traction Co.*, 165 Pa. St. 468. Thus, it has been held that giving authority to a certain corporation to lease the property of railroad companies gives the railroad companies implied authority to make leases of their property. *Pinkerton v. Pennsylvania Traction Co.*, 193 Pa. St. 229.

Authority to Lease Not Implied. — Authority to lease is not implied from a general grant of power to contract. *Troy, etc., R. Co. v. Boston, etc., R. Co.*, 86 N. Y. 107. Nor from a prohibition against consolidation with a parallel or competing line. *Central, etc., R. Co. v. Morris*, 68 Tex. 49. Nor from a provision authorizing a railroad company "to intersect, join, and unite with, and to make such contracts and agreements * * * for the use of its road as to the board of directors may seem proper," *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, *following Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290; or providing that certain acts of the company shall be binding on "its successors and assigns," *Briscoe v. Southern Kansas R. Co.*, 40 Fed. Rep. 273; or that the road may be operated "on such terms for the use thereof as the board of directors may prescribe," and that "they may make special contracts for special services," *McCabe v. Maysville, etc., R. Co.*, (Ky. 1902) 66 S. W. Rep. 1054.

Power to Lease Not Implied from Power to Consolidate. — *Mills v. Central R. Co.*, 41 N. J. Eq. 1.

3. **Authority to Lease Connecting or Continuous Line** — *Indiana.* — *Eel River R. Co. v. State*, 155 Ind. 433.

Kansas. — *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236.

Nebraska. — *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

New Jersey. — *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130.

New York. — *Ogdensburgh, etc., R. Co. v. Vermont, etc., R. Co.*, (Supm. Ct. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 249.

Pennsylvania. — *Van Steuben v. Central R. Co.*, 178 Pa. St. 367; *Smith v. Reading City Pass. R. Co.*, 13 Pa. Co. Ct. 49, 2 Pa. Dist. 490.

The *West Virginia* statute authorizes railroad companies to lease their railroads "to corporations owning and operating any connecting line of railroad, whose line of road is completed or is in process of construction, wholly or partly within this or an adjoining state." It is held that under this statute the lessor must either own a railroad or must be in the *bona fide* operation of one under the authority of a lawful contract therefor. The mere fact that it was operating a connecting line without legal authority is not sufficient. *Chesapeake, etc., R. Co. v. Howard*, 14 App. Cas. (D. C.) 262, *affirmed* 178 U. S. 153.

4. **Implied Prohibition Against Lease to Competing Line.** — *Eel River R. Co. v. State*, 155 Ind. 433. See also the next following subdivision of this section, *Parallel and Competing Lines*.

5. **Continuous Line Defined.** — *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 402, in which it was said that the word "continuous" implies without interval or interruption. See also *State v. Atchison, etc., R. Co.*, 24 Neb. 143, 8 Am. St. Rep. 164.

Successive Connections. — The statutory power is not exhausted by taking a lease of one road, but any number of roads may be leased in succession so long as they all together form a continuous route. *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236.

6. **Passage of Trains from One Road to Other Held Not Necessary.** — *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20; *Hampe v. Pittsburg, etc., Traction Co.*, 165 Pa. St. 468, *reversing* 41 Pittsb. Leg. J. N. S. (Pa.) 330.

of another road connecting with the lessee's line at any point, so that a continuous route is formed over the leased road to either terminus of the lessee's road.¹

"Connected" Lines. — The roads form a connected line when the connection is effected by means of an intervening road.²

bb. PARALLEL AND COMPETING LINES. — In addition to the prohibition of leases between parallel and competing lines, which is implied from the statutory permission to lease connected lines,³ leases of parallel and competing lines are, as a general rule, expressly forbidden by statute or by constitutional provision,⁴ though in some instances such leases have been permitted.⁵

Effect of Prohibited Lease. — In case such a lease is made, it is void *ab initio* and no action can be maintained on it. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action.⁶

cc. RULE AS TO FOREIGN RAILROAD COMPANIES. — A statute which merely provides that railroad companies may lease the property of other companies refers to domestic corporations only, and does not authorize a lease to be made to a foreign company,⁷ unless the statute expressly applies to foreign as well as domestic companies.⁸ But this principle does not forbid a domestic company to take a lease from a foreign company, if the foreign company had authority to lease its property.⁹

Lease to Foreign Companies Expressly Forbidden. — In some jurisdictions leases to foreign companies are expressly prohibited without the consent of the legislature.¹⁰

dd. LEASES TO INDIVIDUALS. — It seems that a statute authorizing leases of railroad property and franchises contemplates leases to railroad companies only, and does not authorize the making of such a lease to one or more individuals.¹¹ It has been held, however, that such a lease is neither *malum in se*

1. **Point of Connection.** — *Hancock v. Louisville, etc., R. Co.*, 145 U. S. 409.

2. **Connected Line Defined.** — *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 402.

3. See the next preceding subdivision of this section, *Continuous or Connecting Lines*.

4. **Leases of Parallel and Competing Lines Expressly Prohibited.** — *Pearsall v. Great Northern R. Co.*, 161 U. S. 646; *Eel River R. Co. v. State*, 155 Ind. 433. See also the statutes and constitutions of the several states.

Street Railways. — It is held that the provision of the constitution of *Pennsylvania* forbidding railroad companies to lease parallel or competing lines does not apply to street railways. *Shipley v. Continental R. Co.*, 13 Phila. (Pa.) 129, 36 Leg. Int. (Pa.) 450.

Right to Build Parallel Line. — A prohibition against leasing a parallel or competing line does not forbid a railroad company, which has lawfully leased another road, from building a line parallel with it. *Catawissa R. Co. v. Philadelphia, etc., R. Co.*, 14 Pa. Co. Ct. 280.

What Constitutes Competing Lines. — For a discussion as to what constitutes competing lines, see *supra*, this title, *Sales — Statutory Authority to Sell*; and the title *CONSOLIDATION OF CORPORATIONS*, vol. 6, pp. 804, 826.

5. **Statutes Authorizing Lease of Competing Line.** — *State v. Montana R. Co.*, 21 Mont. 221; *Wallace v. Long Island R. Co.*, 12 Hun (N. Y.) 460; *Gere v. New York Central, etc., R. Co.*, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 193.

6. **Lease Void Ab Initio.** — *East St. Louis Con-*

necting R. Co. v. Jarvis, (C. C. A.) 92 Fed. Rep. 735.

7. **Leases to Foreign Companies — Express Statutory Authority Required.** — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300; *Archer v. Terre Haute, etc., R. Co.*, 102 Ill. 493; *Ohio, etc., R. Co. v. Indianapolis, etc., R. Co.*, (Ohio 1866) 5 Am. L. Reg. N. S. 733; *McCabe v. Maysville, etc., R. Co.*, (Ky. 1902) 66 S. W. Rep. 1054; *Freeman v. Minneapolis, etc., R. Co.*, 28 Minn. 443; *Van Steuben v. Central R. Co.*, 178 Pa. St. 367.

Consolidation of Foreign and Domestic Companies. — A railroad company formed by the consolidation of a foreign company with a domestic company is itself a domestic company, and as such may take leases of other railroads. *Peters v. Boston, etc., R. Co.*, 114 Mass. 127.

8. **Leases to Foreign Companies Expressly Authorized.** — *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 58 Am. St. Rep. 140; *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 65 N. H. 393; *Michigan Cent. R. Co. v. Wealleans*, 24 Can. Sup. Ct. 309.

9. **Authority to Take Lease from Foreign Company.** — *Day v. Ogdensburgh, etc., R. Co.*, 107 N. Y. 129.

10. **Leases to Foreign Companies Expressly Prohibited.** — *Stockton v. Central R. Co.*, 50 N. J. Eq. 52.

11. **Lease to Individual Not Authorized.** — *Abbott v. Johnstown, etc., Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572; *Middletown v. Rondout, etc., R. Co.*, (Supm. Ct.) 43 How. Pr.

nor *malum prohibitum* nor void as against public policy, and that a lessee who has the possession and use of the property is estopped from denying its validity in an action for rent.¹

cc. LEASES AS AFFECTING PARTICULAR LOCALITIES. — A railroad company which has constructed its road by public aid is under the duty to operate its entire line to any locality which furnished such aid, and cannot lease a part of its line to another company to the injury of such locality.²

b. REQUISITES AND VALIDITY OF LEASES — (1) *What Constitutes Lease.* — It is not every instrument in the form of a lease that is such in legal effect, and conversely, an instrument may be a lease though it is not drawn in the appropriate form. Thus, an instrument which recites a letting of property and designates the parties as lessor and lessee has been variously held to be a mortgage;³ a partnership between the parties;⁴ a contract to operate the road as the agent⁵ or trustee of the owner;⁶ or a contract for a connection between the roads of the parties.⁷

The Requisites of Leases Generally are discussed elsewhere in this work.⁸

A Mere Vote by a Railroad Company to agree with another company to take a lease of its road and a vote by such other company to make the lease do not constitute a lease.⁹

Lease Distinguished from Contract for Joint Possession. — It has been held that a contract by which one railroad company permits another to use the road or a part of it jointly with the owner is not a lease.¹⁰

(2) *Term of Lease.* — In some jurisdictions, the term for which the lease of a railroad may be made is definitely limited by statute.¹¹ But in the absence of such a limitation, the validity of a lease is not affected by the period fixed for its duration,¹² even though the lease is for the full period of the lessor's corporate existence.¹³

Term Exceeding Period of Corporate Existence. — If the term of the lease exceeds the period of the lessor's corporate existence, it will still be valid for the period of such corporate existence.¹⁴

Effect of Holding Over. — Where the lessee of a railroad holds over after the

(N. Y.) 481; *Fisher v. Metropolitan El. R. Co.*, 34 Hun (N. Y.) 433.

1. **Lease to Individual Not Absolutely Void.** — *Woodruff v. Erie R. Co.*, 93 N. Y. 609.

2. **Leases as Affecting Particular Localities.** — *State v. Central Iowa R. Co.*, 71 Iowa 410, 60 Am. Rep. 806.

3. **Instrument Construed as Mortgage.** — *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123.

4. **Partnership and Not Lease.** — *Galveston, etc.*, R. Co. *v.* *Davis*, 4 Tex. Civ. App. 468; *Galveston, etc.*, R. Co. *v.* *Arispe*, 5 Tex. Civ. App. 611. Compare *Houston, etc.*, R. Co. *v.* *McFadden*, 91 Tex. 194.

Element of Partnership Wanting. — In *South Carolina, etc.*, R. Co. *v.* *Augusta Southern R. Co.*, 107 Ga. 164, it was held that a contract between two railroad companies by which one was to operate the other's road and the owner of the road was to receive a share of the profits was not a partnership, because there was to be no sharing of losses.

5. **Contract to Operate Road as Agent.** — *South Carolina, etc.*, R. Co. *v.* *Carolina, etc.*, R. Co., (C. C. A.) 93 Fed. Rep. 543.

6. **Trustee.** — *U. S. Rolling Stock Co. v. Potter*, 48 Iowa 56.

7. **Contract for Connection.** — *Archer v. Terre Haute, etc.*, R. Co., 102 Ill. 493.

8. See the title **LEASES**, vol. 18, p. 597 *et seq.*

9. **Vote to Agree to Take Lease Not Lease.** — *Peters v. Boston, etc.*, R. Co., 114 Mass. 127.

10. **Joint Possession.** — *Coney Island, etc.*, R. Co. *v.* *Brooklyn Cable Co.*, 53 Hun (N. Y.) 169. See also *Chicago, etc.*, R. Co. *v.* *Union Pac. R. Co.*, 47 Fed. Rep. 15, *affirmed* (C. C. A.) 51 Fed. Rep. 309. But see *contra*, *St. Louis, etc.*, R. Co. *v.* *East St. Louis, etc.*, R. Co., 39 Ill. App. 354, *affirmed* 139 Ill. 402.

11. **Term of Lease Limited by Statute.** — Thus, in *New Hampshire* it is provided by statute that no contract between two or more railroad corporations for the use of their roads shall be legal and binding for a longer term than five years. *Currier v. Concord R. Corp.*, 48 N. H. 321. Compare the statutes in other jurisdictions.

12. **Validity of Lease Not Affected by Length of Term.** — *Chicago, etc.*, R. Co. *v.* *People*, 153 Ill. 409, in which a lease to a company "and its successors and assigns forever" was held to be valid.

13. **Lease for Period of Lessor's Corporate Existence.** — *Matter of New York, etc.*, R. Co., 35 Hun (N. Y.) 220.

14. **Lease Exceeding Period of Lessor's Corporate Existence.** — *Gere v. New York Cent., etc.*, R. Co., (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 193; *Union Pac. R. Co. v. Chicago, etc.*, R. Co., (C. C. A.) 51 Fed. Rep. 309, 10 U. S. App. 98.

expiration of the term, a tenancy from year to year is created, as in the case of any other lease.¹

Rule Against Perpetuities. — A lease to a railroad for a term of years, however long, does not violate the rule against perpetuities.²

Expiration of Term. — A railroad lease may be made determinable on the non-performance of its stipulations by either of the parties,³ or it may be terminated by the surrender of the lease, and the obligations of the lessee or one who assumed the lessee's obligations under the lease will terminate with such surrender.⁴

(3) **Consent of Stockholders** — (a) **Requirements in General.** — The statutes authorizing railroad companies to lease their property and franchises generally require the consent of the holders of a certain proportion of the stock before such lease can be made.⁵

Protection of Dissenting Stockholders. — Provision is sometimes made for the protection of the dissenting stockholders by requiring the lessee to purchase their shares.⁶

Term of Lease as Affecting Requirement. — In some jurisdictions, the consent of the stockholders is required only in case the lease exceeds a certain term.⁷

(b) **Proportion of Consenting Stockholders.** — Some of the statutes authorizing railroad companies to lease their property require the consent thereto of the holders of merely a majority of the stock,⁸ but in many instances the consent of a greater proportion is required.⁹

(c) **Mode of Giving Consent.** — The statutes usually require the consent of the stockholders to be given at a stockholders' meeting, either general or special,¹⁰ though it is sometimes provided that the consent may be given either at such meeting or by the stockholders individually in writing.¹¹

1. Holding Over — Tenancy from Year to Year. — *Baltimore, etc., R. Co. v. Illinois Cent. R. Co.*, 137 Ill. 9.

2. Rule Against Perpetuities. — *Montpelier First Nat. Bank v. Sioux City Terminal R., etc., Co.*, 69 Fed. Rep. 441; *Sioux City Terminal R., etc., Co. v. Trust Co.*, (C. C. A.) 82 Fed. Rep. 124.

The General Rule is that a lease for a term of years, however long, or even a lease with a covenant for perpetual renewal, does not create a perpetuity. See the titles *LEASES*, vol. 18, p. 611; *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 706.

3. Termination of Lease by Default of Party. — *Schmitz v. Louisville, etc., R. Co.*, 101 Ky. 441.

4. Lessee's Obligations Terminated by Surrender of Lease. — *Harkness v. Manhattan R. Co.*, 54 N. Y. Super Ct. 174.

Assumption by Third Party. — *Jesup v. Illinois Cent. R. Co.*, 43 Fed. Rep. 483.

5. Consent of Stockholders Required — *United States*. — *St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co.*, 145 U. S. 393, affirming 33 Fed. Rep. 440.

Connecticut. — *Middletown v. Boston, etc., R. Co.*, 53 Conn. 359.

Indiana. — *Tippecanoe County v. Lafayette, etc., R. Co.*, 50 Ind. 85.

Massachusetts. — *Boston, etc., R. Co. v. Graham*, 179 Mass. 62.

New Hampshire. — *Jones v. Concord, etc., R. Co.*, 67 N. H. 234, 68 Am. St. Rep. 650.

North Carolina. — *Opinion of Justices*, 120 N. Car. 623.

Ohio. — *State v. Ohio, etc., R. Co.*, 3 Ohio Cir. Dec. 518, 6 Ohio Cir. Ct. 415.

Virginia. — *Stevens v. Davison*, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

Formerly the consent of the stockholders was not required in *New York*, but such consent is now required in that state, *Beveridge v. New York El. R. Co.*, 112 N. Y. 1; provided the term of the lease exceeds one year, *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, affirmed 158 N. Y. 493.

6. Protection of Dissenting Stockholders. — *Black v. Delaware, etc., Canal Co.*, 24 N. J. Eq. 455; *Mills v. Central R. Co.*, 41 N. J. Eq. 1. And see the statutes of the several states.

7. Flynn v. Brooklyn City R. Co., 9 N. Y. App. Div. 269, affirmed 158 N. Y. 493.

8. Consent of Holders of Majority of Stock. — *Boston, etc., R. Co. v. Graham*, 179 Mass. 62; *Humphreys v. St. Louis, etc., R. Co.*, 37 Fed. Rep. 307 (reciting the requirement of the *Missouri* statute).

9. Consent of More than Majority — *Two-thirds*. — *Peters v. Lincoln, etc., R. Co.*, 2 McCrary (U. S.) 275 (reciting the *Nebraska* statute); *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 65 N. H. 393; *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, affirmed 158 N. Y. 493.

Three-fourths. — *Middletown v. Boston, etc., R. Co.*, 53 Conn. 351; *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299 (reciting the *Tennessee* statute).

And see generally the statutes of the several states.

10. Consent to Be Obtained at Stockholders' Meeting. — *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299; *Peters v. Lincoln, etc., R. Co.*, 2 McCrary (U. S.) 275; *Stevens v. Davison*, 18 Gratt. (Va.) 819, 98 Am. Dec. 692.

11. Consent in Writing. — *Humphreys v. St. Louis, etc., R. Co.*, 37 Fed. Rep. 307; *St.*

(d) *Effect of Failure to Obtain Consent.* — Though the statute, in terms, declares that any lease made without the consent of the stockholders "shall be null and void," it seems that such provision is for the protection of the stockholders alone and is intended to be availed of by them only; it does not limit the scope of the powers conferred on the corporation by law, but merely prescribes regulations as to the manner of exercising corporate powers. Therefore, the stockholders may waive compliance with the requirement, and such waiver is effected by long acquiescence in the lease.¹ The lessor company may also be estopped by lapse of time or otherwise to deny the validity of the lease,² and if the lessee company takes possession under the lease, a recovery may be had against it for the use of the property.³

(4) *Reservation of Rent.* — The lessee may lawfully stipulate to pay as rent an outstanding indebtedness of the lessor or the interest thereon.⁴

Amount of Rental. — A lease is not invalid merely because the rent reserved is so low that the preferred stockholders will absorb it all to the exclusion of the holders of the common stock.⁵

Rent Measured by Earnings. — Railroad leases sometimes stipulate for the payment by the lessee to the lessor of a percentage of the earnings of the leased road, either gross⁶ or net.⁷

c. OPERATION AND EFFECT OF LEASES — (1) *As to Lessor* — (a) *Rights of Lessor.* — The lessor's right to compensation for the use of the property demised is usually fixed by the terms of the lease.⁸ But a promise on the part of the lessee to pay for the use of the property will be implied in the absence of an express promise in the lease, in which case the lessor may recover a reasonable compensation.⁹

Forfeiture of Lease for Breach of Covenant. — The lessor has the right to sue for a forfeiture of the lease on the ground of breach of covenant, where the lease contains a provision for forfeiture in such case, unless there was a failure to declare a forfeiture when the breach occurred and the covenant was performed before a suit was commenced.¹⁰

Right to Extend Road. — The lessor does not, by making the lease, deprive itself of the right to avail itself of any powers conferred by its charter, so long as it does nothing to interfere with the due operation of its agreement with

Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, *affirming* 33 Fed. Rep. 440.

1. *Consent Waived by Stockholders.* — St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, *affirming* 33 Fed. Rep. 440.

Acquiescence for Five Years Held Sufficient. — Latimer v. Richmond, etc., R. Co., 39 S. Car. 44.

2. *Lessor Estopped to Deny Validity of Lease.* — St. Louis, etc., R. Co. v. Terre Haute, etc., R. Co., 145 U. S. 393, *affirming* 33 Fed. Rep. 440.

3. *Lessee Liable for Use of Property.* — Farmers' L. & T. Co. v. St. Joseph, etc., R. Co., 1 McCrary (U. S.) 247; Humphreys v. St. Louis, etc., R. Co., 37 Fed. Rep. 307.

4. *Payment of Lessor's Indebtedness as Rent.* — Eastern Tp. Bank v. St. Johnsbury, etc., R. Co., 40 Fed. Rep. 423; Gere v. New York Cent., etc., R. Co., (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 193. See also Chicago, etc., R. Co. v. Chicago Third Nat. Bank, 134 U. S. 276.

5. *Amount of Rent.* — Middletown v. Boston, etc., R. Co., 53 Conn. 351.

6. *Percentage of Gross Earnings as Rent.* — Terre Haute, etc., R. Co. v. Cox, (C. C. A.)

102 Fed. Rep. 825; Catawissa R. Co. v. Philadelphia, etc., R. Co., 168 Pa. St. 544.

7. *Percentage of Net Earnings as Rent.* — South Carolina, etc., R. Co. v. Augusta Southern R. Co., 107 Ga. 164; Schmidt v. Louisville, etc., R. Co., 95 Ky. 289.

Ascertainment of Net Earnings. — Schmidt v. Louisville, etc., R. Co., 95 Ky. 289.

8. *Rights of Lessor Fixed by Lease.* — March v. Eastern R. Co., 43 N. H. 515.

Covenant to Pay Percentage of Gross Earnings as Rent. — Terre Haute, etc., R. Co. v. Cox, (C. C. A.) 102 Fed. Rep. 825, holding that under a provision for the payment of a percentage of the gross earnings as rent, the lessee becomes chargeable in equity as a trustee for the lessor as soon as the earnings are received. But it has been held that a trust relation is not created by an agreement to pay to the lessor a portion of the net profits. South Carolina, etc., R. Co. v. Augusta Southern R. Co., 107 Ga. 164.

9. *Implied Promise to Pay Rent.* — South Carolina Terminal Co. v. South Carolina, etc., R. Co., 52 S. Car. 1.

10. *Forfeiture for Breach of Covenant.* — South Carolina, etc., R. Co. v. Augusta Southern R. Co., 111 Ga. 420.

the lessee, and therefore it may purchase or otherwise obtain an extension of its road to some point not in view at the date of the lease.¹

Exercise of Corporate Franchise. — A railroad company does not, by a lease of its road, deprive itself of its right to exercise its corporate franchise, except so far as the lease may operate to transfer such right to the lessee. Therefore, it may still condemn land by virtue of the power of eminent domain.²

(b) **Liabilities of Lessor** — *aa. IN GENERAL.* — It is well settled that a lease, though made pursuant to legislative authority, does not operate to relieve the lessor of any duty or liability imposed by its charter or by the general laws of the state, unless the enabling statute contains an exemption from liability.³

Construction and Maintenance of Road. — According to this principle, the lessor is liable for injuries caused by the nonperformance of its duty in regard to the proper construction and maintenance of the road, station buildings, etc.⁴

Failure to Fence Tracks. — And in those jurisdictions where railroad companies are under the legal duty of fencing their tracks, a company which has neglected to perform this duty is liable for injuries to animals which stray on the track, though it has leased the road to another company.⁵

Permitting Accumulation of Combustible Matter. — It is also generally held that the lease of a railroad does not relieve the lessor of liability for fires caused by the accumulation of combustible matter on the right of way, while the lessee is operating the road.⁶

bb. NEGLIGENCE OPERATION BY LESSEE — (*aa*) *Rule Holding Lessor Liable.* — There is a sharp conflict of authority as to whether the lessor of a railroad is liable for injuries to person or property caused by the wrongful or negligent acts or omissions of the lessee in the operation of the road, as distinguished from the nonperformance of a duty which the lessor's charter or the general law imposes primarily on the lessor. There is one line of decisions holding that the proper operation of the road so as to avoid injury to third persons is one of the duties imposed by the charter of the proprietary company, and that it cannot escape such duty and the corresponding liability by leasing its road to another, but that the lessor is liable to any person who may be injured by the negligence or wrongful act of the lessee in operating the leased road, unless the charter or statute authorizing the lease exempts the lessor from

1. **Right to Extend Road.** — *March v. Eastern R. Co.*, 43 N. H. 515.

2. **Power of Lessor to Condemn Land.** — *Chicago, etc., R. Co. v. Illinois Cent. R. Co.*, 113 Ill. 156; *Kip v. New York, etc., R. Co.*, 67 N. Y. 227. The power of eminent domain does not pass to the lessee but remains in the lessor. *Worcester v. Norwich, etc., R. Co.*, 109 Mass. 103.

3. **Duties and Liabilities of Lessor Not Affected by Lease** — *United States.* — *Illinois Cent. R. Co. v. Barron*, 5 Wall. (U. S.) 90; *Washington, etc., R. Co. v. Brown*, 17 Wall. (U. S.) 445; *York, etc., R. Co. v. Winans*, 17 How. (U. S.) 30; *Thomas v. West Jersey R. Co.*, 101 U. S. 71.

Georgia. — *Macon, etc., R. Co. v. Mayes*, 49 Ga. 355, 15 Am. Rep. 678.

Illinois. — *Ohio, etc., R. Co. v. Dunbar*, 20 Ill. 623, 71 Am. Dec. 291.

Michigan. — *Atty.-Gen. v. Erie, etc., R. Co.*, 55 Mich. 15.

New York. — *Abbott v. Johnstown, etc., Horse R. Co.*, 80 N. Y. 27, 36 Am. Rep. 572.

Texas. — *Central, etc., R. Co. v. Morris*, 68 Tex. 49.

4. **Liability of Lessor as to Construction and Maintenance of Road.** — *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 58 Am. St. Rep. 140; *St.*

Louis, etc., R. Co. v. Curl, 28 Kan. 622; *Louisville Southern R. Co. v. Cogar*, 15 Ky. L. Rep. 444; *Kearney v. Central R. Co.*, 167 Pa. St. 362.

Lessee's Servants Injured by Defective Road. — *Rome R. Co. v. Thompson*, 101 Ga. 26.

Even Though the Lessee Assumes the Duty of repairing the road, the lessor remains liable to any one who may be injured in consequence of the nonperformance of such duty. *Hainden v. New Haven, etc., Co.*, 27 Conn. 158.

5. **Neglect of Duty to Fence Tracks.** — *Pittsburgh, etc., R. Co. v. Bolner*, 57 Ind. 572; *Stephens v. Davenport, etc., R. Co.*, 36 Iowa 327; *Harmon v. Columbia, etc., R. Co.*, 28 S. Car. 401, 13 Am. St. Rep. 686. See also the title *FENCES*, vol. 12, pp. 1068, 1069. Compare *Ditchett v. Spuyten Duyvil, etc., R. Co.*, 67 N. Y. 425, where the lease contained a covenant that the lessee should keep up the fences.

6. **Accumulation of Combustible Matter on Right of Way.** — *Balsley v. St. Louis, etc., R. Co.*, 119 Ill. 68, 59 Am. Rep. 784; *Bean v. Atlantic, etc., R. Co.*, 63 Me. 293; *Davis v. Providence, etc., R. Co.*, 121 Mass. 134; *Fisher v. Baltimore, etc., R. Co.*, 6 Ohio Dec. 67, 3 Ohio N. P. 283. But see *Heron v. St. Paul, etc., R. Co.*, 68 Minn. 542.

such liability.¹ The theory of these cases is not that the lessee is to be regarded as the agent or servant of the lessor, but that public policy forbids a railroad company thus to divest itself of its legal responsibility without legislative authority.²

Assumption of Liability by Lessee. — The liability of the lessor is not affected by a covenant in the lease that the lessee will save the lessor harmless in respect to the operation of the road.³

A Statute Expressly Declaring the Lessee Liable for injuries inflicted in the operation of the leased road does not exempt the lessor from liability.⁴

Injuries to Lessee's Servants. — The rule of liability which has just been stated does not apply to the lessee's servants who may be injured by the lessee's negligence.⁵

(bb) **Rule Denying Liability of Lessor.** — Opposed to the rule just stated⁶ is a line of cases holding that legislative authority to lease a railroad implies an exemption of the lessor from liability for the acts of the lessee, and that when a company has leased its road and the lessee is in the exclusive possession and control under the lease, no liability attaches to the lessor for any negligent or wrongful conduct of the lessee or its servants, whereby third persons are injured.⁷

1. Lessor Held Liable for Lessee's Negligence — *Connecticut.* — Driscoll v. Norwich, etc., R. Co., 65 Conn. 230.

Georgia. — Central R. Co. v. Brinson, 64 Ga. 475; Singleton v. Southwestern R. Co., 70 Ga. 464, 48 Am. Rep. 574; Green v. Coast Line R. Co., 97 Ga. 15, 54 Am. St. Rep. 379. *A fortiori* is the lessor liable where the lessee is not put in exclusive possession and control of the road, but has only the right, jointly with the lessor, to run trains over it. Macon, etc., R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Illinois. — Ohio, etc., R. Co. v. Dunbar, 20 Ill. 623, 71 Am. Dec. 291; Pittsburgh, etc., R. Co. v. Campbell, 86 Ill. 443; Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; Chicago, etc., R. Co. v. Doan, 195 Ill. 168, affirming 93 Ill. App. 247. Compare Chicago, etc., R. Co. v. Eichman, 47 Ill. App. 156, in which it was held that the lessor is not liable for trespasses of the servants of the lessee over whom the lessor had no control, committed while repairing the right of way.

Iowa. — Bower v. Burlington, etc., R. Co., 42 Iowa 546.

Maine. — Pratt v. Atlantic, etc., R. Co., 42 Me. 579; Stearns v. Atlantic, etc., R. Co., 46 Me. 95; Mahoney v. Atlantic, etc., R. Co., 63 Me. 68; Bean v. Atlantic, etc., R. Co., 63 Me. 293; Nugent v. Boston, etc., R. Co., 80 Me. 62, 6 Am. St. Rep. 151.

Massachusetts. — Ingersoll v. Stockbridge, etc., R. Co., 8 Allen (Mass.) 438; Davis v. Providence, etc., R. Co., 121 Mass. 134.

North Carolina. — Logan v. North Carolina R. Co., 116 N. Car. 940; Tillett v. Norfolk, etc., R. Co., 118 N. Car. 1031; Kinney v. North Carolina R. Co., 122 N. Car. 961; Pierce v. North Carolina R. Co., 124 N. Car. 83; Perry v. Western North Carolina R. Co., 128 N. Car. 471.

South Carolina. — National Bank v. Atlanta, etc., R. Co., 25 S. Car. 216; Harmon v. Columbia, etc., R. Co., 28 S. Car. 401, 13 Am. St. Rep. 686; Hart v. Charlotte, etc., R. Co., 33 S. Car. 427; Bouknight v. Charlotte, etc., R. Co., 41 S. Car. 415; Davis v. Atlanta, etc., R.

Co., 63 S. Car. 370. See also Southern R. Co. v. Bouknight, (C. C. A.) 70 Fed. Rep. 442.

Vermont. — Nelson v. Vermont, etc., R. Co., 26 Vt. 717, 62 Am. Dec. 614.

2. Rule Founded on Public Policy. — Baisley v. St. Louis, etc., R. Co., 119 Ill. 68, 59 Am. Rep. 784.

3. Covenant in Lease to Hold Lessor Harmless. — It is held that such a covenant in a lease is merely a contract for reimbursement for whatever damages may be recovered against the lessor, and in no wise affects the lessor's liability to any person who may be injured. Nugent v. Boston, etc., R. Co., 80 Me. 62, 6 Am. St. Rep. 151.

4. Statute Making Lessee Liable Does Not Relieve Lessor. — Chicago, etc., R. Co. v. Crane, 113 U. S. 424; Bower v. Burlington, etc., R. Co., 42 Iowa 546; Bean v. Atlantic, etc., R. Co., 63 Me. 293.

5. Injuries to Lessee's Servants. — Banks v. Georgia R., etc., Co., 112 Ga. 656. See also Lee v. Southern Pac. R. Co., 116 Cal. 97, 58 Am. St. Rep. 140; Virginia Midland R. Co. v. Washington, 86 Va. 629.

6. See the next preceding subdivision of this section, *Negligent Operation by Lessee — Rule Holding Lessor Liable.*

7. Lessor Held Not Liable for Negligence of Lessee — *United States.* — Arrowsmith v. Nashville, etc., R. Co., 57 Fed. Rep. 165; Hayes v. Northern Pac. R. Co., (C. C. A.) 74 Fed. Rep. 279.

Arkansas. — Little Rock, etc., R. Co. v. Daniels, 68 Ark. 171.

Kansas. — St. Louis, etc., R. Co. v. Curl, 28 Kan. 622; Caruthers v. Kansas City, etc., R. Co., 59 Kan. 629.

Kentucky. — McCabe v. Maysville, etc., R. Co., (Ky. 1902) 66 S. W. Rep. 1054; Harper v. Newport News, etc., R. Co., 90 Ky. 359.

Minnesota. — Heron v. St. Paul, etc., R. Co., 68 Minn. 542.

New York. — Ditchett v. Spuyten Duyvil, etc., R. Co., 67 N. Y. 425; New York v. Twenty-third St. R. Co., 113 N. Y. 311; Cain v. Syracuse, etc., R. Co., 27 N. Y. App. Div. 376; Fisher v. Metropolitan El. R. Co., 34 Hun (N. Y.) 433;

Possession Retained by Lessor. — But if the lessor retains possession and control of the road, that is, if the lease is merely a grant to the lessee to run its trains over the lessor's road, then, under such circumstances, the lessor is responsible for the lessee's negligence in the operation of its trains.¹

(cc) *Statutes Governing Lessor's Liability.* — In some states it is expressly provided by statute that the lessor of a railroad shall be liable for the acts of the lessee.²

(2) *Rights and Liabilities of Lessee* — (a) **In General.** — The rights of a lessee against and his liabilities to the lessor in any case must of necessity depend on the terms of the particular lease³ except so far as they are illegal,⁴ or have been waived by the lessor.⁵

Estoppel to Deny Lessor's Title. — The general rule that a lessee is not permitted to deny the lessor's title is applicable to a railroad lease, as well as in other cases.⁶

Estoppel to Deny Validity of Lease. — A railroad company having taken a lease of another road is estopped to deny the authority of the lessor's officers in the premises, or the regularity of the proceeding, where the lease was within the scope of the lessor's powers, was executed by the proper officers, and the lessee had taken possession under the lease and recognized it as subsisting.⁷

Philips v. Northern R. Co., 62 Hun (N. Y.) 233, *appeal dismissed* 139 N. Y. 650.

Pennsylvania. — *Szciwak v. Philadelphia, etc., R. Co.*, 4 Pa. Dist. 339; *Von Steuben v. Central R. Co.*, 4 Northam. Co. Rep. (Pa.) 345.

Texas. — *Missouri Pac. R. Co. v. Watts*, 63 Tex. 549; *Houston, etc., R. Co. v. M'Fadden*, 91 Tex. 194.

1. **Lessor Retaining Possession and Control of Road.** — *Central Trust Co. v. Colorado Midland R. Co.*, 89 Fed. Rep. 560; *Central Trust Co. v. Denver, etc., R. Co.*, (C. C. A.) 97 Fed. Rep. 239; *Heron v. St. Paul, etc., R. Co.*, 68 Minn. 542.

2. **Lessor Declared Liable by Statute** — *Missouri.* — *Smith v. Pacific R. Co.*, 61 Mo. 17; *Anderson v. Union Terminal R. Co.*, 161 Mo. 411; *Main v. Hannibal, etc., R. Co.*, 18 Mo. App. 383; *Brown v. Hannibal, etc., R. Co.*, 27 Mo. App. 394; *McCoy v. Kansas City, etc., R. Co.*, 36 Mo. App. 445.

Ohio. — *Fisher v. Baltimore, etc., R. Co.*, 6 Ohio Dec. 67; *Stoltz v. Baltimore, etc., R. Co.*, 7 Ohio Dec. 514, 7 Ohio N. P. 128. See *Cincinnati, etc., R. Co. v. Sleeper*, 5 Ohio Dec. (Reprint) 196, 3 Am. L. Rec. 464.

Compare the statutes in other states.

The *Ohio* statute, making the lessor liable for injuries inflicted by the officers and employees of the lessee, is held not to render a lessor liable for the acts of a receiver of the lessee who is operating the road as such. *Chamberlain v. New York, etc., R. Co.*, 71 Fed. Rep. 636.

3. **Rights and Liabilities of Lessee Fixed by Terms of Lease.** — *March v. Eastern R. Co.*, 43 N. H. 515.

Property Included in Lease. — *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 45 Fed. Rep. 304; *Norwich, etc., R. Co. v. Worcester*, 147 Mass. 518; *Gray v. Central Massachusetts R. Co.*, 171 Mass. 116; *Matter of New York Cent. R. Co.*, 49 N. Y. 414.

Terminal Facilities. — *Jacksonville, etc., R. Co. v. Louisville, etc., R. Co.*, 47 Ill. App. 414, *affirmed* 150 Ill. 480.

Incidental Rights of Lessee — **Car-cleaning Facilities.** — *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596.

Stipulation for Payment of Taxes and Assessments. — *Thomas v. Cincinnati, etc., R. Co.*, 93 Fed. Rep. 587; *McPherson v. Atlantic, etc., R. Co.*, 66 Mo. 103; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 65 Vt. 366. The lessee is not liable for an assessment against the leased property unless the lease so provides. *Baltimore, etc., R. Co. v. Pausch*, 8 Ohio Dec. 677, 7 Ohio N. P. 624.

Stipulation to Pay Taxes Does Not Include Previous Assessments. — *Cleveland v. Spencer*, 25 U. S. App. 626.

Stipulation to Maintain Business of Lessor's Road. — *Catawissa R. Co. v. Philadelphia, etc., R. Co.*, 14 Pa. Co. Ct. 280, 3 Pa. Dist. 111, 34 W. N. C. (Pa.) 11.

Stipulation to Perform All Duties of Lessor — **Construction of Farm Crossings.** — *Buffalo Stone, etc., Co. v. Delaware, etc., R. Co.*, 130 N. Y. 152, *affirming* (*Buffalo Super. Ct. Gen. T.*) 7 N. Y. Supp. 604.

Stipulation Against Debts, Dues, Claims, and Liabilities of Lessor. — *Pennsylvania Co. v. Erie, etc., R. Co.*, 108 Pa. St. 621.

Liability of Lessee for Property Lost, Destroyed, or Injured. — *Stewart v. Western Union R. Co.*, 4 Biss. (U. S.) 362; *Powell v. Dayton, etc., R. Co.*, 16 Oregon 33, 8 Am. St. Rep. 251.

Duty of Lessee to Make Repairs. — *White v. Albany R. Co.*, 17 Hun (N. Y.) 98; *Sturges v. Knapp*, 31 Vt. 1; *Thistle v. Union Forwarding, etc., Co.*, 29 U. C. C. P. 76.

Agreement to Pay Interest on Lessor's Bonds as Rent — **Liability of Lessee to Mortgagees.** — *Welden Nat. Bank v. Smith*, (C. C. A.) 86 Fed. Rep. 398.

4. **Illegal Provisions of Lease.** — *Metropolitan Trust Co. v. Columbus, etc., R. Co.*, 95 Fed. Rep. 18.

5. **Waiver of Conditions by Lessor.** — *Metropolitan Trust Co. v. Columbus, etc., R. Co.*, 95 Fed. Rep. 18.

6. **Estoppel to Deny Lessor's Title.** — *Woodruff v. Erie R. Co.*, 93 N. Y. 609.

7. **Estoppel to Deny Validity of Lease.** — *Peterborough R. Co. v. Nashua, etc., R. Co.*, 59 N. H. 385; *Woodruff v. Erie R. Co.*, 93 N. Y. 609.

Obligation to Return Property in Good Repair. — The lease may fix the liability of the lessor in regard to the preservation of the property, as by a covenant that it shall be turned over to the lessor in good repair at the termination of the lease, in the absence of unavoidable casualty, legal proceedings, etc.¹

Obligation to Operate Leased Road. — A lessee may be required to continue the leased road in operation where the lessor's charter is subject to forfeiture in case the operation of its road is discontinued for a specified period.²

Subject to Lessor's Charter and General Provisions of Law. — The lessee of a railroad is subject to all the provisions and limitations of the lessor's charter,³ and also to the same general provisions of law which were applicable to the lessor.⁴

(b) **Construction, Maintenance, and Operation of Road — In General.** — It is held that the lessee of a railroad is not liable for injuries caused by defects in the original construction of the road where the injury results solely from the defect of construction and not from the operation of the road in its defective condition,⁵ unless the road as constructed constitutes a continuing injury to property⁶ or the construction is such as to be dangerous to the property of others, and the lessee, with knowledge of that fact, maintains the road in such condition.⁷ But it is the duty of the lessee company to see that the road is in a safe condition for the running of trains, and it is liable to any one who may be injured in consequence of the neglect of such duty.⁸

Duty of Lessee to Fence Track. — Therefore, if the leased road is not fenced as required by law, the lessee is liable where animals straying on the track are injured by the lessee's locomotives and cars,⁹ but the lessee is not liable where an animal was killed or injured before the making of the lease and while the road was still being operated by the lessor.¹⁰

Grade Crossings. — On the same principle the lessor's duty to abolish grade crossings devolves on the lessee, so that the lessee is liable for injuries sustained at such a crossing.¹¹

1. **Obligation to Leave Road in Good Repair at Termination of Lease.** — *Louisville, etc., R. Co. v. Schmidt*, (Ky. 1902) 66 S. W. Rep. 629.

2. **Obligation of Lessee to Operate Leased Road.** — *Southern R. Co. v. Franklin, etc., R. Co.*, 96 Va. 693. Compare *Tobique Valley R. Co. v. Canadian Pac. R. Co.*, 2 N. Bruns. Eq. Rep. 195; *Henry v. Pittsburg, etc., R. Co.*, 5 Ohio Dec. 41.

3. **Lessee Subject to Provisions of Lessor's Charter** — *Iowa*. — *Hibbs v. Chicago, etc., R. Co.*, 39 Iowa 340.

Massachusetts. — *Linnfield v. Old Colony R. Corp.*, 10 Cush. (Mass.) 562, 57 Am. Dec. 124.

Michigan. — *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

New Jersey. — *McGregor v. Erie R. Co.*, 35 N. J. L. 89.

New York. — *New York v. Twenty-third St. R. Co.*, 113 N. Y. 311.

Pennsylvania. — *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205; *Mullen v. Philadelphia Traction Co.*, 19 Phila. (Pa.) 441, 44 Leg. Int. (Pa.) 393.

South Carolina. — *McCandless v. Richmond, etc., R. Co.*, 38 S. Car. 103.

Lessee Subject to Charter Duty of Lessor to Reconstruct Highway. — *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637.

Special Charter Privileges of Lessor Held Not to Pass to Lessee. — *Pittsburgh, etc., R. Co. v. Moore*, 33 Ohio St. 384, 31 Am. Rep. 543. See also *Robinson v. Southern Pac. R. Co.*, 105 Cal. 526.

Lessor's Charter Governs as to Tolls, Etc. — *Pennsylvania R. Co. v. Sly*, 65 Pa. St. 205.

See also *Fisher v. New York Cent., etc., R. Co.*, 46 N. Y. 644.

4. **Statutory Regulation of Lessee.** — *Dryden v. Grand Trunk R. Co.*, 60 Me. 512, in which the rule was applied to a foreign corporation. *McMillan v. Michigan Southern, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Cincinnati, etc., R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

5. **Defective Construction of Road.** — Thus, the lessee, by continuing the operation of the leased road, does not become liable for an injury to land caused by the improper construction of a bridge which had been built by the lessor. *Kearney v. Central R. Co.*, 167 Pa. St. 362.

6. **Road Constituting Continuing Injury.** — *Little Miami R. Co. v. Hambleton*, 40 Ohio St. 496. See also *Stickley v. Chesapeake, etc., R. Co.*, 93 Ky. 323.

7. **Defects Known to Lessee.** — *Silver v. Missouri Pac. R. Co.*, 101 Mo. 79.

8. **Operating Road in Unsafe Condition — Lessee Liable.** — *Wabash, etc., R. Co. v. Peyton*, 106 Ill. 534, 46 Am. Rep. 705.

9. **Lessee's Duty to Fence Tracks.** — *Liddle v. Keokuk, etc., R. Co.*, 23 Iowa 378; *Stephens v. Davenport, etc., R. Co.*, 36 Iowa 327; *Tracy v. Troy, etc., R. Co.*, 38 N. Y. 433, 98 Am. Dec. 54, affirming 55 Barb. (N. Y.) 529; *Burchfield v. Northern Cent. R. Co.*, 57 Barb. (N. Y.) 589. See also the title *FENCES*, vol. 12, p. 1067.

10. **Injuries Before Making of Lease — Lessee Not Liable.** — *Pittsburgh, etc., R. Co. v. Kain*, 35 Ind. 291.

11. **Duty to Abolish Grade Crossings.** — *West-*

Maintenance of Nuisance. — The lessee is also liable where the leased road is so constructed as to constitute a nuisance.¹

Negligence in Operation of Road. — In the case of an injury caused by the negligence or wrongful conduct of the lessee in the operation of the road, the lessee is unquestionably liable to the person injured,² and in some instances this rule has been expressly declared by statute.³ The liability of the lessee in this respect for its own torts is not affected by the rule holding the lessor liable; but in the jurisdictions where such rule obtains the lessor and the lessee are jointly liable.⁴ And so, too, the lessee is liable for continuing to operate the road while it is in a defective condition, though there was no negligence in the running of the train on or by which the injury occurred.⁵

Subletting by Lessee. — In case of a subletting of the right to use the leased road, the lessee is liable for the negligence of the sublessee.⁶

(3) **Rights and Liabilities of Stockholders.** — A lease of a railroad pursuant to statutory authority does not release a subscriber to the capital stock of the company from liability on his subscription. He is charged with notice of the power.⁷ But if a lease is contrived for the purpose of defrauding the stockholders, or to pervert the franchises and property of the company to fraudulent or illegal uses, equity will interfere at the instance of the stockholders.⁸

d. ASSIGNMENT OF LEASES — What Constitutes Assignment of Lease. — An assignment of a lease is effected by any contract between the lessee and a third person by which the lessee transfers to such third person all the rights under the lease.⁹

brook's Appeal, 57 Conn. 95. As to the rules relating to grade crossings generally, see the title CROSSINGS, vol. 8, p. 335.

1. **Road Constituting Nuisance.** — Wasmer v. Delaware, etc., R. Co., 80 N. Y. 212, 36 Am. Rep. 608.

2. **Lessee Liable for Negligence in Operating Road** — *Georgia.* — Logan v. Central R. Co., 74 Ga. 684.

Illinois. — Pennsylvania Co. v. Sloan, 125 Ill. 72, 8 Am. St. Rep. 337.

Iowa. — Stewart v. Chicago, etc., R. Co., 27 Iowa 282; Clary v. Iowa Midland R. Co., 37 Iowa 344.

Maine. — Mahoney v. Atlantic, etc., R. Co., 63 Me. 68.

Massachusetts. — McCluer v. Manchester, etc., R. Co., 13 Gray (Mass.) 124, 74 Am. Dec. 624.

Minnesota. — Cantlon v. Eastern R. Co., 45 Minn. 481; Heron v. St. Paul, etc., R. Co., 68 Minn. 542.

New York. — Abbott v. Johnstown, etc., Horse R. Co., 80 N. Y. 27, 36 Am. Rep. 572; Kain v. Smith, 80 N. Y. 458.

Texas. — Missouri Pac. R. Co. v. Watts, 63 Tex. 549.

Lease of Trackage Rights Only. — The fact that the lease is of the trackage rights only does not exempt the lessee from liability for injuries caused by its negligence in operating its trains. St. Louis, etc., R. Co. v. Rawley, 90 Ill. App. 653.

The Fact that the Lease Is Illegal does not exempt the lessee from liability from its torts in operating the road. Jacksonville, etc., R. Co. v. Peninsula Land, etc., Co., 27 Fla. 1.

3. **Liability of Lessor Declared by Statute.** — Bower v. Burlington, etc., R. Co., 42 Iowa 546.

4. **Joint Liability of Lessor and Lessee.** — Pennsylvania Co. v. Sloan, 125 Ill. 72, 8 Am. St. Rep. 337; Chicago, etc., R. Co. v. Doan, 93

Ill. App. 247, affirmed 195 Ill. 168; Logan v. North Carolina R. Co., 116 N. Car. 940.

Rule as to Liability of Lessee Stated. — See *supra*, this section, *Liabilities of Lessor — Negligent Operation by Lessee — Rule Holding Lessor Liable.*

5. **Continuing Operation of Defective Road.** — Wabash, etc., R. Co. v. Peyton, 106 Ill. 534, 46 Am. Rep. 705; St. Louis, etc., R. Co. v. Rawley, 90 Ill. App. 653.

6. **Subletting by Lessee.** — Suburban R. Co. v. Balkwill, 94 Ill. App. 454, affirmed 195 Ill. 535.

7. **Liability of Stockholders.** — Hays v. Ottawa, etc., R. Co., 61 Ill. 422; Ottawa, etc., R. Co. v. Black, 79 Ill. 262; Lynch v. Eastern, etc., R. Co., 57 Wis. 430. As to the rights in general of stockholders respecting leases, see *supra*, this section, *Requisites and Validity of Leases — Consent of Stockholders.*

8. **Rights of Stockholders to Relief in Equity.** — Coe v. East, etc., R. Co., 52 Fed. Rep. 531; Ottawa, etc., R. Co. v. Black, 79 Ill. 262; Boston, etc., R. Co. v. Boston, etc., R. Co., 65 N. H. 393; Barr v. New York, etc., R. Co., 125 N. Y. 263; People v. Metropolitan El. R. Co., 26 Hun (N. Y.) 82; Harkness v. Manhattan R. Co., 54 N. Y. Super. Ct. 174, affirmed 113 N. Y. 627. And see generally the titles STOCK; STOCKHOLDERS.

Common Directors of Lessor and Lessee. — The fact that the same persons were directors of both the lessor and the lessee companies is not of itself sufficient to avoid the lease at the instance of stockholders. Wallace v. Long Island R. Co., 12 Hun (N. Y.) 460.

9. **What Constitutes Assignment of Lease — General Assignment of All Lessee's Property and Rights.** — Indianapolis Mfg., etc., Union v. Cleveland, etc., R. Co., 45 Ind. 281.

Assignment of Gross Earnings of Leased Road and Agreement to Operate It under Directions of Assignee. — Boston, etc., R. Co. v. Boston,

Covenant Against Assignment. — A railroad lease may, by its terms, forbid the lessee to assign it without the consent of the lessor,¹ and unless the lessor ratifies the assignment,² an assignment in violation of such a covenant is a ground of forfeiture of the lease.³

Liabilities of Assignee. — Where a lease has been duly assigned, the assignee is bound by all the covenants therein which were binding on the lessee, including the obligation to pay rent.⁴

4. Consolidation. — The subject of consolidation of railroad companies has been fully discussed under another title in this work, to which reference is made in the note.⁵

X. CRIMES AND OFFENSES — 1. By Railroads — a. IN GENERAL. — The liability of railroad corporations under penal statutes and to indictment is the same as that of corporations generally. Of this question a full treatment is given elsewhere in this work.⁶

b. CRIMINAL LIABILITY FOR DEATH BY WRONGFUL ACT — (1) In General. — In some jurisdictions there have been statutory enactments providing for a fine to be recovered by indictment where the death of a passenger has been caused by reason of the negligence or carelessness of the proprietors of a railroad or their servants or agents, the fine to go to the surviving relatives.⁷ This provision has also been extended to include all persons other than employees, whether passengers or not.⁸

(2) Constitutionality of Statutes. — The constitutionality of such a provision has been upheld against the objections that it was an infringement of vested rights and a discrimination against railroads.⁹

(3) Nature of Proceeding. — The proceeding, though in the name of the state, is substantially a civil proceeding to recover damages, and is to be governed, as far as is practicable, by the same rules of evidence and principles of law which govern and are applicable to civil actions for damages.¹⁰

(4) When Prosecution Will Lie — (a) View that Death Must Be Immediate. — The view has been taken that the remedy by indictment is limited to cases where death results immediately, and that it does not apply where the death was not immediate, as, in the latter event, there is another remedy.¹¹

(b) Contrary View. — Other decisions do not, however, place this limitation upon the statute, but hold that its purpose is to impose a punishment upon the corporation as well as to secure compensation to the family of the

etc., R. Co., 65 N. H. 393. And see generally the title LEASES, vol. 18, p. 656 *et seq.*

1. Covenant Against Assignment Without Consent of Lessor. — *Terre Haute, etc., R. Co. v. Peoria, etc., R. Co.*, 61 Ill. App. 405, *affirmed* 167 Ill. 296; *Schmidt v. Louisville, etc., R. Co.*, 101 Ky. 441.

What Constitutes an Assignment. — *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 65 N. H. 393; *Frank v. New York, etc., R. Co.*, 122 N. Y. 197; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

Assumption of Lease by Purchaser from Lessee. — *Terre Haute, etc., R. Co. v. Peoria, etc., R. Co.*, 167 Ill. 296.

2. Ratification by Lessor. — *Chicago, etc., R. Co. v. Denver, etc., R. Co.*, 143 U. S. 596.

3. Forfeiture of Lease. — *Indianapolis Mfg., etc., Union v. Cleveland, etc., R. Co.*, 45 Ind. 281.

4. Liability of Assignee to Pay Rent. — *St. Louis, etc., R. Co. v. East St. Louis, etc., R. Co.*, 39 Ill. App. 354, *affirmed* 139 Ill. 402; *Jacksonville, etc., R. Co. v. Louisville, etc.,*

R. Co., 47 Ill. App. 414, *affirmed* 150 Ill. 480; *Avery v. Kansas City, etc., R. Co.*, 113 Mo. 561; *Frank v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 7 N. Y. St. Rep. 814, 122 N. Y. 197; *Van Schaick v. Third Ave. R. Co.*, 49 Barb. (N. Y.) 409.

5. See the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

6. Criminal Liability. — See the title CORPORATIONS (PRIVATE), vol. 7, p. 840 *et seq.*

7. Statutory Enactments. — *Me. Rev. Stat.*, c. 51, § 36; *Mass. Stat.* 1840, c. 80; *N. H. Comp. Stat.* 354, § 66.

8. *Mass. Stat.* 1874, c. 372, § 163.

9. Statutes Constitutional. — *Boston, etc., R. Co. v. State*, 32 N. H. 215.

10. Proceeding of Civil Nature. — *State v. Maine Cent. R. Co.*, 77 Me. 244; *State v. Grand Trunk R. Co.*, 58 Me. 176, 4 Am. Rep. 258; *State v. Manchester, etc., R. Corp.*, 52 N. H. 528.

Action Properly Discontinued by Nol. Pros. — *State v. Maine Cent. R. Co.*, 77 Me. 244.

11. Death Must Be Immediate. — *State v. Maine Cent. R. Co.*, 60 Me. 490; *State v. Grand Trunk R. Co.*, 61 Me. 114, 14 Am. Rep. 552.

deceased, and extend the remedy to cases where death does not result immediately.¹

(c) **Degree of Negligence.** — To render the railroad liable the negligence or carelessness of its servants or agents must have been gross, though in the case of the corporation itself gross negligence is not necessary.² In *New Hampshire* no distinction is made between the care required by the company and that required of the servants and agents.³

(d) **Employees Not Included.** — The provisions of these enactments do not include cases in which the person killed is an employee.⁴

(5) **Who Is Liable — Proprietors.** — The proprietors whom the statutes render liable to indictment are all common carriers, whether corporate or merely joint-stock companies.⁵ To render a corporation liable as a proprietor within the purview of the statutes it is not necessary that it should be proprietor *de jure* in every sense and for every legal purpose, but it is sufficient if it is proprietor in fact, having possession and control of the railway and operating it.⁶ Thus, the statute applies when the loss of life occurs upon a track not owned by the company or within the chartered limits of its own road, or of a road under its control, but upon a private track of which it is making a use reasonably incident to its business, though this use is upon the mere sufferance and license of the owner.⁷

Stockholders. — The individual stockholders cannot be indicted under this statute, but its application is limited to the corporation.⁸

(6) **For Whom Fine Is Recoverable.** — The fine being for the benefit of the persons designated by the statute, it would seem that it cannot be inflicted when there is no widow, child, heir, or other party, to whom, under the provisions of the statute, the amount recovered is to be given.⁹

Assignment of Interest in Action. — An assignment by an heir of his interest in the action has no bearing on the liability of the company, and it cannot claim an exemption on the ground of the invalidity of such an assignment and the assignee's inability to control the enforcement of the judgment or to receive the fine when collected.¹⁰

(7) **Contributory Negligence.** — In *Maine* and *New Hampshire* the company cannot be held liable if the contributory negligence of the deceased was the proximate cause of his injury.¹¹ By the *Massachusetts* statute,¹² the railroad becomes subject to the penalty for causing the death of a passenger even though he was wanting in the exercise of due care.¹³ But it was held under this statute that if the deceased passenger was killed while voluntarily leaving the train while it was in motion, no liability attached to the company, as upon his so doing he ceased to be a passenger.¹⁴ To render the company

1. **Immediate Death Not Necessary.** — *Com. v. Boston, etc.*, R. Co., 133 Mass. 383; *Com. v. Metropolitan R. Co.*, 107 Mass. 236. See also *Com. v. Boston, etc.*, R. Corp., 134 Mass. 211.

2. **Degree of Negligence.** — *Com. v. Boston, etc.*, R. Co., 133 Mass. 383; *Com. v. Fitchburg R. Co.*, 120 Mass. 372. See also *Com. v. Boston, etc.*, R. Corp., 126 Mass. 61.

3. **Rule in New Hampshire.** — *State v. Boston, etc.*, R. Co., 58 N. H. 408.

4. **Death of Employees.** — *State v. Maine Cent. R. Co.*, 60 Me. 490. See also the statutes of the several states.

5. **Proprietors.** — *Com. v. Boston, etc.*, R. Corp., 11 Cush. (Mass.) 512.

6. *State v. Boston, etc.*, R. Co., 58 N. H. 410.

7. **Use of Track as Licensee.** — *Com. v. Boston, etc.*, R. Corp., 126 Mass. 61.

8. **Stockholders Not Liable.** — *State v. Gilmore*, 24 N. H. 461.

9. **No Beneficiaries.** — *State v. Grand Trunk*

R. Co., 60 Me. 145; *Com. v. Boston, etc.*, R. Co., 121 Mass. 36; *Com. v. Boston, etc.*, R. Corp., 11 Cush. (Mass.) 512; *Com. v. Easter*, R. Co., 5 Gray (Mass.) 473; *State v. Gilmore*, 24 N. H. 461.

10. **Assignment.** — *State v. Boston, etc.*, R. Co., 58 N. H. 510.

11. **Contributory Negligence.** — *State v. Maine Cent. R. Co.*, 81 Me. 84; *State v. Maine Cent. R. Co.*, 77 Me. 538; *State v. Grand Trunk R. Co.*, 58 Me. 176. 4 Am. Rep. 258; *State v. Manchester, etc. R. Corp.*, 52 N. H. 528. See also the title CONTRIBUTORY NEGLIGENCE, vol. 7, p. 371 *et seq.*

12. **Massachusetts Statute.** — Mass. Stat. 1874, c. 372, § 163.

13. *Com. v. Boston, etc.*, R. Corp., 134 Mass. 211.

14. *Com. v. Boston, etc.*, R. Co., 129 Mass. 500, 37 Am. Rep. 382. See also the title CARRIERS OF PASSENGERS, vol. 5, p. 664 *et seq.*

liable for the death of a person other than a passenger, the person killed must have been in the exercise of due care.¹

Negligence of Third Persons No Defense. — It is no defense that the improper conduct of third persons contributed to the death if the carrier was also at fault.²

(8) *Effect of Limitation of Liability.* — The railroad is not relieved from liability under the statute by conditions printed upon the back of the ticket, where it has been guilty of gross negligence and carelessness.³

(9) *Limitation of Action.* — An indictment under the statute does not come within the limitation imposed for the bringing of actions or suits for penalties or forfeitures of the penal statutes, but is controlled by the limitations fixed for indictments generally. Nor does a statute of limitation, enacted after the indictment has been found, alter the limitation, but it must be deemed to refer to future indictments.⁴

(10) *Burden of Proof.* — The burden of showing due care and diligence on the part of the persons killed is upon the state.⁵ This burden is sustained by proving facts and circumstances from which it may be fairly inferred. If there is a sufficient disclosure of facts, the mere absence of fault may be sufficient.⁶

(11) *Amount of Recovery.* — The amount of the fine to be imposed should be ascertained by the jury, subject, however, to the limitations fixed by the statute.⁷

c. FAILURE TO PROVIDE PRECAUTIONS AT CROSSINGS AND TO ERECT FENCES. — The liability of a railroad for failure to comply with provisions of statutes or ordinances in regard to precautions at crossings,⁸ and for failure to erect fences,⁹ will be found elsewhere in this work.

d. FAILURE TO REPAIR HIGHWAY. — A railway company which has laid its track in a public highway is liable to indictment for a failure to restore the highway in a reasonable time to as good a condition for travel as it was before.¹⁰

e. FAILURE TO REPAIR BRIDGE. — At common law¹¹ and under many statutes¹² railroads are indictable for failure to repair bridges which it is their duty to repair.

f. INDICTMENT FOR NUISANCES. — The liability of corporations generally to indictment for the creation and maintenance of nuisances has been discussed elsewhere in this work.¹³

1. *Persons Other than Passengers.* — *Com. v. Boston, etc., R. Co.*, 129 Mass. 500, 37 Am. Rep. 382. See also *Com. v. Boston, etc., R. Corp.*, 134 Mass. 211.

2. *Negligence of Third Persons.* — *Com. v. Coburn*, 132 Mass. 555.

3. *Limitation of Liability.* — *Com. v. Vermont, etc., R. Co.*, 108 Mass. 7, 11 Am. Rep. 301.

4. *Limitation.* — *Com. v. Boston, etc., R. Corp.*, 11 Cush. (Mass.) 512.

5. *Burden of Proof.* — *State v. Maine Cent. R. Co.*, 76 Me. 357, 49 Am. Rep. 622; *State v. Maine Cent. R. Co.*, 77 Me. 538.

6. *Com. v. Boston, etc., R. Corp.*, 126 Mass. 61.

7. *Amount of Fine.* — *State v. Maine Cent. R. Co.*, 76 Me. 357, 49 Am. Rep. 622.

8. *Precautions at Crossings.* — See the title CROSSINGS, vol. 8, p. 394 *et seq.*

9. *Fences.* — See the title FENCES, vol. 12, p. 1063.

10. *Failure to Repair Highway.* — *Gear v. Chicago, etc., R. Co.*, 43 Iowa 83; *Com. v. Pennsylvania R. Co.*, 117 Pa. St. 637; *Pittsburgh, etc., R. Co. v. Com.*, 101 Pa. St. 192. See also *State v. Gorham*, 37 Me. 451.

11. *Failure to Repair Bridge.* — *Reg. v. Birmingham, etc., R. Co.*, 9 C. & P. 469, 38 E. C. L. 187.

12. *State v. Gorham*, 37 Me. 451; *Vicksburg, etc., R. Co. v. State*, 64 Miss. 5; *New York, etc., R. Co. v. State*, 50 N. J. L. 303; *People v. New York Cent., etc., R. Co.*, 74 N. Y. 302. See also the title BRIDGES, vol. 4, p. 936.

13. *Nuisances.* — See the titles CORPORATIONS (PRIVATE), vol. 7, pp. 711, 828; NUISANCES, vol. 21, p. 712.

For the Application of the Principles to railways, see the titles HIGHWAYS, vol. 15, p. 501; NUISANCES, vol. 21, p. 696; PARKS AND PUBLIC SQUARES, vol. 21, p. 1073, and the following cases:

Failure to Put In Draw at Crossing. — *Com. v. Nashua, etc., R. Corp.*, 2 Gray (Mass.) 54.

Bridge Obstructing Highway. — *People v. New York, etc., R. Co.*, 89 N. Y. 266.

Obstructing Highway. — *Reg. v. Scott*, 6 Jur. 1084; *Palatka, etc., R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395; *Chesapeake, etc., R. Co. v. Com.*, 88 Ky. 368; *Com. v. Old Colony, etc., R. Co.*, 14 Gray (Mass.) 93; *Com. v. Wilkesbarre, etc., St. R. Co.*, 127 Pa. St. 278;

g. VIOLATION OF REGULATIONS OF RAILROAD COMMISSIONERS. — The penal liability of railroads for violation of the regulations established by state railroad commissioners is treated elsewhere.¹

h. VIOLATION OF INTERSTATE COMMERCE ACT. — The criminal liability of railroads for acts in contravention of the interstate commerce act has been treated elsewhere.²

i. VIOLATION OF SUNDAY LAWS. — The question of the liability of railroads for the violation of statutes prohibiting the operation of certain classes of trains on Sunday is treated elsewhere in this work.³

2. Against Railroads — *a.* SHOOTING OR THROWING AT TRAIN. — Statutes have been enacted making it a criminal offense to shoot or throw a missile at locomotives or cars. The question whether the statute applies solely to cars in use,⁴ or includes cars not in actual use,⁵ depends upon the particular statute. To constitute a violation of the *English* statute it is necessary that the missile should be thrown against and strike an engine or car having a person upon it.⁶

b. OBSTRUCTING RAILROADS — (1) *In General.* — By statute in the larger number, if not all, of the jurisdictions, the obstruction of railroads is made a criminal offense.⁷ The purpose of these enactments is not merely to protect the company in the enjoyment of its property, but also to provide for the security and protection of the passengers and for the public safety and convenience.⁸

(2) *To What Railroads Applicable.* — The protection of the statute extends to all railroads in actual use, whether operated by a duly chartered corporation, or by a corporation *de facto*,⁹ or by individuals merely.¹⁰ Street railways are also included in its provisions.¹¹

(3) *Nature of Obstruction* — (a) *In General.* — While the exact nature of the obstruction prohibited depends largely upon the provisions of the particular statute, it is generally considered that an obstruction is created by the doing of any act, or the placing on the track of any object, or the removal of any part of the structure, which will endanger the life of those upon the train or interfere with or delay the operation of the road. Thus, it has been held to be an offense for a person standing on the track to delay a train by signalling it,¹² but not where a passenger on the train stops it by pulling the bell rope;¹³

State v. Vermont Cent. R. Co., 30 Vt. 108; *State v. Troy, etc., R. Co.*, 57 Vt. 144; *State v. Ohio River R. Co.*, 38 W. Va. 242. See also *supra*, this title, VI. 11. *Use of Highways and Streets.*

Obstructing Navigation. — *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778.

1. See the title RAILROAD COMMISSIONERS, *ante*.

2. **Interstate Commerce.** — See the title INTERSTATE COMMERCE, vol. 17, p. 178.

3. **Violation of Sunday Laws.** — See the title SUNDAYS AND HOLIDAYS. See also the title INTERSTATE COMMERCE, vol. 17, p. 97.

4. **Car Must Be in Actual Use.** — *State v. Boyd*, 86 N. Car. 634.

5. **Actual Use Not Essential.** — *Com. v. Carroll*, 145 Mass. 403.

6. **English Statute.** — *Reg. v. Court*, 6 Cox C. C. 202.

Showing that Car Was Not Struck Is a Matter of Defense. — *State v. Hinson*, 82 N. Car. 597.

7. **Statutory Provisions.** — See the cases cited *infra*, this section. See also the statutes of the several states.

Alabama Statute Construed. — See *Clifton v. State*, 73 Ala. 473.

Indiana Statute. — *Coghill v. State*, 37 Ind. 111. **Mississippi Statute.** — See *McCarty v. State*, 37 Miss. 411.

Statute Includes Line Not Yet Open to Transportation of Passengers. — *Reg. v. Bradford*, Bell Cr. Cas. 268.

8. *Com. v. Hicks*, 7 Allen (Mass.) 573. See also *Rooney v. Com.*, 102 Ky. 373.

Statutes Constitutional. — *State v. Stubblefield*, 157 Mo. 360; *Davis v. State*, 51 Neb. 301.

Obstruction of Train for Purpose of Robbery. — See *State v. Stubblefield*, 157 Mo. 360.

Obstruction of Handcar Not an Offense. — *Harris v. State*, 14 Lea (Tenn.) 485.

9. **Corporations De Facto.** — *Duncan v. State*, 29 Fla. 439; *Hodge v. State*, 82 Ga. 643.

10. *State v. Wentworth*, 37 N. H. 196.

11. **Street Railways.** — *People v. Stites*, 75 Cal. 570; *Price v. State*, 74 Ga. 378; *Com. v. McCauly*, 2 Pa. Dist. 63. See also the title STREET RAILWAYS.

12. **Signalling Train.** — *Reg. v. Hadfield*, 11 Cox C. C. 574.

Shooting at Brakeman Not Within Purview of Michigan Statute Prohibiting Obstruction. — *People v. Dunkel*, 39 Mich. 255.

13. **Passenger Stopping Train.** — *Com. v. Killian*, 109 Mass. 345, 12 Am. Rep. 714.

to place an object on the track of such nature as to interfere with or delay the train;¹ to interfere with or remove signals or switch-lights;² to impair the track,³ or burn a bridge forming a part of the roadbed.⁴ But the removal of a fence not constituting any part of the roadbed proper is not a violation of the statute.⁵

(b) **Actual Obstruction Not Necessary.** — The offense does not consist in injury to the trains, track, or other property, but in placing the obstructions upon the track, or in doing the other acts whereby danger to life is caused;⁶ and a criminal liability may be incurred by placing the obstruction upon the track even though it was removed before it interfered with any train.⁷

(c) **Size of Obstruction.** — To render the offense complete it is enough that the obstruction was placed upon the track with the intent to obstruct the passage of the trains or to derail them, and it is not necessary that it should have been of sufficient size to accomplish this purpose, though this would be properly considered in determining the question of intent.⁸

(4) **Intent** — (a) **In General.** — Where the obstruction is purposely created a criminal liability exists even though no intent or design to cause the injury which would naturally result is shown, as the intent will be inferred from the quality of the act.⁹ But where the obstruction is caused purely through accident and without design, no criminal liability exists.¹⁰

(b) **Obstruction for Purpose of Obtaining Reward.** — That the purpose of the person placing the obstruction on the track, or tearing up the track, was not to cause a wreck but to signal the train, with a view to receiving a reward for his services, does not relieve him from criminal liability.¹¹

(5) **Liability Where Death Results.** — Where death results through the act of a person wilfully and intentionally placing an obstruction on or removing a portion of the track, he is guilty of murder or manslaughter, according to the circumstances, even though it is not shown that he was possessed of any malice toward the person killed, or had any special design against his life or that of any other person on the train.¹²

(6) **Evidence** — (a) **Burden of Proof and Sufficiency of Evidence.** — As in other criminal prosecutions, the burden of proving the guilt of the accused is upon the state.¹³ To show this mere suspicion of the guilt is insufficient. Nor can the

1. **Obstruction on Track.** — Reg. v. Bradford, Bell Cr. Cas. 268; Reg. v. Monaghan, 11 Cox C. C. 608; Clifton v. State, 73 Ala. 473; Hodge v. State, 82 Ga. 643; Allison v. State, 42 Ind. 354; State v. Clemens, 38 Iowa 257; Com. v. Bakeman, 105 Mass. 53; State v. Kilty, 28 Minn. 421; McCarty v. State, 37 Miss. 411; Weinecke v. State, 34 Neb. 14; State v. Beckman, 57 N. H. 174; State v. Brooks, 1 Ohio Dec. (Reprint) 407, 9 West L. J. 109; Barton v. State, 28 Tex. App. 483. See also Reg. v. Romp, 17 Ont. 567; Roberts v. Preston, 9 C. B. N. S. 208, 99 E. C. L. 208.

2. **Interfering with Signals.** — Reg. v. Hadfield, L. R. 1 C. C. 253; Rooney v. Com., 102 Ky. 373.

3. **Impairing Track.** — State v. Stubblefield, 157 Mo. 360; State v. Johns, 124 Mo. 379; Harris v. State, 14 Lea (Tenn.) 485.

4. **Burning Bridge.** — Duncan v. State, 29 Fla. 439.

Removal of Bridge Obstructing Navigation No Offense. — State v. Parrott, 71 N. Car. 311, 17 Am. Rep. 5.

5. **Removal of Fence.** — State v. Walsh, 43 Minn. 444.

Salting Stock on Track. — Clifton v. State, 73 Ala. 473.

6. **Actual Obstruction Not Necessary.** — State v. Wentworth, 37 N. H. 196.

7. Reg. v. Bradford, Bell Cr. Cas. 268; State v. Clemens, 38 Iowa 257; State v. Kilty, 28 Minn. 421.

8. **Size of Obstruction.** — Riley v. State, 95 Ind. 446. See also State v. Stubblefield, 157 Mo. 360. Compare Bullion v. State, 7 Tex. App. 462.

9. **Criminal Intent Inferred.** — Reg. v. Holroyd, 2 M. & Rob. 339; Reg. v. Bradford, Bell Cr. Cas. 268; Reg. v. Monaghan, 11 Cox C. C. 608; Clifton v. State, 73 Ala. 473; Com. v. Bakeman, 105 Mass. 53; Com. v. Temple, 14 Gray (Mass.) 69; Com. v. Hicks, 7 Allen (Mass.) 573; State v. Beckman, 57 N. H. 174; People v. Adams, 16 Hun (N. Y.) 549. Compare Allison v. State, 42 Ind. 354. See also *supra*, this section, *Size of Obstruction*.

10. **Accidental Obstruction.** — Reg. v. Holroyd, 2 M. & Rob. 339; Batting v. Bristol, etc., R. Co., 9 W. R. 271; Nowell v. State, 94 Ga. 588.

11. State v. Johns, 124 Mo. 379; Crawford v. State, 15 Lea (Tenn.) 343, 54 Am. Rep. 423. See also Davis v. State, 51 Neb. 301.

12. **Liability for Murder.** — Presley v. State, 59 Ala. 98; Davis v. State, 51 Neb. 301; State v. Brooks, 1 Ohio Dec. (Reprint) 407, 9 West L. J. 109; Harris v. State, 14 Lea (Tenn.) 485.

13. **Burden of Proof.** — Stanfield v. State, (Tex. Crim. 1901) 62 S. W. Rep. 917. See also the title BURDEN OF PROOF, vol. 5, p. 33.

guilt be inferred merely because the facts are consistent with guilt. They must be inconsistent with innocence.¹

(b) **Evidence of Similar Acts.** — Evidence that the accused placed on the track other obstructions than those charged in the indictment is admissible for showing the motive or intent on his part, where the acts are so closely connected that they may be considered as a part of the same transaction.²

(c) **Testimony of Accomplice.** — The complicity of a witness in and his conviction of this offense affects his credibility, not his competency.³ A conviction cannot be had, however, upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the offense.⁴

(7) **Former Acquittal.** — That a person has been acquitted of the crime of wilfully obstructing a railroad does not prevent a new indictment being found against him in which the crime charged is the wilful doing of an act with intent to obstruct the railroad.⁵ Nor is an acquittal upon an indictment charging one with a felony in creating an obstruction with the intent to injure passengers or property a bar to an indictment under another section of the statute declaring the obstruction of a track to be a misdemeanor, where there is no intent to do an injury.⁶

c. **TRAIN ROBBERY.** — By statute it has been made a criminal offense to stop⁷ or board⁸ a train with intent to rob. These enactments have been declared to be constitutional.⁹

d. **OFFENSES AS TO TICKETS AND FARES.** — The questions relating to the forgery¹⁰ and the unauthorized sale of tickets, and other offenses connected with tickets, fares, and passes, are treated elsewhere in this work.¹¹

e. **BURGLARY.** — By statute, breaking and entering a railroad car,¹² depot,¹³ or office,¹⁴ with intent to commit a felony, constitutes a burglary.

f. **LARCENY.** — Tickets¹⁵ and other property of a railroad,¹⁶ and goods which it has in its custody for transportation,¹⁷ may be the subject of larceny.¹⁸

1. **Connection of Accused with Crime.** — Brown v. Com., 97 Va. 791.

Sufficiency of Evidence. — See the following cases: Mitchell v. State, 94 Ala. 68; Hodge v. State, 82 Ga. 643; Com. v. Bakeman, 105 Mass. 53; Davis v. State, 51 Neb. 301; Cox v. State, (Tex. Crim. 1900) 59 S. W. Rep. 903.

2. **Evidence of Similar Acts.** — State v. Wentworth, 37 N. H. 196; State v. Beckman, 57 N. H. 174; Barton v. State, 28 Tex. App. 483; Stanfield v. State, (Tex. Crim. 1901) 62 S. W. Rep. 917. See generally the title **PROOF OF OTHER CRIMES**, ante, p. 247.

3. **Evidence of Accomplice.** — Clifton v. State, 73 Ala. 473.

4. State v. Clemens, 38 Iowa 257.

Confession Admissible. — Weinecke v. State, 34 Neb. 14.

5. **Former Acquittal.** — Com. v. Bakeman, 105 Mass. 53.

6. Reg. v. Gilmore, 15 Cox C. C. 85.

7. **Train Robbery.** — State v. Stubblefield, 157 Mo. 360.

8. People v. Lovren, 119 Cal. 88.

9. See cases cited in preceding notes.

10. **Forgery.** — See the title **FORGERY**, vol. 13, p. 1099.

11. See the title **TICKETS AND FARES**. See also *infra*, this section, *Larceny*.

12. **Burglary.** — See Graves v. State, 63 Ala. 134; Johnson v. State, 98 Ala. 57; Lyons v. People, 68 Ill. 271; Boyer v. Com., (Ky. 1892) 19 S. W. Rep. 845; State v. Parker, 16 Nev. 79; Burke v. State, 34 Ohio St. 79; State v. Crawford, 38 S. Car. 330; Nicholls v. State, 68 Wis. 416.

13. **Depot.** — State v. Edwards, 109 Mo. 315; State v. Bishop, 51 Vi. 287, 31 Am. Rep. 690.

14. **Office.** — People v. Young, 65 Cal. 225; Norton v. State, 74 Ind. 337. Compare Com. v. White, 6 Cush. (Mass.) 181.

15. **Larceny.** — McDaniels v. People, 118 Ill. 301; State v. Musgang, 51 Minn. 556; State v. Brin, 30 Minn. 522; Eaton v. Farmer, 46 N. H. 200. Compare State v. Hill, 1 Houst. Crim. Cas. (Del.) 421.

16. Nichols v. People, 17 N. Y. 114; State v. Jenkins, 78 N. Car. 478; White v. State, 24 Tex. App. 231, 5 Am. St. Rep. 879.

17. Rountree v. State, 58 Ala. 381; State v. Poynier, 36 La. Ann. 572; Manson v. State, 24 Ohio St. 590; Price v. State, 41 Tex. 215.

18. See generally the title **LARCENY**, vol. 18, p. 456.

Declaration of Conspirator Admissible. — People v. Lovren, 119 Cal. 88.

RAILROAD SECURITIES.

BY BRISCOE BALDWIN CLARK.

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CROSS-REFERENCES.

See the title RAILROADS, ante, and references there given.

I. MORTGAGES — 1. Power to Mortgage — a. IN ABSENCE OF STATUTORY AUTHORITY. — In pursuance of the general rule that a railway company, as a *quasi*-public corporation, has no power to transfer its corporate property so as to disable itself from performing the duties which it owes to the public,¹ it is also held that, as a mortgage may become an absolute conveyance by foreclosure, in the absence of express statutory authority a railway company has no power to mortgage its property essential to the operation of the road, such as its roadbed,² and *a fortiori* has no power to mortgage its franchise to operate a railway,³ nor its franchise to exist as a corporation so that any right so to exist may pass on a foreclosure of the mortgage.⁴ This implied restriction upon the power of a railway company to mortgage its franchise and property applies equally to street-railway companies.⁵

Minority Rule. — In a few jurisdictions the courts have upheld the power of a railway company to mortgage its franchise to operate a railway, together with its property, in the absence of express statutory authority, and have refused to recognize as sound the contention that to prevent the transfer of the powers and privileges conferred by a railroad franchise would be subversive of the public interests.⁶

Surplus Property. — A railway company has generally the power to sell and convey lands or other property not used for the operation of its road,⁷ and as a mortgage is in effect a *quasi* sale, it may mortgage such property.⁸

b. STATUTORY AUTHORITY TO MORTGAGE — (1) In General. — A railway company may, of course, mortgage its franchise and other property whenever there is legislative authority therefor, either in express terms or by reasonable implication.⁹ The legislature may also, by a curative act, render valid a

1. *Shrewsbury, etc., R. Co. v. Northwestern R. Co.*, 6 H. L. Cas. 113; *Whiteside v. Bell-chamber*, 22 U. C. C. P. 241. See the titles RAILROADS, *ante*; ULTRA VIRES.

2. **No Implied Power to Mortgage** — *Massachusetts*. — *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Daniels v. Hart*, 118 Mass. 543.

Pennsylvania. — *Pittsburg, etc., R. Co. v. Allegheny County*, 63 Pa. St. 126. See also *Susquehanna Canal Co. v. Bonham*, 9 W. & S. (Pa.) 27.

Tennessee. — *Frazier v. East Tennessee, etc., R. Co.*, 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358, *affirmed* 139 U. S. 288.

Virginia. — *Naglee v. Alexandria, etc., R. Co.*, 83 Va. 707, 32 Am. & Eng. R. Cas. 401.

Canada. — *Grand Junction R. Co. v. Bickford*, 23 Grant Ch. (U. C.) 302.

See also *Georgia Southern, etc., R. Co. v. Barton*, 101 Ga. 466; *State v. Mexican Gulf R. Co.*, 3 Rob. (La.) 513; *Pierce v. Emery*, 32 N. H. 484.

3. *Pullan v. Cincinnati, etc., Air-Line R. Co.* 4 Biss. (U. S.) 35; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

4. *Atkinson v. Marietta, etc., R. Co.*, 15 Ohio St. 21.

5. *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700.

In *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632, it was held that section 706 of the Revised Statutes in force in 1883 (Rev. Stat. Mo. 1899, § 971, subdiv. 4), authorizing "every corporation" to mortgage such real and personal estate as the purpose of the corporation

might require, authorized a street-railway company to mortgage its right of way and roadbed.

6. **Minority Rule.** — *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 555; *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mobile, etc., R. Co. v. Talman*, 15 Ala. 472; *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489, 21 Am. R. Rep. 138; *Swann v. Gaston*, 87 Ala. 569; *Bardstown, etc., R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541; *Shepley v. Atlantic, etc., R. Co.*, 55 Me. 395; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 59 Me. 9; *Miller v. Rutland, etc., R. Co.*, 36 Vt. 452.

7. **Surplus Property.** — *Gardner v. London, etc., R. Co.*, L. R. 2 Ch. 201. And see the title RAILROADS, *ante*.

8. *Blackburn v. Selma, etc., R. Co.*, 2 Flipp. (U. S.) 525; *Leo v. Union Pac. R. Co.*, 17 Fed. Rep. 273; *Tucker v. Ferguson*, 22 Wall. (U. S.) 572; *Farnsworth v. Minnesota, etc., R. Co.*, 92 U. S. 49; *Taber v. Cincinnati, etc., R. Co.*, 15 Ind. 459; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *Pierce v. Emery*, 32 N. H. 484. See also *Richardson v. Sibley*, 11 Allen (Mass.) 65, 87 Am. Dec. 700; *Uncas Nat. Bank v. Rith*, 23 Wis. 339; *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Bickford v. Grand Junction, etc., R. Co.*, 1 Can. Sup. Ct. 737.

The mere fact that a mortgage by a railway company covers, in addition to property which it had the power to mortgage, other distinct property or franchises over which it had no such power, will not necessarily render the mortgage invalid *in toto*; it may be sustained as a valid mortgage of the property which the company had the power to mortgage. *Hendee v. Pinkerton*, 14 Allen (Mass.) 381.

9. **Statutory Authority to Mortgage.** — *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss.

railway company mortgage executed without original authority.¹

When Railway Companies Consolidate, the new company, having the rights and powers of the old companies, succeeds to their power to mortgage.²

Restrictions upon Power. — The power of a railway company to mortgage its property is, of course, subject to the restrictions thereon imposed by the statute conferring the power.³

(2) *What May Be Included in Mortgage.* — Where the statute conferring the power to mortgage expressly enumerates the property which may be included in the mortgage, it of course confers no power to include property not within the enumeration.⁴ A general power conferred upon a railway company to mortgage its railroad has been held to include the power to mortgage the franchise to operate the railroad, so as to enable the purchaser, on foreclosure of the mortgage, to continue its operation.⁵ But authority to mortgage franchises has been denied where the power was merely to mortgage real and personal estate;⁶ but even though this power did not include power to mortgage its franchises, still a mortgage covering the road, income, and other property, and also the franchise of the company, would be void only as regards the franchise.⁷ A railroad company with power to mortgage its property, franchises, etc., cannot include in the mortgage its franchise to act as a corporation, so as to confer on a purchaser under foreclosure sale the right so to act.⁸ It has been held that a railroad company cannot mortgage

(U. S.) 35; *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606, 26 Am. & Eng. R. Cas. 404; *Columbus, etc., R. Co. v. Braden*, 110 Ind. 558; *Covington v. Covington, etc., Bridge Co., to Bush (Ky.)* 69; *Butler v. Rahm*, 46 Md. 541; *Hovelman v. Kansas City Horse R. Co.*, 79 Mo. 632, 20 Am. & Eng. R. Cas. 17; *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Pierce v. Emery*, 32 N. H. 484; *Baker v. Guarantee Trust, etc., Co.*, (N. J. 1895) 31 Atl. Rep. 174; *Thompson v. Erie R. Co.*, (Supm. Ct.) 11 Abb. Pr. N. S. (N. Y.) 188, 42 How. Pr. (N. Y.) 68; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125, 4 Am. & Eng. R. Cas. 413. See also *Commercial Bank v. Great Western R. Co.*, 13 L. T. N. S. 105, 3 Moo. P. C. C. N. S. 295.

Illustrations. — A general power to transfer, sell, or alien all of its privileges, franchises, and property (Branch v. Atlantic, etc., R. Co., 3 Woods (U. S.) 481; *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, 54 Fed. Rep. 759, 6 U. S. App. 469; *East Boston Freight R. Co. v. Eastern R. Co.*, 13 Allen (Mass.) 422; *Hendee v. Pinkerton*, 14 Allen (Mass.) 381; *McAllister v. Plant*, 54 Miss. 106, 17 Am. R. Rep. 389; *Bickford v. Grand Junction R. Co.*, 1 Can. Sup. Ct. 696. See also *Platt v. Union Pac. R. Co.*, 99 U. S. 48; *Willamette Mfg. Co. v. British Columbia Bank*, 119 U. S. 191, or to borrow money and execute such securities as may be expedient (*Pierce v. Milwaukee, etc., R. Co.*, 24 Wis. 551, 1 Am. Rep. 203), authorizes a mortgage of all the property and franchises of the railway company. And a general power to mortgage authorizes a deed of trust in the nature of a mortgage. *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. (U. S.) 35.

A General Statute Restricting the Powers of Corporations Generally to issue bonds secured by mortgage has been held to include railway companies. *Flynn v. Coney Island, etc., R. Co.*, 26 N. Y. App. Div. 416.

1. Curative Acts. — *Hatcher v. Toledo, etc., R. Co.*, 62 Ill. 477; *Shepley v. Atlantic, etc.,*

R. Co., 55 Me. 395; *Daniels v. Hart*, 118 Mass. 543; *Richards v. Merrimack, etc., R. Co.*, 44 N. H. 127.

2. Consolidation of Corporations. — *Mead v. New York, etc., R. Co.*, 45 Conn. 199. And see the title CONSOLIDATION OF CORPORATIONS, vol. 6, p. 800.

3. Restrictions upon Power. — *Fidelity Ins., etc., Co. v. Western Pennsylvania, etc., R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911; *Pittsburgh, etc., R. Co.'s Appeal*, (Pa. 1886) 4 Atl. Rep. 385, 26 Am. & Eng. R. Cas. 50; *Galveston, etc., R. Co. v. Fontaine*, 23 Tex. Civ. App. 519.

4. What May Be Included in Power. — *Morris v. Cheney*, 51 Ill. 451; *Taber v. Cincinnati, etc., R. Co.*, 15 Ind. 459; *Bath v. Miller*, 51 Me. 341; *Lloyd v. European, etc., R. Co.*, 18 N. Bruns. 194.

5. Branch v. Atlantic, etc., R. Co., 3 Woods (U. S.) 481, 4 Fed. Cas. No. 1,807; *Chadwick v. Old Colony R. Co.*, 171 Mass. 239; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518. See also *Bardstown, etc., R. Co. v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541.

6. Dunham v. Iselt, 15 Iowa 284; *Randolph v. Wilmington, etc., R. Co.*, 11 Phila. (Pa.) 502, 33 Leg. Int. (Pa.) 221. See also *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Likewise where power was given to mortgage the "road, income, and other property." *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. (U. S.) 35.

In *McAllister v. Plant*, 54 Miss. 106, whether power to mortgage "property of every kind" carried with it authority to mortgage the corporate franchise was left undecided.

7. Pullan v. Cincinnati, etc., Air-Line R. Co., 4 Biss. (U. S.) 35; *Butler v. Rahm*, 46 Md. 541; *Gloninger v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 13.

8. Branch v. Atlantic, etc., R. Co., 3 Woods (U. S.) 481; *Butler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86.

its income, rents, and profits under a power to mortgage its property and franchises.¹ When general power to mortgage the franchise and property of a railway company is conferred, a mortgage of a portion of the railway and franchise is authorized.²

Future-acquired Property. — A general power conferred upon a railway company to mortgage its property and franchises authorizes it to include in the mortgage future acquisitions of the company which constitute proper accessories to the railroad as an entirety, and which are essential to its proper operation.³

(3) *Purpose for Which Mortgage May Be Executed.* — Where the statute conferring the power to mortgage expressly designates for what purpose the power may be exercised, the railway company has no power to mortgage for a different purpose.⁴

(4) *Modification of Power — Impairment of Obligation of Contracts.* — A general statutory power to mortgage its property, conferred upon a railway company, is not protected by the provision of the Federal Constitution prohibiting the impairment of the obligation of contracts, before the power has been exercised; and prior to the exercise of such power, the terms and conditions under which it may be exercised are subject to legislative control. Therefore, the law in force when a railway mortgage is executed, with all the conditions and limitations which it imposes, is the law which determines the force and effect of the mortgage.⁵

2. Requisites and Validity of Mortgage — *a. IN GENERAL.* — The execution of railway mortgages is, of course, in the absence of statutory provisions upon the subject, regulated by the general rules relating to the execution of other mortgages.⁶ When a mortgage has not been executed with the formalities necessary to give it validity as a legal mortgage, the principles of equitable mortgages⁷ have been applied so as to sustain in equity railway mortgages insufficient as legal mortgages.⁸

b. BY WHOM MORTGAGE TO BE EXECUTED. — A railway company, like other corporations, can act only through its officers and agents, and the general rules heretofore treated with regard to the powers of the officers and agents of private corporations apply, of course, to the execution of railway mortgages.⁹ Reference is made to the notes for cases involving the question of the power of particular officers of railway companies to execute mortgages.¹⁰

1. Georgia Southern, etc., R. Co. v. Barton, 101 Ga. 466.

2. East Boston Freight R. Co. v. Eastern R. Co., 13 Allen (Mass.) 422. Compare Grand Junction R. Co. v. Bickford, 23 Grant Ch. (U. C.) 302.

3. Future-acquired Property. — Dunham v. Earl, 16 Leg. Int. (Pa.) 45, 8 Fed. Cas. No. 4,140; New Orleans Pac. R. Co. v. Parker, 33 Fed. Rep. 693, affirmed 143 U. S. 42; Baker v. Guarantee Trust, etc., Co., (N. J. 1895) 31 Atl. Rep. 174; Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518; Coopers v. Wolf, 15 Ohio St. 523. See also *infra*, this section, *Property Covered by Mortgage*.

Sometimes the power to mortgage future-acquired property is expressly conferred upon railway companies. See Central Trust Co. v. Chattanooga, etc., R. Co., (C. C. A.) 94 Fed. Rep. 275; Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co., 94 Ga. 306, 47 Am. St. Rep. 153; Quincy v. Chicago, etc., R. Co., 94 Ill. 537; Covington v. Covington, etc., Bridge Co., 10 Bush (Ky.) 69; Seibert v. Minneapolis, etc., R. Co., 52 Minn. 246.

4. Purpose of Mortgage. — Gloninger v. Pittsburgh, etc., R. Co., 139 Pa. St. 13; Grand Junction R. Co. v. Bickford, 23 Grant Ch. (U. C.) 302.

Thus a provision in a charter that the railway company may mortgage its property to complete the railway gives no power to mortgage the road for other purposes after its completion. East Tennessee, etc., R. Co. v. Frazier, 139 U. S. 288, affirming 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

5. Obligation of Contracts. — East Tennessee, etc., R. Co. v. Frazier, 139 U. S. 288, affirming 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358.

6. General Execution. — See the title CHATTEL MORTGAGES, vol. 5, p. 945; MORTGAGES, vol. 20, p. 888.

7. See the title EQUITABLE MORTGAGES, vol. 11, p. 122.

8. Equitable Mortgages. — Mobile, etc., R. Co. v. Talman, 15 Ala. 472; Texas Western R. Co. v. Gentry, 69 Tex. 625; Poland v. Lamoille Valley R. Co., 52 Vt. 144, 4 Am. & Eng. R. Cas. 408; Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 33 W. Va. 761. See also King v. Tusculumbia, etc., R. Co., 7 Pa. L. J. 166, 14 Fed. Cas. No. 7,808.

9. By Whom Executed. — See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833.

10. Augusta, etc., R. Co. v. Kittel, 52 Fed. Rep. 63, 2 U. S. App. 409; Kappner v. St. Louis, etc., R. Assoc., 3 Dill. (U. S.) 228;

Consent of Stockholders. — Where a statute required the consent of two-thirds or other portion of the stockholders before a mortgage could be executed, a mortgage executed with the consent of the directors of the company, who owned practically all the stock of the corporation, has been sustained as valid.¹

c. TO WHOM MORTGAGE MAY BE EXECUTED. — The question as to whom a railway mortgage may be executed is, of course, as in the case of other mortgages, dependent upon the mortgagee's power to acquire an interest in the mortgaged property.² Railway mortgages are usually executed to a trustee for the benefit of the holders of the bonds or other evidence of the indebtedness secured thereby;³ and it has been held that no rule of public policy forbids the execution of a railway mortgage to a foreign trust company as trustee.⁴ The fact that the mortgagee is an officer or agent of the railway corporation does not necessarily render the mortgage invalid.⁵

d. FRAUDULENT MORTGAGES. — Though a provision in an ordinary mortgage under which the mortgagor is empowered to dispose of the mortgaged property at his pleasure may render the mortgage invalid as in fraud of creditors,⁶ still the provision in a railway mortgage that nothing therein should prevent the railroad company, before the default in the payment of the indebtedness secured, from selling or disposing of any of the mortgaged property not necessary in its judgment for the use of the railway, has been held not to render the mortgage fraudulent.⁷

Mortgage to Secure Future Issue of Bonds. — Railway mortgages are generally issued to secure bonds thereafter to be issued,⁸ and it has been held that such a mortgage is not within a general statute prohibiting mortgages to secure future advances.⁹

e. STATUTORY REQUIREMENTS AND RESTRICTIONS — (1) *In General.* — General statutory requirements and restrictions relating to the execution of mortgages have been held applicable to railway mortgages. Thus a general statute rendering invalid mortgages of land situated in several counties has been held to render invalid a railway mortgage including a railway and other realty situated in more than one county.¹⁰ Provisions relating to the acknowledgment of mortgages have also been held to apply to railway mortgages.¹¹

(2) *Registration.* — The general state statutes requiring the registration of

Meyer v. Johnston, 53 Ala. 237, 15 Am. R. Rep. 467; *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 555; *Chicago v. Cameron*, 22 Ill. App. 91, affirmed 120 Ill. 447; *Elwell v. Grand St., etc., R. Co.*, 67 Barb. (N. Y.) 83, affirmed 67 Barb. (N. Y.) 85, note; *Hoyt v. Thompson*, 5 N. Y. 320, reversing 3 Sandf. (N. Y.) 416; *Luse v. Isthmus Transit R. Co.*, 6 Oregon 125, 25 Am. Rep. 506; *Gettysburg R. Co.*, 65 Pa. St. 290; *Jesup v. City Bank*, 14 Wis. 331.

1. **Consent of Stockholders.** — *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462, 11 Am. & Eng. R. Cas. 306.

2. **To Whom Executed.** — See the title MORTGAGES, vol. 20, p. 914.

3. *Butler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86.

The *Minnesota* statute of uses and trusts does not invalidate a railway mortgage to a trustee. *Minnesota v. Duluth, etc., R. Co.*, 97 Fed. Rep. 353.

4. *Hervey v. Illinois Midland R. Co.*, 28 Fed. Rep. 169.

5. *Gould v. Little Rock, etc., R. Co.*, 52 Fed. Rep. 680.

6. **Fraudulent Mortgages.** — See the title FRAUDULENT SALES AND CONVEYANCES, vol. 14, p. 515.

7. *Butler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86.

8. *Butler v. Rahm*, 46 Md. 541; *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 38 Am. & Eng. R. Cas. 534.

9. *Richards v. Merrimack, etc., R. Co.*, 44 N. H. 127.

10. **Statutory Requirement and Restrictions.** — *Farmers L. & T. Co. v. Oregon, etc., R. Co.*, 11 Sawy. (U. S.) 115, 24 Fed. Rep. 407.

11. **Acknowledgments.** — *Kenosha, etc., R. Co. v. Sperry*, 3 Biss. (U. S.) 309. See also *Branch v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 481. Compare *Cooper v. Corbin*, 105 Ill. 224, 13 Am. & Eng. R. Cas. 394.

Acknowledgment out of State. — Where a railroad company is organized under the laws of a certain state, and all of its property is in that state, the president of the company may, while in an adjoining state, acknowledge a mortgage of its property. *Hodder v. Kentucky, etc., R. Co.*, 7 Fed. Rep. 793.

mortgages of both real ¹ and personal property ² have been held, in the absence of statutory exception, to apply to railway mortgages.

Unrecorded Mortgages. — While an unrecorded railway mortgage is valid as between the parties ³ and as against third persons who have actual knowledge of the mortgage, ⁴ or purchasers who do not pay a valuable consideration, ⁵ it is invalid as regards the persons for whose protection the recording acts are intended, such as attachment and execution creditors of the railway company and subsequent purchasers and mortgagees in good faith. ⁶

Mortgage Covering Both Realty and Personalty. — By the great weight of authority a mortgage upon the rolling stock of a corporation is considered as a mortgage of personal property and should be recorded as a chattel mortgage; and when the mortgage covers both the railroad property and other real estate, and also the rolling stock, it must be recorded as a real-estate mortgage as regards the former class of property, and as a chattel mortgage as regards the latter. ⁷ Though in some cases it has been held that rolling stock is a part of the railroad and covered by a mortgage thereof, so that if the mortgage is recorded as a real-estate mortgage it is sufficient. ⁸

Statutory Provisions. — In some jurisdictions the statutes now expressly provide that railway mortgages shall not be subject to the provisions of the

1. Registration. — *Ludlow v. Clinton Line R. Co.*, 1 Flipp. (U. S.) 25, 15 Fed. Cas. No. 8,600; *Palmer v. Forbes*, 23 Ill. 301. See also *Branch v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 431.

Necessity for Registration as Real-estate Mortgage in Each County through Which Railroad Runs. — *Ludlow v. Clinton Line R. Co.*, 1 Flipp. (U. S.) 25.

2. *Heyford v. Davis*, 102 U. S. 235; *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123; *Farmers' L. & T. Co. v. St. Joseph, etc.*, R. Co., 3 Dill. (U. S.) 412, 8 Fed. Cas. No. 4,669; *Illinois Trust, etc., Bank v. Seattle Electric R., etc.*, Co., 48 U. S. App. 744, 82 Fed. Rep. 941; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68; *Palmer v. Forbes*, 23 Ill. 301; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 337; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *Hoyle v. Plattsburgh, etc.*, R. Co., 54 N. Y. 314, 13 Am. Rep. 595, *reversing* 51 Barb. (N. Y.) 45; *Stevens v. Buffalo, etc.*, R. Co., 31 Barb. (N. Y.) 590; *Radebaugh v. Tacoma, etc.*, R. Co., 8 Wash. 570. See also *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Nichols v. Mase*, 94 N. Y. 160; *Merchants' Bank v. Petersburg R. Co.*, 12 Phila. (Pa.) 482, 34 Leg. Int. (Pa.) 240.

The federal courts have in some instances held that state statutes requiring the recording and refileing of chattel mortgages did not apply to railway mortgages covering the railroad and the personal property, such as rolling stock, used in connection therewith. *Southern California Motor Road Co. v. Union L. & T. Co.*, 64 Fed. Rep. 450, 29 U. S. App. 110. See also *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77.

A federal court, upon the question whether a railroad mortgage is within the general provisions of a state statute relating to the recording of chattel mortgages, should, in the absence of a decision by the Supreme Court of the state, follow the decision of the United States Supreme Court that railroad mortgages are not controlled by such statutes. *Farmers'*

L. & T. Co. v. Detroit, etc., R. Co., 71 Fed. Rep. 29.

3. Unrecorded Mortgages — Validity. — *Illinois Cent. R. Co. v. Mississippi Cent. R. Co.*, 12 Fed. Cas. No. 7,008.

4. *Allen v. Montgomery R. Co.*, 11 Ala. 437; *Mead v. New York, etc.*, R. Co., 45 Conn. 199, 17 Am. R. Rep. 367; *Butler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 108.

Bondholders under Junior Mortgage Made Expressly Subject to Prior Unrecorded Mortgage. — *Coe v. Columbus, etc.*, R. Co., 10 Ohio St. 372, 75 Am. Dec. 518. See also *Wilson v. Beckwith*, 117 Mo. 61.

5. *Zorn v. Savannah, etc.*, R. Co., 5 S. Car. 90. **6.** *Heryford v. Davis*, 102 U. S. 235; *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. R. Rep. 572, *reversing* 28 N. J. Eq. 278; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *Stevens v. Buffalo, etc.*, R. Co., 31 Barb. (N. Y.) 590.

7. Mortgage of Both Realty and Personalty. — *Union L. & T. Co. v. Southern California Motor Road Co.*, 51 Fed. Rep. 840; *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 337, *reversing* 28 N. J. Eq. 277; *Stevens v. Buffalo, etc.*, R. Co., 31 Barb. (N. Y.) 590; *Hoyle v. Plattsburgh, etc.*, R. Co., 54 N. Y. 314, 13 Am. Rep. 595, *reversing* 51 Barb. (N. Y.) 45, 47 Barb. (N. Y.) 104; *Radebaugh v. Tacoma, etc.*, R. Co., 8 Wash. 570. See also *Heryford v. Davis*, 102 U. S. 235, 2 Am. & Eng. R. Cas. 386; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619. See, however, *Farmers' L. & T. Co. v. Hendrickson*, 25 Barb. (N. Y.) 484.

8. *Farmers L. & T. Co. v. St. Joseph, etc.*, R. Co., 3 Dill. (U. S.) 412; *Palmer v. Forbes*, 23 Ill. 301. See the title **FIXTURES**, vol. 13, p. 606, upon the general question whether the rolling stock of a railway company is to be considered as personal property or as realty on the principle of constructive annexation.

general statute requiring the recording of mortgages,¹ and instead provide a special manner in which they are to be recorded.² While such statutes apply to mortgages executed prior to this enactment,³ still they have no retroactive effect so as to defeat the prior attaching rights of third persons.⁴ Where the statutes expressly provide the manner in which railway mortgages shall be recorded, a subsequent act relating to the recording of mortgages generally has been held not impliedly to repeal the former statute relating to railway mortgages so as to bring such mortgages within the provisions of the latter act.⁵

(3) *Affidavit of Good Faith.* — The general state statutes requiring a mortgage of chattels to be accompanied by an affidavit of the mortgagor that it is made in good faith, and without any design to hinder, delay, or defraud creditors, have been held to apply to railway mortgages which include personal property,⁶ though in some cases where specific statutory provision is made for railway mortgages it has been held that such general provisions are not applicable thereto.⁷

3. **General Construction of Provisions in Railway Mortgages and Bonds** — *a.* **IN GENERAL.** — The general rules relating to the construction and interpretation of contracts apply, of course, to the stipulations contained in railway mortgages and bonds.⁸ There are, however, several special provisions and stipulations frequently inserted in railway bonds and mortgages which require treatment in this title. The railway mortgage and the bond secured thereby are, as a general rule, to be construed together,⁹ and where there is a discrepancy between the terms of the bond and of the mortgage, the terms of the bond should control, that being the principal thing containing the obligation of the railway company and the mortgage being a mere security to insure the performance of the obligation.¹⁰

b. **PROVISION FOR APPLICATION OF PROCEEDS OF BONDS SECURED BY MORTGAGE.** — A stipulation of the manner in which the bonds secured by the mortgage or their proceeds shall be used is frequently found in railway mortgages;¹¹ and it has been held that where the agreement requires the railway company to apply the proceeds of the mortgage bonds to the betterment of the mortgaged property, such proceeds are impressed with a trust requiring

1. *Parker v. New Orleans, etc., R. Co.*, 33 Fed. Rep. 693, citing Rev. Stat. La., §§ 726, 727, 2396, 1397 (Wolff's Rev. Laws La. 1897, §§ 2427, 2428, 692, 693).

2. *Metropolitan Trust Co. v. Pennsylvania, etc., R. Co.*, 25 Fed. Rep. 760 (*New Jersey* statute); *Gilchrist v. Helena, etc., R. Co.*, 47 Fed. Rep. 593 (*Montana* statute); *Kelly v. Boylan*, 32 N. J. Eq. 581.

Foreign Corporation. — *Nichols v. Mase*, 94 N. Y. 160, 17 Am. & Eng. R. Cas. 230.

3. *Kelly v. Boylan*, 32 N. J. Eq. 581.

4. **Rights of Third Persons.** — *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. R. Rep. 572, reversing 28 N. J. Eq. 278; *Hoyle v. Plattsburgh, etc., R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595, reversing 51 Barb. (N. Y.) 45, 47 Barb. (N. Y.) 104.

5. *Metropolitan Trust Co. v. Pennsylvania, etc., R. Co.*, 25 Fed. Rep. 760; *Gilchrist v. Helena, etc., R. Co.*, 47 Fed. Rep. 593.

6. **Affidavit of Good Faith.** — *Illinois Trust, etc., Bank v. Seattle Electric R., etc., Co.*, 82 Fed. Rep. 936, 48 U. S. App. 744 (*Washington* statute); *Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68, disapproving *Southern California Motor Road Co. v. Union L. & T. Co.*, (C. C. A.) 64 Fed. Rep. 450.

An Affidavit by the Directors of a corporation has been held sufficient, though in signing the oath they did not profess to act for the railway company. *Richards v. Merrimack, etc., R. Co.*, 44 N. H. 127.

7. *Southern California Motor Road Co. v. Union L. & T. Co.*, 64 Fed. Rep. 450, 29 U. S. App. 110, reversing 51 Fed. Rep. 851 (*California* statute).

8. See the title **INTERPRETATION AND CONSTRUCTION**, vol. 17, p. 1.

9. **Construction Together of Bond and Mortgage.** — *Benjamin v. Elmira, etc., R. Co.*, 49 Barb. (N. Y.) 441.

10. *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532; *Miller v. Ratterman*, 47 Ohio St. 141.

11. **Application of Proceeds of Bonds.** — See *Denver, etc., R. Co. v. U. S. Trust Co.*, 41 Fed. Rep. 720. The mere fact that the purchasers of railway-mortgage bonds purchased them under the belief that the proceeds were to be used for the improvement of the mortgaged property and that the directors of the railway company had knowledge of such belief on the part of the purchasers, does not bind the railway company to use the bonds for such purpose. *Ives v. Smith*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 645.

their application to the designated purpose.¹

c. **PROVISION FOR CONVERSION OF BONDS INTO STOCK.** — In the issue of railway-mortgage bonds a provision for their conversion into stock of the railway company at the option of the bondholders is frequently inserted.² Where the time within which the bondholder shall exercise his option to convert his bond into stock is expressly limited, such stipulation is of the essence of the contract, and the option must be exercised at the stipulated time.³

Demand and Tender. — Where the exercise of the option is to be made by a demand accompanied with a tender of the bonds for surrender, an actual tender will, of course, as a general rule, be essential to a valid exercise of the option;⁴ but if, on demand for conversion, the officers of the railway company absolutely refuse the demand on the ground that it is too late, they cannot subsequently base their refusal on the ground that a tender of the bonds did not accompany the demand, as by the absolute refusal the company waived the necessity of such tender.⁵

Specific Performance. — Though in a proper case a court of equity may specifically enforce the contract of the railway company to convert bonds into stock, still it should not do this by compelling the company to issue stock for the bond when such method would cause an illegal increase of stock.⁶

4. **Property Covered by Mortgage** — a. **IN GENERAL.** — In construing a railway mortgage with regard to the property covered thereby, of course the

1. *Central Trust Co. v. Burke*, 2 Ohio Dec. 96, 1 Ohio N. P. 169.

Following Proceeds in Hands of Third Persons. — It has been held that where the railway company has actually broken its agreement as to the stipulated use of the money, and has parted with the money to third persons, the remedy of the mortgage bondholders is by an action for a breach of contract. The money so diverted by the railway company cannot be followed in the hands of such third persons as a trust fund. *Banque Franco-Egyptienne v. Brown*, 34 Fed. Rep. 162.

Waiver. — Such a stipulation is for the benefit of the bondholders and may be waived by them, and where the stipulation has been so waived, a subsequent purchaser of bonds, with notice of the waiver, is bound thereby. *Belden v. Burke*, 147 N. Y. 542, reversing 72 Hun (N. Y.) 51.

Lien. — A provision that the proceeds of the bonds secured thereby should be used in the construction or improvement of the railway property does not give a lien on such proceeds to a third person making such improvement under contract with the railway company. *Dillon v. Barnard*, Holmes (U. S.) 386, 7 Fed. Cas. No. 3,915, affirmed 21 Wall. (U. S.) 430.

2. **Conversion of Bonds into Stock.** — See *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Sutliff v. Cleveland, etc., R. Co.*, 24 Ohio St. 147.

Consolidation of Corporation. — *Cayley v. Couborg, etc., R., etc., Co.*, 14 Grant Ch. (U. C.) 571.

Assignment of Right of Action for Breach of Stipulation. — *Denney v. Cleveland, etc., R. Co.*, 28 Ohio St. 108, 14 Am. R. Rep. 73.

3. **Time of Exercise of Option.** — *Chaffee v. Middlesex R. Co.*, 146 Mass. 224; *Muhlenberg v. Philadelphia, etc., R. Co.*, 47 Pa. St. 16.

Extension of Time of Payment of Bond. — Where, by the terms of a railroad bond, a period was fixed within which it might be con-

verted into stock at the option of the holder, it was held that an agreement for the extension of time of payment before the maturity of the bond did not extend the right of conversion after the time limited. *Muhlenberg v. Philadelphia, etc., R. Co.*, 47 Pa. St. 16.

Bonds Maturing on Sunday. — Where the bonds were convertible into stock "at or before maturity," and the bonds matured on Sunday, it was held that an offer of the bonds for conversion into stock on the following Monday was too late; though in such a case where the bonds were presented at a reasonable hour on the Saturday before maturity, the presentation was held sufficient. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224.

Where There Was No Limit Expressed in the Bond as to the time within which the election to convert them into stock should be exercised, it has been held that it was too late to exercise such election several months after their maturity and after the railway company had made a deposit of money for their payment at the designated place of payment. *Loomis v. Chicago, etc., R. Co.*, 102 Fed. Rep. 233, 42 C. C. A. 290.

Where a Decree in a Railroad Foreclosure Suit Provided that When Bondholders Became Purchasers of the Property they might exchange their bonds for stock if they chose to do so, it was held that the choice of making the exchange must be exercised before the property was conveyed to those who had decided to become purchasers and make the exchange, and that this was so though a bondholder was not aware of the legal proceedings and had overlooked the fact of his owning bonds until after the conveyance. *Landis v. Western Pennsylvania R. Co.*, 133 Pa. St. 579, 26 W. N. C. (Pa.) 64.

4. See generally the title **TENDER**.

5. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224.

6. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224.

general rules with regard to the interpretation and construction of contracts prevail.¹

b. GENERAL AND SPECIFIC DESCRIPTIONS. — Where a railway mortgage first describes the property conveyed by a general description, such as "all the property" of the railway company, and this general description is subsequently qualified or followed by a particular description enumerating the property, the general description will usually be controlled by such subsequent specific description;² though this rule of construction always yields to the intention of the parties to be gathered from the context and general scope of the whole mortgage.³ When the particular description is preceded by the word "including," this does not indicate a restrictive intention, but rather the contrary,⁴ and where the rule of restriction has been applied it will usually be found that the particular description was introduced by a *videlicet* or some other manifestation of the intention to restrain the general description.⁵

c. "RAILROAD." — The term "railroad," as ordinarily used in railway mortgages, should not be confined to the track, or to the land simply necessary to lay the track upon.⁶ In its broadest sense it has been ruled to be very comprehensive and to include the franchise to operate, easement or right of way, roadbed, superstructures, materials, depot buildings, turnouts, rolling stock, shops, tools, and all other property, real and personal, owned and used in connection with the road or its operation.⁷ The term does not, however, include lands other than the roadway or other personal property when such lands or property are not used in the operation of the railroad.⁸

d. "FRANCHISES." — A mortgage by a railway company of all its "corporate franchises" does not include its lands used independently of the operation of the railroad;⁹ but it seems that when land owned by a railway company becomes subject to the franchise to operate the railroad by subordination to it as essential or proper for its operation, it becomes incorporated with it and will be included in a mortgage of the company's corporate franchise.¹⁰ A general mortgage by a railway company of all of its property, railroad effects, etc., does not include its franchise to exist as a corporation,¹¹ but it does include the franchise to operate the railroad.¹²

e. "UNDERTAKING." — In *England* railway securities usually pledge the "undertaking" as security for the money borrowed, and this has been held

1. *Property Covered by Mortgage.* — See the titles *BOUNDARIES*, vol. 4, p. 756; *DEEDS*, vol. 9, p. 87; *INTERPRETATION AND CONSTRUCTION*, vol. 17, p. 1.

For the construction of particular provisions see *Hazard v. Vermont*, etc., R. Co., 17 Fed. Rep. 753, 12 Am. & Eng. R. Cas. 388; *Augusta*, etc., R. Co. v. *Kittel*, 52 Fed. Rep. 63, 2 U. S. App. 409; *Dunham v. Cincinnati*, etc., R. Co., 9 Pittsb. Leg. J. (Pa.) 90, 8 Fed. Cas. No. 4,148; *Seibert v. Minneapolis*, etc., R. Co., 58 Minn. 39; *State v. Glenn*, 18 Nev. 34; *Randolph v. New Jersey West Line R. Co.*, 28 N. J. Eq. 49, 14 Am. R. Rep. 11; *Seymour v. Canandaigua*, etc., R. Co., (Supm. Ct. Gen. T.) 14 How. Pr. (N. Y.) 531, 25 Barb. (N. Y.) 284; *Durant v. Kenyon*, 32 Hun (N. Y.) 634; *Chapman v. Pittsburgh*, etc., R. Co., 26 W. Va. 299; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

"Between." — In *Central Trust Co. v. Kneeland*, 138 U. S. 414, a railway mortgage covering all the railroad "between" two termini was held to include stations, depot grounds, etc., within the limits of such termini.

2. *General and Specific Descriptions.* — *Pullan v. Cincinnati*, etc., Air Line R. Co., 4 Biss. (U. S.) 35; *Spies v. Chicago*, etc., R. Co., 40

Fed. Rep. 34, 40 Am. & Eng. R. Cas. 401; *Smith v. McCullough*, 104 U. S. 25; *Alabama v. Montague*, 117 U. S. 602; *Boston*, etc., Air-Line R. Co. v. *Coffin*, 50 Conn. 150; *Walsh v. Barton*, 24 Ohio St. 28.

3. *Calhoun v. Memphis*, etc., R. Co., 2 Flipp. (U. S.) 442; *Raymond v. Clark*, 46 Conn. 129.

4. *Calhoun v. Memphis*, etc., R. Co., 2 Flipp. (U. S.) 442.

5. *Calhoun v. Memphis*, etc., R. Co., 2 Flipp. (U. S.) 442.

6. "Railroad." — *Knevals v. Florida Cent.*, etc., R. Co., 66 Fed. Rep. 224, 23 U. S. App. 549.

7. *Pierce v. Emery*, 32 N. H. 484.

8. *Calhoun v. Memphis*, etc., R. Co., 2 Flipp. (U. S.) 442; *Morgan v. Donovan*, 58 Ala. 241; *Wilson v. Beckwith*, 117 Mo. 61; *Dinsmore v. Racine*, etc., R. Co., 12 Wis. 649.

9. "Franchises." — *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552; *Eldridge v. Smith*, 34 Vt. 484.

10. *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552.

11. *Meyer v. Johnston*, 53 Ala. 237; *Eldridge v. Smith*, 34 Vt. 484.

12. *Meyer v. Johnston*, 53 Ala. 237.

to operate only as a transfer of the tolls, unpaid calls, and all that belongs to the company as proprietor of the railway, but not the stock or property belonging to it as a common carrier, and is practically equivalent to a pledge of the net earnings.¹ It does not pass any interest in the lands of the railway company.²

f. "DEPOT." — The term "depot," as used in a railway mortgage, is not limited to a place provided for the convenience of passengers while waiting for the arrival or departure of trains, but includes also buildings used for the receipt and storage of freight which, when received, is to be safely kept until forwarded by the cars of the company or delivered to the owner or consignee.³

g. WHAT INCLUDED UNDER GENERAL TERM "PROPERTY." — A mortgage by a railroad company of all of its "property" has been held not to include aid bonds donated to the company by the state or a municipality,⁴ nor other indebtedness due to it,⁵ nor claims for unpaid subscriptions to its stock,⁶ nor personal contracts or covenants between it and third persons,⁷ nor money on hand or thereafter received.⁸ The term "property" would include leasehold interests acquired by the railway company as lessee,⁹ rolling stock,¹⁰ fuel collected and stored by the company for the use of its engines,¹¹ and office furniture.¹²

Old Materials, such as old rails which have been taken up and replaced by others, still remain subject to the mortgage.¹³

h. APPURTENANCES AND PROPERTY APPERTAINING TO OR FOR USE IN CONNECTION WITH RAILROAD. — Under the term "appurtenances" or "property appertaining thereto" only such property passes as is directly appurtenant to the railroad and is necessary for its maintenance, operation, preservation, and security.¹⁴ The term will not include property acquired simply because it may prove useful to the company and thus facilitate the discharge of its business.¹⁵ On the other hand, land other than that upon

1. "Undertaking." — *Hart v. Eastern Union R. Co.*, 6 R. & Can. Cas. 818, 7 Exch. 246, affirmed 8 Exch. 116, 17 Jur. 89, 22 L. J. Exch. 20. See also *Gardner v. London, etc., R. Co.*, L. R. 2 Ch. 201.

2. *Doe v. St. Helen's, etc., R. Co.*, 1 Gale & D. 663, 2 R. & Can. Cas. 756, 2 Q. B. 364, 42 E. C. L. 715, 6 Jur. 641. See also *Wickham v. New Brunswick, etc., R. Co.*, L. R. 1 P. C. 64.

3. "Depot." — *Humphreys v. McKissock*, 140 U. S. 304.

4. "Property" Does Not Include Aid Bonds. — *Smith v. McCullough*, 104 U. S. 25; *Wilson v. Beckwith*, 117 Mo. 61.

5. Nor Indebtedness Owning Railroad. — *Chesapeake, etc., R. Co. v. U. S.*, 19 Ct. Cl. 300; *Emerson v. European, etc., R. Co.*, 67 Me. 387, 24 Am. Rep. 39; *Dean v. Biggs*, 25 Hun (N. Y.) 122; *Farmers' L. & T. Co. v. Cary*, 13 Wis. 110.

County Bonds Issued for Subscription to Stock of Railway Company. — *Morgan County v. Thomas*, 76 Ill. 120.

6. Unpaid Stock Subscriptions. — *Dean v. Biggs*, 25 Hun (N. Y.) 122; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

7. Personal Contracts. — *Moran v. Pittsburgh, etc., R. Co.*, 32 Fed. Rep. 878; *Grand Trunk R. Co. v. Central Vermont R. Co.*, 91 Fed. Rep. 696.

Contract for Carriage of Mails. — *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733, affirming 18 Ct. Cl. 405.

Guaranties. — *Metropolitan Trust Co. v. New York, etc., R. Co.*, 45 Hun (N. Y.) 84.

8. Money. — *Gratz v. Redd*, 4 B. Mon. (Ky.)

178; *Platt v. New York, etc., R. Co.*, 63 N. Y. App. Div. 401.

9. Leasehold Interests. — *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794, 22 U. S. App. 54; *Barnard v. Norwich, etc., R. Co.*, 4 Cliff. (U. S.) 351, 2 Fed. Cas. No. 1,007.

10. Rolling Stock. — *Scott v. Clinton, etc., R. Co.*, 6 Biss. (U. S.) 529, 21 Fed. Cas. No. 12,527.

Where a company executes a mortgage describing the property as "all the present and in-future-to-be-acquired property" of the company, including right of way and land occupied, and all rails and other materials used therein or procured therefor, rolling stock is included. *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 4 Biss. (U. S.) 35.

11. Fuel for Engines. — *Dunham v. Earl*, 16 Leg. Int. (Pa.) 45, 8 Fed. Cas. No. 4,149. Compare *Bath v. Miller*, 53 Me. 308.

12. Office Furniture. — *Ludlow v. Hurd*, 1 Disney (Ohio) 552.

13. Old Materials. — *Salem First Nat. Bank v. Anderson*, 75 Va. 250, 12 Am. & Eng. R. Cas. 411. See also *Hamlin v. Jerrard*, 72 Me. 62; *Coopers v. Wolf*, 15 Ohio St. 523.

14. "Appurtenances" or "Property Appertaining." — *Humphreys v. McKissock*, 140 U. S. 304; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 896; *Wilson v. Beckwith*, 117 Mo. 61; *Millard v. Burley*, 13 Neb. 259.

15. Thus, the interest of a Railroad Company in a Grain Elevator jointly constructed with others not belonging to the company, and situated some distance from its road, does not pass under a railway mortgage as an appurtenance

which the track is laid may be appurtenant to a railroad so as to pass under a mortgage of the railroad as lands appurtenant or appertaining thereto.¹ The question whether the property is appurtenant to the railway has been held to be a question of fact, and, when the trial is at law, to be submitted to the jury.²

Necessary for Operation. — Where the mortgage covers all the property "necessary or used for the operation" of the road, property should be regarded as necessary for the road when it is such as the company, in the reasonable exercise of its discretion, considers it best to procure, though the railroad might have been operated without it;³ as in determining whether the land is necessary, the term "necessary" is not to be confined to its most restricted meaning.⁴

Property Used for Operation. — The general description of property real or personal used for or appertaining to the operation of the road has a very wide signification, and includes practically any property identified with the operation of the road.⁵ But to bring property within the description as property "used" or "appropriated" for, or "appertaining" to, the operation of the railroad, it must have been so used or appropriated; it is not sufficient that it was owned by the railway company where it was not used or intended for use in the operation of the road.⁶ So the phrase "property acquired by the

to the road. *Humphreys v. McKissock*, 140 U. S. 304.

Nor will a Congressional or State Land Grant to aid in the construction of the railroad pass as appurtenant thereto. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, *reversing* 33 Fed. Rep. 693; *Wilson v. Beckwith*, 117 Mo. 61; *Shirley v. Waco Tap R. Co.*, 78 Tex. 131.

Lands Purchased for Resale. — Nor will town lots or other lands situated outside of the lay-out of the roadway, and purchased by the company for resale, pass. *Calhoun v. Memphis, etc., R. Co.*, 2 Flipp. (U. S.) 442; *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 896; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552. See also *Seymour v. Canandaigua, etc., R. Co.*, (Supm. Ct. Gen. T.) 14 How. Pr. (N. Y.) 531, 25 Barb. (N. Y.) 284.

Nor Woodland purchased by the company for the purpose of getting wood and timber therefrom to be used on the railroad. *Dinsmore v. Racine, etc., R. Co.*, 12 Wis. 649.

Nor a Hotel, though used as a railroad eating-house. *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 896.

In *Omaha, etc., R. Co. v. Wabash, etc., R. Co.*, 108 Mo. 298, 50 Am. & Eng. R. Cas. 700, the mortgage was held to include a hotel built at the terminus of the railroad, outside of the right of way, for the accommodation of its employees and passengers. See also *U. S. Trust Co. v. Wabash, etc., R. Co.*, 32 Fed. Rep. 480.

Nor Canal Boats used and run by the company in connection with its railroad, but beyond its terminus. *Patish v. Wheeler*, 22 N. Y. 494.

Stock in Another Corporation. — Nor stock in another corporation owned by the company. *Humphreys v. McKissock*, 140 U. S. 304.

1. *Knevals v. Florida Cent., etc., R. Co.*, 66 Fed. Rep. 224, 23 U. S. App. 549, wherein Locke, J., said: "A careful examination of the numerous authorities cited satisfies us that any piece of land that may be considered reasonably necessary for the present operations of the road, or contemplated and prospective extensions or improvements, and held for that

purpose, may, within the scope of the decisions, be held to appertain to a railroad."

2. **Question of Fact.** — *Knevals v. Florida Cent., etc., R. Co.*, (C. C. A.) 66 Fed. Rep. 224.

3. *Buck v. Seymour*, 46 Conn. 156.

4. *Knevals v. Florida Cent., etc., R. Co.*, 66 Fed. Rep. 224, 23 U. S. App. 549. See also *Morgan v. Donovan*, 58 Ala. 241. Compare *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552.

Town Lots, Buildings, and Farming Land purchased for resale, and the like, not included. *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150, 12 Am. & Eng. R. Cas. 375; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 846.

Congressional Land Grant in Aid of Construction Not Included. — *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, *reversing* 33 Fed. Rep. 693.

5. **Property Used for Operation** — *United States*. — *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603; *Fosdick v. Schall*, 99 U. S. 235; *U. S. Trust Co. v. Wabash Western R. Co.*, 150 U. S. 287; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Central Trust Co. v. Chattanooga, etc., R. Co.*, (C. C. A.) 94 Fed. Rep. 275. See also *Linder v. Hartwell R. Co.*, 73 Fed. Rep. 320.

Colorado. — *Roberts v. Denver, etc., R. Co.*, 8 Colo. App. 504.

Georgia. — *Georgia Southern, etc., R. Co. v. Barton*, 101 Ga. 466.

Kentucky. — *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. R. Rep. 273; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221.

Maine. — *Emerson v. European, etc. R. Co.*, 67 Me. 387, 24 Am. Rep. 39.

New York. — *Frank v. New York, etc., R. Co.*, 122 N. Y. 197, *modifying and affirming* (Supm. Ct. Spec. T.) 7 N. Y. St. Rep. 814, 44 Hun (N. Y.) 624; *Platt v. New York, etc., R. Co.*, 63 N. Y. App. Div. 401.

Office Furniture. — *Raymond v. Clark*, 46 Conn. 129.

6. *Morgan v. Donovan*, 58 Ala. 241; *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150; *Walsh v. Barton*, 24 Ohio St. 28.

company for the purposes of the railroad" will not include town lots outside of the lay-out of the road, purchased by the company for resale.¹

Intended or Designed for Use. — A mortgage covering property "intended to be used" in connection with the railroad includes rails, fishplates, bolts, etc., purchased for the road, but not yet actually used in its construction, or brought upon the right of way of the company.² Similarly, a mortgage covering future-acquired property designed for use in connection with the railroad was held to include lots purchased by the company for railway purposes, though they were subsequently found unsuited for these purposes and resold.³

i. ROLLING STOCK. — A railway mortgage may, of course, expressly cover the rolling stock,⁴ and it has been held that rolling stock would pass under a mortgage of the railroad as a part of the realty.⁵ The better doctrine, however, seems to be that the rolling stock retains its distinctive character of personalty and would not pass as a part of the realty.⁶ In some jurisdictions the statutes expressly provide that the rolling stock of railroads shall be regarded as fixtures, and under such statutes it would pass as part of the railroad.⁷ A mortgage of the railroad with all the toll and revenues thereof has been held to pass the rolling stock which was essential to the production of tolls and revenues.⁸

j. INCOME, EARNINGS, AND PROFITS. — As a general rule, a railway mortgage does not cover the income, earnings, and profits of the railway while it is operated by the company, but such income and earnings are analogous to the rents and profits in case of ordinary land mortgages,⁹ and are, so long as the railway is operated by the company, the absolute property of the company

Land Purchased for Resale to Employees. — *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

Land Purchased by a Railway Company for a General Manufactory for Cars was held not to pass under a mortgage of the road and lands belonging thereto, and intended for the use and accommodation of said road. *Eldridge v. Smith*, 34 Vt. 484.

Railroad Chairs subsequently purchased by the company, but never used in connection with the road, are not included in a mortgage of all property which shall be used for operating the road. *Farmers' L. & T. Co. v. Commercial Bank*, 11 Wis. 207.

Parol Evidence Is Admissible to show for what purpose land was purchased by the railway company in determining the question whether it passed under a mortgage as property purchased for and pertaining to the railroad. *Aldridge v. Pardee*, 24 Tex. Civ. App. 254.

1. *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150.

2. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 49 Fed. Rep. 188.

3. *Hawkins v. Mercantile Trust, etc., Co.*, 96 Ga. 580.

4. **Rolling Stock.** — *Minnesota Co. v. St. Paul Co.*, 2 Wall. (U. S.) 609; *Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co.*, 6 Wall. (U. S.) 742.

Designation of Rolling Stock to Particular Division. — Where the mortgagor of rolling stock of a certain division of a railroad covenants to designate in a certain manner as belonging to that division such a proportion of the whole rolling stock owned by it as the division bears to the entire railway, such mortgage covers only the rolling stock which is designated as belonging to the division named, although the mortgagor has failed to designate the quantity

covenanted for. But where rolling stock is purchased for and designated as belonging to a certain division of the railroad, the lien of a mortgage on that division attaches to such rolling stock as against the mortgagor or purchasers at a sale under a subsequent mortgage of the entire railroad who take with notice of the first mortgage, if such stock may otherwise be traced, although the designation is subsequently obliterated. *U. S. Trust Co. v. Wabash Western R. Co.*, 38 Fed. Rep. 891, 40 Am. & Eng. R. Cas. 397.

5. *Michigan Cent. R. Co. v. Chicago, etc., R. Co.*, 1 Ill. App. 399; *Palmer v. Forbes*, 23 Ill. 301. See also *Farmers L. & T. Co. v. St. Joseph, etc., R. Co.*, 3 Dill. (U. S.) 412.

6. *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, reversing 28 N. J. Eq. 277; *Beardsley v. Ontario Bank*, 31 Barb. (N. Y.) 619; *Bement v. Plattsburgh, etc., R. Co.*, 47 Barb. (N. Y.) 104; *Stevens v. Buffalo, etc., R. Co.*, 31 Barb. (N. Y.) 590; *Hoyle v. Plattsburgh, etc., R. Co.*, 54 N. Y. 314, 13 Am. Rep. 595; *Randall v. Elwell*, 52 N. Y. 521, 11 Am. Rep. 747; *Chicago, etc., R. Co. v. Ft. Howard*, 21 Wis. 44, 91 Am. Dec. 458. See also *Dubuque v. Illinois Cent. R. Co.*, 39 Iowa 516; *Boston, etc., R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

7. *Milwaukee, etc., R. Co. v. James*, 6 Wall. (U. S.) 750, explained in *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 326. See *supra*, this section, *Requisites and Validity of Mortgage*.

8. *State v. Northern Cent. R. Co.*, 18 Md. 193. See also *Pullan v. Cincinnati, etc., Air Line R. Co.*, 4 Biss. (U. S.) 35, 20 Fed. Cas. No. 11,461.

9. See the title MORTGAGES, vol. 20, p. 888.

as if the mortgage did not exist, and subject to the claims of the general creditors of the company.¹ Even though the mortgage gives in terms a lien on the profits and income, the whole earnings have been held to belong to the company and to be subject to its control until possession of the mortgaged premises is actually taken by the mortgagee, or something equivalent is done, when provision is made for continued possession by the railway company until default, with power to receive the earnings, income, etc.² Where the mortgagee takes possession of the railroad,³ or makes demand for possession⁴ under provisions therefor, he becomes entitled from such time to the earnings which may be applied to the mortgage debt; and the same is true with regard to the earnings in the hands of a receiver appointed at the instance of the mortgagee in a suit for foreclosure.⁵ A mortgage may expressly cover the net earnings of a railway company so as to require such earnings to be applied to the payment of the indebtedness secured.⁶

k. FUTURE INTERESTS. — A railway mortgage which purports to grant *in presenti* will not, of course, cover property subsequently acquired by the company.⁷ In pursuance of the rule in equity in regard to mortgages generally, railway mortgages expressly mortgaging future-to-be-acquired property of the company, both real and personal, are valid in equity. The lien of the mortgage will attach in equity immediately upon the acquisition of the future interests,⁸ and will attach not only to future interest to which

1. **Rents, Income, and Earnings.** — *Farmers L. & T. Co. v. Cary*, 13 Wis. 110. See also *Parkhurst v. Northern Cent. R. Co.*, 19 Md. 472, 81 Am. Dec. 648; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 1. Compare *Addison v. Lewis*, 75 Va. 701, 9 Am. & Eng. R. Cas. 702.

2. *Fosdick v. Schall*, 99 U. S. 235; *Gilman v. Illinois, etc., Tel. Co.*, 91 U. S. 603; *Dow v. Memphis, etc., R. Co.*, 124 U. S. 652; *Platt v. New York, etc., R. Co.*, 63 N. Y. App. Div. 401; *Clay v. East Tennessee, etc., R. Co.*, 6 Heisk. (Tenn.) 421, 12 Am. R. Rep. 38.

3. *Emerson v. European, etc., R. Co.*, 67 Me. 387, 24 Am. Rep. 39.

4. *Dow v. Memphis, etc., R. Co.*, 124 U. S. 652, 33 Am. & Eng. R. Cas. 12, reversing 20 Fed. Rep. 768. See also *King v. Housatonic R. Co.*, 45 Conn. 226.

5. *Downs v. Farmers' L. & T. Co.*, 79 Fed. Rep. 215, 52 U. S. App. 79; *Central Trust Co. v. Chattanooga, etc., R. Co.*, (C. C. A.) 94 Fed. Rep. 275.

6. **Net Earnings Expressly Included in Mortgage.** — *Barry v. Missouri, etc., R. Co.*, 34 Fed. Rep. 829, 36 Am. & Eng. R. Cas. 332; *Spies v. Chicago, etc., R. Co.*, 40 Fed. Rep. 34; *Pullan v. Cincinnati, etc., Air-Line R. Co.*, 5 Biss. (U. S.) 237; *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489, 21 Am. R. Rep. 138; *Jessup v. Bridge*, 11 Iowa 572, 79 Am. Dec. 513; *Schmidt v. Louisville, etc., R. Co.*, 95 Ky. 289; *Seibert v. Minneapolis, etc., R. Co.*, 52 Minn. 246; *Day v. Ogdensburgh, etc., R. Co.*, 107 N. Y. 129. See also *Grand Trunk R. Co. v. Central Vermont R. Co.*, 78 Fed. Rep. 690.

Right of Bondholders to Accounting as to Income. — *Spies v. Chicago, etc., R. Co.*, 40 Fed. Rep. 34.

Earnings "From or Over" a Particular Lien include earnings from business in both directions. *Schmidt v. Louisville, etc., R. Co.*, 95 Ky. 289.

"Net Earnings" from Division. — *Schmidt v. Louisville, etc., R. Co.*, 95 Ky. 289.

7. **Future Interests.** — *Pennock v. Coe*, 23

How. (U. S.) 117; *Louisville Trust Co. v. Cincinnati Inclined-Plane R. Co.*, 91 Fed. Rep. 699; *Randolph v. New Jersey West Line R. Co.*, 28 N. J. Eq. 49, 14 Am. R. Rep. 11; *Farmers' L. & T. Co. v. Commercial Bank*, 15 Wis. 424, 82 Am. Dec. 689; *Lloyd v. European, etc., R. Co.*, 18 N. Bruns. 194. See also *Shirley v. Waco Tap R. Co.*, 78 Tex. 131. Compare *Pierce v. Emery*, 32 N. H. 484.

8. **Mortgage of Future Interests** — *United States*. — *McGourkey v. Toledo, etc., R. Co.*, 146 U. S. 536; *Scott v. Clinton, etc., R. Co.*, 6 Biss. (U. S.) 529; *Central Trust Co. v. Ohio Cent. R. Co.*, 36 Fed. Rep. 520; *Contracting, etc., Co. v. Continental Trust Co.*, (C. C. A.) 108 Fed. Rep. 1; *Mercantile Trust, etc., Co. v. Roanoke, etc., R. Co.*, 109 Fed. Rep. 3; *Branch v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 481, 4 Fed. Cas. No. 1,807; *Barnard v. Norwich, etc., R. Co.*, 4 Cliff. (U. S.) 351, 2 Fed. Cas. No. 1,007; *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Blackburn v. Selma, etc., R. Co.*, 2 Flipp. (U. S.) 525; *Pennock v. Coe*, 23 How. (U. S.) 117; *Branch v. Jesup*, 106 U. S. 468; *Augusta, etc., R. Co. v. Kittell*, 52 Fed. Rep. 63, 2 U. S. App. 409; *Parker v. New Orleans, etc., R. Co.*, 33 Fed. Rep. 693; *Manhattan Trust Co. v. Sioux City, etc., R. Co.*, 68 Fed. Rep. 72; *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794; *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263; *Central Trust Co. v. Chattanooga, etc., R. Co.*, 89 Fed. Rep. 388.

Alabama. — *Meyer v. Johnston*, 53 Ala. 237, 64 Ala. 603; *Swann v. Gaston*, 87 Ala. 569.

Arkansas. — *Little Rock, etc., R. Co. v. Page*, 35 Ark. 304, 7 Am. & Eng. R. Cas. 36.

Connecticut. — *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150; *Buck v. Seymour*, 46 Conn. 156.

Georgia. — *Hawkins v. Mercantile Trust, etc., Co.*, 96 Ga. 580; *Georgia Southern, etc., R. Co. v. Mercantile Trust, etc., Co.*, 94 Ga. 306, 47 Am. St. Rep. 153.

the company acquires the legal title, but also to that to which it acquires a full equitable title.¹

In Describing the Future-acquired Property which is to be covered by the mortgage it is necessary that there be some certainty in the description, and a mortgage of all property of a railroad company to be acquired in the future has been held to be insufficient in so far as regards future-acquired property which is in no way appurtenant to the operation of the railroad.²

Consolidation of Railway Companies. — A mortgage containing an after-acquired-property clause covers, of course, only property acquired by the mortgagor, and where the mortgagor is merged by consolidation into another company, its prior mortgage will not cover property afterwards acquired by the consolidated company.³

5. Indebtedness Secured by Mortgage. — The question as to the indebtedness secured by a railway mortgage is, of course, dependent upon the terms of the mortgage.⁴

6. Priority of Claims — a. IN GENERAL. — The lien of a railway mortgage

Illinois. — *Quincy v. Chicago, etc., R. Co.*, 94 Ill. 537.

Louisiana. — *Bell v. Chicago, etc., R. Co.*, 34 La. Ann. 785.

Maine. — *Hamlin v. European, etc., R. Co.*, 72 Me. 83; *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486.

Maryland. — *Batler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86; *Brady v. Johnson*, 75 Md. 445.

Massachusetts. — *Henshaw v. Bellows Falls Bank*, 10 Gray (Mass.) 568; *Howe v. Freeman*, 14 Gray (Mass.) 566.

Minnesota. — *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115.

New Jersey. — *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13; *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398; *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658, reversing 27 N. J. Eq. 110; *Williamson v. New Jersey Southern R. Co.*, 29 N. J. Eq. 311, 15 Am. R. Rep. 572, reversing 28 N. J. Eq. 278; *Coe v. Delaware, etc., R. Co.*, 34 N. J. Eq. 266, 4 Am. & Eng. R. Cas. 513, affirming 31 N. J. Eq. 105.

New York. — *Seymour v. Canandaigua, etc., R. Co.*, 25 Barb. (N. Y.) 284; *Stevens v. Watson*, (Ct. App.) 45 How. Pr. (N. Y.) 104, 4 Abb. App. Dec. (N. Y.) 302; *Benjamin v. Elmira, etc., R. Co.*, 49 Barb. (N. Y.) 441; *Platt v. New York, etc., R. Co.*, 9 N. Y. App. Div. 87, 17 Misc. (N. Y.) 22; *Westinghouse Electric, etc., Co. v. New Paltz, etc., Traction Co.*, (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 132.

Ohio. — *Coopers v. Wolf*, 15 Ohio St. 523.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Woelpper*, 64 Pa. St. 366, 3 Am. Rep. 596.

Tennessee. — *Clay v. East Tennessee, etc., R. Co.*, 6 Heisk. (Tenn.) 421.

Texas. — *Texas Western R. Co. v. Gentry*, 69 Tex. 625, 33 Am. & Eng. R. Cas. 46.

Wisconsin. — *Pierce v. Milwaukee, etc., R. Co.*, 24 Wis. 551, 1 Am. Rep. 203; *Farmers' L. & T. Co. v. Fisher*, 17 Wis. 114.

Canada. — *Lanark v. Cameron*, 9 U. C. C. P. 109. Compare *Lloyd v. European, etc., R. Co.*, 18 N. Bruns. 194.

See also *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

For a treatment of the rules both at law and in equity, together with certain statutory pro-

visions, in regard to mortgages generally, see the title MORTGAGES, vol. 20, p. 916.

1. Future Equitable Interests. — *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Boston, etc., Air Line R. Co. v. Coffin*, 50 Conn. 150; *Brady v. Johnson*, 75 Md. 445.

2. *Calhoun v. Memphis, etc., R. Co.*, 2 Flipp. (U. S.) 442, 4 Fed. Cas. No. 2,309; *Mississippi Valley Co. v. Chicago, etc., R. Co.*, 58 Miss. 896, 38 Am. Rep. 348, 2 Am. & Eng. R. Cas. 414. See the title MORTGAGES, vol. 20, p. 917.

In *Buck v. Seymour*, 46 Conn. 156, it was said that there is not the same necessity in such a case for particularity of description as there is in the case of an individual. See also *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794; *Hawkins v. Mercantile Trust, etc., Co.*, 96 Ga. 580.

Property Acquired under Extension of Charter Powers. — Where, after a general mortgage containing an after-acquired-property clause was executed, the charter powers of the company were extended so as to authorize it to acquire property which it had no authority to acquire at the time of the execution of the mortgage, it has been held that the property thus afterwards acquired would not be included in the mortgage as after-acquired property, as it could not have been in contemplation when the mortgage was executed. *Meyer v. Johnston*, 53 Ala. 237, 15 Am. R. Rep. 467; *Alexandria, etc., R. Co. v. Graham*, 31 Gratt. (Va.) 769. See also *Randolph v. New Jersey West Line R. Co.*, 28 N. J. Eq. 49.

3. Consolidation of Railway Companies. — *New York Security, etc., Co. v. Louisville, etc., R. Co.*, 102 Fed. Rep. 382.

4. Indebtedness Secured by Mortgage. — *Vose v. Bronson*, 6 Wall. (U. S.) 452; *Blair v. St. Louis, etc., R. Co.*, 23 Fed. Rep. 524; *Mercantile Trust Co. v. Missouri, etc., R. Co.*, 41 Fed. Rep. 8; *Mason v. York, etc., R. Co.*, 52 Me. 82; *Butler v. Rahm*, 46 Md. 541, 18 Am. R. Rep. 86; *Atlantic Trust Co. v. Kinderhook, etc., R. Co.*, 17 N. Y. App. Div. 212; *Rice v. Southern Pennsylvania Iron, etc., Co.*, 9 Phila. (Pa.) 294, 31 Leg. Int. (Pa.) 5; *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966; *Grand Junction R. Co. v. Bickford*, 23 Grant Ch. (U. C.) 302.

has priority over all pre-existing¹ or subsequent general creditors² of the company. Leases by the railway company of the property after the execution of a mortgage are, of course, subject to the mortgage, the lease being terminated by a foreclosure.³ On the other hand, the lien is inferior to all liens upon the property covered by the mortgage existing at the time of its execution.⁴

b. PRIORITY BETWEEN SUCCESSIVE MORTGAGES. — As between successive mortgages, the first-in time has, of course, priority;⁵ and the fact that a part of the railway is built entirely with the money raised by a later mortgage gives to the latter no priority over the earlier mortgage, even as to the part of the road so built.⁶ When a first mortgage is given to secure an issue of bonds for a specified amount, and while some of such bonds remain unissued

1. Priorities — Creditors. — *Fogg v. Blair*, 133 U. S. 534; *Blair v. St. Louis, etc.*, R. Co., 25 Fed. Rep. 684; *Dunham v. Isett*, 15 Iowa 284. Compare *Spence v. Mobile, etc.*, R. Co., 79 Ala. 576.

2. United States. — *Morgan's Louisiana, etc., R., etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171; *Thompson v. White Water Valley R. Co.*, 132 U. S. 68; *Southern Express Co. v. Western North Carolina R. Co.*, 99 U. S. 191; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Dunham v. Cincinnati, etc., R. Co.*, 1 Wall. (U. S.) 254; *Blair v. St. Louis, etc., R. Co.*, 23 Fed. Rep. 523; *Central Trust Co. v. Wabash, etc., R. Co.*, 32 Fed. Rep. 566; *Union L. & T. Co. v. Southern California Motor Road Co.*, 49 Fed. Rep. 267; *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263; *Terre Haute, etc., R. Co. v. Harrison*, (C. C. A.) 88 Fed. Rep. 913; *Jessup v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 441.

Alabama. — *Meyer v. Johnston*, 53 Ala. 237, 15 Am. R. Rep. 467.

Pennsylvania. — *Fidelity Ins., etc., Co. v. Western Pennsylvania, etc., R. Co.*, 138 Pa. St. 404, 21 Am. St. Rep. 911.

Texas. — *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

Virginia. — *Addison v. Lewis*, 75 Va. 701, 9 Am. & Eng. R. Cas. 702.

Money Borrowed to Pay Interest on Bonds. — A claim for money borrowed to pay interest on the bonds secured by a railway company is not entitled to priority over the principal of the bonds, though the necessity for borrowing such money was caused by the application of the current income to the purchase of rolling-stock which became subject to the mortgage through an after-acquired-property clause. *Contracting, etc., Co. v. Continental Trust Co.*, (C. C. A.) 108 Fed. Rep. 1. See also *Morgan's Louisiana, etc., R., etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

Claims for Moneys Received by a Connecting Road on Through Fares and Freights for which it may be accountable in part to connecting lines constitute nothing more than open accounts, which stand on the same footing as other unsecured debts. *Jessup v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 441.

Agreement for Displacement of Mortgages. — The company may, by an agreement in the mortgage, be authorized to incur a subsequent indebtedness which shall have precedence of the indebtedness secured by the

mortgage. *Campbell v. Texas, etc., R. Co.*, 2 Woods (U. S.) 263, 4 Fed. Cas. No. 2,369.

3. Subsequent Lease. — *Hale v. Nashua, etc., R. Co.*, 60 N. H. 333. See also *Louisville, etc., R. Co. v. Schmidt*, (Ky. 1899) 52 S. W. Rep. 835.

4. Pre-existing Liens. — *Farmers L. & T. Co. v. Newman*, 127 U. S. 649; *Farmers L. & T. Co. v. Canada, etc., R. Co.*, 127 Ind. 250, 47 Am. & Eng. R. Cas. 271; *Pittsburgh, etc., R. Co. v. Marshall*, 85 Pa. St. 187, 18 Am. R. Rep. 388.

5. Successive Mortgages — United States. — *Wade v. Chicago, etc., R. Co.*, 149 U. S. 327; *Kneeland v. Lawrence*, 140 U. S. 209; *Thompson v. White Water Valley R. Co.*, 132 U. S. 68; *Miltnerberger v. Logansport, etc., R. Co.*, 106 U. S. 286, 12 Am. & Eng. R. Cas. 464; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Bronson v. LaCrosse, etc., R. Co.*, 2 Wall. (U. S.) 283; *Columbus, etc., R. Co.'s Appeal*, 109 Fed. Rep. 177, 48 C. C. A. 275; *U. S. Trust Co. v. Wabash Western R. Co.*, 38 Fed. Rep. 891.

Alabama. — *Morton v. New Orleans, etc., R. Co.*, 79 Ala. 590.

Kentucky. — *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221.

Missouri. — *Wilson v. Beckwith*, 117 Mo. 61. *New Jersey.* — *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105.

New York. — *Brown v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 22 How. Pr. (N. Y.) 451.

Ohio. — *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

South Carolina. — *Gibbes v. Greenville, etc., R. Co.*, 13 S. Car. 228.

Vermont. — *Poland v. Lamoille Valley R. Co.*, 52 Vt. 144.

Virginia. — *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 38 Am. & Eng. R. Cas. 534.

Where Money Is Advanced to a Railway Company upon Bond and Mortgage Before the Borrowing Powers of the Company Are in Operation, although the money is admittedly expended in the construction of the railway, the creditors will not be allowed to come in in equal priority with other *bona fide* debenture and mortgage creditors. *In re Bagnalstown, etc., R. Co.*, 1r. R. 4 Eq. 172.

6. Galveston, etc., R. Co. v. Cowdrey, 11 Wall. (U. S.) 459; *Thompson v. White Water Valley R. Co.*, 132 U. S. 68, 40 Am. & Eng. R. Cas. 373.

or undisposed of a second mortgage is executed, the holders of such bonds issued after the execution of the second mortgage still have priority over the indebtedness secured by the second mortgage.¹

c. PRIORITY BETWEEN SAME CLASSES OF BONDHOLDERS. — All the holders of the same issue of bonds secured by the mortgage are on an equal footing as regards the mortgage security, and must share *pari passu* in the distribution of the proceeds of the mortgaged property.² It has been held that where a mortgage is given to secure a certain number of bonds, and bonds above the designated number are issued, the bonds constituting the overissue will, in the hands of *bona fide* holders, share equally in the mortgage security with the other bonds.³ Interest coupons are not entitled to priority over the principal or other coupons subsequently maturing,⁴ especially when the mortgage provides that interest coupons and the principal shall share equally in the proceeds of the mortgaged property;⁵ though in the absence of such an express stipulation it has been held that coupons belonging to a class in which a part of the coupons had been paid should be paid before the coupons or principal falling due at a later date,⁶ and that coupons detached and in the hands of others than the holders of the bonds from which they were detached should be paid before such bonds.⁷

d. TAXES. — The lien for taxes, though they accrued after the execution of the mortgage, is superior to the lien of the mortgage.⁸

e. JUDGMENTS. — The lien of judgments recovered subsequently to the execution of the mortgage is, of course, inferior to the lien of the mortgage.⁹

f. PRIORITY BETWEEN MORTGAGE AND PREFERRED STOCK. — The lien of a mortgage is superior to a claim of a preferred stockholder.¹⁰

g. MORTGAGES OF FUTURE INTERESTS. — The lien upon future-acquired interests of a mortgage containing a future-interest clause is superior to all liens created by the company after it has acquired the property;¹¹ and where

1. *Claffin v. South Carolina R. Co.*, 4 Hughes (U. S.) 12, 4 Am. & Eng. R. Cas. 231, 8 Fed. Rep. 118.

2. *Bondholders of Same Class.* — *Barry v. Missouri, etc.*, R. Co., 34 Fed. Rep. 829; *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 524; *Ames v. New Orleans, etc.*, R. Co., 2 Woods (U. S.) 206; *Claffin v. South Carolina R. Co.*, 8 Fed. Rep. 118; *Pittsburgh, etc.*, R. Co. v. Lynde, 55 Ohio St. 23. See also *Coe v. East, etc.*, R. Co., 52 Fed. Rep. 531; *Humphreys v. Morton*, 100 Ill. 592.

Bonds Issued Successively. — *Pittsburgh, etc.*, R. Co. v. Lynde, 55 Ohio St. 23.

3. *Over-issue.* — *Stanton v. Alabama, etc.*, R. Co., 2 Woods (U. S.) 523, 22 Fed. Cas. No. 13,297.

4. *Interest Coupons.* — *Ketchum v. Duncan*, 96 U. S. 659; *Duncan v. Mobile, etc.*, R. Co., 3 Woods (U. S.) 567, 8 Fed. Cas. No. 4,138; *Humphreys v. Morton*, 100 Ill. 592; *State v. Spartanburg, etc.*, R. Co., 8 S. Car. 129; *Sewall v. Brainerd*, 38 Vt. 364; *Miller v. Rutland, etc.*, R. Co., 40 Vt. 399, 94 Am. Dec. 413.

5. *Dunham v. Cincinnati, etc.*, R. Co., 1 Wall. (U. S.) 254.

6. *Stevens v. New York, etc.*, R. Co., 13 Blatchf. (U. S.) 412, 23 Fed. Cas. No. 13,406. Compare *Humphreys v. Morton*, 100 Ill. 592.

7. *Stevens v. New York, etc.*, R. Co., 13 Blatchf. (U. S.) 412, 23 Fed. Cas. No. 13,406. See, however, *Ketchum v. Duncan*, 96 U. S. 659.

8. *Taxes.* — *Farmers' L. & T. Co. v. Stuttgart, etc.*, R. Co., 92 Fed. Rep. 246. See also

Ream v. Stone, 102 Ill. 359. And see the title TAXATION.

Where a decree for foreclosure and sale provides that the proceeds shall be brought into court to await the further order of the court as to distribution, saving the rights of all persons in the fund for future determination, a party may, on petition, after such sale and before a distribution is made, have an order to pay to him out of the fund, before payment is made to other creditors, any moneys which he may have advanced to save the mortgaged property from sale for taxes due thereon, which were a prior lien. *Humphreys v. Allen*, 100 Ill. 511.

9. *Judgments.* — *Bronson v. La Crosse, etc.*, R. Co., 2 Wall. (U. S.) 283; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 68 Fed. Rep. 36; *Ludlow v. Clinton Line R. Co.*, 1 Flipp. (U. S.) 25, 15 Fed. Cas. No. 8,600; *Kelly v. Boylan*, 32 N. J. Eq. 581; *Covey v. Pittsburg, etc.*, R. Co., 3 Phila. (Pa.) 173, 15 Leg. Int. (Pa.) 228.

10. *Mortgage and Preferred Stock.* — *In re Burry Port, etc.*, R. Co., 54 L. J. Ch. 710, 52 L. T. N. S. 842, 33 W. R. 741; *St. John v. New York, etc.*, R. Co., 22 Wall. (U. S.) 136, 11 Am. R. Rep. 446; *Mercantile Trust Co. v. Baltimore, etc.*, R. Co., 82 Fed. Rep. 360; *Branch v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 481. See also *King v. Ohio, etc.*, R. Co., 9 Biss. (U. S.) 278. And see the titles STOCKS; STOCKHOLDERS.

11. *Mortgage on Future Interests.* — *Thompson v. White Water Valley R. Co.*, 132 U. S. 68; *Galveston, etc.*, R. Co. v. Cowdrey, 11 Wall.

the company has acquired full equitable title to future interests, the mortgage will have priority over liens created by the trustee to secure indebtedness of the railway company prior to the conveyance of the legal title to the company.¹

Judgment Creditors. — Mortgages by railway companies of future-acquired property have precedence over judgment creditors.²

Extent of Lien. — The lien of the mortgage upon future-acquired interests attaches only to such interests in future acquisitions as the railway company itself acquires,³ and is inferior to liens which attach to the property at the time of its acquisition by the company.⁴

Conditional Sale. — When property is sold to a railway company on conditional sale, the title being retained by the seller until the purchase money is paid, the rights of the seller are superior to the general mortgage of future interests;⁵ and the failure of the conditional seller to record the contract, under the statutes requiring such sales to be recorded, does not give priority to the general mortgage over the interest of the conditional vendor;⁶ and in such a case, the subsequent possession of the property so conditionally sold by the mortgagee, or by a receiver in proceedings to foreclose the mortgage, adds nothing to the title of the mortgagee.⁷ The lien of the mortgage

(U. S.) 459; *Central Trust Co. v. Ohio Cent. R. Co.*, 36 Fed. Rep. 520; *Pierce v. Emery*, 32 N. H. 484; *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123.

Landlord's Lien. — A mortgage covering after-acquired property has precedence, with regard to rolling stock subsequently acquired, over the lien of the lessor of depot grounds upon which such rolling stock is used. *Manhattan Trust Co. v. Sioux City, etc.*, R. Co., 68 Fed. Rep. 72.

1. *Central Trust Co. v. Kneeland*, 138 U. S. 414; *Wade v. Chicago, etc.*, R. Co., 149 U. S. 327.

2. **Judgment Creditors.** — *Pennock v. Coe*, 23 How. (U. S.) 117; *Bell v. Chicago, etc.*, R. Co., 34 La. Ann. 785.

3. *U. S. v. New Orleans, etc.*, R. Co., 12 Wall. (U. S.) 362; *Fosdick v. Schall*, 99 U. S. 235; *Spoon v. Chicago, etc.*, R. Co., 86 Mich. 309; *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277, 14 Am. R. Rep. 34, 29 N. J. Eq. 319; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290. *Compare Pierce v. Milwaukee, etc.*, R. Co., 24 Wis. 551, 1 Am. Rep. 203; *Wallbridge v. Farwell*, 18 Can. Sup. Ct. 1.

Telephone Poles and Wires Placed on Right of Way by third persons under contract with railway company. *Western Union Tel. Co. v. Burlington, etc.*, R. Co., 11 Fed. Rep. 1.

4. **Liens Existing on Acquisition.** — *U. S. v. New Orleans, etc.*, R. Co., 12 Wall. (U. S.) 362; *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123; *Newgass v. Atlantic, etc.*, R. Co., 56 Fed. Rep. 676; *Central Trust Co. v. Louisville, etc.*, R. Co., 81 Fed. Rep. 772; *Branch v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 481, 4 Fed. Cas. No. 1,807; *Meyer v. Johnston*, 64 Ala. 603, 8 Am. & Eng. R. Cas. 584; *Brady v. Johnson*, 75 Md. 445; *Western Pennsylvania R. Co. v. Johnston*, 50 Pa. St. 290.

Vendor's Lien. — *Galt v. Erie, etc.*, R. Co., 15 Grant Ch. (U. C.) 637. See also *Central Trust Co. v. Texas, etc.*, R. Co., 27 Fed. Rep. 178.

In *Fisk v. Potter*, 2 Abb. App. Dec. (N. Y.) 138, 2 Keyes (N. Y.) 64, it was held that where a stockholder of a company who has acted as agent of the company in acquiring title to lands

conveys land to the company after it has executed and recorded a mortgage of all of its lands which it then owned or might thereafter acquire, to secure its bondholders, he must be deemed to have waived a vendor's lien on the land conveyed.

A Purchase-money Mortgage or lien attaching to future-acquired real or personal property at the time of its acquisition by the railway company is superior to the lien of the railway mortgage expressly covering future-acquired interests of the company, and a failure to register or record such purchase-money mortgage does not prevent it from being superior to the prior general mortgage of future interests. *U. S. v. New Orleans, etc.*, R. Co., 12 Wall. (U. S.) 362.

5. **Conditional Sales.** — *Fosdick v. Schall*, 99 U. S. 235; *Fosdick v. Southwestern Car Co.*, 99 U. S. 256; *Wright v. Kentucky, etc.*, R. Co., 117 U. S. 72, 24 Am. & Eng. R. Cas. 312; *McGourkey v. Toledo, etc.*, R. Co., 146 U. S. 536; *Hardesty v. Pyle*, 15 Fed. Rep. 778; *Frank v. Denver, etc.*, R. Co., 23 Fed. Rep. 123; *Thomas v. Peoria, etc.*, R. Co., 36 Fed. Rep. 808, 36 Am. & Eng. R. Cas. 381; *Central Trust Co. v. Marietta, etc.*, R. Co., 48 Fed. Rep. 865, 2 U. S. App. 120; *Newgass v. Atlantic, etc.*, R. Co., 56 Fed. Rep. 676; *Metro-politan Trust Co. v. Columbus, etc.*, R. Co., 93 Fed. Rep. 702; *Contracting, etc.*, Co. v. *Continental Trust Co.*, 108 Fed. Rep. 1, 47 C. C. A. 143; *Vilas v. Page*, 106 N. Y. 439, *affirming* 11 N. Y. St. Rep. 416.

6. *Myer v. Western Car Co.*, 102 U. S. 1, 2 Am. & Eng. R. Cas. 375; *Central Trust Co. v. Marietta, etc.*, R. Co., 48 Fed. Rep. 868, 2 U. S. App. 95; *Newgass v. Atlantic, etc.*, R. Co., 56 Fed. Rep. 676.

7. *Fosdick v. Schall*, 99 U. S. 235; *Myer v. Western Car Co.*, 102 U. S. 1, 2 Am. & Eng. R. Cas. 375.

Unpaid Instalments. — The mortgage has, however, priority over unpaid instalments on such conditional sale, in so far as regards the general property of the company, as the conditional seller, in reference to his claim for such unpaid instalments and its enforcement against the general property, occupies merely

attaches to the property conditionally sold, subject to the rights of the conditional vendor, and such lien cannot be displaced by the railway company and the vendor without the mortgagee's consent.¹

Bona Fide Purchasers Without Notice of future-acquired interests will be protected against the lien of the mortgage claimed under the future-interest clause.²

h. CLAIMS ARISING OUT OF PROCUREMENT OF RIGHT OF WAY. — The claim of an abutting landowner for damages arising out of the construction of the railway, or for compensation for property actually taken, is prior to a mortgage given by the railway company before the damages were assessed and paid,³ and the fact that the claimant did not seek to restrain the construction of the railway until his claim was paid does not deprive such claim of priority over the mortgage.⁴ So persons who convey a right of way directly to a railroad company are entitled to a lien for the purchase price which is prior to a mortgage upon the railroad.⁵ A person, however, who merely loans or advances the money for the purchase of the right of way acquires no lien to which priority over a mortgage upon the railroad can be given.⁶

i. CLAIMS FOR ORIGINAL CONSTRUCTION. — In the absence of statutory provision, the lien of a railway mortgage has priority over claims for the original construction of the railroad, though it was constructed after the execution of the mortgage.⁷ When a lien is given by statute to laborers, materialmen, contractors, etc., for claims arising out of the construction of railroads, and such claims are not expressly made superior to pre-existing mortgages, the mortgages will have precedence over such liens.⁸ In some juris-

the position of a general creditor. *Fosdick v. Schall*, 99 U. S. 235; *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Farmers' L. & T. Co. v. Chicago*, etc., R. Co., 42 Fed. Rep. 6, 43 Am. & Eng. R. Cas. 436; *Manchester Locomotive Works v. Truesdale*, 44 Minn. 115.

1. *Contracting, etc., Co. v. Continental Trust Co.*, 108 Fed. Rep. 1, 47 C. C. A. 143.

2. **Bona Fide Purchasers.** — *Campbell v. Texas*, etc., R. Co., 2 Woods (U. S.) 263.

3. **Right-of-way Claims.** — *Mercantile Trust Co. v. Pittsburgh*, etc., R. Co., 29 Fed. Rep. 732; *Central Trust Co. v. Louisville*, etc., R. Co., 81 Fed. Rep. 772; *Central Trust Co. v. Hennen*, (C. C. A.) 90 Fed. Rep. 593; *Central Trust Co. v. Thurman*, 94 Ga. 735; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273; *Western Pennsylvania R. Co. v. Johnston*, 59 Pa. St. 290; *Crosby v. Morristown*, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 507.

It seems that a judgment rendered against a railway company for damages for property taken for the use of its road is binding upon the mortgage bondholders, though they were not parties to the condemnation proceedings. *Central Trust Co. v. Louisville*, etc., R. Co., 81 Fed. Rep. 772. *Compare Central Trust Co. v. Hennen*, (C. C. A.) 90 Fed. Rep. 593.

4. *Mercantile Trust Co. v. Pittsburgh*, etc., R. Co., 29 Fed. Rep. 732.

5. *Central Trust Co. v. Bridges*, 16 U. S. App. 142, 57 Fed. Rep. 753. See also *Levy v. Tatum*, (Tex. Civ. App. 1897) 43 S. W. Rep. 941. *Compare Crosby v. Morristown*, etc., R. Co., (Tenn. Ch. 1897) 42 S. W. Rep. 507.

Arrearage of Rentals. — A turnpike company, by a contract in the form of a deed, executed and recorded, agreed that a railroad company might use a certain portion of its road for a right of way for a certain stipulated annual rental; but no specific lien was reserved, and

afterwards the railroad company became insolvent while in arrears for such rent. It was held that a claim therefor did not constitute a lien on the road as against subsequent mortgagees. *Baltimore*, etc., *Turnpike Co. v. Moale*, 71 Md. 353.

6. *Frost v. Galesburg*, etc., R. Co., 167 Ill. 161.

7. **Claims for Original Construction** — *United States*, — *Toledo*, etc., R. Co. *v. Hamilton*, 134 U. S. 296, 43 Am. & Eng. R. Cas. 476; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649; *Tommey v. Spartanburg*, etc., R. Co., 4 Hughes (U. S.) 640, 7 Fed. Rep. 429; *Central Trust Co. v. Louisville*, etc., R. Co., 70 Fed. Rep. 282; *Farmers' L. & T. Co. v. Stuttgart*, etc., R. Co., 92 Fed. Rep. 246; *International Trust Co. v. T. B. Townsend Brick*, etc., Co., (C. C. A.) 95 Fed. Rep. 850; *Allen v. Dallas*, etc., R. Co., 3 Woods (U. S.) 316, 1 Fed. Cas. No. 221; *Denniston v. Chicago*, etc., R. Co., 4 Biss. (U. S.) 414, 7 Fed. Cas. No. 3,800. See also *Thompson v. White Water Valley R. Co.*, 132 U. S. 68; *King v. Ohio*, etc., R. Co., 26 Int. Rev. Rec. 325, 14 Fed. Cas. No. 7,801. *Compare Reynolds v. Manhattan Trust Co.*, 83 Fed. Rep. 593, 27 C. C. A. 620; *Dunham v. Cincinnati*, etc., R. Co., 1 Wall. (U. S.) 254.

Arkansas, — *Barstow v. Pine Bluff*, etc., R. Co., 57 Ark. 334.

Pennsylvania, — *Reed's Appeal*, 122 Pa. St. 505.

South Carolina, — *Hand v. Savannah*, etc., R. Co., 17 S. Car. 219.

Virginia, — *Addison v. Lewis*, 75 Va. 701.

Compare Botsford v. New Haven, etc., R. Co., 41 Conn. 454, 7 Am. R. Rep. 153; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

8. **Liens of Contractors**, etc. — *Toledo*, etc., R. Co. *v. Hamilton*, 134 U. S. 296, 43 Am. & Eng. R. Cas. 476; *Cleveland*, etc., R. Co. *v. Knicker-*

dictions, liens arising out of the original construction of the railway are given by statute in favor of contractors, laborers, and materialmen, which are entitled to priority over the lien of a mortgage upon the railroad executed before the construction of the road.¹

j. OPERATING EXPENSES. — In some jurisdictions priority over a pre-existing mortgage is given to claims for services rendered or materials furnished for the operation of the road, in so far as the rolling stock of the railroad is covered by the mortgage;² but where the statute giving liens for labor and materials in the repair of a completed railroad does not provide with regard to the priority of such lien and that of an existing mortgage, the lien of the mortgage has priority.³

k. CLAIMS ARISING OUT OF TORTS IN OPERATING RAILROAD. — Claims for damages for negligence in the operation of the railway while in the hands of the company, whether for personal injuries or injuries to property, have no priority, in the absence of statutory provision, over the lien of a pre-existing mortgage;⁴ and as the mortgagee is entitled to the income from the operation of the railway after the appointment of a receiver for the foreclosure of the mortgage, such claims for injuries received prior to the appointment of the receiver are not entitled to any priority over the mortgage debt as to the income accruing after the receiver's appointment.⁵ Still, as regards claims for injuries caused by the negligent operation of the railway while in the hands of the receivers, it has been held that they are to be paid out of the income earned by the receiver in the operation of the railway, in preference to the mortgage indebtedness,⁶ but not out of the proceeds of the sale

bocker Trust Co., 86 Fed. Rep. 73; Ban v. Columbia Southern R. Co., 109 Fed. Rep. 499. Compare Kilpatrick v. Kansas City, etc., R. Co., 38 Neb. 650, 57 Am. & Eng. R. Cas. 398.

1. Brooks v. Burlington, etc., R. Co., 101 U. S. 443; Hassall v. Wilcox, 130 U. S. 493, 40 Am. & Eng. R. Cas. 385; Central Trust Co. v. Texas, etc., R. Co., 23 Fed. Rep. 673; Central Trust Co. v. Bridges, (C. C. A.) 57 Fed. Rep. 753; Central Trust Co. v. Louisville, etc., R. Co., 70 Fed. Rep. 282; Central Trust Co. v. Georgia Pac. R. Co., 83 Fed. Rep. 386; Ruhlender v. Chesapeake, etc., R. Co., (C. C. A.) 91 Fed. Rep. 5; Neilson v. Iowa Eastern R. Co., 44 Iowa 71; Equitable L. Ins. Co. v. Slye, 45 Iowa 618; Rousculp v. Ohio Southern R. Co., 10 Ohio Cir. Dec. 621, 19 Ohio Cir. Ct. 436. See also Taylor v. Burlington, etc., R. Co., 4 Dill. (U. S.) 570; Farmers' L. & T. Co. v. Canada, etc., R. Co., 127 Ind. 250, 47 Am. & Eng. R. Cas. 271.

2. Operating Expenses. — Central Trust Co. v. Wabash, etc., R. Co., 30 Fed. Rep. 332; Columbus, etc., R. Co.'s Appeal, 109 Fed. Rep. 177, 48 C. C. A. 275; Newgass v. Atlantic, etc., R. Co., 56 Fed. Rep. 676; Farmers' L. & T. Co. v. Vicksburg, etc., R. Co., 33 Fed. Rep. 778; Newgass v. Atlantic, etc., R. Co., 72 Fed. Rep. 712; Poland v. Lamoille Valley R. Co., 52 Vt. 144, 4 Am. & Eng. R. Cas. 408.

3. Bear v. Burlington, etc., R. Co., 48 Iowa 619.

4. Claims for Torts in Operation. — Central Trust Co. v. Wabash, etc., R. Co., 28 Fed. Rep. 871; St. Louis Trust Co. v. Riley, 70 Fed. Rep. 32, 36 U. S. App. 100; Foreman v. Central Trust Co., 71 Fed. Rep. 776, 30 U. S. App. 653; Farmers' L. & T. Co. v. Detroit, etc., R. Co., 71 Fed. Rep. 29; Farmers' L. & T. Co. v. Northern Pac. R. Co., (C. C. A.) 79 Fed. Rep. 227; Farmers' L. & T. Co. v. Nes-

telle, 48 U. S. App. 326; Farmers' L. & T. Co. v. Longworth, (C. C. A.) 83 Fed. Rep. 336. See also Central Trust Co. v. East Tennessee, etc., R. Co., 30 Fed. Rep. 895; Central Trust Co. v. Wabash, etc., R. Co., 32 Fed. Rep. 566; Easton v. Houston, etc., R. Co., 38 Fed. Rep. 12, 39 Am. & Eng. R. Cas. 588; Central Trust Co. v. East Tennessee, etc., R. Co., 69 Fed. Rep. 658.

Where the Mortgage Covers the Income of the railway company, and in proceedings to foreclose the mortgage a receiver is appointed, and the income accruing prior to the appointment of the receiver is paid over to him by the company, it does not seem that a claim for personal injuries arising while the road was operated by the company would have priority over the mortgage as to the income so paid to the receiver. Farmers' L. & T. Co. v. Detroit, etc., R. Co., 71 Fed. Rep. 29. Compare Frazier v. East Tennessee, etc., R. Co., 88 Tenn. 138.

Personal Injuries to Passengers. — Davenport v. Alabama, etc., R. Co., 2 Woods (U. S.) 519, 7 Fed. Cas. No. 3,588.

Personal Injuries to Employee of Railway Company. — Farmers' L. & T. Co. v. Green Bay, etc., R. Co., 45 Fed. Rep. 664, 46 Am. & Eng. R. Cas. 296.

Injuries to Goods in Transportation. — Central Trust Co. v. Wabash, etc., R. Co., 28 Fed. Rep. 871.

5. Central Trust Co. v. Wabash, etc., R. Co., 28 Fed. Rep. 871; Farmers' L. & T. Co. v. Green Bay, etc., R. Co., 45 Fed. Rep. 664; St. Louis Trust Co. v. Riley, 70 Fed. Rep. 32, 36 U. S. App. 100; Farmers' L. & T. Co. v. Detroit, etc., R. Co., 71 Fed. Rep. 29. Compare Dow v. Memphis, etc., R. Co., 20 Fed. Rep. 260.

6. Ex p. Brown, 15 S. Car. 518.

of the property covered by the mortgage.¹

Statutes. — By statute, in some jurisdictions, priority over the mortgage indebtedness is given to claims against railways for torts committed prior to or at the time of the execution of the mortgage,² while in others, priority over the mortgage is given in favor of claims for torts committed either before or after the execution of the mortgage.³ While these latter statutes are undoubtedly constitutional as regards mortgages executed after their passage,⁴ they are, in so far as they apply to mortgages executed prior to their enactment, invalid as impairing the obligation of the contract between the railway company and its mortgagee.⁵

I. EQUITIES IN CASE OF APPOINTMENT OF RECEIVER — (1) *Claims Arising Prior to Receivership* — (a) **In General.** — General Creditors of the railway company whose claims do not fall within the category of operating expenses have no preference to payment from the income earned by the receiver as against the mortgage creditors at whose instance he was appointed,⁶ or from the earnings prior to his appointment which were voluntarily paid over to him by the railway company and which were covered by the mortgage,⁷ and *a fortiori* have no prior right to payment from the proceeds of the mortgaged property.⁸

Operating Expenses. — Where a court of chancery is asked by railroad mortgagees to appoint a receiver of the mortgaged property pending foreclosure proceedings, the rule seems to be settled that the income earned by the receiver from the operation of the road should be applied, as against any claim

1. *Davenport v. Alabama, etc., R. Co.*, 2 Woods (U. S.) 519, 7 Fed. Cas. No. 3,588. See also *Dow v. Memphis, etc., R. Co.*, 20 Fed. Rep. 260.

2. **Statutory Preferences.** — *Finance Co. v. Charleston, etc., R. Co.*, 61 Fed. Rep. 369 (Code N. Car. 1883, § 685).

Statute to Be Strictly Construed as in derogation of the common law. *Fidelity Ins., etc., Co. v. Norfolk, etc., R. Co.*, 90 Fed. Rep. 175 (Code N. Car. 1883, § 1255).

3. *East Tennessee, etc., R. Co. v. Frazier*, 139 U. S. 288, *affirming* 88 Tenn. 138; *Phinizy v. Augusta, etc., R. Co.*, 63 Fed. Rep. 922 (*South Carolina* statute); *Central Trust Co. v. Charlotte, etc., R. Co.*, 65 Fed. Rep. 257; *Central Trust Co. v. East Tennessee, etc., R. Co.*, 69 Fed. Rep. 658 (*Tennessee* statute); *Southern R. Co. v. Bouknight*, 70 Fed. Rep. 442, 25 U. S. App. 415 (*South Carolina* statute); *State v. Port Royal, etc., R. Co.*, 84 Fed. Rep. 67; *Penn Mut. L. Ins. Co. v. Heiss*, 141 Ill. 35, 33 Am. St. Rep. 273; *Hill v. Southern R. Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 888. See also *St. Louis Trust Co. v. Riley*, (C. C. A.) 70 Fed. Rep. 32 (*Arkansas* statute); *Burlington, etc., R. Co. v. Verry*, 48 Iowa 458; *White v. Keokuk, etc., R. Co.*, 52 Iowa 97.

Code Iowa (1873), § 1309 (*Code* 1897, § 2075), making judgments for personal injuries prior to the liens of mortgages and trust deeds, cannot be extended to embrace claims for such injuries, even though actions therefor be pending, and the purchaser of a railroad on foreclosure of mortgage takes it free from such claims unless they have been prosecuted to judgment. *Burlington, etc., R. Co. v. Verry*, 48 Iowa 458. See also *Winter v. Iowa Cent. R. Co.*, 111 Iowa 342; *White v. Keokuk, etc., R. Co.*, 52 Iowa 97.

So it has been held that the *Tennessee* statute (M. & V. Code 1884, § 1271; Annot. Code 1896, § 1530) providing that railroad com-

panies shall not have power to give mortgages which shall be valid against judgments for damages to persons or property arising out of the operation of the road does not give a lien upon the road for such damages, and that the purchaser of the road on foreclosure of the mortgage would take free from all claims for such damages where no lien therefor had been procured by legal proceedings. *Baltimore Trust, etc., Co. v. Hofstetter*, 85 Fed. Rep. 75, 29 C. C. A. 35.

4. **Constitutionality.** — *Central Trust Co. v. Charlotte, etc., R. Co.*, 65 Fed. Rep. 257 (*South Carolina* statute).

5. *Phinizy v. Augusta, etc., R. Co.*, 63 Fed. Rep. 922.

6. **General Claims Prior to Receivership.** — *Fosdick v. Schall*, 99 U. S. 252; *Huidekoper v. Locomotive Works*, 99 U. S. 258; *Burnham v. Bowen*, 111 U. S. 776, 17 Am. & Eng. R. Cas. 308; *Dow v. Memphis, etc., R. Co.*, 124 U. S. 653; *American L. & T. Co. v. East, etc., R. Co.*, 46 Fed. Rep. 101; *Mather Humane Stock Transp. Co. v. Anderson*, (C. C. A.) 76 Fed. Rep. 164; *Union L. & T. Co. v. Southern California Motor Road Co.*, 49 Fed. Rep. 267; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221.

7. *Farmers' L. & T. Co. v. Detroit, etc., R. Co.*, 71 Fed. Rep. 29.

8. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82; *Morgan's Louisiana, etc., R., etc., Co. v. Texas Cent. R. Co.*, 137 U. S. 171; *St. Louis, etc., R. Co. v. Cleveland, etc., R. Co.*, 125 U. S. 658; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649; *Mather Humane Stock Transp. Co. v. Anderson*, (C. C. A.) 76 Fed. Rep. 164; *Louisville, etc., R. Co. v. Central Trust Co.*, (C. C. A.) 87 Fed. Rep. 500; *Duncan v. Mobile, etc., R. Co.*, 2 Woods (U. S.) 542, 8 Fed. Cas. No. 4,137; *Denniston v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 414.

of the mortgagees, to the payment of expenses incurred by the company in the operation of the road while in its possession;¹ and the court may even direct such expenses to be paid out of the corpus of the mortgaged property.² As a general rule, however, expenses incurred by the railway company in the operation of its railway are not entitled to priority over the mortgage as regards the corpus of the mortgaged property or the proceeds thereof on foreclosure sales, where there has been no diversion of the current income in favor of the mortgage creditors at the expense of the operating-expense creditors.³

Six Months' Rule. — In determining whether the operating expense in question should be paid from the income earned by the receiver, the courts have adopted the general rule that the income should be so applied where the expenses were incurred within six months of the appointment of the receiver,⁴ and that it should not be so applied if the indebtedness was incurred more than six months before his appointment.⁵ This, however, is not a hard and

1. Operating Expenses Prior to Receivership — *United States*. — *Fosdick v. Schall*, 99 U. S. 252; *Union Trust Co. v. Souther*, 107 U. S. 591; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; *Burnham v. Bowen*, 111 U. S. 776; *Miltenberger v. Logansport, etc.*, R. Co., 106 U. S. 286, 12 Am. & Eng. R. Cas. 464; *Taylor v. Philadelphia, etc.*, R. Co., 7 Fed. Rep. 377; *Calhoun v. St. Louis, etc.*, R. Co., 14 Fed. Rep. 9; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471; *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Thomas v. Peoria, etc.*, R. Co., 36 Fed. Rep. 808, 36 Am. & Eng. R. Cas. 381; *Finance Co. v. Charleston, etc.*, R. Co., 49 Fed. Rep. 693; *Farmers' L. & T. Co. v. Kansas City, etc.*, R. Co., 53 Fed. Rep. 182; *Finance Co. v. Charleston, etc.*, R. Co., 62 Fed. Rep. 205, 8 U. S. App. 547; *Manhattan Trust Co. v. Sioux City, etc.*, R. Co., 102 Fed. Rep. 710; *Cleveland, etc.*, R. Co. *v. Knickerbocker Trust Co.*, 86 Fed. Rep. 73; *Atkins v. Petersburg R. Co.*, 3 Hughes (U. S.) 307. See also *Union Trust Co. v. Walker*, 107 U. S. 596.

Alabama. — *Meyer v. Johnston*, 53 Ala. 237, 15 Am. R. Rep. 467.

Minnesota. — *Seibert v. Minneapolis, etc.*, R. Co., 58 Minn. 53.

Texas. — *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

Utah. — *Central Trust Co. v. Utah Cent. R. Co.*, 16 Utah 12.

Virginia. — *Addison v. Lewis*, 75 Va. 701, 9 Am. & Eng. R. Cas. 702; *Fidelity Ins., etc.*, Co. *v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858.

Washington. — *Bellingham Bay Imp. Co. v. Fairhaven, etc.*, R. Co., 17 Wash. 371.

Rule Not Applicable to Mortgages by Canal or Navigation Company. — *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 312.

Nor to Mining Company. — *Fidelity Ins., etc.*, Co. *v. Shenandoah Iron Co.*, 42 Fed. Rep. 372.

2. Payment from Corpus of Mortgaged Property. — *Miltenberger v. Logansport, etc.*, R. Co., 106 U. S. 286; *Union Trust Co. v. Souther*, 107 U. S. 591; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; *U. S. Trust Co. v. Wabash Western R. Co.*, 150 U. S. 287; *Farmers' L. & T. Co. v. Kansas City, etc.*, R. Co., 53 Fed. Rep. 182; *Finance Co. v. Charleston, etc.*, R. Co., 62 Fed. Rep. 205, 8 U. S. App. 547; *Newgass v. Atlantic, etc.*, R. Co.,

72 Fed. Rep. 712; *Litzenberger v. Jarvis-Conklin Trust Co.*, 8 Utah 15; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705. See also *Thomas v. Western Car Co.*, 149 U. S. 95; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471. Compare *Gregg v. Mercantile Trust Co.*, (C. C. A.) 109 Fed. Rep. 220; *Metropolitan Trust Co. v. Tonawanda Valley, etc.*, R. Co., 103 N. Y. 245.

3. United States. — *Penn v. Calhoun*, 121 U. S. 251; *St. Louis, etc.*, R. Co. *v. Cleveland, etc.*, R. Co., 125 U. S. 658, 33 Am. & Eng. R. Cas. 16; *Kneeland v. American L. & T. Co.*, 136 U. S. 89, 43 Am. & Eng. R. Cas. 519; *Quincy, etc.*, R. Co. *v. Humphreys*, 145 U. S. 82, 51 Am. & Eng. R. Cas. 38, affirming 34 Fed. Rep. 259; *Thomas v. Western Car Co.*, 149 U. S. 95; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471; *Blair v. St. Louis, etc.*, R. Co., 25 Fed. Rep. 232; *Central Trust Co. v. Wabash, etc.*, R. Co., 46 Fed. Rep. 26; *Finance Co. v. Charleston, etc.*, R. Co., 48 Fed. Rep. 188, followed in 49 Fed. Rep. 693; *Bound v. South Carolina R. Co.*, (C. C. A.) 58 Fed. Rep. 473; *Cutting v. Tavares, etc.*, R. Co., 61 Fed. Rep. 150, 23 U. S. App. 363; *Central Trust Co. v. Charlotte, etc.*, R. Co., 65 Fed. Rep. 264; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 68 Fed. Rep. 36; *Central Trust Co. v. Chattanooga Southern R. Co.*, 69 Fed. Rep. 295; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 69 Fed. Rep. 658; *Whiteley v. Central Trust Co.*, (C. C. A.) 76 Fed. Rep. 74; *Kansas L. & T. Co. v. Electric R., etc.*, Co., 108 Fed. Rep. 702; *Gregg v. Mercantile Trust Co.*, 109 Fed. Rep. 220, 48 C. C. A. 318; *Monsarrat v. Mercantile Trust Co.*, 109 Fed. Rep. 230, 48 C. C. A. 328; *Jessup v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 441; *Meyer v. Johnston*, 53 Ala. 237, 15 Am. R. Rep. 467.

Georgia. — *Central Trust Co. v. Thurman*, 94 Ga. 735.

New York. — *Metropolitan Trust Co. v. Tonawanda Valley, etc.*, R. Co., 103 N. Y. 245.

4. Six Months' Rule. — *Fosdick v. Schall*, 99 U. S. 252; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471; *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521.

5. Blair v. St. Louis, etc., R. Co., 22 Fed. Rep. 471; *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521; *Thomas v. Peoria, etc.*, R. Co., 36 Fed. Rep. 808, 36 Am. & Eng. R. Cas. 381; *Finance Co. v. Charleston, etc.*, R. Co., 52 Fed. Rep. 678.

fast rule, and under the particular circumstances of the case the court may, in its discretion, direct such income to be applied to indebtedness for operating expenses incurred more than six months before the receiver was appointed.¹

(b) **What Constitute Operating Expenses.** — Claims constituting operating expenses so as to entitle them to preferential rights when a receiver is appointed in the foreclosure of a mortgage have been said to include all claims necessarily incurred in the ordinary administration of the affairs of the railway company,² such as amounts due to connecting carriers for ticket and freight balances,³ wages of employees of all grades,⁴ attorneys' fees for necessary legal services,⁵ and claims for operating supplies such as fuel and materials for necessary repairs;⁶ but not claims for money loaned to the railway company,⁷ claims for materials and labor furnished for original construction,⁸ accrued rentals on leased lines and terminal facilities,⁹ instalments accrued on conditional or absolute sales of rolling stock and locomotives,¹⁰ claims for rental

1. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776; *Olcott v. Headrick*, 141 U. S. 543; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 769; *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 704; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Farmers' L. & T. Co. v. Kansas City, etc.*, R. Co., 53 Fed. Rep. 182; *Atkins v. Petersburg R. Co.*, 3 Hughes (U. S.) 307; *Barstow v. Pine Bluff, etc.*, R. Co., 57 Ark. 334; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705; *Bellingham Bay Imp. Co. v. Fairhaven, etc.*, R. Co., 17 Wash. 371.

2. **What Constitute Operating Expenses.** — *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521.

3. **Ticket and Freight Balances.** — *Miltenberger v. Logansport, etc.*, R. Co., 106 U. S. 286; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Finance Co. v. Charleston, etc.*, R. Co., (C. C. A.) 62 Fed. Rep. 205; *Gregg v. Mercantile Trust Co.*, 109 Fed. Rep. 220, 48 C. C. A. 318.

4. **Wages of Employees.** — *Calhoun v. St. Louis, etc.*, R. Co., 14 Fed. Rep. 9; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Union Trust Co. v. Illinois Midland R. Co.*, 117 U. S. 434; *Litzenberger v. Jarvis-Conklin Trust Co.*, 8 Utah 15. *Compare Central Trust Co. v. Thurman*, 94 Ga. 735.

5. **Attorneys' Fees.** — *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521. See also *Louisville, etc.*, R. Co. v. *Wilson*, 138 U. S. 501. *Compare Finance Co. v. Charleston, etc.*, R. Co., 52 Fed. Rep. 678; *Gregg v. Mercantile Trust Co.*, 109 Fed. Rep. 220, 48 C. C. A. 318.

6. **Claims for Fuel and Repairs.** — *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776; *Calhoun v. St. Louis, etc.*, R. Co., 9 Biss. (U. S.) 330, 14 Fed. Rep. 9; *Blair v. St. Louis, etc.*, R. Co., 22 Fed. Rep. 471; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Finance Co. v. Charleston, etc.*, R. Co., 48 Fed. Rep. 188; *Gregg v. Mercantile Trust Co.*, 109 Fed. Rep. 220, 48 C. C. A. 318; *Bound v. South Carolina R. Co.*, 47 Fed. Rep. 30, 51 Am. & Eng. R. Cas. 58; *Cleveland, etc.*, R. Co. v. *Knickerbocker Trust Co.*, 86 Fed. Rep. 73; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705; *Bellingham Bay Imp. Co. v. Fairhaven, etc.*, R. Co., 17 Wash. 371.

7. **Money Loaned.** — *Blair v. St. Louis, etc.*, R. Co., 23 Fed. Rep. 521; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Penn. v. Calhoun*, 121 U. S. 251; *Morgan's Louisiana, etc.*, R., etc., Co. v. *Texas Cent. R. Co.*, 137 U. S. 171; *Central Trust Co. v. Bridges*, (C. C. A.) 57 Fed. Rep. 753; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705. See also *Southern Express Co. v. Western North Carolina R. Co.*, 99 U. S. 191. *Compare Central Trust Co. v. Wabash, etc.*, R. Co., 30 Fed. Rep. 332; *Atkins v. Petersburg R. Co.*, 3 Hughes (U. S.) 307.

8. **Labor and Materials for Original Construction.** — *Hale v. Frost*, 99 U. S. 389; *Porter v. Pittsburg Bessemer Steel Co.*, 120 U. S. 649, 30 Am. & Eng. R. Cas. 472; *Porter v. Pittsburg Bessemer Steel Co.*, 122 U. S. 267, 30 Am. & Eng. R. Cas. 495; *Wood v. Guarantee Trust, etc.*, Co., 128 U. S. 421; *Toledo, etc.*, R. Co. v. *Hamilton*, 134 U. S. 296, 43 Am. & Eng. R. Cas. 476; *Kelly v. Green Bay, etc.*, R. Co., 10 Biss. (U. S.) 151, 5 Fed. Rep. 846; *American L. & T. Co. v. East, etc.*, R. Co., 46 Fed. Rep. 101; *Farmers' L. & T. Co. v. Stuttgart, etc.*, R. Co., 92 Fed. Rep. 246; *Dillon v. Barnard, Holmes (U. S.)*, 386; *Barstow v. Pine Bluff, etc.*, R. Co., 57 Ark. 334; *Farmers L. & T. Co. v. Candler*, 92 Ga. 249; *Ten Eyck v. Pontiac, etc.*, R. Co., 114 Mich. 494. *Compare McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

9. **Accrued Rentals.** — *Quincy, etc.*, R. Co. v. *Humphreys*, 145 U. S. 82, 51 Am. & Eng. R. Cas. 38, *affirming* 34 Fed. Rep. 259; *St. Louis, etc.*, R. Co. v. *Cleveland, etc.*, R. Co., 125 U. S. 678; *Central Trust Co. v. Charlotte, etc.*, R. Co., 65 Fed. Rep. 264 [*distinguishing Miltenberger v. Logansport, etc.*, R. Co., 106 U. S. 286]; *Louisville, etc.*, R. Co. v. *Central Trust Co.*, (C. C. A.) 87 Fed. Rep. 500; *Gregg v. Mercantile Trust Co. (C. C. A.)*, 109 Fed. Rep. 220. See also *New York, etc.*, R. Co. v. *New York, etc.*, R. Co., 58 Fed. Rep. 281.

Terminal Rentals. — *Gregg v. Mercantile Trust Co. (C. C. A.)*, 109 Fed. Rep. 220. *Compare Manhattan Trust Co. v. Sioux City, etc.*, R. Co., 102 Fed. Rep. 710.

10. **Instalments on Rolling Stock.** — *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Huidkoper v. Locomotive Works*, 99 U. S. 258; *Continental Trust Co. v. Toledo, etc.*, R. Co., 93 Fed. Rep. 532; *Rhode Island Locomotive*

of cars,¹ or claims arising out of the negligent operation of the road by the company.²

(c) *Diversion of Income.* — The current income derived from the operation of the railway while in the hands of the company should, in equity, be applied to pay the current operating expenses,³ and it has been held that where such income, instead of being so applied, is used for the payment of the interest or principal of the mortgage indebtedness, or in the procurement of new equipment, or in making lasting improvements which inure to the benefit of the mortgage security, the court may and should direct the income in the hands of the receiver, or even the proceeds of the mortgaged property, to be applied, to the extent of such diversion of the income, to the payment of such operating expenses, in preference to the payment of the mortgage indebtedness.⁴

(2) *Claims Arising under Receivership — General Rule.* — The income earned by the receiver should always be applied to the payment of the expenses of the operation of the railroad incurred by him, rather than to the mortgage indebtedness,⁵ and where such income is diverted to the betterment of the railroad and the consequent advancement of the mortgage security, the proceeds of the foreclosure sale to the extent of such diversion may be applied to the payment of claims for operating expenses incurred by the receiver.⁶

Where Income Insufficient. — If the income accruing to the receiver in the operation of the railroad is insufficient to pay the necessary expenses incurred

Works v. Continental Trust Co., (C. C. A.) 108 Fed. Rep. 5. See also *Gregg v. Mercantile Trust Co.*, (C. C. A.) 109 Fed. Rep. 220.

1. *Car Rentals.* — *Thomas v. Western Car Co.*, 149 U. S. 95; *Mather Humane Stock Transp. Co. v. Anderson*, 76 Fed. Rep. 164, 46 U. S. App. 138; *Fosdick v. Schall*, 99 U. S. 252; *Central Trust Co. v. Thurman*, 94 Ga. 735; *Central Trust Co. v. Ohio Southern R. Co.*, 9 Ohio Cir. Dec. 317, 17 Ohio Cir. Ct. 633. See also *Kneeland v. American L. & T. Co.*, 136 U. S. 89. Compare *In re Cornwall Minerals R. Co.*, 48 L. T. N. S. 41.

2. *Claims for Torts.* — *St. Louis Trust Co. v. Riley*, (C. C. A.) 70 Fed. Rep. 32; *Farmers L. & T. Co. v. Detroit, etc.*, R. Co., 71 Fed. Rep. 29.

3. *Fosdick v. Schall*, 99 U. S. 252.

4. *Diversion of Income.* — *Fosdick v. Schall*, 99 U. S. 252; *Virginia, etc., Coal Co. v. Central R.*, etc., Co., 170 U. S. 355; *Southern R. Co. v. Carnegie Steel Co.*, 176 U. S. 257; *Calhoun v. St. Louis, etc.*, R. Co., 14 Fed. Rep. 9; *Farmers' L. & T. Co. v. Vicksburg, etc.*, R. Co., 33 Fed. Rep. 778; *Thomas v. Peoria, etc.*, R. Co., 36 Fed. Rep. 808; *Finance Co. v. Charleston, etc.*, R. Co., 48 Fed. Rep. 188; *Finance Co. v. Charleston, etc.*, R. Co., 49 Fed. Rep. 693, 51 Am. & Eng. R. Cas. 55; *Gregg v. Mercantile Trust Co.*, 109 Fed. Rep. 220, 48 C. C. A. 318; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705; *Central Trust Co. v. Utah Cent. R. Co.*, 16 Utah 12.

Where the Receiver Has Diverted the Current Income received by him to the betterment and increase of the property covered by the mortgage, instead of applying such income to the payment of operating expenses incurred prior to his appointment, it has been held that the claims for such expenses would be entitled to priority over the mortgage and would constitute in equity a lien on the property. *Burnham v. Bowen*, 111 U. S. 776, 17 Am. & Eng.

R. Cas. 308; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705; *Central Trust Co. v. Utah Cent. R. Co.*, 16 Utah 12; *Bellingham Bay Imp. Co. v. Fairhaven, etc.*, R. Co., 17 Wash. 371.

The Company May Apply Surplus Current Earnings, after the payment of all current operating expenses, to the payment of the interest on the mortgage indebtedness and the improvement and better equipment of the railway without constituting a diversion of such income so as to give rise to equities in favor of subsequent operating-expense creditors, as against the mortgage creditors. *St. Louis, etc.*, R. Co. v. *Cleveland, etc.*, R. Co., 125 U. S. 658.

Where Supplies Are Furnished to the Company on Long Credit, thereby showing that it was the intention of the parties that current income during such credit should be applied to the payment of interest on outstanding mortgage bonds, an application of such earnings to the payment of interest is not a diversion so as to entitle the supply creditors to a preference as against the mortgage bondholders. *Bound v. South Carolina R. Co.*, (C. C. A.) 58 Fed. Rep. 473.

The Burden of Showing a Diversion by the company of current income from the payment of current operating expenses is upon the party asserting such diversion. *Kansas L. & T. Co. v. Electric R., etc.*, Co., 108 Fed. Rep. 702.

5. *Claims Arising under Receivership.* — *Fosdick v. Schall*, 99 U. S. 252; *Hale v. Frost*, 99 U. S. 389; *U. S. Trust Co. v. New York, etc.*, R. Co., 25 Fed. Rep. 797; *Thomas v. Peoria, etc.*, R. Co., 36 Fed. Rep. 808, 36 Am. & Eng. R. Cas. 381; *Ames v. Union Pac. R. Co.*, 73 Fed. Rep. 49; *Douglass v. Cline*, 12 Bush (Ky.) 608, 18 Am. R. Rep. 273; *Ex p. Carolina Nat. Bank*, 18 S. Car. 289.

6. *Fosdick v. Schall*, 99 U. S. 252. See also *Ryan v. Hays*, 62 Tex. 42, 23 Am. & Eng. R. Cas. 501.

by him under sanction of the court in the preservation, management, and operation of the railroad, such expense may be made chargeable upon the corpus of the mortgaged property and paid out of its proceeds on foreclosure sale.¹ When the receiver is not appointed in the interest of mortgage creditors, but at the instance of third persons whose claims are subject to the mortgage, expenses incurred in the operation of the railroad which the income is insufficient to pay are not necessarily a prior lien on the mortgaged property in preference to the mortgage.²

m. WAIVER AND POSTPONEMENT OF MORTGAGE LIEN BY AGREEMENT.

— The creditors or bondholders may, of course, postpone or waive by agreement the priority of their mortgage,³ and this is frequently done by the surrender of the bonds secured by the mortgage and the acceptance in their stead of bonds secured by a later mortgage.⁴

n. POWER OF LEGISLATURE TO DISPLACE MORTGAGE LIEN. — The legislature has no power, after a railway mortgage has been executed, to displace the lien of the mortgage in favor of other claims against the railway company; such legislation would be unconstitutional as impairing the obligation of the mortgage.⁵

7. Foreclosure — *a. SALES UNDER POWER.* — Railway mortgages and deeds of trust frequently contain a power of sale to the trustee for the purpose of foreclosing, the general principles relating to deeds of trust and powers of sale applying to such mortgages.⁶

1. Where Income Insufficient — *United States.* — *Milteneberger v. Logansport, etc., R. Co.,* 106 U. S. 286; *Kneeland v. American L. & T. Co.,* 136 U. S. 89; *Mercantile Trust Co. v. Missouri, etc., R. Co.,* 41 Fed. Rep. 8; *Wallace v. Loomis,* 97 U. S. 146; *Kneeland v. Bass Foundry, etc., Works,* 140 U. S. 592, 48 Am. & Eng. R. Cas. 675; *Kneeland v. Luce,* 141 U. S. 491; *Louisville, etc., R. Co. v. Central Trust Co., (C. C. A.)* 87 Fed. Rep. 500; *Kennedy v. St. Paul, etc., R. Co.,* 5 Dill. (U. S.) 519; *Thomas v. Western Car Co.,* 149 U. S. 95, affirming 36 Fed. Rep. 808; *Pullan v. Cincinnati, etc., Air-Line R. Co.,* 5 Biss. (U. S.) 237. *California.* — *McLane v. Placerville, etc., R. Co.,* 66 Cal. 606.

Georgia. — *Central Trust Co. v. Thurmon,* 94 Ga. 735.

New Jersey. — *Hoover v. Montclair, etc., R. Co.,* 29 N. J. Eq. 4.

New York. — *Vilas v. Page,* 106 N. Y. 439; *Metropolitan Trust Co. v. Tonawanda Valley, etc., R. Co.,* 103 N. Y. 245, reversing 40 Hun (N. Y.) 80.

Texas. — *McIlhenny v. Binz,* 80 Tex. 1, 26 Am. St. Rep. 705.

Vermont. — *Langdon v. Vermont, etc., R. Co.,* 54 Vt. 593.

See also *Union Trust Co. v. Southern,* 107 U. S. 591; *Union Trust Co. v. Illinois Midland R. Co.,* 117 U. S. 462; *Denison, etc., R. Co. v. Ranney-Alton Mercantile Co., (Indian Ter. 1899)* 53 S. W. Rep. 496; *Hand v. Savannah, etc., R. Co.,* 17 S. Car. 219. Compare *Quincy, etc., R. Co. v. Humphreys,* 145 U. S. 82; *Union L. & T. Co. v. Southern California Motor Road,* 51 Fed. Rep. 106.

Sale Subject to Indebtedness Incurred by Receiver. — *Bound v. South Carolina R. Co., (C. C. A.)* 58 Fed. Rep. 473.

2. Central Trust Co. v. Wabash, etc., R. Co., 46 Fed. Rep. 26, 46 Am. & Eng. R. Cas. 301; *Kneeland v. American L. & T. Co.,* 136 U. S. 89; *Tome v. King,* 64 Md. 166. See also

Bound v. South Carolina R. Co., 47 Fed. Rep. 30, 51 Am. & Eng. R. Cas. 58.

3. Waiver and Postponement. — *Southeastern R. Co. v. Jortin,* 6 H. L. Cas. 425, 4 Jur. N. S. 467; *Langdon v. Vermont, etc., R. Co.,* 53 Vt. 228, 4 Am. & Eng. R. Cas. 33.

4. Ex p. *White,* 2 S. Car. 469; *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.,* 33 W. Va. 761. Compare *Gibbes v. Greenville, etc., R. Co.,* 13 S. Car. 228, 4 Am. & Eng. R. Cas. 459.

Where a Part of the Bondholders Surrender Their Bonds and accept therefor bonds secured by a later mortgage, this does not, of course, affect the rights of the bondholders who refuse to exchange their bonds. *Kneeland v. Lawrence,* 140 U. S. 209.

When, under a scheme for refunding the indebtedness of a railway company, part of the bondholders secured by a first mortgage surrender their bonds and accept in lieu thereof bonds secured by a second mortgage, under agreement that all of the first-mortgage bonds shall be surrendered, the holders of other first-mortgage bonds who refuse to exchange their bonds acquire no priority over those who did exchange them, but they are not to be prejudiced by any additional indebtedness secured by the second mortgage. *Ames v. New Orleans, etc., R. Co.,* 2 Woods (U. S.) 206; *Barry v. Missouri, etc., R. Co.,* 34 Fed. Rep. 829.

5. Power of Legislature to Displace Mortgage Lien. — *Phinizy v. Augusta, etc., R. Co.,* 63 Fed. Rep. 922 (*South Carolina statute, affirmed (C. C. A.)* 70 Fed. Rep. 451; *Montgomery, etc., R. Co. v. Branch,* 59 Ala. 139; *Feike v. C., etc., R. Co.,* 5 Ohio Cir. Dec. 640, 12 Ohio Cir. Ct. 362; *Gibbes v. Greenville, etc., R. Co.,* 13 S. Car. 228. See also *Toledo, etc., R. Co. v. Hamilton,* 134 U. S. 296; *Andrews v. St. Louis Tunnel R. Co.,* 16 Mo. App. 299. Compare *McIlhenny v. Binz,* 80 Tex. 1, 26 Am. St. Rep. 705.

6. Sales under Power. — *Macon, etc., R. Co.*

b. FORECLOSURE BY BILL IN EQUITY—(1) *When Right to Foreclose Accrues*.—The accrual of the right to foreclose, by bill in equity, a railway mortgage depends, of course, upon whether there has been a breach of the condition of the mortgage.¹

Default in Payment.—The usual ground of foreclosure is default in the payment of the indebtedness secured by the mortgage;² and while, as a general rule, a demand for payment is necessary to place the company in default, still a demand may be dispensed with when the company is insolvent and has no funds at the place where the indebtedness is payable.³ Where the indebtedness secured is payable by instalments, the failure to pay an instalment authorizes a foreclosure.⁴

Default in Payment of Interest.—Where the mortgage secures payment of both principal and interest, default in the payment of interest entitles the bondholders to foreclose.⁵ As a general rule, where foreclosure is for nonpayment of interest only, it can be had only for the interest, and no more of the property covered by the mortgage than is sufficient to pay such interest should be sold.⁶ Still, in the case of railway mortgages, the courts, in view of the character of the property and its value only as an entirety, have adopted the rule of allowing the whole property to be sold free of the mortgage, and transferring the lien of the bondholders to the proceeds of the sale, not only for the interest in arrears, but also for the principal of the bonds.⁷

v. Georgia R. Co., 63 Ga. 103, 1 Am. & Eng. R. Cas. 378; *Coe v. Peacock*, 14 Ohio St. 187. See the title TRUST DEEDS AND POWER-OF-SALE MORTGAGES.

1. Accrual of Right to Foreclose.—*Union Trust Co. v. St. Louis, etc.*, R. Co., 5 Dill. (U. S.) 1; *Hodder v. Kentucky, etc.*, R. Co., 7 Fed. Rep. 793; *Dows v. Chicago, etc.*, R. Co., 7 Fed. Cas. No. 4,048; *Chicago, etc.*, R. Land Co. *v. Peck*, 112 Ill. 408; *Chicago, etc.*, Rapid Transit R. Co. *v. Northern Trust Co.*, 90 Ill. App. 460; *Newport, etc.*, Bridge Co. *v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221.

2. See *Pennsylvania Co. v. Jacksonville, etc.*, R. Co., (C. C. A.) 55 Fed. Rep. 131.

3. *Shaw v. Bill*, 95 U. S. 10.

4. Default in Instalment.—*Goodman v. Cincinnati, etc.*, R. Co., 2 Disney (Ohio) 176.

5. Default in Interest.—*Chicago, etc.*, R. Co. *v. Fosdick*, 106 U. S. 47; *Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487, 1 Fed. Cas. No. 166; *Dows v. Chicago, etc.*, R. Co., 7 Fed. Cas. No. 4,048; *Farmers' L. & T. Co. v. Chicago, etc.*, R. Co., 27 Fed. Rep. 147, 24 Am. & Eng. R. Cas. 166; *Mercantile Trust Co. v. Missouri, etc.*, R. Co., 36 Fed. Rep. 221, 36 Am. & Eng. R. Cas. 259; *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. Rep. 139; *Pennsylvania Co. v. Philadelphia, etc.*, R. Co., 69 Fed. Rep. 482; *Kennebec, etc.*, R. Co. *v. Portland, etc.*, R. Co., 59 Me. 9; *McFadden v. Mays Landing, etc.*, R. Co., 49 N. J. Eq. 176; *Van Benthuyssen v. Central New England, etc.*, R. Co., (Supm. Ct. Gen. T.) 45 N. Y. St. Rep. 16, 63 Hun (N. Y.) 627; *Goodman v. Cincinnati, etc.*, R. Co., 2 Disney (Ohio) 176; *Farmer's L. & T. Co. v. Nova Scotia Central R. Co.*, 24 Nova Scotia 542. Compare *Great Western R. Co. v. Galt, etc.*, R. Co., 8 Grant Ch. (U. C.) 283.

Stipulation for Waiver of Default by Bondholders.—*McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, reversing (N. Y. City Ct. Gen. T.) 3 N. Y. St. Rep. 250.

6. *Union Trust Co. v. St. Louis, etc.*, R. Co., 5 Dill. (U. S.) 1, 24 Fed. Cas. No. 14,403; *McFadden v. Mays Landing, etc.*, R. Co., 49 N. J. Eq. 176.

7. Sale of Entire Property.—*Chicago, etc.*, R. Co. *v. Fosdick*, 106 U. S. 47, 7 Am. & Eng. R. Cas. 427; *Howell v. Western R. Co.*, 94 U. S. 463; *Mercantile Trust Co. v. Missouri, etc.*, R. Co., 36 Fed. Rep. 221; *Simmons v. Taylor*, 38 Fed. Rep. 682; *Wilmer v. Atlanta, etc.*, Air-Line R. Co., 2 Woods (U. S.) 409; *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77; *Muller v. Dows*, 94 U. S. 444; *Ohio Cent. R. Co. v. Central Trust Co.*, 133 U. S. 83; *McLane v. Placerville, etc.*, R. Co., 66 Cal. 606, 26 Am. & Eng. R. Cas. 404; *Yoakam v. White*, 97 Cal. 286; *Louisville, etc.*, R. Co. *v. Schmidt*, (Ky. 1899) 52 S. W. Rep. 835; *McFadden v. Mays Landing, etc.*, R. Co., 49 N. J. Eq. 176; *Campbell v. Macomb*, 4 Johns. Ch. (N. Y.) 534; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

In a proper case the court has the power to order a sale of the railway to satisfy the interest in arrears and preserve the lien of the mortgage upon the property in the hands of the purchaser for the principal of the bonds and the future-accruing bonds. *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 48 Fed. Rep. 139.

When Road Should Be Leased instead of Sold.—*Bardstown, etc.*, R. Co. *v. Metcalfe*, 4 Met. (Ky.) 199, 81 Am. Dec. 541.

A Provision Stipulating that in Case of Default in the payment of interest the principal shall become due is quite common in railway mortgages. This provision is valid, and on default in the payment of interest foreclosure may, of course, be had for both principal and interest. *Indiana, etc.*, R. Co. *v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532; *Morgan's Louisiana, etc.*, R., etc., Co. *v. Texas Cent. R. Co.*, 137 U. S. 171, 45 Am. & Eng. R. Cas. 631; *Savannah, etc.*, R. Co. *v. Lancaster*, 62 Ala. 555; *Chicago, etc.*, Rapid

(2) *Who May Sue for Foreclosure* — (a) *Right of Trustee to Foreclose*. — The trustee in a railway mortgage or deed of trust is, as a general rule, the proper party to sue for a foreclosure of the mortgage,¹ and the fact that a majority of the bondholders are opposed to the foreclosure does not deprive him of his power to foreclose.²

Bad Faith of Trustee. — Still, a foreclosure suit by the trustee should be stayed at the request of the bondholders when it is shown that he is acting in bad faith, to injure the bondholders and for the benefit of the stockholders of the railway company.³

Payment to Complaining Bondholders. — So when a trustee has commenced a foreclosure suit at the request of some of the bondholders, other bondholders who do not desire a foreclosure may defeat it by paying to all of the bondholders who are seeking a foreclosure the full value of their bonds and the costs of the suit.⁴

Request of Requisite Proportion of Bondholders. — The right of the trustee to foreclose is frequently restricted by a provision in the mortgage that the trustee shall not institute proceedings for foreclosure unless a certain proportion of the bondholders request him to do so, and of course he is bound by such stipulation.⁵

Power of Sale and Provision for Possession by Trustee. — The fact that the mortgage authorizes the trustee on default to take possession of the railway and operate it, and also contains a power of sale, does not deprive him of his right to foreclose by suit in equity;⁶ nor does the fact that he has taken possession

Transit R. Co. v. Northern Trust Co., 90 Ill. App. 460; *State v. Brown*, 64 Md. 199, 24 Am. & Eng. R. Cas. 192; *McFadden v. Mays Landing, etc.*, R. Co., 49 N. J. Eq. 176; *Mallory v. West Shore Hudson River R. Co.*, 35 N. Y. Super. Ct. 174.

Preventing Sale — Costs and Interest. — Where the mortgage does not contain a stipulation accelerating the maturity of the principal upon default in the payment of interest, the railroad may, at any time before the foreclosure sale, prevent such sale by payment of the costs and interest in arrears. *Farmers' L. & T. Co. v. Chicago, etc.*, R. Co., 27 Fed. Rep. 146, 24 Am. & Eng. R. Cas. 166.

Where the suit is by one bondholder in behalf of himself and all others to foreclose for nonpayment of interest, a foreclosure cannot be arrested by the payment of the interest due to the bondholder by whom the suit is instituted; it must be paid on the other bonds as well. *Van Benthuyzen v. Central New England, etc.*, R. Co., 63 Hun (N. Y.) 627, 45 N. Y. St. Rep. 16.

1. *Right of Trustee to Foreclose*. — *Morgan v. Kansas Pac. R. Co.*, 15 Fed. Rep. 55; *Richards v. Chesapeake, etc.*, R. Co., 1 Hughes (U. S.) 28; *Grand Trunk R. Co. v. Central Vermont R. Co.*, 88 Fed. Rep. 622.

A provision authorizing the trustee to refuse to institute foreclosure proceedings unless indemnified against costs does not restrict his right to foreclose. *Phillips v. Southern Div., etc.*, R. Co., (Ky. 1901) 60 S. W. Rep. 941, 22 Ky. L. Rep. 1530.

2. *Toler v. East Tennessee, etc.*, R. Co., 67 Fed. Rep. 168; *Hollister v. Stewart*, 111 N. Y. 644, 20 N. Y. St. Rep. 941.

3. *Tillinghast v. Troy, etc.*, R. Co., 48 Hun (N. Y.) 420, affirmed 121 N. Y. 649.

4. *Tillinghast v. Troy, etc.*, R. Co., 48 Hun (N. Y.) 420.

5. *Chicago, etc.*, R. Co. v. *Fosdick*, 106 U. S. 47, 7 Am. & Eng. R. Cas. 427; *Seibert v. Minneapolis, etc.*, R. Co., 52 Minn. 148, 38 Am. St. Rep. 530.

Such Limitations Should Be Construed Strictly, and a stipulation which refers merely to a foreclosure by summary sale under a power contained in the mortgage does not affect the trustee's right to foreclose by a suit in equity. *Guaranty Trust, etc., Co. v. Green Cove Springs, etc.*, R. Co., 139 U. S. 137; *Morgan's Louisiana, etc.*, R., etc., Co. v. *Texas Cent. R. Co.*, 137 U. S. 171; *Toler v. East Tennessee, etc.*, R. Co., 67 Fed. Rep. 168; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487; *Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 46.

6. *Power of Sale and Provision for Possession — United States*. — *Guaranty Trust, etc., Co. v. Green Cove Springs, etc.*, R. Co., 139 U. S. 137; *Morgan's Louisiana, etc.*, R., etc., Co. v. *Texas Cent. R. Co.*, 137 U. S. 171; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487, 1 Fed. Cas. No. 166; *Hall v. Sullivan R. Co.*, Brun. Col. Cas. (U. S.) 613, 11 Fed. Cas. No. 5,948; *Williamson v. New Albany, etc.*, R. Co., 1 Biss. (U. S.) 198; *Phinizy v. Augusta, etc.*, R. Co., 56 Fed. Rep. 273; *Dow v. Memphis, etc.*, R. Co., 20 Fed. Rep. 260, 17 Am. & Eng. R. Cas. 324; *Mercantile Trust Co. v. Missouri, etc.*, R. Co., 36 Fed. Rep. 221, 36 Am. & Eng. R. Cas. 259.

Indiana. — *Eaton, etc.*, R. Co. v. *Hunt*, 20 Ind. 457.

Kentucky. — *Louisville, etc.*, R. Co. v. *Schmidt*, (Ky. 1899) 52 S. W. Rep. 835.

Massachusetts. — *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162.

Mississippi. — *McAllister v. Plant*, 54 Miss. 106.

New Jersey. — *McFadden v. Mays Landing, etc.*, R. Co., 49 N. J. Eq. 176.

of the railroad and is operating it deprive him of the right to bring a suit for foreclosure.¹

(b) **Right of Bondholders to Foreclose.** — In case of a railway mortgage or deed of trust to trustees to secure bonds, the bondholders have no absolute right to institute foreclosure proceedings,² though, of course, any bondholder may bring an action or suit for the enforcement of his bond when the proceeding does not involve the enforcement of any security conferred by the mortgage or deed of trust.³ Still, by stipulations and conditions in the bonds and mortgage, the bondholders may, for their mutual protection, restrict the right of a bondholder to sue, even at law, to enforce his bond.⁴

Refusal of Trustee. — It is a well-settled general rule that when the trustee refuses to institute foreclosure proceedings the bondholders secured by the mortgage or deed of trust may institute such proceedings,⁵ but they may agree among themselves that no individual bondholder shall institute foreclosure proceedings unless the trustee has refused to do so after a request from a certain proportion of the bondholders. In such a case an individual bondholder cannot institute foreclosure proceedings unless the refusal of the trustee was upon request of such proportion of the bondholders.⁶

Position of Trustee Antagonistic. — Where the trustee has acquired adverse interests and stands in a position hostile to the bondholders, so that he cannot maintain their interests without attacking his own, the bondholders may themselves sue to foreclose the mortgage.⁷

Death of Trustee — Vacancy in Trusteeship. — Where the trustees have died, or the office of trustee becomes vacant, one or more of the bondholders may institute foreclosure proceedings on behalf of himself and all others.⁸

New York. — *Central Trust Co. v. New York City, etc., R. Co.*, 33 Hun (N. Y.) 513.

Canada. — *Farmers' L. & T. Co. v. Nova Scotia Cent. R. Co.*, 24 Nova Scotia 542.

1. *Springbrook R. Co. v. Lehigh Coal, etc., Co.*, 2 Lack. Leg. N. (Pa.) 258.

Provision Ousting Jurisdiction of Courts. — It has also been held that a provision in the mortgage that the mode of foreclosure through the exercise of the power of sale should be exclusive was an attempt to provide against a remedy in the ordinary course of judicial proceedings and to oust the jurisdiction of the courts, and was therefore invalid, as against public policy. *Guaranty Trust, etc., Co. v. Green Cove Springs, etc., R. Co.*, 139 U. S. 137, 45 Am. & Eng. R. Cas. 689. See also *McFadden v. Mays Landing, etc., R. Co.*, 49 N. J. Eq. 176.

2. **Right of Bondholders to Foreclose.** — *Richards v. Chesapeake, etc., R. Co.*, 1 Hughes (U. S.) 28; *Stern v. Wisconsin Cent. R. Co.*, 11 Chicago Leg. N. 384, 22 Fed. Cas. No. 13,378. Compare *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487, 1 Fed. Cas. No. 166.

3. *Spies v. Chicago, etc., R. Co.*, 24 Blatchf. (U. S.) 280.

4. *Guilford v. Minneapolis, etc., R. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694, 51 Am. & Eng. R. Cas. 98.

5. **Refusal of Trustee.** — *Jackson, etc., Co. v. Burlington, etc., R. Co.*, 29 Fed. Rep. 474, 24 Blatchf. (U. S.) 194; *Chicago, etc., R. Co. v. Fosdick*, 106 U. S. 47; *Campbell v. Texas, etc., R. Co.*, 1 Woods (U. S.) 368; *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 10; *Beekman v. Hudson River West Shore R. Co.*, 35 Fed. Rep. 3; *Toler v. East Tennessee, etc., R. Co.*, 67 Fed. Rep. 168; *Alexander v. Central R. Co.*, 3 Dill. (U. S.) 487, 1 Fed. Cas. No. 166;

Louisville, etc., R. Co. v. Schmidt, (Ky. 1899) 52 S. W. Rep. 835; *Seibert v. Minneapolis, etc., R. Co.*, 52 Minn. 148, 38 Am. St. Rep. 530, 57 Am. & Eng. R. Cas. 208; *Hale v. Nashua, etc., R. Co.*, 60 N. H. 333; *McFadden v. Mays Landing, etc., R. Co.*, 49 N. J. Eq. 176; *Van Benthuyzen v. Central New England, etc., R. Co.*, 63 Hun (N. Y.) 627, 45 N. Y. St. Rep. 16; *Stevens v. Union Trust Co.*, 57 Hun (N. Y.) 498; *Wright v. Ohio, etc., R. Co.*, 1 Disney (Ohio) 465.

The Refusal of a Trustee to Renew a Foreclosure Proceeding in a Federal Court, pending an appeal from a special-term decree dismissing a foreclosure suit instituted by the trustee in a state court, has been held to authorize the institution of a foreclosure suit by a bondholder in a federal court. *Beekman v. Hudson River West Shore R. Co.*, 35 Fed. Rep. 3.

Motive of Bondholder Instituting Foreclosure Suit Immaterial. — *Louisville, etc., R. Co. v. Schmidt*, (Ky. 1899) 52 S. W. Rep. 835; *McFadden v. Mays Landing, etc., R. Co.*, 49 N. J. Eq. 176.

6. *Toler v. East Tennessee, etc., R. Co.*, 67 Fed. Rep. 168; *Seibert v. Minneapolis, etc., R. Co.*, 52 Minn. 148, 38 Am. St. Rep. 530, 57 Am. & Eng. R. Cas. 208.

But if the bondholders withholding their assent to the foreclosure act fraudulently, with the intention of defeating the right of the others, the necessity for their assent may be dispensed with. *Linder v. Hartwell R. Co.*, 73 Fed. Rep. 320.

7. **Trustee in Antagonistic Position.** — *Webb v. Vermont Cent. R. Co.*, 20 Blatchf. (U. S.) 218, 9 Fed. Rep. 793; *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 324, 17 Fed. Cas. No. 9,432.

8. **Death and Vacancy in Trusteeship.** — *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U.

Nonresidence of Trustee. — The mere fact that the trustee is a nonresident and without the jurisdiction of the court is not sufficient to entitle bondholders to institute foreclosure proceedings.¹

Pendency of Foreclosure Suit by Trustee. — Where the trustee has, in the first instance, instituted foreclosure proceedings, it seems that during the pendency of such suit an individual bondholder cannot institute an independent foreclosure suit for the protection of his interests, but can be heard only in the pending suit.²

Jurisdiction of Federal Courts. — Where the bondholders suing to foreclose are citizens of a state other than that in which the company was incorporated, the federal courts have jurisdiction of the suit on account of the diverse citizenship of the parties.³

Suit by Some Bondholders on Behalf of All. — Where the bondholders are entitled to institute foreclosure proceedings, and they are so numerous as to render it impossible to make them all parties to the suit, one or more of them may, on behalf of himself and all others, institute the foreclosure suit without making all the others actual parties thereto.⁴

Effect of Opposition by Some of the Bondholders. — When there has been a default in the payment of the mortgage and a foreclosure suit has been instituted by some of the bondholders, it is no defense to such suit that a majority of the bondholders are opposed to the suit,⁵ but the bondholders opposing it should be allowed to stop the proceedings by purchasing the bonds of those desirous of foreclosing.⁶

Intervention by Other Bondholders as Complainants. — Where some bondholders on behalf of themselves and all others institute foreclosure proceedings, the others are entitled to be admitted as complainants so as to enable them to take the necessary steps for the protection of their interests.⁷

(3) **Intervention — By Bondholders.** — In the foreclosure of railway mortgages the trustee represents the bondholders. The latter are not necessary parties to the foreclosure suit,⁸ and have no right to demand that they be made parties unless the trustee is acting in bad faith or failing to protect their interests.⁹ But if he does act in bad faith and fails to protect their interests,

S.) 459; *Wheelwright v. St. Louis, etc., Canal Transp. Co.*, 56 Fed. Rep. 164.

Successive Mortgages. — If there are several successive mortgages, the trustees of which are dead, a holder of bonds secured by each mortgage may institute proceedings for the foreclosure of all the mortgages on behalf of himself and all of the other bondholders under each mortgage. *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459.

1. **Nonresidency of Trustee.** — *Morgan v. Kansas Pac. R. Co.*, 15 Fed. Rep. 55.

2. *Stern v. Wisconsin Cent. R. Co.*, 1 Fed. Rep. 555.

3. And this is true though other bondholders are citizens of the state in which the railway company was incorporated. *Jackson, etc., Co. v. Burlington, etc., R. Co.*, 29 Fed. Rep. 474. It was further held in this case that though the suit is by the nonresident bondholders, if it is on behalf of all others in like interest the resident bondholders cannot be made parties plaintiff at their request.

4. **Where Bondholders Numerous.** — *Campbell v. Texas, etc., R. Co.*, 1 Woods (U. S.) 368; *Wilmer v. Atlanta, etc., Air-Line R. Co.*, 2 Woods (U. S.) 447; *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 10; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 146.

But where the mortgage is executed directly to the bondholders and their several interests

are specified, one bondholder cannot, on behalf of himself and all others, institute foreclosure proceedings without making the other bondholders parties to the suit, so that each may be present to defend his own claims and if necessary attach others, especially when the adequacy of the security is doubtful. *Nashville, etc., R. Co. v. Orr*, 18 Wall. (U. S.) 471.

5. *Toler v. East Tennessee, etc., R. Co.*, 67 Fed. Rep. 168; *Louisville, etc., R. Co. v. Schmidt*, (Ky. 1899) 52 S. W. Rep. 835.

6. *Tillinghast v. Troy, etc., R. Co.*, 48 Hun (N. Y.) 420, affirmed 121 N. Y. 649.

7. *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Wilmer v. Atlanta, etc., Air-Line R. Co.*, 2 Woods (U. S.) 447; *Chickering v. Rutland R. Co.*, 56 Vt. 82, 26 Am. & Eng. R. Cas. 646.

8. **Intervention by Bondholders.** — *Campbell v. Texas, etc., R. Co.*, 1 Woods (U. S.) 368, 4 Fed. Cas. No. 2,366; *Dows v. Chicago, etc., R. Co.*, 7 Fed. Cas. No. 4,048; *Kerp v. Michigan Lake Shore R. Co.*, 6 Chicago Leg. N. 101, 14 Fed. Cas. No. 7,727; *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 324, 17 Fed. Cas. No. 9,432; *McElrath v. Pittsburg, etc., R. Co.*, 68 Pa. St. 37, 1 Am. R. Rep. 139.

9. *Farmers' L. & T. Co. v. Kansas City, etc.,*

or stands in a position hostile thereto, the bondholders are entitled to intervene,¹ and a provision in the mortgage that no bondholder shall institute foreclosure proceedings does not, in such a case, deprive them of the right of intervention in a suit instituted by the mortgage trustee.² Where the suit is by one bondholder on behalf of himself and all others, such others may intervene.³

By Stockholders. — The officers of the mortgaged railway company are the proper parties for the protection of the interests of the stockholders of the company, and the stockholders as such have no right to intervene in a foreclosure suit;⁴ but where the officers fraudulently neglect or refuse to protect the interests of the stockholders, the latter should be allowed to intervene for their own protection.⁵

General Creditors of the railway company who have no lien on the mortgaged property have no right to intervene in a suit for the foreclosure of the mortgage.⁶

A Senior Mortgagee has no right to intervene in a suit to foreclose by a junior mortgagee,⁷ nor can a purchaser on foreclosure by the senior mortgagee intervene in a foreclosure suit by the junior mortgagee.⁸

Adverse Claimants. — Persons who claim a title to the mortgaged property in hostility to that of the mortgagor are not entitled to intervene in the foreclosure suit.⁹

Holders of Receivers' Certificates. — Where a receiver is appointed in a suit to foreclose a railway mortgage, the holders of receivers' certificates may intervene in order to enforce payment of their claims from a fund in the hands of the receiver.¹⁰

Purchaser Pendente Lite. — Purchasers of the mortgaged property pending the foreclosure suit should be allowed to intervene to protect their interests.¹¹

State. — The foreclosure of a railway mortgage is not necessarily such a matter of public interest as to entitle the state to intervene to prevent the foreclosure.¹²

(4) **Jurisdiction.** — The general jurisdiction of courts to foreclose railway mortgages is the same as their jurisdiction to foreclose other mortgages.¹³

R. Co., 53 Fed. Rep. 182; *Clyde v. Richmond*, etc., R. Co., 55 Fed. Rep. 445; *Kneeland v. Luce*, 141 U. S. 491; *Kent v. Lake Superior Ship Canal, etc., Co.*, 144 U. S. 75; *Elwell v. Fosdick*, 134 U. S. 500; *Central Trust Co. v. Peoria, etc., R. Co.*, (C. C. A.) 104 Fed. Rep. 420; *Skiddy v. Atlantic, etc., R. Co.*, 3 Hughes (U. S.) 320, 22 Fed. Cas. No. 12,922; *Central Trust Co. v. Texas, etc., R. Co.*, 24 Fed. Rep. 153.

1. **Bad Faith — Hostile Interests of Trustee.** — *Farmers' L. & T. Co. v. Cape Fear, etc., R. Co.*, 71 Fed. Rep. 38; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 70 Fed. Rep. 423; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 66 Fed. Rep. 169; *Campbell v. Texas, etc., R. Co.*, 1 Woods (U. S.) 368, 4 Fed. Cas. No. 2,366; *Cleveland First Nat. Bank v. Shedd*, 121 U. S. 86; *Williams v. Morgan*, 111 U. S. 684; *Williamson v. New Jersey Southern R. Co.*, 25 N. J. Eq. 13; *De Betz's Petition*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 246.

2. *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 66 Fed. Rep. 169.

3. *Campbell v. Texas, etc., R. Co.*, 1 Woods (U. S.) 368, 4 Fed. Cas. No. 2,366.

4. **Intervention by Stockholders.** — *Central Trust Co. v. Peoria, etc., R. Co.*, 104 Fed. Rep. 418, 43 C. C. A. 613; *Central Trust Co. v. Marietta, etc., R. Co.*, 48 Fed. Rep. 14;

Alexander v. Searcy, 81 Ga. 536, 12 Am. St. Rep. 337, 36 Am. & Eng. R. Cas. 239; *Phillips v. Southern Div., etc., R. Co.*, (Ky. 1901) 60. S. W. Rep. 941, 22 Ky. L. Rep. 1530.

5. *Bronson v. LaCrosse, etc., R. Co.*, 2 Wall. (U. S.) 283; *Guarantee Trust, etc., Co. v. Duluth, etc., R. Co.*, 70 Fed. Rep. 803.

6. **Intervention by General Creditors.** — *Bronson v. LaCrosse, etc., R. Co.*, 2 Black (U. S.) 524; *Herring v. New York, etc., R. Co.*, 105 N. Y. 340. See also *Farmers' L. & T. Co. v. New Rochelle, etc., R. Co.*, 57 Hun (N. Y.) 376, affirmed 126 N. Y. 624.

7. *McHenry's Petition*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 256.

8. *Bronson v. La Crosse, etc., R. Co.*, 2 Black (U. S.) 524.

9. *Coe v. New-Jersey Midland R. Co.*, 31 N. J. Eq. 105, 34 N. J. Eq. 266.

10. *Central Trust Co. v. Sheffield, etc., Coal, etc., R. Co.*, 44 Fed. Rep. 526.

11. *Farmers' L. & T. Co. v. Texas Western R. Co.*, 32 Fed. Rep. 359; *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, 43 Fed. Rep. 223.

12. *State v. Farmers' L. & T. Co.*, 81 Tex. 530. Compare *Herring v. New York, etc., R. Co.*, 105 N. Y. 340, 35 Am. & Eng. R. Cas. 54.

13. **Jurisdiction.** — *McElrath v. Pittsburg, etc., R. Co.*, 55 Pa. St. 189; *Youngman v. Elmira, etc., R. Co.*, 65 Pa. St. 278.

Federal Courts. — The federal courts, as in case of other mortgages, have jurisdiction of suits to foreclose railway mortgages.¹

Jurisdiction as Affected by Situs of Property. — Where the mortgaged road lies in several jurisdictions, the courts, both state and federal, have upheld their jurisdiction to decree a foreclosure of a mortgage upon the entire railroad by compelling a transfer of the title by the mortgagor,² or through the agency of the mortgage trustee, in whom is vested a power of sale.³ The effect of a conveyance by the mortgagor or the mortgage trustee as regards the property in the foreign jurisdiction, however, is still a question for the courts of such jurisdictions.⁴ The court has no power, by virtue of its decree or any conveyance thereunder, except through the mortgagor or trustee in whom the title is vested, to foreclose the mortgage so as to affect the title of the mortgagor or other person as regards the part of the railway situated out of its territorial jurisdiction.⁵ Where the railroad extends through several judicial districts or counties in one jurisdiction, the foreclosure suit may be brought and a sale directed by the courts in any of them.⁶

(5) *Defenses.* — It has been held that in a suit to foreclose negotiable railway bonds in the hands of *bona fide* purchasers, no other defense can be made than in an action on the bonds themselves;⁷ but when the holders of the bonds cannot claim protection as *bona fide* holders, a defense which will defeat the recovery of the bonds will defeat a foreclosure of the mortgage or the right of such holders to participate in the proceeds of the foreclosure.⁸

1. *Beekman v. Hudson River West Shore R. Co.*, 35 Fed. Rep. 3, 36 Am. & Eng. R. Cas. 321; *Bell v. Chicago, etc.*, R. Co., 34 La. Ann. 785.

In regard to the jurisdiction of federal courts dependent upon the diverse citizenship of the parties, the general principles applicable to other cases apply in suits for the foreclosure of railway mortgages. *Farmers' L. & T. Co. v. Houston, etc.*, R. Co., 44 Fed. Rep. 115; *Morgan's Louisiana, etc.*, R., etc., Co. v. Texas Cent., etc., R. Co., 137 U. S. 171; *Carey v. Houston, etc.*, R. Co., 52 Fed. Rep. 671.

2. **Road Extending through Several Jurisdictions.** — *Muller v. Dows*, 94 U. S. 444; *Owens v. Ohio Cent. R. Co.*, 20 Fed. Rep. 10; *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 2 N. Y. St. Rep. 506, 26 Am. & Eng. R. Cas. 61. See also *Mercantile Trust Co. v. Kanawha, etc.*, R. Co., 39 Fed. Rep. 337; *Lynde v. Columbia, etc.*, R. Co., 57 Fed. Rep. 993.

3. *Muller v. Dows*, 94 U. S. 444; *Wilmer v. Atlanta, etc.*, Air Line R. Co., 2 Woods U. S. 447, 30 Fed. Cas. No. 17,776; *Mead v. New York, etc.*, R. Co., 45 Conn. 199, 17 Am. R. Rep. 367; *Craft v. Indiana, etc.*, R. Co., 166 Ill. 580; *McElrath v. Pittsburg, etc.*, R. Co., 55 Pa. St. 189; *Randolph v. Wilmington, etc.*, R. Co., 11 Phila. (Pa.) 502, 33 Leg. Int. (Pa.) 221.

4. *Pittsburgh, etc.*, R. Co.'s Appeal, (Pa. 1886) 4 Atl. Rep. 385, 26 Am. & Eng. R. Cas. 50.

5. *Grey v. Manitoba, etc.*, R. Co., (1897) A. C. 254; *Lynde v. Columbus, etc.*, R. Co., 57 Fed. Rep. 993; *Farmers' L. & T. Co. v. Postal Tel. Co.*, 55 Conn. 334, 3 Am. St. Rep. 53; *Pittsburgh, etc.*, R. Co.'s Appeal, (Pa. 1886) 4 Atl. Rep. 385, 26 Am. & Eng. R. Cas. 50. See also *Union Trust Co. v. Olmsted*, 102 N. Y. 729, 2 N. Y. St. Rep. 506. Compare *Blackburn v. Selma, etc.*, R. Co., 2 Flipp. (U. S.) 525; *Hand v. Savannah, etc.*, R. Co., 12 S. Car. 314.

Jurisdiction of Person. — Therefore, when the court attempts a foreclosure of the mortgage upon that part of the railroad which is out of its jurisdiction, it must acquire jurisdiction of the person of the mortgagor or trustee through whom it compels a transfer of title. *Lynde v. Columbus, etc.*, R. Co., 57 Fed. Rep. 993. See also *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 324, 17 Fed. Cas. No. 9,432.

Interstate Corporation. — In the case of corporations created by different states operating a continuous line of road, the decree of foreclosure made in one jurisdiction on service on the corporation residing therein and the appearance of the other will bind the latter. *Wilmer v. Atlanta, etc.*, Air Line R. Co., 2 Woods (U. S.) 447, 30 Fed. Cas. No. 17,776.

6. *Whitney v. Stevens*, (Supm. Ct. Spec. T.) 16 How. Pr. (N. Y.) 369; *Matter of U. S. Rolling Stock Co.*, (Supm. Ct. Spec. T.) 55 How. Pr. (N. Y.) 286; *Taylor v. Atlantic, etc.*, R. Co., (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 9.

Where a Railroad Extended through Several Jurisdictions, for the purpose of having it sold as a unit separate suits have been instituted in each jurisdiction, and the same persons appointed by each court to conduct the sale in its jurisdiction. *Rome, etc.*, R. Co. v. *Sibert*, 97 Ala. 393. See also *Crumlish v. Shenandoah Valley R. Co.*, 32 W. Va. 244.

7. **Defenses to Foreclosure Suit.** — *Kenicott v. Wayne County*, 16 Wall. (U. S.) 452; *Guaranty Trust, etc.*, Co. v. *Green Cove Springs, etc.*, R. Co., 139 U. S. 137. Compare *Chicago, etc.*, R. Co. v. *Lowenthal*, 93 Ill. 433.

8. *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 45 Fed. Rep. 518; *Chicago, etc.*, R. Co. v. *Lowenthal*, 93 Ill. 433; *Ryan v. Anglesea R. Co.*, (N. J. 1888) 12 Atl. Rep. 539, 35 Am. & Eng. R. Cas. 51; *Atwood v. Shenandoah Valley R. Co.*, 85 Va. 966, 38 Am. & Eng. R. Cas. 534.

Where the mortgage is given to cover a large number of bonds, the fact that some of them are invalid is no defense to a foreclosure for payment of the others.¹

Pledge. — Where a pledge of railway-mortgage bonds was valid it has been held to be no defense to a foreclosure of the mortgage for their payment that on a foreclosure of the pledge the bonds were sold below their face value.²

Estoppel. — Where a railway company has received the benefit evidenced by railway-mortgage bonds it has been held that it would be estopped to defend a foreclosure by questioning its power to execute the mortgage, or by showing a defective execution of such power.³

A Successor to the Interests of the Company by which the mortgage was executed can interpose no defense to the foreclosure of the mortgage which could not have been interposed by the mortgagor.⁴

(6) **Foreclosure Sale** — (a) **When Sale to Be Ordered** — **Sale Pendente Lite.** — Where the railway company is insolvent, and there are no funds to meet the cost of necessary repairs, and the property is of such a character that it will seriously deteriorate in value pending the litigation as to the validity of the mortgage and the indebtedness secured thereby, it has been held that the court may order a sale *pendente lite*,⁵ but as a general rule, and unless special circumstances require it, there is no authority to sell the property covered by the mortgage *pendente lite* except by consent of all persons interested,⁶ though a sale may be ordered before the ownership of the bonds secured by the mortgage has been determined.⁷

Priorities to Be Determined. — Where there is a contest as to the priority between several mortgages, such priorities should, as a rule, be settled before the sale of the property is ordered.⁸

(b) **Time of Sale and Adjournments.** — The action of the court in fixing the time for the foreclosure sale is largely a matter of discretion. Thus the time to be allowed after the entry of a foreclosure decree for the payment of the railway mortgage is within the discretion of the court.⁹ The master or marshal con-

1. *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 25 Am. & Eng. R. Cas. 53.

2. *Wheelwright v. St. Louis, etc., Canal Transp. Co.*, 56 Fed. Rep. 164. See also *Peck v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 59 How. Pr. (N. Y.) 419.

3. *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462, 11 Am. & Eng. R. Cas. 306.

4. *Thomas v. Citizens' Horse R. Co.*, 104 Ill. 462; *Beekman v. Hudson River West Shore R. Co.*, 35 Fed. Rep. 3, 36 Am. & Eng. R. Cas. 321.

5. **Sale Pendente Lite.** — *Middleton v. New Jersey West Line R. Co.*, 26 N. J. Eq. 269. See also *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 853.

6. *Bound v. South Carolina R. Co.*, 46 Fed. Rep. 315. See also *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

7. *Toler v. East Tennessee, etc., R. Co.*, 67 Fed. Rep. 168; *Washington, etc., R. Co. v. Cazenove*, 83 Va. 744.

8. **Determination of Priorities.** — *Campbell v. Texas, etc., R. Co.*, 2 Woods (U. S.) 263, 4 Fed. Cas. No. 2,369, *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 42 Fed. Rep. 82.

Subsequent Adjustment. — Cases sometimes, however, arise where a sale of the property out and out and a subsequent adjustment of the conflicting claims upon the fund is the only just method which can be pursued. *Fitzgerald v. Evans*, 49 Fed. Rep. 426, 4 U. S. App. 154; *Compton v. Jesup*, 167 U. S. 1; *Turner v.*

Indianapolis, etc., R. Co., 8 Biss. (U. S.) 380; *Hand v. Savannah, etc., R. Co.*, 13 S. Car. 467, 12 Am. & Eng. R. Cas. 488. See also *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497, *modifying* 86 Fed. Rep. 929.

The Property May Be Sold Subject to Such Claims as May Be Adjudicated Against It where the validity and amount of such claims depend upon a long course of litigation. *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380, 24 Fed. Cas. No. 14,259.

Where There Are Conflicting Claims under Two Mortgages to be foreclosed, before such claims are settled, the property may be sold with the consent of the trustees in the two mortgages though some of the bondholders object on the ground that a sale before the conflicting rights are settled would seriously depreciate the property, especially when the earnings of the company in the hands of the receiver are not sufficient to pay the operating expenses and it is depreciating in value. *Cleveland First Nat. Bank v. Shedd*, 121 U. S. 74.

9. **Time of Sale — Court's Discretion.** — *Chicago, etc., Rapid Transit R. Co. v. Fosdick*, 106 U. S. 70; *Howell v. Western R. Co.*, 94 U. S. 463; *Chicago, etc., R. Co. v. Northern Trust Co.*, 90 Ill. App. 460.

The allowance of only four months is not an abuse of discretion. *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794.

ducting the sale has the right to adjourn it if deemed best.¹ Where the sale is made on a day different from that fixed by the court, the court may nevertheless confirm the sale.²

(c) **Place of Sale.** — In *Illinois* a foreclosure sale of a railroad conducted out of the state has been upheld,³ and in other jurisdictions as well the general statutory provisions requiring foreclosure sales of mortgaged property to be made in the county in which such property is situated have been held not to apply to mortgages of railroads.⁴

(d) **Property to Be Sold.** — Of course, only such property is to be sold as is subject to the mortgage.⁵

Sales En Masse or in Parcels. — As the value of a railroad lies in its system as a unit, in the foreclosure of a mortgage covering the entire system the property should, as a rule, be sold as an entirety;⁶ and when the mortgage covers the railroad proper and the rolling stock, they may be sold together though the rolling stock is regarded as personal property.⁷

Divisional Mortgages. — Where the system of a railway is subject to several mortgages covering separate divisions, in the foreclosure of such mortgages the court should not, as a rule, offer a sale of the system as an entirety, and divide the proceeds among the several classes of bondholders according to the value of the several divisions covered by their mortgages, as such a course would to a large extent deprive the bondholders under each mortgage of the right of combining by agreement between themselves in order to protect their security.⁸

(e) **Terms of Sale.** — The fixing of the terms of the sale is a matter within the discretion of the court, which may, after the term at which the final decree was rendered, modify such terms, though it cannot modify the essential provisions of the decree.⁹

Instances. — If necessary, the court may delay the sale to await a better condition of the finances and business of the country, *Duncan v. Atlantic, etc., R. Co.*, 4 *Hughes* (U. S.) 125; and may, pending an appeal from the decree of foreclosure, postpone the sale without a supersedeas, if a sale on the day fixed would be oppressive or unjust, *Bound v. South Carolina R. Co.*, 55 *Fed. Rep.* 186.

Where the foreclosure suit is for default in the payment of interest, the court is not required to postpone the sale because the condition of the railroad has been increasing in prosperity when it would require many years of such prosperity to pay off the overdue interest. *Duncan v. Atlantic, etc., R. Co.*, 88 *Fed. Rep.* 840.

1. *Blossom v. Milwaukee, etc., R. Co.*, 3 *Wall.* (U. S.) 196.

2. *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 28 *Oregon* 44.

3. **Place of Sale.** — *Craft v. Indiana, etc., R. Co.*, 166 *Ill.* 580.

4. *Macon, etc., R. Co. v. Parker*, 9 *Ga.* 377; *Craft v. Indiana, etc., R. Co.*, 166 *Ill.* 580. Compare *Coe v. Columbus, etc., R. Co.*, 10 *Ohio St.* 372, 75 *Am. Dec.* 518.

In *Maryland* it has been held that the prohibition in Code Md. (1860), art. 64 (Pub. Gen. Laws Md. 1888, art. 66), against selling mortgaged premises out of the county in which they lie applies only to "technical mortgages," so called, and does not affect deeds of trust. *Harrison v. Annapolis, etc., R. Co.*, 50 *Md.* 490.

5. **Property to Be Sold.** — *Randolph v. Wilmington, etc., R. Co.*, 11 *Phila. (Pa.)* 502, 33 *Leg. Int. (Pa.)* 221.

6. **Sale En Masse.** — *Muller v. Dows*, 94 *U. S.* 449; *Compton v. Jesup*, (C. C. A.) 68 *Fed. Rep.* 263; *Wheeling Bridge, etc., R. Co. v. Reymann Brewing Co.*, (C. C. A.) 90 *Fed. Rep.* 189; *Wilmer v. Atlanta, etc., Air Line R. Co.*, 2 *Woods* (U. S.) 447; *Macon, etc., R. Co. v. Parker*, 9 *Ga.* 377; *Chicago, etc., R. Co. v. Loewenthal*, 93 *Ill.* 433; *Coe v. Columbus, etc., R. Co.*, 10 *Ohio St.* 372, 75 *Am. Dec.* 518; *Dayton, etc., R. Co. v. Lewton*, 20 *Ohio St.* 401.

7. *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 *Fed. Rep.* 794; *Southwestern Arkansas, etc., R. Co. v. Hays*, 63 *Ark.* 355; *McFadden v. Mays Landing, etc., R. Co.*, 49 *N. J. Eq.* 176; *Coe v. Columbus, etc., R. Co.*, 10 *Ohio St.* 372, 75 *Am. Dec.* 518. See also *Peoria, etc., R. Co. v. Thompson*, 103 *Ill.* 187, 7 *Am. & Eng. R. Cas.* 101.

8. **Divisional Mortgages.** — *Wabash, etc., R. Co. v. Central Trust Co.*, 22 *Fed. Rep.* 138; *Union Trust Co. v. Illinois Midland R. Co.*, 117 *U. S.* 434; *Campbell v. Texas, etc., R. Co.*, 2 *Woods* (U. S.) 263, 4 *Fed. Cas. No.* 2,369. But the court may, in its discretion, where the system is subject to divisional mortgage, direct a sale of the road as an entirety when such manner of sale is most advantageous to the divisional bondholders. *Farmers L. & T. Co. v. Cape Fear, etc., R. Co.*, 82 *Fed. Rep.* 344, *affirmed* (C. C. A.) 87 *Fed. Rep.* 392; *Cleveland First Nat. Bank v. Shedd*, 121 *U. S.* 74; *Gibert v. Washington City, etc., R. Co.*, 33 *Gratt. (Va.)* 586, 1 *Am. & Eng. R. Cas.* 473.

9. **Terms of Sale.** — *Turner v. Indianapolis, etc., R. Co.*, 8 *Biss. (U. S.)* 380, 24 *Fed. Cas. No.* 14,259; *Farmers Loan Co. v. Oregon Pac. R. Co.*, 28 *Oregon* 44.

Upset Price. — The court may fix an upset price.¹

Deposit by Bidders. — In order to prevent "straw" bids and delays, the court may require each bidder to make a deposit.²

(f) **Sales Subject to or Free from Liens.** — Where there are liens upon the property having priority over the mortgage, on foreclosure of the mortgage the road should, as a rule, be sold subject to such prior liens,³ but where the liens are inferior to the mortgage, the property should be sold free from such liens so as to enable the mortgage bondholders to have the advantage of their entire security.⁴ The court may, where all parties in interest are before it, order a sale of the property free from the liens having priority over the mortgage and transfer such liens to the proceeds of the sale.⁵

(g) **Who May Purchase at Sale.** — When the state statutes authorize any railroad to become a purchaser, foreign as well as domestic railways are included.⁶ Where there is no fraud or connivance relating to the foreclosure, the president of the mortgagor railroad company may purchase at the sale in his individual capacity without incurring any liability to the mortgage bondholders.⁷ The latter may purchase for themselves,⁸ and irrespective of whether the solicitor of the mortgagor railroad can purchase for himself, he may purchase and take title as the agent of and for the benefit of the bondholders.⁹ The trustee in the mortgage cannot purchase for himself without being liable to account to the bondholders therefor.¹⁰

(h) **Appraisement.** — Statutes requiring an appraisement of "real estate"

1. **Upset Price.** — *Blair v. St. Louis, etc., R. Co.*, 25 Fed. Rep. 232; *McIlhenny v. Binz*, 80 Tex. 1, 26 Am. St. Rep. 705.

2. **Deposit by Bidders.** — *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380; *Easton v. Houston, etc., R. Co.*, 44 Fed. Rep. 718.

A requirement that each bidder deposit fifty thousand dollars was sustained in *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380.

Where the mortgage provided that in case of a foreclosure the mortgage trustee should bid in the property for the benefit of the bondholders, it was held not error to provide in the decree that if any one except the trustee became the purchaser, he should pay down in cash a part of his bid as earnest money. *Sage v. Central R. Co.*, 99 U. S. 334.

3. **Sale Subject to Prior Liens.** — *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380, 24 Fed. Cas. No. 14,259; *Compton v. Jesup*, 167 U. S. 1; *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42, affirming 33 Fed. Rep. 693; *Pennsylvania R. Co. v. Allegheny Valley R. Co.*, 42 Fed. Rep. 82; 48 Fed. Rep. 139; *Wabash, etc., R. Co. v. Central Trust Co.*, 22 Fed. Rep. 138, 17 Am. & Eng. R. Cas. 254; *Randolph v. Middleton*, 26 N. J. Eq. 543.

Sale Subject to Expenses of Receivership. — *Bound v. South Carolina R. Co.*, (C. C. A.) 58 Fed. Rep. 473.

4. **St. Louis Southwestern R. Co. v. Jackson**, (C. C. A.) 95 Fed. Rep. 560; *Hardin v. Iowa R., etc., Co.*, 78 Iowa 726, 40 Am. & Eng. R. Cas. 394; *Severin v. Cole*, 38 Iowa 463.

5. **Sale Free of Prior Liens.** — *Bound v. South Carolina R. Co.*, 58 Fed. Rep. 473, 8 U. S. App. 461; *Bronson v. La Crosse, etc., R. Co.*, 2 Black (U. S.) 524; *Kneeland v. Luce*, 141 U. S. 437; *Wheeling Bridge, etc., R. Co. v. Reymann Brewing Co.*, (C. C. A.) 90 Fed. Rep. 189; *Woods v. Pittsburgh, etc., R. Co.*, 99 Pa. St. 101, 3 Am. & Eng. R. Cas. 525, 7 Am. & Eng. R. Cas. 478. See also *Central Trust Co. v. Wabash, etc., R. Co.*, 30 Fed. Rep. 332; *St.*

Louis Southwestern R. Co. v. Jackson, (C. C. A.) 95 Fed. Rep. 560.

6. **Foreign Railroad as Purchaser.** — *Boston, etc., R. Co. v. Boston, etc., R. Co.*, 65 N. H. 393. See also *Rogers v. Nashville, etc., R. Co.*, (C. C. A.) 91 Fed. Rep. 299.

No private person can object to a purchase by a foreign corporation. *Central Trust Co. v. Western North Carolina R. Co.*, 89 Fed. Rep. 24.

7. **President of Road.** — *Credit Co. v. Arkansas Cent. R. Co.*, 5 McCrary (U. S.) 23, 15 Fed. Rep. 46.

8. **Bondholders.** — *Wetmore v. St. Paul, etc., R. Co.*, 1 McCrary (U. S.) 466; *Thornton v. Wabash R. Co.*, 81 N. Y. 462; *Vose v. Cowdrey*, 49 N. Y. 336; *Pennsylvania Transp. Co.'s Appeal*, 101 Pa. St. 576.

Nor do the bondholders occupy any fiduciary relation to each other which will prevent a part of them from legitimately combining together for their mutual protection and benefit and purchasing the property, without becoming liable to account therefor to the other bondholders where they are guilty of no fraud or unfair dealings. *Kropholler v. St. Paul, etc., R. Co.*, 2 Fed. Rep. 302; *Moss v. Geddes*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 291.

9. *Pacific R. Co. v. Ketchum*, 101 U. S. 289.

10. **The Trustee.** — *Zebley v. Farmers' L. & T. Co.*, 139 N. Y. 461; *James v. Cowing*, 17 Hun (N. Y.) 256.

He may, however, purchase for the bondholders with their consent, *Barnes v. Chicago, etc., R. Co.*, 122 U. S. 1; especially where the mortgage contains a provision authorizing such a purchase, *Sage v. Central R. Co.*, 99 U. S. 334.

Where the trustee is in possession under his mortgage he cannot, as against the railway company, purchase the equity of redemption on the foreclosure of a junior mortgage. *Racine, etc., R. Co. v. Farmers' L. & T. Co.*, 49 Ill. 331, 95 Am. Dec. 595.

sold on foreclosure sale have been held not to apply to a foreclosure sale under a railway mortgage covering the roadbed, franchises, and rolling stock, which are to be sold as an entirety.¹

(i) **Redemption.** — State statutes providing for redemption from judicial sales of real estate where at the sale the property sold does not bring two-thirds of its appraised value do not apply to a foreclosure sale of a railroad, franchise, and rolling stock as an entirety.² The right to redeem from the mortgage when there has been no foreclosure, but the mortgagee has entered into possession, applies, of course, to railway mortgages.³

(j) **Restraining Sale.** — Persons who are not parties to the foreclosure suit, and who, therefore, cannot be injured by the sale, are not entitled to an injunction restraining the sale.⁴

(k) **Vacating Sale.** — After a foreclosure sale has been confirmed and a deed of conveyance executed to the purchaser, a bill in equity will lie to vacate the sale on the ground of fraud,⁵ or the validity and fairness of the sale may be questioned on motion for its confirmation;⁶ but after such confirmation and conveyance bondholders have no right to intervene as actual parties to the foreclosure suit and apply for a vacation of the sale.⁷

Laches. — Persons may, of course, be precluded by their laches from the right to have the sale vacated on the ground of fraud.⁸

Inadequacy of Price. — A sale will not be vacated for mere inadequacy of price unless it is so inadequate as to show that it was not the result of fair dealing and an honest purchase.⁹

Combination Among Bidders. — The mere fact that the bondholders combine among themselves to purchase at a sale, when there is no actual fraud, is not ground for vacating the sale.¹⁰

1. **Appraisements.** — *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, 60 Fed. Rep. 794, 22 U. S. App. 54 (*Kentucky* statute). See also *Southwestern Arkansas, etc., R. Co. v. Hays*, 63 Ark. 355. See, however, *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

2. **Redemption.** — *Hammock v. Farmers' L. & T. Co.*, 105 U. S. 77 (*Illinois* statute); *Columbia Finance, etc., Co. v. Kentucky Union R. Co.*, (C. C. A.) 60 Fed. Rep. 794 (*Kentucky* statute); *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380, 24 Fed. Cas. No. 14,259. See also *Simmons v. Taylor*, 38 Fed. Rep. 682; *Vatable v. New York, etc., R. Co.*, 96 N. Y. 49, 17 Am. & Eng. R. Cas. 268. See, however, *Jackson, etc., Co. v. Burlington, etc., R. Co.*, 29 Fed. Rep. 474, 24 Blatchf. (U. S.) 194.

3. **Equity of Redemption.** — *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621; *Wood v. Goodwin*, 49 Me. 260, 77 Am. Dec. 259; *Kennebec, etc., R. Co. v. Portland, etc., R. Co.*, 54 Me. 173; *American Dock, etc., Co. v. Public Schools*, 35 N. J. Eq. 187; *Drexel v. Pennsylvania, etc., Canal Co.*, 6 Phila. (Pa.) 503, 25 Leg. Int. (Pa.) 44; *Boston, etc., R. Corp. v. New York, etc., R. Co.*, 12 R. I. 220. See also *Compton v. Jesup*, (C. C. A.) 68 Fed. Rep. 263. And see generally the title EQUITY OF REDEMPTION, vol. II, p. 205.

4. **Restraining Sale.** — Thus a second mortgagee who is not a party to the foreclosure of a first mortgage cannot be affected by a sale, and therefore is not entitled to an injunction to restrain the sale. *Searles v. Jacksonville, etc., R. Co.*, 2 Woods (U. S.) 621.

5. **Vacating Sale.** — *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627, *affirmed* 146 U. S. 88; *James v. Milwaukee, etc., R. Co.*, 6 Wall. (U. S.) 752; *Drury v. Cross*, 7 Wall. (U. S.) 299;

Ribon v. Chicago, etc., R. Co., 16 Wall. (U. S.) 446, 4 Am. R. Rep. 285; *Harwood v. Cincinnati, etc., R. Co.*, 17 Wall. (U. S.) 78; *Jackson v. Ludeling*, 99 U. S. 513; *Pacific R. Co. v. Missouri Pac. R. Co.*, 111 U. S. 505; *Leavenworth County Com'rs v. Chicago, etc., R. Co.*, 134 U. S. 688, 43 Am. & Eng. R. Cas. 485; *Robinson v. Iron R. Co.*, 135 U. S. 522, 46 Am. & Eng. R. Cas. 383.

A decree for the plaintiffs on a bill to set aside a railroad-mortgage foreclosure and to subject the property to the payment of their judgments renders the foreclosure invalid only as to the creditors who filed the bill. *Barnes v. Chicago, etc., R. Co.*, 8 Biss. (U. S.) 514, 2 Fed. Cas. No. 1,016, *affirmed* 122 U. S. 1.

6. **Fidelity Trust, etc., Co. v. Mobile St. R. Co.**, 54 Fed. Rep. 26; *Farmers' L. & T. Co. v. Central R. Co.*, 4 Dill. (U. S.) 546, 8 Fed. Cas. No. 4,664; *Kent v. Lake Superior Ship Canal, etc., Co.*, 144 U. S. 75.

7. *Wetmore v. St. Paul, etc., R. Co.*, 1 McCrary (U. S.) 466, 3 Fed. Rep. 177, 5 Dill. (U. S.) 531; *Meyer v. Utah, etc., R. Co.*, 3 Utah 280.

8. **Laches.** — *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627, *affirmed* 146 U. S. 88, 57 Am. & Eng. R. Cas. 245; *Carey v. Houston, etc., R. Co.*, 52 Fed. Rep. 671; *Harwood v. Cincinnati, etc., R. Co.*, 17 Wall. (U. S.) 78; *Graham v. Boston, etc., R. Co.*, 118 U. S. 161, 25 Am. & Eng. R. Cas. 53.

9. **Inadequacy of Price.** — *Turner v. Indianapolis, etc., R. Co.*, 8 Biss. (U. S.) 380; *Leavenworth County v. Chicago, etc., R. Co.*, 25 Fed. Rep. 219, 22 Am. & Eng. R. Cas. 61; *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 54 Fed. Rep. 26; *Farmers' Loan Co. v. Oregon Pac. R. Co.*, 28 Oregon 44.

10. **Combination Amongst Bidders.** — *Kropholler*

Combination Between Bondholders and Stockholders. — Where the bondholders and stockholders of a mortgagor railway company combine for the purpose of a foreclosure and purchase of the property, so as to cut off the rights of the unsecured creditors of the railway, the sale will be vacated as a fraud on such creditors.¹

(1) **Liability on and Enforcement of Bid.** — The purchaser at a foreclosure sale makes himself, by his purchase, a *quasi* party to the foreclosure suit, subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and he is entitled to be heard on all rulings affecting his liability on his bid.²

Personal Liability of Purchaser. — The purchasers are, of course, personally liable for the amount of their individual bids, though the property is conveyed directly to a railway company organized by them.³

Purchase by Bondholders — Payment with Bonds. — When the mortgage bondholders purchase the property at the foreclosure, they are entitled, after paying the costs and charges of the litigation and of the trust, to pay the residue of their bid in bonds so far as to cover their own proportion of such residue,⁴ and the foreclosure decree often expressly provides, in case of a purchase by bondholders, for payment of the bid by surrender of the mortgage bonds.⁵

Lien for Amount of Bond. — Where the foreclosure sale is for credit, the court may reserve in the foreclosure decree a lien for the amount of the bid in the nature of a vendor's lien which will be enforced against grantees of the purchaser, as they are bound to take notice of the lien.⁶

(m) **General Rights and Liabilities of Purchaser** — *aa. TITLE ACQUIRED.* — The purchaser on foreclosure of the mortgage acquires, as against persons who are not parties to the foreclosure suit, only such title as the railway company and mortgagee held.⁷ Thus, the title of the purchaser is subject to the liens against the mortgaged property prior to the lien of the mortgage foreclosed,⁸ though, of course, liens junior to the mortgage are not enforceable against the purchaser.⁹

bb. CAVEAT EMPTOR. — The rule of *caveat emptor*, which is applied generally

v. St. Paul, etc., R. Co., 1 McCrary (U. S.) 299, 2 Fed. Rep. 302; Wetmore v. St. Paul, etc., R. Co., 3 Fed. Rep. 177; Fidelity Trust, etc., Co. v. Mobile, St. R. Co., 54 Fed. Rep. 26; Walker v. Montclair, etc., R. Co., 30 N. J. Eq. 525.

1. *St. Louis Trust Co. v. Des Moines, etc., R. Co., 101 Fed. Rep. 632; Louisville Trust Co. v. Louisville, etc., R. Co., 174 U. S. 674, reversing 84 Fed. Rep. 539. Compare Farmers' L. & T. Co. v. Louisville, etc., R. Co., 103 Fed. Rep. 110.*

2. *Kneeland v. American L. & T. Co., 136 U. S. 89, 43 Am. & Eng. R. Cas. 519.*

3. *Holland v. Lee, 71 Md. 338, 40 Am. & Eng. R. Cas. 379.*

4. **Purchase by Bondholders.** — *Duncan v. Mobile, etc., R. Co., 3 Woods (U. S.) 597, 8 Fed. Cas. No. 4,139; Columbus, etc., R. Co.'s Appeal, (C. C. A.) 109 Fed. Rep. 177.*

5. *Farmers' L. & T. Co. v. Green Bay, etc., R. Co., 10 Biss. (U. S.) 203, 6 Fed. Rep. 100; Central Trust Co. v. Cincinnati, etc., R. Co., 58 Fed. Rep. 500.*

6. *Continental Trust Co. v. American Surety Co., 80 Fed. Rep. 180, 53 U. S. App. 44.*

7. **Title Acquired by Purchaser.** — *Hall v. Mobile, etc., R. Co., 58 Ala. 10; Collins v. Bellefonte Cent. R. Co., 171 Pa. St. 243, 37 W. N. C. (Pa.) 233; Frazier v. East Tennessee, etc., R. Co., 88 Tenn. 138.*

In *Foot v. Mt. Pleasant, 1 McCrary (U. S.) 101, 9 Fed. Cas. No. 4,914*, a purchaser under a decree of foreclosure of a railway mortgage was held not to be a *bona fide* purchaser as to municipal aid bonds, given on a subscription to stock under a condition with which the company had not complied.

8. *Hale v. Burlington, etc., R. Co., 2 McCrary (U. S.) 558, 13 Fed. Rep. 203; Loomis v. Davenport, etc., R. Co., 3 McCrary (U. S.) 489, 17 Fed. Rep. 301; Cooper v. Corbin, 105 Ill. 224, 13 Am. & Eng. R. Cas. 394; Lake Erie, etc., R. Co. v. Griffin, 92 Ind. 487; Swan v. Burlington, etc., R. Co., 72 Iowa 650; Frazier v. East Tennessee, etc., R. Co., 88 Tenn. 138, 40 Am. & Eng. R. Cas. 358; Gilman v. Sheboygan, etc., R. Co., 37 Wis. 317.*

9. *Cooper v. Corbin, 105 Ill. 224, 13 Am. & Eng. R. Cas. 394; Houston, etc., R. Co. v. Keller, 8 Tex. Civ. App. 537.* Under the *New York* statute (Laws 1897, c. 418, § 111), which makes invalid a conditional sale of rolling stock to a railroad company unless the contract of sale is recorded, a purchaser on the foreclosure sale of a mortgage containing a future-property clause executed prior to a conditional sale is entitled to retain rolling stock conditionally sold to the railroad company, where the contract of sale was not recorded. *Westinghouse Electric, etc., Co. v. New Paltz, etc., Traction Co., (Supm. Ct. Tr. T.) 32 Misc. (N. Y.) 132.*

to judicial sales,¹ applies equally to sales on the foreclosure of railway mortgages.² If the sale is expressly made free from prior liens the purchaser is, of course, entitled to have such liens discharged from the proceeds of the sale.³

cc. LIABILITY OF PURCHASER FOR OBLIGATIONS OF RAILWAY COMPANY. — As a general rule, the purchasers of a railway on the foreclosure sale of the railway mortgage do not incur any liability on the obligations or for the indebtedness of the old company.⁴ The purchaser on the foreclosure may, after the sale, adopt, through his conduct and dealings, a contract entered into by the mortgagor railway company, so as to make such contract his own and thereby render him liable thereon, though he would not have been liable merely through the foreclosure purchase;⁵ and the mortgaged property may be sold

1. Caveat Emptor. — See the title JUDICIAL SALES, vol. 17, p. 1010.

2. *Osterberg v. Union Trust Co.*, 93 U. S. 424; *Terre Haute, etc., R. Co. v. Harrison*, 96 Fed. Rep. 907, 37 C. C. A. 615; *Houston First Nat. Bank v. Ewing*, 103 Fed. Rep. 168, 43 C. C. A. 150; *Washington, etc., R. Co. v. Lewis*, 83 Va. 246. See also *Boyle v. Farmers' L. & T. Co.*, 101 Fed. Rep. 184, 41 C. C. A. 291.

Thus, a purchaser cannot demand that claims arising out of defects in the title to the right of way shall be paid from the proceeds of the sale. *Houston First Nat. Bank v. Ewing*, (C. C. A.) 103 Fed. Rep. 168.

3. *Houston First Nat. Bank v. Ewing*, 103 Fed. Rep. 168, 43 C. C. A. 150.

4. No Liability on Obligations of Railway Company — *United States*. — *Hoard v. Chesapeake, etc., R. Co.*, 123 U. S. 222; *McKittrick v. Arkansas Cent. R. Co.*, 152 U. S. 474; *Central Trust Co. v. Wabash, etc., R. Co.*, 30 Fed. Rep. 332; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 44 Fed. Rep. 653; *Baltimore Trust, etc., Co. v. Hofstetter*, 85 Fed. Rep. 75, 29 C. C. A. 35; *Keeler v. Atchison, etc., R. Co.*, (C. C. A.) 92 Fed. Rep. 545; *Secombe v. Milwaukee, etc., R. Co.*, 2 Dill. (U. S.) 469; *Hopkins v. St. Paul, etc., R. Co.*, 2 Dill. (U. S.) 396. See also *Columbus, etc., R. Co.'s Appeal*, 109 Fed. Rep. 177; 48 C. C. A. 275.

Alabama. — *Hall v. Mobile, etc., R. Co.*, 58 Ala. 10.

Illinois. — *Cooper v. Corbin*, 105 Ill. 224; *People v. Louisville, etc., R. Co.*, (Ill. 1886) 5 N. E. Rep. 379, 25 Am. & Eng. R. Cas. 235; *People v. Louisville, etc., R. Co.*, 120 Ill. 48. See also *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 94 Ill. 83.

Indiana. — *Moyer v. Ft. Wayne, etc., R. Co.*, 132 Ind. 88; *Lake Erie, etc., R. Co. v. Griffin*, 92 Ind. 487.

Iowa. — *State v. Central Iowa R. Co.*, 71 Iowa 410, 60 Am. Rep. 806; *Brochert v. Iowa Cent. R. Co.*, 93 Iowa 132; *Hunter v. Burlington, etc., R. Co.*, 76 Iowa 490.

Kentucky. — *Chesapeake, etc., R. Co. v. Griest*, 85 Ky. 619, 30 Am. & Eng. R. Cas. 149; *Louisville, etc., R. Co. v. Orr*, 91 Ky. 109.

Michigan. — *Cook v. Detroit, etc., R. Co.*, 43 Mich. 349, 9 Am. & Eng. R. Cas. 443; *Gage v. Pontiac, etc., R. Co.*, 105 Mich. 335.

Missouri. — *Helton v. St. Louis, etc., R. Co.*, 25 Mo. App. 322. See also *Dickey v. Kansas City, etc., Rapid Transit R. Co.*, 122 Mo. 223.

New Jersey. — *North Hudson County R. Co. v. Booraem*, 28 N. J. Eq. 450.

New York. — *Vatable v. New York, etc., R.*

Co., 96 N. Y. 49; *People v. Rome, etc., R. Co.*, 103 N. Y. 95; *Taylor v. Atlantic, etc., R. Co.*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 36.

Pennsylvania. — *Campbell v. Pittsburgh, etc., R. Co.*, 137 Pa. St. 574; *Stewart, etc., Co.'s Appeal*, 72 Pa. St. 291.

South Carolina. — *Hammond v. Port Royal, etc., R. Co.*, 15 S. Car. 10, 11 Am. & Eng. R. Cas. 352.

Texas. — *Farmers' L. & T. Co. v. Fidelity Ins., etc., Co.*, (Tex. Civ. App. 1897) 41 S. W. Rep. 113; *Houston, etc., R. Co. v. Keller*, 8 Tex. Civ. App. 537; *Ryan v. Hays*, 62 Tex. 42; *Houston, etc., R. Co. v. Shirley*, 54 Tex. 125.

Virginia. — *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

Wisconsin. — *Gilman v. Sheboygan, etc., R. Co.*, 37 Wis. 317; *Smith v. Chicago, etc., R. Co.*, 18 Wis. 21; *Wright v. Milwaukee, etc., R. Co.*, 25 Wis. 46; *Vilas v. Milwaukee, etc., R. Co.*, 17 Wis. 497; *Menasha v. Milwaukee, etc., R. Co.*, 52 Wis. 414, 5 Am. & Eng. R. Cas. 300.

See also *Lynn v. Mt. Savage Iron Co.*, 34 Md. 603.

Thus, such purchasers are not liable upon an agreement of the railway company to maintain a station in consideration of a grant of municipal aid. *People v. Louisville, etc., R. Co.*, 120 Ill. 48; *Sherwood v. Atlantic, etc., R. Co.*, 94 Va. 291.

Covenants between the railway company and third persons entered into before the execution of the mortgage may be such that the burden of their obligations runs with the mortgaged property, so that the purchaser of such property may, through privity of estate, become personally liable for their performance. *Gilmer v. Mobile, etc., R. Co.*, 79 Ala. 569, 85 Ala. 422; *Peden v. Chicago, etc., R. Co.*, 73 Iowa 328, 5 Am. St. Rep. 680; *Ruddick v. St. Louis, etc., R. Co.*, 116 Mo. 25, 38 Am. St. Rep. 570; *Frank v. New York, etc., R. Co.*, 122 N. Y. 197; *Dexter v. Beard*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 11. And see the title COVENANTS, vol. 8, p. 135. Thus, when a leasehold estate is included in the mortgage, a purchaser may be held liable as an assignee of the leasehold for rent accruing after his purchase. *St. Joseph Union Depot Co. v. Chicago, etc., R. Co.*, (C. C. A.) 89 Fed. Rep. 648; *Frank v. New York, etc., R. Co.*, 122 N. Y. 197, 46 Am. & Eng. R. Cas. 356; *South Carolina R. Co. v. Wilmington, etc., R. Co.*, 7 S. Car. 410.

5. *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396. See also *St. Joseph Union*

under express conditions that the purchaser assume certain obligations of the mortgagor, so that the assumption of such obligations will become a part of the consideration of the purchase and render the purchaser liable on such obligations to the obligee.¹ Where, on the foreclosure of a junior mortgage, the railway is sold subject merely to prior mortgages, the purchaser does not incur any personal liability to pay such mortgages.² The purchasers on foreclosure are, of course, subject to the same liability as the mortgagor railway company in so far as respects its duty to perform *quasi*-public functions, such as the proper operation of the railway, etc.³

dd. LIABILITY FOR OBLIGATIONS INCURRED BY RECEIVER. — Where, on the foreclosure of a mortgage, a receiver is appointed, a purchaser at the foreclosure sale takes the property, as a general rule, free from indebtedness or obligations incurred by the receiver during the receivership.⁴ The mortgaged property is frequently sold subject to all debts and liabilities of the receivership, so that the purchaser is required to pay such debts and liabilities as a part of the consideration of the purchase.⁵ The burden of proving that the property

Depot Co. *v.* Chicago, etc., R. Co., (C. C. A.) 89 Fed. Rep. 648.

1. Assumption of Obligations. — Swann *v.* Wright, 110 U. S. 590, 17 Am. & Eng. R. Cas. 345; Union Trust Co. *v.* Morrison, 125 U. S. 591, 33 Am. & Eng. R. Cas. 33; Olcott *v.* Headrick, 141 U. S. 543; Lafayette Co. *v.* Neely, 21 Fed. Rep. 738, 17 Am. & Eng. R. Cas. 242; Fitzgerald *v.* Evans, 49 Fed. Rep. 426, 4 U. S. App. 154; St. Louis Southwestern R. Co. *v.* Stark, (C. C. A.) 55 Fed. Rep. 758; Baltimore Trust, etc., Co. *v.* Hofstetter, 85 Fed. Rep. 75, 29 C. C. A. 35; Central Trust Co. *v.* Georgia Pac. R. Co., (C. C. A.) 87 Fed. Rep. 288; Mercantile Trust Co. *v.* St. Louis, etc., R. Co., 99 Fed. Rep. 485; Chicago, etc., R. Co. *v.* Chicago, etc., Coal Co., 79 Ill. 121; Evansville, etc., R. Co. *v.* Frank, 3 Ind. App. 96. See also Campton *v.* Jesup, 167 U. S. 1.

Construction of Decree as to Liabilities Assumed by Purchaser. — Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. Rep. 332; Baltimore Trust, etc., Co. *v.* Hofstetter, (C. C. A.) 85 Fed. Rep. 75; Campbell *v.* Pittsburgh, etc., R. Co., 137 Pa. St. 574.

2. Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. Rep. 332.

3. People *v.* Louisville, etc., R. Co., 120 Ill. 48; State *v.* Central Iowa R. Co., 71 Iowa 410, 60 Am. Rep. 806.

Keeping in Repair Bridges at Crossings. — New York, etc., R. Co. *v.* State, 50 N. J. L. 303, *affirmed* 53 N. J. L. 244.

4. Obligations Incurred by Receiver. — Chicago, etc., R. Co. *v.* McCammon, (C. C. A.) 61 Fed. Rep. 772; Sloss Iron, etc., Co. *v.* South Carolina, etc., R. Co., (C. C. A.) 85 Fed. Rep. 133; Atchison, etc., R. Co. *v.* Young, (Indian Ter. 1899) 53 S. W. Rep. 481; Broekert *v.* Iowa Cent. R. Co., 93 Iowa 132; George *v.* Wabash Western R. Co., 40 Mo. App. 433; Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 53 Am. St. Rep. 752. See also Hicks *v.* International, etc., R. Co., 62 Tex. 41; Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 53 Am. St. Rep. 752. *Compare* Tennessee *v.* Quintard, (C. C. A.) 80 Fed. Rep. 829.

Claim for Personal Injuries. — Houston Electric St. R. Co. *v.* Bell, (Tex. Civ. App. 1897) 42 S. W. Rep. 772.

Judgment Obtained Against Receiver. — Brockert *v.* Iowa Cent. R. Co., 93 Iowa 132.

Nuisance. — Where the receiver creates a nuisance through the alteration of a roadbed, and the purchaser of the railway on the foreclosure sale continues such nuisance, he should be held liable for the damages therefrom. George *v.* Wabash Western R. Co., 40 Mo. App. 433.

When the Purchaser Voluntarily Pays liabilities incurred by the receiver, he is not entitled to be reimbursed therefor. Central Trust Co. *v.* Cincinnati, etc., R. Co., 58 Fed. Rep. 500.

5. Sale Subject to Receivership Indebtedness. — Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 43 Am. & Eng. R. Cas. 503; Central Nat. Bank *v.* Hazard, 30 Fed. Rep. 484, 24 Blatchf. (U. S.) 310; Louisville, etc., R. Co. *v.* Wilson, 138 U. S. 501; Central R., etc., Co. *v.* Farmers' L. & T. Co., 79 Fed. Rep. 158; Morgan's Louisiana, etc., R., etc., Co. *v.* Moran, (C. C. A.) 91 Fed. Rep. 22; Thompson *v.* Northern Pac. R. Co., (C. C. A.) 93 Fed. Rep. 384; Central Trust Co. *v.* Denver, etc., R. Co., 97 Fed. Rep. 239, 38 C. C. A. 143; Anderson *v.* Condict, (C. C. A.) 94 Fed. Rep. 716; Wabash R. Co. *v.* Stewart, 41 Ill. App. 640; Atchison, etc., R. Co. *v.* Cunningham, 59 Kan. 722. See also Central Trust Co. *v.* Wabash, etc., R. Co., 30 Fed. Rep. 332; Tennessee *v.* Quintard, (C. C. A.) 80 Fed. Rep. 820.

Where a decree foreclosing a mortgage specially provides that the purchaser shall take subject to all the current liabilities of the receivership, the question of the liability of the purchaser for such claims is not affected by the question whether such claims were in effect prior to the lien of the mortgage foreclosed. Anderson *v.* Condict, (C. C. A.) 94 Fed. Rep. 716, (C. C. A.) 93 Fed. Rep. 349.

Where the foreclosure decree provides that the purchaser shall take the mortgaged property subject to all such claims against the receiver as may be established before the court within a given time, the purchaser is not, by virtue of such decree, liable for claims not established within such time. Houston, etc., R. Co. *v.* Crawford, 88 Tex. 277, 53 Am. St. Rep. 752.

Claim for Personal Injuries. — Where the property was sold subject to all debts and liabilities of the receivership, it was held that the purchaser was liable for an injury caused by the

was sold subject to a particular indebtedness or liability incurred by the receiver is upon the person seeking to hold the purchaser therefor.¹ Where the liability was incurred by the receiver during his possession after the sale and time for delivery of possession to the purchaser, the receiver has been considered the *quasi* agent of the purchaser so as to render the parties liable therefor,² especially when such liability was incurred with the consent of the purchaser.³

ee. WHAT RIGHTS AND INTERESTS PASS TO PURCHASER. — The general question with regard to what property passes to the purchaser depends, of course, upon the terms of the mortgage and of the decree directing the foreclosure sale.⁴

Earnings. — The purchaser at the foreclosure sale is not entitled to the net earnings in the hands of a receiver.⁵

Franchises. — Special privileges or franchises not necessary for the operation of the railway conferred upon the company by charter have been held not to pass to the purchaser on the foreclosure of the mortgage, such as a special privilege as to passenger fare chargeable,⁶ or an exemption from taxation.⁷ So the franchise of the company to exist as a corporation does not pass to the purchaser,⁸ though the statutes now, as a general rule, provide for the manner in which the purchaser may organize as a corporation for the operation of the railway.⁹ Where the mortgage includes the general franchises of the railway company, the franchise to maintain and operate the railway will pass to the purchaser.¹⁰ It has also been held that the franchise of exercising the power of eminent domain passes to the purchaser, though he is an individual.¹¹

negligent operation of the road by the receiver. *Wabash R. Co. v. Stewart*, 41 Ill. App. 640; *Atchison, etc., R. Co. v. Cunningham*, 59 Kan. 722.

Subrogation. — Where the purchaser on foreclosure of a railroad mortgage is required to assume all liabilities incurred by the receiver during the receivership, such purchaser is not entitled, on payment of such claims, to be subrogated to the rights of the holders of the claims. *Morgan's Louisiana, etc., R., etc., Co. v. Moran*, (C. C. A.) 91 Fed. Rep. 22.

Jurisdiction. — When the property is thus sold, a person having a claim against the receiver may sue the purchaser in any court of competent jurisdiction, and is not required to resort to the court under whose decree the sale was made. *Atchison, etc., R. Co. v. Cunningham*, 59 Kan. 722. *Compare Jesup v. Wabash, etc., R. Co.*, 44 Fed. Rep. 663.

1. *Atchison, etc., R. Co. v. Young*, (Indian Ter. 1899) 53 S. W. Rep. 481.

2. **Indebtedness Incurred After Sale.** — *Houston, etc., R. Co. v. Bath*, 17 Tex. Civ. App. 697. See also *Houston, etc., R. Co. v. Crawford*, 88 Tex. 277, 53 Am. St. Rep. 752; *Houston, etc., R. Co. v. Strycharski*, (Tex. Civ. App. 1896) 35 S. W. Rep. 851.

3. *Vilas v. Page*, 106 N. Y. 439.

4. **What Rights and Interests Pass to Purchaser.** — See *Wiggins Ferry Co. v. Ohio, etc., R. Co.*, 142 U. S. 396, 52 Am. & Eng. R. Cas. 82; *Coe v. New Jersey Midland R. Co.*, 31 N. J. Eq. 105, reversed 34 N. J. Eq. 266; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552; *Washington, etc., R. Co. v. Lewis*, 83 Va. 246, 30 Am. & Eng. R. Cas. 468.

Right-of-Way Interests. — *Harshbarger v. Midland R. Co.*, 131 Ind. 177; *Columbus, etc., R. Co. v. Braden*, 110 Ind. 558.

It has been held that on a general foreclosure sale under a mortgage covering all the prop-

erty of the railway company, the burden of proving his contention is upon one claiming that certain land belonging to the railway company did not pass to the purchaser. *Knevals v. Florida Cent., etc., R. Co.*, (C. C. A.) 66 Fed. Rep. 224.

5. **Earnings.** — *Strang v. Montgomery, etc., R. Co.*, 3 Woods (U. S.) 613.

When the purchaser has not paid the purchase money punctually, and indulgence is granted by the court, the property meanwhile to continue in the receiver's possession, the purchaser is not entitled to the earnings during such period. *Osterberg v. Union Trust Co.*, 93 U. S. 424. See also *Boyle v. Farmers' L. & T. Co.*, (C. C. A.) 88 Fed. Rep. 930.

6. **Franchises — Tolls Chargeable.** — *Dow v. Beidelman*, 49 Ark. 325. See, however, *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274.

7. **Exemptions from Taxation.** — *Memphis, etc., R. Co. v. Berry*, 41 Ark. 436, affirmed 112 U. S. 609. See also *Morgan v. Louisiana*, 93 U. S. 217; *Louisville, etc., R. Co. v. Palmes*, 109 U. S. 244.

8. **Franchise of Corporate Existence.** — *Memphis, etc., R. Co. v. Railroad Com'rs* 112 U. S. 609, affirming 41 Ark. 436; *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672; *Hall v. Sullivan R. Co.*, 2 Redf. Am. R. Cas. 621. *Compare Gulf, etc., R. Co. v. Morris*, 67 Tex. 692, 35 Am. & Eng. R. Cas. 94.

9. See the title REORGANIZATION OF CORPORATIONS.

10. **Franchise to Operate.** — *Memphis, etc., R. Co. v. Railroad Com'rs*, 112 U. S. 609; *State v. Central Iowa R. Co.*, 71 Iowa 410, 60 Am. Rep. 806; *Parker v. Elmira, etc., R. Co.*, 165 N. Y. 274, affirming 27 N. Y. App. Div. 383.

11. **Eminent Domain.** — *Lawrence v. Morgan's Louisiana, etc., R., etc., Co.*, 39 La. Ann. 427, 4 Am. St. Rep. 265, 30 Am. & Eng. R. Cas. 309.

8. Trustee — *a.* POWER TO BIND BONDHOLDERS. — The action of the trustee within the scope of his duties is, of course, in the absence of fraud, binding upon bondholders,¹ and in exercising his trust he may exercise his discretion within the scope of his powers.² The trustees have general power to maintain litigation to protect the security from loss or injury.³ As a general rule, the trustees have no power to modify the terms of the mortgage or deed of trust without the consent of the bondholders.⁴

Notice to Trustees. — The trustee is the representative of the bondholders, and the general rule that notice to the trustee is notice to his *cestui que trust* applies equally to trustees in railway mortgages.⁵

b. LIABILITY TO BONDHOLDERS FOR NEGLIGENCE. — The trustees are required to act with reasonable diligence in the performance of their duties, and will become personally liable to the bondholders for injuries to them arising from the negligent performance of the duties of the trustees.⁶

c. COMPENSATION AND REIMBURSEMENT. — The trustee is entitled to be reimbursed for all expenditures reasonably incurred in the execution of the trust,⁷ and such expenses are a lien on the mortgaged property, so that he will not be compelled to give up possession of the property until his expenditures have been repaid.⁸ Thus, reasonable fees for counsel,⁹ costs of litigation, and expenses of the repairs and preservation of the property¹⁰ should be allowed to him. He is entitled to receive reasonable compensation for his services.¹¹

d. TRUSTEE IN POSSESSION. — Railway mortgages frequently provide that in certain contingencies the trustee shall be entitled to take possession of the

1. Credit Co. v. Arkansas Cent. R. Co., 5 McCrary (U. S.) 23, 15 Fed. Rep. 46.

2. Discretion of Trustee. — See Bound v. South Carolina R. Co., 50 Fed. Rep. 853; Toler v. East Tennessee, etc., R. Co., 67 Fed. Rep. 168; Sturges v. Knapp, 31 Vt. 1.

If there are differences of opinion among the bondholders as to what their interests require, it is not improper that the trustee should be governed by the voice of the majority, in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust. Shaw v. Little Rock, etc., R. Co., 100 U. S. 605; Cleveland First Nat. Bank v. Shedd, 121 U. S. 74; Western North Carolina R. Co. v. Drew, 3 Woods (U. S.) 674.

3. Power to Litigate. — Murdock v. Woodson, 2 Dill. (U. S.) 188, 17 Fed. Cas. No. 9,942; Shaw v. Little Rock, etc., R. Co., 100 U. S. 605.

4. Hollister v. Stewart, 111 N. Y. 644.

5. Notice to Trustee. — Pierce v. Emery, 32 N. H. 481; Haven v. Emery, 33 N. H. 66; Miller v. Rutland, etc., R. Co., 36 Vt. 452; Crumlish v. Shenandoah Valley R. Co., 32 W. Va. 244, 38 Am. & Eng. R. Cas. 577.

6. Liability of Trustees for Negligence. — Antelo v. Farmers' L. & T. Co., 95 Fed. Rep. 12; Frishmuth v. Farmers' L. & T. Co., 95 Fed. Rep. 5, 107 Fed. Rep. 169, 46 C. C. A. 222; Campbell v. Texas, etc., R. Co., 1 Woods (U. S.) 368; Banque Franco-Egyptienne v. Brown, 34 Fed. Rep. 162; Ridenour v. Wherriitt, 30 Ind. 485; Fleisher v. Farmers' L. & T. Co., 58 N. Y. App. Div. 473; De Betz's Petition, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 246; Merrill v. Farmers' L. & T. Co., 24 Hun (N. Y.) 297, 4 N. Y. St. Rep. 122; Sulzbach v. Thomson, 17 Phila. (Pa.) 530, 41 Leg. Int. (Pa.) 75.

7. Reimbursement of Trustee. — McLane v.

Placerville, etc., R. Co., 66 Cal. 606; Woodruff v. New York, etc., R. Co., 129 N. Y. 27; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 152. 8. Rensselaer, etc., R. Co. v. Miller, 47 Vt. 152.

9. Fees for Counsel. — Walker v. Quincy, etc., R. Co., 28 Fed. Rep. 734; Central Trust Co. v. Wabash, etc., R. Co., 36 Fed. Rep. 622; Easton v. Houston, etc., R. Co., 40 Fed. Rep. 189; Mercantile Trust Co. v. Missouri, etc., R. Co., 41 Fed. Rep. 8, 43 Am. & Eng. R. Cas. 469; McLane v. Placerville, etc., R. Co., 66 Cal. 606. Compare Investment Co. v. Ohio, etc., R. Co., 46 Fed. Rep. 696.

Unnecessary Litigation. — Bound v. South Carolina R. Co., 62 Fed. Rep. 536; Rensselaer, etc., R. Co. v. Miller, 47 Vt. 146.

10. McLane v. Placerville, etc., R. Co., 66 Cal. 606.

11. Compensation. — Williams v. Morgan, 111 U. S. 684, 17 Am. & Eng. R. Cas. 217; Walker v. Quincy, etc., R. Co., 28 Fed. Rep. 734; Central Trust Co. v. Wabash, etc., R. Co., 36 Fed. Rep. 622; Easton v. Houston, etc., R. Co., 40 Fed. Rep. 189; Mercantile Trust Co. v. Missouri, etc., R. Co., 41 Fed. Rep. 8; Bound v. South Carolina R. Co., 62 Fed. Rep. 536; Gilman v. Des Moines Valley R. Co., 41 Iowa 22; Tome v. King, 64 Md. 166; Boston, etc., R. Corp. v. Haven, 8 Allen (Mass.) 359; Woodruff v. New York, etc., R. Co., 129 N. Y. 27, 51 Am. & Eng. R. Cas. 89. Compare Coe v. Columbus, etc., R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

While, as a rule, the fixing of the amount of such compensation is a matter for the determination of the trial court, the appellate courts have not hesitated to set aside an allowance therefor where it was clearly excessive. Williams v. Morgan, 111 U. S. 684, 17 Am. & Eng. R. Cas. 217.

railway and operate it for the benefit of the trust,¹ and under such a provision the trustee may take possession and operate the railway in his own name.² He is entitled to hold the earnings received by him while in possession for the purposes of the trust.³ Where the railway company refuses to give possession to the trustee, he will be put in possession by the courts,⁴ and the company will be compelled to account for the earnings received while he was wrongfully kept out of possession.⁵ Where the mortgage trustees take possession of the railway, they stand in place of the corporation and are subject to all the liabilities incidental to the exercise of the franchise and the operation of the road;⁶ or the railway may continue to be responsible for the liabilities incurred by the trustees.⁷ If the trustees continue to operate the railway in the name of the company, they may be sued for liabilities growing out of such operation.⁸ When the trustee has taken possession, he then occupies a fiduciary relation with regard to the company which forbids his speculation for his individual benefit in the bonds secured by the mortgage.⁹

e. REMOVAL OF TRUSTEE AND FILLING VACANCY. — A court of equity has power to remove the trustee in a railway mortgage for sufficient cause and to appoint another in his place.¹⁰

Filling Vacancies. — Railway mortgages sometimes provide for filling vacancies in the office of trustee,¹¹ but in the absence of any provision in the mortgage, a court of equity, in pursuance of its general equity power, may appoint suitable trustees to fill vacancies.¹²

II. BONDS — 1. In General. — Where money is to be raised by a railway company, the usual method is to issue bonds which are secured by mortgage or are by statute made a lien upon the property of the railway company; but in order to make them a lien upon the railway property they must either be secured by mortgage or made a lien by statute.¹³

2. Power to Issue Bonds. — A railway company has power to give a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some provision expressed or implied in its charter, or in some legislative act.¹⁴ It may issue bonds in any

1. Trustee in Possession. — *Matter of New Paltz, etc., R. Co.*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 324.

Suit by Bondholders to Compel Trustee to Take Possession. — *First Nat. F. Ins. Co. v. Salisbury*, 130 Mass. 303, 4 Am. & Eng. R. Cas. 480.

2. Palmer v. Forbes, 23 Ill. 301.

3. Frayser v. Richmond, etc., R. Co., 81 Va. 388, 25 Am. & Eng. R. Cas. 597.

4. Dow v. Memphis, etc., R. Co., 124 U. S. 652; *Shepley v. Atlantic, etc., R. Co.*, 55 Me. 395.

5. Dow v. Memphis, etc., R. Co., 124 U. S. 652.

6. Wilkinson v. Fleming, 30 Ill. 353; *Daniels v. Hart*, 118 Mass. 543 (fires communicated from engine); *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434; *Rogers v. Wheeler*, 43 N. Y. 598, *affirming* 2 Lans. (N. Y.) 486.

Continued Liability of Railway Company. — *Jones v. Pennsylvania R. Co.*, 19 D. C. 178.

7. Grand Tower Mfg., etc., Co. v. Ullman, 89 Ill. 244.

8. Wisconsin Cent. R. Co. v. Ross, 142 Ill. 9, 34 Am. St. Rep. 49, *affirming* 43 Ill. App. 454, 53 Am. & Eng. R. Cas. 73; *Wilkinson v. Fleming*, 30 Ill. 353.

9. Ashuelot R. Co. v. Elliot, 57 N. H. 397.

10. Removal of Trustees. — *Ketchum v. Mobile, etc., R. Co.*, 2 Woods (U. S.) 532; *Brooks v. Vermont Cent. R. Co.*, 14 Blatchf. (U. S.) 463; *Equitable Trust Co. v. Fisher*, 106 Ill. 189;

Farmers' L. & T. Co. v. Hughes, 11 Hun (N. Y.) 130; *North Carolina R. Co. v. Wilson*, 81 N. Car. 223. See also *Stevens v. Eldridge*, 4 Cliff. (U. S.) 348.

11. Filling Vacancies. — Where a railroad mortgage provides for filling vacancies in the office of trustee by nomination by one of the beneficiaries and approval by the court, notice to the company of the application for approval is not required. The mode of appointment in such case is governed by the mortgage and not by the general law. *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103, 1 Am. & Eng. R. Cas. 378; *Tarbell's Appeal*, 7 Pa. Super. Ct. 283, 42 W. N. C. (Pa.) 192.

12. Anson, Petitioner, 85 Me. 79; *In re York, etc., R. Co.*, 50 Me. 552; *Gibbes v. Greenville, etc., R. Co.*, 13 S. Car. 228, 4 Am. & Eng. R. Cas. 459.

13. Bonds. — *Skiddy v. Atlantic, etc., R. Co.*, 3 Hughes (U. S.) 320.

14. General Power to Issue Bonds — England. — *Eastern, etc., R. Co. v. Hart*, 8 Exch. 117, 17 Jur. 89, 22 L. J. Exch. 20; *Fountain v. Carmarthen R. Co.*, L. R. 5 Eq. 316, 37 L. J. Ch. 429, 16 W. R. 476; *In re Bagnalstown, etc., R. Co.*, Ir. R. 4 Eq. 505.

United States. — *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Branch v. Atlantic, etc., R. Co.*, 3 Woods (U. S.) 481.

Alabama. — *Kelly v. Alabama, etc., R. Co.*, 58 Ala. 489.

form and with any conditions or terms as to the time of payment it desires, if not prohibited by its charter or by-laws,¹ and may issue negotiable as well as nonnegotiable bonds.² Thus, railway companies with power to borrow money may borrow it and issue bonds as evidence of the indebtedness incurred,³ or to refund outstanding bonds,⁴ or in payment for the construction of the railway,⁵ or for leases of other lines,⁶ or in payment of property or franchises acquired.⁷ On the other hand, a railway company has no power to issue bonds as evidence of an indebtedness which it had no power to contract,⁸ nor has it power to issue bonds for which it receives no consideration.⁹ Where statutes restrict the power of railroad companies to issue bonds, for example, where it is provided that such corporations shall not issue bonds for more than a certain proportion of their capital stock or the value of their property, such restrictions must be complied with in their issuance.¹⁰ The

California. — *McLane v. Placerville, etc.*, R. Co., 66 Cal. 606; *Illinois Trust, etc., Bank v. Pacific R. Co.*, 117 Cal. 332.

Connecticut. — *Mead v. New York, etc., R. Co.*, 45 Conn. 109.

Florida. — *State v. Florida Cent. R. Co.*, 15 Fla. 690.

Massachusetts. — *Com. v. Smith, to Allen (Mass.)* 455, 87 Am. Dec. 672.

New Hampshire. — *Richards v. Merrimack, etc.*, R. Co., 44 N. H. 127.

New Jersey. — *Willoughby v. Chicago Junction R., etc.*, Co., 50 N. J. Eq. 656.

New York. — *Olcott v. Tioga R. Co.*, 27 N. Y. 546, 84 Am. Dec. 208; *Miller v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 8 Abb. Pr. (N. Y.) 431; *Hubbard v. New York, etc., R. Co.*, 36 Barb. (N. Y.) 286, 14 Abb. Pr. (N. Y.) 275; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Duncomb v. New York, etc., R. Co.*, 84 N. Y. 190, 4 Am. & Eng. R. Cas. 293.

North Carolina. — *Craven County Com'rs v. Atlantic, etc., R. Co.*, 77 N. Car. 289.

Pennsylvania. — *Gloninger v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 13, 46 Am. & Eng. R. Cas. 276; *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574; *Philadelphia, etc., R. Co.'s Appeal*, 11 W. N. C. (Pa.) 325, 4 Am. & Eng. R. Cas. 118; *Philadelphia, etc., R. Co. v. Stichter*, (Pa. 1882) 21 Am. L. Reg. N. S. 713; *McMasters v. Reed, 1 Grant Cas. (Pa.)* 36. *Compare* *McCalmont v. Philadelphia, etc., R. Co.*, 14 Phila. (Pa.) 479, 38 Leg. Int. (Pa.) 168.

Effect of Invalidity of Mortgage Securing Bond.

— The bonds of a railroad are not rendered void in consequence of being secured by a mortgage which the company may have had no authority to execute. *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

1. *Willoughby v. Chicago Junction R., etc.*, Co., 50 N. J. Eq. 656.

2. See *infra*, this section, *Transfer of Bonds and Rights of Bona Fide Holders*.

3. *Miller v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 374, 8 Abb. Pr. (N. Y.) 431; *Philadelphia, etc., R. Co.'s Appeal*, 4 Am. & Eng. R. Cas. 118; *Geddes v. Toronto, etc., R. Co.*, 14 U. C. C. P. 513.

Power to Issue Bonds Implied from Power to Mortgage. — *Gloninger v. Pittsburgh, etc., R. Co.*, 139 Pa. St. 13.

Irredeemable Bonds. — It has been held that under a general power to borrow money a railway company has power to issue irredeemable

bonds entitling the bondholders to a share of the earnings of the company. *Philadelphia, etc., R. Co.'s Appeal*, (Pa. 1882) 4 Am. & Eng. R. Cas. 118. See, however, *Taylor v. Philadelphia, etc., R. Co.*, 7 Fed. Rep. 386; *McCalmont v. Philadelphia, etc., R. Co.*, (U. S. 1881) 3 Am. & Eng. R. Cas. 163.

4. *Mead v. New York, etc., R. Co.*, 45 Conn. 109.

5. *White v. Carmarthen, etc., R. Co.*, 1 Hem. & M. 786; *Farmers' L. & T. Co. v. Rockaway Valley R. Co.*, 69 Fed. Rep. 9; *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497; *McMasters v. Reed, 1 Grant Cas. (Pa.)* 36.

6. *Coe v. East, etc., R. Co.*, 52 Fed. Rep. 531.

7. *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287, *affirming* 19 Fed. Rep. 388; *Thayer v. Wathen*, 17 Tex. Civ. App. 382.

8. *Kemble v. Wilmington, etc., R. Co.*, 13 Phila. (Pa.) 469, 35 Leg. Int. (Pa.) 165; *Northside R. Co. v. Worthington*, 88 Tex. 562, 53 Am. St. Rep. 778. *Compare* *In re Cork, etc.*, R. Co., L. R. 4 Ch. 748, 39 L. J. Ch. 277, 21 L. T. N. S. 735.

Thus, where a railway company's act empowers it to borrow money after the whole capital is subscribed for and one-half is paid up, bonds issued while only a part of the capital is subscribed for are illegal. *Chambers v. Manchester, etc., R. Co.*, 5 B. & S. 588, 117 E. C. L. 588.

9. *Chicago v. Cameron*, 120 Ill. 447; *Kemble v. Wilmington, etc., R. Co.*, 13 Phila. (Pa.) 469, 35 Leg. Int. (Pa.) 165, 14 Fed. Cas. No. 7,684.

10. *Beach v. Wakefield*, 107 Iowa 567; *Com. v. Smith, to Allen (Mass.)* 448, 87 Am. Dec. 672; *Flynn v. Coney Island, etc., R. Co.*, 26 N. Y. App. Div. 416; *Fidelity Ins., etc., Co. v. West Pennsylvania, etc., R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911; *Reed's Appeal*, 122 Pa. St. 565. See also *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Coe v. East, etc., R. Co.*, 52 Fed. Rep. 531; *Sioux City, etc., R. Co. v. Manhattan Trust Co.*, (C. C. A.) 92 Fed. Rep. 428; *Altwood v. Shenandoah Valley R. Co.*, 85 Va. 966.

Money or Property Received or Labor Done. — A constitutional provision prohibiting railroad corporations from issuing bonds except for money or property actually received, or labor done, and declaring void all fictitious increase of indebtedness, does not necessarily render the validity of railway bonds dependent upon

payee of a bond given for borrowed money is not bound to see that the money is applied by the officers of the railway company to corporate purposes, and where there is no fraud upon his part, the fact that the money was misappropriated is no defense to a recovery upon the bonds.¹

3. Transfer of Bonds and Rights of Bona Fide Holders — *a. TRANSFERS.* — Railway bonds payable to a named payee or his assigns are not transferable so as to enable a holder to sue thereon in his own name without an assignment,² but bonds which are payable to bearer are transferable by delivery, so as to enable the holder to sue thereon in his own name.³ So bonds payable in blank, no payee's name being inserted, may be filled up by the holder in his own name and suit be maintained thereon.⁴

b. PROTECTION AFFORDED TO BONA FIDE HOLDERS. — Though railway

the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the bonds, so as to restrict the corporations, when acting with the approval of their stockholders, in the exchange of their bonds for money, property, or labor upon such terms as they may deem proper, provided always the transaction is a real one based upon a present consideration and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Brown v. Duluth, etc., R. Co.*, 53 Fed. Rep. 889. See also *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187; *Fidelity Ins., etc., Co. v. Western Pennsylvania, etc., R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911, 27 W. N. C. (Pa.) 267.

1. *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

2. **Transfer of Bonds.** — *Bunting v. Camden, etc., R. Co.*, 81 Pa. St. 254, 15 Am. R. Rep. 570.

3. **Bonds Payable to Bearer — Transfer by Delivery** — *United States*. — *White v. Vermont, etc., R. Co.*, 21 How. (U. S.) 575; *Zabitskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 381; *Hotchkiss v. National Shoe, etc., Bank*, 21 Wall. (U. S.) 354, *affirming* 10 Blatchf. (U. S.) 385; *Kneeland v. Lawrence*, 140 U. S. 209, 46 Am. & Eng. R. Cas. 319.

Alabama. — *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 555.

Indiana. — *Junction R. Co. v. Cleneay*, 13 Ind. 161; *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 750, 2 Am. & Eng. R. Cas. 532.

Maryland. — *Virginia v. State*, 32 Md. 501.

Massachusetts. — *Haven v. Grand Junction R., etc., Co.*, 109 Mass. 88; *Hinckley v. Union Pac. R. Co.*, 129 Mass. 52, 37 Am. Rep. 297.

Minnesota. — *Guilford v. Minneapolis, etc., R. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694, 51 Am. & Eng. R. Cas. 98.

Missouri. — *Tyrell v. Cairo, etc., R. Co.*, 7 Mo. App. 294.

New Jersey. — *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423.

New York. — *Brainerd v. New York, etc. R. Co.*, 25 N. Y. 496; *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534; *Hubbard v. New York, etc., R. Co.*, 36 Barb. (N. Y.) 286; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 225, 41 Barb. (N. Y.) 9, *affirming* 23 How. Pr. (N. Y.) 180; *Brainerd v. New York, etc., R. Co.*, 10 Bosw. (N. Y.) 332; *Finnegan v. Lee*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 186.

Pennsylvania. — *Carr v. Le Fevre*, 27 Pa. St. 413; *Carpenter v. Rommel*, 5 Phila. (Pa.) 34, 19 Leg. Int. (Pa.) 148.

Rhode Island. — *National Exch. Bank v. Hartford, etc., R. Co.*, 8 R. I. 375, 91 Am. Dec. 237.

South Carolina. — *Langston v. South Carolina R. Co.*, 2 S. Car. 248.

Canada. — *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. r. 26 Am. & Eng. R. Cas. 655. *Compare Geddes v. Toronto St. R. Co.*, 14 U. C. C. P. 513.

Provision for Registry. — Where a railroad corporation issues its bonds payable to bearer, their negotiability is not affected by a provision therein that they may "be registered and made payable by transfer only on the books of the company." *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 555.

Bonds of Foreign Railway Company. — *Canada Southern R. Co. v. Gebhard*, 109 U. S. 527, 14 Am. & Eng. R. Cas. 581.

Provision for Payment Must Be Unconditional to render bonds negotiable. *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397.

Time of Payment Must Be Certain. — *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397.

The negotiability of a railroad bond, payable by its terms at a certain time, is not affected by an option given to a mortgage trustee to declare it due before the time of payment in case of a default in the payment of interest. *Chicago, etc., Rapid Transit R. Co. v. Northern Trust Co.*, 90 Ill. App. 460, *affirmed* 105 Ill. 288.

Bonds with Place of Payment Uncertain. — *Jackson v. Vicksburg, etc., R. Co.*, 2 Woods (U. S.) 141; *Parsons v. Jackson*, 99 U. S. 434; *Ledwich v. McKim*, 53 N. Y. 307, *affirming* 35 N. Y. Super. Ct. 304.

Purchaser from Thief. — A *bona fide* purchaser for value without notice of railroad bonds payable to bearer which had been stolen has a good title as against the former owner. *Gilbough v. Norfolk, etc., R. Co.*, 1 Hughes (U. S.) 410, *Hotchkiss v. National Shoe, etc., Bank*, 21 Wall. (U. S.) 354; *Wylie v. Missouri Pac. R. Co.*, 41 Fed. Rep. 623, 43 Am. & Eng. R. Cas. 431; *Carpenter v. Rommel*, 5 Phila. (Pa.) 34, 19 Leg. Int. (Pa.) 148.

4. **Payee of Bond Left Blank.** — *White v. Vermont, etc., R. Co.*, 21 How. (U. S.) 577; *Chapin v. Vermont, etc., R. Co.*, 8 Gray (Mass.) 576; *Hubbard v. New York, etc., R. Co.*, 36 Barb. (N. Y.) 286, 14 Abb. Pr. (N. Y.) 275.

bonds negotiable in form are not strictly negotiable by the law merchant, still, *bona fide* purchasers for value are afforded protection against defenses on behalf of the company which would have been available against the first holder or original payee.¹

Violation of Statute or Charter. — Nor is it any defense, as against a *bona fide* holder, that the bonds were issued for a greater amount than that allowed by statute;² nor that, in the issuance of the bonds, restrictions imposed by the charter of the railway company on its power to issue bonds were violated;³ nor that the bonds were issued for the construction of a railroad other than that specified in the articles of incorporation;⁴ nor that the bonds were sold by the railway company for less than par, in violation of a statute.⁵

A Purchaser of Overdue Bonds can claim no protection as a *bona fide* purchaser,⁶ but the presence of past-due interest coupons upon an unmatured railway bond is not notice to a purchaser of the dishonor thereof so as to prevent him from becoming a *bona fide* purchaser.⁷

Persons Who Do Not Pay Value for railway bonds cannot claim protection as *bona fide* purchasers.⁸

Fraud by One of Firm to Which Bonds Issued. — When bonds issued to a firm of contractors are invalid on account of fraud, the knowledge of and participation in such fraud by one member of the firm will prevent another member from claiming protection as a *bona fide* purchaser.⁹

The Presumption is that holders of negotiable railway bonds are *bona fide* holders for value,¹⁰ but if fraud in the inception of the bonds is shown, the

1. Protection Afforded Bona Fide Holders —

United States. — *Kneeland v. Lawrence*, 140 U. S. 209; *McMurray v. Moran*, 134 U. S. 150, 43 Am. & Eng. R. Cas. 442; *Enfield v. Jordan*, 119 U. S. 680; *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532; *Johnson County v. Thayer*, 94 U. S. 631; *Porter v. Pittsburgh Bessemer Steel Co.*, 120 U. S. 649; *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 397; *Bronson v. La Crosse, etc., R. Co.*, 2 Wall. (U. S.) 283; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Foster v. Mansfield, etc., R. Co.*, 36 Fed. Rep. 627; *Wylie v. Missouri, etc., R. Co.*, 41 Fed. Rep. 623, 43 Am. & Eng. R. Cas. 431; *Union L. & T. Co. v. Southern California Motor Road Co.*, 51 Fed. Rep. 840; *Farmers' L. & T. Co. v. Rockaway Valley R. Co.*, 69 Fed. Rep. 9; *Gilbough v. Norfolk, etc., R. Co.*, 1 Hughes (U. S.) 410; *Kennicott v. Wayne County*, 6 Biss. (U. S.) 138; *Stanton v. Alabama, etc., R. Co.*, 2 Woods (U. S.) 523; *Allen v. Dallas, etc., R. Co.*, 3 Woods (U. S.) 316; *Western Div., etc., R. Co. v. Drew*, 3 Woods (U. S.) 691, 29 Fed. Cas. No. 17,434.

California. — *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606, 26 Am. & Eng. R. Cas. 404.

Georgia. — *Hazlehurst v. Savannah, etc., R. Co.*, 43 Ga. 13.

Indiana. — *Madison, etc., R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

Iowa. — *Nelson v. Iowa Eastern R. Co.*, (Iowa 1875) 8 Am. R. Rep. 82.

Mississippi. — *New Orleans, etc., R. Co. v. Mississippi College*, 47 Miss. 560.

Missouri. — *Tyrell v. Cairo, etc., R. Co.*, 7 Mo. App. 294.

New York. — *McClelland v. Norfolk Southern R. Co.*, 110 N. Y. 469, 6 Am. St. Rep. 397; *Ellsworth v. St. Louis, etc., R. Co.*, 98 N. Y. 553; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 259; *Duncomb v. New York, etc., R. Co.*, 84 N. Y. 190, 4 Am. & Eng. R. Cas.

293; *Maas v. Missouri, etc., R. Co.*, 83 N. Y. 223, 3 Am. & Eng. R. Cas. 30; *Belden v. Buke*, 72 Hun (N. Y.) 51; *Brainerd v. New York, etc., R. Co.*, 25 N. Y. 496, *affirming* 10 Bosw. (N. Y.) 332.

Pennsylvania. — *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574; *Oil Creek, etc., R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160.

Vermont. — *Rutland, etc., R. Co. v. Proctor*, 29 Vt. 93.

Bonds Issued to Contractor — Damages for Breach of Contract. — *Mercantile Trust Co. v. Zanesville, etc., R. Co.*, 52 Fed. Rep. 342; *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187, 7 Am. & Eng. R. Cas. 101; *McElrath v. Pittsburgh, etc., R. Co.*, 55 Pa. St. 189.

2. *Baker v. Guarantee Trust, etc., Co.*, (N. J. 1895) 31 Atl. Rep. 174; *Fidelity Ins., etc., Co. v. Western Pennsylvania, etc., R. Co.*, 138 Pa. St. 494, 21 Am. St. Rep. 911.

3. *Ellsworth v. St. Louis, etc., R. Co.*, 98 N. Y. 553, *affirming* 33 Hun (N. Y.) 7.

4. *Baker v. Guarantee Trust, etc., Co.*, (N. J. 1895) 31 Atl. Rep. 174.

5. *Savannah, etc., R. Co. v. Lancaster*, 62 Ala. 555; *Reid v. Mobile Bank*, 70 Ala. 199.

6. **Overdue Bonds.** — *American L. & T. Co. v. St. Louis, etc., R. Co.*, 42 Fed. Rep. 819.

7. *Indiana, etc., R. Co. v. Sprague*, 103 U. S. 756, 2 Am. & Eng. R. Cas. 532; *Gilbough v. Norfolk, etc., R. Co.*, 1 Hughes (U. S.) 410; *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606, 26 Am. & Eng. R. Cas. 404.

8. *Baker v. Guarantee Trust, etc., Co.*, (N. J. 1895) 31 Atl. Rep. 174.

9. *Smith v. Florida Cent., etc., R. Co.*, 43 Fed. Rep. 731.

10. **Presumption.** — *Kneeland v. Lawrence*, 140 U. S. 209; *Western North Carolina R. Co. v. Drew*, 3 Woods (U. S.) 691; *Gibson v. Lenhart*, 101 Pa. St. 522.

holder, to be entitled to protection as a *bona fide* holder, must show that he is such; his mere possession of the bonds is insufficient.¹

4. General Requisites and Validity. — In the issuance of railway bonds the statutory requirements in regard thereto should, of course, be complied with; for example, where the statute prescribes the time for which the bonds shall run.²

Authority of Officers. — With respect to the authority of the officers of a railway company to issue bonds, the principles of the law are the same as in the case of any other corporate contract.³

Rate of Interest. — Sometimes the statutes expressly fix a limit to the rate of interest at which companies may borrow money, and, of course, bonds and other evidences of indebtedness for borrowed money may not bear a higher rate of interest than is so allowed;⁴ but the mere fact that a railway bond or note bears a higher rate of interest does not necessarily bring it within such a statute, as it may not have been given for borrowed money, and therefore the statute may not apply.⁵

Delivery. — A delivery of its bonds by the company is essential to their validity as legal obligations.⁶ Thus, railway bonds made complete in form by due execution are not legal obligations so long as they remain in the hands of the company or its agents for issuance or negotiation, and therefore cannot, as property, be taken on attachment, execution, or other process against the company,⁷ but a delivery in pledge to creditors of the company is sufficient to render them valid.⁸

Rates at Which Bonds May Be Negotiated. — In many jurisdictions the statutes regulate the rates at which bonds may be negotiated or sold by railway companies as regards their face or par value,⁹ and when a statute authorizes a

1. *Simmons v. Taylor*, 38 Fed. Rep. 682; *Louisville, etc., R. Co. v. Ohio Valley Imp., etc., Co.*, 57 Fed. Rep. 42.

2. **General Requisites and Validity.** — *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672. See also *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221.

Time of Maturity. — Where the statute authorizing the issue of bonds for borrowed money expressly provides that they are "not to mature at an earlier period than thirty years," a provision that they shall mature at the option of the bondholders in case of nonpayment of interest is invalid, but the bonds will be otherwise good. *Howell v. Western R. Co.*, 94 U. S. 463.

Indorsement by Trustee. — Where bonds on their face expressly provide that they shall not become obligatory until the certificate of the mortgage trustee is indorsed thereon, such certificate is essential to their validity, and if they are stolen from the possession of the railway company and the certificate of the trustee is forged thereon, they will be invalid, even in the hands of a *bona fide* purchaser. *Maas v. Missouri, etc., R. Co.*, 83 N. Y. 223, 11 Hun (N. Y.) 8.

Name of Payee in Blank or Payable to Bearer. — Bonds issued with the name of the payee left blank, or made payable to bearer, have been sustained as valid, as such a bond must be construed to be in effect an undertaking payable to the person to whom it is issued, or to the holder. *White v. Vermont, etc., R. Co.*, 21 How. (U. S.) 577; *Chapin v. Vermont, etc., R. Co.*, 8 Gray (Mass.) 575; *Hubbard v. New York, etc., R. Co.*, 36 Barb. (N. Y.) 286; *Geddes v. Toronto St. R. Co.*, 14 U. C. C. P.

513; *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. 1, 26 Am. & Eng. R. Cas. 655.

3. **Authority of Officers.** — *Riggs v. Pennsylvania, etc., R. Co.*, 16 Fed. Rep. 804; *Farmers' L. & T. Co. v. San Diego St. Car Co.*, 45 Fed. Rep. 518; *Coe v. East, etc., R. Co.*, 52 Fed. Rep. 531; *State v. Florida Cent. R. Co.*, 15 Fla. 600; *Mason v. York, etc., R. Co.*, 52 Me. 82; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 9; *Pittsburgh, etc., R. Co. v. Lynde*, 55 Ohio St. 23; *Jesup v. City Bank*, 14 Wis. 331; *Toronto Bank v. Cobourg, etc., R. Co.*, 7 Ont. 1, 26 Am. & Eng. R. Cas. 655. And see the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 833.

4. *Sand. & H. Dig. Stat. Ark.* (1894), § 6268.

5. *Memphis, etc., R. Co. v. Dow*, 120 U. S. 287; *Southwestern Arkansas, etc., R. Co. v. Hays*, 63 Ark. 355.

6. **Delivery.** — *Rice's Appeal*, 79 Pa. St. 168.

7. *Cunningham v. Pennsylvania, etc., R. Co.*, (N. Y. City Ct. Gen. T.) 11 N. Y. St. Rep. 663; *Sickles v. Richardson*, 23 Hun (N. Y.) 559. See also *Coddington v. Gilbert*, 17 N. Y. 489.

8. **Pledge.** — *Farmers' L. & T. Co. v. Toledo, etc., R. Co.*, (C. C. A.) 54 Fed. Rep. 759; *Morton v. New Orleans, etc., R. Co.*, 79 Ala. 590; *Newport, etc., Bridge Co. v. Douglass*, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221; *Duncomb v. New York, etc., R. Co.*, 88 N. Y. 1, *affirming* 23 Hun (N. Y.) 291, 13 Am. & Eng. R. Cas. 84; *Loeb v. Chur.* (Supm. Ct. Gen. T.) 6 N. Y. Supp. 296; *Sickles v. Richardson*, 23 Hun (N. Y.) 559; *Pfister v. Milwaukee Electric R. Co.*, 83 Wis. 86.

9. **Rates at Which Bonds May Be Issued.** — See *Continental Trust Co. v. Toledo, etc., R. Co.*,

company to issue bonds bearing a certain rate of interest and negotiate them at a certain percentage of their par value, the effect is to exempt railway companies from the general usury statutes.¹

5. General Rights of Bondholders. — A bondholder of a railway company, as such, is merely a general creditor of the company and cannot interfere with its general business.²

Right to Vote as Stockholder. — Some statutes authorizing the issuance of bonds confer upon the bondholders the right under certain circumstances of voting for the election of officers of the corporation.³

Action on Bonds. — A holder of railway bonds, irrespective of whether they are secured by mortgage or deed of trust, may, as a general rule, maintain an action at law on the bonds, and a judgment recovered thereon may be enforced like any other judgment against the railway company.⁴

6. Payment. — Where railroad bonds are to run for a certain time, the company has no authority, prior to their maturity by lapse of time, to call them in and require the holders to receive payment.⁵ Provisions in the bonds accelerating their maturity at the option of the holders on default in the payment of interest are valid at law and in equity.⁶ Where bonds or scrip are payable when the railroad is constructed to a certain point, and before it reaches that point the work is abandoned, the company cannot defend an action for recovery on the bonds on the ground that the indebtedness has not matured, as this would permit it to take advantage of its own wrong.⁷ Railroad bonds, though negotiable, are not promissory notes within

82 Fed. Rep. 642, 86 Fed. Rep. 929; *Toledo, etc., R. Co. v. Continental Trust Co.*, (C. C. A.) 95 Fed. Rep. 497; *Coe v. Columbus, etc., R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518; *Philadelphia, etc., R. Co.'s Appeal*, 11 W. N. C. (Pa.) 325, 4 Am. & Eng. R. Cas. 118; *Pfister v. Milwaukee Electric R. Co.*, 83 Wis. 86.

A corporation created by state law, authorized to issue bonds and sell them to raise funds, may sell them either in the state or out, and if they are sold out of the state, where a lower rate of interest exists, the transaction will not be regarded as a loan. *Ashland Bank v. Jones*, 16 Ohio St. 145.

Right of Foreign Corporation to Issue. — *Junction R. Co. v. Ashland Bank*, 12 Wall. (U. S.) 226.

1. Metropolitan Trust Co. v. Railroad Equipment Co., 108 Fed. Rep. 913, 48 C. C. A. 135. Otherwise, it would seem that railway bonds are within such statutes. *Philadelphia, etc., R. Co. v. Lewis*, 33 Pa. St. 33, 75 Am. Dec. 574.

2. General Rights of Bondholders. — *Toronto Bank v. Cobourg, etc., R. Co.*, 10 Ont. 376.

Consolidated Company. — *Tysen v. Wabash R. Co.*, 11 Biss. (U. S.) 510, 15 Fed. Rep. 763, 13 Am. & Eng. R. Cas. 134; *Hart v. Ogdenburg, etc., R. Co.*, 69 Hun (N. Y.) 378. See also *Matthews v. Murchison*, 15 Fed. Rep. 691, 9 Am. & Eng. R. Cas. 603.

Bond Receivable in Payment of Freight. — A bond conditioned that it shall not be receivable in payment of freight "to a greater amount than one-half of the amount then to be paid by the holder" to the company for freights requires the company to accept it when tendered, although the freight due is more than double the amount of the bond tendered; and such company cannot insist that one bond shall be tendered for each shipment. Upon such a contract the freight of several shipments may be added together and a de-

mand made that one-half or any less amount of it be paid by acceptance of bonds. *Evansville, etc., R. Co. v. Frank*, 3 Ind. App. 96.

3. Right to Vote as Stockholder. — *Hart v. Ogdenburg, etc., R. Co.*, 69 Hun (N. Y.) 378; *In re Thomson*, 8 Ont. Pr. 423; *Re Thomson, etc., R. Co.*, 9 Ont. Pr. 119; *Osler v. Toronto, etc., R. Co.*, 8 Ont. Pr. 506; *In re Johnson, etc., R. Co.*, 8 Ont. Pr. 535; *Hendrie v. Grand Trunk R. Co.*, 2 Ont. 441, 13 Am. & Eng. R. Cas. 62.

4. Right to Sue on Bond. — *Coleman v. Llanelly R., etc., Co.*, 17 L. T. N. S. 86, 15 W. R. 1014; *Hart v. Eastern Union R. Co.*, 6 R. & Can. Cas. 818, 7 Exch. 246, *affirmed* 8 Exch. 116, 17 Jur. 89; *Manning v. Norfolk Southern R. Co.*, 29 Fed. Rep. 838; *Marlor v. Texas, etc., R. Co.*, 19 Fed. Rep. 867, 17 Am. & Eng. R. Cas. 215; *Evansville, etc., R. Co. v. Frank*, 3 Ind. App. 96; *Welsh v. First Div. St. Paul, etc., R. Co.*, 25 Minn. 314; *Philadelphia, etc., R. Co. v. Johnson*, 54 Pa. St. 127; *Com. v. Susquehanna, etc., R. Co.*, 122 Pa. St. 306.

Where bonds on their face refer to a trust deed or mortgage by which they are secured, the right of holders of the bonds to sue at law thereon may be restricted by provisions in the trust deed or mortgage. *Guilford v. Minneapolis, etc., R. Co.*, 48 Minn. 560, 31 Am. St. Rep. 694, 51 Am. & Eng. R. Cas. 98.

5. Payment. — *Chicago, etc., R. Co. v. Pyne*, 30 Fed. Rep. 86.

Provision, however, may be inserted in the bonds whereby a certain proportion, to be determined by lot, shall become payable each year from a sinking fund provided for such purpose. See *Henry v. Syracuse, etc., R. Co.*, 57 N. Y. Super. Ct. 69.

6. Newport, etc., Bridge Co. v. Douglass, 12 Bush (Ky.) 673, 18 Am. R. Rep. 221. And see the title PAYMENT, vol. 22, p. 513.

7. Gulf, etc., R. Co. v. Winder, (Tex. Civ. App. 1901) 63 S. W. Rep. 1043.

the meaning of the *Massachusetts* statutes so as to be entitled to days of grace.¹ When the company has the option of paying interest on its bonds in scrip, it becomes liable to pay in money where it fails to issue the scrip upon the day the interest falls due.²

III. NEGOTIABLE BILLS AND NOTES. — In England and Canada the rule seems to be that railway companies have no implied authority to become the makers of negotiable promissory notes, nor the drawers of negotiable bills, nor the indorsers or acceptors thereof.³

In the United States the doctrine is recognized that railway companies having the power to borrow money or otherwise incur indebtedness have the power to make negotiable promissory notes⁴ and to draw bills⁵ in payment of or as security for such indebtedness, and that they may transfer by indorsement bills and notes which they have taken in the course of their business.⁶ A railroad company has, however, no power to make a note for an indebtedness which it had no power to incur.⁷

IV. GUARANTY AND SURETYSHIP. — The General Rule that a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise to lend its credit to another, unless such power is expressly conferred by its charter or unless such a contract is reasonably necessary or is usual in the conduct of its business,⁸ applies to railway companies;⁹ and the fact that the contract of guaranty or surety will result in gain to the railway company through an increase of its traffic will not bring such a contract within its power.¹⁰

Express Power. — The power to enter into contracts of guaranty or suretyship is sometimes expressly conferred upon railway companies.¹¹

Power Implied. — It is not essential, however, to the existence of the power to contract as surety or guarantor that it be expressly conferred by the charter of the railway company; it may be implied where it is reasonably

1. *Chaffee v. Middlesex R. Co.*, 146 Mass. 224, *construing* Act Mass. 1824, c. 130; Act 1852, c. 76; Pub. Stat. (1882), c. 77, §§ 4, 9, 10.

2. *Texas, etc., R. Co. v. Marlor*, 123 U. S. 687.

3. **Bills and Notes — English Doctrine.** — *Bate-man v. Mid-Wales R. Co.*, L. R. 1 C. P. 509; *Gilbert v. McAnnan*, 28 U. C. Q. B. 384. *Compare* *Peruvian R. Co. v. Thames, etc., Marine Ins. Co.*, L. R. 2 Ch. 617.

4. **United States Doctrine — California.** — *Temple St. Cable R. Co. v. Hellman*, 103 Cal. 634.

Georgia. — *Mitchell v. Rome R. Co.*, 17 Ga. 590.

Indiana. — *Hamilton v. Newcastle, etc., R. Co.*, 9 Ind. 359. See also *Indiana, etc., R. Co. v. Davis*, 20 Ind. 6, 83 Am. Dec. 303.

Maine. — *Came v. Brigham*, 39 Me. 35.

Massachusetts. — *Kneeland v. Brintree St. R. Co.*, 167 Mass. 161. See also *Com. v. Smith*, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

New Hampshire. — *Richards v. Merrimack, etc., R. Co.*, 44 N. H. 127.

New York. — *Pusey v. New Jersey West Line R. Co.* (Supm. Ct. Gen. T.) 14 Abb. Pr. N. S. (N. Y.) 434.

Oregon. — *Fink v. Canyon Road Co.*, 5 Ore-
gon 301.

Tennessee. — *Union Bank v. Jacobs*, 6
Humph. (Tenn.) 515.

Virginia. — *Richmond, etc., R. Co. v. Snead*,
19 Gratt. (Va.) 354, 100 Am. Dec. 670.

5. *Olcott v. Tioga R. Co.*, 40 Barb. (N. Y.)
179, *affirmed* 27 N. Y. 549, 84 Am. Dec. 298.
See also *Indiana, etc., R. Co. v. Davis*, 20
Ind. 6, 83 Am. Dec. 303.

6. *Pearce v. Madison, etc., R. Co.*, 21 How.
(U. S.) 441; *Railroad Cos. v. Schutte*, 103 U.
S. 118, 3 Am. & Eng. R. Cas. 1; *Irwin v.*
Bailey, 8 Biss. (U. S.) 523, 13 Fed. Cas. No.
7,079; *Frye v. Tucker*, 24 Ill. 181; *Olcott v.*
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7. *Pearce v. Madison, etc., R. Co.*, 21 How.
(U. S.) 441; *Smead v. Indianapolis, etc., R.*
Co., 11 Ind. 104.

8. **Guaranty and Suretyship.** — See the title
CORPORATIONS (PRIVATE), vol. 7, p. 788.

9. *Colman v. Eastern Counties R. Co.*, 10
Beav. 1; *Louisville, etc., R. Co. v. Louisville*
Trust Co., 174 U. S. 552; *Central Trust Co. v.*
Indiana, etc., R. Co., 98 Fed. Rep. 666, 39 C.
C. A. 220.

Accommodation Guaranty. — *Ellerman v. Chi-*
cago Junction R., etc., Co., 49 N. J. Eq. 217.

10. **Guaranty of Dividends on Stock of Connect-**
ing Steamboat Line. — *Colman v. Eastern*
Counties R. Co., 10 Beav. 1.

Guaranty of Payment of Expenses to Fair to
Attract Strangers. — *Davis v. Old Colony R.*
Co., 131 Mass. 258, 41 Am. Rep. 221.

Guaranty of Dividends on Stock of Elevator Com-
pany. — *Memphis Grain, etc., Elevator Co. v.*
Memphis, etc., R. Co., 85 Tenn. 703, 7 Am.
St. Rep. 798.

11. **Power Expressly Conferred.** — *Louisville*
Trust Co. v. Louisville, etc., R. Co., 75 Fed.
Rep. 433, 43 U. S. App. 550; *Central Trust Co.*
v. Indiana, etc., R. Co., 98 Fed. Rep. 666, 39
C. C. A. 220; *Toppa v. Cleveland, etc., R. Co.*,
1 Flipp. (U. S.) 74, 24 Fed. Cas. No. 14,099;
Camden, etc., R. Co. v. Cox, (Pa. 1886) 26
Am. & Eng. R. Cas. 102.

necessary or proper in order to carry out some other power.¹ Thus, a railway company empowered to aid another company to construct the latter's railway may for such purposes guarantee the latter's bonds.² So a railway company empowered to lease or purchase the road of another company may, as a part of the consideration for such lease or purchase, guarantee the bonds of the latter company.³ Again, where one railway company owns the bonds, notes, and other evidences of the indebtedness of a third person, with power to sell or negotiate them, it may guarantee their payment to enable it to negotiate or sell them to advantage.⁴ Similarly, a railway company may guarantee the payment of the salary of an engineer employed by a contractor for the construction of the road.⁵

Ultra Vires — Right of Bona Fide Holder of Bonds. — Where the contract by one railway company guaranteeing the bonds of another railway company is upon its face such a contract as the former can make, the fact that the guaranty is one which the company has no power to make cannot affect the right of a *bona fide* holder of the bonds to recover upon the guaranty.⁶

RAINWATER. — See the title WATERS AND WATERCOURSES.

RAINY DAY. (See also the title DEMURRAGE, vol. 9, p. 235.) — See note 7.

1. **Implied Power.** — *Green Bay, etc., R. Co. v. Union Steamboat Co.*, 107 U. S. 98; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, 41 Barb. (N. Y.) 10. See also *Codman v. Vermont, etc., R. Co.*, 17 Blatchf. (U. S.) 1. **Consideration of Guaranty.** — *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 381.

2. **Authority to Aid in Construction.** — *Zabriskie v. Cleveland, etc., R. Co.*, 23 How. (U. S.) 381; *Louisville Trust Co. v. Louisville, etc., R. Co.*, (C. C. A.) 75 Fed. Rep. 433; *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 225, 41 Barb. (N. Y.) 9, *affirming* 23 How. Pr. (N. Y.) 180. See also *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

3. **Authority to Lease or Purchase.** — *U. S. Trust Co. v. Western Contract Co.*, (C. C. A.) 81 Fed. Rep. 454; *Eastern Tp. Bank v. St. Johnsbury, etc., R. Co.*, 40 Fed. Rep. 423, 40 Am. & Eng. R. Cas. 566; *Opdyke v. Pacific R. Co.*, 3 Dill. (U. S.) 55; *Low v. California Pac. R. Co.*, 52 Cal. 53, 28 Am. Rep. 629; *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236; *Ellerman v. Chicago Junction R., etc., Co.*, 49 N. J. Eq. 217; *Gere v. New York, etc., R. Co.*, (Supm. Ct. Spec. T.) 19 Abb. N. Cas. (N. Y.) 193. See also *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Camden, etc., R. Co. v. Coxé*, (Pa. 1886) 26 Am. & Eng. R. Cas. 102.

4. **Guaranty Securities for Purpose of Negotiation — United States.** — *Chicago, etc., R. Co. v. Howard*, 7 Wall. (U. S.) 392; *Rogers Locomotive, etc., Works v. Southern R. Assoc.*, 34 Fed. Rep. 278; *Bonner v. New Orleans*, 2 Woods (U. S.) 135, 3 Fed. Cas. No. 1,631; *Evans v. Cleveland, etc., R. Co.*, 5 Phila. (Pa.) 512, 21 Leg. Int. (Pa.) 29, 8 Fed. Cas. No. 4,557. See also *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47.

Indiana. — *Madison, etc., R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457.

Kansas. — *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236.

New Jersey. — *Ellerman v. Chicago Junction R., etc., Co.*, 49 N. J. Eq. 217.

New York. — *Arnot v. Erie R. Co.*, 67 N. Y. 315.

Pennsylvania. — *Evans v. Cleveland, etc., R. Co.*, 2 Pittsb. (Pa.) 483.

5. **Salary.** — *Mathesius v. Brooklyn Heights R. Co.*, 96 Fed. Rep. 792.

6. **Ultra Vires Contract — Georgia.** — *Cozart v. Georgia R., etc., Co.*, 54 Ga. 379.

Indiana. — *Madison, etc., R. Co. v. Norwich Sav. Soc.*, 24 Ind. 457, *disapproving* *Smead v. Indianapolis, etc., R. Co.*, 11 Ind. 104.

Kansas. — *Atchison, etc., R. Co. v. Fletcher*, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34.

New York. — *Connecticut Mut. L. Ins. Co. v. Cleveland, etc., R. Co.*, (Supm. Ct. Gen. T.) 26 How. Pr. (N. Y.) 225, 41 Barb. (N. Y.) 9, *affirming* 23 How. Pr. (N. Y.) 180. See also *Arnot v. Erie R. Co.*, 67 N. Y. 315.

See also *Toppan v. Cleveland, etc., R. Co.*, 1 Flipp. (U. S.) 74. But see *Eastern Tp. Bank v. St. Johnsbury, etc., R. Co.*, 40 Fed. Rep. 423, 40 Am. & Eng. R. Cas. 566.

Reimbursement. — Where one railway company guarantees the bonds of another, and payments thereon are made by the former company, the latter company cannot defend against liability to reimburse the former on the ground that the guaranty was *ultra vires*. *Macon, etc., R. Co. v. Georgia R. Co.*, 63 Ga. 103, 1 Am. & Eng. R. Cas. 378. And see the title ULTRA VIRES.

Irregular Exercise of Power to Guarantee. — *Louisville, etc., R. Co. v. Louisville Trust Co.*, 174 U. S. 552.

7. **Rainy Day.** — In *Balfour v. Wilkins*, 5 Sawy. (U. S.) 434, 2 Fed. Cas. No. 807, it was said: "The phrase *rainy day* has no definite and certain meaning. It may be used and understood in many senses. In common parlance, it varies in signification from the day with light, passing April showers to the steady and strong pour-down of an Oregon December. Worcester defines 'rainy' as follows: 'Abounding in rain; showery; wet;' and Webster's definition is the same. But the definition, while it fixes some limit to the signification of the term, as that a *rainy day* is a wet one, and therefore not a dry one, does not free the matter from the uncertainty which is inherent in the expression." And

RAISE. — To Raise Money, as the term is ordinarily understood, is to collect or procure a supply of money for use, as, in the case of a municipal corporation, by taxation or perhaps by loan.¹

To Raise Children. — It has been held that children have been "raised" when they have attained the age of twenty-one years.²

RAISED CHECKS. — See the title CHECKS, vol. 5, p. 1075.

RANCHMAN. — See note 3.

RANDOM. — Random means done at hazard, or without any settled aim, purpose, or direction; left to chance; casual; haphazard. When the phrase "at random" is used, it is applied to anything done at haphazard or chance.⁴

RANGE. — See note 5.

RANGE BRAND. — See the title BRANDS AND MARKS, vol. 4, p. 874, and see ROAD BRAND.

RANGING. — See note 6.

RANK. (See also the title MILITARY LAW, vol. 20, p. 635.) — The word "rank" is often used to express something different from office. It then becomes a designation or title of honor, dignity, or distinction conferred upon an officer in order to fix his relative position with reference to other officers in matters of privilege, precedence, and sometimes of command, or by which to determine his pay and emoluments.⁷

the court in that case held that evidence was admissible to show the sense in which the term was used.

1. **Raise.** — Childs v. Hillsborough Electric Light, etc., Co., 70 N. H. 324.

Borrowing. — In Dickinson County v. Warren, 98 Mich. 146, it was held that a board of supervisors, under an authority to raise money, had no power to borrow money. The court said: "The word *raise*, without qualifying words, is frequently employed in grants of authority to provide the necessary funds for public use in cases where the intent to prescribe the method in which the power is to be exercised, viz., by taxation, is so clearly obvious that the words may be said to have acquired a clearly defined meaning when used in that connection." See also Schneewind v. Niles, 103 Mich. 306; Wells v. Salina, 119 N. Y. 280, 29 Am. & Eng. Corp. Cas. 101.

Pledge. — The directors of a corporation were empowered to issue and sell or pledge all or any of certain bonds for the purpose of raising money. It was held that a liberal construction should be given to the expression "raising money," and that bonds might be issued by the company and pledged as security for work to be done. Winnipeg, etc., R. Co. v. Mann, 7 Manitoba 81.

Raising Revenue. — The Constitution of Alabama provided that bills to raise revenue should originate in the lower house of the legislature. In Perry County v. Selma, etc., R. Co., 58 Ala. 546, it was held that a bill to raise revenue, within this provision, meant a bill to provide for the levy of taxes as a means of collecting revenue, and that a bill for reducing taxation, if it provided for collecting revenue, was still a bill for raising revenue.

An Act Granting a Lottery was as follows: "A lottery is hereby granted," etc., "to raise the sum of," etc. It was held that the word as here used meant "to create or produce a fund," and the word *raised* as used in the same act was held to mean "actually pro-

duced and realized in cash," ready to be paid into the treasury of the state, and not ineffectually attempted to be raised. Opinions of Justices, 7 Me. 504.

2. **Raise Children.** — Shoemaker v. Stobaugh, 59 Ind. 598, which was an action for an accounting against the widow of a testator who had devised the control, benefit, and proceeds of his real estate to his widow "to help her raise and school all" his children.

3. **Ranchman.** — Where a statute gave to a ranchman a lien on sheep intrusted to his charge, it was held that the term *ranchman* did not apply to one merely hired to take care of the sheep, where the owner retained possession and control of them. Hooker v. McAllister, 12 Wash. 46.

4. **Random.** — Com. v. Bynum, (Ky. 1899) 50 S. W. Rep. 843, quoting Webst. Dict.; Encyc. Dict. In that case it was held that when the defendant, with a fixed purpose, intentionally shot at a dog, he was not in any sense of the word guilty of shooting at random.

5. **Range.** — In Vicksburg, etc., R. Co. v. Patton, 31 Miss. 185, it was said: "This state is comparatively new, and for the most part sparsely populated, with large bodies of woodlands and prairies which have never been inclosed lying in the neighborhoods of the plantations of our citizens, and which by common consent have been understood, from the early settlement of the state, to be a common of pasture, or, in the phrase of the people, the *range*, to which large numbers of cattle, hogs, and other animals in the neighborhood, not of a dangerous or unlawful character, have been permitted to resort."

6. **Ranging.** — See Reid v. Klein, 138 Ind. 484, stated under the title DEEDS, vol. 9, p. 816, note.

7. **Rank.** — Wood's Case, 15 Ct. Cl. 159.

In Verdier v. Roach, 96 Cal. 476, it was said: "It is assumed by counsel for appellants that before the contingency happens the obligation is not a debt, and hence they conclude that it could not have been 'ranked

RANSOM. — A ransom is only a redemption for money or other consideration of that which is taken in war.¹

among the acknowledged debts of the estate.' Conceding, for the sake of the argument, that a contingent claim is not a technical legal debt, it does not follow that it may not be *ranked* among debts. The first two examples given by Mr. Webster of authorized uses of the verb 'to *rank*' are as follows: 'Poets were *ranked* in the class of philosophers;' 'Heresy is *ranked* with idolatry and witchcraft.' The first does not necessarily mean nor imply that poets are philosophers, nor the second that heresy is idolatry or witchcraft. Nor does the requirement that an allowed claim shall be *ranked* among debts exclude from the *ranks* all claims which may not properly be termed legal debts." *Quoted in Barto v. Stewart*, 21 Wash. 617.

1. **Ransom.** — *Havelock v. Rockwood*, 8 T. R. 277, *per* Grose, J.

Repurchase. — "Nor is a *ransom*, strictly speaking, a repurchase of the captured property. It is rather a repurchase of the actual right of the captors at the time, be it what it may; or, more properly, it is a relinquishment of all the interest and benefit which the captors might acquire or consummate in the property by the regular adjudications of a prize tribunal, whether it be an interest *in rem*, a lien, or

a mere title to expenses." *Maisonnable v. Keating*, 2 Gall. (U. S.) 338.

A Ransom Bill is "a contract for payment of *ransom* of a captured vessel, with stipulations of safe conduct, if she pursue a certain course and arrive at a certain time. If found out of time and course the safe conduct is void." *Bouv. L. Dict., citing Wheaton on Int. Law* 107.

The cognizance of *ransom* bills belongs exclusively to admiralty, but an action on a bill of exchange given as collateral security for the payment of a *ransom* bill may be maintained in a court of common law. *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

The payment of a *ransom* bill cannot be enforced in *England* during the war by an action on the contract, but can be so enforced in the *United States*. *Bouv. L. Dict., citing 1 Kent's Com.* 104, 105; *Maisonnaire v. Keating*, 2 Gall. (U. S.) 325.

An ally is bound by the *ransom* bill of a co-belligerent. *Miller v. Ship Resolution*, 2 Dall. (U. S.) 15.

In Sense of Fine. — Where a statute forbade the act of forcible entry under pain of imprisonment and *ransom*, it was held that the word *ransom* meant not only a fine, but a severe fine. *U. S. v. Griffin*, 6 D. C. 57.

RAPE.

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CROSS-REFERENCES.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see in this work the titles *ABDUCTION*, vol. 1, p. 162; *ADULTERY (AS A CRIME)*, vol. 1, p. 746; *ASSAULT AND BATTERY*, vol. 2, p. 952; *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 250; *CRIMINAL LAW*, vol. 8, p. 274; *FORNICATION*, vol. 13, p. 1118; *INCEST*, vol. 16, p. 134; *SEDUCTION*.

I. DEFINITION.—Rape at common law may be defined as the carnal knowledge of a female, forcibly and against her will,¹ or without her consent,² or against her will or consent,³ or when she did not consent.⁴ The expressions "without her consent" and "against her will" mean the same thing, and the attempt to draw a distinction between these phrases as applied to this crime, which has been suggested in some modern books, is unfounded.⁵

II. ORIGIN AND NATURE OF CRIME.—Rape is a common-law crime,⁶ though at the present time there are statutes in all jurisdictions punishing the offense.⁷ Carnal abuse of children with their consent is a statutory crime.⁸ These two crimes, though their punishment is made the same, have been held to be distinct,⁹ so that under an indictment for rape the defendant could not be convicted of the other crime.¹⁰ If the indictment is for a forcible rape, an

1. Definition.—*England*.—1 East P. C., c. 10, § 1; Reg. v. Flattery, 2 Q. B. D. 413.

Alabama.—Dawkins v. State, 58 Ala. 376.

49 Am. Rep. 754; Hooper v. State, 106 Ala. 41.

Arkansas.—Charles v. State, 11 Ark. 389;

Bradley v. State, 32 Ark. 704; Harvey v. State,

53 Ark. 427; Maxey v. State, 66 Ark. 525.

California.—People v. Ah Yek, 29 Cal. 576.

Delaware.—State v. Handy, 4 Harr. (Del.)

566; State v. Smith, 9 Houst. (Del.) 588.

Florida.—Williams v. State, 20 Fla. 777.

Georgia.—Jenkins v. State, 53 Ga. 35, 21

Am. Rep. 255; Wesley v. State, 65 Ga. 731.

Illinois.—Porter v. People, 158 Ill. 370.

Indiana.—Pomeroy v. State, 94 Ind. 96, 48

Am. Rep. 146.

Iowa.—State v. Tomlinson, 11 Iowa 401;

State v. Urie, 101 Iowa 411.

Kentucky.—White v. Com., 96 Ky. 180.

Maine.—State v. Blake, 39 Me. 322.

Massachusetts.—Com. v. Sugland, 4 Gray

(Mass.) 7; Com. v. Fogerty, 8 Gray (Mass.)

490, 69 Am. Dec. 264; Com. v. Roosnell, 143

Mass. 32; Com. v. Hackett, 170 Mass. 194.

Michigan.—People v. Crosswell, 13 Mich.

427, 87 Am. Dec. 774; Don Moran v. People,

25 Mich. 356, 12 Am. Rep. 283.

Mississippi.—Mobley v. State, 46 Miss. 501.

Nebraska.—Garrison v. People, 6 Neb. 274;

Comstock v. State, 14 Neb. 205; Richards v.

State, 36 Neb. 23.

Nevada.—State v. Pickett, 11 Nev. 255, 21

Am. Rep. 754.

New York.—People v. Clemons, 37 Hun

(N. Y.) 580.

North Carolina.—State v. Johnston, 76 N.

Car. 209.

Ohio.—Smith v. State, 12 Ohio St. 466.

Oklahoma.—Sowers v. Territory, 6 Okla.

436; Parker v. Territory, 9 Okla. 109.

Tennessee.—State v. Cherry, 1 Swan (Tenn.)

163; Wyatt v. State, 2 Swan (Tenn.) 394.

Virginia.—Givens v. Com., 29 Gratt. (Va.)

830; Bailey v. Com., 82 Va. 107, 3 Am. St.

Rep. 87; Mings v. Com., 85 Va. 638.

Wisconsin.—Croghan v. State, 22 Wis. 444.

2. Jenkins v. State, 1 Tex. App. 355; White

v. State, 1 Tex. App. 211; Williams v. State, 1

Tex. App. 90, 28 Am. Rep. 399; Battle v. State,

4 Tex. App. 595, 30 Am. Rep. 169; Burk v.

State, 8 Tex. App. 341; Baldwin v. State, 15

Tex. App. 275; Kennon v. State, (Tex. Crim.

1897) 42 S. W. Rep. 379; Edmonson v. State,

(Tex. Crim. 1898) 44 S. W. Rep. 154; Hardin

v. State, 39 Tex. Crim. 426; Reg. v. Riopel,

2 Can. Crim. Cas. (Quebec) 225.

3. Weatherford v. Com., 10 Bush (Ky.) 197;

Kessler v. Com., 12 Bush (Ky.) 19; Fenston v.

Com., 82 Ky. 551; Brown v. Com., 102 Ky.

227; People v. Flaherty, 27 N. Y. App. Div.

536; People v. Maxon, 57 Hun (N. Y.) 367.

4. State v. Sudduth, 52 S. Car. 488.

5. Com. v. Burke, 105 Mass. 377, 7 Am. Rep.

531. Compare Reg. v. Fletcher, 8 Cox C. C.

131.

6. Common-law Crime.—1 Hale P. C. 626; 1

East P. C., c. 10, § 1; O'Connell v. State, 6

Minn. 279; Mobley v. State, 46 Miss. 501.

7. See the local statutes.

8. Carnal Abuse of Children—Statutory Crime.

—Mobley v. State, 46 Miss. 501.

9. Distinct Crimes.—Vasser v. State, 55 Ala.

264; State v. Gaston, 96 Iowa 505; Rhodes v.

State, 1 Coldw. (Tenn.) 351; State v. Cherry,

1 Swan (Tenn.) 160; Hardin v. State, 39 Tex.

Crim. 426.

10. Indictment for Rape—No Conviction for

Carnal Abuse of Children—*Alabama*.—Vasser

v. State, 55 Ala. 264.

Arkansas.—Warner v. State, 54 Ark. 660.

Indiana.—Greer v. State, 50 Ind. 267, 19

Am. Rep. 709.

Mississippi.—Bonner v. State, 65 Miss. 293;

Alfred v. State, (Miss. 1902) 32 So. Rep. 54.

North Carolina.—State v. Johnson, 100 N.

Car. 494.

South Carolina.—State v. Haddon, 49 S.

Car. 308.

Texas.—Jenkins v. State, 34 Tex. Crim. 201;

Morgan v. State, (Tex. Crim. 1899) 50 S. W.

Rep. 718.

Vermont.—State v. Wheat, 63 Vt. 673.

Washington.—Whitcher v. State, 2 Wash.

286.

See also State v. Gaul, 50 Conn. 578; State

v. Lee, 33 Oregon 506.

Contra.—State v. Smith, 9 Houst. (Del.) 588;

McMath v. State, 55 Ga. 303; Stephen v. State,

11 Ga. 225; Fenston v. Com., 82 Ky. 549;

Young v. Com., 96 Ky. 573; State v. Jackson,

46 La. Ann. 547, 15 So. Rep. 402; State v.

Black, 63 Me. 210; Com. v. Sugland, 4 Gray

(Mass.) 7; People v. Crosswell, 13 Mich. 427,

87 Am. Dec. 774.

If the Age of the Female Is Alleged and is

within the age of consent, the additional allegation that the act was done forcibly and

against her will may be treated as surplusage.

State v. Mahoney, 24 Mont. 281; State v.

Horne, 20 Oregon 485; McAvoy v. State, 41

Tex. Crim. 56; Lawrence v. Com., 30 Gratt.

(Va.) 845; Com. v. Bennet, 2 Va. Cas. 235;

allegation that the female was under the statutory age of consent is immaterial, and on proof that the rape was committed with force, a conviction is proper though the evidence shows that she was over the age of consent.¹ So one indicted for carnal abuse of a child under the statutory age of consent may be convicted though the evidence shows the use of force, and therefore that the accused was also guilty of rape proper.² In *England* it has been held that under an indictment for the misdemeanor of carnally knowing a girl between the ages of ten and twelve years the defendant cannot be convicted on evidence that the girl was under ten years of age and that he was therefore guilty of rape.³

III. WHO MAY COMMIT RAPE — 1. In General. — From the nature of the crime of rape, it is, of course, apparent that the crime can be directly committed only by a male person;⁴ but a female person who aids and abets in the commission of the crime by a male person may be guilty as a principal in the second degree or as an accessory or accomplice.⁵ All male persons of sufficient physical capacity to perform the act of carnal intercourse may commit the crime of rape.⁶

Age. — All male persons over the age of fourteen years are presumed to be physically capable of committing the crime of rape unless the contrary appears.⁷ Under some of the statutes punishing the carnal knowledge of female children irrespective of consent, the criminality of the defendant and the degree of his punishment are made to depend upon his age, and not upon his physical capacity to commit the act of carnal intercourse.⁸

2. Impotent Persons. — No one can commit the crime of rape unless he has the physical capacity to perform the act of carnal knowledge, and therefore one who is impotent, irrespective of his age, cannot be guilty of the crime.⁹ So it has been held that impotency renders the accused incapable of committing the crime of attempt or assault with intent to commit rape,¹⁰ though in some jurisdictions in the United States it has been held that impotency was no defense to a prosecution for assault with intent to commit rape.¹¹

Drunkenness. — Though drunkenness is no defense where the crime of rape is consummated,¹² it may render the accused temporarily impotent and therefore totally incapable of committing the crime, and it is, of course, to be considered for such purpose;¹³ and where the prosecution is for assault with

State v. Sullivan, 68 Vt. 541; *State v. Erickson*, 45 Wis. 86.

1. *Nicholas v. State*, 23 Tex. App. 317. See also *Mobley v. State*, 46 Miss. 501.

2. *State v. Hamey*, 168 Mo. 167, *reversing* (Mo. 1901) 65 S. W. Rep. 946.

3. *Reg. v. Shott*, 3 C. & K. 206.

4. **Who May Commit Rape — Male Person Only.** — *State v. Williamson*, 22 Utah 248, 83 Am. St. Rep. 780.

5. **Female as Accessory or Accomplice.** — *Reg. v. Ram*, 17 Cox C. C. 609. See also *Rex v. Baltimore*, 4 Burr. 2179; *Kessler v. Com.*, 12 Bush (Ky.) 18.

Under the English statute which punishes the carnal knowledge of female children under a certain age, though they consent thereto, a female child who incites and solicits a male to have carnal knowledge of her person is not guilty as an aider or abettor of the consummated crime. *Reg. v. Tyrrell*, (1894) 1 Q. B. 710.

Attempt to Commit Rape. — *State v. Jones*, 83 N. Car. 605, 35 Am. Rep. 586.

6. **All Males May Commit.** — *Blair v. Com.*, 7 Bush (Ky.) 227; *Young v. Com.*, 2 Va. Cas. 328. See also *State v. Peter*, 8 Jones L. (53 N. Car.) 19.

7. **Presumption as to Male Over Fourteen.** — *State v. Handy*, 4 Harr. (Del.) 566.

8. *State v. Hall*, 164 Mo. 528; *State v. Huffman*, 39 Oregon 48; *State v. Knighten*, 39 Oregon 63; *Com. v. Goodhead*, 23 Pa. Co. Ct. 651; *McIntyre v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 104; *State v. Sullivan*, 68 Vt. 540.

9. **Impotency.** — *Nugent v. State*, 18 Ala. 521.

10. **Attempt or Assault to Commit Rape.** — *Reg. v. Williams*, (1893) 1 Q. B. 320; *Reg. v. Waite*, (1892) 2 Q. B. 600; *Nugent v. State*, 18 Ala. 521; *State v. McCune*, 16 Utah 170. See also the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 270.

11. *Territory v. Keyes*, 5 Dak. 244. And see the reference given in the last preceding note.

Impotency May Exist although there is power of penetration, if there is no power of emission. *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592.

12. **Drunkenness.** — *People v. Murray*, 72 Mich. 10; *State v. Murphy*, 118 Mo. 7. See also the title INTOXICATION, vol. 17, p. 403.

13. **Evidence of Drunkenness Incapacitating Defendant.** — *Nugent v. State*, 18 Ala. 521; *Jeffers v. State*, 10 Ohio Cir. Dec. 832, 20 Ohio Cir. Ct. 294.

intent to rape, drunkenness to such an extent as to render him unable to form the specific intent to ravish is a defense.¹

Aiding and Abetting. — An impotent person who aids and abets another to commit rape may be guilty of rape as a principal in the second degree or as an accomplice or accessory.²

Proof of Potency. — On an issue as to the impotency of the accused, it has been held that the burden is on the prosecution to prove potency,³ and to warrant a conviction this fact must, of course, be established beyond a reasonable doubt.⁴

3. Infants. — The capacity of infants to commit the crime of rape or of assault with intent to rape has been fully treated elsewhere in this work.⁵

4. Husband. — A husband does not commit rape by having carnal knowledge of his wife forcibly and against her will.⁶

A Husband Who Aids and Abets a Third Person to ravish his wife may be guilty as principal in the second degree, accomplice, or accessory.⁷

5. Accomplices and Accessories. — The crime of rape permits of accomplices and accessories, and all persons who aid and abet the commission of the crime, though they do not themselves have carnal knowledge of the woman ravished, may be punished as principals in the second degree or accessories;⁸

1. Inability to Form Intent. — See the title INTOXICATION, vol. 17, pp. 406, 411. See also *Reagan v. State*, 28 Tex. App. 227, 19 Am. St. Rep. 833 (stated under the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 263, note); *Crew v. State*, (Tex. Crim. 1893) 23 S. W. Rep. 14.

2. See *supra*, this section, *In General*; *infra*, this section, *Infants*. And see the title AIDER AND ABETTOR, vol. 2, p. 31.

3. Burden of Proving Potency. — *Jeffers v. State*, 10 Ohio Cir. Dec. 832, 20 Ohio Cir. Ct. 294. See also the title BURDEN OF PROOF, vol. 5, p. 33. But compare the title PRESUMPTIONS, vol. 22, p. 1286.

4. *State v. McCune*, 16 Utah 170.

5. See the titles ASSAULT AND BATTERY, vol. 2, p. 976, note 3; ATTEMPTS TO COMMIT CRIME, vol. 3, p. 270; INFANTS, vol. 16, p. 315. See also the following cases supporting the common-law rule: *People v. Ah Yek*, 29 Cal. 575; *Chism v. State*, 42 Fla. 232; *Word v. State*, 12 Tex. App. 174; *Foster v. Com.*, 96 Va. 306, 70 Am. St. Rep. 846.

As sustaining the view that the presumption is rebuttable, see *Bird v. State*, 110 Ga. 315; *Davidson v. Com.*, (Ky. 1898) 47 S. W. Rep. 213; *Com. v. Underhill*, Lewis's Crim. L. (Pa.) 102; *Com. v. Hummel*, 21 Pa. Co. Ct. 445, 4 Lack. Leg. N. (Pa.) 324, 7 Pa. Dist. 715; *State v. Coleman*, 54 S. Car. 162 (decided as to the statutory offense on a girl under fourteen years of age only).

Proof to Rebut Presumption. — See *People v. Randolph*, (Supm. Ct. Gen. T.) 2 Park. Crim. (N. Y.) 174; *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592; *Wagoner v. State*, 5 Lea (Tenn.) 352, 40 Am. Rep. 36.

Sufficiency of Proof of Defendant's Age. — See *Wilcox v. State*, 33 Tex. Crim. 392.

The Appearance alone of the defendant has been held to be insufficient legal evidence against him of either age or puberty. *Williams v. State*, 20 Fla. 777. Though, of course, the appearance of the defendant is evidence to be considered upon the question of his age. *State v. Huffman*, 39 Oregon 48. See also *State v. McNair*, 93 N. Car. 629.

Conviction as Aider and Abettor. — An infant under the age of fourteen years may, it seems, be convicted as a principal in the second degree. *Reg. v. Eldershaw*, 3 C. & P. 396, 14 E. C. L. 367 (dictum).

A Conviction for an Indecent or Common Assault may be sustained against an infant under fourteen years of age. *Reg. v. Williams*, (1893) 1 Q. B. 320; *Reg. v. Phillips*, 8 C. & P. 736, 34 E. C. L. 610; *Rex v. Eldershaw*, 3 C. & P. 396, 14 E. C. L. 367. And see generally the title ASSAULT AND BATTERY, vol. 2, p. 976.

6. Husband. — *State v. Haines*, 51 La. Ann. 731; *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549. See also *Gonzales v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1060; *State v. Williamson*, 22 Utah 248, 83 Am. St. Rep. 780.

As to the form of indictment in such cases, see the title RAPE, 17 ENCYC. OF PL. AND PR. 651.

7. Accomplice or Accessory. — *Audley's Case*, 3 How. St. Tr. 414; *State v. Haines*, 51 La. Ann. 731; *People v. Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857; *State v. Dowell*, 106 N. Car. 722, 19 Am. St. Rep. 568. See also *State v. Boyland*, 24 Kan. 186; *Com. v. Fogerty*, 8 Gray (Mass.) 489, 69 Am. Dec. 264. And see generally the titles ACCESSORY, vol. 1, p. 260; AIDER AND ABETTOR, vol. 2, p. 31.

8. Aiders and Abettors and Accessories — *England*. — *Reg. v. Hapgood*, L. R. 1 C. C. 221; *Rex v. Gray*, 7 C. & P. 164, 32 E. C. L. 480; *Reg. v. Crisham*, C. & M. 187, 41 E. C. L. 106; *Rex v. Folkes*, 1 Moody 354; *Reg. v. Ram*, 17 Cox C. C. 609.

Arkansas. — *Dennis v. State*, 5 Ark. 230.

District of Columbia. — *Keenan v. U. S.*, 2 Hayw. & H. (D. C.) 341.

Indiana. — *Greer v. State*, 50 Ind. 267, 19 Am. Rep. 709; *McGuire v. State*, 50 Ind. 284.

Iowa. — *State v. Comstock*, 46 Iowa 265.

Kentucky. — *Kessler v. Com.*, 12 Bush (Ky.) 18, *Clymer v. Com.*, (Ky. 1901) 64 S. W. Rep. 409.

Louisiana. — *State v. Williams*, 32 La. Ann. 335, 36 Am. Rep. 272; *State v. Haines*, 51 La. Ann. 731.

but a person who merely stands by when a rape is committed or attempted, and who does no act to aid, assist, or abet its commission,¹ or who merely has knowledge that a rape is being committed and does not interfere,² is not guilty.

In New Jersey it is held that a person who merely furnishes a room in which a male person may have carnal knowledge of a female child under the statutory age, with her consent, this being a misdemeanor, is not guilty as an accomplice or accessory.³

IV. UPON WHOM RAPE MAY BE COMMITTED — 1. In General. — Rape or assault with intent to commit rape can be committed only upon a female human being;⁴ but it is immaterial that such female is insane or idiotic.⁵

Daughter or Sister. — The crime of rape may be committed upon the sister or daughter of the accused though that crime may also constitute incest.⁶

2. Age of Victim. — Rape, attempt to commit rape, or assault with intent to commit rape may be committed upon any female human being, irrespective of her age,⁷ as upon a female child under the age at which carnal knowledge with her consent is made a statutory offense also designated as rape.⁸ Under the statutes which punish the carnal knowledge of any female "child" under a specified age, though she consents thereto, the term "child" includes a female infant under the specified age though she has reached the state of puberty.⁹

3. Chastity of Victim. — Rape, attempt to commit rape, or assault with intent to commit rape may be committed upon a female irrespective of her previous character and though she was a common prostitute.¹⁰

Michigan. — *People v. Flynn*, 96 Mich. 276; *People v. Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857.

Missouri. — *State v. Harris*, 150 Mo. 56.

New York. — *People v. Satterlee*, 5 Hun (N. Y.) 167; *People v. Batterson*, 50 Hun (N. Y.) 44; 6 N. Y. Crim. 173; *People v. Bowles*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 447.

North Carolina. — *State v. Jordan*, 110 N. Car. 491; *State v. Jones*, 83 N. Car. 605, 35 Am. Rep. 586.

Texas. — *Caruth v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 778.

1. *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

2. *Caruth v. State*, (Tex. Crim. 1894) 28 S. W. Rep. 532.

3. *State v. Jackson*, 65 N. J. L. 105.

4. **It Is Not Necessary to Allege in the Indictment**, however, either that the victim is a human being, *State v. Ward*, 35 Minn. 182; or that the victim is a female, if this appears by the use of a feminine name or a feminine pronoun, *State v. Armstrong*, 167 Mo. 257; *Battle v. State*, 4 Tex. App. 595, 30 Am. Rep. 169; *Taylor v. Com.*, 20 Gratt. (Va.) 825. See further the title **RAPE**, 17 ENCYC. OF PL. AND PR. 650, 651.

5. **Insane or Idiotic Woman.** — *State v. Crow*, 1 Ohio Dec. (Reprint) 586, 10 West. L. J. 501.

As to the capacity of persons of unsound mind to consent to the act of carnal knowledge, so as to prevent the act from being rape, see *infra*, this title, **Consent** — *Weak-minded, Insane, or Idiotic Woman*.

6. **Same Act Rape and Incest.** — *Bowles v. State*, 7 Ohio (pt. ii.) 243. See also the titles **INCEST**, vol. 16, p. 135; **MERGER**, vol. 20, p. 606, note.

7. **Age of Female Immaterial.** — *Coates v. State*, 50 Ark. 330; *Greer v. State*, 50 Ind. 267,

19 Am. Rep. 709; *Com. v. Sugland*, 4 Gray (Mass.) 7; *Bowles v. State*, 7 Ohio (pt. ii.) 243; *O'Meara v. State*, 17 Ohio St. 515; *Reg. v. Riopel*, 2 Can. Crim. Cas. (Quebec) 225, 8 Quebec L. R. 181 (stated under **MAN**, vol. 19, p. 705, note).

Female under Age of Puberty. — *Dawson v. State*, 29 Ark. 116; *Stephen v. State*, 11 Ga. 227.

An indictment designating a girl under twelve years of age who has not attained to puberty as a "woman" has been held good. *Com. v. Watts*, 4 Leigh (Va.) 673. *Contra*, *Sydney v. State*, 3 Humph. (Tenn.) 478.

8. **Children under Statutory Age of Consent.** — *Reg. v. Neale*, 1 C. & K. 591, 47 E. C. L. 591; *Vasser v. State*, 55 Ala. 264; *Charles v. States*, 11 Ark. 389; *State v. Gaul*, 50 Conn. 580; *Mobley v. State*, 46 Miss. 501; *People v. Draper*, 28 Hun (N. Y.) 1, 1 N. Y. Crim. 138; *State v. Farmer*, 4 Ired. L. (26 N. Car.) 224. See also *Hill v. State*, 3 Heisk. (Tenn.) 317. But see *Sydney v. State*, 3 Humph. (Tenn.) 478; *Brown v. State*, 6 Baxt. (Tenn.) 422; *Rhodes v. State*, 1 Coldw. (Tenn.) 351; *Com. v. Bennet*, 2 Va. Cas. 235.

The Creation of a Special Statutory Crime Consisting in Carnal Intercourse with a Girl under a Certain Age does not prevent a rape being committed on a child under that age. *Reg. v. Dicken*, 14 Cox C. C. 8; *Reg. v. Ratcliffe*, 10 Q. B. D. 74, 15 Cox C. C. 127; *State v. Warden*, 46 Conn. 362, 33 Am. Rep. 27.

9. **"Child."** — *People v. Miller*, 96 Mich. 119; *State v. Wright*, 25 Neb. 38 (stated under the title **CHILD** — **CHILDREN**, vol. 5, p. 1083, note).

10. **Chastity of Female Immaterial** — *England*. — *Audley's Case*, 3 How St. Tr. 414.

Alabama. — *Barnett v. State*, 83 Ala. 40; *Dryman v. State*, 102 Ala. 130.

Arkansas. — *Pleasant v. State*, 13 Ark. 360.

The Alleged Victim's Character for Chastity is involved, however, as bearing on the question of consent.¹

Statutory Requirement of Chastity. — Some statutes punishing the carnal knowledge of female children beneath a certain age require between certain ages that the female should have been chaste or of previous good repute;² but if the statute does not contain this requirement the unchastity of the child is immaterial.³

V. CARNAL KNOWLEDGE — 1. In General. — Carnal knowledge by the man of the person of the female is an essential element to the crime of rape,⁴ but the fact of carnal knowledge may be proved by circumstantial evidence.⁵

2. Penetration. — Essential to the carnal knowledge of a female is penetration, that is, the virile member of the male must have been within the labia of the pudendum of the female; but the slightest penetration, as thus defined, is sufficient.⁶ Actual contact merely of the sexual organ of the male with

Florida. — *Rice v. State*, 35 Fla. 236, 48 Am. St. Rep. 245.

Illinois. — *Johnson v. People*, 197 Ill. 48.

Indiana. — *Richie v. State*, 58 Ind. 355; *Anderson v. State*, 104 Ind. 467.

Iowa. — *State v. Fernald*, 88 Iowa 553.

Kentucky. — *Pugh v. Com.*, (Ky. 1888) 7 S. W. Rep. 541, 8 S. W. Rep. 340; *Neace v. Com.*, (Ky. 1901) 62 S. W. Rep. 733.

Nevada. — *State v. Campbell*, 20 Nev. 122.

New York. — *Higgins v. People*, 1 Hun (N. Y.) 307, affirmed 58 N. Y. 377.

Texas. — *Favors v. State*, 20 Tex. App. 155; *Steinke v. State*, 33 Tex. Crim. 65.

Utah. — *State v. McCune*, 16 Utah 170.

Virginia. — *Givens v. Com.*, 29 Gratt. (Va.) 830; *Fry v. Com.*, 82 Va. 334.

See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 871, note.

Though the Woman Has Consented to Previous Intercourse, the crime may be committed. *State v. Long*, 93 N. Car. 542; *Wright v. State*, 4 Humph. (Tenn.) 194.

1. Character for Chastity. — See the title CHARACTER (IN EVIDENCE), vol. 5, pp. 853, 871; and *infra*, this title, *Consent; Evidence*.

2. Carnal Knowledge of Children — Chastity Essential by Statute. — *People v. Mills*, 94 Mich. 630; *Young v. Territory*, 8 Okla. 525; *Com. v. Allen*, 135 Pa. St. 483.

Evidence of subsequent unchastity is inadmissible. *State v. Knox*, 142 Mo. 515.

Character as distinguished from reputation is involved. *Com. v. Davis*, 3 Pa. Dist. 271; *Com. v. Goodhead*, 23 Pa. Co. Ct. 651.

Previous Intercourse with the Defendant Alone out of the state will render the female previously unchaste within the meaning of the *Nebraska* statute. *Bailey v. State*, 57 Neb. 706, 73 Am. St. Rep. 540.

The Girl Need Not Be a Virgin, and a chaste life for six or seven years prior to submitting to the defendant has been held to establish her chastity. *People v. Mills*, 94 Mich. 630. See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 871, note.

The Defendant's Ignorance of the Unchastity of the Prosecutrix is immaterial; the fact acquits him. *Com. v. Goodhead*, 23 Pa. Co. Ct. 651.

3. Statutes Not Requiring Chastity. — *People v. Johnson*, 106 Cal. 289; *State v. Gaul*, 50 Conn. 578; *Holton v. State*, 28 Fla. 303; *People v. Glover*, 71 Mich. 303; *People v. Abbott*, 97

Mich. 484, 37 Am. St. Rep. 360; *State v. Duffey*, 128 Mo. 549; *George v. State*, 61 Neb. 669; *State v. Hilberg*, 22 Utah 27; *State v. Williamson*, 22 Utah 248, 83 Am. St. Rep. 780.

This is true as to younger children in some of the states where prior chastity is required when the girl is below the age of consent, but above a certain age. See the cases cited in this note and that immediately preceding.

4. Actual Carnal Knowledge Required. — *Wesley v. State*, 65 Ga. 731; *Shirwin v. People*, 69 Ill. 55; *State v. Crawford*, 39 Kan. 257. See also CARNAL KNOWLEDGE, vol. 5, p. 150.

5. Circumstantial Evidence. — *Hanes v. State*, 155 Ind. 112; *State v. Welch*, (Oregon 1902) 68 Pac. Rep. 808.

6. Penetration Required — England. — *Audley's Case*, 3 How. St. Tr. 403; *Fitz Patrick's Case*, 3 How. St. Tr. 419.

California. — *People v. Rangod*, 112 Cal. 669; *People v. Harlan*, 133 Cal. 16.

Connecticut. — *State v. Shields*, 45 Conn. 259.

Delaware. — *State v. Burton*, *Houst. Crim. Cas.* (Del.) 363.

Florida. — *Ellis v. State*, 25 Fla. 702.

Georgia. — *Morris v. State*, 54 Ga. 440; *Wesley v. State*, 65 Ga. 731; *Brown v. State*, 76 Ga. 623.

Illinois. — *Bean v. People*, 124 Ill. 576.

Indiana. — *Taylor v. State*, 111 Ind. 279.

Iowa. — *State v. Watson*, 81 Iowa 380; *State v. Kyne*, 86 Iowa 616; *State v. Carnagy*, 106 Iowa 483.

Kansas. — *State v. Grubb*, 55 Kan. 678.

Kentucky. — *White v. Com.*, 96 Ky. 180.

Michigan. — *People v. Courier*, 79 Mich. 366; *People v. Bernor*, 115 Mich. 692.

Minnesota. — *State v. Rollins*, 80 Minn. 216.

Missouri. — *State v. Dalton*, 106 Mo. 463.

New York. — *People v. Crowley*, 102 N. Y. 234; *People v. Tench*, 167 N. Y. 520.

North Carolina. — *State v. Monds*, 130 N. Car. 697.

South Carolina. — *State v. Le Blanc*, *Mill* (S. Car.) 354.

Texas. — *Davis v. State*, 42 Tex. 226; *Davis v. State*, 43 Tex. 189; *Jenkins v. State*, 1 Tex. App. 346; *Word v. State*, 12 Tex. App. 174; *Johnson v. State*, 27 Tex. App. 163; *McGee v. State*, 21 Tex. App. 670; *Blair v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 622.

Virginia. — *Bailey v. Com.*, 82 Va. 107, 3 Am. St. Rep. 87.

the organ of the female,¹ or emission without penetration,² is not sufficient to constitute rape.

Proof of Penetration. — The fact of penetration may be proved by circumstantial evidence.³ No particular form of words on the part of a witness testifying to the fact of penetration is necessary,⁴ nor is expert testimony necessary to such fact.⁵ But to warrant a conviction the jury must be satisfied beyond a reasonable doubt that there was a penetration.⁶

3. Emission — English Doctrine. — In the earliest English decisions it was held that emission was not essential to the consummation of the crime of rape.⁷ At a later date, however, it was expressly adjudged that emission as well as penetration was essential.⁸ After this decision the statute 9 Geo. IV., c. 31, § 18, was enacted, which provided that in prosecutions for rape proof of penetration alone should be sufficient and dispensed with proof of emission; and the same proof is sufficient in prosecutions for the crime of carnally knowing children under the prohibited age.⁹

Wisconsin. — Brauer v. State, 25 Wis. 413; Hardtke v. State, 67 Wis. 552; Murphy v. State, 108 Wis. 111.

See also Chambers v. State, 46 Neb. 447.

Rupture of Hymen Unnecessary. — Rex v. Russen, 1 East P. C. 438; Reg. v. Lines, 1 C. & K. 393, 47 E. C. L. 393; Reg. v. Jordan, 9 C. & P. 118, 38 E. C. L. 63; Reg. v. Hughes, 2 Moody 190, 9 C. & P. 752, 38 E. C. L. 320; Taylor v. State, 111 Ind. 279; Com. v. Hollis, 170 Mass. 433; People v. Courier, 79 Mich. 366. See also the title MEDICAL JURISPRUDENCE, vol. 20, p. 534.

But the fact that the hymen is intact is some proof that there has been no penetration. Reg. v. M'Rue, 8 C. & P. 641, 34 E. C. L. 562.

In the Statutory Crime of Carnal Knowledge of Female Children the requirement is the same. Reg. v. Lines, 1 C. & K. 393, 47 E. C. L. 393; Reg. v. Stanton, 1 C. & K. 415, 47 E. C. L. 415; Rex v. Russen, 1 East P. C. 438; People v. Rangod, 112 Cal. 669; White v. Com., 96 Ky. 180; Com. v. Hollis, 170 Mass. 433.

"Abusing" in Statute Defining Crime Equivalent to "Knowing" — Penetration Essential. — State v. Monds, 130 N. Car. 697. See also Chambers v. State, 46 Neb. 447.

But in the *Alabama* statute the word "abuse" has been held to include injuries to the genitals falling short of penetration. Dawkins v. State, 58 Ala. 376, 29 Am. Rep. 754. See also ABUSE AND MISUSE, vol. 1, p. 222, note.

1. Contact Insufficient. — State v. Grubb, 55 Kan. 678; White v. Com., 96 Ky. 180. See also Territory v. Eddie, 6 N. Mex. 555.

2. Emission Without Penetration. — 1 East P. C., c. 10, § 3; 1 Hale P. C. 628; State v. Sullivan, Add. (Pa.) 143. See also Audley's Case, 3 How. St. Tr. 414.

3. Proof of Penetration — Circumstantial Evidence — Indiana. — Taylor v. State, 111 Ind. 279.

Iowa. — State v. Tarr, 28 Iowa 397; State v. Carnagy, 106 Iowa 483.

Kentucky. — White v. Com., 96 Ky. 180.

Massachusetts. — Com. v. Hollis, 170 Mass. 433.

Michigan. — People v. Scouten, (Mich. 1902) 90 N. W. Rep. 332, 9 Detroit Leg. N. 157.

Pennsylvania. — Com. v. Senak, 9 Kulp (Pa.) 558.

Wisconsin. — Brauer v. State, 25 Wis. 413.

See also People v. Mayes, 66 Cal. 597, 56 Am. Rep. 126; Shirwin v. People, 69 Ill. 55; State v. Armstrong, 167 Mo. 257; Belcher v. State, (Tex. Crim. 1898) 44 S. W. Rep. 519.

Proof of Penetration Held to Be Sufficient. — State v. Depoister, 21 Nev. 107; Word v. State, 12 Tex. App. 174; Proctor v. State, (Tex. Crim. 1901) 65 S. W. Rep. 368.

Occupation of Same Bed. — State v. Welch, (Oregon 1902) 68 Pac. Rep. 808.

Proof of Penetration Held to Be Insufficient. — People v. Tench, 167 N. Y. 520, reversing 59 N. Y. App. Div. 627; Davis v. State, 43 Tex. 189; Davis v. State, 42 Tex. 226; Blair v. State, (Tex. Crim. 1900) 56 S. W. Rep. 622; Hardtke v. State, 67 Wis. 552.

4. No Particular Form of Words Necessary. — State v. Hodges, Phil. L. (61 N. Car.) 231; Duckworth v. State, (Tex. Crim. 1901) 63 S. W. Rep. 874; Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87.

5. Expert Evidence. — Comstock v. State, 14 Neb. 205.

But it has been said to be advisable where the victim is a young child to have an examination by a physician. Davis v. State, 42 Tex. 226.

6. Quantum of Proof. — Davis v. State, 43 Tex. 189; Word v. State, 12 Tex. App. 174. Compare State v. Depoister, 21 Nev. 107.

7. Emission — English Rule. — 1 Hale P. C. 628; Rex v. Sheridan, 1 East P. C. 438. See, however, Cave's Case, 1 East P. C. 438; Rex v. Blomfield, 1 East P. C. 438.

* If there was penetration, emission within the person of the female was not required, but it was considered rape if the accused withdrew himself and emitted upon the body of the female. Audley's Case, 3 How. St. Tr. 414.

8. Hill's Case, 1 East P. C. 439. See also Rex v. Burrows, R. & R. C. C. 519.

But Emission Might Be Presumed Prima Facie from the fact of penetration. Hill's Case, 1 East P. C. 439; Harmwood's Case, 1 East P. C. 440; Rex v. Flemming, 1 East P. C. 440; Rex v. Burrows, R. & R. C. C. 519.

9. Statute Making Penetration Sufficient. — Reg. v. Allen, 9 C. & P. 31, 38 E. C. L. 24; Reg. v. Marsden, (1891) 2 Q. B. 149, 17 Cox C. C. 297; Rex v. Jennings, 4 C. & P. 249, 19 E. C. L. 368, 1 Lewin C. C. 93; Rex v. Reek-

United States Doctrine. — In the United States, with few exceptions, the rule has always been that emission was not essential to the crime of rape or to the statutory crime of having carnal knowledge of a child below the age of consent;¹ and in some jurisdictions this rule is expressly recognized by statute.²

VI. FORCE. — Force, actual or constructive, is an essential element in the crime of rape, but any, even the least, force is sufficient.³

As to What Amounts to Force, different views have been taken by different courts. It is plain that something more is required than the bodily contact necessarily implied in the act of sexual intercourse when consummated with the consent of the woman.⁴ On the other hand, force may exist without actual violence.⁵ Whether force was used very generally depends on the

spear, 1 Moody 342; *Rex v. Cozins*, 6 C. & P. 351, 25 E. C. L. 434.

See as to *Scotland*, *Robertson's Case*, 1 Swinton 93.

1. United States — Emission Generally Not Essential. — *Waller v. State*, 40 Ala. 325; *State v. Smith*, 9 Houst. (Del.) 588; *Ellis v. State*, 25 Fla. 702; *Barker v. State*, 40 Fla. 178; *State v. Rollins*, 80 Minn. 216; *Comstock v. State*, 14 Neb. 205; *State v. Sullivan*, Add. (Pa.) 143.

2. *Taylor v. State*, 111 Ind. 279; *Johnson v. State*, 27 Tex. App. 163; *Lujano v. State*, 32 Tex. Crim. 414; *Serio v. State*, 22 Tex. App. 633; *Rodgers v. State*, 30 Tex. App. 510. And see generally the statutes of the various states.

In *North Carolina* and *Ohio* earlier cases followed the law as laid down in *England* before the statute of 9 Geo. IV. *State v. Gray*, 8 Jones L. (53 N. Car.) 170; *Williams v. State*, 14 Ohio 222, 45 Am. Dec. 536; *Blackburn v. State*, 22 Ohio St. 102. But statutes having the same effect as the English statute have been enacted in these jurisdictions. *State v. Hodges*, Phil. L. (61 N. Car.) 231; *State v. Monds*, 130 N. Car. 697; *Hiltabiddle v. State*, 35 Ohio St. 52, 35 Am. Rep. 592.

3. Force — Alabama. — *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *McNair v. State*, 53 Ala. 453; *Vasser v. State*, 55 Ala. 264; *Dawkins v. State*, 58 Ala. 376, 29 Am. Rep. 754; *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

Arkansas. — *Bradley v. State*, 32 Ark. 704.

California. — *People v. Royal*, 53 Cal. 62.

Delaware. — *State v. Burton*, Houst. Crim. Cas. (Del.) 363; *State v. Riggs*, Houst. Crim. Cas. (Del.) 120.

Florida. — *Cato v. State*, 9 Fla. 163.

Indiana. — *Mills v. State*, 52 Ind. 187.

Kentucky. — *Brown v. Com.*, 102 Ky. 227.

Louisiana. — *State v. Williams*, 32 La. Ann. 335, 36 Am. Rep. 272.

Maine. — *State v. Blake*, 39 Me. 322.

Massachusetts. — *Com. v. Scannel*, 11 Cush. (Mass.) 547; *Com. v. Fogerty*, 8 Gray (Mass.) 489, 69 Am. Dec. 264.

Michigan. — *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774; *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283.

Mississippi. — *Monroe v. State*, 71 Miss. 196.

Missouri. — *State v. Cunningham*, 100 Mo. 382.

New York. — *Walter v. People*, 50 Barb. (N. Y.) 144, 6 Am. L. Reg. N. S. 746.

North Carolina. — *State v. Johnson*, 67 N. Car. 55.

Tennessee. — *Wyatt v. State*, 2 Swan (Tenn.) 394.

Texas. — *Jenkins v. State*, 1 Tex. App. 346; *Bladwin v. State*, 15 Tex. App. 275; *Walton v. State*, 29 Tex. App. 163; *Gutierrez v. State*, 44 Tex. 587; *Williams v. State*, (Tex. App. 1890) 13 S. W. Rep. 609.

Virginia. — *Mings v. Com.*, 85 Va. 638.

4. What Amounts to Force. — *Per May, C. J.*, in *Reg. v. Dee*, 15 Cox C. C. 579 (a case decided in the Court for Crown Cases Reserved in *Ireland*, the judges refusing to follow English precedents; *Reg. v. Sweeney*, 8 Cox C. C. 223. In the last case, decided in *Scotland* in the High Court of Justiciary, Lord Ardmillan observed: "I am of opinion that force, actual or constructive, is an essential element in the crime of rape; that any mode of overpowering the will without actual personal violence, such as the use of threats or drugs, is force in the estimation of law; and that any degree of force is sufficient in law to constitute the crime of rape if it is sufficient in fact to overcome the opposing will of the woman, but it must be force employed to overcome the will; and I do not concur in the proposition maintained by the prosecutor, that the mere bodily contact necessarily implied in the act of connection is sufficient force to satisfy the legal definition." Lord Cowan said: "What is requisite is the forcibly taking possession of the woman's person and having connection with her, her will resisting; or if not resisting, her will having been overcome by felonious acts of the assailer." See also *Walters v. People*, 50 Barb. (N. Y.) 144; *Baldwin v. State*, 15 Tex. App. 275.

Where the Woman Is Insensible and therefore incapable of consenting, the force necessary to the performance of the sexual act is sufficient to render such act rape. *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381; *Com. v. Burke*, 105 Mass. 376, 7 Am. Rep. 531 (quoted under AGAINST, vol. 1, p. 926); *Payne v. State*, 40 Tex. Crim. 202, 76 Am. St. Rep. 712. But compare *Reg. v. Sweeney*, 8 Cox C. C. 223 (a Scotch case). See also *infra*, this title, *Consent*.

Woman Taken by Surprise. — See *Reg. v. Stanton*, 1 C. & K. 415, 47 E. C. L. 415, stated under the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 261, note.

5. Force May Exist Without Violence. — *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283, the court saying: "We think it is well and properly settled that the terms 'by force' do not necessarily imply the positive exertion

question whether the woman consented to the act; ¹ and this is fully discussed in a subsequent section.²

Force Must Relate to Carnal Knowledge. — The element of force must relate to the act of carnal knowledge. Thus, breaking into a dwelling house and having carnal knowledge of a female therein by fraudulently procuring her consent does not involve a sufficient element of force to render the act rape.³

Arts or Devices to Corrupt Moral Nature. — So any employment of arts or devices, without violence, by which the moral nature of the female is corrupted so that she is no longer able to resist the temptation to yield to sexual desire does not involve a sufficient element of force.⁴

Carnally Knowing Children under Statutory Age — Whether Force Essential. — The statutory crime, though designated as rape, of carnally knowing female children under a certain age does not, it seems, involve any element of force, actual or constructive.⁵ In some cases, however, it has been said that the element of force in such cases is implied from the carnal act and the incapacity of the infant to consent.⁶

VII. CONSENT — 1. In General. — An essential element in the crime of rape is that the act of intercourse should have been against the will or without the consent of the woman.⁷

2. Consent Before Rape Completed. — Consent of the woman at any time before penetration will prevent the act from constituting rape though the

of actual physical force in the act of compelling submission of the female to the sexual connection; but that force or violence threatened as the result of noncompliance, and for the purpose of preventing resistance or extorting consent, if it be such as to create a real apprehension of dangerous consequences or great bodily harm, or such as in any manner to overpower the mind of the victim so that she dare not resist, is, and upon all sound principles must be, regarded for this purpose as in all respects equivalent to force actually exerted for the same purpose." To the same effect see *Clymer v. Com.*, (Ky. 1901) 64 S. W. Rep. 409; *State v. Hann*, 73 Minn. 130; *Hays v. People*, 1 Hill (N. Y.) 351, stated under the title *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 258, note.

As to Submission Secured by Threats, see *infra*, this title, *Consent — Submission Distinguished from Consent*.

1. Force as Depending on Consent. — In *Reg. v. Dee*, 15 Cox C. C. 579, commenting on certain English cases which held that consent obtained by fraudulently personating a woman's husband was sufficient to prevent the crime being rape, but that the defendant might be guilty of an assault, *May, C. J.*, said: "If the consent of the woman prevented the crime being a rape, it would seem that it would also prevent it being an assault, which consent excludes."

For the doctrine as to force in assault, see the title *ASSAULT AND BATTERY*, vol. 2, pp. 959, 986.

Force Implied Where Consent Absent. — *State v. Riggs*, *Houst. Crim. Cas.* (Del.) 120; *Pomeroy v. State*, 94 Ind. 96, 48 Am. Rep. 146; *Mings v. Com.*, 85 Va. 638. See also *Cato v. State*, 9 Fla. 163; *State v. Philpot*, 97 Iowa 365; *State v. Beabout*, 100 Iowa 155.

2. See *infra*, this title, *Consent*.

3. Act of Intercourse Must Be by Force. — *McNair v. State*, 53 Ala. 453; *Wyatt v. State*, 2 Swan (Tenn.) 394.

4. Corrupting Moral Nature. — *People v. Royal*, 53 Cal. 62.

5. Intercourse with Children under Statutory Age. — *People v. Courier*, 79 Mich. 366; *Exon v. State*, (Tex. Crim. 1895) 33 S. W. Rep. 336. See also *State v. Black*, 63 Me. 210; *Wood v. State*, 46 Neb. 58.

6. Com. v. Sugland, 4 Gray (Mass.) 7; *People v. McDonald*, 9 Mich. 150; *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774.

7. Want of Consent — England. — *Reg. v. Jones*, 4 L. T. N. S. 154.

Alabama. — *Dawkins v. State*, 58 Ala. 376, 29 Am. Rep. 754.

Arizona. — *Territory v. Potter*, 1 Ariz. 421.

Georgia. — *Pounds v. State*, 95 Ga. 475.

Iowa. — *Pollard v. State*, 2 Iowa 567; *State v. Gaston*, 96 Iowa 505; *State v. Austin*, 109 Iowa 118.

Kentucky. — *King v. Com.*, (Ky. 1892) 20 S. W. Rep. 224; *Neace v. Com.*, (Ky. 1901) 62 S. W. Rep. 733.

Massachusetts. — *Com. v. Sugland*, 4 Gray (Mass.) 10.

Michigan. — *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774; *Strang v. People*, 24 Mich. 1; *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283; *Rogers v. People*, 34 Mich. 345.

Missouri. — *State v. Cunningham*, 100 Mo. 382.

New York. — *People v. Maxon*, 57 Hun (N. Y.) 367; *Woodin v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 464.

Texas. — *Coates v. State*, 2 Tex. App. 16; *Reed v. State*, 27 Tex. App. 317.

"Without Her Consent" and "Against Her Consent." — Where the definition of rape contains the phrase "without her consent," a mere absence of consent, as in the case of a sleeping woman or a woman incapable of consent from drunkenness or imbecility, is said to render the act rape. Where the phrase "against her consent" is used, a positive dissent is said to be necessary. *Reg. v. Fletcher*, *Bell Cr. Cas.*

assault, when first made, was against her will, and though she expressly refused at first to consent to intercourse;¹ but if the assault in the first instance was with the intent to have carnal knowledge of the woman with or without her consent, and to use any force necessary to overcome her resistance, the woman's subsequent consent to the act of intercourse will not prevent the act from constituting assault with intent to commit rape.²

3. Subsequent Consent. — The consent of the female after an act of sexual intercourse effected against her will has been completed cannot prevent the defendant from being guilty of rape.³ Whether consent given after penetration has been effected (which constitutes the crime of rape), but before the act of intercourse has been finished, is sufficient to negative rape is, perhaps, not clear. It has been said that consent during any part of the act of intercourse relieves the defendant from the guilt of rape.⁴

4. Withdrawal of Consent. — Consent to an act of sexual intercourse may be withdrawn at any time before the act is completed, and if it is so withdrawn and the defendant afterwards effects penetration he is guilty of rape.⁵

5. Sleeping Woman. — Carnal knowledge of a woman while she is asleep, her body being penetrated before she awakes, is against her will and without her consent so as to constitute rape.⁶

6. Unconscious, Drunken, or Drugged Woman. — Sexual intercourse with a woman while she is unconscious has been held to be against the will of the woman and without her consent so as to constitute rape.⁷

63, 8 Cox C. C. 131; *Mooney v. State*, 29 Tex. App. 257. Other authorities declare the expressions synonymous, and hold that where the woman is incapable of giving consent, the act is against her consent or will. *Reg. v. Dee*, 15 Cox C. C. 579 (an Irish case); *Payne v. State*, 40 Tex. Crim. 202, 76 Am. St. Rep. 712, *disapproving the Texas case* just cited. See also *AGAINST*, vol. I, p. 926, where quotations from authorities are given.

Consent to Familiarities is not consent to intercourse. *Johnson v. People*, 197 Ill. 48.

Conditional Consent. — See *State v. Long*, 93 N. Car. 542, stated in the title *ASSAULT AND BATTERY*, vol. 2, p. 987, note.

1. Consent Before Rape Completed — *England*. — *Reg. v. Hallett*, 9 C. & P. 748, 38 E. C. L. 318.

Alabama. — *Dawkins v. State*, 58 Ala. 376, 29 Am. Rep. 754.

Arizona. — *Territory v. Potter*, 1 Ariz. 421.

California. — *People v. Royal*, 53 Cal. 62.

Georgia. — *Mathews v. State*, 101 Ga. 547;

Taylor v. State, 110 Ga. 150.

Iowa. — *State v. Cross*, 12 Iowa 66, 79 Am. Dec. 519; *State v. Atherton*, 50 Iowa 189, 32 Am. Rep. 134.

Michigan. — *Brown v. People*, 36 Mich. 203.

Missouri. — *State v. Burgdorf*, 53 Mo. 65; *State v. Cunningham*, 100 Mo. 382.

Wisconsin. — *Connors v. State*, 47 Wis. 523; *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856.

2. Where Intent to Rape Exists, though Woman Ultimately Yields. — *Joice v. State*, 53 Ga. 50; *State v. Delong*, 96 Iowa 471; *People v. Marrs*, 125 Mich. 376; *State v. Bagan*, 41 Minn. 285; *State v. Montgomery*, 63 Mo. 296; *Reynolds v. State*, 27 Neb. 90, 20 Am. St. Rep. 659; *McClearland v. State*, 24 Tex. App. 202. See also the title *ASSAULT AND BATTERY*, vol. 2, p. 987.

3. Subsequent Consent. — *Com. v. Slattery*, 147 Mass. 423; *State v. Hammond*, 77 Mo.

157; *Wright v. State*, 4 Humph. (Tenn.) 194. See generally the title *CRIMINAL LAW*, vol. 8, p. 294.

4. *Brown v. People*, 36 Mich. 203. See also *State v. Ward*, 73 Iowa 532; *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856.

5. Withdrawal of Consent. — *State v. McCaffrey*, 63 Iowa 479.

As to Withdrawal of Consent During the Act there is said to be no universal rule, and the facts of the case are to be considered, such as the age and relative strength of the parties. *State v. Niles*, 47 Vt. 82. In this case, under the circumstances, a charge was approved that a dissent by the girl at any stage of the intercourse was enough to render the act rape. But see dicta in *State v. McCaffrey*, 63 Iowa 479.

6. Sleeping Woman. — *Reg. v. Young*, 14 Cox C. C. 114; *Malone v. Com.*, 91 Ky. 307; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344; *Payne v. State*, 40 Tex. Crim. 202, 76 Am. St. Rep. 712. See also *Pollard v. State*, 2 Iowa 567. But compare *Reg. v. Sweeney*, 8 Cox C. C. 223; *Mooney v. State*, 29 Tex. App. 257.

The Same Principle Mutatis Mutandis Applies in Regard to Attempts to Commit Rape. — *Maupin v. State*, (Ark. 1890) 14 S. W. Rep. 924; *State v. Dalton*, 106 Mo. 463. See also *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25; *Edwards v. State*, 37 Tex. Crim. 242, and the title *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 260. See, however, *Passmore v. State*, 29 Tex. App. 241.

7. Unconscious Woman. — *Reg. v. Ryan*, 2 Cox C. C. 115; *Com. v. Burke*, 105 Mass. 377, 7 Am. Rep. 531; *Com. v. Childs*, 2 Pittsb. (Pa.) 398. See also *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Shirwin v. People*, 69 Ill. 55.

Intoxicating Liquor Administered by Defendant to Victim. — *Reg. v. Camplin*, 1 C. & K. 746, 47 E. C. L. 746, 1 Cox C. C. 220.

7. Weak-minded, Insane, or Idiotic Woman. — Sexual intercourse with an insane or idiotic woman whose mind, to the knowledge of the man, is totally incapable of consenting to the act is rape though she submits to the act without resistance, as in such a case the intercourse is without her consent and against her will.¹ If, however, the female, though weak-minded or idiotic, consents to the intercourse from animal instincts, passion, or morbid desires, the act is not rape.²

8. Fraud. — Where the female consents to the sexual intercourse, the act cannot be said to be against her will or without her consent though the consent is procured by fraud, and it is the generally recognized rule that her consent thus procured will prevent the act from constituting rape.³

Statutes Rendering Intercourse Procured by Fraud Rape have been enacted in some of the *United States*.⁴

Fraud of Physician. — Where a physician has sexual intercourse with a female patient with her consent, though her consent is procured by a fraudulent representation that such act is necessary to her medical treatment, the act does not constitute rape.⁵ It is otherwise, however, where the patient is a

Chloroform Administered to Victim. — *State v. Green*, 2 Ohio Dec. (Reprint) 255, 2 West. L. Month. 185.

Attempts to Administer Drugs. — See the title *ATTEMPTS TO COMMIT CRIME*, vol. 3, pp. 260, 261, notes.

Statutes Declaring Such Offense to Be Rape. — *People v. Snyder*, 75 Cal. 323; *People v. Vann*, 129 Cal. 118; *People v. O'Brien*, 130 Cal. 1; *Territory v. Elie*, 6 N. Mex. 555; *Ford v. State*, 41 Tex. Crim. 270.

Crime Made by Statute Distinct Offense Not Rape. — See *People v. Quin*, 50 Barb. (N. Y.) 125. But compare *Pen. Code N. Y.*, § 278.

1. Weak-minded, Insane, or Idiotic Woman. — *Reg. v. Fletcher*, Bell Cr. Cas. 63, 5 Jur. N. S. 179, 8 Cox C. C. 131; *State v. Williams*, 149 Mo. 496. See also *Reg. v. Ryan*, 2 Cox C. C. 115; *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *State v. Atherton*, 50 Iowa 189, 32 Am. Rep. 134; *State v. Tarr*, 28 Iowa 397; *Stephen v. State*, 11 Ga. 227; and the title *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 260.

It would seem that the man must know of the woman's absolute incapacity to assent or dissent and must intend to take advantage of such incapacity. *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774. But the line of demarcation between the preceding cases and those in the note following appear to lack definiteness in the present state of adjudication.

The Mental Condition of the Woman Is an Important Consideration in determining whether her submission amounted to consent. *State v. Tarr*, 28 Iowa 397; *State v. McDonough*, 104 Iowa 6. See also *State v. Huff*, 164 Mo. 480; *Segrest v. State*, (Tex. Crim. 1900) 57 S. W. Rep. 845. And see *infra*, this section, *Resistance*.

Statutes Declaring Such Connection to Be Rape. — *State v. Enright*, 90 Iowa 520; *State v. Austin*, 109 Iowa 118; *State v. Hann*, 73 Minn. 140; *State v. Crow*, 1 Ohio Dec. (Reprint) 586. 10 West. L. J. 501.

Ignorance of the Female's Mental Condition is no defense to a conviction under such a statute. *People v. Griffith*, 117 Cal. 583, 59 Am. St. Rep. 216. See also *Caruth v. State*, (Tex. Crim. 1894) 25 S. W. Rep. 778.

Admissibility of Evidence to Prove Mental Condition. — *People v. Griffin*, 117 Cal. 583, 59 Am. St. Rep. 216.

Sufficiency of Proof of Mental Incapacity. — *Thompson v. State*, 33 Tex. Crim. 472; *Lee v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1047.

2. Weak-minded Female Animated by Animal Passion. — *Reg. v. Fletcher*, 10 Cox C. C. 248; *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774; *State v. Cunningham*, 100 Mo. 382; *Baldwin v. State*, 15 Tex. App. 275; *Rodriguez v. State*, 20 Tex. App. 542. See also *Reg. v. Fletcher*, 8 Cox C. C. 131, *per Willes, J.*; *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

When the woman is insane or idiotic, mere proof of connection will not warrant the case being left to the jury; there must be some evidence that the act was without her consent — *e. g.*, that she was incapable of expressing consent or dissent, or of exercising any judgment upon the matter, from imbecility of mind or defect of understanding; if she consented from animal instinct or passion, it would not be rape. *Reg. v. Connolly*, 26 U. C. Q. B. 317.

3. Consent Procured by Fraud. — *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Peasant v. State*, 13 Ark. 360; *Com. v. Childs*, 2 Pittsb. (Pa.) 391; *Bloodworth v. State*, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546. See also the title *ATTEMPTS TO COMMIT CRIME*, vol. 3, p. 260.

4. Statutory Provisions. — *Williams v. State*, 1 Tex. App. 90; *Franklin v. State*, 34 Tex. Crim. 203; *Payne v. State*, 38 Tex. Crim. 494, 70 Am. St. Rep. 757, 40 Tex. Crim. 202, 76 Am. St. Rep. 712. And see the local statutes.

To constitute "fraud" under the *Texas* statute in personating the female's husband the man must use some stratagem for the purpose of inducing her thus to believe. *Muoney v. State*, 29 Tex. App. 257.

Reasonable Doubt as to the Female's Knowledge of Actual Identity of the accused, alleged to have personated her husband, requires acquittal. *Ledbetter v. State*, 33 Tex. Crim. 400.

5. Fraud of Physician. — *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283; *Walter v. People*, 50 Barb. (N. Y.) 144. See also *State v. Nash*, 109 N. Car. 824.

child and does not understand the nature of the act.¹

Personating Husband. — Again, where a man secures the consent of a married woman to sexual intercourse by personating her husband, he is not guilty of rape;² but if the woman, before penetration, discovers the fraud on the part of the man, and he, instead of desisting, completes his purpose notwithstanding her resistance and dissent, he is guilty of rape.³

Mock Marriage. — So where the consent of a woman to sexual intercourse is secured by a mock marriage, the act is not rape.⁴

9. Consent of Infants — *a.* **EARLY DOCTRINE.** — Under the early common law, it does not seem that there was any fixed age at which a child was deemed incompetent to consent to sexual intercourse so as to render the act of intercourse rape irrespective of consent upon her part.⁵ In 1275, however, the forcible ravishment against her will of a female of age or the carnal knowledge, even with her consent, of a child "within age" (which was considered to be twelve years) was made a misdemeanor by the first statute of Westminster,⁶ and ten years afterward, by the second statute of Westminster, rape was made a felony, but nothing was said in this statute as to the age of the victim.⁷ Then, after some three hundred years, a statute was passed making the carnal knowledge of a child under ten years of age, with her consent, a felony.⁸

In the United States, the courts in a number of cases, adopting the effect of these early English statutes as a part of their common law, have considered as rape the carnal knowledge of a child under the age of ten⁹ or even twelve years.¹⁰

1. Where a Physician Had Intercourse with a Child Patient, telling her that he was performing a surgical operation, and she acquiesced in such belief and in ignorance of the real nature of his act, he was held to be guilty of rape. *Reg. v. Flattery*, 13 Cox C. C. 388, 2 Q. B. D. 410; *Pomeroy v. State*, 94 Ind. 96, 48 Am. Rep. 146. See also *Reg. v. Case*, 4 Cox C. C. 220, 1 Den. C. C. 580, 1 Eng. L. & Eq. 544 (stated under the title ASSAULT AND BATTERY, vol. 2, p. 975, note); *Reg. v. Stanton*, 1 C. & K. 415, 47 E. C. L. 415; *Eberhart v. State*, 134 Ind. 651.

Sufficiency of Proof of Ignorance of Character of Act of Intercourse. — *Walter v. People*, 50 Barb. (N. Y.) 144.

Woman Frightened with Fear of Surgical Operation. — In *Don Moran v. People*, 25 Mich. 356, 12 Am. Rep. 283, it was held that if, however, a girl was induced by a physician to submit to sexual intercourse with him from the fear, falsely and fraudulently inspired by him for the purpose of overcoming her opposition, that if she did not yield, he would use instruments for the purpose of enlarging her parts, and that such operation would probably kill her, he is guilty of rape.

2. Personating Husband. — *Reg. v. Clarke*, 6 Cox C. C. 412; *Reg. v. Saunders*, 8 C. & P. 265, 34 E. C. L. 383; *Reg. v. Francis*, 13 U. C. Q. B. 116; *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Wyatt v. State*, 2 Swan (Tenn.) 394.

In Ireland the contrary has been held, upon the ground that the consent of the woman was to a lawful act by the husband; that, she being deceived, not even adultery is committed; that the consent must be not only to the act, but to the person, and the English cases to the contrary were disapproved. *Reg. v. Dee*, 15 Cox C. C. 579, 14 L. R. Ir. 468.

Statutes. — In *North Carolina* procuring intercourse with a married woman by fraudu-

lently personating her husband is made a separate statutory felony. *State v. Williams*, 128 N. Car. 573. As to the previous rule in this state, see the title ASSAULT AND BATTERY, vol. 2, p. 987, note.

So in *Alabama*. *Crim. Code Ala.* (1896), § 5449.

For Other Cases see the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 260, note.

3. Franklin v. State, 34 Tex. Crim. 203.

4. Mock Marriage. — *State v. Murphy*, 6 Ala. 765, 41 Am. Dec. 79; *Bloodworth v. State*, 6 Baxt. (Tenn.) 614, 32 Am. Rep. 546.

5. Consent of Infant — Early Doctrine. — *Reg. v. Johason*, 10 Cox C. C. 114; *Warner v. State*, 54 Ark. 660; *State v. Wright*, 25 Neb. 38; *O'Meara v. State*, 17 Ohio St. 515; *Moore v. State*, 17 Ohio St. 521. See also *Vasser v. State*, 55 Ala. 264.

6. Early Statutes. — *Stat. Westm.* 1, c. 13; 1 East P. C., c. 10, § 1; 4 Black. Com. 212. See also 2 Pollock & Maitland's *Hist. Eng. Law* (2d ed.) 491.

7. Stat. Westm. 2, c. 34; 1 East P. C., c. 10, § 1; 4 Black. Com. 212; 2 Pollock & Maitland's *Hist. Eng. Law* (2d ed.) 491.

8. Stat. 18 Eliz., c. 7, § 4.

This statute was held to leave the case of girls over ten and under twelve years of age to be governed by the first statute of Westminster, and it was held that intercourse with a girl between those ages was not felonious rape unless against her consent. 1 East P. C., c. 10, § 2. See also 4 Black. Com. 212.

9. United States — Early English Statutes as Common Law. — *Stephen v. State*, 11 Ga. 226; *McMath v. State*, 55 Ga. 304; *Gosha v. State*, 56 Ga. 36; *Johnson v. Com.*, 7 Ky. L. Rep. 46. And see the title ASSAULT AND BATTERY, vol. 2, p. 987.

10. State v. Tilman, 30 La. Ann. 1249, 31 Am. Rep. 236. See also *State v. Jackson*, 46 La. Ann. 547.

and in some instances over these ages, where from the physical development of the victim she could be considered incapable of being prompted to consent by the instincts of animal passion,¹ though in fact she consented to the act of intercourse, these decisions being based on the ground that in law she was incapable of consenting. On the other hand, if the child was over ten years of age and capable of consenting, her consent was held to prevent the act from being rape.² In all cases, the age of the female ravished, as stated elsewhere, is an element for consideration in determining whether in fact there was consent in fact on her part to the sexual intercourse.³

b. STATUTORY AGE OF CONSENT — (1) In General. — At the present time in all jurisdictions the statutes either designate as rape the carnal knowledge of a female child under a designated age though she consents, or punish it as a distinct crime, the extent of the punishment sometimes varying according to the age of the child,⁴ and the age varying greatly in the several states.⁵

1. Children Over Twelve Years of Age. — *Coates v. State*, 50 Ark. 330; *Stephen v. State*, 11 Ga. 226; *Joiner v. State*, 62 Ga. 560; *Jones v. State*, 106 Ga. 365; *Anschicks v. State*, 6 Tex. App. 524. See also *Pounds v. State*, 95 Ga. 475; *Hawkins v. State*, 136 Ind. 630.

2. Children Over Ten Years of Age — Consent Preventing Rape. — *Pounds v. State*, 95 Ga. 475; *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774.

3. See infra, this section, *Resistance*.

4. Statutory Age of Consent — England. — *Reg. v. Holland*, 10 Cox C. C. 478.

Canada. — *Reg. v. Brice*, 7 Manitoba 627; *Reg. v. Chisholm*, 7 Manitoba 613.

United States. — *In re Lane*, 135 U. S. 443.

Alabama. — *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25.

California. — *People v. Mills*, 17 Cal. 276; *People v. Gordon*, 70 Cal. 467; *People v. Harlan*, 133 Cal. 16; *People v. Johnson*, 106 Cal. 289; *People v. Knight*, (Cal. 1895) 43 Pac. Rep. 67; *People v. Rangod*, 112 Cal. 669; *People v. Totman*, 135 Cal. 133.

Dakota. — *Territory v. Keyes*, 5 Dak. 244.

Delaware. — *State v. Smith*, 9 Houst. (Del.) 588.

Florida. — *Holton v. State*, 28 Fla. 303; *Schang v. State*, (Fla. 1901) 31 So. Rep. 346.

Illinois. — *Porter v. People*, 158 Ill. 370.

Indiana. — *Murphy v. State*, 120 Ind. 115.

Iowa. — *State v. Bailor*, 104 Iowa 1.

Kansas. — *State v. Hart*, 33 Kan. 218; *State v. Eberline*, 47 Kan. 155; *State v. Frazier*, 54 Kan. 719; *State v. Woods*, 49 Kan. 237.

Kentucky. — *White v. Com.*, 96 Ky. 180.

Maine. — *State v. Black*, 63 Me. 210.

Massachusetts. — *Com. v. Sugland*, 4 Gray (Mass.) 10; *Com. v. Sullivan*, 6 Gray (Mass.) 477; *Com. v. Murphy*, 165 Mass. 66.

Michigan. — *People v. Bernor*, 115 Mich. 692; *People v. Glover*, 71 Mich. 303; *People v. Miller*, 96 Mich. 119; *People v. Smith*, 122 Mich. 284.

Minnesota. — *State v. Rollins*, 80 Minn. 216; *State v. Erickson*, 81 Minn. 134.

Mississippi. — *Bonner v. State*, 65 Miss. 293; *Alfred v. State*, (Miss. 1902) 32 So. Rep. 54.

Missouri. — *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686; *State v. Lacey*, 111 Mo. 513; *State v. Baker*, 136 Mo. 74; *State v. Ernest*, 150 Mo. 347.

Montana. — *State v. Bowser*, 21 Mont. 133; *State v. Mahoney*, 24 Mont. 281.

Nebraska. — *State v. Wright*, 25 Neb. 38; *George v. State*, 61 Neb. 669; *Davis v. State*, 51 Neb. 301; *Chapman v. State*, 61 Neb. 888; *Reinoehl v. State*, 62 Neb. 619.

New Jersey. — *Farrell v. State*, 54 N. J. L. 416.

New York. — *Singer v. People*, 13 Hun (N. Y.) 418, affirmed 75 N. Y. 608; *People v. Maxon*, 57 Hun (N. Y.) 367; *People v. Flaherty*, 79 Hun (N. Y.) 48; *People v. Connor*, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 674, affirmed 126 N. Y. 278.

North Carolina. — *State v. Smith*, Phil. L. (61 N. Car.) 302; *State v. Dancy*, 83 N. Car. 608; *State v. Johnson*, 100 N. Car. 494.

Ohio. — *Jones v. State*, 54 Ohio St. 1.

Oregon. — *State v. Horne*, 20 Oregon 485.

Pennsylvania. — *Com. v. Fowler*, 18 Phila. (Pa.) 516, 44 Leg. Int. (Pa.) 482.

South Carolina. — *State v. Haddon*, 49 S. Car. 308.

Tennessee. — *Wright v. State*, 4 Humph. (Tenn.) 194; *De Berry v. State*, 99 Tenn. 207.

Texas. — *Davis v. State*, 42 Tex. 226; *Nicholas v. State*, 23 Tex. App. 317; *Rodgers v. State*, 30 Tex. App. 510; *Gonzales v. State*, (Tex. Crim. 1895) 31 S. W. Rep. 371; *Edens v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 89; *Fields v. State*, 39 Tex. Crim. 488; *Buchanan v. State*, 41 Tex. Crim. 127; *Gonzales v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1060; *Gray v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 375.

Utah. — *State v. Hilberg*, 22 Utah 27.

Virginia. — *Givens v. Com.*, 29 Gratt. (Va.) 830; *Lawrence v. Com.*, 30 Gratt. (Va.) 845; *Com. v. Bennet*, 2 Va. Cas. 235.

Washington. — *State v. Phelps*, 22 Wash. 181.

Wisconsin. — *State v. Erickson*, 45 Wis. 86; *Barnard v. State*, 88 Wis. 656; *Dodge v. State*, 100 Wis. 294.

See also the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259.

"Age of Puberty." — *State v. Pierson*, 44 Ark. 265; *Warner v. State*, 54 Ark. 660; *Coates v. State*, 50 Ark. 330.

5. See the local statutes.

The Constitutionality of Statutes raising the age of consent to sixteen or eighteen years has been upheld as against the objection that they inflict cruel and unusual punishments. See the title CRUEL AND UNUSUAL PUNISHMENT, vol. 8, p. 440, note.

Such statutes are not unconstitutional because marriage under the age of consent for

Under these statutes, the fact that the child has reached the age of puberty is immaterial.¹ On the other hand, where the child is over such statutory age, she is deemed capable of consenting so as to prevent the act from constituting rape proper.²

(2) *Ignorance of Age.* — The fact that the defendant was ignorant of the age of the child with whom he had sexual intercourse and who was below the statutory age of consent, and *bona fide* believed that she was above the age and could therefore legally consent to such intercourse, is no defense.³

(3) *Proof of Age — Admissibility of Evidence.* — The age of the girl may be proved by records or documents⁴ or by other evidence, such as belief and reputation as to her age among her family.⁵

Testimony of Child or Members of Family. — A child may testify as to her own age,⁶ as may her parents⁷ and her brothers and sisters.⁸ But the child's declarations to another as to her age are not admissible.⁹

The Appearance of the Child may be taken into consideration.¹⁰

The Opinion of Medical Experts has been held to be admissible on the question of age.¹¹

The Burden of Proving beyond a reasonable doubt that the child was under the statutory age of consent is upon the prosecution.¹²

Sufficiency. — The question whether the child was within the age of consent is, as the existence of any other fact, for the determination of the jury,¹³ and though the evidence as to her age was uncontradicted, it has been held to be error on the part of the court to assume such fact as established.¹⁴ Where the evidence as to the child's age is conflicting, the finding of the jury

rape is recognized. *State v. Rollins*, 80 Minn. 216.

1. *Fact of Puberty Immaterial.* — *People v. Miller*, 96 Mich. 119; *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686. See also the title CHILD — CHILDREN, vol. 5, p. 1083, note, where cases are stated and quoted.

2. *Children Over Statutory Age.* — *Taylor v. State*, 24 Tex. App. 299; *Shell v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 207.

3. *Ignorance of Age of Child No Defense.* — *People v. Ratz*, 115 Cal. 132; *Holton v. State*, 28 Fla. 303; *State v. Sherman*, 106 Iowa 684; *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686; *State v. Baskett*, 111 Mo. 271; *Edens v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 89; *Manning v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 920; *Smith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 995. See also *Reg. v. Prince*, L. R. 2 C. C. 154; *People v. Fowler*, 88 Cal. 136; *People v. Dolan*, 96 Cal. 315; *State v. Grossheim*, 79 Iowa 75; and the title CRIMINAL LAW, vol. 8, pp. 291, 297.

4. *Extract Copy from Register of Births.* — *Reg. v. Weaver*, 12 Cox C. C. 527.

Certificate of Birth Identifying Child with Person Named Therein. — *Com. v. Hollis*, 170 Mass. 433.

Alteration of Parish Register of Birth. — *People v. Flaherty*, 162 N. Y. 532, reversing 27 N. Y. App. Div. 535.

Record of Physician as to Confinement of Mother. — *People v. Vann*, 129 Cal. 118.

Family Bible. — *People v. Ratz*, 115 Cal. 132. But see *People v. Mayne*, 118 Cal. 516, 62 Am. St. Rep. 256; *People v. Sheppard*, 44 Hun (N. Y.) 565.

5. *Reg. v. Hayes*, 2 Cox C. C. 226 (testimony of mother based on knowledge derived from statements of father and custom of keeping birthday).

6. *Child's Testimony as to Her Age.* — *Weed v. State*, 55 Ala. 13; *People v. Ratz*, 115 Cal. 132; *Com. v. Phillips*, 162 Mass. 504; *Com. v. Hollis*, 170 Mass. 433; *People v. Bernor*, 115 Mich. 692; *State v. Bowser*, 21 Mont. 133; *Johnson v. State*, (Tex. Crim. 1900) 59 S. W. Rep. 898; *Dodge v. State*, 100 Wis. 294. See also *State v. Lacey*, 111 Mo. 513.

7. *Parents.* — *Reg. v. Nicholls*, 10 Cox C. C. 476; *People v. Bernor*, 115 Mich. 692; *George v. State*, 61 Neb. 669; *Lawrence v. State*, 35 Tex. Crim. 114.

8. *Brothers and Sisters.* — *George v. State*, 61 Neb. 669.

9. *Declarations to Third Parties.* — *State v. Deputy*, 3 Penn. (Del.) 19.

10. *Appearance of Child.* — *Com. v. Phillips*, 162 Mass. 504; *Com. v. Hollis*, 170 Mass. 433; *People v. Dickerson*, 58 N. Y. App. Div. 202. See also *State v. McNair*, 93 N. Car. 628, and the title EVIDENCE, vol. 4, p. 538.

11. *Medical Experts.* — *State v. Smith*, Phil. L. (61 N. Car.) 302. See also *Lawrence v. State*, 35 Tex. Crim. 114. Compare *State v. Robinson*, 32 Oregon 43.

As to nonexpert opinion testimony, see the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 490.

12. *Burden of Proof.* — *State v. Houx*, 109 Mo. 654, 32 Am. St. Rep. 686; *Lawrence v. State*, 35 Tex. Crim. 114. See also *Smith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 995.

13. *Age Question for Jury.* — *People v. Webster*, 111 Cal. 381.

14. *People v. Webster*, 111 Cal. 381, where the only evidence as to the age of the child was her own testimony. See also *People v. Dickerson*, 58 N. Y. App. Div. 202.

When the Age of the Child is Admitted by the Defendant the question need not be submitted to the jury. *People v. Baldwin*, 117 Cal. 244.

thereon is as a rule conclusive;¹ but there must be a fair amount of evidence to establish her age, and in a number of cases the courts have held that the evidence in regard thereto was insufficient to allow the submission of the question to the jury.²

10. Submission Distinguished from Consent. — Submission on the part of the woman to the act of carnal knowledge is not necessarily the same as consent, so as to prevent the act from being rape.³

Fear Induced by Threats Equivalent to Force. — Where the woman's submission to the act of intercourse is due to threats and an exhibition of physical force on the part of the defendant, putting her in reasonable fear of death or of great bodily harm in case of resistance, the fact that no actual violence was used by the defendant is immaterial.⁴ It is not necessary, however, that the woman expressly consent by words to prevent the act from being rape, but her consent may be implied from her acts, manner, and conduct,⁵ and even against her express declaration.⁶

11. Resistance — *a.* IN GENERAL. — To establish that absence of consent on the part of the woman which is an essential element in rape, it is necessary, where the woman was in possession of her faculties and not laboring under some disability, to show resistance on her part.⁷

Extent of Resistance. — As bearing on the extent of the necessary resistance by the woman, the courts have used various expressions, illustrations of which are collected in the note.⁸ Some phrases, however, are purely relative.

1. Sufficiency of Proof of Age. — Reg. v. Nicholls, 10 Cox C. C. 476; People v. Harlan, 133 Cal. 16; People v. Johnson, 106 Cal. 289; People v. Bernor, 115 Mich. 692; State v. Duffey, 128 Mo. 549.

2. Rex v. Wedge, 5 C. & P. 208, 24 E. C. L. 329; People v. Dickerson, 58 N. Y. App. Div. 202; Clark v. State, 30 Tex. 448; Lawrence v. State, 35 Tex. Crim. 114; Parnell v. State, (Tex. Crim. 1897) 42 S. W. Rep. 563; Duckworth v. State, (Tex. Crim. 1900) 57 S. W. Rep. 665.

3. Submission Distinguished from Consent. — Reg. v. Day, 9 C. & P. 722, 38 E. C. L. 306 (stated under the title ASSAULT AND BATTERY, vol. 2, p. 988, note); Ledley v. State, 4 Ind. 580; Hawkins v. State, 136 Ind. 630; State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; State v. Ruth, 21 Kan. 585; State v. Cunningham, 100 Mo. 382; Wright v. State, 4 Humph. (Tenn.) 194. See also the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259, note.

4. Submission Secured by Threats. — People v. Lenon, 79 Cal. 625, 631; Rice v. State, 35 Fla. 236, 48 Am. St. Rep. 245; Doyle v. State, 39 Fla. 155, 63 Am. St. Rep. 159; Felton v. State, 139 Ind. 531; Clymer v. Com., (Ky. 1901) 64 S. W. Rep. 409; Don Moran v. People, 25 Mich. 356, 12 Am. Rep. 283.

For other authorities see *infra*, this section, *Resistance* — *In General*.

5. Implied Consent. — People v. Brown, 47 Cal. 447; Adams v. People, 179 Ill. 633; State v. Chapman, 88 Iowa 254; Mathews v. State, 19 Neb. 330; Reynolds v. State, 27 Neb. 90, 20 Am. St. Rep. 659; Com. v. Parr, 5 W. & S. (Pa.) 345.

In *Alabama* it has been held that though the prosecutor may not have consented in fact, yet if her conduct towards the defendant at the time of the alleged rape was such as to create in his mind an honest and reasonable belief that she consented or was willing for

him to have sexual intercourse with her, a conviction could not be had, and that to refuse so to instruct was error. Allen v. State, 87 Ala. 107. See also McQuirk v. State, 84 Ala. 435, 5 Am. St. Rep. 381.

6. Mills v. U. S., 164 U. S. 644; Huber v. State, 126 Ind. 185; Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87.

7. Necessity for Resistance — *United States*. — Mills v. U. S., 164 U. S. 644.

Arkansas. — Maxey v. State, 66 Ark. 523.

California. — People v. Brown, 47 Cal. 447.

Georgia. — Cheney v. State, 109 Ga. 503.

Illinois. — Austine v. People, 110 Ill. 248;

Adams v. People, 179 Ill. 633.

Iowa. — State v. Tomlinson, 11 Iowa 401.

Kansas. — State v. Brown, 54 Kan. 71.

Minnesota. — State v. Reid, 39 Minn. 277;

State v. Iago, 66 Minn. 231.

Mississippi. — Newton v. State, (Miss. 1893)

12 So. Rep. 560.

Missouri. — State v. Murphy, 118 Mo. 7.

Nebraska. — Reynolds v. State, 27 Neb. 90,

20 Am. St. Rep. 659.

Oklahoma. — Harmon v. Territory, 5 Okla.

368.

South Carolina. — State v. Sudduth, 52 S.

Car. 488.

Texas. — Hooker v. State, 29 Tex. App. 327;

Rhea v. State, 30 Tex. App. 483; Kennon v.

State, (Tex. Crim. 1897) 42 S. W. Rep. 376; Ed-

monson v. State, (Tex. Crim. 1898) 44 S. W.

Rep. 154; Cox v. State, (Tex. Crim. 1898) 44

S. W. Rep. 157.

Vermont. — State v. Wilkins, 66 Vt. 1.

Virginia. — Brown v. Com., 82 Va. 653.

Wisconsin. — Bohlmann v. State, 98 Wis.

617; O'Boyle v. State, 100 Wis. 296.

8. "Every Resistance That She Could." — Reg.

v. Hallett, 9 C. & P. 748, 38 E. C. L. 318.

"Force to Prevent Him, the Best She Could."

— State v. Colestock, (Oregon 1902) 67 Pac.

Rep. 418.

The nature and extent of the resistance required in each particular case depend upon the peculiar circumstances attending it, including the strength of the man and the age and mental and physical strength of the woman assaulted.¹ The sufficiency of the resistance is to be tested by the determination of the question whether her failure to make further resistance was or was not intentional, in order that the man might accomplish his purpose.² Thus, a woman cannot be regarded as consenting where her nonresistance proceeds from fear of great bodily harm in case she should continue to resist,³ or from the honest and *bona fide* belief that further resistance would be absolutely useless.⁴

b. CONSIDERATIONS AFFECTING DEGREE OF RESISTANCE — (1) *In General*. — In determining whether the resistance of the prosecutrix was of such a character as to show a want of consent, it is proper to take into consideration her mental and physical condition,⁵ her age, as less resistance is required

"To the Utmost" or "Utmost Resistance," — *People v. Crosswell*, 13 Mich. 427, 87 Am. Dec. 774 ("utmost reluctance and resistance"); *State v. Burgdorf*, 53 Mo. 65; *State v. Perkins*, 11 Mo. App. 82; *Mares v. Territory*, 10 N. Mex. 770; *People v. Clemons*, 37 Hun (N. Y.) 580; *People v. Abbot*, 19 Wend. (N. Y.) 192; *People v. Morrison*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 625. Compare *Davis v. State*, 63 Ark. 470; *State v. Montgomery*, 63 Mo. 296; *People v. Monnais*, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 345.

"Such Resistance as Was in Her Power to Make," — *Territory v. Potter*, 1 Ariz. 421.

"Such Resistance as She Was Capable of Making," — *State v. Harris*, 150 Mo. 56.

"The Utmost Effort on Her Part to Resist the Assault," — *Barnett v. State*, (Tex. Crim. 1900) 62 S. W. Rep. 768.

"To the Extent of Her Ability," — *Mathews v. State*, 19 Neb. 330; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349. See also *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366. Compare *Com. v. McDonald*, 110 Mass. 405.

1. *Resistance to Be Offered Depends on Circumstances*. — *Anderson v. State*, 104 Ind. 467; *Cross v. State*, 132 Ind. 65; *Dunn v. State*, 58 Neb. 807; *People v. Dohring*, 59 N. Y. 374, 17 Am. Rep. 349; *Anschicks v. State*, 6 Tex. App. 524; *Jenkins v. State*, 1 Tex. App. 346.

For Full Treatment, see *infra*, this subsection, *Considerations Affecting Degree of Resistance*.

2. *Sufficiency of Resistance*. — *State v. Shields*, 45 Conn. 264. See also *Reg. v. Fick*, 16 U. C. C. P. 379.

3. *Nonresistance Because of Fear of Great Bodily Harm*. — *England*. — *Reg. v. Hallett*, 9 C. & P. 748, 38 E. C. L. 318; *Reg. v. Woodhurst*, 12 Cox C. C. 443; *Reg. v. Day*, 9 C. & P. 722, 38 E. C. L. 306; *Reg. v. Jones*, 4 L. T. N. S. 154.

Alabama. — *Smith v. State*, 47 Ala. 540.

Arizona. — *Territory v. Potter*, 1 Ariz. 421.

Arkansas. — *Davis v. State*, 63 Ark. 470.

Connecticut. — *State v. Shields*, 45 Conn. 264; *State v. Long*, 72 Conn. 44.

Florida. — *Hollis v. State*, 27 Fla. 387.

Illinois. — *Huston v. People*, 121 Ill. 497.

Indiana. — *Ledley v. State*, 4 Ind. 580.

Iowa. — *State v. Ward*, 73 Iowa 532; *State v. Harlan*, 98 Iowa 458; *State v. Urie*, 101 Iowa 411.

Kansas. — *State v. Ruth*, 21 Kan. 583.

Kentucky. — *King v. Com.*, (Ky. 1892) 20 S. W. Rep. 421.

Michigan. — *People v. Flynn*, 96 Mich. 276; *People v. Burwell*, 106 Mich. 27; *Strang v. People*, 24 Mich. 1; *Turner v. People*, 33 Mich. 363; *Maillet v. People*, 42 Mich. 262.

Missouri. — *State v. Cunningham*, 100 Mo. 382; *State v. Dusenberry*, 112 Mo. 277.

New Mexico. — *Territory v. Edie*, 6 N. Mex. 555.

New York. — *People v. Clemons*, 37 Hun (N. Y.) 580.

Tennessee. — *Wright v. State*, 4 Humph. (Tenn.) 194.

Texas. — *Sharp v. State*, 15 Tex. App. 171; *Bass v. State*, 16 Tex. App. 62; *Franklin v. State*, 34 Tex. Crim. 203; *Myers v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 750.

Wisconsin. — *Whittaker v. State*, 50 Wis. 518, 36 Am. Rep. 856.

See also *supra*, this section, *Submission Distinguished from Consent*.

Where the evidence shows an entire want of threats by which the will of the woman was overcome, it is error to instruct upon the theory of submission through fear of personal violence. *Wortman v. People*, 25 Colo. 270.

When the woman submits through fear of personal violence, the man may be guilty of rape, irrespective of his ulterior intention not to use actual force in case of further resistance. *Hooper v. State*, 106 Ala. 41.

Apprehension of Death Not Essential. — *Waller v. State*, 40 Ala. 325.

Fear Leading to Nonresistance though Man Lays No Hand on Woman. — *Rice v. State*, 35 Fla. 236, 48 Am. St. Rep. 245; *Doyle v. State*, 39 Fla. 155, 63 Am. St. Rep. 159; *Bailey v. Com.*, 82 Va. 107, 3 Am. St. Rep. 87.

4. *Honest Belief that Further Resistance Useless*. — *Reg. v. Woodhurst*, 12 Cox C. C. 443; *Reg. v. Hallett*, 9 C. & P. 748, 38 E. C. L. 318; *State v. Long*, 72 Conn. 44; *Huber v. State*, 126 Ind. 185; *State v. Ruth*, 21 Kan. 583; *People v. Clemons*, 37 Hun (N. Y.) 580. But see *State v. Shields*, 45 Conn. 264.

5. *Mental and Physical Condition*. — *Smith v. State*, 47 Ala. 540; *Vasser v. State*, 55 Ala. 264; *State v. Atherton*, 50 Iowa 189, 32 Am. Rep. 134; *People v. Marrs*, 125 Mich. 376; *State v. Cunningham*, 100 Mo. 384; *Thompson v. State*, 44 Neb. 366; *Welsh v. State*, 60 Neb. 101; *State v. Knapp*, 45 N. H. 148.

Proof of Deformity of the Prosecutrix, as by want of a hand, is proper as tending to show diminished power of resistance. *Richards v. State*, 36 Neb. 17.

from a child of tender years than would be required of an adult woman,¹ the physical strength of the man,² the relationship of the parties to each other,³ and all the circumstances attending the transaction.⁴

(2) *Outcry*. — The failure of a woman, when assaulted for the purpose of sexual intercourse, to make outcry, especially when help is known to be at hand, is always a material fact to be considered as showing want of resistance and an implied or express assent to the sexual intercourse,⁵ though, of course, the failure of the prosecutrix to make outcry is not conclusive of the innocence of the accused,⁶ and on the other hand, evidence that the woman did make outcry is evidence to show force on the part of the accused and resistance on her part.⁷

(3) *Condition of Person and Clothing*. — Similarly, the fact that there were no marks of violence upon the person of the woman⁸ or that her clothing was not torn⁹ is to be taken into consideration, while on the other hand the existence of these facts tends to show resistance on her part.¹⁰

12. Particular Considerations Showing Consent — *a. FAILURE TO MAKE COMPLAINT*. — Failure by the victim of the alleged rape to make immediate disclosure or complaint of the outrage is to be considered as tending to show consent on her part.¹¹ It is always permissible for the prosecution to explain such failure, for the purpose of rebutting any inference to be drawn there-

1. Age. — Reg. v. Jones, 4 L. T. N. S. 154; Smith v. State, 47 Ala. 540; Vasser v. State, 55 Ala. 264; Barker v. State, 40 Fla. 178; Eberhart v. State, 134 Ind. 651; Hawkins v. State, 136 Ind. 630; State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; State v. Daugherty, 63 Kan. 473; Hammond v. State, 39 Neb. 252; People v. Connor, 126 N. Y. 278; State v. Haddon, 49 S. Car. 308; Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87. See also *supra*, this section, *Consent of Infants*.

2. Physical Strength of Man. — State v. Knapp, 45 N. H. 148, holding that it is admissible to show the strength of the accused as displayed in encounters with other men.

3. Relationship of Parties. — People v. Mayes, 66 Cal. 597, 56 Am. Rep. 126; Bean v. People, 124 Ill. 576; Hawkins v. State, 136 Ind. 630; State v. Daugherty, 63 Kan. 473; Strang v. People, 24 Mich. 1; Maillet v. People, 42 Mich. 262; People v. Burwell, 106 Mich. 27; Hammond v. State, 39 Neb. 252; People v. Clemons, 37 Hun (N. Y.) 580; Sharp v. State, 15 Tex. App. 171; Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87.

4. General Circumstances. — Smith v. State, 47 Ala. 540; Bean v. People, 124 Ill. 576; Maillet v. People, 42 Mich. 262; People v. Clemons, 37 Hun (N. Y.) 580.

5. Failure to Make Outcry — *California*. — People v. Benson, 6 Cal. 221, 65 Am. Dec. 506. See also People v. Totman, 135 Cal. 133.

Colorado. — Bueno v. People, 1 Colo. App. 232.

Georgia. — Crockett v. State, 49 Ga. 185; Smith v. State, 77 Ga. 705.

Florida. — Hollis v. State, 27 Fla. 387.

Illinois. — Barney v. People, 22 Ill. 160; Austine v. People, 110 Ill. 248.

Indiana. — Whitney v. State, 35 Ind. 503; Eyer v. State, 71 Ind. 49.

Iowa. — State v. Tomlinson, 11 Iowa 401; State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; State v. Hagerman, 47 Iowa 151; State v. Cassidy, 85 Iowa 145.

Missouri. — State v. Witten, 100 Mo. 525.

New Mexico. — Territory v. Edie, 6 N. Mex. 555.

North Carolina. — State v. Cone, 1 Jones L. (46 N. Car.) 18.

Texas. — Rogers v. State, 1 Tex. App. 188.

6. Eberhart v. State, 134 Ind. 651; State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; State v. Brown, 54 Kan. 71 (stated under the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259, note); State v. Reid, 39 Minn. 277; People v. Connor, (Supm. Ct. Gen. T.) 9 N. Y. Supp. 674, affirming 126 N. Y. 278; Bailey v. Com., 82 Va. 107, 3 Am. St. Rep. 87.

7. People v. Knight, (Cal. 1895) 43 Pac. Rep. 6; Sutton v. People, 145 Ill. 279; Mings v. Com., 85 Va. 638.

8. Marks of Violence. — People v. Benson, 6 Cal. 221, 65 Am. Dec. 506; Bueno v. People, 1 Colo. App. 232; Crockett v. State, 49 Ga. 185; State v. Tomlinson, 11 Iowa 401; State v. Cassidy, 85 Iowa 145; Richards v. State, 36 Neb. 17.

9. Clothing Not Torn. — Barnett v. State, 83 Ala. 40; Bueno v. People, 1 Colo. App. 232; State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; Richards v. State, 36 Neb. 17.

10. See *infra*, this title, Evidence — Admissibility — Condition of Clothing, Person, and Mind of Prosecutrix.

11. Failure to Make Complaint — *California*. — People v. Benson, 6 Cal. 221, 65 Am. Dec. 506.

Colorado. — Bueno v. People, 1 Colo. App. 232.

Connecticut. — State v. De Wolf, 8 Conn. 101, 20 Am. Dec. 90; State v. Byrne, 47 Conn. 465.

Georgia. — Crockett v. State, 49 Ga. 185; Smith v. State, 77 Ga. 705.

Indiana. — Whitney v. State, 35 Ind. 503; Eyer v. State, 71 Ind. 49.

Iowa. — State v. Cross, 12 Iowa 66, 79 Am. Dec. 519; State v. Cassidy, 85 Iowa 145.

Michigan. — Maillet v. People, 42 Mich. 262.

Missouri. — State v. Wilson, 91 Mo. 410; State v. Witten, 100 Mo. 525; State v. Patrick, 107 Mo. 147.

Nebraska. — Richards v. State, 36 Neb. 17.

from,¹ and when the delay or failure is satisfactorily explained a conviction may be had.²

To Corroborate the Testimony of the Victim of the alleged rape it is always permissible to show that complaint and disclosure of the alleged outrage were immediately made by her.³

The Admissibility of Complaints of the Woman generally will be discussed later.⁴

b. CONTINUED FRIENDLY RELATIONS.—The fact that the relations between the accused and the victim of the alleged rape remain friendly and cordial after the alleged outrage is a very material consideration, tending to show that the sexual intercourse was with the consent of the woman.⁵

c. CHASTITY OF WOMAN.—On the theory that an unchaste woman will more readily consent to sexual intercourse than a woman who is chaste, it is a well-recognized rule that the character of the woman for chastity is to be taken into consideration in determining whether the sexual intercourse was with or without her consent.⁶

d. IMPREGNATION.—Though there is no doubt that impregnation may follow from an act of rape,⁷ yet the fact that the female made no complaint until the signs of pregnancy could be no longer concealed may be considered as discrediting her testimony.⁸

13. Burden of Proof.—The accused has not the burden of proving consent; the prosecution must prove beyond a reasonable doubt the want of consent.⁹

VIII. ASSAULT WITH INTENT TO RAPE.—At common law, where there was no penetration, and the crime of rape was not therefore committed, the accused might still be guilty of assault with intent to rape;¹⁰ and this at common law constituted a misdemeanor.¹¹ By statute in many jurisdictions, an assault with intent to rape is expressly made a crime and generally a felony.¹²

New Mexico.—Territory *v. Edie*, 6 N. Mex. 555.

North Carolina.—State *v. Peter*, 8 Jones L. (53 N. Car.) 19.

Texas.—Rogers *v. State*, 1 Tex. App. 188; Thompson *v. State*, 33 Tex. Crim. 472.

Utah.—State *v. Halford*, 17 Utah 475.

Vermont.—State *v. Wilkins*, 66 Vt. 1.

1. Explaining Delay.—People *v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; People *v. Knight*, (Cal. 1895) 43 Pac. Rep. 6; Bennet *v. State*, 102 Ga. 656; Polson *v. State*, 137 Ind. 519; Turner *v. People*, 33 Mich. 373; People *v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; People *v. Ezzo*, 104 Mich. 341; State *v. Shettleworth*, 18 Minn. 208; State *v. Baker*, 136 Mo. 74; State *v. Knapp*, 45 N. H. 148; Hill *v. State*, 5 Lea (Tenn.) 725; State *v. Wilkins*, 66 Vt. 1; Jackson *v. State*, 91 Wis. 253.

The rule that the failure of the prosecutrix to make prompt disclosure is a circumstance of suspicion does not require complaint to the first person who is seen. A proper opportunity must be presented, and in the application of the rule her excited condition must be considered. Higgins *v. People*, 58 N. Y. 377.

2. State *v. Wilcox*, 111 Mo. 569, 33 Am. St. Rep. 551; State *v. Marcks*, 140 Mo. 656; People *v. Terwilliger*, 74 Hun (N. Y.) 310; State *v. Marshall*, Phill. L. (61 N. Car.) 49.

3. Bennett *v. State*, 102 Ga. 656. And see *infra*, this title, Evidence—Admissibility—Complaint by Prosecutrix.

4. See *infra*, this title, Evidence—Admissibility—Complaint by Prosecutrix.

5. Continued Friendly Relations—Georgia.—Smith *v. State*, 77 Ga. 705.

Illinois.—Barney *v. People*, 22 Ill. 160. See also Sutton *v. People*, 145 Ill. 279.

Indiana.—Whitney *v. State*, 35 Ind. 503; Eyler *v. State*, 71 Ind. 49; Huber *v. State*, 126 Ind. 185.

Minnesota.—State *v. Connelly*, 57 Minn. 482.

Missouri.—State *v. Witten*, 100 Mo. 525;

State *v. Patrick*, 107 Mo. 147.

Vermont.—State *v. Hollenbeck*, 67 Vt. 34.

Canada.—Rex *v. Riendeau*, 10 Quebec K. B. 584.

6. Chastity of Female.—People *v. Benson*, 6 Cal. 221, 65 Am. Dec. 506; Wilson *v. State*, 16 Ind. 392; Carney *v. State*, 118 Ind. 525; Bedgood *v. State*, 115 Ind. 275; Neace *v. Com.*, (Ky. 1901) 62 S. W. Rep. 733; State *v. Hollenbeck*, 67 Vt. 34. See also *infra*, this title, Evidence, and the title CHARACTER (IN EVIDENCE), vol. 5, p. 871.

7. Pregnancy.—1 East P. C., c. 10, § 7; 1 Hawk. P. C., c. 41, § 2; 1 Hale P. C. 631; Smith *v. State*, 23 Ga. 305; State *v. Lingle*, 128 Mo. 528.

8. State *v. Wilson*, 91 Mo. 410. See also Smith *v. State*, 23 Ga. 297.

9. Burden of Proof.—Pollard *v. State*, 2 Iowa 567; State *v. Philpot*, 97 Iowa 365; State *v. Beabout*, 100 Iowa 155; Strang *v. People*, 24 Mich. 1; People *v. Page*, 162 N. Y. 272; State *v. Taylor*, 57 S. Car. 483, 76 Am. St. Rep. 575; Jenkins *v. State*, 1 Tex. App. 346.

10. Assault with Intent to Rape.—Rookey *v. State*, 70 Conn. 104; Mahoney *v. People*, 43 Mich. 39; State *v. Peak*, 130 N. Car. 711; Lights *v. State*, 21 Tex. App. 308.

11. Stout *v. Com.*, 11 S. & R. (Pa.) 177.

12. Assault with Intent under Statute.—State *v. Smith*, 9 Houst. (Del.) 588; State *v. Austin*, 109 Iowa 118; Garrison *v. People*, 6 Neb. 274; Williams *v. State*, Wright (Ohio) 42; State *v. Daly*, 16 Oregon 240.

The crime of assault with intent to rape includes every ingredient of the crime of rape except the element of penetration;¹ and therefore if the assault was made under such circumstances that the act of sexual intercourse, if it had been actually accomplished, would not have been rape, the accused cannot be guilty of assault with intent to commit rape.² The elements of the offense of assault with intent to commit rape, then, are (1) an assault, (2) an intent to have carnal knowledge of the female assaulted, and (3) a purpose to carry into effect this intention against the consent of the female and to use whatever force may become necessary to accomplish the object.³

The Assault must contain all the elements of a common assault.⁴ The consent of the female, if of legal age to consent, prevents the offense being assault with intent to rape.⁵

The Connecticut Statute merely prescribes a new penalty for an existing common-law offense. *Rookey v. State*, 70 Conn. 104.

Tennessee — Punishment More Severe When Accompanied with Battery. — *Wilson v. State*, 103 Tenn. 87.

1. *State v. Smith*, 9 Houst. (Del.) 588.

2. See the title ASSAULT AND BATTERY, vol. 2, p. 974, and cases cited. See also *Com. v. Fields*, 4 Leigh (Va.) 648.

Consent Obtained by Fraud — No Rape. — See the title ASSAULT AND BATTERY, vol. 2, p. 987, note, and *supra*, this title, *Consent — Fraud*. See also *Reg. v. Francis*, 13 U. C. Q. B. 116; *Milton v. State*, 23 Tex. App. 204.

3. See the title ASSAULT AND BATTERY, vol. 2, p. 973, and see *Dorsey v. State*, 108 Ga. 477.

4. See the title ASSAULT AND BATTERY, vol. 2, p. 952.

As to the Assault, see generally *Miles v. State*, 93 Ga. 117, 44 Am. St. Rep. 140; *Garrison v. People*, 6 Neb. 274; *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656.

Hands Need Not Actually Be Laid on Woman. — *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25; *Goldin v. State*, 104 Ga. 549; *State v. McDewitt*, 69 Iowa 549; *State v. Smith*, 80 Mo. 516; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344; *Hays v. People*, 1 Hill (N. Y.) 351 (stated under the title ASSAULT AND BATTERY, vol. 2, p. 974, note); *State v. Neely*, 74 N. Car. 425, 21 Am. Rep. 496; *State v. Garner*, 129 N. Car. 536; *Dibrell v. State*, 3 Tex. App. 456.

Necessity of Overt Act. — *Gaskin v. State*, 105 Ga. 631; *Murphy v. State*, 120 Ind. 115; *Marshall v. State*, 34 Tex. Crim. 22. See also *State v. Jeffreys*, 117 N. Car. 743. And see the title ASSAULT AND BATTERY, vol. 2, p. 956.

Threats Insufficient. — *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656; *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157. See also the title ASSAULT AND BATTERY, vol. 2, p. 957.

Solicitation to Intercourse Insufficient. — *State v. Biggs*, 93 Iowa 125. And this has been held where the solicitation was addressed to a child under the age of consent, whose person was not touched. *Murphy v. State*, 120 Ind. 115; *Elam v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 710. See also *State v. Harney*, 101 Mo. 470. But see *State v. Sherman*, 106 Iowa 684. *Aliter*, where the person of the child is in any manner fondled or touched. *Hanes v. State*, 155 Ind. 112; *McAvoy v. State*, 41 Tex. Crim. 56. See also *People v. Johnson*, 131 Cal. 511; *People v. Courier*, 79 Mich. 366.

5. Consent of Female. — *People v. Stewart*, 85 Cal. 174; *Jackson v. State*, 114 Ga. 861; *Adams v. People*, 179 Ill. 633; *Tynes v. State*, (Miss. 1901) 29 So. Rep. 91; *Hall v. State*, 40 Neb. 320; *State v. Nash*, 109 N. Car. 824; *Martin v. State*, 7 Ohio Cir. Dec. 564, 13 Ohio Cir. Ct. 604; *Langan v. State*, 27 Tex. App. 498. See also the title ASSAULT AND BATTERY, vol. 2, p. 987.

Consent of Infants — English Doctrine — Consent Constitutes Defense. — See the title ASSAULT AND BATTERY, vol. 2, p. 988, note, and see *Reg. v. Mehegan*, 7 Cox C. C. 145; *Reg. v. Woodhurst*, 12 Cox C. C. 443; *Reg. v. Roadley*, 14 Cox C. C. 463; *Reg. v. Read*, 1 Den. C. C. 377, 2 C. & K. 957, 61 E. C. L. 957.

In Canada the English rule is followed, *Reg. v. Connolly*, 26 U. C. Q. B. 317, except as changed by statute, 53 Vict., c. 37 (D.), *Reg. v. Brice*, 7 Manitoba 637.

So in some of the *United States*. See the title ASSAULT AND BATTERY, *ubi supra*; also *Patterson v. State*, 11 Ohio Cir. Dec. 602, 21 Ohio Cir. Ct. 184.

General Rule in United States — Consent No Defense. — See the title ASSAULT AND BATTERY, vol. 2, pp. 987, 988, also the following cases:

California. — *People v. Gordon*, 70 Cal. 467; *People v. Lourintz*, 114 Cal. 628; *People v. Roach*, 129 Cal. 33; *People v. Vann*, 129 Cal. 118; *People v. Johnson*, 131 Cal. 511; *People v. Verdegren*, 106 Cal. 211, 46 Am. St. Rep. 234. Compare *People v. Gomez*, 118 Cal. 326.

Delaware. — *State v. Smith*, 9 Houst. (Del.) 588.

Florida. — *Schang v. State*, (Fla. 1901) 31 So. Rep. 246.

Illinois. — *Porter v. People*, 158 Ill. 370; *Adison v. People*, 193 Ill. 405.

Indiana. — *Murphy v. State*, 120 Ind. 115 [overruling *Stephens v. State*, 107 Ind. 185]; *Hanes v. State*, 155 Ind. 112.

Iowa. — *State v. Grossheim*, 79 Iowa 75; *State v. Carnagy*, 106 Iowa 483; *State v. Sherman*, 106 Iowa 684.

Massachusetts. — *Com. v. Murphy*, 165 Mass. 66, 52 Am. St. Rep. 496.

Mississippi. — See *Williams v. State*, 47 Miss. 609.

Missouri. — *State v. Wray*, 109 Mo. 594; *State v. Meinhart*, 73 Mo. 563.

Nebraska. — *Davis v. State*, 31 Neb. 247; *Head v. State*, 43 Neb. 30; *Wood v. State*, 46 Neb. 58; *George v. State*, 61 Neb. 669.

New Jersey. — *Farrell v. State*, 54 N. J. L. 416.

The Intent with which the assault is committed must be the specific intent to rape.¹ While the intent with which an assault was made is to be determined from the circumstances surrounding the transaction,² and may be implied from the conduct of the accused,³ and is for the determination of the jury, still, the evidence must show the intent of the accused beyond a reasonable doubt.⁴ Though as a general rule the appellate court will not reverse the finding of the jury as to the existence of an intent to rape,⁵ yet the courts

New York. — *People v. Justices*, 18 Hun (N. Y.) 330.

Oregon. — *State v. Sargent*, 32 Oregon 110.

Tennessee. — *Hardwick v. State*, 6 Lea (Tenn.) 103.

Texas. — *Croomes v. State*, 40 Tex. Crim. 672 [overruling *Hardin v. State*, 39 Tex. Crim. 426]; *Callison v. State*, 37 Tex. Crim. 211; *Allen v. State*, 36 Tex. Crim. 381; *Comer v. State*, (Tex. Crim. 1892) 20 S. W. Rep. 547; *Blair v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 879; *McAvoy v. State*, 41 Tex. Crim. 56.

Vermont. — *State v. Sullivan*, 68 Vt. 540. Compare *State v. Wheat*, 63 Vt. 673.

Washington. — *State v. Hunter*, 18 Wash. 670, overruling *Whitcher v. State*, 2 Wash. 286.

Wisconsin. — *Proper v. State*, 85 Wis. 615.

1. **Intent to Rape Essential** — *England.* — *Reg. v. Wright*, 4 F. & F. 967.

Alabama. — *Toulet v. State*, 100 Ala. 72; *Jacobi v. State*, (Ala. 1902) 32 So. Rep. 159.

California. — *People v. O'Neil*, 48 Cal. 257; *People v. Manchego*, 80 Cal. 306.

Indiana. — *White v. State*, 136 Ind. 308.

Iowa. — See *State v. Jerome*, 82 Iowa 749.

Missouri. — *State v. Dalton*, 106 Mo. 463; *State v. Whitsett*, 111 Mo. 202; *State v. Scholl*, 130 Mo. 396.

Nebraska. — *Skinner v. State*, 28 Neb. 814; *Dunn v. State*, 58 Neb. 807.

Ohio. — *Blannett v. State*, 4 Ohio Cir. Dec. 32, 8 Ohio Cir. Ct. 313.

Texas. — *Moon v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 806; *McCullough v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 990; *McGee v. State*, 21 Tex. App. 670; *Robertson v. State*, 30 Tex. App. 498; *Powder v. State*, 30 Tex. App. 662. See also *Walton v. State*, 29 Tex. App. 163.

Wisconsin. — See *Bannen v. State*, (Wis. 1902) 91 N. W. Rep. 107.

Compare *Dawson v. State*, 29 Ark. 116; *People v. Courier*, 79 Mich. 366. See further the title ASSAULT AND BATTERY, vol. 2, p. 973, etc.

More Intent to Have Improper Sexual Intercourse with the Woman's Consent does not make out the offense of assault with intent to rape. See the title ASSAULT AND BATTERY, vol. 2, pp. 973, 974. And see also *Taylor v. State*, 50 Ga. 79; *State v. Kendall*, 73 Iowa 255, 5 Am. St. Rep. 679; *People v. Kirwan*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 160; *People v. Clark*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 280; *Outlaw v. State*, 35 Tex. 481; *Pefferling v. State*, 40 Tex. 493; *Ellenberg v. State*, 36 Tex. Crim. 139; *Taylor v. State*, 24 Tex. App. 299.

2. **Proof of Intent** — **Accompanying Circumstances.** — *Hunter v. State*, 29 Fla. 486; *State v. Underwood*, 49 La. Ann. 1599; *Bill v. State*, 5 Humph. (Tenn.) 155.

Racial Differences may be considered as bearing on the question of consent, as that the defendant was a negro, the woman white. *Dorsey v. State*, 108 Ga. 477; *Jackson v. State*, 91

Ga. 322, 44 Am. St. Rep. 25. See also *State v. Garner*, 129 N. Car. 536.

3. **Implication from Conduct** — *California.* — *People v. Johnson*, 131 Cal. 511.

Dakota. — *Territory v. Keyes*, 5 Dak. 244.

Delaware. — *State v. Smith*, 9 Houst. (Del.) 588.

Iowa. — *State v. Grossheim*, 79 Iowa 75; *State v. Urie*, 101 Iowa 411.

Michigan. — *People v. Courier*, 79 Mich. 366.

North Carolina. — *State v. Garner*, 129 N. Car. 536.

Ohio. — *Patterson v. State*, 11 Ohio Cir. Dec. 602, 21 Ohio Cir. Ct. 184.

Oregon. — *State v. Chaims*, 25 Oregon 221.

That the Defendant Requested Intercourse may be considered as showing absence of intent to rape. *Hunter v. State*, 29 Fla. 486; *State v. Biggs*, 93 Iowa 125.

4. **Proof of Intent Beyond Reasonable Doubt.** — *Dorsey v. State*, 108 Ga. 477; *Hunter v. State*, 29 Fla. 486; *Curry v. State*, 4 Tex. App. 574; *State v. McCune*, 16 Utah 170. See also *Krum v. State*, 19 Neb. 728.

5. **Proof of Intent Held to Be Sufficient** — *Alabama.* — *Brown v. State*, 121 Ala. 9; *Smith v. State*, 129 Ala. 89.

Arkansas. — *Pleasant v. State*, 13 Ark. 360.

California. — *People v. Cesena*, 90 Cal. 381; *People v. Stewart*, 97 Cal. 238; *People v. Johnson*, 131 Cal. 511; *People v. Kuches*, 120 Cal. 566.

Dakota. — *Territory v. Keyes*, 5 Dak. 244.

Georgia. — *Dunn v. State*, 56 Ga. 401.

Idaho. — *State v. Beard*, (Idaho 1899) 57 Pac. Rep. 867.

Illinois. — *Fitzpatrick v. People*, 98 Ill. 269; *Lathrop v. People*, 197 Ill. 169.

Indiana. — *Hanes v. State*, 155 Ind. 112.

Iowa. — *State v. Delong*, 96 Iowa 471; *State v. Urie*, 101 Iowa 411; *State v. Jerome*, 82 Iowa 749; *State v. Rudd*, 97 Iowa 389.

Kansas. — *State v. Kendall*, 56 Kan. 238.

Missouri. — *State v. Whitsett*, 111 Mo. 202; *State v. Prather*, 136 Mo. 20; *State v. Edie*, 147 Mo. 535; *State v. Alcorn*, 137 Mo. 121.

New York. — *Reynolds v. People*, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 179.

North Carolina. — *State v. Page*, 127 N. Car. 512; *State v. Williams*, 121 N. Car. 628; *State v. Deberry*, 123 N. Car. 703.

Pennsylvania. — *Com. v. Bell*, 13 Pa. Super. Ct. 576.

Tennessee. — *De Berry v. State*, 99 Tenn. 207.

Texas. — *Dockery v. State*, 35 Tex. Crim. 487; *Farmer v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 701.

Utah. — *State v. McCune*, 16 Utah 170.

Vermont. — *State v. Sullivan*, 68 Vt. 540; *State v. Hanlon*, 62 Vt. 334.

Washington. — *State v. Courtemarch*, 11 Wash. 446.

have in many cases, without hesitation, reversed convictions on the ground that the evidence was insufficient to prove such intent.¹ To sustain a conviction the testimony of the woman assaulted is not essential.²

Wisconsin. — *Bannen v. State*, (Wis. 1902) 91 N. W. Rep. 107.

Entering Bedroom of Sleeping Woman. — *Dudley v. State*, 121 Ala. 4; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344; *State v. Boon*, 13 Ired. L. (35 N. Car.) 244, 57 Am. Dec. 555; *Dibrell v. State*, 3 Tex. App. 456 (entering bedroom and removing bedclothes from sleeping girl). See also *Ford v. State*, 41 Tex. Crim. 270 (attempt to administer chloroform). *Compare Davis v. State*, 22 Fla. 633; *Mitchell v. State*, 33 Tex. Crim. 575; *Carroll v. State*, 24 Tex. App. 366; *Hancock v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 465; *Cunningham v. Com.*, 88 Va. 37.

Getting in Bed with Sleeping Woman. — *State v. Dalton*, 106 Mo. 463; *State v. Smith*, 80 Mo. 516 (husband also with woman). *Compare Ellenberg v. State*, 36 Tex. Crim. 139.

Negro Entering Bedroom or Getting into Bed of White Girl at Night. — *Carter v. State*, 35 Ga. 263; *Sharpe v. State*, 48 Ga. 16; *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25; *Darden v. State*, 97 Ga. 407. *Compare Johnson v. State*, 63 Ga. 355; *Gaskin v. State*, 105 Ga. 631; *Fields v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 907 (feeble-minded negro raising window and touching sleeping girl).

Negro Seizing White Child in Lonely Place. — *Ware v. State*, 67 Ga. 349.

Negro Pursuing White Girl. — *State v. Garner*, 129 N. Car. 536; *State v. Neely*, 74 N. Car. 425, 21 Am. Rep. 496. But see the next note *infra*.

Woman of Feeble Mind Consenting to Liberties with Her Person. — *State v. Huff*, 164 Mo. 480.

Hack Driver Entering Hack and Indecently Assaulting Passenger. — *State v. Daly*, 16 Oregon 240.

Decoying Child into Building. — *Head v. State*, 43 Neb. 30; *Hays v. People*, 1 Hill (N. Y.) 351; *Glover v. Com.*, 86 Va. 382. *Compare Robertson v. State*, 30 Tex. App. 498.

Decoying Female from House on False Report of Sickness. — *Crew v. State*, (Tex. Crim. 1893) 22 S. W. Rep. 973.

Place of Assault. — The fact that in case of resistance by the female assaulted, discovery would probably have followed, because of the surroundings of the place at which the assault was made, does not conclusively show absence of an intent to rape. *People v. Kuches*, 120 Cal. 566; *State v. Delong*, 96 Iowa 471; *State v. Garner*, 129 N. Car. 536. But the time and place of the assault are material elements for consideration in determining the intent of the accused. *Fitzpatrick v. People*, 98 Ill. 269; *Hollister v. State*, 156 Ind. 255; *Steinke v. State*, 33 Tex. Crim. 65.

Burglary with Intent to Rape. — See the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259, note. And see *State v. Underwood*, 49 La. Ann. 1599; *Burke v. State*, 5 Tex. App. 74 (stated under the title BURGLARY, vol. 5, p. 61, note).

1. Proof of Intent Insufficient. — *Alabama.* — *Jones v. State*, 90 Ala. 628, 24 Am. St. Rep. 850; *Toulet v. State*, 100 Ala. 72.

California. — *People v. Fleming*, 94 Cal. 308.

Florida. — *Davis v. State*, 22 Fla. 633.

Georgia. — *Joice v. State*, 53 Ga. 50; *Gaskin v. State*, 105 Ga. 631; *Dorsey v. State*, 108 Ga.

477.

Illinois. — *Jacques v. People*, 66 Ill. 84.

Indiana. — *Hollister v. State*, 156 Ind. 255.

Iowa. — *State v. Biggs*, 93 Iowa 125; *State v. Kendall*, 73 Iowa 255, 5 Am. St. Rep. 679; *State v. Chapman*, 88 Iowa 254.

Massachusetts. — *Com. v. Merrill*, 14 Gray (Mass.) 415, 77 Am. Dec. 336 (quoted from under title ASSAULT AND BATTERY, vol. 2, p. 973, note).

Mississippi. — *Green v. State*, 67 Miss. 356; *Harvey v. State*, (Miss. 1900) 26 So. Rep. 931.

Missouri. — *State v. Owsley*, 102 Mo. 678; *State v. Scholl*, 130 Mo. 396.

Nebraska. — *Skinner v. State*, 28 Neb. 814.

New York. — *People v. Kirwan*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 160.

North Carolina. — *State v. Massey*, 86 N. Car. 658, 41 Am. Rep. 478.

Ohio. — *Blannett v. State*, 4 Ohio Cir. Dec. 32, 8 Ohio Cir. Ct. 313; *Patterson v. State*, 11 Ohio Cir. Dec. 602, 21 Ohio Cir. Ct. 184.

Texas. — *Hancock v. State*, (Tex. Crim. 1898) 47 S. W. Rep. 465; *House v. State*, 9 Tex. App. 53; *Jones v. State*, 18 Tex. App. 485; *Steinke v. State*, 33 Tex. Crim. 65; *Fields v. State*, (Tex. Crim. 1894) 24 S. W. Rep. 907; *Robertson v. State*, 30 Tex. App. 498; *Power v. State*, 30 Tex. App. 662; *Carson v. State*, (Tex. Crim. 1893) 24 S. W. Rep. 409; *Bozeman v. State*, 34 Tex. Crim. 503; *Ellenberg v. State*, 36 Tex. Crim. 139; *Laco v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 176; *O'Brien v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 969; *Moon v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 806; *Grayhill v. State*, 41 Tex. Crim. 286; *Wood v. State*, (Tex. Crim. 1901) 61 S. W. Rep. 308.

Virginia. — *Hairston v. Com.*, 97 Va. 754; *Christian v. Com.*, 23 Gratt. (Va.) 954.

Wisconsin. — *Moore v. State*, 79 Wis. 546.

Negro Taking Hold of Skirt of Woman on Horseback. — *Green v. State*, 67 Miss. 356.

Man on Horseback Striking Woman with Whip. — *Mathews v. State*, 34 Tex. Crim. 479.

Accosting and Following Woman. — *Dorsey v. State*, 108 Ga. 477. See also *State v. Jeffreys*, 117 N. Car. 743 (accosting woman and following her with person exposed); *State v. Massey*, 86 N. Car. 658, 41 Am. Rep. 478.

In *State v. Donovan*, 61 Iowa 369, an instruction that a man's chasing a woman who is alone and in a private place raises a presumption of intent to rape was held to be error.

But see as to the *North Carolina* cases the last note, *supra*.

2. Prosecutrix Need Not Testify. — *People v. Bates*, (Oyer & T. Ct.) 2 Park. Crim. (N. Y.) 27; *Blair v. State*, (Tex. Crim. 1900) 60 S. W. Rep. 879.

The Prosecutrix Should Not Testify to Conclusions of Law, as that the defendant attempted to ravish her. *Scott v. State*, 48 Ala. 420; *Sullivant v. State*, 8 Ark. 400.

Abandonment of Purpose. — Where the assault is made in the first instance with an intent to commit rape, the subsequent abandonment by the accused of his unlawful purpose, irrespective of the cause of such abandonment, is no defense.¹

Merger. — The general doctrine of merger in its application to criminal law has been fully examined under its appropriate title.² Additional authorities and specific references may be found in the note.³ When on an indictment for rape the evidence establishes some sexual crime not an essential of rape, no conviction can be had.⁴

IX. ATTEMPT TO RAPE. — An attempt to commit a rape is an indictable offense without statute,⁵ but in some jurisdictions an attempt to rape is expressly made a crime, or comes within a general provision punishing generally attempts to commit felonies.⁶ On an indictment for rape, the accused

1. **Abandonment of Purpose.** — *People v. Johnson*, 131 Cal. 511; *State v. Smith*, 9 Houst. (Del.) 588; *People v. Courier*, 79 Mich. 368; *State v. Williams*, 121 N. Car. 628. And see the title ASSAULT AND BATTERY, vol. 2, p. 974, note.

2. See the title MERGER, vol. 20, p. 602 *et seq.*

3. **Conviction of Assault with Intent on Indictment for Rape.** — See the titles ASSAULT AND BATTERY, vol. 2, p. 974, note; MERGER, vol. 20, pp. 604, 605. And see the title RAPE, 17 ENCYC. OF PL. AND PR. 665. See also the following cases: *Murphy v. State*, 120 Ind. 115; *State v. Taylor*, 103 Iowa 22; *State v. Austin*, 109 Iowa 118; *State v. Kendall*, 56 Kan. 238; *Bethel v. Com.*, 80 Ky. 526; *Stricklin v. Com.*, (Ky. 1889) 10 S. W. Rep. 465, 10 Ky. L. Rep. 747; *Reg. v. John*, 11 Montreal Leg. N. 313.

Conviction of Common Assault on Indictment for Rape. — See the references under the last preceding catchline. See also the following cases: *Richardson v. State*, 54 Ala. 158; *Richie v. State*, 58 Ind. 355; *Mills v. State*, 52 Ind. 187; *State v. Love*, 106 La. 452; *State v. Alcorn*, 137 Mo. 121; *Reg. v. Edwards*, 29 Ont. 451.

No Actual Violence. — When the assault with intent to commit rape was without actual violence, on an indictment therefor a verdict of common assault has been held to be improper. *Reg. v. Catherall*, 13 Cox C. C. 109. See also *Reg. v. Bostock*, 17 Cox C. C. 700; *Reg. v. Holcroft*, 2 C. & K. 341, 61 E. C. L. 341; *State v. McAvoy*, 73 Iowa 557. See further the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 261. The English cases involve assault on children below the age of consent. See also the title ASSAULT AND BATTERY, vol. 2, pp. 987, 988, note.

Under an Indictment for Assault with Intent to Rape, there may be a conviction for a common assault:

England. — *Rex v. Dawson*, 3 Stark. 62, 14 E. C. L. 163; *Reg. v. Guthrie*, L. R. 1 C. C. 241, 11 Cox C. C. 522; *Reg. v. Bostock*, 17 Cox C. C. 700; *Reg. v. Williams*, (1893) 1 Q. B. 320; *Rex v. Lloyd*, 7 C. & P. 318, 32 E. C. L. 523.

Alabama. — *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Norris v. State*, 87 Ala. 85.

California. — *People v. Manchego*, 80 Cal. 306. Compare *People v. Gomez*, 118 Cal. 326.

Georgia. — *Tiller v. State*, 101 Ga. 782.

Iowa. — *State v. Rudd*, 97 Iowa 389. Compare *State v. McDonough*, 104 Iowa 6.

Missouri. — *State v. White*, 52 Mo. App. 285. *North Carolina.* — *State v. Garner*, 129 N. Car. 536.

Texas. — *Bartlett v. State*, (Tex. Crim. 1899) 51 S. W. Rep. 918; *Curry v. State*, 4 Tex. App. 574; *Brown v. State*, 7 Tex. App. 569; *Shields v. State*, 32 Tex. Crim. 498; *Porter v. State*, 33 Tex. Crim. 385.

Washington. — *State v. Keen*, 10 Wash. 93.

See also the title ASSAULT AND BATTERY, vol. 2, p. 966.

Indecent Assault. — *State v. West*, 39 Minn. 321.

Aggravated Assault — *Texas.* — *Shell v. State*, (Tex. Crim. 1896) 38 S. W. Rep. 207; *Amunsden v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 418.

4. **Indictment for Rape, Fornication Shown.** — See the title FORNICATION, vol. 13, p. 1122 and note; also *Speer v. State*, 60 Ga. 381.

Incest. — See *Com. v. Goodhue*, 2 Met. (Mass.) 193, decided under a special statute in Massachusetts and conviction sustained. See also the title MERGER, vol. 20, p. 605, note.

Adultery. — *State v. Hooks*, 69 Wis. 182, 2 Am. St. Rep. 728. Compare *Com. v. Squires*, 97 Mass. 59.

Detaining Woman Against Her Will for Purpose of Prostitution. — *Lowry v. Com.*, (Ky. 1901) 63 S. W. Rep. 977, 23 Ky. L. Rep. 1240.

5. **Attempt to Rape.** — *Reg. v. Mayers*, 12 Cox C. C. 311. And see the title ATTEMPTS TO COMMIT CRIME, vol. 3, pp. 251, 252, note.

6. **Statutes** — *California.* — *People v. Gardner*, 98 Cal. 127.

Connecticut. — *Rooke v. State*, 70 Conn. 104.

Georgia. — *Camp v. State*, 3 Ga. 417.

Kansas. — *State v. Hart*, 33 Kan. 218; *Matter of Lloyd*, 51 Kan. 501.

Missouri. — *State v. Harney*, 101 Mo. 470. See also *State v. Ross*, 25 Mo. 426.

New Jersey. — *Farrell v. State*, 54 N. J. L. 421.

New York. — *People v. Mosier*, 73 N. Y. App. Div. 5.

Texas. — *Melton v. State*, 24 Tex. App. 284; *Franklin v. State*, 34 Tex. Crim. 203; *West v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 686; *Taylor v. State*, (Tex. Crim. 1902) 69 S. W. Rep. 149.

Virginia. — *Christian v. Com.*, 23 Gratt. (Va.) 954; *Givens v. Com.*, 29 Gratt. (Va.) 830; *Cunningham v. Com.*, 88 Va. 37.

Compare *Fox v. State*, 34 Ohio St. 377;

may be convicted of an attempt to rape.¹

Attempt Distinguished from Assault with Intent to Commit. — An attempt to commit rape is distinct from an assault with intent to rape, as the element of assault which is essential to the consummation of the latter offense² is not necessary to the crime of attempt to rape.³ Thus, in *England* and in a few jurisdictions in the *United States*, when the attempt is made to have sexual intercourse with an infant under the statutory age of consent, the accused is not guilty of assault with intent to rape if the infant in fact consented, as the consent destroys the element of assault;⁴ but he may be convicted of an attempt to rape.⁵ So it has been held that a verdict of guilty of an "attempt to commit rape" will not authorize a sentence for an assault with intent to commit rape.⁶ And in *Texas* it is held that on an indictment for an assault with intent to rape, the accused cannot be convicted of an attempt to rape.⁷

Overt Act. — A mere intention existing in the mind of the accused to commit rape is not an attempt to commit rape; there must be some overt act in pursuance of such intent.⁸ But the overt act need not be such as amounts to a technical assault.⁹

An Intent on the part of the accused to have sexual intercourse with the female with force and against her will, or, in other words, the intent to commit rape, must, of course, exist in the mind of the accused to render him guilty of an attempt to rape.¹⁰

Proof of Intent. — The principles regarding the proof of intent in prosecutions

Martin v. State, 7 Ohio Cir. Dec. 564, 13 Ohio Cir. Ct. 604.

Statutes in some states make the attempt a felony punishable with one-half the term of imprisonment for the completed offense. See *infra*, this title, *Punishment*.

Attempt by Negro upon White Woman. — Under early statutes in some of the Southern states, an attempt by a negro to commit rape upon a white woman was a capital offense. *Anthony v. State*, 29 Ala. 27; *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Lewis v. State*, 35 Ala. 380; *Pleasant v. State*, 13 Ark. 360, 15 Ark. 624; *Grandison v. State*, 2 Humph. (Tenn.) 451; *Henry v. State*, 4 Humph. (Tenn.) 270; *Com. v. Watis*, 4 Leigh (Va.) 672; *Com. v. Mann*, 2 Va. Cas. 210. See also *infra*, this title, *Punishment*.

1. Indictment for Rape, Conviction for Attempt — *England*. — Reg. v. Ryland, 11 Cox C. C. 101; Reg. v. Hapgood, L. R. 1 C. C. 221.

Alabama. — *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113.

Connecticut. — *Rookey v. State*, 70 Conn. 104.

Kansas. — *State v. Frazier*, 53 Kan. 87, 42 Am. St. Rep. 274.

Kentucky. — *Stricklin v. Com.*, (Ky. 1889) 10 S. W. Rep. 465, 10 Ky. L. Rep. 747.

Nevada. — *State v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754.

See also the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 255; and see the title RAPE, 17 ENCYC. OF PL. AND PR. 666.

Though the Attempt Is Punishable with the Same Severity as the Completed Crime, a conviction for an attempt may still be had on such an indictment. *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Wash v. State*, 14 Smed. & M. (Miss.) 120. These cases arose under old statutes punishing an attempt by a negro on a white woman with death.

2. See *supra*, this title, *Assault with Intent to Rape*.

3. Assault Not Essential to Attempt. — Reg. v. Martin, 9 C. & P. 213, 38 E. C. L. 85; *Lewis v. State*, 35 Ala. 380; *People v. Gardner*, 98 Cal. 127; *Melton v. State*, 24 Tex. App. 284.

4. See *supra*, this title, *Assault with Intent to Rape*.

5. Reg. v. Martin, 9 C. & P. 213, 38 E. C. L. 85; Reg. v. Paquet, 9 Quebec L. R. 351; *Givens v. Com.*, 29 Gratt. (Va.) 830. And see the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259.

6. Fox v. State, 34 Ohio St. 377. Compare *Rookey v. State*, 70 Conn. 104.

7. Taylor v. State, (Tex. Crim. 1902) 69 S. W. Rep. 149; *Brown v. State*, 7 Tex. App. 569; *Burney v. State*, 21 Tex. App. 565; *Milton v. State*, 23 Tex. App. 204; *Melton v. State*, 24 Tex. App. 284; *Reagan v. State*, 28 Tex. App. 227.

8. Necessity for Overt Act. — *Matter of Lloyd*, 51 Kan. 501; *State v. Frazier*, 53 Kan. 87, 42 Am. St. Rep. 274; *State v. Sunnafrank*, (Kan. 1902) 67 Pac. Rep. 1103; *Kelly v. Com.*, 1 Grant Cas. (Pa.) 484; *Cunningham v. Com.*, 88 Va. 37. See also *Com. v. Clark*, 6 Gratt. (Va.) 684. And see the title ATTEMPTS TO COMMIT CRIME, vol. 3, pp. 254, 258 *et seq.*

Verbal Solicitations Insufficient. — *State v. Harney*, 101 Mo. 470. And see the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259, notes.

9. Lewis v. State, 35 Ala. 380, stated under the title ATTEMPTS TO COMMIT CRIME, vol. 3, p. 259, note.

10. Intent. — *Lewis v. State*, 30 Ala. 54, 68 Am. Dec. 113; *Lewis v. State*, 35 Ala. 380; *Charles v. State*, 11 Ark. 389; *State v. Lung*, 21 Nev. 209, 37 Am. St. Rep. 505; *Moon v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 806; *Warren v. State*, 38 Tex. Crim. 152; *McAdoo v. State*, 35 Tex. Crim. 603, 60 Am. St. Rep. 61; *Com. v. Fields*, 4 Leigh (Va.) 648.

for attempts to rape are the same as in prosecutions for assault with intent to commit rape.¹

X. COMPULSORY DEFILEMENT. — By statute in some states it is made a crime by force, menace, or duress to compel a woman to be defiled against her will. While to constitute such a crime it is necessary that the defilement be against the will of the woman, and her dissent must be shown by the prosecution,² it is not necessary to show the same degree of force and resistance on the part of the woman as is required in the crime of rape.³

XI. TAKING OR DETENTION FOR SEXUAL INTERCOURSE. — In *Kentucky* the statutes make it an offense to take or detain a woman against her will for the purpose of sexual intercourse. The purpose of this statute is to punish those who "take or detain" females against their will and consent in instances where they would not be guilty of rape or attempt to rape.⁴

XII. EVIDENCE — 1. Admissibility — a. IN GENERAL. — The general rules of evidence as regards relevancy and materiality apply of course to prosecutions for rape.⁵

1. See *supra*, this title, *Assault with Intent to Rape*.

Sufficiency of Evidence to Show Intent — Evidence Held to Be Sufficient. — *Franklin v. State*, 34 Tex. Crim. 203; *Givens v. Com.*, 29 Gratt. (Va.) 830; *Mings v. Com.*, 85 Va. 638.

Evidence Held to Be Insufficient. — *Payne v. Com.*, (Ky. 1889) 11 S. W. Rep. 1133, 11 Ky. L. Rep. 226; *West v. State*, (Tex. Crim. 1893) 21 S. W. Rep. 686; *Waire v. State*, (Tex. Crim. 1901) 64 S. W. Rep. 1061; *Christian v. Com.*, 23 Gratt. (Va.) 954.

2. Compulsory Defilement. — *Pollard v. State*, 2 Iowa 567; *Lampton v. State*, (Miss. 1892) 11 So. Rep. 656 (stated under the title ABDUCTION, vol. 1, p. 174). See also *State v. Maloney*, 105 Mo. 10.

See generally as to this and similar statutes the titles ABDUCTION, vol. 1, p. 173 *et seq.*; SEDUCTION.

Defilement of Ward or Employee under Eighteen Years of Age. — See Rev. Stat. Mo. (1899), § 1845. This statute includes every one to whose care a child under eighteen years of age is committed. *State v. Strattman*, 100 Mo. 540; *State v. Summar*, 143 Mo. 220.

Previous Chastity Not Essential. — *State v. Summar*, 143 Mo. 220; *State v. Rogers*, 108 Mo. 202.

If the Evidence Shows Rape, there can be no conviction under this statute. *State v. Woolaver*, 77 Mo. 103; *State v. Strattman*, 100 Mo. 540.

3. *Pollard v. State*, 2 Iowa 567; *State v. Montgomery*, 79 Iowa 737. See also DEFILE, vol. 9, p. 178.

Compelling Intercourse by Threats of Exposure. — Where a man who has detected a woman in the act of having sexual intercourse with another man compels her to submit to sexual intercourse under threats to expose her, he is guilty of compulsory defilement. *State v. Fernald*, 88 Iowa 553.

Previous Chastity Not Essential. — *State v. Fernald*, 88 Iowa 553. See also the title ABDUCTION, vol. 1, p. 179.

4. *Evans v. Com.*, 79 Ky. 414; *Porter v. Com.*, 7 Ky. L. Rep. 364; *Everhart v. Com.*, 7 Ky. L. Rep. 218. And see the title ABDUCTION, vol. 1, p. 174, note.

See generally as to this and similar statu-

tory offenses the titles ABDUCTION, *ubi supra*; SEDUCTION.

Where the Woman Detained Is So Weak-minded as to be unable to consent to the act of sexual intercourse, but the defendant is ignorant of such fact and she so conducts herself that a reasonable person would deem her to consent, he is not guilty of detaining her against her will. *Beaven v. Com.*, (Ky. 1895) 30 S. W. Rep. 968.

To Detain, within the meaning of this statute, is to stop, delay, or restrain from proceeding, and any actual detention is sufficient. *Paynter v. Com.*, (Ky. 1900) 55 S. W. Rep. 687, holding that to take the crutch of a crippled girl and to hold her hand while soliciting sexual intercourse was sufficient.

But there must be an actual detention by force or threats; and so where a drunken man solicited a woman to have sexual intercourse with him, following her as she ran, it was held that he could not be convicted under the statute. *Riley v. Com.*, (Ky. 1900) 55 S. W. Rep. 547.

As to what amounts to detention under a somewhat similar *Missouri* statute, see *State v. Maloney*, 105 Mo. 10, stated under DETAIN, vol. 9, p. 409.

5. See generally the title EVIDENCE, vol. 11, p. 484.

Evidence that the Prosecutrix Knew of the Bad Character of the Defendant is immaterial, having no tendency to show consent. *State v. Porter*, 57 Iowa 601.

That Defendant Is Married Man with Children Inadmissible. — *Smith v. State*, (Tex. Crim. 1902) 68 S. W. Rep. 995.

Social Customs founded on racial difference may be considered by the jury in the prosecution of a negro for rape on a white woman. *Jackson v. State*, 91 Ga. 322, 44 Am. St. Rep. 25.

Inoculation of Prosecutrix with Venereal Disease. — *State v. Marcks*, 140 Mo. 656. See also *State v. Otey*, 7 Kan. 69, and the title MEDICAL JURISPRUDENCE, vol. 20, p. 534.

Opinion Evidence — Generally Inadmissible. — *Scott v. State*, 48 Ala. 420; *State v. Crawford*, 39 Kan. 257.

The prosecutrix may testify as to whether she consented, and such testimony is not ob-

b. ADMISSIONS BY DEFENDANT. — Admissions by the accused may, of course, be given in evidence against him, and such admissions may be either express or implied from equivocal statements or from his conduct.¹

c. ADMISSIONS BY PROSECUTRIX. — As the female upon whom the rape is charged to have been committed is not a party to the prosecution, her statements out of court, except when they constitute a part of the *res gestæ*, or are introduced for the purpose of impeaching her testimony after a proper foundation has been laid therefor,² are wholly inadmissible against the state.³

d. CHARACTER OF DEFENDANT. — Instances arising in prosecutions for rape and illustrating the application of general rules of evidence to evidence of the defendant's character are given in the note.⁴

e. CHASTITY OF PROSECUTRIX — (1) *Evidence for Defense* — (a) *In General* — *Reputation*. — As a general rule, a witness's general credibility for truth and veracity cannot be impeached by showing his or her reputation for chastity;⁵ but in prosecutions for rape, the character of the prosecuting witness for chastity is always in issue as bearing on the probability of her consent to the act.⁶ And the fact that the prosecutrix is not a witness does not exclude

jectionable as stating a conclusion of law or an opinion. *Jones v. State*, 104 Ala. 30; *Coates v. State*, 2 Tex. App. 16.

See generally the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 421.

Identification of Accused. — *Cotton v. State*, 87 Ala. 75; *Dudley v. State*, 121 Ala. 4; *Lathrop v. People*, 197 Ill. 169; *State v. Baker*, 106 Iowa 99; *State v. Washington*, 104 La. 57; *State v. Lee*, 33 Oregon 506; *Bruce v. State*, 31 Tex. Crim. 590; *Oxsheer v. State*, 38 Tex. Crim. 499; *Clark v. State*, 39 Tex. Crim. 152; *State v. Bedard*, 65 Vt. 278; *Brogy v. Com.*, 10 Gratt. (Va.) 722. And see generally the title IDENTITY, vol. 15, p. 918.

Crime Committed in Lonely Place — *Prosecution, to Rebut Consent, May Account for Prosecutrix's Presence*. — *Stevens v. Com.*, (Ky. 1898) 45 S. W. Rep. 76. See also *State v. Hartnett*, 75 Mo. 251; *State v. Patrick*, (Mo. 1891) 15 S. W. Rep. 290.

Evidence as to Locus in Quo — *Signs of Struggle at Place*. — *Roberts v. State*, 122 Ala. 47. But see *Lawson v. State*, 17 Tex. App. 292 (inadmissible after interval of four days).

Finding of Hair Ornament at Locus. — *State v. Armstrong*, 167 Mo. 257.

Identification of Locus. — *Roberts v. State*, 122 Ala. 47; *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48.

Plan of Place — *House*. — *State v. Jerome*, 33 Conn. 265. See generally the titles DOCUMENTARY EVIDENCE, vol. 9, p. 900; EVIDENCE, vol. 11, p. 539.

1. *Admissions by Accused*. — *People v. Roach*, 129 Cal. 33; *Hogan v. State*, 46 Miss. 274; *People v. Flaherty*, 27 N. Y. App. Div. 535; *People v. Flaherty*, 162 N. Y. 532. And see generally the title CONFESSIONS, vol. 6, p. 520.

Offer of Consideration to Stop Prosecution. — *McMath v. State*, 55 Ga. 303. See also *Hardtke v. State*, 67 Wis. 552.

An Admission that the Accused "Insulted" the Prosecutrix is not an admission that he raped her. *People v. Page*, 162 N. Y. 272.

Silence Not Admission. — *People v. Page*, 162 N. Y. 272. Compare *People v. Morris*, (Supm. Ct. Gen. T.) 12 N. Y. Supp. 492.

Statements of One Joint Defendant. — *State v. Harris*, 150 Mo. 56. See also *Hardtke v. State*, 67 Wis. 552.

2. *Admissions by Prosecutrix*. — *People v. Lambert*, 120 Cal. 170; *Smith v. State*, 77 Ga. 705; *Kennedy v. People*, 40 Ill. 488; *Shirwin v. People*, 69 Ill. 55; *Austine v. People*, 110 Ill. 248; *Bessette v. State*, 101 Ind. 85; *State v. Spidle*, 42 Kan. 441; *King v. Com.*, (Ky. 1892) 20 S. W. Rep. 224; *Hardtke v. State*, 67 Wis. 552.

3. *State v. Shettleworth*, 18 Minn. 208; *State v. Vocum*, 117 Mo. 622; *State v. Sudduth*, 52 S. Car. 488.

4. *Prosecution Cannot Attack Defendant's Character in First Instance*. — *Addison v. People*, 193 Ill. 405; *Gifford v. People*, 87 Ill. 210; *Owens v. State*, 39 Tex. Crim. 391. See also *State v. Boyland*, 24 Kan. 186. And see the titles CHARACTER (IN EVIDENCE), vol. 5, p. 854; EVIDENCE, vol. 11, p. 518.

Accused May Show His Character Good or Good for Chastity. — *Lincecum v. State*, 29 Tex. App. 328, 25 Am. St. Rep. 727; *Hardtke v. State*, 67 Wis. 552. See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 866.

When the Accused Has Put His Character in Issue, the prosecution may attack it. *State v. Jerome*, 33 Conn. 265; *State v. Knapp*, 45 N. H. 148. See also *McMurrin v. Rigby*, 80 Iowa 322; and the titles CHARACTER (IN EVIDENCE), vol. 5, p. 854; EVIDENCE, vol. 11, p. 519.

When Defendant Becomes Witness, His Character Is in Issue. — *People v. Satterlee*, 5 Hun (N. Y.) 167. See also the title CHARACTER (IN EVIDENCE), vol. 5, pp. 857 *et seq.*, 874, 875.

5. See the title CHARACTER (IN EVIDENCE), vol. 5, p. 859.

Aliter in Missouri. — *State v. Duffy*, 128 Mo. 549.

As Bearing Partly on Credibility. — In some decisions evidence of the woman's unchastity is held admissible "not only as affecting her credibility as a witness, but as independently bearing upon the question" of her consent, (as to which see the next paragraph *infra*). *Seals v. State*, 114 Ga. 518. See also *Carney v. State*, 118 Ind. 525; *Neace v. Com.*, (Ky. 1901) 62 S. W. Rep. 733; *Jenkins v. State*, 1 Tex. App. 346.

6. *Chastity of Prosecutrix as Bearing on Consent* — *England*. — *Reg. v. Clay*, 5 Cox C. C. 146; *Reg. v. Dean*, 6 Cox C. C. 23; *Reg. v. Tissington*, 1 Cox C. C. 48 (proof of general indecency admitted).

evidence on the part of the defense attacking her reputation for chastity.¹

Attempts — Assault with Intent to Rape. — The rule admitting evidence of the reputation of the prosecutrix for chastity applies in prosecutions for attempt to rape or assault with intent to commit rape.²

(b) **Particular Acts of Unchastity — With Third Persons.** — By the great weight of authority it is held that in prosecutions for rape specific acts of unchastity on the part of the prosecutrix with third persons cannot be shown in evidence,³ though in a few jurisdictions the contrary is held.⁴

Arkansas. — *Maxey v. State*, 66 Ark. 523.
Georgia. — *Seals v. State*, 114 Ga. 518.

Indiana. — *Carney v. State*, 118 Ind. 525.
 See also *Wilson v. State*, 16 Ind. 392.

Iowa. — *State v. McDonough*, 104 Iowa 6.
Kentucky. — *Neace v. Com.*, (Ky. 1901) 62 S. W. Rep. 733, 23 Ky. L. Rep. 125.

Louisiana. — *State v. Reed*, 41 La. Ann. 581.
Massachusetts. — *Com. v. Kendall*, 113 Mass.

210, 18 Am. Rep. 469.
Nevada. — *State v. Campbell*, 20 Nev. 122.

New Hampshire. — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

New Mexico. — *Territory v. Pino*, 9 N. Mex. 598.

New York. — *Conkey v. People*, 1 Abb. App. Dec. (N. Y.) 418.

North Carolina. — *State v. Long*, 93 N. Car. 542.

Ohio. — *McDermott v. People*, 13 Ohio St. 332, 82 Am. Dec. 444.

Oregon. — *State v. Ogden*, 39 Oregon 195.
Tennessee. — *Titus v. State*, 7 Baxt. (Tenn.) 132.

Texas. — *Steinke v. State*, 33 Tex. Crim. 65.
 For Other Cases see the title CHARACTER (IN EVIDENCE), vol. 5, p. 871.

Evidence of Reputation of House in Which Prosecutrix Lived Excluded. — *State v. Taylor*, 57 S. Car. 483, 76 Am. St. Rep. 575.

Evidence as to the Character of a House where the Prosecutrix with Her Husband Had Stayed for the Night has been held to be properly excluded. *State v. Duffy*, 124 Mo. 1.

Evidence that Mother of Prosecutrix Was Keeping House of Ill Fame Excluded. — *Manning v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 920.

Habit of Prosecutrix to Tell Indecent Stories Held to Be Inadmissible. — *People v. Kuches*, 120 Cal. 566.

Evidence of Frequent Intoxication of Prosecutrix Excluded. — *State v. Shields*, 45 Conn. 258.

Proof that the Prosecutrix Had Been a Common Seller of Intoxicating Liquor has been excluded. *Com. v. McDonald*, 110 Mass. 405.

Prosecutrix May Be Asked Whether She Has Been Prostitute. — *Rex v. Barker*, 3 C. & P. 589, 14 E. C. L. 467. Compare *Fry v. Com.*, 82 Va. 334.

1. *People v. Johnson*, 106 Cal. 289.

2. **Rule in Cases of Assault with Intent and Attempt.** — *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Camp v. State*, 3 Ga. 419; *Com. v. Kendall*, 113 Mass. 210, 18 Am. Rep. 469; *State v. Daniel*, 87 N. Car. 507. See also the title CHARACTER (IN EVIDENCE), vol. 5, p. 871.

3. **Specific Acts with Third Persons Incompetent.** — *England.* — *Reg. v. Dean*, 6 Cox C. C. 23. See, however, *Reg. v. Robins*, 2 M. & Rob. 512; *Rex v. Martin*, 6 C. & P. 562, 25 E. C. L. 544, dicta per Williams, J.; *Reg. v. Mercer*, 6 Jur. 243.

4. **Contra — Specific Acts Provable.** — In the following cases, evidence of specific acts has been admitted in cases of rape: *People v. Shea*, 125 Cal. 151; *Brennan v. People*, 7 Hun (N. Y.) 171; *State v. Murray*, 63 N. Car. 31; *State v. Freeman*, 100 N. Car. 429 (prosecutrix may be asked as to having given birth to bastard); *Titus v. State*, 7 Baxt. (Tenn.) 133. See also contra cases under the title CHARACTER (IN EVIDENCE), vol. 5, p. 878.

Without deciding whether specific acts may be shown to impeach the prosecutrix's chastity, it has been held that evidence that she had been in the habit of receiving men at her house

Alabama. — See *Nugent v. State*, 18 Ala. 521.
Arkansas. — *Pleasant v. State*, 15 Ark. 624.

Delaware. — *State v. Turner*, *Houst. Crim. Cas.* (Del.) 76.

Georgia. — *Innis v. State*, 42 Ga. 485; *Seals v. State*, 114 Ga. 518.

Indiana. — *Richie v. State*, 59 Ind. 121. See also *Wilson v. State*, 16 Ind. 392.

Iowa. — *State v. McDonough*, 104 Iowa 6.
Massachusetts. — *Com. v. Regan*, 105 Mass. 593.

Michigan. — *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360.

Minnesota. — *State v. Vadnais*, 21 Minn. 382.
Missouri. — See *State v. Whitesell*, 142 Mo. 467.

Nevada. — *State v. Campbell*, 20 Nev. 122.
New Hampshire. — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132; *State v. Knapp*, 45 N. H. 148; *State v. Abbott*, cited in *State v. Knapp*, 45 N. H. 155.

New Mexico. — *Territory v. Pino*, 9 N. Mex. 598.

Oregon. — *State v. Ogden*, 39 Oregon 195.

Texas. — *Dorsey v. State*, 1 Tex. App. 33; *Mayo v. State*, 7 Tex. App. 342.

See also for further authorities and discussion the title CHARACTER (IN EVIDENCE), vol. 5, p. 878.

Assault with Intent to Rape — Same Rule. — *Reg. v. Holmes*, L. R. 1 C. C. 334; *Reg. v. Riley*, 18 Q. B. D. 481, 16 Cox C. C. 191; *People v. McLean*, 71 Mich. 309, 15 Am. St. Rep. 263; *Shields v. State*, 32 Tex. Crim. 498.

In *McDermott v. State*, 13 Ohio St. 332, 82 Am. Dec. 444, evidence that the prosecutrix had made an arrangement with a third person to have sexual intercourse with him upon the day of the alleged rape was held to be inadmissible.

In Case the Prosecutrix Denies Such Acts, she cannot be contradicted by other witnesses. *Reg. v. Holmes*, L. R. 1 C. C. 334; *Rex v. Hodgson*, R. & R. C. C. 211; *Reg. v. Cockcroft*, 11 Cox C. C. 410; *People v. McLean*, 71 Mich. 309, 15 Am. St. Rep. 263. See also *Reg. v. Dean*, 6 Cox C. C. 23. But see *Reg. v. Robins*, 2 M. & Rob. 512, 1 Cox C. C. 55.

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Without deciding whether specific acts may be shown to impeach the prosecutrix's chastity, it has been held that evidence that she had been in the habit of receiving men at her house

With Defendant. — In all jurisdictions, even those which refuse to allow the introduction of evidence of specific acts of unchastity by the prosecutrix with third persons, it is now recognized as a settled rule that the defense may show specific acts of unchastity between the prosecutrix and the defendant, as tending to show that the sexual intercourse complained of was with her express or implied consent.¹ The question whether the prosecution may show prior acts of intercourse between the prosecutrix and the defendant is discussed hereinafter.²

(c) **Carnal Knowledge of Children under Age of Consent.** — In prosecutions for carnally knowing a child under the statutory age of consent, as consent on her part is no defense, the defense can show neither the reputation of the prosecutrix for chastity,³ specific acts of unchastity on her part with third persons,⁴ nor previous intercourse by her with the defendant.⁵

(d) **Admissibility to Rebut Other Evidence.** — Where the condition of the private parts of the female is relied upon to show the fact of sexual intercourse, evidence to show other acts of intercourse between the prosecutrix and other persons is admissible to show the cause of such condition and to rebut the contention that it was caused by the defendant.⁶ For example, such evi-

for promiscuous intercourse is admissible, as such evidence goes further than specific acts and shows her to be a prostitute. *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309.

There being testimony that the prosecutrix was a common prostitute, testimony has been held admissible that she had had other separate acts of intercourse running down to the time of the trial. *Brown v. State*, 72 Miss. 997.

Acts of Solicitation by Prosecutrix Held Not to Be Admissible. — *State v. Hairston*, 121 N. Car. 579.

The Prosecutrix May Be Compelled to Answer as to such acts. *Titus v. State*, 7 Baxt. (Tenn.) 133; *Benstine v. State*, 2 Lea (Tenn.) 169, 31 Am. Rep. 593. But *quære*, *State v. Johnson*, 28 Vt. 512. Though such acts may be proved in the first instance by other testimony, without interrogating her thereon. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506.

1. Specific Acts of Unchastity with Defendant — England. — *Reg. v. Riley*, 18 Q. B. D. 481, 16 Cox C. C. 191; *Rex v. Martin*, 6 C. & P. 562, 25 E. C. L. 544; *Rex v. Hodgson*, R. & R. C. C. 211.

Alabama. — *McQuirk v. State*, 84 Ala. 435, 5 Am. St. Rep. 381.

Arkansas. — *Pleasant v. State*, 15 Ark. 624.

Florida. — *Rice v. State*, 35 Fla. 236, 48 Am. St. Rep. 245.

Iowa. — *State v. Cassidy*, 85 Iowa 145.

Kentucky. — *Brown v. Com.*, 102 Ky. 227.

Nebraska. — *Bailey v. State*, 57 Neb. 706, 73 Am. St. Rep. 540.

New Hampshire. — *State v. Forshner*, 43 N. H. 89, 80 Am. Dec. 132.

New York. — *Woods v. People*, 55 N. Y. 515, 14 Am. Rep. 309.

North Carolina. — *State v. Jefferson*, 6 Ired. L. (28 N. Car.) 305.

Oregon. — *State v. Ogden*, 39 Oregon 195.

Texas. — *Rogers v. State*, 1 Tex. App. 187.

Wisconsin. — *Hardtke v. State*, 67 Wis. 552.

Evidence of Admissions by the Prosecutrix of previous acts of intercourse with the defendant has been held to be admissible. *State v. Cook*, 65 Iowa 560; *State v. Cassidy*, 85 Iowa 145.

Where Several Defendants Were Indicted for a Rape, evidence of the prosecutrix's prior acts of unchastity with any of the defendants was held to be admissible even though a *nolle prosequi* had been entered as to the defendant with whom such prior intercourse was had. *Bedgood v. State*, 115 Ind. 275.

Prosecutrix Compellable to Answer as to Such Prior Acts. — *Bedgood v. State*, 115 Ind. 275.

When the Prosecutrix Denies such intercourse, the defense may introduce evidence contradicting her. *Reg. v. Riley*, 16 Cox C. C. 191.

2. See *infra*, this subsection, *Proof of Other Crimes*.

3. Carnal Knowledge of Infants. — *People v. Johnson*, 106 Cal. 289; *People v. Benc*, 130 Cal. 159; *State v. Eberline*, 47 Kan. 155; *People v. Glover*, 71 Mich. 303; *State v. Duffey*, 128 Mo. 549; *State v. Williamson*, 22 Utah 248, 83 Am. St. Rep. 780.

4. Evidence as to Specific Acts Irrelevant. — *People v. Johnson*, 106 Cal. 289; *People v. Glover*, 71 Mich. 303; *People v. Abbott*, 97 Mich. 484, 37 Am. St. Rep. 360; *State v. Whitesell*, 142 Mo. 467; *State v. Hilberg*, 22 Utah 27. See also *State v. Sibley*, 131 Mo. 519; *State v. Hairston*, 121 N. Car. 579.

5. *People v. Harris*, 103 Mich. 473.

6. To Rebut Inference from Female's Condition. — *Rice v. State*, 35 Fla. 236, 48 Am. St. Rep. 245; *People v. Betsinger*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 916. Compare *Shartzer v. State*, 63 Md. 149, 52 Am. Rep. 501.

Thus, where a woman testifies that she was unconscious when the act was committed, and, to prove its commission, the prosecution proves the subsequent want of physical evidences of virginity, evidence of specific acts of unchastity on her part is admissible to account for such want of evidences of virginity. *Shirwin v. People*, 69 Ill. 55.

On Cross-examination of Witness as to Reputation for Chastity. — Where a witness on behalf of the prosecution testifies in support of the prosecutrix's general reputation for chastity, he may, on cross-examination, have his attention called to particular acts of unchastity on her part for the purpose of ascertaining the

dence is admissible where it is shown that the prosecutrix has a venereal disease similar to a disease with which the defendant was afflicted,¹ or where injury to the private parts of a child under the statutory age of consent is shown for the purpose of showing intercourse between her and the defendant,² or where the prosecution has shown the pregnancy of the prosecutrix, which it claims resulted from intercourse between her and the accused.³

(e) **Admissibility as Relating to Time.** — Evidence of unchastity of the prosecutrix should be restricted to her character and acts prior to the time of the alleged rape. Thus, the defense cannot show her reputation for unchastity acquired after the alleged rape,⁴ nor specific acts of unchastity on her part committed thereafter.⁵ But there is not, it seems, any fixed rule which will exclude evidence of acts committed or reputation acquired long prior to the alleged rape on the ground that such evidence relates to a time too remote.⁶

(f) **Purpose and Effect of Evidence of Unchastity.** — The inference to be drawn from evidence of the unchastity of the prosecutrix is for the jury.⁷

(2) **Evidence for Prosecution.** — Where the defense first introduces evidence to show unchastity of the prosecutrix, the prosecution may, of course, introduce evidence to support her general character for chastity;⁸ but unless her character for chastity is first attacked by the defense, the prosecution, according to the better doctrine, is not entitled to introduce evidence in support thereof.⁹

f. COMPLAINT BY PROSECUTRIX — (1) *In General.* — It is a well-settled rule that evidence that the prosecutrix made complaint that the alleged crime had been committed upon her is admissible for the purpose of corroborating her testimony by showing that her conduct was consistent therewith.¹⁰ For

weight to be attached to his testimony. *State v. Campbell*, 20 Nev. 122.

1. *Nugent v. State*, 18 Ala. 521. *Compare* *People v. Glover*, 71 Mich. 303.

2. *Nugent v. State*, 18 Ala. 521; *People v. Knight*, (Cal. 1895) 43 Pac. Rep. 6.

3. *People v. Craig*, 116 Mich. 388; *People v. Flaherty*, 79 Hun (N. Y.) 48; *Bice v. State*, 37 Tex. Crim. 38. *Compare* *State v. Whitesell*, 142 Mo. 467.

4. **Reputation After Offense.** — *State v. Ward*, 73 Iowa 532; *State v. Foishner*, 43 N. H. 89, 80 Am. Dec. 132; *State v. Taylor*, 57 S. Car. 433, 76 Am. St. Rep. 575. See also *State v. Knock*, 142 Mo. 515; *Pratt v. State*, 19 Ohio St. 277.

In *Rex v. Barker*, 3 C. & P. 589, 14 E. C. L. 467, however, evidence that the prosecutrix was a streetwalker at a period subsequent to the alleged rape was admitted. *Compare* *Reg. v. Clay*, 5 Cox C. C. 146.

5. *State v. McDonough*, 104 Iowa 6. *Compare* *Reg. v. Mercer*, 6 Jur. 243.

6. *Reg. v. Clay*, 5 Cox C. C. 146, where evidence that the prosecutrix was a reputed prostitute twenty years prior to the alleged rape was admitted.

In *Brown v. State*, 72 Miss. 997, however, evidence that seven years before the alleged crime the prosecutrix contracted a venereal disease by promiscuous sexual intercourse was held to be inadmissible.

7. **Effect of Evidence of Unchastity.** — *Barnett v. State*, 83 Ala. 40; *Dryman v. State*, 102 Ala. 130.

The proper instruction in this regard is merely that the proof of the unchastity of the prosecutrix is to be taken into consideration in determining whether the intercourse was had with the consent of the prosecutrix.

Anderson v. State, 104 Ind. 467. See also *People v. Crego*, 70 Mich. 319; *Favors v. State*, 20 Tex. App. 155.

8. **Evidence for Prosecution.** — *People v. Kuches*, 120 Cal. 566; *State v. Case*, 96 Iowa 264; *McDermott v. State*, 13 Ohio St. 332, 82 Am. Dec. 444.

In *Coleman v. Com.*, 84 Va. 1, it having been proved without objection that the daughter of the prosecutrix, living with her, had an illegitimate child, it was held that this was such an attack upon the character of the prosecutrix for chastity as admitted evidence in support of her character.

9. *People v. O'Brien*, 130 Cal. 1; *Myers v. State*, 51 Neb. 517; *People v. Hulse*, 3 Hill (N. Y.) 309. See also *Giles v. State*, 83 Ga. 368; *Coleman v. Com.*, 84 Va. 1. And see the title CHARACTER (IN EVIDENCE), vol. 5, p. 853. But see *State v. De Wolf*, 8 Conn. 100, 20 Am. Dec. 90; *Turney v. State*, 8 Smed. & M. (Miss.) 104, 47 Am. Dec. 74.

10. **Complaint by Prosecutrix** — *England*. — *Reg. v. Osborne*, C. & M. 622, 41 E. C. L. 338; *Reg. v. Walker*, 2 M. & Rob. 212; *Rex v. Clarke*, 2 Stark. 241, 3 E. C. L. 393; *Reg. v. Guttridge*, 9 C. & P. 471, 38 E. C. L. 188.

Alabama. — *Leoni v. State*, 44 Ala. 110; *Lacy v. State*, 45 Ala. 80.

Arizona. — *Kirby v. Territory*, (Ariz. 1891) 28 Pac. Rep. 1134.

Arkansas. — *Williams v. State*, 66 Ark. 264.

California. — *People v. Snyder*, 75 Cal. 323; *People v. Stewart*, 97 Cal. 238; *People v. Barney*, 114 Cal. 554.

Connecticut. — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90.

Dakota. — *Territory v. Godfrey*, 6 Dak. 46.

Georgia. — *Lowe v. State*, 97 Ga. 792.

this purpose the prosecutrix may be examined as to such fact on her examination in chief, without waiting for her testimony to be first attacked; ¹ and of course the persons to whom complaint was made may be called to testify to that fact. ² In *England*, where the prosecutrix testified to the making of complaint, the court has required the prosecution to also call as a witness the person to whom the complaint was alleged to have been made; ³ but it is not necessary that every one to whom the prosecutrix made complaint should be called to testify thereto. ⁴

Explaining Failure to Complain. — As hereinbefore stated, the fact that the prosecutrix failed to make an early complaint of the offense is an element for consideration in impeachment of her testimony, and evidence is therefore admissible to explain her failure or delay in this regard. ⁵

(2) *Particulars of Complaint* — (a) *Doctrine in United States — General Rule.* — Though there is a direct conflict of authority, the rule established by the great weight of decisions in the United States is that the particulars of the complaint or statement of the prosecutrix relating to the offense are not admissible in evidence in the first instance and cannot be testified to by either the prosecutrix or the persons to whom complaint was made. The prosecution can merely show the fact that the complaint was made by her. ⁶ After the

Illinois. — *Bean v. People*, 124 Ill. 576; *Stevens v. People*, 158 Ill. 111.

Indiana. — *Thompson v. State*, 38 Ind. 39; *Cross v. State*, 132 Ind. 65.

Iowa. — *State v. Richards*, 33 Iowa 420; *State v. Mitchell*, 68 Iowa 116; *State v. Clark*, 69 Iowa 294; *State v. Watson*, 81 Iowa 380; *State v. Cook*, 92 Iowa 483; *State v. Baker*, 106 Iowa 99.

Kansas. — *State v. Daugherty*, 63 Kan. 473.

Kentucky. — *Philpot v. Com.*, 5 Ky. L. Rep. 862.

Louisiana. — *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277.

Maine. — *State v. Mulkern*, 85 Me. 106.

Maryland. — *Parker v. State*, 67 Md. 329, 1 Am. St. Rep. 387; *Legore v. State*, 87 Md. 735.

Massachusetts. — *Com. v. Phillips*, 162 Mass. 504; *Com. v. Cleary*, 172 Mass. 175.

Michigan. — *Strang v. People*, 24 Mich. 1; *Brown v. People*, 36 Mich. 203; *People v. Brown*, 53 Mich. 531; *People v. Bernor*, 115 Mich. 692; *People v. Marrs*, 125 Mich. 376, 7 Detroit Leg. N. 533; *People v. Goulette*, 82 Mich. 36.

Minnesota. — *State v. Shettlworth*, 18 Minn. 208; *State v. Reid*, 39 Minn. 277.

Nebraska. — *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366; *Welsh v. State*, 60 Neb. 101.

New Hampshire. — *State v. Knapp*, 45 N. H. 148.

New Mexico. — *Territory v. Maldonado*, 9 N. Mex. 629.

New York. — *People v. Bowles*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 447; *People v. Terwilliger*, 74 Hun (N. Y.) 310; *People v. Garner*, (N. Y. 1901) 62 N. E. Rep. 1099, affirming 64 N. Y. App. Div. 410; *Baccio v. People*, 41 N. Y. 265.

Ohio. — See *Dunn v. State*, 45 Ohio St. 249.

Oklahoma. — *Harmon v. Territory*, 5 Okla. 368.

Oregon. — *State v. Ogden*, 39 Oregon 195; *State v. Sargent*, 32 Oregon 110.

South Carolina. — *State v. Sudduth*, 52 S. Car. 488.

Tennessee. — *Phillips v. State*, 9 Humph. (Tenn.) 247, 49 Am. Dec. 709; *Bensline v. State*, 2 Lea (Tenn.) 175, 31 Am. Rep. 593.

Texas. — *Pefferling v. State*, 40 Tex. 486; *Lights v. State*, 21 Tex. App. 308; *Roberson v. State*, (Tex. Crim. 1899) 49 S. W. Rep. 398; *Wells v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 1020.

Utah. — *State v. Neel*, 21 Utah 151.

Vermont. — *State v. Niles*, 47 Vt. 82.

Virginia. — *Brogy v. Com.*, 10 Gratt. (Va.) 722.

Washington. — *State v. Hunter*, 18 Wash. 670.

Wisconsin. — *Lee v. State*, 74 Wis. 45; *Proper v. State*, 85 Wis. 615; *Bannen v. State*, (Wis. 1902) 91 N. W. Rep. 107.

Request to Third Person to Report Offense to Authorities. — *Smith v. State*, 47 Ala. 540.

1. *Reg. v. Eyre*, 2 F. & F. 579; *Griffin v. State*, 76 Ala. 29; *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; *Maillet v. People*, 42 Mich. 262.

2. *Reg. v. Wood*, 14 Cox C. C. 46; *Griffin v. State*, 76 Ala. 29; *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48; *Williams v. State*, 66 Ark. 264; *People v. Baldwin*, 117 Cal. 244; *Stevens v. People*, 158 Ill. 111; *Hannon v. State*, 70 Wis. 448.

3. *Reg. v. Stroner*, 1 C. & K. 650, 47 E. C. L. 650.

4. **Complaint to Several — Husband Alone Called.** — *Woodin v. People*, (Supm. Ct. Gen. T.) 1 Park. Crim. (N. Y.) 464. See also *State v. Ogden*, 39 Oregon 195.

5. See *supra*, this title, *Consent — Particular Considerations Showing Consent — Failure to Make Complaint.*

6. **Particulars of Complaint — General Rule in United States — Alabama.** — *Lacy v. State*, 45 Ala. 80; *Scott v. State*, 48 Ala. 420; *Griffin v. State*, 76 Ala. 29; *Bray v. State*, (Ala. 1901) 31 So. Rep. 107.

Arizona. — *Kirby v. Territory*, (Ariz. 1891) 28 Pac. Rep. 1134.

Arkansas. — *Pleasant v. State*, 15 Ark. 624; *Williams v. State*, 66 Ark. 264.

credibility or the particular testimony of the prosecutrix has been attacked, the prosecution is entitled to show her complaint in detail, either by her testimony or by that of other persons to whom the complaint was made;¹ and where on cross-examination the defense elicits only in part the particulars of the complaint, the prosecutrix may then prove the whole of such particulars.²

Minority Rule in United States. — In a few jurisdictions in the United States the courts permit the prosecution in the first instance to go into the particulars of the complaint by the prosecutrix to show that her conduct at the time of the offense was consistent with her testimony and thereby corroborate her, though her credibility or testimony has not been attacked by the defense.³ And in *Michigan* it has been held that the rule excluding the particulars of the complaint is not inflexible and ought to yield where the circumstances of the case render it inapplicable, as where the female ravished is of tender years.⁴

(b) **Doctrine in England and Canada.** — In England the early doctrine was

California. — *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; *People v. Tierney*, 67 Cal. 54; *People v. Stewart*, 97 Cal. 238; *People v. Lambert*, 120 Cal. 170.

Florida. — *Ellis v. State*, 25 Fla. 702.

Georgia. — *Stephen v. State*, 11 Ga. 225; *Lowe v. State*, 97 Ga. 792.

Illinois. — *Stevens v. People*, 158 Ill. 111.

Indiana. — *Thompson v. State*, 38 Ind. 39; *Cross v. State*, 132 Ind. 65.

Iowa. — *State v. Richards*, 33 Iowa 420.

Kansas. — *State v. Daugherty*, 63 Kan. 473.

Louisiana. — *State v. Robertson*, 38 La. Ann. 618, 58 Am. Rep. 201; *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277. *Compare State v. Peter*, 14 La. Ann. 527.

Maine. — *State v. Mulkern*, 85 Me. 106.

Maryland. — *Parker v. State*, 67 Md. 329, 1 Am. St. Rep. 387.

Michigan. — *People v. Marrs*, 125 Mich. 376, 7 Detroit Leg. N. 533. But see *infra*, *Minority Rule in United States*.

Minnesota. — *State v. Shettleworth*, 18 Minn. 208; *State v. Reid*, 39 Minn. 277.

Missouri. — *State v. Jones*, 61 Mo. 232.

Nebraska. — *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366. See also *State v. Meyers*, 46 Neb. 152.

Nevada. — *State v. Campbell*, 20 Nev. 122.

New Hampshire. — *State v. Knapp*, 45 N. H. 148.

New Mexico. — *Territory v. Maldonado*, 9 N. Mex. 629.

New York. — *People v. Clemons*, 37 Hun (N. Y.) 580; *Baccio v. People*, 41 N. Y. 265; *People v. McGee*, 1 Den. (N. Y.) 19; *People v. Flaherty*, 162 N. Y. 532.

Oklahoma. — *Harmon v. Territory*, 5 Okla. 368.

Oregon. — *State v. Sargent*, 32 Oregon 110.

Texas. — *Pefferling v. State*, 40 Tex. 486; *Johnson v. State*, 21 Tex. App. 368; *Holst v. State*, 23 Tex. App. 1; *McGee v. State*, 21 Tex. App. 670; *Caudle v. State*, 34 Tex. Crim. 26; *Reddick v. State*, 35 Tex. Crim. 463, 60 Am. St. Rep. 56. *Compare Bruce v. State*, 31 Tex. Crim. 590.

Utah. — *State v. Neel*, 21 Utah 151.

Vermont. — *State v. Niles*, 47 Vt. 82; *State v. Carroll*, 67 Vt. 477.

Virginia. — *Brogy v. Com.*, 10 Gratt. (Va.) 722.

Washington. — *State v. Hunter*, 18 Wash. 670.

See also *Douglas v. Com.*, (Ky. 1902) 68 S. W. Rep. 1107. *Compare State v. Freeman*, 100 N. Car. 429.

The fact that the prosecutrix is so young that she cannot give an account of the particulars of the offense does not render the particulars of her complaint admissible. *People v. Graham*, 21 Cal. 261.

Letter Written by Prosecutrix Giving Particulars Inadmissible. — *State v. Clark*, 69 Iowa 294.

The Death of the Female Alleged to Have Been Ravished does not of itself render admissible in evidence the particulars of her complaint. *Reg. v. Megson*, 9 C. & P. 420, 38 E. C. L. 173. See also *State v. Hill*, 2 Hill L. (S. Car.) 608, 27 Am. Dec. 406.

1. After Impeachment of Prosecutrix. — *Griffin v. State*, 76 Ala. 29; *Barnett v. State*, 83 Ala. 40; *Pleasant v. State*, 15 Ark. 624; *Thompson v. State*, 38 Ind. 39; *State v. Freeman*, 100 N. Car. 429; *Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157; *State v. Neel*, 21 Utah 151. See also *Stevens v. People*, 158 Ill. 111; *State v. Clark*, 69 Iowa 294.

Cross-examination for Purpose of Impeachment — Particulars of Complaint Then Held to Be Admissible. — *State v. Brown*, 125 N. Car. 606. See also *State v. De Wolf*, 8 Conn. 99, 20 Am. Dec. 90.

2. Barnett v. State, 83 Ala. 40; *State v. Neel*, 21 Utah 151.

3. Minority Rule in United States — Connecticut. — *State v. Kinney*, 44 Conn. 155, 26 Am. Rep. 436; *State v. Byrne*, 47 Conn. 466.

Ohio. — *McCombs v. State*, 8 Ohio St. 643; *Johnson v. State*, 17 Ohio 593; *Laughlin v. State*, 18 Ohio 99, 51 Am. Dec. 444; *Burt v. State*, 23 Ohio St. 394. See also *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608; *Dunn v. State*, 45 Ohio St. 249.

Pennsylvania. — *Com. v. Sallager*, 3 Pa. L. J. Rep. 127, 4 Pa. L. J. 511.

Tennessee. — *Benstine v. State*, 2 Lea (Tenn.) 169, 31 Am. Rep. 593; *Phillips v. State*, 9 Humph. (Tenn.) 246, 49 Am. Dec. 709; *Hill v. State*, 5 Lea (Tenn.) 725.

Particulars of Complaint Charging Accused with Offense. — *Burt v. State*, 23 Ohio St. 394.

4. People v. Gage, 62 Mich. 271, 4 Am. St. Rep. 854; *People v. Glover*, 71 Mich. 303. See also *People v. Brown*, 53 Mich. 531; *People v. Hicks*, 98 Mich. 89; *People v. Bernor*, 115 Mich. 692.

undoubtedly in effect that the particulars of the complaint of the prosecutrix should not be admitted in evidence in the first instance;¹ but in later decisions the courts have refused to follow this doctrine, and have held that the particulars of the complaint may be given in evidence for the purpose of enabling the jury to judge whether the conduct of the prosecutrix was consistent with her testimony, negating her consent and affirming that the acts complained of were against her will and in accordance with the conduct they would expect in a truthful woman under the circumstances detailed by her.² It is held, however, that the particulars of the complaint are not evidence of the facts complained of, and that the judge should direct the jury not to make use of the complaint as any evidence whatever of those facts or for any other purpose than that stated above;³ and lapse of time between the commission of the offense and the making of the complaint may be sufficient ground to render the particulars of her complaint inadmissible even for the limited purpose above stated.⁴ Under this doctrine particulars as to the name of the assailant have been held to be admissible.⁵

(c) **What Are Particulars.**—Under the doctrine which excludes in the first instance the particulars of the complaint, the statement of the prosecutrix as to the name of or her description of her assailant is not admissible,⁶ though it is permissible to show the fact that the prosecutrix in her complaint named a person as her assailant, provided the name of such person is not brought out;⁷ and in some cases the courts have not considered the statement of the prosecutrix as to the name of her assailant a particular of her complaint which should be excluded, and have admitted such statement though the other particulars of the complaint were excluded.⁸ Similarly, statements of the prosecutrix in her complaint as to the place of the commission of the offense,⁹ as to what clothes she had on at the time,¹⁰ as to the violence used,¹¹ and that scratches or injuries to her person were made by the accused in the commission of the offense,¹² have been held to be inadmissible.

1. **Early English Doctrine.**—Reg. v. Nicholas, 2 C. & K. 246, 61 E. C. L. 246; Reg. v. Osborne, C. & M. 622, 41 E. C. L. 338; Reg. v. Megson, 9 C. & P. 420, 38 E. C. L. 173; Reg. v. Walker, 2 M. & Rob. 212; Rex v. Clarke, 2 Stark. 241, 3 E. C. L. 393.

2. **Later English Doctrine.**—Reg. v. Lillyman, (1896) 2 Q. B. 167; Reg. v. Folley, 60 J. P. 569; Reg. v. Riendeau, 9 Quebec Q. B. 147, affirmed 10 Quebec K. B. 584. And see Reg. v. Wood, 14 Cox C. C. 46; Reg. v. Eyre, 2 F. & F. 579, where particulars of the complaint were admitted without comment.

3. Reg. v. Lillyman, (1896) 2 Q. B. 167; Reg. v. Rowland, 62 J. P. 459.

4. Reg. v. Rush, 60 J. P. 777; Reg. v. Graham, 31 Ont. 77.

5. Reg. v. Riendeau, 9 Quebec Q. B. 147, affirmed 10 Quebec K. B. 584.

6. **Name and Description of Assailant**—*England*.—Reg. v. Nicholas, 2 C. & K. 246, 61 E. C. L. 246; Reg. v. Osborne, C. & M. 622, 41 E. C. L. 338.

Alabama.—Bray v. State, (Ala. 1901) 31 So. Rep. 107.

Georgia.—Stepher. v. State, 11 Ga. 226.

Illinois.—Stevens v. People, 158 Ill. 111. See also Bean v. People, 124 Ill. 576.

Indiana.—Thompson v. State, 38 Ind. 39.

Kansas.—State v. Daugherty, 63 Kan. 473.

Louisiana.—State v. Robertson, 38 La. Ann. 618, 58 Am. Rep. 201.

New Hampshire.—State v. Knapp, 45 N. H. 148.

New York.—People v. Clemons, 37 Hun (N. Y.) 580.

Texas.—Johnson v. State, 21 Tex. App. 368; Holst v. State, 23 Tex. App. 1. See also Reddick v. State, 35 Tex. Crim. 463, 60 Am. St. Rep. 56.

Vermont.—State v. Niles, 47 Vt. 82. Compare State v. Carroll, 67 Vt. 477.

Virginia.—Brogy v. Com., 10 Gratt. (Va.) 722.

See also Com. v. Phillips, 162 Mass. 504. Compare Legore v. State, 87 Md. 735; Brown v. People, 36 Mich. 203; People v. Glover, 71 Mich. 303; Welsh v. State, 60 Neb. 101.

7. Reg. v. Osborne, C. & M. 622, 41 E. C. L. 338. See also State v. Niles, 47 Vt. 82.

8. Ellis v. State, 25 Fla. 702; State v. Watson, 81 Iowa 380; State v. Mitchell, 68 Iowa 116; State v. Cook, 92 Iowa 483; State v. Hutchinson, 95 Iowa 566; Harmon v. Territory, 9 Okla. 313. See also People v. Barney, 114 Cal. 554. Compare State v. Hussey, 7 Iowa 409.

9. **Particulars as to Locus of Offense.**—Reg. v. Mercer, 6 Jur. 243; People v. Clemons, 37 Hun (N. Y.) 580; State v. Carroll, 67 Vt. 477.

10. **Her Clothes.**—Leoni v. State, 44 Ala. 110; Lowe v. State, 97 Ga. 792. Compare State v. Peterson, 110 Iowa 647.

11. **Violence.**—Reddick v. State, 35 Tex. Crim. 463, 60 Am. St. Rep. 56.

12. **Injuries to Person.**—Scott v. State, 48 Ala. 420.

Matters Held Not to Be Particulars. — The circumstances under which the complaint was made,¹ when and where² and to whom it was made,³ the fact that the prosecutrix complained of being ravished,⁴ and her condition at the time⁵ are considered not to be particulars of the complaint and to be admissible in evidence. So her statements as to pain she is suffering do not relate to the details of the assault so as to render them inadmissible.⁶

(3) **Lapse of Time or Delay in Making Complaint.** — Lapse of time between the commission of the alleged offense and the making of the complaint by the prosecutrix does not of itself render evidence of the fact that complaint was made inadmissible, but is only a matter for consideration as to whether such delay is consistent with the testimony of the prosecutrix,⁷ and the question whether there was or was not too great delay in the making of the complaint is generally for the determination of the court.⁸ But when there was considerable lapse of time between the commission of the offense and the making of complaint, and the delay in making the complaint was not explained, it has been held to be error to admit evidence that the complaint was made.⁹

(4) **Prosecutrix Not Witness.** — As the purpose for which evidence that complaint was made by the victim of the alleged offense is admissible is merely to corroborate or confirm her testimony by showing consistent conduct on her part,¹⁰ the fact that such complaint was made cannot be shown when the female on whom the alleged offense was committed is not examined as a witness.¹¹ Thus, where the victim is a child of such tender years or a person of such inferior intelligence that she is not competent as a witness, evidence that a complaint was made by her is not admissible.¹² But the admission of evidence of the making of complaint by the prosecutrix before the prosecutrix herself testifies as a witness is not erroneous where she does subsequently testify.¹³

1. **Particulars as to Complaint.** — *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48.

2. *State v. Neel*, 21 Utah 151.

3. *Harmon v. Territory*, 9 Okla. 313.

4. *State v. Mitchell*, 68 Iowa 116; *State v. Cook*, 92 Iowa 483; *State v. Peterson*, 110 Iowa 647; *People v. Clemons*, 37 Hun (N. Y.) 580. See also *McMurrin v. Rigby*, 80 Iowa 322.

5. *State v. Robertson*, 38 La. Ann. 618, 58 Am. Rep. 201; *State v. Langford*, 45 La. Ann. 1177, 40 Am. St. Rep. 277; *Hannon v. State*, 70 Wis. 448.

6. *State v. Baker*, 106 Iowa 99.

7. **Delay in Making Complaint** — *Connecticut*. — *State v. De Wolf*, 8 Conn. 93, 20 Am. Dec. 90 (delay for one year); *State v. Byrne*, 47 Conn. 465.

Iowa. — *State v. Peterson*, 110 Iowa 647.

Maine. — *State v. Mulkern*, 85 Me. 106.

Maryland. — *Legore v. State*, 87 Md. 735.

Michigan. — *People v. Gage*, 62 Mich. 271, 4 Am. St. Rep. 854; *People v. Bernor*, 115 Mich. 692.

Minnesota. — *State v. Shettleworth*, 18 Minn. 208; *State v. Reid*, 39 Minn. 277.

New Hampshire. — *State v. Knapp*, 45 N. H. 148.

New York. — *People v. Terwilliger*, 74 Hun (N. Y.) 310; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530; *Baccio v. People*, 41 N. Y. 265.

South Carolina. — *State v. Sudduth*, 52 S. Car. 488.

Tennessee. — *Hill v. State*, 5 Lea (Tenn.) 725.

Vermont. — *State v. Niles*, 47 Vt. 82.

Canada. — *Reg. v. Riendeau*, 9 Quebec Q. B. 147 (lapse of seven days).

See also *Com. v. Cleary*, 172 Mass. 175; *Jackson v. State*, 91 Wis. 253.

8. *Com. v. Cleary*, 172 Mass. 175; *Reg. v. Riendeau*, 9 Quebec Q. B. 147 (delay of a week from sense of modesty).

9. *People v. Lambert*, 120 Cal. 170 (delay of two months); *People v. Duncan*, 104 Mich. 460; *Richards v. State*, 36 Neb. 17; *People v. Loftus*, 58 Hun (N. Y.) 606, 11 N. Y. Supp. 905; *People v. Flaherty*, 162 N. Y. 532; *People v. O'Sullivan*, 104 N. Y. 481, 58 Am. Rep. 530; *Dunn v. State*, 45 Ohio St. 249.

10. See *supra*, this subsection, *Complaint by Prosecutrix* — *In General*.

11. **Prosecutrix Not Witness.** — *Reg. v. Gutteridge*, 9 C. & P. 471, 38 E. C. L. 188; *Thompson v. State*, 38 Ind. 39; *State v. Meyers*, 46 Neb. 152; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608. See also *Reg. v. Megson*, 9 C. & P. 420, 38 E. C. L. 173; *People v. Clemmons*, 37 Hun (N. Y.) 580. Compare *McMath v. State*, 55 Ga. 303.

12. **Prosecutrix Child or Weak-minded.** — *Reg. v. Nicholas*, 2 C. & K. 246, 61 E. C. L. 246; *Weldon v. State*, 32 Ind. 81; *State v. Meyers*, 46 Neb. 152 (imbecility); *People v. McGee*, 1 Den. (N. Y.) 19; *Hornbeck v. State*, 35 Ohio St. 277, 35 Am. Rep. 608. See also *People v. McGee*, 1 Den. (N. Y.) 19. Compare *Brazier's Case*, 1 East P. C. 443; *People v. Figueroa*, 134 Cal. 159; *People v. Barney*, 114 Cal. 554; *Philpot v. Com.*, 5 Ky. L. Rep. 862.

13. *State v. Mitchell*, 68 Iowa 116; *People v. Bowles*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 447. See also *Osborn v. Com.*, (Ky. 1892) 20 S. W. Rep. 223, 14 Ky. L. Rep. 246.

(5) *Res Gestæ*. — The fact that the complaint was made very soon after the alleged ravishment does not render the particulars of the complaint admissible in evidence as a part of the *res gestæ*;¹ but of course the complaint and statement of the prosecutrix may, when made immediately after the offense was committed and in the presence of the accused, constitute part of the *res gestæ*, so as to render the particulars thereof admissible, not merely for the purpose of corroboration, but as direct evidence of the facts stated.²

(6) *Cross-examination of Prosecutrix by Defense*. — On cross-examination, the prosecutrix may, it has been held, be questioned as to the particulars of her complaint, where the fact that she made complaint has been brought out by the prosecution,³ and any contradictory statements relating to the offense, though made out of court, are admissible in evidence to impeach her testimony.⁴

g. CONDITION OF CLOTHING, PERSON, AND MIND OF PROSECUTRIX — Clothing. — The condition of the clothing of the prosecutrix after the alleged offense is to be considered upon the question of force and resistance by the prosecutrix, and from stains upon it to show penetration;⁵ and not only may witnesses testify as to the condition of the clothing as regards its being torn,⁶ but testimony is admissible as regards blood stains⁷ and stains from seminal fluid,⁸ to show actual carnal knowledge. Such testimony is not inadmissible on the ground that the clothing itself is the best evidence.⁹ The clothes themselves may, of course, be put in evidence,¹⁰ but they must be identified as those worn by the prosecutrix at the time of the offense.¹¹

Physical Conditions. — Marks of violence, such as bruises, etc., upon the person of the prosecutrix, are also elements for consideration upon the question of force and want of consent,¹² and witnesses may testify as to their existence upon the person of the prosecutrix after the commission of the alleged offense,¹³ and as to complaints by the prosecutrix as to the seat of pain from

1. *Res Gestæ*. — Reg. v. Osborne, C. & M. 622, 41 E. C. L. 338; Williams v. State, 66 Ark. 264 (statement fifteen minutes after offense); Caudle v. State, 34 Tex. Crim. 26. Compare Snowden v. U. S., 2 App. Cas. (D. C.) 89; People v. Brown, 53 Mich. 531. And see the cases cited *supra*, this division of this subsection, *Particulars of Complaint*.

2. *Immediate Complaint in Presence of Accused*. — McMath v. State, 55 Ga. 303; Jesting v. State, 68 Ga. 824; State v. Jerome, 82 Iowa 749; State v. Peter, 14 La. Ann. 527; State v. Fitzsimon, 18 R. I. 236, 49 Am. St. Rep. 766; Lights v. State, 21 Tex. App. 308; Castillo v. State, 31 Tex. Crim. 145, 37 Am. St. Rep. 794; Sentell v. State, 34 Tex. Crim. 260; State v. Neel, 21 Utah 151; State v. Imlay, 22 Utah 156. See also McMurrin v. Rigby, 80 Iowa 322. And see the title *RES GESTÆ*.

In Snowden v. U. S., 2 App. Cas. (D. C.) 89, it was held that no inflexible rule as to the length of interval between the act charged and the complaint of the prosecutrix can be laid down to render the complaint admissible as *res gestæ*, and declarations of the prosecutrix made during the day of the outrage were admitted.

3. Reg. v. Walker, 2 M. & Rob. 212; Wood v. State, 46 Neb. 58.

4. See *supra*, this subsection, *Admissions by Prosecutrix*.

5. *Condition of Prosecutrix's Clothing*. — Rex v. Clarke, 2 Stark. 241, 3 E. C. L. 393; Richards v. State, 36 Neb. 17; Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608; Grimmitt v.

State, 22 Tex. App. 36; State v. Hunter, 18 Wash. 670; Bannen v. State, (Wis. 1902) 91 N. W. Rep. 107. See also *supra*, this title, *Consent — Resistance — Condition of Person and Clothing*.

Hands Tied. — Brown v. State, 72 Miss. 997.

6. State v. Murphy, 118 Mo. 7.

7. State v. Watson, 81 Iowa 380.

In People v. Flynn, 96 Mich. 276, the question whether the prosecutrix had experienced her monthly period was held to be proper in connection with her statement that she found blood on her drawers after the intercourse.

8. State v. Montgomery, 79 Iowa 737.

9. People v. Figueroa, 134 Cal. 159.

10. *Clothing in Evidence*. — Ransbottom v. State, 144 Ind. 250; State v. Peterson, 110 Iowa 647; State v. Murphy, 118 Mo. 7; Long v. State, (Tex. Crim. 1898) 46 S. W. Rep. 640.

Clothes Afterwards Washed may be put in evidence to show the torn condition. McMurrin v. Rigby, 80 Iowa 322.

11. Lowe v. State, 97 Ga. 792; Gonzales v. State, 32 Tex. Crim. 611.

12. *Marks of Violence*. — Hornbeck v. State, 35 Ohio St. 277, 35 Am. Rep. 608. See also People v. Benc, 130 Cal. 159. And see *supra*, this title, *Consent — Resistance — Condition of Person and Clothing*.

13. State v. McLaughlin, 44 Iowa 82; State v. Shettleworth, 18 Minn. 208; State v. Murphy, 118 Mo. 7; Hannon v. State, 70 Wis. 448; State v. Sudduth, 52 S. Car. 488. See also State v. Houx, 109 Mo. 654, 32 Am. St. Rep. 686.

which she suffers.¹ So for the purpose of proving penetration the condition of the private parts of the victim after the commission of the alleged offense may be shown.² The condition of such parts should be and usually is shown by the testimony of a physician who has made an examination;³ still, it is not necessary that the witness who examined the prosecutrix should have been a physician to render him or her competent to testify as to the condition of such parts.⁴ The fact that the examination of the person of the female was not made immediately after the commission of the alleged offense does not render inadmissible the results of such examination,⁵ since such remoteness goes merely to the probative force of the evidence.⁶ The examination may, however, be so long after the offense as to render the result inadmissible as too remote.⁷ Evidence of the sickness of the child upon whom the offense was committed, following its commission, has been held to be admissible.⁸

Mental Condition. — Evidence as to the mental condition of the prosecutrix after the commission of the alleged offense has frequently been admitted to show force on the part of the accused and resistance by the prosecutrix.⁹ The general mental condition of the prosecutrix prior to the commission of the offense may, as heretofore stated, be shown for consideration on the question whether there was sufficient resistance by her.¹⁰

h. CONDUCT OF MEMBERS OF PROSECUTRIX'S FAMILY. — The defense cannot show in the first instance that members of the family of the prosecutrix continued upon friendly relations with the accused after the alleged crime,¹¹ nor that they failed to take steps against him for private revenge;¹² and on the other hand the prosecution cannot show that members of her family did take steps for private revenge.¹³ For the purpose of impeaching the testimony of the members of the family of the prosecutrix, however, the defense may show that their relations with the accused continued to be

1. **Pain.** — *State v. Hutchinson*, 95 Iowa 566; *State v. Baker*, 106 Iowa 99; *Dunn v. State*, 53 Neb. 807.

2. **Conditions of Pudenda.** — *Myers v. State*, 84 Ala. 11; *Gifford v. People*, 148 Ill. 173.

3. *Myers v. State*, 84 Ala. 11; *Polson v. State*, 137 Ind. 519; *State v. Watson*, 81 Iowa 380; *Com. v. Allen*, 26 W. N. C. (Pa.) 285. See also *People v. Brown*, 53 Mich. 531.

4. *People v. Figueroa*, 134 Cal. 159; *Polson v. State*, 137 Ind. 519; *State v. Sanford*, 124 Mo. 484.

5. **Lapse of Time Before Examination.** — *Myers v. State*, 84 Ala. 11 (examination of infant ten days after offense); *People v. Benc*, 130 Cal. 159 (four to six days after offense); *Gifford v. People*, 148 Ill. 173 (condition of hymen five or six months after offense); *State v. Watson*, 81 Iowa 380 (four weeks after offense); *State v. Teipner*, 36 Minn. 535 (twelve days after offense); *Com. v. Allen*, 135 Pa. St. 483 (eleven to eighteen months after offense); *Pless v. State*, 23 Tex. App. 73 (five weeks after offense); *Gonzales v. State*, 32 Tex. Crim. 611 (two months after offense).

6. *People v. Benc*, 130 Cal. 159; *Gifford v. People*, 148 Ill. 173.

7. **Examination Excluded as Too Remote.** — *People v. Butler*, 55 N. Y. App. Div. 361, wherein the result of an examination twenty months after the offense was held to be inadmissible; *People v. Cornelius*, 36 N. Y. App. Div. 565, in which case the result of an examination four years after the offense, the prosecutrix having, in the meantime, had sexual intercourse with others, was held to be inadmissible.

In *State v. Evans*, 138 Mo. 116, 60 Am. St. Rep. 549, the result of an examination four months after the prosecutrix reached the age of consent was held to be too remote in a prosecution for carnal knowledge of a child while under the age of consent.

8. **Sickness of Child After Offense.** — *State v. Steffens*, (Iowa 1902) 89 N. W. Rep. 974.

9. **Mental Condition.** — *People v. Stewart*, 97 Cal. 238; *People v. Benc*, 130 Cal. 159; *State v. Shettleworth*, 18 Minn. 208; *People v. Clemons*, 37 Hun (N. Y.) 580 (appearance morning after offense); *State v. Sudduth*, 52 S. Car. 488; *Sentell v. State*, 34 Tex. Crim. 260; *State v. Bedard*, 65 Vt. 278; *Bannen v. State*, (Wis. 1902) 91 N. W. Rep. 107. See also *People v. Knight*, (Cal. 1895) 43 Pac. Rep. 6; *People v. Totman*, 135 Cal. 133.

It is proper to show by the victim's mother that two days after the alleged rape her daughter's appearance and behavior were such that she insisted on knowing what the matter was, and the daughter told her. *People v. Brown*, 53 Mich. 531.

Threats of Suicide some days after the offense are inadmissible. *People v. Batterson*, 50 Hun (N. Y.) 44, 6 N. Y. Crim. 173.

10. See *supra*, this title, *Consent — Weak-minded, Insane, or Idiotic Woman; Resistance — Considerations Affecting Degree of Resistance.*

11. **Subsequent Relations of Prosecutrix's Family with Accused.** — *Bean v. People*, 124 Ill. 576. See also *McCombs v. State*, 8 Ohio St. 643.

12. *Williams v. State*, 45 Ala. 57.

13. *Lynn v. Com.*, (Ky. 1890) 13 S. W. Rep. 74, 11 Ky. L. Rep. 772; *Wells v. State*, (Tex. Crim. 1902) 67 S. W. Rep. 1020.

friendly, or that there was delay on their part in taking steps for his apprehension,¹ but it has been held not to be error to instruct that the fact that the husband of the prosecutrix did not kill the accused was not to be considered as impeaching his testimony.²

i. DYING DECLARATIONS. — The dying declarations of the alleged victim are inadmissible in a prosecution for rape.³

j. EXPERT MEDICAL TESTIMONY. — Under general principles, which have been fully discussed in another title,⁴ the courts have recognized the admissibility of expert medical testimony to prove particular facts in prosecutions for rape.⁵

k. INFANT PROSECUTRIX AS WITNESS. — The general rules discussed in another part of this work with regard to the competency of infants as witnesses⁶ apply in prosecutions for rape in determining the competency as a witness of an infant of tender years upon whom the alleged offense was committed, the test of competency being the degree of intelligence of the proposed witness; that is, the capacity to distinguish between good and evil and the possession of sufficient knowledge.⁷

l. MOTIVE OF PROSECUTRIX. — Evidence is of course admissible to show that the motive of the prosecutrix or her family in instituting the prosecution is to extort money from the accused;⁸ and to impeach their testimony, evidence of offers to stop the prosecution for a consideration have been admitted.⁹

1. *Merritt v. State*, 107 Ga. 675.

2. *Miles v. State*, 93 Ga. 117, 44 Am. St. Rep. 140.

3. See the title DYING DECLARATIONS, vol. 10, pp. 370-372, and note 1 on the latter page.

4. *Expert Medical Testimony*. — See the title EXPERT AND OPINION EVIDENCE, vol. 12, p. 414.

5. *Instruction with Regard to Expert Testimony*. — *State v. Watson*, 81 Iowa 380.

Expert Evidence Has Been Admitted on the following facts: The possibility of sexual intercourse under the circumstances. *People v. Baldwin*, 117 Cal. 244; *Hardtke v. State*, 67 Wis. 552. See also *McMurrin v. Rigby*, 80 Iowa 322; *State v. Taylor*, 103 Iowa 22. *Compare Cook v. State*, 24 N. J. L. 845.

The natural physical result of intercourse to a person of the prosecutrix's age and condition. *People v. Duncan*, 104 Mich. 460.

The likelihood of pregnancy following rape. *Young v. Johnson*, 123 N. Y. 226.

The length of time during which evidence of sexual intercourse could be detected on the clothing of the prosecutrix; whether the condition of her private parts could not have been produced by disease as well as by intercourse. *People v. Baldwin*, 117 Cal. 244. Or whether such condition could have been caused by intercourse. *Proper v. State*, 85 Wis. 615. See also *State v. Smith*, Phil. L. (51 N. Car.) 302.

Expert Evidence Has Been Held Inadmissible on the following points: The effect of indecent liberties on the mind of the prosecutrix. *People v. Royal*, 53 Cal. 62.

Whether a man could accomplish the act of sexual intercourse against the *bona fide* resistance of a female. *People v. Benc*, 130 Cal. 159; *Cook v. State*, 24 N. J. L. 843.

Whether, considering the condition of the female, force was used. *Noonan v. State*, 55 Wis. 258.

For other instances where expert testimony was excluded, see *People v. Benc*, 130 Cal. 159; *Cook v. State*, 24 N. J. L. 843; *State v. Hull*, 45 W. Va. 767.

6. See the title INFANTS, vol. 16, p. 267 *et seq.*

7. *Infants Considered to Be Competent*. — *Rex v. Brasier*, 1 Leach C. C. 199 (seven years of age); *Wade v. State*, 50 Ala. 164 (eight years of age); *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25 (seven years of age); *People v. Baldwin*, 117 Cal. 244 (eight years of age); *Johnson v. State*, 61 Ga. 35 (seven years of age); *State v. Steffens*, (Iowa 1902) 89 N. W. Rep. 974 (eight years of age).

Infants Considered to Be Incompetent. — *Rex v. Williams*, 7 C. & P. 320, 32 E. C. L. 524 (eight years of age); *Carter v. State*, 63 Ala. 52, 35 Am. Rep. 4 (nine years of age); *Beason v. State*, 72 Ala. 191 (eleven years of age); *Johnson v. State*, 76 Ga. 76 (six years of age); *Gaines v. State*, 99 Ga. 703.

Instruction of Infant as to Nature of Oath. — *Rex v. Williams*, 7 C. & P. 320, 32 E. C. L. 524.

Exclusion of Child's Testimony as Being What She Had Been Told by Her Mother to Say. — *State v. Steffens*, (Iowa 1902) 89 N. W. Rep. 974.

Testimony of an Infant Prosecutrix Elicited by Presents, where she also contradicts herself in material matters, should be excluded. *People v. Beech*, (Mich. 1902) 89 N. W. Rep. 363.

Infant Testifying Without Being Sworn. — *People v. Beech*, (Mich. 1902) 89 N. W. Rep. 363 (Comp. Laws Mich., 1897, § 10,215).

Encouragement of Infant by Presence of Elderly Woman. — *Hill v. State*, 5 Lea (Tenn.) 725.

8. *Motive for Prosecution*. — *Shirwin v. People*, 69 Ill. 55; *Callison v. State*, 37 Tex. Crim. 211. See also *People v. Knight*, (Cal. 1895) 43 Pac. Rep. 6.

Motive to Shield Another. — *Curby v. Territorv*, (Ariz. 1895) 42 Pac. Rep. 953.

That the Prosecutrix Is Subject to Hallucinations during which she has before made unfounded charges of rape may be proved. *Derwin v. Parsons*, 52 Mich. 425, 50 Am. Rep. 262; *People v. Evans*, 72 Mich. 367.

9. *Offers to Stop Prosecution*. — *Huff v. State*, 106 Ga. 432; *Gaines v. State*, 99 Ga. 704.

But it has been held that evidence merely that a civil suit has been instituted to recover damages for the alleged ravishment does not show a motive to extort money, and that the exclusion of such evidence is not error.¹

m. PRIOR SOLICITATION, THREATS, ETC. — Evidence of prior solicitations for sexual intercourse with the prosecutrix by the defendant has been held to be admissible, as showing lustful desires on the part of the defendant towards the prosecutrix.² Similarly, evidence of prior threats by the defendant to commit the rape has been held to be admissible.³ So evidence of prior statements of the defendant showing his carnal passion for the prosecutrix and his belief that she would not yield to his desires has been admitted.⁴

n. PHYSICAL EXAMINATION OF PROSECUTRIX. — Though it is not essential to a conviction for rape that evidence be introduced of a physical medical examination of the prosecutrix while the offense was recent, for the purpose of showing penetration and the use of force or violence upon her person,⁵ the question whether the result of an examination of the person of the prosecutrix is admissible in evidence has been discussed elsewhere in this title.⁶

o. PREGNANCY OF PROSECUTRIX AND OFFSPRING OF INTERCOURSE. — On a prosecution for the carnal knowledge of a child under the age of consent, evidence of her pregnancy and subsequent delivery is admissible.⁷

p. PROOF OF OTHER CRIMES. — The general rule in criminal law that the prosecution cannot show in evidence the commission of other crimes by the defendant⁸ applies generally in prosecutions for rape.⁹ On such trials, how-

Thus, in *McMath v. State*, 55 Ga. 303, it was held that the defendant might show that the mother, who was a witness, offered to drop the prosecution for a sum of money.

But where the mother was not a witness for the state, evidence of such an offer was held to be inadmissible. *State v. Knock*, 142 Mo. 515.

1. *Reg. v. Riendeau*, 9 Quebec Q. B. 147.

2. *Prior Solicitations*. — *State v. Knapp*, 45 N. H. 148. See also *People v. Manahan*, 32 Cal. 68; *People v. Duncan*, 104 Mich. 460; *Reinoehl v. State*, 62 Neb. 619. *Compare Rex v. Lloyd*, 7 C. & P. 318, 32 E. C. L. 523.

3. *Prior Threats*. — *State v. Harris*, 150 Mo. 56. See also *Johnson v. Com.*, 7 Ky. L. Rep. 46.

Threats Admissible though Particular Female Not Designated. — *Massey v. State*, 31 Tex. Crim. 371.

4. *Barnes v. State*, 88 Ala. 204, 16 Am. St. Rep. 48.

Statements Made Long Before, as to Possession of Drug Which Would Overcome Resistance. — Evidence of statements by the defendant long before the alleged offense that he had a drug which would compel women to submit to his carnal desires has been held inadmissible, as tending to excite the prejudices of the jury. *Tomlin v. State*, 25 Tex. App. 676.

5. *Physical Examination*. — *Barnett v. State*, 83 Ala. 40; *Frazier v. State*, 56 Ark. 242; *State v. Ogden*, 39 Oregon 195.

It is not material error even to refuse to require the prosecutrix to answer as to whether any physical examination of her person has been made. *State v. Ogden*, 39 Oregon 195.

Whether Defendant May Demand Examination of Prosecutrix. — See the title INSPECTION AND PHYSICAL EXAMINATION, vol. 16, p. 818.

In *Texas* the court has expressed itself very strongly as to the duty of the prosecution to make such an examination where the alleged

victim is a young child. *Davis v. State*, 42 Tex. 226.

In *Pennsylvania* it has been said that the prosecution should call the physician who examined the prosecutrix soon after the alleged offense, whether his testimony would tend to acquit or to convict. *Donaldson v. Com.*, 95 Pa. St. 21.

6. See *supra*, this subsection, *Condition of Clothing, Person, and Mind of Prosecutrix*.

7. *Pregnancy and Birth of Child Admissible*. — *People v. Flaherty*, 27 N. Y. App. Div. 535; *State v. Robinson*, 32 Oregon 43. See, however, *People v. Loftus*, (Supm. Ct. Gen. T.) 11 N. Y. Supp. 905.

The prosecutrix may not testify that the child of the alleged intercourse had been taken from her, the defendant being in no manner connected with such taking away. *People v. Duncan*, 104 Mich. 460.

Exhibiting to Jury Child, the Result of Intercourse Charged, Is Error. — *Gray v. State*, (Tex. Crim. 1901) 65 S. W. Rep. 375.

8. See the title PROOF OF OTHER CRIMES, *ante*.

9. *Proof of Other Crimes Generally Inadmissible*. — *People v. Bowen*, 49 Cal. 654; *People v. Lenon*, 79 Cal. 625; *People v. Stewart*, 85 Cal. 174; *Janzen v. People*, 159 Ill. 440; *State v. Bonsor*, 49 Kan. 758; *State v. Masteller*, 45 Minn. 128; *Owens v. State*, 39 Tex. Crim. 391.

Inadmissible though Committed on Same Female. — *Parkinson v. People*, 135 Ill. 401; *Snurr v. State*, 2 Ohio Cir. Dec. 614, 4 Ohio Cir. Ct. 393.

The Admission of Evidence of a Similar Crime by Another, committed upon the prosecutrix, has been held to be harmless when the defendant was in no way connected with it. *People v. Walker*, 113 Mich. 367.

A Direction to the Jury to Disregard Such Evidence does not render harmless the error in admitting it over the defendant's objection,

ever, as well as on those for assault with intent to commit rape, evidence of other crimes is admissible upon the same principles which regulate the exceptions to the general exclusion of evidence of other offenses.¹

Carnal Knowledge of Children. — In prosecutions for the carnal knowledge of an infant under the statutory age of consent, the authorities are in conflict on the question whether the prosecution may show in evidence more than one act of sexual intercourse between the prosecutrix and the defendant. According to the better doctrine it is held that such evidence is admissible, and should not be excluded on the ground that it tends to prove separate and distinct felonies.² In at least one jurisdiction, however, it has been held to be error to admit evidence of more than one act of intercourse between the defendant and the child.³ In some cases a distinction has been made between acts prior and acts subsequent to the offense charged, and evidence of the former is held to be admissible,⁴ while evidence of the latter is held to be inadmissible.⁵

Election. — Where, on a prosecution for the carnal knowledge of a child under the statutory age of consent, evidence of several different acts of intercourse is admitted, the prosecution should be compelled to elect upon which act it will rely to convict,⁶ though it has been held that if no demand for an

People v. Zimmerman, (Supm. Ct. Gen. T.) 4 N. Y. Crim. 272.

Necessity for Objection by Defendant to Admission of Such Evidence. — People v. Hosmer, (Supm. Ct. App. Div.) 72 N. Y. Supp. 480, 66 N. Y. App. Div. 616.

1. See, for such principles, the title PROOF OF OTHER CRIMES, *ante*.

The Facts of a Previous Rape Have Been Held Admissible to Explain the Prosecutrix's Submission on the occasion in question. Strang v. People, 24 Mich. 1.

Evidence of Prior Attempts Held Admissible, not being too remote. State v. Patrick, 107 Mo. 147; People v. O'Sullivan, 104 N. Y. 481, 58 Am. Rep. 530.

Evidence of Rape on Another Held Admissible, when Part of Same Transaction. — Parkinson v. People, 135 Ill. 401. See also as to this case (Ill. 1890) 24 N. E. Rep. 772, which seems to be a prior though withdrawn opinion in the case. See further Proper v. State, 85 Wis. 615.

Evidence of Distinct Offense Admitted as Part of Res Gestæ. — State v. Taylor, (Mo. 1893) 22 S. W. Rep. 806 (robbery committed at time of rape). See also Cross v. State, 138 Ind. 254 (prosecutrix taken to house of prostitution).

Indictment for Assault with Intent to Rape — Proof of Other Rapes or Assaults on Prosecutrix by the defendant admitted on issue of intent. State v. Walters, 45 Iowa 389; State v. Acheson, 91 Me. 240; Williams v. State, 8 Humph. (Tenn.) 585. See also State v. Neely, 74 N. Car. 425, 21 Am. Rep. 496. Compare People v. Stewart, 85 Cal. 174, and People v. Bowen, 49 Cal. 654, which hold the general rule of exclusion applicable in such cases.

Necessity for Instruction Limiting Purpose of Such Evidence. — Taylor v. State, 22 Tex. App. 529; Cox v. State, (Tex. Crim. 1898) 44 S. W. Rep. 157. See also State v. Acheson, 91 Me. 240.

Taking Liberties. — Evidence that the defendant had taken liberties with the prosecutrix on a prior occasion is not admissible to show intent. Rex v. Lloyd, 7 C. & P. 318, 32 E. C. L. 523.

Failure to Make Timely Objection. — Where

the prosecutrix testifies without objection, and not in response to any question by the prosecution, to other acts of intercourse with her by the defendant, the prosecution may show that such intercourse was without her consent, even though evidence of the other acts would have been excluded on timely objection. People v. Lenon, 79 Cal. 625.

2. Carnal Knowledge of Children — General Rule — England. — Reg. v. Rearden, 4 F. & F. 76.

California. — People v. Castro, 133 Cal. 11. See also People v. Williams, 133 Cal. 168.

Colorado. — Mitchell v. People, 24 Colo. 532.

Iowa. — State v. Walters, 45 Iowa 389; State v. Gaston, 96 Iowa 505. See also State v. Forsythe, 99 Iowa 1.

Michigan. — People v. Abbott, 97 Mich. 484, 37 Am. St. Rep. 360.

New York. — People v. Grauer, 12 N. Y. App. Div. 464. But see People v. Flaherty, 162 N. Y. 532, reversing 27 N. Y. App. Div. 535.

Oregon. — State v. Robinson, 32 Oregon 43; Hamilton v. State, 36 Tex. Crim. 372.

Wisconsin. — Proper v. State, 85 Wis. 615.

Cases where the female is under the age of consent are regarded as other crimes involving sexual intercourse and are subject to the same rules. See State v. Hilberg, 22 Utah 27, and as to the general rule in such cases see the title PROOF OF OTHER CRIMES, *ante*.

Other Act of Intercourse Excluded as Too Remote. — People v. Freeman, 25 N. Y. App. Div. 583, affirmed 156 N. Y. 694.

3. Parkinson v. People, 135 Ill. 401. See also State v. Bonsor, 49 Kan. 758.

4. Prior and Subsequent Acts Distinguished. — Manning v. State, (Tex. Crim. 1901) 65 S. W. Rep. 920; State v. Neel, 23 Utah 541.

5. State v. Hilberg, 22 Utah 27; People v. Etter, 81 Mich. 570, in which case evidence of sexual intercourse with the prosecutrix with her consent soon after she reached the age of consent was held to be inadmissible on a prosecution for intercourse before she reached such age. See also Smith v. State, (Tex. Crim. 1902) 68 S. W. Rep. 995.

6. Election. — People v. Castro, 133 Cal. 11;

election is made by the defense the defendant cannot complain on appeal that no election was made.¹ In some jurisdictions the prosecution will be presumed to have elected to stand for conviction upon the act of intercourse to establish which it first introduced evidence, and unless the evidence is sufficient to prove this offense, the defendant is entitled to an acquittal;² though the rule has also been announced that in such a case the indictment will be deemed to cover the act of intercourse of which evidence is given nearest in period of time to the date of the indictment.³

g. RELATIONSHIP OR FRIENDSHIP BETWEEN PROSECUTRIX AND DEFENDANT. — The Relationship between the prosecutrix and the defendant may be of importance as bearing on the reasonableness of the prosecutrix's story and upon the degree of her resistance,⁴ and evidence of such relationship is admissible.⁵

Prior Friendly Relations. — The defendant may show that his previous relations with the prosecutrix were friendly, as tending to show the means by which he intended to accomplish and did accomplish the act of sexual intercourse.⁶ When the prosecution is for the carnal knowledge of a child under the age of consent, evidence that the relations between the defendant and the prosecutrix were intimate is admissible to show opportunity for intercourse and to corroborate the testimony of the prosecutrix;⁷ and evidence of previous harshness or ill treatment of the prosecutrix by the defendant, in whose family she lived, has been held to be admissible to explain her submission and show want of consent.⁸

2. Sufficiency — *a. IN GENERAL.* — The caution of Sir Matthew Hale that rape "is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent," and that the judges should be "the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance, the heinousness of the offense many times transporting the judge and jury with so much indignation that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony sometimes of malicious and false witnesses,"⁹ has frequently received the strong approbation of the courts in reviewing the testimony in such prosecutions.¹⁰

People v. Williams, 133 Cal. 168. *Compare Reg. v. Rearden*, 4 F. & F. 76. See generally the title **PROOF OF OTHER CRIMES, ante**.

Time When Election May Be Compelled. — *People v. Flaherty*, 162 N. Y. 532, *reversing* 27 N. Y. App. Div. 535. *Compare State v. Parish*, 104 N. Car. 679.

When the Election Has Been Made, Evidence of Other Disconnected Acts Should Be Stricken Out. — *State v. Bonsor*, 49 Kan. 758.

Election Once Made Is Final, and it appearing that the act elected took place after the age of consent had been reached, the state cannot waive a conviction and proceed on another act. *State v. Masteller*, 45 Minn. 128.

1. *Mitchell v. People*, 24 Colo. 532. *Compare People v. Castro*, 133 Cal. 11.

2. *People v. Williams*, 133 Cal. 168; *Mitchell v. People*, 24 Colo. 532; *State v. Acheson*, 91 Me. 240. *Compare State v. Hilberg*, 22 Utah 27.

3. *People v. Flaherty*, 162 N. Y. 540.

4. See *supra*, this title, **Consent — Resistance**.
5. **Evidence of Relationship Admissible.** — *Strang v. People*, 24 Mich. 1; *People v. Mills*, 94 Mich. 630; *State v. Bowser*, 21 Mont. 133. See also *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126.

The objection that such evidence would

have a tendency to excite prejudice against the defendant, as where the defendant owed a duty of protection to the prosecutrix, has been held not to be sufficient ground for its exclusion. *Strang v. People*, 24 Mich. 1.

6. *Hall v. People*, 47 Mich. 636.

7. *State v. Forsythe*, 99 Iowa 1 (subsequent intimacy).

8. **Evidence of Previous Ill Treatment** — *People v. Lenon*, 79 Cal. 625; *People v. Burwell*, 106 Mich. 27, in which case evidence of general abusive treatment of his family by a father charged with rape upon his daughter was held to be admissible. *Compare People v. Tyler*, 36 Cal. 522.

9. 1 Hale P. C. 635, 636.

10. **Caution of Sir Matthew Hale Approved** — *Alabama*. — *Barnett v. State*, 83 Ala. 45.
Arizona. — *Curby v. Territory*, (Ariz. 1895) 42 Pac. Rep. 953.

Colorado. — *Bueno v. People*, 1 Colo. App. 232.

Georgia. — *Crockett v. State*, 49 Ga. 188; *Smith v. State*, 77 Ga. 705.

Idaho. — *State v. Anderson*, (Idaho 1899) 59 Pac. Rep. 180.

Iowa. — *State v. Tomlinson*, 11 Iowa 401; *State v. Hagerman*, 47 Iowa 151.

b. CORROBORATION OF PROSECUTRIX — (1) *Common-law Rule*. — It is a well-settled rule of the common law that in prosecutions for rape the uncorroborated testimony of the prosecutrix may be sufficient to sustain a conviction,¹ even though the prosecutrix is a woman of previous unchaste character;² and even the uncorroborated testimony of an infant prosecutrix of tender years has been held to be sufficient to sustain a conviction.³

Rule Where Defendant Testifies in His Own Behalf. — In a few cases where the accused testified in his own behalf and directly and explicitly denied his guilt, it has been held that his testimony offset the testimony of the prosecutrix and that a conviction could not be had without corroboration of her testimony;⁴ but the better doctrine is undoubtedly that the uncorroborated testimony of the prosecutrix may warrant a conviction even where the defendant as a witness denies his guilt.⁵

Instructions. — While it is undoubtedly the duty of the trial court properly

Minnesota. — *State v. Connelly*, 57 Minn. 482.

Missouri. — *State v. Burgdorf*, 53 Mo. 65; *State v. Wilson*, 91 Mo. 410.

Nebraska. — *Oleson v. State*, 11 Neb. 276, 38 Am. Rep. 366; *Mathews v. State*, 19 Neb. 330; *Reynolds v. State*, 27 Neb. 90, 20 Am. St. Rep. 659.

New Jersey. — *State v. Jackson*, 65 N. J. L. 105.

Utah. — *State v. Hilberg*, 22 Utah 27.

Wisconsin. — *Connors v. State*, 47 Wis. 523.

1. *Corroboration of Prosecutrix Unnecessary* — *Arizona*. — *Curby v. Territory*, (Ariz. 1895) 42 Pac. Rep. 953.

Arkansas. — *Frazier v. State*, 56 Ark. 242.

California. — *People v. Mayes*, 66 Cal. 597, 56 Am. Rep. 126; *People v. Mesa*, 93 Cal. 580; *People v. Fleming*, 94 Cal. 308; *People v. Stewart*, 97 Cal. 238; *People v. Wessel*, 98 Cal. 352; *People v. Gardner*, 98 Cal. 127; *People v. Benc*, 130 Cal. 159.

Florida. — *Doyle v. State*, 39 Fla. 155, 63 Am. St. Rep. 159.

Georgia. — *Coney v. State*, 108 Ga. 773.

Idaho. — *State v. Anderson*, (Idaho 1899) 59 Pac. Rep. 180.

Illinois. — *Johnson v. People*, 197 Ill. 48.

Kentucky. — *Pugh v. Com.*, (Ky. 1888) 7 S. W. Rep. 541, 10 Ky. L. Rep. 64; *Lynn v. Com.*, (Ky. 1890) 13 S. W. Rep. 74.

Michigan. — *People v. Bates*, 70 Mich. 234.

Minnesota. — *State v. Connelly*, 57 Minn. 482.

Mississippi. — *Monroe v. State*, 71 Miss. 196.

Missouri. — *State v. Hert*, 89 Mo. 590; *State v. Wilcox*, 111 Mo. 569, 33 Am. St. Rep. 551; *State v. Dusenberry*, 112 Mo. 277; *State v. Marcks*, 140 Mo. 656; *State v. Harris*, 150 Mo. 56. *Compare State v. Patrick*, 107 Mo. 147.

Nebraska. — *Garrison v. People*, 6 Neb. 274. *Compare Mathews v. State*, 19 Neb. 330.

Oregon. — *State v. Knighten*, 39 Oregon 63.

Pennsylvania. — *Com. v. Wire*, 5 York. Leg. Rec. (Pa.) 11.

Texas. — *McIntyre v. State*, (Tex. Crim. 1897) 43 S. W. Rep. 104; *Keith v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 628; *Hamilton v. State*, 41 Tex. Crim. 599. *Compare Cox v. State*, (Tex. Crim. 1898) 44 S. W. Rep. 157.

Utah. — *State v. Hilberg*, 22 Utah 27.

Virginia. — *Givens v. Com.*, 29 Gratt. (Va.) 830.

Wisconsin. — *Lanphere v. State*, (Wis. 1902) 89 N. W. Rep. 128.

Wyoming. — *Tway v. State*, 7 Wyo. 74.

The absence of corroborating evidence when capable of being produced is strong ground of suspicion, and if unexplained is enough to cause a reasonable doubt of guilt. *Com. v. Childs*, 2 Pittsb. (Pa.) 391.

2. *Prosecutrix Unchaste*. — *Boddie v. State*, 52 Ala. 395; *Barnett v. State*, 83 Ala. 40. *Compare State v. Anderson*, (Idaho 1899) 59 Pac. Rep. 180.

3. *Uncorroborated Testimony of Infant Prosecutrix*. — *People v. Stewart*, 90 Cal. 212; *State v. Lattin*, 29 Conn. 389. To the same effect is *Anonymous*, 1 Russ. on Cr. (9th Am. ed.) 932, 1 Leach C. C. 430, note, a case before Rooke, J., at Gloucester. See also the title CORROBORATIVE EVIDENCE, vol. 7, p. 867.

That Child under Age Consents Does Not Render Her an Accomplice so as to require corroboration. *Bond v. State*, 63 Ark. 504, 58 Am. St. Rep. 129; *State v. Knighten*, 39 Oregon 63; *Hamilton v. State*, 36 Tex. Crim. 372; *State v. Hilberg*, 22 Utah 27. See also *Reg. v. Tyrrell*, (1894) 1 Q. B. 710; *Whittaker v. Com.*, 95 Ky. 632.

Girl Inciting Commission of Offense. — In *Reg. v. Tyrrell*, (1894) 1 Q. B. 710, it was held that it is not a criminal offense for a girl between the ages of thirteen and sixteen to aid and abet the commission of the misdemeanor of having carnal intercourse with her or to solicit and incite a male person to commit that misdemeanor.

4. See the title CORROBORATIVE EVIDENCE, vol. 7, pp. 867, 868. See also *Mares v. Territory*, 10 N. Mex. 770. *Compare Garrison v. People*, 6 Neb. 283.

Corroborative Evidence Held to Be Sufficient. — *Fager v. State*, 22 Neb. 332; *Hammond v. State*, 39 Neb. 252; *George v. State*, 61 Neb. 669; *Dunn v. State*, 58 Neb. 807.

5. *Uncorroborated Testimony Sufficient Even though Defendant Denies Guilt*. — *Barnett v. State*, 83 Ala. 40; *Johnson v. People*, 197 Ill. 48; *People v. Miller*, 96 Mich. 119; *State v. Wilcox*, 111 Mo. 569, 33 Am. St. Rep. 551; *State v. Dusenberry*, 112 Mo. 277; *State v. Marcks*, 140 Mo. 656; *State v. Harris*, 150 Mo. 56; *Com. v. Wire*, 5 York Leg. Rec. (Pa.) 11; *Com. v. Byerts*, 5 York Leg. Rec. (Pa.) 13; *Tway v. State*, 7 Wyo. 74. *Compare State v. Patrick*, 107 Mo. 147.

to caution the jury against the danger of conviction for rape on the testimony of the prosecutrix alone, uncorroborated by other evidence, direct or circumstantial,¹ it has been held that the failure to do so is not reversible error when the defendant did not request such an instruction.²

(2) *Statutory Requirement.* — In a few jurisdictions it is expressly provided by statute that the defendant in a prosecution for rape cannot be convicted on the testimony of the female ravished unless she is corroborated by other evidence tending to connect the defendant with the commission of the offense.³ Under such statutes, however, the *corpus delicti* may be established by the testimony of the prosecutrix alone.⁴ Where the statute merely requires corroborative evidence to warrant a conviction for rape, it is not necessary that there should be corroborative evidence to warrant a conviction for assault with intent to commit rape.⁵

Sufficiency of Corroboration. — No general rule can be laid down as to what corroborative evidence is sufficient to connect the defendant with the commission of the offense, so as to warrant a conviction, except that the corroborative evidence must point out the defendant and single him out from other persons as the perpetrator.⁶

c. *CONFESSION.* — The extrajudicial confession of guilt by the accused, whether it is made in express words or is to be implied from expressions, is not sufficient to warrant a conviction when the *corpus delicti* is not proved;⁷ but of course where the *corpus delicti* is also proved, it is sufficient.⁸

XIII. PUNISHMENT. — At least since the second statute of Westminster, A. D. 1285, rape has in *English* law been a felony and punishable by death.⁹

1. *People v. Benson*, 6 Cal. 221, 65 Am. Dec. 506. See also *Leoni v. State*, 44 Ala. 110.

2. *People v. Rangod*, 112 Cal. 669.

3. *Statutory Requirement.* — *People v. Terwilliger*, 74 Hun (N. Y.) 310, affirmed 142 N. Y. 620, 60 N. Y. St. Rep. 866; *People v. Kunz*, (Supm. Ct. Gen. T.) 27 N. Y. Supp. 945. And see the local statutes.

Failure to Instruct as to the necessity for such corroboration is ground for reversal though the defense made no request therefor. *State v. Carnagy*, 106 Iowa 483.

Form of Instruction Upheld. — *State v. French*, 96 Iowa 255.

Instruction Held to Be Erroneous. — *State v. Fountain*, 110 Iowa 15.

4. *Prosecutrix May Establish Corpus Delicti.* — *State v. McLaughlin*, 44 Iowa 82; *State v. Cassidy*, 85 Iowa 145.

5. *Assault with Intent to Rape — No Corroboration Required.* — *State v. Cook*, 92 Iowa 483; *State v. Grossheim*, 79 Iowa 75; *People v. Kirwan*, 67 Hun (N. Y.) 652, 22 N. Y. Supp. 160. And see the title ASSAULT AND BATTERY, vol. 2, p. 974, note. See also *State v. McIntire*, 66 Iowa 341; *Rogers v. Winch*, 76 Iowa 546.

The rule in *Iowa* is now changed by statute. Code Iowa (1897), § 5488.

As to *Forcible Defilement*, see *State v. Montgomery*, 79 Iowa 737. But see Code Iowa (1897), § 4757.

6. *What Is Sufficient Corroboration.* — *State v. Painter*, 50 Iowa 317; *State v. Stowell*, 60 Iowa 535.

That the Prosecutrix Made Complaint and Her Person Bore Marks of Violence is insufficient, as it does not connect the defendant with the offense. *State v. Stowell*, 60 Iowa 535; *State v. Wheeler*, (Iowa 1902) 89 N. W. Rep. 978; *People v. Page*, 162 N. Y. 272.

That Opportunity Existed to Commit Offense Is

Not Sufficient Corroboration. — *State v. Wheeler*, (Iowa 1902) 89 N. W. Rep. 978; *State v. Chapman*, 88 Iowa 254, wherein it was held that the fact that the parties were seen walking together a short time before the alleged attempt to commit the rape was not sufficient to constitute corroboration of the testimony of the prosecutrix. Compare *People v. McKeon*, 64 Hun (N. Y.) 504, where corroborative evidence that the defendant was seen going to and coming from the house where the offense was alleged to have been committed and that the prosecutrix, in an excited state, made immediate complaint, was held to be sufficient.

That Defendant Admits the Intercourse Is Sufficient though he says that the prosecutrix consented. *State v. Cassidy*, 85 Iowa 145; *State v. Sigg*, 86 Iowa 746. See also *State v. Forsythe*, 99 Iowa 1.

Circumstantial Evidence Is Sufficient. — *People v. Grauer*, 12 N. Y. App. Div. 464.

Other Cases Wherein Corroboration Was Held to Be Sufficient — Iowa. — *State v. Comstock*, 46 Iowa 265; *State v. Mitchell*, 68 Iowa 116; *State v. Moore*, 81 Iowa 578; *State v. Watson*, 81 Iowa 380.

New York. — *People v. Morris*, 58 Hun (N. Y.) 609, 12 N. Y. Supp. 492; *People v. Cullen*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 886; *People v. O'Connell*, (Supm. Ct. Gen. T.) 35 N. Y. St. Rep. 940; *People v. Flaherty*, 27 N. Y. App. Div. 535; *People v. Adams*, 72 N. Y. App. Div. 166.

7. *Matthews v. State*, 55 Ala. 187, 28 Am. Rep. 698. See also *People v. Tarbox*, 115 Cal. 57.

8. See the title *CONFESSIONS*, vol. 6, p. 581 *et seq.*

9. *Punishment of Rape.* — Stat. West. II., c. 34; 1 Hale P. C. 627; 4 Black. Com. 211, 212. For the earlier history of "the crime which

In all jurisdictions, at the present time, the statutes fix the punishment to be imposed for rape and kindred offenses.¹

Discretion. — The severity of the punishment to be imposed for rape is generally left to the discretion of the jury or the trial court.²

XIV. FORMER JEOPARDY. — The general rules regulating the plea of *autrefois acquit* or *autrefois convict* have been investigated in another title.³ In the notes are collected some illustrations of the application of those rules to rape and kindred offenses.⁴

we call rape," see 2 Pollock & M. Hist. Eng. Law (2d ed.) 490.

1. Punishment Now Universally Fixed by Statute — Rape. — See the local statutes, and see *Dennis v. State*, 5 Ark. 230; *Blair v. Com.*, 7 Bush (Ky.) 227; *State v. Reid*, 39 Minn. 277; *Brown v. State*, 72 Miss. 997; *Ex p. Dusenberry*, 97 Mo. 504; *State v. Gray*, 100 Mo. 523; *State v. Davidson*, 2 Coldw. (Tenn.) 184 (slave freed between commission of crime and trial).

Rape in Indian Country — Death Penalty. — *U. S. v. Partello*, 48 Fed. Rep. 670.

Age of Defendant Determines Penalty — Texas Statute. — *Ake v. State*, 6 Tex. App. 398, 32 Am. Rep. 586; *Pen. Code Tex.* (1895), art. 35.

Carnal Knowledge of Infants. — See the statutes, and see *Schang v. State*, (Fla. 1901) 31 So. Rep. 346; *State v. Rippy*, 127 N. Car. 516 (infant between ten and fourteen).

Assault with Intent to Rape. — See the statutes, and *Barker v. State*, 40 Fla. 178; *Schang v. State*, (Fla. 1901) 31 So. Rep. 346; *O'Connell v. State*, 6 Minn. 279; *State v. Scholl*, 130 Mo. 396; *State v. Dancy*, 83 N. Car. 608; *Wilson v. State*, 103 Tenn. 87.

Grading Punishment by Age of Child Assaulted. — When the severity of the punishment for assault to rape is graded according to the age of the female assaulted, upon a conviction on an indictment charging an attempt to commit a rape, without alleging the age of the female upon whom the assault was made, the milder punishment only will be awarded. *State v. Fielding*, 32 Me. 585. See also *State v. Erickson*, 81 Minn. 134.

Attempt to Rape. — See *People v. Gardner*, 98 Cal. 127; *State v. Hilsabeck*, 132 Mo. 348; *Givens v. Com.*, 29 Gratt. (Va.) 830; *State v. Berzaman*, 10 Wash. 277.

Where the statute punishes rape by imprisonment for life, and further provides that on conviction of attempt to commit crime the punishment may be fixed at one-half the longest term of imprisonment prescribed upon the conviction of the offense, a sentence of five years imprisonment on conviction of attempt to rape is warranted. *People v. Gardner*, 98 Cal. 127. See also *State v. Berzaman*, 10 Wash. 277.

Attempt by Negro or Slave on White Woman Punishable by Death — Early Statutes. — See *Dennis v. State*, 5 Ark. 230; *Wash v. State*, 14 Smed. & M. (Miss.) 120; *State v. Davidson*, 2 Coldw. (Tenn.) 184; *Peter v. State*, 5 Humph. (Tenn.) 436. See also *supra*, this title, *Attempt to Rape*.

Prior to the Fourteenth Amendment to the Federal Constitution statutes imposing the penalty of death in such cases were held to be constitutional, though for the same offense by a white man the penalty was only imprison-

ment. *Charles v. State*, 11 Ark. 389; *Pleasant v. State*, 13 Ark. 360.

2. See the local statutes.

Where the Statute Requires the Court to Fix the Punishment it is reversible error to delegate such discretion to the jury. *Leoni v. State*, 44 Ala. 110.

Instances of Punishment Not Interfered with by Appellate Court. — *Dykes v. State*, 64 Ga. 437 (twenty years for assault with intent to rape); *State v. Baskett*, 111 Mo. 271 (thirty years for rape of girl under fourteen years of age); *State v. Rippy*, 127 N. Car. 516 (ten years for rape of girl between ten and fourteen years of age); *Asher v. Territory*, 7 Okla. 188 (fifteen years for rape of girl under fourteen years of age); *Johnson v. State*, 26 Tex. App. 399 (death penalty); *Mischer v. State*, 41 Tex. Crim. 212 (death penalty); *Murphy v. State*, 108 Wis. 111 (twenty-five years, reducible by good conduct to fourteen years, for rape of girl of ten years).

Instances of Punishment Held Excessive on Appeal. — *State v. Blunt*, 77 Iowa 106 (fifteen years for assault with intent to rape child of tender years reduced to ten years); *State v. Steffens*, (Iowa 1902) 89 N. W. Rep. 974 (life sentence for rape of child when penetration, if effected at all, was but slight, and accused was intoxicated at the time, reduced to fifteen years).

3. See the title JEOPARDY, vol. 17, p. 580, especially p. 598 *et seq.*

4. Subsequent Prosecution for Rape Barred. — Where the indictments were founded on the same transactions, it has been held that a subsequent prosecution for rape was barred by:

Former Conviction for Attempt to Rape — *State v. Shepard*, 7 Conn. 54. See also *State v. Smith*, 43 Vt. 324, *arguendo* as to a former conviction for assault with intent to rape.

Former Acquittal for Assault and Battery. — *People v. Purcell*, (Ct. Gen. Sess.) 16 N. Y. Supp. 199. Compare *People v. Saunders*, (Oyer & T. Ct.) 4 Park. Crim. (N. Y.) 196.

So an Acquittal for Rape Has Been Held to Bar a Subsequent Prosecution for Adultery. — *Com. v. McIlvain*, 17 Pa. Co. Ct. 174, 5 Pa. Dist. 175.

A Prosecution for Fornication and Bastardy Is a Bar to a Subsequent Prosecution for Statutory Rape, based on the same transaction, in carnally knowing a female below the statutory age of consent. *Com. v. Arner*, 149 Pa. St. 35. *Aliter* where transactions may be different. *Com. v. Walker*, 15 Pa. Co. Ct. 418.

Acquittal for Forcible Defilement Is No Bar to Prosecution for Conspiracy to Commit the Crime. *State v. Brown*, 95 Iowa 381.

Attempt to Rape and Attempt to Commit Burglary. — A former acquittal of an attempt to commit rape is not a bar to a prosecution for an attempt to commit burglary for the purpose

XV. CONDONATION. — The general rule that the person injured through the commission of a crime cannot by condoning or forgiving the offense relieve the accused from criminal prosecution ¹ applies fully to the crime of rape and kindred offenses. ²

XVI. STATUTE OF LIMITATIONS. — In some jurisdictions the statutes limit the time within which prosecutions for rape and kindred offenses must be instituted. ³

XVII. CIVIL ACTION. — A woman on whom rape has been committed may maintain a civil action for the injury, as in such a case the right of action does not merge in the crime; ⁴ and the same is of course true with regard to the injury from an assault with intent to rape or an indecent assault. The gist of the action in such cases is the force and violence, and of course the consent of the woman is a defense. ⁵ In such actions, as in criminal prosecutions, the failure of the woman to complain ⁶ or the continued existence of friendly relations between the plaintiff and the defendant ⁷ is admissible as tending to show the falsity of the claim. On the other hand, evidence of recent complaint by the female is admissible in her favor to the same extent as in criminal prosecutions. ⁸ Evidence of the good character of the defendant has been held to be admissible in such actions. ⁹ Evidence that the defendant was living apart from his wife is not admissible as tending to establish the offense of which complaint is made. ¹⁰

Upon the Question of Damages the defense may show the generally depraved character of the female, ¹¹ but it cannot show specific acts of depravity on her part. ¹² In such actions exemplary damages may undoubtedly be awarded. ¹³

of committing the rape involved in the former indictment. *Byas v. State*, 41 Tex. Crim. 51. Compare *Com. v. Reed*, 4 Lanc. L. Rev. 89.

Rape and Incest Are Distinct, and an acquittal on the charge of rape is no bar to a subsequent prosecution for incest founded on the same transaction. *Stewart v. State*, 35 Tex. Crim. 174, 60 Am. St. Rep. 35.

Rape and Attempt to Rape — Old Statute. — In *North Carolina*, under an early statute, it was held that an acquittal on an indictment for rape was not a bar to a subsequent prosecution for an attempt to rape by the accused, a negro, upon a white woman, such offense being also a capital felony. *State v. Jesse*, 3 Dev. & B. L. (30 N. Car.) 98.

1. **Condonation.** — See the title **CRIMINAL LAW**, vol. 8, p. 294.

2. **Forgiveness of Accused by Victim No Defense.** — *Com. v. Slattery*, 147 Mass. 423. See also *State v. Harris*, 150 Mo. 56; *State v. Hammond*, 77 Mo. 157.

The fact that the woman charged to have been assaulted made the complaint against the accused under the threats of her husband is no defense. This fact can only affect the wife's credibility as showing a false charge. *Pratt v. State*, 51 Ark. 167.

Subsequent Marriage of the Accused to the Victim, a girl under the age of consent, is no defense. *State v. Newcomer*, 59 Kan. 668.

Anciently, however, the female ravished might, if she pleased, redeem the accused from execution if she elected him for her husband and he consented thereto. 1 Hale P. C. 627.

Subsequent Consent to Intercourse No Defense to Indictment for Assault with Intent. — See *supra*, this title, *Consent — Consent Before Rape Completed*.

3. **Statute of Limitations.** — *Reg. v. Cotton*, 60 J. P. 824; *State v. Steffens*, (Iowa 1902) 89 N.

W. Rep. 974; *State v. Birchard*, 35 Oregon 484; *Anschicks v. State*, 6 Tex. App. 524; *Reed v. State*, (Tex. App. 1890) 13 S. W. Rep. 865; *Gonzales v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 1060. See also *State v. Fountain*, 110 Iowa 15. And see generally the title **LIMITATION OF ACTIONS**, vol. 19, p. 163 *et seq.*

4. **Civil Action by Female.** — *Koenig v. Nott*, 2 Hilt. (N. Y.) 323.

5. *Robinson v. Musser*, 78 Mo. 153; *Koenig v. Nott*, 2 Hilt. (N. Y.) 323.

Evidence of Nonconsent Held to Be Insufficient. — *Lind v. Closs*, 88 Cal. 6.

6. **Failure to Complain.** — *Lind v. Closs*, 88 Cal. 6; *Young v. Johnson*, 123 N. Y. 226, *affirming* 46 Hun (N. Y.) 164.

7. **Continued Friendly Relations.** — *Schuek v. Hagar*, 24 Minn. 339; *Young v. Johnson*, 123 N. Y. 226, *affirming* 46 Hun (N. Y.) 164.

8. **Recent Complaint.** — *Gardner v. Kellogg*, 23 Minn. 463.

Evidence of Remote Complaint Should Be Excluded. — *Dean v. Rapple*, 64 Hun (N. Y.) 537.

9. **Defendant's Good Character.** — *Schuek v. Hagar*, 24 Minn. 339. Compare *Kinneberg v. Kinneberg*, 8 N. Dak. 311 (evidence of defendant's general reputation for chastity excluded); *Ryan v. Sayen*, 5 Ohio Dec. 165, 7 Ohio N. P. 389 (evidence of reputation as a quiet and peaceable citizen excluded).

10. **Defendant Living Apart from Wife.** — *Haulish v. Boller*, 72 N. Y. App. Div. 559.

11. **Damages — Evidence of Female's Depravity.** — *Parker v. Coture*, 63 Vt. 155, 25 Am. St. Rep. 750.

12. *Miller v. Curtis*, 158 Mass. 127, 35 Am. St. Rep. 469.

13. **Exemplary Damages.** — *Gardner v. Kellogg*, 23 Minn. 463; *Haulish v. Boller*, 72 N. Y. App. Div. 559. See also *Mohelsky v. Hartmeister*, 68 Mo. App. 318.

RASH. — See note 1.

RASURE. — See the title ALTERATION OF INSTRUMENTS, vol. 2, p. 181.

RATABLE. — Ratable means capable of being appraised or assessed.² But the term "ratable property" is sometimes used in the sense of "taxable property."³

RATE. (See also *RATIO*, *post.*) — Rate is defined to be the price or amount stated or fixed on anything.⁴ The term is also used in the sense of proportion or percentage; a standard of valuation; a rule or measure of assessment; an assessment according to a given standard.⁵ It has also the meaning of a public valuation or assessment of every man's estate, or the ascertaining how much tax every one should pay, and may apply either to the percentage of taxation or to the valuation of property.⁶ In *England*, the term usually means a local tax; as, the county rate, the borough rate, the poor rate.⁷

1. *Rash and Hazardous Speculation.* — A *rash* and hazardous speculation is one in which no reasonable man or no man of ordinary commercial prudence under similar circumstances would venture to embark. *Ex p. Fryer*, 10 L. T. N. S. 197.

2. *Ratable.* — *Reg. v. Malden*, 10 B. & S. 323; *Darrow v. Langdon*, 20 Conn. 288; *Coventry Co. v. Coventry*, 16 R. I. 240; *Tripp v. Torrey*, 17 R. I. 362.

A statute required every owner of property to give in to the tax assessors an account showing his *ratable* estate. It was held that *ratable*, as thus used, meant capable of being appraised or assessed; that the word, therefore, was not synonymous with "taxable;" and that under the statute a return of "no *ratable* personal estate over and above the actual indebtedness of the company" was insufficient. *Coventry Co. v. Coventry*, 16 R. I. 240.

"*Ratable* property means property in its nature capable of being rated, and is not confined to property which would be actually inserted in a rate at a time the list is returned." *Reg. v. Malden*, L. R. 4 Q. B. 329. See also *Reg. v. Hammersmith*, 33 L. T. N. S. 183, 7 W. R. 524.

Ratable Value Equivalent to Appraised or Assessed Value. — See *Darrow v. Langdon*, 20 Conn. 292.

3. *Ratable Estate Equivalent to Taxable Estate.* — See *State v. Camp Sing*, 18 Mont. 145; *Marshfield v. Middlesex*, 55 Vt. 545.

Ratable Polls. — In *Opinions of Justices*, 7 Mass. 523, it was held that the polls of aliens might be *ratable* polls when made liable by the legislature to be rated for public taxes.

4. *Price.* — *Raun v. Reynolds*, 11 Cal. 19, quoting *Webst. Dict.*

"*Rate* means price, value." *Barrett v. Schooner Wacousta*, 1 Flipp. (U. S.) 519, 2 Fed. Cas. No. 1,050.

Regular Rate. — In *Martinsburg Bank v. Central Pennsylvania Telephone, etc., Co.*, 150 Pa. St. 36, it was held that what parties mean by the use of words in a parol contract is always a question of fact in the particular case, and that by the words "regular rates" for telephone service in the case at bar, were meant *rates* charged in the neighborhood.

Going Rate. — See *GO, GOING, ETC.*, vol. 14, p. 1072.

5. *Rate in Sense of Percentage, Proportion, and*

Degree. — *State v. Mobile, etc., R. Co.*, 59 Ala. 325; *People v. Dolan*, 36 N. Y. 67.

Rate of Fare. — See *FARE*, vol. 12, p. 881.

Rate of Interest. (See also the title *INTEREST*, vol. 19, p. 1048 *et seq.*) — In *Raun v. Reynolds*, 11 Cal. 19, it was said: "According to the common acceptance, the expression '*rate of interest*' has reference to the percentage or amount of interest, and not to the manner of computing."

Rate Per Cent. — In *Wilson v. Davis*, 1 Mont. 195, it was said: "The term '*rate per cent.*' whether used at common law or in statutes, so far as I have been able to learn, signifies so much per cent. on the principal."

6. *Tax.* — *State v. Camp Sing*, 18 Mont. 145; *State v. Utter*, 34 N. J. L. 494; *Coventry Co. v. Coventry*, 16 R. I. 240; *Atty.-Gen. v. Eau Claire*, 37 Wis. 426.

In *People v. Weaver*, 100 U. S. 545, it was said: "There can be no *rate* or percentage without a valuation."

In *Bressler v. Wayne County*, 32 Neb. 842, it was said: "The word *rate*, as used in this section, applies as well to the valuation of the shares of the stockholder as to the ratio of tax to be levied thereon."

Rate Dependent upon Connection in Which Used. — In *Darrow v. Langdon*, 20 Conn. 295, it was said: "The word *rate* is frequently used as synonymous with 'tax,' and often as the public valuation on which the tax is laid; and what it means in a particular instance must depend upon its connection as applied to the subject-matter."

Rate and Impose. — In *State v. Camp Sing*, 18 Mont. 128, it was held that the intent of a section of the constitution to refer to taxation proper, and not to licenses, was expressed by the use of the word "levy," "assess," and *rate*, when speaking of taxes, and the use of the word "impose" when speaking of licenses.

7. *Rate.* — *State v. Camp Sing*, 18 Mont. 145, quoting *And. L. Dict.*

Rates, Taxes, and Assessments. — But in *Baylis v. Jiggins*, (1898) 2 Q. B. 315, it was held that expenses of paving, etc., of a street, under the English Public Health Act of 1875, could not be recovered by the owner from his tenant under a covenant by the tenant to pay "all *rates*, taxes, and assessments whatsoever." See also *Hartley v. Hudson*, 4 C. P. D. 367; *Wilkinson v. Collyer*, 13 Q. B. D. 1. And see the titles *SPECIAL OR LOCAL ASSESSMENTS; TAXATION.*

RATIFY — RATIFICATION. (See also the titles AGENCY, vol. 1, p. 1181 *et seq.*; PROMOTERS; TAXATION.) — To ratify is to give validity to the act of another, and the act of ratification implies that the person or body ratifying has at the time power to do the act ratified.¹ Ratification is the confirmation of a previous act done either by the party himself or by another; it is the confirmation of a voidable act.² The term is used, as applying to the unauthorized contracts of one acting as an agent or representative of another, to contracts made during infancy, to treaties, and to the amendment of written constitutions, in the sense of "confirmation," "adoption," and "affirmation."³ It is said, however, that "ratification" applies properly only to agency.⁴

Existing Person. — A ratification, properly so called, implies an existing person, on whose behalf the contract might have been made at the time. There cannot, in law, be a ratification of a contract which could not have been made binding on the ratifier at the time when it was made because the ratifier was not then in existence.⁵

1. Ratify. — Norton *v.* Shelby County, 118 U. S. 451. See also Marsh *v.* Fulton County, 10 Wall (U. S.) 676; McCracken *v.* San Francisco, 16 Cal. 623; State *v.* Ward, 9 Heisk. (Tenn.) 130.

New Proceeding. — To *ratify* means to confirm acts already done, not to authorize new proceedings in the future. Barker *v.* Chesterfield, 102 Mass. 128.

2. Ratification. — Ft. Scott First Nat. Bank *v.* Drake, 29 Kan. 324, *quoting* Burr. L. Dict.

Ratification means the confirmation of an act not before binding, making it good, agreeing to or adopting it. Scott *v.* Buchanan, 11 Humph. (Tenn.) 470.

"Ratification is the adopting and making some previous act one's own." Hatton *v.* Stewart, 2 Lea (Tenn.) 234.

"Ratification is an agreement to adopt an act performed by another for us." Bouv. L. Dict., *quoted in* Evans *v.* Buckner, 1 Heisk. (Tenn.) 294, and Hatton *v.* Stewart, 2 Lea (Tenn.) 235.

In Ansonia *v.* Cooper, 64 Conn. 544, it was said: "**Ratification** means the adoption by a person as binding upon himself, of an act done in such relations that he may claim it as done for his benefit, although done under such circumstances as would not bind him except for his subsequent assent; as where an act was done by a stranger having at the time no authority to act as his agent, or by an agent not having adequate authority. The acceptance of the results of the act with an intent to *ratify*, and with full knowledge of all the material circumstances, is a *ratification*." See also Curnane *v.* Scheidel, 70 Conn. 13.

Ratification May Be Express or Implied. — Evans *v.* Buckner, 1 Heisk. (Tenn.) 294; Hatton *v.* Stewart, 2 Lea (Tenn.) 235.

Knowledge. — "A *ratification* supposes a knowledge of the thing ratified." Blen *v.* Bear River, etc., Min. Co., 20 Cal. 613; *quoted in* San Diego, etc., R. Co. *v.* Pacific Beach Co., 112 Cal. 53.

Acquiescence and Ratification Distinguished. — In Moore *v.* Robinson, 62 Ala. 547, it was said: "Acquiescence is not necessarily *ratification*, though evidence tending to prove it." See generally ACQUIESCENCE, vol. 1, p. 570.

Ratification and Estoppel Distinguished. — See the title ESTOPPEL, vol. 11, p. 446.

Ratification by Infants. — See the title INFANTS, vol. 16, p. 300 *et seq.*

Ratification by Master. — See the title MASTER AND SERVANT, vol. 20, p. 179.

Ratification of Contracts by Married Women. — See the titles HUSBAND AND WIFE, vol. 15, p. 785; SEPARATE PROPERTY OF MARRIED WOMEN.

Ratification of Treaty. — See the title TREATIES.

Partner's Ratification of Acts of Copartner. — See the title PARTNERSHIP, vol. 22, pp. 136, 144, 159.

Ratification of Acts of Officers of Corporation. — See the title OFFICERS AND AGENTS OF PRIVATE CORPORATIONS, vol. 21, p. 853.

Ratification of Acts of Public Officers. — See the title PUBLIC OFFICERS, *ante*.

3. Confirmation, Adoption, etc. — See Pearsoll *v.* Chapin, 44 Pa. St. 17; Scales *v.* Johnson, (Tex. Civ. App. 1897) 41 S. W. Rep. 830; and an article on The Law of Ratification, 19 Cent. L. J. 482, where such use is condemned. See also ADOPT, vol. 1, p. 724; CONFIRMATION, vol. 6, p. 588.

Adoption and Ratification as Relating to Contracts Used Synonymously. — Stanton *v.* New York, etc., R. Co., 59 Conn. 285; Schreyer *v.* Turner Flouring Co., 29 Oregon 1. See also Ellison *v.* Jackson Water Co., 12 Cal. 551. Compare Blood *v.* La Serena Land, etc., Co., 113 Cal. 221; Mitchell *v.* Minnesota F. Assoc., 48 Minn. 278; McArthur *v.* Times Printing Co., 48 Minn. 319.

Ratify and Confirm Distinguished. — See Blood *v.* La Serena Land, etc., R. Co., 113 Cal. 221. See also CONFIRMATION, vol. 6, p. 588.

Recognition, Ratification, Confirmation, and Adoption. — But in Byrne *v.* Doughty, 13 Ga. 52, it was said: "Recognition, confirmation, adoption, and *ratification* are used indifferently in the books, as having substantially the same legal import."

"Ratification is in general the adoption of a previously formed contract, notwithstanding the vice that rendered it relatively void." Hill *v.* Indianapolis, 92 Fed. Rep. 469. See also Reid *v.* Field, 83 Va. 33.

4. Term Properly Applies Only to Agency. — Clough *v.* Clough, 73 Me. 487, 40 Am. Rep. 386; Adams *v.* Bateman, (Tex. Civ. App. 1895) 29 S. W. Rep. 1128.

5. Existing Person. — *In re* Empress Engineering Co., 16 Ch. D. 128; Melhado *v.* Porto Alegre, etc., R. Co., L. R. 9 C. P. 505; Kelter *v.* Baxter, L. R. 2 C. P. 185; McArthur *v.* Times Printing Co., 48 Minn. 319. See also

Form or Mode. — Where authority to do a particular act can originally be conferred only in a particular form or mode, the ratification must follow the same form or mode. Thus, where an authority to do any particular act on the part of a corporation can be conferred by ordinance only, a ratification of such act can be by ordinance alone.¹

Relation. — Ratification relates back to the beginning of the thing ratified and renders it obligatory from the outset.²

RATING. (See also the titles MARINE INSURANCE, vol. 19, p. 930; SHIPS AND SHIPPING.) — See note 3.

RATIO. (See also PROPORTION, *ante*; RATE, *ante*.) — Ratio is variously defined to be “the relation between two numbers or two magnitudes of the same kind;” “the relation between two similar magnitudes in respect to quantity;” “the relation between two similar quantities in respect to how many times one makes so many times the other;” “especially, the relation expressed by indicating the division of one quantity by the other, or by the factor that multiplied into one will produce the other.”⁴

RAVINE. — A ravine is defined to be a deep and narrow hollow, usually worn by a stream or torrent of water; a gorge; a mountain cleft.⁵

RAVISH. (See also the title RAPE, *ante*.) — To ravish is to constuprate by force; to deflower by violence; to violate; to debauch; to defile by force.⁶

Force. — The word “ravish” implies force and violence in the man and want of consent in the woman.⁷

Carnal Knowledge. — The word “ravish” includes carnal knowledge.⁸

RAWHIDE LEATHER. — See note 9.

Norton *v.* Shelby County, 118 U. S. 451; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676.

1. **Form or Mode.** — McCracken *v.* San Francisco, 16 Cal. 623, *quoted* in State *v.* Ward, 9 Heisk. (Tenn.) 130.

2. **Relation.** — Grenada County *v.* Brogden, 112 U. S. 261; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. Rep. 742; Hill *v.* Indianapolis, 92 Fed. Rep. 469; Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Sykes *v.* Columbus, 55 Miss. 137; Municipal Security Co. *v.* Baker County, 33 Oregon 338; Nashville *v.* Hagan, 9 Baxt. (Tenn.) 505; Scales *v.* Johnson, (Tex. Civ. App. 1897) 41 S. W. Rep. 830; Reid *v.* Field, 83 Va. 33.

Equivalent to Previous Authority. — *Ratification* is equivalent to previous authority. It operates upon the act *ratified* in the same manner as though the authority had been originally given. Marsh *v.* Fulton County, 10 Wall. (U. S.) 676; Norton *v.* Shelby County, 118 U. S. 451; McCracken *v.* San Francisco, 16 Cal. 623; Zottman *v.* San Francisco, 20 Cal. 102; State *v.* Ward, 9 Heisk. (Tenn.) 130.

3. **Rating of Vessel.** — In Orient Mut. Ins. Co. *v.* Wright, 1 Wall. (U. S.) 472, it was said: “What is meant by the *rating* of vessels in insurance policies? It means the determination of their relative state or condition in regard to their insurable qualities.”

4. **Ratio.** — Matter of Klock, 30 N. Y. App. Div. 41, *quoting* Cent. Dict.; Worcester’s Dict.; Standard Dict.

In Shattuck *v.* Balcom, 170 Mass. 251, it was said: “From the connection in which it is found, we think that the word *ratio* imports a payment to certain persons in certain proportions.”

5. **Ravine.** — Gibbs *v.* Williams, 25 Kan. 217. **Bridge over Ravine** — **Bridge over Stream.** — See Long *v.* Boone County, 36 Iowa 60.

6. **Ravish.** — Harper *v.* Delp, 3 Ind. 230, *quoting* Johnson’s Dict. In this case, which was an action for slander, the court said: “The word *ravish* has, no doubt, other significations; but when used in the connection it here is — when it is said that a man was seen *ravishing* a cow — we must consider the natural meaning of the words to be that the person so seen was committing the crime of bestiality and buggery with the cow.”

7. **Force and Want of Consent.** — Leoni *v.* State, 44 Ala. 110; Com. *v.* Scannell, 11 Cush. (Mass.) 547; Com. *v.* Fogerty, 8 Gray (Mass.) 489; People *v.* Willett, 105 Mich. 110; O’Connell *v.* State, 6 Minn. 279; State *v.* Daly, 16 Oregon 240; Harman *v.* Com., 12 S. & R. (Pa.) 69; Walling *v.* State, 7 Tex. App. 626; Gibson *v.* State, 17 Tex. App. 574; Gutierrez *v.* State, 44 Tex. 587; Williams *v.* State, 1 Tex. App. 90.

Rape and Ravish. — In McComas *v.* State, 11 Mo. 117, it was said: “The words ‘rape’ and *ravish* are used here as in common parlance as synonymous terms, and the only difference in the statute between the two species of the offense is that the latter contemplates force, whilst the former may consist in the act of sexual intercourse alone — irrespective of actual violence or consent.”

But in Davis *v.* State, 42 Tex. 228, it was held that at common law an indictment for rape must charge that the accused “did *ravish*,” etc., and that the use of the noun “rape” instead of the verb *ravish* was insufficient.

8. **Carnal Knowledge Included.** — Sullivant *v.* State, 8 Ark. 404; Com. *v.* Fogerty, 8 Gray (Mass.) 490; O’Connell *v.* State, 6 Minn. 279; Fields *v.* State, 39 Tex. Crim. 488; Gibson *v.* State, 17 Tex. App. 574.

9. **Rawhide Leather.** — See Weatherhead *v.* Coupe, 147 U. S. 327.

RAW MATERIAL. — See note 1.

RAZOR. — A razor is a sharp instrument or tool used for shaving purposes.²

READ. — See note 3.

READILY. — “Readily” means quickly; speedily; easily; at hand; immediately available; convenient; handy.⁴

READINESS TO PAY. — See the title **TENDER**.

READING. (See also the title **STATUTES**.) — “Reading” means the act of making known the contents of a written or printed document.⁵

READY — READINESS. — Ready is defined as prepared at the moment; not behindhand or backward when called upon; causing no delay for lack of being fitted or furnished; prepared in mind or disposition; not reluctant; willing; free; inclined; disposed.⁶

1. **Raw Material.** — A statute provided that any individual or association engaged in mining or manufacturing who should, for a specified time, refuse to pay the furnisher of any ore, clay, coal, or other *raw material* should become liable to a receivership. It was held that by *raw material* was not meant only “such *raw material* as became incorporated in the course of manufacture with the product evolved,” and that a debt for coal was within the statute. *Hicks v. Consolidated Coal Co.*, 77 Md. 91.

2. **Razor.** — *Scott v. State*, (Tex. Crim. 1901) 62 S. W. Rep. 420.

Deadly Weapon. — In *State v. Nelson*, 38 La. Ann. 942, a *razor* was held not to be a dangerous weapon. *Compare State v. Larkin*, 24 Mo. App. 412. And see the title **CARRYING WEAPONS**, vol. 5, p. 737, note.

3. **Read.** — In *Matter of Paikuli*, 8 Hawaii 680, it was held that where a statute required in a voter the ability to *read*, this meant an ability to *read* printed or written text with reasonable fluency and to comprehend the meaning. See also the title **ELECTIONS**, vol. 10, p. 592.

Read and Write — Jurors. — See the title **JURY AND JURY TRIAL**, vol. 17, p. 1118.

4. **Readily.** — *Western Coal, etc., Co. v. Berberich*, (C. C. A.) 94 Fed. Rep. 334, *quoting* Cent. Dict. and Standard Dict., and holding that an instruction that it was the duty of the master to use all appliances *readily* attainable for the protection of his servants was not erroneous.

Readily Seen. — In an action for personal injuries resulting from falling into an excavation made by the defendant, the trial court instructed the jury to find for the defendant if it believed from the evidence that an electric light furnished sufficient light for the excavation to be *readily* seen by a person exercising ordinary care. The appellate court said: “The term ‘*readily* seen,’ in the connection in which it appears in the charge, while not happily employed, is the equivalent of ‘patent’ or ‘obvious,’ which are the terms generally used in legal parlance in stating the rule under consideration.” *Missouri, etc., R. Co. v. Johnson*, (Tex. Civ. App. 1901) 67 S. W. Rep. 771.

5. **Reading.** — *New Orleans v. Brooks*, 36 La. Ann. 642, *quoting* Bouv. L. Dict.

Reading Matter. — In *Kanopolis Land Co. v. Morgan*, 1 Kan. App. 68, it was held that what constitutes *reading* matter as distinguished from advertisements in a news-

paper, was not a question of law to be determined by the court. The court said: “What might be properly considered ‘*reading* matter’ under some circumstances, under other and different circumstances would not be so classified. No certain or fixed rule can probably be applied to enable a court, from a mere inspection of a newspaper, to say to what particular class of printed matter every insertion should belong.”

6. **Ready.** — *State v. Gooch*, 105 Mo. 398, *quoting* Webst. Dict.

Ability. — In *Rawson v. Johnson*, 1 East 203, it was held, in an action for nondelivery of malt which the defendant had undertaken to deliver on request at a certain price, that it was sufficient for the plaintiff in his declaration to aver such request and that he was *ready* and willing to receive and pay for the malt, as a *readiness* to pay implies an ability as well as a willingness to do so. See also *Morton v. Lamb*, 7 T. R. 125.

A real-estate broker found a purchaser who “was *ready* to carry out the contract.” It was held that the word *ready* implied that the purchaser was able and willing to carry out the contract. *Smith v. Keeler*, 51 Ill. App. 268.

In *Lawrence v. Knowles*, 5 Bing. N. Cas. 399, 35 E. C. L. 150, Bosanquet, J., said: “I cannot conceive any circumstance more indicative of want of *readiness* than incapacity.” See also *De Medina v. Norman*, 9 M. & W. 827.

Assault. — Upon a prosecution for assault the trial court instructed the jury that if one of the defendants committed the alleged assault and the other defendants were present and *ready* if necessary to aid, assist, or encourage the defendant in making the assault, such other defendants were also guilty. Counsel for the defendants objected to the use of the word *ready* instead of the words ordinarily used in such connection, viz., “for the purpose and with the intent to aid and assist if necessary.” The appellate court, however, refused to sustain this contention, saying: “We think the words ‘*ready*, if necessary, to aid and assist,’ convey substantially the same meaning.” *State v. Gooch*, 105 Mo. 398.

Ready to Discharge. — By a charter-party time for delivery was to “count when steamer is *ready* to discharge.” There was only one customary place of discharge at the port in question, and when the steamer arrived at port that place was occupied. It was held

READY MONEY. (See also the titles MONEY, vol. 20, p. 837; WILLS.) — It has been held that under a bequest of "ready money" funds of the testator in bank will pass, and this whether in the form of a balance on a running account, a deposit, or a sum withdrawable after notice.¹

REAL. — See the title REASONABLE DOUBT, *post*.

REAL ACTIONS. (See also the title REAL ACTIONS, 17 ENCYC. OF PL. AND PR. 669.) — Real actions are such as are brought for the specific recovery of a freehold estate in lands, without regard to any damages for the wrongful detention.²

REAL CHATTELS. (See also CHATTELS, vol. 5, p. 1022, and see REAL ESTATE, *post*.) — See note 3.

REAL COST. — The terms "actual cost," "real cost," and "prime cost" are phrases of equivalent import, and mean the true and real price paid for goods upon a genuine *bona fide* purchase.⁴

REAL COVENANTS. — See the title COVENANTS, vol. 8, p. 52.

REAL DANGER. — See note 5.

that the steamer was not *ready* to discharge, and the time for delivery did not, therefore, begin until she was at the customary place of discharge in the port. *Sanders v. Jenkins*, (1897) 1 Q. B. 93.

1. **Ready Money.** — *Fryer v. Ranken*, 11 Sim. 55; *Parker v. Marchant*, Y. & C. Ch. 290, 12 L. J. Ch. 385; *Taylor v. Taylor*, 1 Jur. 401; *Tallent v. Scott*, (1868) W. N. 236; *Stein v. Ritherdon*, (1868) W. N. 65; *Smith v. Burch*, 92 N. Y. 228, *reversing* 28 Hun (N. Y.) 332. See also *Smith v. Butler*, 9 Ir. Eq. 308, 3 J. & La. T. 565; *Bevan v. Bevan*, 5 L. R. Ir. 57; *Vaisey v. Reynolds*, 5 Russ. 12, 6 L. J. Ch. 172; *Knight v. Knight*, 2 Giff. 616, 30 L. J. Ch. 644.

By an antenuptial settlement the woman's property, consisting of land and slaves in which she had but a life estate and a little personality which she held absolutely, was conveyed to trustees in trust for her sole and separate use, and it was further provided that the *ready money* accruing out of such separate estate should from time to time be put out at interest and invested as she should direct. It was held that the term *ready money* meant surplus interest accruing during coverture. *Staggers v. Matthews*, 13 Rich. Eq. (S. Car.) 142.

Interest — Rent. — In *Fryer v. Ranken*, 11 Sim. 55, it was held that the rent of a house and the interest on a sum due on a mortgage did not pass by the bequest of *ready money*.

Dividends. — In *May v. Grave*, 3 De G. & Sm. 462, 18 L. J. Ch. 401, it was held that the words *ready money* did not include unrecieved dividends of stock. But in *Cooke v. Wagster*, 2 Smale & G. 296, 23 L. J. Ch. 496, it was said that this case could not be reconciled with *Parker v. Marchant*, 1 Phil. 356, 12 L. J. Ch. 385, and *Fryer v. Ranken*, 11 Sim. 55, 9 L. J. Ch. 337.

Legacy. — A testatrix bequeathed to her husband all the *ready money* which she might have at the bank or elsewhere. Before her death her husband had collected for her a legacy, which money he retained in his own hands until her death. It was held that this sum passed under the bequest of *ready money*. *Smith v. Burch*, 92 N. Y. 228, *reversing* 28 Hun (N. Y.) 332.

2. **Real Actions.** — 4 Min. Inst. 339.

"The essential and distinguishing fact that gives an action the character of a *real action* is that it seeks to recover specifically the land and its possession." *Hall v. Decker*, 48 Me. 255, *citing* Stephen's Pl. 3.

3. **A Real Chattel Is a Leasehold Estate.** — *Westervelt v. People*, 20 Wend. (N. Y.) 420; *Exp. Leland*, 1 Nott & M. (S. Car.) 461. See also *Warren v. Leland*, 2 Barb. (N. Y.) 619.

4. **Real Cost.** — U. S. v. 16 Packages Goods, 2 Mason (U. S.) 53, where it was said that the words were wholly inapplicable to cases of a gift or voluntary conveyance, or where anything but money or its equivalent mingled substantially in the consideration. See also *ACTUAL* — *ACTUALLY*, vol. 1, p. 602, note.

5. **Real Danger.** — Upon a trial for murder the court instructed the jury as follows: "It would be immaterial whether the *danger* was *real*, provided the defendant acted upon the *real* appearance of *danger*." This instruction was objected to by counsel for the defendant because "it limits and abridges the right of the defendant to act upon *real* appearances of *danger*, and omits reasonable appearances of *danger*." The appellate court, *per* Hurt, J., said: "*Danger*, with reference to whether the appearance of it is *real* or reasonable, takes its classification under one or the other according as whether the manifestations are positive, threatening, and imminent, or are merely such as reasonably create alarm and apprehension for one's safety. *Real danger* is a danger such as is manifest to the physical senses: 'reasonable' danger, as the very force of the term imports, is something to be judged of by an exercise of reason and judgment, exercised upon acts which require construction to render their meaning apparent. It is manifest from the facts in evidence that whatever *danger* there was to appellant, if any at all, was *real*, and hence the court discharged its duty when it instructed the jury upon that character of danger, it not being bound to instruct upon another form of danger which the facts not only did not present, but absolutely precluded." *Allen v. State*, 24 Tex. App. 225. See also the title SELF-DEFENSE.

Real Probable Danger. — In an action against a city for damages to property from the prox.

REAL DELIVERY.—See SYMBOLICAL DELIVERY.

REAL EFFECTS.—See EFFECTS, vol. 10, p. 446.

REAL ESTATE. (See also the titles CONVERSION AND RECONVERSION, vol. 7, p. 463; FIXTURES, vol. 13, p. 594; ICE, vol. 15, p. 907; LICENSE (REAL PROPERTY), vol. 18, p. 1127; PERSONAL PROPERTY, vol. 22, p. 746; PROPERTY, *ante*; REAL PROPERTY, *post*; RECORDING ACTS; STATUTE OF FRAUDS; TAXATION; TREES AND TIMBER. And see LAND, vol. 18, p. 140.)—Real estate is the interest which a man has in lands, tenements, or hereditaments.¹ The term means something that may be held by tenure, or that will pass to the heir of the possessor at his death instead of to his administrator, including lands, tenements, and hereditaments, whether the latter be corporeal or incorporeal.² So the term has been defined by numerous statutes to embrace lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal.³ The term "real estate" may denote the *quantum* or interest which one has in land or it may denote the land itself.⁴ In the note will be found a number of cases in which the courts have construed certain interests to be or not to be real estate.⁵

imity of a pesthouse the trial court instructed the jury that in order to authorize a recovery there must have been a *real* probable *danger* from smallpox being communicated through the atmosphere from such pesthouse. In holding that there was no reversible error in this instruction the court said: "The court evidently intended by the term '*real* probable *danger*' to say that the probable danger must be an actual fact, as distinct from one solely imaginary or apprehended." *Paducah v. Allen*, (Ky. 1901) 63 S. W. Rep. 984.

1. **Real Estate.**—*Avery v. Dufrees*, 9 Ohio 147.

2. *Gillett v. Gaffney*, 3 Colo. 360, *citing* *Bouv. L. Dict.*

3. **Lands, Tenements, and Hereditaments**—*Arkansas*.—*Stull v. Graham*, 60 Ark. 461.

Illinois.—*Wallace v. Monroe*, 22 Ill App. 611; *Matzon v. Griffin*, 78 Ill. 477.

Indiana.—*Peacock v. Albin*, 39 Ind. 25.

Iowa.—*Ralston v. Ralston*, 3 Greene (Iowa) 534; *Blain v. Stewart*, 2 Iowa 378; *Burton v. Hintrager*, 18 Iowa 351; *Severin v. Cole*, 38 Iowa 463.

Kansas.—*Scarborough v. Smith*, 18 Kan. 409.

Kentucky.—*Nutter v. Russell*, 3 Met. (Ky.) 163; *Ray v. Sweeney*, 14 Bush (Ky.) 7.

Michigan.—*Buhl v. Kenyon*, 11 Mich. 250.

Missouri.—*Jones v. Howard*, 142 Mo. 117.

New Hampshire.—*Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562.

New York.—*State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 387; *Bedlow v. Stillwell*, 91 Hun (N. Y.) 386, *affirmed* 158 N. Y. 292.

Tennessee.—*Lewis v. Glass*, 92 Tenn. 147.

West Virginia.—*State v. South Penn Oil Co.*, 42 W. Va. 80.

Wisconsin.—*Van Camp v. Peerenboom*, 14 Wis. 69.

4. *Fox v. Phelps*, 17 Wend. (N. Y.) 399. And see *ESTATE*, vol. 11, p. 358, and the title *PROPERTY, ante*.

5. **Annuities.** (See also the title *ANNUITIES*, vol. 2, p. 391.)—In *Meason's Estate*, 4 Watts (Pa.) 347, it was said: "In *Stafford v. Buckley*, 2 Ves. 170, Lord Hardwicke said: 'An annuity in fee, granted out of the four and a half per cent. duties upon goods exported from the

West Indies, is a personal hereditament.' He was of opinion that it was a mere personal annuity, having no relation to lands or tenements, nor partaking of the nature of rent, which savors of the realty. I think it plain that if it had savored of the realty, the chancellor would have been of the opinion that it was a real and not a personal hereditament."

Buildings.—*Real estate* includes buildings erected upon the land. *Dooley v. Crist*, 25 Ill. 556; *Mathes v. Dobschuetz*, 72 Ill. 441; *Matzon v. Griffin*, 78 Ill. 477.

In *Portland, etc., R. Co. v. Saco*, 60 Me. 196, it was held that a statute providing that the track of a railroad and the land on which it was constructed should not be deemed *real estate* for purposes of taxation did not apply to and exempt from taxation depots and other erections of railroad corporations upon land owned by them.

Buildings Erected on Leased Ground.—In *Knapp v. Jones*, 38 Ill. App. 489, *affirmed* 143 Ill. 375, it was held that a building erected by a lessee on leased ground was not personal property so that at the expiration of two years from the date of a mortgage thereon the mortgagee must take possession or lose his lien as against execution creditors, but that such a building was a chattel real, and under the statutes of *Illinois* referring to the recording of incumbrances was to be classed as *real estate*.

A mortgage on a building erected on leased land under an agreement that the lessee might remove it or the lessor should pay for it at its appraised value has been held to be a mortgage on realty, falling within the designation of a chattel real at common law. *Griffin v. Marine Co.*, 52 Ill. 130; *Stafford v. Adair*, 57 Vt. 66.

Dividends Held Not to Be Real Estate.—See *Jersey City Gaslight Co. v. United Gas Imp. Co.*, (C. C. A.) 58 Fed. Rep. 323.

Easements Are Real Estate.—*Ray v. Sweeney*, 14 Bush (Ky.) 7; *Brower v. Tichenor*, 41 N. J. L. 345; *Adee v. Nassau Electric R. Co.*, 72 N. Y. App. Div. 404; *In re Metropolitan El. R. Co.*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 278. And see the title *EASEMENTS*, vol. 10, p. 399.

Real Estate Includes Equitable Estate.—*Lowry v. Wright*, 15 Ill. 97; *Wallace v. Monroe*, 22

Ill. App. 611; *Blain v. Stewart*, 2 Iowa 378; *Seevers v. Delashmutt*, 11 Iowa 177; *Burton v. Hintrager*, 18 Iowa 351; *Livingston v. Newkirk*, 3 Johns. Ch. (N. Y.) 316; *Avery v. Duffrees*, 9 Ohio 147.

Equity of Redemption. — See the title EQUITY OF REDEMPTION, vol. II, pp. 209, 210.

Fire-Insurance Policy. — See *Wyman v. Wyman*, 26 N. Y. 253, and see the title FIRE INSURANCE, vol. 13, p. 86.

Franchises. — See FRANCHISES, vol. 14, p. 4.

Growing Crops. (See also the title CROPS, vol. 8, p. 303 *et seq.*) — Growing crops were held to be *real estate*. *Bagley v. Columbus Southern R. Co.*, 98 Ga. 626.

In *Ralston v. Ralston*, 3 Greene (Iowa) 534, the court said: "The growing wheat was an interest which belonged to the soil; it was an interest embraced in the phrase *real estate*."

As to when growing crops are not realty, see the title CROPS, vol. 8, p. 308, and see *Hecht v. Deitman*, 56 Iowa 679.

Growing Trees. — See *infra*, this note, *Trees*.

Hereditaments. — In *Meason's Estate*, 4 Watts (Pa.) 347, it was said: "Wherever a perpetual inheritance is granted, as here, which arises out of lands, or is in any degree connected with or, as it is emphatically expressed by Lord Coke, exercisable within it, it is that sort of property which the law denominates 'real property.'"

And that *real estate* includes incorporeal hereditaments, see *In re Metropolitan El R. Co.*, (Supm. Ct. Spec. T.) 2 N. Y. Supp. 278.

Ice. — See the title ICE, vol. 15, pp. 907, 908.

Improvements. — *Real estate* embraces not only land, but all improvements of a permanent character placed upon the land. *Mathes v. Dobschuetz*, 72 Ill. 441. See also *White v. Butt*, 32 Iowa 335.

Lease. (See also *supra*, this note, *Buildings*.) — At common law the term *real estate* does not include a lease. *Senow v. Fones*, 48 Ark. 566; *Buhl v. Kenyon*, 11 Mich. 249; *Grever v. Fox*, 36 Mich. 459; *Despard v. Churchill*, 53 N. Y. 199; *State Trust Co. v. Casino Co.*, 5 N. Y. App. Div. 387; *People v. Westervelt*, 17 Wend. (N. Y.) 674; *New York v. Mabie*, 13 N. Y. 159. See also *Tone v. Brace*, 11 Paige (N. Y.) 566. Compare *Kinney v. Watts*, 14 Wend. (N. Y.) 38.

But a lease may be *real estate* by statute. *McKee v. Howe*, 17 Colo. 538; *Melhop v. Meinhardt*, 70 Iowa 685.

In *Dennis's Appeal*, 72 Conn. 369, the term *real estate* was held to include a lease for nine hundred and ninety-nine years.

Same — Curtesy. (See also the title CURTESY, vol. 8, p. 518.) — In *Lewis v. Glass*, 92 Tenn. 147, it was held that a husband could not have curtesy in the leaseholds of his wife, although by statute it was provided that the term *real estate* should include the lands, tenements, and hereditaments, and all rights thereto and interests therein, equitable as well as legal.

Manure. — See MANURE, vol. 19, p. 927, and see *Snow v. Perkins*, 60 N. H. 493, 49 Am. Rep. 333.

Mining Claims Are Real Estate. — See the title MINES AND MINING CLAIMS, vol. 20, p. 775; and see *Black v. Elkhorn Min. Co.*, 49 Fed. Rep. 549; *Hughes v. Devlin*, 23 Cal. 505.

Mortgages. — See the title MORTGAGES, vol. 20, p. 973.

Navigation. — In *Buckeridge v. Ingram*, 2 Ves. Jr. 652, it was held that shares in the navigation of the river Avon, under the statute of 10 Anne, were *real estate*. See also *Drybutter v. Bartholomew*, 2 P. Wms. 127.

But that the right of navigation generally is not *real estate*, see the title NAVIGABLE WATERS, vol. 21, p. 440.

Pews. — See the title PEWS AND PEW RIGHTS, vol. 22, p. 769.

Pier. — In *Bedlow v. Stillwell*, 91 Hun (N. Y.) 386, *affirmed* 158 N. Y. 292, it was held that the owner of a fee in a public street had an interest in *real estate* subject to dower in a pier built on the south side of the street with the permission of the city.

A Pipe Line Is Real Estate. — *Tide-water Pipe Line Co. v. Berry*, 52 N. J. L. 312, 53 N. J. L. 212.

Railroad Tracks. (See also the title RAILROADS, *ante*.) — Railroad tracks have been held not to be *real estate* for purposes of taxation. *Detroit v. Detroit City R. Co.*, 76 Mich. 421; *State v. District Ct.*, 31 Minn. 354. See also *People v. Fredericks*, 48 Barb. (N. Y.) 177, *affirmed* 48 N. Y. 70.

In *State v. District Ct.*, 31 Minn. 354, it was held that a portion of the track of a street-railway company in a public street was not *real estate* within a tax act. See also *State v. Anderson*, 90 Wis. 550.

But in *New Haven v. Fair Haven*, etc., R. Co., 38 Conn. 422, it was held that the rails, sleepers, ties, and spikes of a horse-railroad company so laid into and attached to the soil of the street as to become part of the realty were *real estate*.

Right to Herbage. (See also the title PROFIT A PRENDRE, *ante*.) — In *Laws v. Eltringham*, 8 Q. B. D. 283, it was held, where the soil of a town moor was vested in the corporation of the town in fee, but freemen of the town were, by statute, entitled to the "full right and benefit to the herbage" of the town moor for two milch cows each, that this right to the herbage was not "any real and personal property whatsoever," within the meaning of the English Malicious Injuries to Property Act, 24 & 25 Vict., c. 97, § 52.

Sawdust, Shavings, etc. — In *Jenkins v. McCurdy*, 48 Wis. 628, it was held that while "slabs, sawdust, shavings, and other refuse matter," used to fill up low and marshy ground, may be a part of the realty, "slabs and pieces of lumber suitable for firewood, piled up on the premises and intended to be used and removed as such," were personal property.

Tax Sale. — In *McNeil v. Carter*, 57 Ark. 579, it was held that where land has been sold for taxes, the interest of the former owner during the period allowed for redemption is *real estate*. See generally the title TAX TITLES. Compare the title EQUITY OF REDEMPTION, vol. II, p. 213.

Trees. — See *Owens v. Lewis*, 46 Ind. 488, and see the title TREES AND TIMBER.

Water Main. (See also the titles TAXATION; WATERWORKS AND WATER COMPANIES.) — In *Colorado Fuel, etc., Co. v. Pueblo Water Co.*, 11 Colo. App. 352, it was held that water mains, pipes, and hydrants laid in the streets of a city were realty for the purposes of taxation.

Possession. — Possession of land under a contract of purchase is real estate.¹

Life Estates — Remainders. — The term "real estate" applies as well to life estates or estates in remainder as to absolute or entire fees.²

Water Rights Held to Be Interest in Real Estate. — *Amoskeag Mfg. Co. v. Concord*, 66 N. H. 562; *Winnepiseogee Lake Cotton, etc., Mfg. Co. v. Gilford*, 64 N. H. 337. And see the titles RIPARIAN RIGHTS; WATERS AND WATER-COURSES.

1. Possession. (See also *supra*, the next preceding note, *Lease*.) — *Land v. Hopkins*, 7 Ala. 118; *White v. Butt*, 32 Iowa 335; *Brent v. Robertson*, 16 Mo. 149; *Quell v. Hanlin*, 81 Mo. 441; *Block v. Morrison*, 112 Mo. 351; *Jackson v. Scott*, 18 Johns. (N. Y.) 94; *Jackson v. Parker*, 9 Cow. (N. Y.) 73; *Van Camp v. Peerenboom*, 14 Wis. 69. And see the titles STATUTE OF FRAUDS; VENDOR AND PURCHASER.

Public Lands. (See also the title PUBLIC LANDS, *ante*.) — The term *real estate* has been held to include possessory claims of the public lands of the United States, whether those lands were mineral or non-mineral. *State v. Moore*, 12 Cal. 56; *Gillett v. Gaffney*, 3 Colo. 360; *Salisbury v. Lane*, (Idaho 1900) 63 Pac. Rep. 386; *Ross v. Outagamie County*, 12 Wis. 39.

In *Courtney v. Missoula County*, 21 Mont. 591, it was held that such lands were subject to taxation as the *real estate* of the purchaser after the sale and before the price was fully paid. See also *Edgington v. Cook*, 32 Neb. 551.

Widow's Interest. — In *Burns v. Bangert*, 92 Mo. 167, where by the terms of a husband's will the widow was to have the use, possession, and control of his farm for twenty years, in consideration of which she was to rear and educate the children of the marriage, and at the expiration of the term she was to have absolutely one-fifth part of the farm, her interest under the will was held to be *real estate*.

Vendee in Possession — Vendor's Interest. — But the vendor's interest in land after he has received part of the purchase money and put the vendee in possession is not *real estate*. *Jones v. Howard*, 142 Mo. 123; *Black v. Long*, 60 Mo. 182; *Parks v. People's Bank*, 97 Mo. 133; *Davis v. Owenby*, 14 Mo. 170.

Possession Not Necessary. — And possession is not necessary to constitute an interest in land *real estate*. *Scarborough v. Smith*, 18 Kan. 409.

2. Life Estates and Remainders. — *Cooper v. Hepburn*, 15 Gratt. (Va.) 563; *Faulkner v. Davis*, 18 Gratt. (Va.) 671. See also *Stull v. Graham*, 60 Ark. 461.

Contingent Remainders or Executory Devises. — In *Nutter v. Russell*, 3 Met. (Ky.) 163, it was held that a contingent remainder or an interest in the nature of an executory devise was included in the term *real estate*. See also *Matter of Dodge*, 105 N. Y. 590.

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CROSS-REFERENCES.

See the title *AGENCY*, vol. 1, p. 930, and the references there given.

I. DEFINITION. — Real-estate brokers are those who make a business of negotiating or assisting in negotiating for others the sale, purchase, or exchange of real property; in addition to which they frequently plan and obtain loans on real-estate mortgage security, collect rents, and attend to the leasing of houses and lands.¹ They are often called real-estate agents, and sometimes land brokers or agents. In this article they are frequently termed merely brokers.

II. TERMINOLOGY — Owner. — In this article the term "owner" is used in its obvious sense as denoting the one who owns the property which he has employed the broker to sell or lease.

1. **Definition.** — See the title *BROKERS*, vol. 4, p. 962. And see also *McCullough v. Hitchcock*, 71 Conn. 401; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494, 79 Am. Dec. 756; *Brauckman v. Leighton*, 60 Mo. App. 38;

Glentworth v. Luther, 21 Barb. (N. Y.) 145; *Pierce v. Thomas*, 4 E. D. Smith (N. Y.) 354; *Condict v. Cowdrey*, 57 N. Y. Super. Ct. 66; *Kramer v. Blair*, 88 Va. 456.

Employer. — The term "employer" is used to designate one who has engaged the broker's services to perform any act within the scope of his occupation.

Principal. — The term "principal" is used in exactly the same sense. And this use is proper, because in the majority of cases the broker is given some powers as the agent of his employer.

Purchaser. — The term "purchaser" is used in this article somewhat broadly as denoting not only one who actually buys the property, but also one who considers the purchase thereof and enters into some negotiations therefor, though he does not actually complete the transaction. The use of the term in this broad sense has been found convenient, and will not in any case prove confusing.

Customer. — This term denotes one with whom the broker has entered into negotiations looking to the sale, exchange, or leasing of property or the making of a loan thereon, or whom he has sent to his employer for that purpose.

Sale. — In some instances, where it is not material to the question of law under discussion whether the particular transaction involved was a sale or an exchange of property, the term "sale" is, for the sake of brevity, used alone, even though one or more of the cases cited may relate to an exchange. The distinction between the two transactions is not, however, left unnoticed in any case where it is material.

III. LICENSE. — The business of a real-estate broker may properly be subjected to an occupation tax, or a license required for its exercise.¹

IV. EMPLOYMENT — 1. Who May Employ Broker — a. AGENT OF OWNER. — It has been held that an agent of the owner of lands, with power to sell the same, may employ a real-estate broker to assist in making a sale,² but on the other hand it has been asserted that an agency to sell does not include the power to bind the principal by the employment of a broker and a promise to pay him a commission,³ though, of course, it is otherwise where the owner has referred the broker to his agent, holding out that such agent is authorized to act for him in the matter of employing the broker.⁴

b. HUSBAND OF OWNER. — The husband of the owner of land may bind her by his act in employing a broker to assist in the sale thereof when she has authorized him to do so⁵ or ratified the employment,⁶ or when he has a general control of the land sufficient to authorize his act in employing the broker.⁷

1. See the title OCCUPATION, BUSINESS, AND PRIVILEGE TAXES, vol. 21, p. 770, wherein will be found a full discussion of the general principles of this subject, which are, of course, applicable to real-estate brokers.

Occupation of Real-estate Broker Subject to Privilege Tax under Tennessee Constitution. — *Wiltse v. State*, 8 Heisk. (Tenn.) 544.

Right of Municipality to Require License. — *Little Rock v. Barton*, 33 Ark. 436.

License Required under U. S. Business Laws. — *Rounds v. Allee*, (Iowa 1902) 89 N. W. Rep. 1098.

Persons Are Exercising the Privilege of Real-estate Brokers within the meaning of the *Tennessee* statute requiring a license when they associate themselves together as a firm to do business as real-estate brokers, advertise and distribute cards as such, and solicit business as real-estate brokers, and hence are liable for the penalty prescribed for exercising the privilege without a license whether they actually do any business or not. *Blackford v. State*, 8 Heisk. (Tenn.) 538.

2. Agent May Employ Broker. — *Renwick v. Bancroft*, 56 Iowa 527; *Gaither v. O'Doherty*, (Ky. 1889) 12 S. W. Rep. 306, 11 Ky. L. Rep. 595. See also *Mahony v. Ungrich*, 59 N. Y. Super. Ct. 377.

3. Agent Not Authorized to Employ Broker. — *Jenkins v. Funk*, 33 Fed. Rep. 915; *Hensel v. Maas*, 101 Mich. 443; *Bonwell v. Howes*, 15 Daly (N. Y.) 43.

The Fact that an Agent Is Engaged in Renting Property and collecting rents for the owner cannot give rise to an inference that the agent is authorized to empower a broker to sell the property. *Topliff v. Shadwell*, (Kan. 1902) 67 Pac. Rep. 545.

4. *Hensel v. Maas*, 101 Mich. 443.

Evidence of What Was in Fact the Agent's Authority should not be excluded where the broker has been permitted to give evidence of statements of the agent's calculation to induce the belief that his authority was unlimited. *Hensel v. Maas*, 94 Mich. 563.

5. Husband of Owner. — *Simes v. Rockwell*, 156 Mass. 372; *Codd v. Seitz*, 94 Mich. 191; *Esmond v. Kingsley*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 696.

6. *Simes v. Rockwell*, 156 Mass. 372; *Carroll v. O'Shea*, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 374; *McCormack v. McCaffrey*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 775.

7. *Bird v. Phillips*, (Iowa 1901) 87 N. W. Rep. 414; *Carroll v. O'Shea*, (N. Y. City Ct. Gen. T.) 19 N. Y. Supp. 374.

c. ONE OF SEVERAL COPARTNERS. — A firm may be bound by the employment of a broker by one of its members, where none of the others disclaims or denies his joint liability.¹

2. **What Amounts to Employment.** — The mere leaving of a description of the property at the office of a broker by the owner or his agent, with a request that the broker sell it at a designated price and upon designated terms, amounts to an employment of the broker.²

Contract to Share Profits. — A contract between the owner of land and a broker, by which the broker is to sell the land and receive a share of the profits resulting from such sale, is one of agency merely and not of partnership.³

3. **Whether Writing Necessary.** — Whether or not the contract of employment of a broker must be in writing in order to be valid is a subject as to which no general rule can be laid down, as it is governed entirely by the statutes of different jurisdictions.⁴

V. **AUTHORITY, POWERS, AND DUTIES** — 1. **General Rule** — a. **RULE STATED.** — As a general rule the entire duty of a broker employed to assist in the sale of property is to find and introduce or report to his employer a person who is willing and able to purchase the property at the price and upon the terms which the employer has designated, and this is also the limit of his authority.⁵ Of course, though, his powers and duties in any specific case are also fixed by his contract of employment⁶ and the instructions which he has received from his employer.⁷

b. **RATIFICATION OF UNAUTHORIZED ACTS.** — A broker's unauthorized act in reference to the sale of property may, however, be ratified by the owner.⁸ The question as to whether or not there has been a ratification in a particular case must be determined in accordance with the settled principles of ratification, which have been discussed elsewhere in this work.⁹

2. **Must Act in Good Faith and in Interest of Employer.** — A real-estate broker employed to sell land must act in good faith and in the interest of his employer,¹⁰ but this rule cannot be extended so as to preclude his having the

1. *Durgin v. Somers*, 117 Mass. 55.

2. *Long v. Herr*, 10 Colo. 380.

3. **Agreement to Share Profits.** — *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300; *Coward v. Clanton*, 122 Cal. 451.

4. **Writing Necessary.** — *Shanklin v. Hall*, 100 Cal. 26; *McGeary v. Satchwell*, 129 Cal. 389; *Dolan v. O'Toole*, 129 Cal. 488; *Perkins v. Cooper*, (Cal. 1890) 24 Pac. Rep. 377; *Mendenhall v. Rose*, (Cal. 1893) 33 Pac. Rep. 884; *King v. Benson*, 22 Mont. 256.

Sufficiency of Writing. — *Maze v. Gordon*, 96 Cal. 61; *Melone v. Ruffino*, 129 Cal. 514; *Longstreth v. Korb*, 64 N. J. L. 112.

Writing Not Necessary. — *Long v. Herr*, 10 Colo. 380; *Talbot v. Bowen*, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; *Vaughan v. McCarthy*, 59 Minn. 199; *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104; *Hannan v. Prentiss*, 124 Mich. 417; *Griffith v. Woolworth*, 28 Neb. 715; *Jackson v. Higgins*, 70 N. H. 637; *Lamb v. Baxter*, 130 N. Car. 67; *McLaughlin v. Wheeler*, 1 S. Dak. 497.

In Missouri a written contract of employment is not necessary to entitle the broker to recover commissions, though for some purposes it is necessary. *Gerhart v. Peck*, 42 Mo. App. 644; *Rice Dwyer Real Estate Co. v. Ruhlman*, 68 Mo. App. 503. See *infra*, this article, section V. 4. **Power to Make Contract of Sale** — *Whether Authority Must Be in Writing*.

5. **General Rule.** — *Ryon v. McGee*, 2 Mackey (D. C.) 17; *Hamilton v. Cutts*, 6 Mackey (D.

C.) 208; *Greene v. Hollingshead*, 40 Ill. App. 195; *Millan v. Porter*, 31 Mo. App. 563; *Fairmount Cab Co.'s Assigned Estate*, 9 Pa. Co. Ct. 201; *Kramer v. Blair*, 88 Va. 456.

6. See *Maze v. Gordon*, 96 Cal. 61.

7. **Person Dealing with Broker Must Ascertain His Authority.** — *Dayton v. Buford*, 18 Minn. 126. See *Eidson v. Saxon*, (Tex. Civ. App. 1895) 30 S. W. Rep. 957.

Nature, Effect, and Interpretation of Instructions a Question of Fact. — *Dayton v. Buford*, 18 Minn. 126.

Construction of Particular Contracts or Instructions, etc. — *Welsh v. Lemert*, 92 Iowa 116.

8. **May Be Ratified.** — *Maze v. Gordon*, 96 Cal. 61; *Powell v. Gossom*, 18 B. Mon. (Ky.) 179.

9. **For a Full Discussion**, see the title AGENCY, vol. 1, pp. 1181-1215.

Facts Must Be Known. — *Maze v. Gordon*, 96 Cal. 61; *Lester v. Kinne*, 37 Conn. 9.

Facts Showing or Failing to Show Ratification. — *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683; *Reynolds v. Davison*, 34 Md. 662.

10. **Interest of Employer.** — *Page v. Voorhies*, (Brooklyn City Ct. Gen. T.) 16 N. Y. Supp. 101; *Stearns v. Hochbrunn*, 24 Wash. 206.

Thus, where a broker who is employed to sell a piece of land at a certain price net to the owner, all over that which he can obtain to be his compensation, subsequently learns of facts considerably increasing the value of the land, it is his duty to inform the owner. *Hegen-*

land of others or even his own land for sale, provided he does not permit his interest in the sale of such lands to interfere with his duty to his employer.¹

3. Power to Sell. — The powers granted to a real-estate broker do not, as a rule, include the power to make a complete sale of his employer's property,² though this power may be delegated to him if the employer sees fit to do so.³

4. Power to Make Contract of Sale — *a. GENERAL RULE.* — It is not within the scope of the ordinary powers of a real-estate broker to make a contract of sale which shall be binding upon his employer;⁴ but the latter may, and frequently does, invest the broker with this power,⁵ and when this is done the contract made by the broker may undoubtedly be enforced against the owner.⁶

b. WHETHER AUTHORITY MUST BE IN WRITING. — In some jurisdictions a verbal grant of authority to make a contract of sale is held sufficient,⁷ while in others a writing is held indispensable.⁸

c. EFFECT OF GRANT OF POWER "TO SELL." — Some courts have taken the view that where a broker is employed "to sell" property power is given to make a binding contract of sale,⁹ but there is also considerable authority for the view that an employment "to sell" amounts to nothing more than an employment to find a purchaser and present him to the owner or conduct negotiations with him, and does not give the broker any authority to bind the owner by a contract to convey to a purchaser,¹⁰ as such authority

myer *v.* Marks, 37 Minn. 6, 5 Am. St. Rep. 808.

1. Gaty *v.* Sack, 19 Mo. App. 470.

2. **Broker Has No Power to Sell.** — Greene *v.* Hollingshead, 40 Ill. App. 195; Stewart *v.* Pickering, 73 Iowa 652; Moore *v.* Lockett, 2 Bibb (Ky.) 67, 4 Am. Dec. 683. See also Lester *v.* Kinne, 37 Conn. 9.

3. **Grants of Power to Sell — Construction.** — Vaughn *v.* Sheridan, 50 Mich. 155; Carson *v.* Smith, 5 Minn. 78, 77 Am. Dec. 539.

4. **Broker Cannot Make Contract of Sale** — *California.* — Rutenberg *v.* Main, 47 Cal. 213; Grant *v.* Ede, 85 Cal. 418, 20 Am. St. Rep. 237. *Colorado.* — Malone *v.* McCullough, 15 Colo. 460.

Connecticut. — McCullough *v.* Hitchcock, 71 Conn. 401.

Illinois. — Greene *v.* Hollingshead, 40 Ill. App. 195.

Indiana. — Campbell *v.* Galloway, 148 Ind. 440.

Iowa. — Gilbert *v.* Baxter, 71 Iowa 327; Furst *v.* Tweed, 93 Iowa 300; Balkema *v.* Searle, (Iowa 1902) 89 N. W. Rep. 1087. See also Berry *v.* Tweed, 93 Iowa 296.

Minnesota. — Stillman *v.* Fitzgerald, 37 Minn. 186.

Mississippi. — Barton *v.* New England Mortg. Security Co., (Miss. 1899) 25 So. Rep. 362.

New Jersey. — Dickinson *v.* Updike, (N. J. 1901) 49 Atl. Rep. 712; Keim *v.* Lindley, (N. J. 1895) 30 Atl. Rep. 1063. See also Planer *v.* Equitable Life Assur. Soc., (N. J. 1897) 37 Atl. Rep. 668.

North Dakota. — Ballou *v.* Bergvendsen, 9 N. Dak. 285.

Pennsylvania. — See Fairmount Cab Co.'s Assigned Estate, 9 Pa. Co. Ct. 201.

Washington. — Scully *v.* Book, 3 Wash. 182.

5. **Broker May Be Authorized to Make Contract of Sale.** — Malone *v.* McCullough, 15 Colo. 460. See also cases cited in next note.

Language Sufficient to Give Power to Make

Contract of Sale. — See Hopwood *v.* Crobin, 63 Iowa 218.

Delegation of Power to Broker by Agent of Owner. — Renwick *v.* Bancroft, 56 Iowa 527.

6. **Contract May Be Enforced Against Owner.** — Rutenberg *v.* Main, 47 Cal. 213; Renwick *v.* Bancroft, 56 Iowa 527.

Contract in Name of Agent. — Butler *v.* Kaulback, 8 Kan. 668.

7. **Verbal Authority Sufficient.** — Johnson *v.* Dodge, 17 Ill. 433; Taylor *v.* Merrill, 55 Ill. 52; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Brown *v.* Eaton, 21 Minn. 409; Dickerman *v.* Ashton, 21 Minn. 538. See also Proudfoot *v.* Wightman, 78 Ill. 553; Smith *v.* Armstrong, 24 Wis. 446.

8. **Written Authority Indispensable to Bind Owner.** — Rice-Dwyer Real Estate Co. *v.* Ruhlman, 68 Mo. App. 503; Ballou *v.* Bergvendsen, 9 N. Dak. 285. See also Gerhart *v.* Peck, 42 Mo. App. 644. Compare Johnson *v.* McGruder, 15 Mo. 365; Riley *v.* Minor, 29 Mo. 439.

Purchaser Bound though Agent's Authority Not in Writing. — Rice-Dwyer Real Estate Co. *v.* Ruhlman, 68 Mo. App. 503.

9. **Power "to Sell" Includes Power to Make Contract of Sale.** — Rosenbaum *v.* Belson, (1900) 2 Ch. 267, 69 L. J. Ch. 569, 82 L. J. N. S. 658, 48 W. R. 522; Johnson *v.* Dodge, 17 Ill. 433; Talbot *v.* Bowen, 1 A. K. Marsh. (Ky.) 436, 10 Am. Dec. 747; Vanada *v.* Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Haydock *v.* Stow, 40 N. Y. 363, *disapproving* Coleman *v.* Garrigues, 18 Barb. (N. Y.) 60; Pringle *v.* Spaulding, 53 Barb. (N. Y.) 17; Matherson *v.* Davis, 2 Coldw. (Tenn.) 443; Smith *v.* Tate, 82 Va. 657.

A Power to Sell Which Is Insufficient for Want of a Seal may authorize the agent to make a contract to convey which will bind his principal. Minor *v.* Willoughby, 3 Minn. 225; Jackson *v.* Badger, 35 Minn. 52.

10. **Employment "to Sell" Does Not Give Power to Make Contract of Sale** — *California.* — Armstrong *v.* Lowe, 76 Cal. 616.

must be given by express grant or result from necessary implication from words used, and the word "sell" is so commonly used in conversation and agreements between brokers and their employers in the restricted sense last referred to that its use, without more, should not be construed as giving the broker so large a power as to bind the owner by a contract.¹

d. AUTHORITY GIVEN MUST BE COMPLIED WITH. — Where power has been given a real-estate agent to make a contract of sale, he must act within the terms of his authority in order that his contract may be binding upon his employer.² Thus, where authority is given to make a contract for a sale of the property, he cannot bind his employer by a contract for the sale of an option to purchase it.³

e. BURDEN OF PROOF AS TO AGENT'S AUTHORITY. — One who seeks to enforce against the owner of land a contract of sale entered into by his agent must show that the agent had authority to enter into such a contract on behalf of his principal.⁴

f. RATIFICATION OF UNAUTHORIZED CONTRACT. — The unauthorized act of a broker in making a contract for the sale of his employer's land may be adopted and ratified by the latter, in which case the ratification will relate back to the time when the contract was made, and the contract will have the same binding effect as though it had been authorized when made.⁵

5. Right to Collect Proceeds of Sale. — Where a contract between the owner of property and a real-estate broker provided that the owner should apply the proceeds of sales to the payment of a debt which was a lien on the property, and that until sales were made the broker should make the revenues from the property sufficient to pay taxes, insurance, and interest on such debt, the broker had authority to collect the rents but not the proceeds of sale.⁶

6. Price. — The duty of the broker is to endeavor to effect a sale at the price set by his employer,⁷ and where the owner reduces the price but withdraws the reduction before the broker has made any effort to sell at the reduced price, the broker has no right subsequently to offer the property at such reduced price.⁸

7. Terms of Sale — *a. BROKER MUST ADHERE TO TERMS FIXED BY EMPLOYER.* — A broker employed or empowered to sell land must exact from the purchaser the terms and conditions of sale which his employer has fixed,⁹

District of Columbia. — Mannix v. Hildreth, 2 App. Cas. (D. C.) 259; Jones v. Holladay, 2 App. Cas. (D. C.) 279; Ryon v. McGee, 2 Mackey (D. C.) 17; Hamilton v. Cutts, 6 Mackey (D. C.) 208; Armes v. Cameron, 19 D. C. 435.

Iowa. — See Furst v. Tweed, 93 Iowa 300.

New Jersey. — Milne v. Kleb, 44 N. J. Eq. 378; Scull v. Brinton, 55 N. J. Eq. 489.

Virginia. — Chapman v. Jewett, (Va. 1896) 24 S. E. Rep. 261. Compare Smith v. Tate, 82 Va. 657.

Washington. — McReavy v. Eshelman, 4 Wash. 757.

1. Mannix v. Hildreth, 2 App. Cas. (D. C.) 259; Jones v. Holladay, 2 App. Cas. (D. C.) 279.

2. Must Act Within Terms of Authority. — Gilbert v. Baxter, 71 Iowa 327.

Rights of Purchaser When Agents Has Exceeded Authority. — See Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92.

3. Jones v. Holladay, 2 App. Cas. (D. C.) 279.

4. Burden of Proof. — Malone v. McCullough, 15 Colo. 460; Johnson v. Dodge, 17 Ill. 433; Proudfoot v. Wightman, 78 Ill. 553.

5. Ratification. — Hoyt v. Tuxbury, 70 Ill. 331; Roby v. Cossitt, 78 Ill. 638.

Knowledge of Circumstances Necessary for Valid Ratification. — Rowan v. Hyatt, 45 N. Y. 138.

Circumstances Not Amounting to Ratification. — Roby v. Cossitt, 78 Ill. 638; Toppliff v. Shadwell, (Kan. 1902) 67 Pac. Rep. 545.

6. Melvin v. Aldridge, 81 Md. 650.

7. Watts v. Howard, 51 Ill. App. 243.

Price Must Be Reasonable. — Where the contract between the broker and the owner allows the latter to fix the price, the law infers that he shall fix a reasonable price. Tinsley v. Darfev, 99 Ill. App. 239.

Broker May Sell for More than Price Fixed. — Fiske v. Soule, 87 Cal. 313.

Evidence that the Property Has Doubled in Value within a year does not tend to disprove the authority of brokers to sell at the price fixed in an agreement made about the middle of the year. Wilkinson v. Churchill, 114 Mass. 184.

8. Wilson v. Dyer, 12 Ind. App. 320.

9. Terms and Conditions Fixed Must Be Adhered To — United States. — De Sollar v. Hanscome, 158 U. S. 216; Merritt v. Wassenich, 49 Fed. Rep. 785.

Illinois. — Monson v. Kill, 144 Ill. 248.

Iowa. — Balkema v. Searle, (Iowa 1902) 89 N. W. Rep. 1087.

Michigan. — Muffatt v. Gott, 74 Mich. 672.

and a sale or contract of sale made by the broker (he having the necessary authority) on any other terms cannot be enforced against the owner of the property.¹

b. WHEN TERMS OF SALE NOT EXPRESSED. — It has been held that an authority to an agent to sell land of his principal is, unless otherwise expressly provided, an authority to sell only for cash,² but on the other hand it has been held that in such case parol evidence is admissible to explain the contract,³ and the view has also been taken that under such circumstances the owner has a right to demand payment in cash, but until such demand is made the broker is required only to find a purchaser at the price fixed and on such terms as the owner may agree to.⁴

c. DISCRETION OF BROKER. — Where the sale was to be part cash and part credit, but the proportions were not expressed, it was held that this was left to the discretion of the broker.⁵

d. RATIFICATION OF SALE ON UNAUTHORIZED TERMS. — The act of the agent in making a sale on terms other than those upon which he was authorized to sell may be ratified by the owner of the property, and there is such a ratification when he in any manner expresses his assent. It is not necessary that the ratification should be in writing.⁶ But the principal cannot be held to a ratification unless he has had notice or knowledge of the unauthorized terms.⁷

8. Broker Not Required to Draw Contract. — A broker's duty does not require him to draw and attend to the execution of a contract between his employer and the customer whom he has produced.⁸

VI. TIME ALLOWED TO FIND PURCHASER, LENDER, ETC. — **1. Where Time Fixed by Contract.** — Where the time which a broker is allowed to find a purchaser for the property, a person willing to make the required loan thereon, etc., is fixed by the contract between the broker and his employer, the broker must, of course, in order to be entitled to the benefits of the contract, fulfil his obligation within the time so limited.⁹

Where a Sale Is Made After the Time Limited, to a customer whom the broker has found, and with whom he has entered into negotiations before the expiration of such time, it has been held that the broker is entitled to his compensation;¹⁰

Minnesota. — *Jackson v. Badger*, 35 Minn. 52.

Nebraska. — See *Huffman v. Ellis*, (Neb. 1902) 90 N. W. Rep. 552.

Loan Must Be Obtained on Terms Fixed. — *Gatling v. Menke*, (Sapm. Ct. App. T.) 34 Misc. (N. Y.) 787.

Construction of Grants of Authority. — A contract to sell "one-half payable in one year" is in compliance with an authority to sell "one-half payable on or before one year." *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827.

An authority to sell for a certain amount, "about one-half cash," has been held to authorize a sale for that amount cash. *Witherell v. Murphy*, 147 Mass. 417.

1. *Speer v. Craig*, 16 Colo. 478; *Wanless v. McCandless*, 38 Iowa 20; *Thomas v. Joslin*, 30 Minn. 388. See also *Field v. Small*, 17 Colo. 386.

2. *Marble v. Bang*, 54 Minn. 277.

3. *Bourke v. Van Keuren*, 20 Colo. 95.

4. *Millan v. Porter*, 31 Mo. App. 563. See also *Fiske v. Soule*, 87 Cal. 313; *Dreisback v. Rollins*, 39 Kan. 268.

5. *Smith v. Keeler*, 151 Ill. 518, *affirming* 51 Ill. App. 267. See also *Fuller v. Brady*, 22 Ill. App. 174.

In *Smith v. Keeler*, 151 Ill. 518, *affirming* 51

Ill. App. 267, the broker was also held to be allowed to use his discretion as to the method of securing deferred payments, and agreeing that the vendor should show good title.

6. *Goss v. Stevens*, 32 Minn. 472.

7. *Jackson v. Badger*, 35 Minn. 52.

8. *Fitzpatrick v. Gilson*, 176 Mass. 477.

9. **Limit of Time.** — *Wright v. Beach*, 52 Mich. 469; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Watson v. Brooks*, 11 Oregon 271.

Particular Contracts Construed as to Time. — See the following cases: *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321; *Learned v. McCoy*, 4 Ind. App. 238; *Leslie v. Boyd*, 124 Ind. 320; *Dubois v. Dubois*, 54 Iowa 216.

"A Short Time." — *Smith v. Fairchild*, 7 Colo. 510.

"Right Away." — *Lorimer v. Boylan*, 98 Mich. 18.

10. **Sale After Time Limited** — *Illinois*. — *Griswold v. Pierce*, 86 Ill. App. 406.

Indiana. — *Williams v. Leslie*, 111 Ind. 70.

Michigan. — See *Nolan v. Swift*, 111 Mich. 56.

Missouri. — *Goffe v. Gibson*, 18 Mo. App. 1.

New York. — *Vanderveer v. Suydam*, 83 Hun (N. Y.) 116, *affirmed* 151 N. Y. 673.

Wisconsin. — *O'Connor v. Semple*, 57 Wis. 243.

though it has been held otherwise where the sale was made a year after the termination of the broker's authority and at a price less than that for which he was authorized to sell.¹

2. Where No Time Fixed by Contract. — Where no time is fixed by the contract it cannot be inferred that the authority of the broker is to continue indefinitely,² but in such case he should be allowed a reasonable time within which to succeed in accomplishing what he was employed to do.³

3. Abandonment by Broker of Efforts to Sell. — Where a broker has negotiated with a certain person, or introduced him to the owner, but his efforts to sell to such person have proved unsuccessful and have been abandoned, he can claim no compensation for, or commission on, a sale made to such person some time afterwards as the result of independent negotiations with which he was in no way connected.⁴

4. Delay in Completing Sale. — A broker's right to his commission is not affected by the fact that after he has found a purchaser there has been a considerable delay in completing the sale, where a sale is finally made and there is a continuous connection between the steps taken, and the broker has all along been connected with the negotiations, etc.⁵

VII. RIGHTS OF BROKER AGAINST EMPLOYER. — Where real-estate brokers have received payments on account of property sold by them, and have paid over such amounts to their employer, the fact that the title to the property has failed does not create any liability on the part of the employer to the brokers, unless they have, at their employer's instance, refunded to the purchasers the amounts paid. And this is true even though the receipts for some payments have been assigned to them, for such assignment merely gives them the benefit of the contracts of purchase.⁶

VIII. LIABILITIES OF BROKER — 1. To Employer — a. FAILURE TO CARRY OUT CONTRACT TO SELL AT CERTAIN PRICE. — It has been held that a real-estate agent who fails to carry out an express contract to sell property at a certain price within a designated time, is liable to his employer in damages, the measure of which is the difference between the price at which he undertook to sell the property and its market value at the end of the time limited.⁷

b. PURCHASE MONEY NOT PAID OVER. — A real-estate broker who has collected purchase money and failed to pay over the same (less commissions) to his employer promptly is liable for the amount so retained⁸ with interest.⁹

c. EXPENSES IN SUIT FOR SPECIFIC PERFORMANCE. — Where a real-estate

1. *Antisdell v. Canfield*, 119 Mich. 229. See also *Page v. Griffin*, 71 Mo. App. 524.

2. See *Watts v. Howard*, 51 Ill. App. 243. **Presumption as to Continuance of Authority.** — *Hensel v. Maas*, 94 Mich. 563.

3. **Reasonable Time** — *Alabama*. — *Henderson v. Vincent*, 84 Ala. 99.

Georgia. — *Collier v. Weyman*, 114 Ga. 944. *Illinois*. — *Biddison v. Johnson*, 50 Ill. App. 173; *Day v. Porter*, 60 Ill. App. 386, *affirmed* 161 Ill. 235; *Tinsley v. Durfee*, 99 Ill. App. 239.

Iowa. — See *Boyd v. Watson*, 101 Iowa 214. *Missouri*. — *Veatch v. Norman*, (Mo. App. 1902) 69 S. W. Rep. 472.

New York. — *Bathrick v. Coffin*, 13 N. Y. App. Div. 101.

Three Years an Unreasonable Time. — *Green v. Wright*, 36 Mo. App. 208.

Contract Not Invalid Because No Time Fixed. — *Boyd v. Watson*, 101 Iowa 214.

4. **Abandonment** — *Illinois*. — *Lipe v. Ludewick*, 14 Ill. App. 372; *Davis v. Gassette*, 30 Ill. App. 41; *Carlson v. Nathan*, 43 Ill. App. 364; *Watts v. Howard*, 51 Ill. App. 243; *Singer, etc., Stone Co. v. Hutchinson*, 61 Ill. App. 308.

Iowa. — *Moore v. Cresap*, 109 Iowa 749.

Minnesota. — *Fairchild v. Cunningham*, 84 Minn. 521.

Nebraska. — *Frenzer v. Lee*, (Neb. 1902) 90 N. W. Rep. 914.

New York. — *Harris v. Burtnett*, 2 Daly (N. Y.) 189; *Ludlow v. Carman*, 2 Hilt. (N. Y.) 107; *Meyer v. Strauss*, (Supm. Ct. App. Div.) 58 N. Y. Supp. 904, 42 N. Y. App. Div. 613; *Getzler v. Boehm*, (Supm. Ct. App. T.) 16 Misc. (N. Y.) 390; *Woolley v. Loew*, 80 Hun (N. Y.) 294; *Hay v. Platt*, 66 Hun (N. Y.) 488. See also *Randrup v. Schroeder*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 52. See *Brown v. Snyder*, 57 N. Y. App. Div. 413, *affirming* 30 Misc. (N. Y.) 540.

Pennsylvania. — *Kifer v. Yoder*, 198 Pa. St. 308.

Texas. — *Duval v. Moody*, 24 Tex. Civ. App. 627.

5. *Michaelis v. Gahren*, 9 N. Y. App. Div. 495.

6. *Mears v. Adreon*, 31 Md. 229.

7. *Dunn v. Mackey*, 80 Cal. 104.

8. *Witsell v. Riggs*, 14 Rich. L. (S. Car.) 186.

9. *Melvin v. Aldridge*, 81 Md. 650.

broker, acting within his authority, enters into an agreement with a purchaser relative to the sale of land, which is not binding upon the owner as a contract of sale, the broker is not liable for the expenses incurred by the owner in a suit for specific performance by the purchaser.¹

d. INDUCING OTHER PARTY TO WITHDRAW FROM DEAL. — It has been held that when a contract for an exchange of properties which is the result of negotiations conducted by a broker, gives to the customer found by the broker the right to withdraw for any reason that he may see fit to act upon, the broker's employer cannot recover damages from the broker for having by fraudulent representations induced the other party to withdraw.²

e. FAILURE TO COLLECT RENTS, ETC. — An agent to rent lands and collect the rents is liable to his principal for neglect only when he has or with reasonable diligence could have collected rent, or could have rented the lands to some person who could or would have paid rent therefor.³

f. FAILURE TO PROPERLY CARE FOR PROPERTY — EVIDENCE. — In an action by the owner of property against a real-estate agent employed to take charge of the property and collect rents, for damages for allowing the water to remain in the pipes while the buildings were unoccupied, by reason of which the pipes burst and repairs became necessary, evidence is admissible that it is the custom of real estate agents having property for rent to look after it while it is unoccupied.⁴

g. EXCESS OF AUTHORITY — (1) Presumption of Acting Within Authority. — It has been held that where an agent appointed to hire, lease, and sell property, received Confederate money in payment therefor, it would be presumed, in the absence of proof to the contrary, that his principal authorized him to do so, and that he acted within the scope of his authority.⁵

(2) Measure of Damages for Excess of Authority. — Where an agent employed to sell property has exceeded his authority by taking a security for deferred payments, other than what he was authorized to take, the measure of his employer's damages is the difference in value between the security contracted for and that actually given.⁶

(3) Ratification. — Where an agent employed to sell has transcended his authority by selling on unauthorized terms, but the principal has received and retained the consideration taken from the purchaser, and does not offer to return it, the principal cannot, no fraud being charged, recover damages from the agent for his excess of authority.⁷

h. DECEPTION AS TO AMOUNT FOR WHICH PROPERTY SOLD. — If the broker understates to his employer the price which a purchaser is willing to pay or for which the property can be sold, and upon a sale being made obtains a larger amount, but conceals such fact and pays over to his employer only a portion of what he has received, or by any means whatever accomplishes the result of obtaining and converting to his own use a part of the purchase money, beyond his commission, the employer can recover the amount so retained or obtained and converted;⁸ and the same is true where a

1. *Martin v. Ede*, 103 Cal. 157.

2. *Hetzler v. Morrell*, 82 Iowa 562.

3. *Burpe v. Van Eman*, 11 Minn. 327.

4. *Cameron v. McNair, etc.*, Real Estate Co., 76 Mo. App. 366.

5. *Leake v. Sutherland*, 25 Ark. 219.

6. *Lunn v. Guthrie*, (Iowa 1902) 88 N. W. Rep. 1060.

7. *Lunn v. Guthrie*, (Iowa 1902) 88 N. W. Rep. 1060.

8. *Recovery of Purchase Money Retained.* — *Helberg v. Nichol*, 149 Ill. 249; *Bassett v. Rogers*, 165 Mass. 377; *Emmons v. Alvord*, 177 Mass. 466; *Stearns v. Hochbrunn*, 24

Wash. 206. See also *Bassett v. Rogers*, 162 Mass. 47.

In *Kerfoot v. Hyman*, 52 Ill. 512, a real-estate agent, who was authorized to sell property for a certain amount, sold a portion of it for a larger sum and placed the title to the remainder in a third person for his own benefit. It was held that he must account for the excess received for the portion sold and that the legal title to the remainder should be released to the principal.

Misconduct of Broker Must Clearly Appear. — See *Henshaw v. Wilson*, 46 Ill. App. 364.

broker employed to buy has by any device induced his employer to pay more than the property can be bought for and has converted the excess to his own use.¹

i. PURCHASE FOR HIMSELF AND RESALE AT PROFIT. — If a broker employed to sell real estate, without the knowledge of his employer, or through fraud or concealment, himself becomes the purchaser of the property, either directly or indirectly, and then resells the same at a profit, the employer is entitled to receive from the broker the profit so realized.² But in a case where a firm of brokers was employed to sell several lots and one member of the firm purchased one of the lots at auction, and the employer ratified the sale, executed a deed, and agreed that the price should be credited on the broker's fee, it was held that, no fraud being shown, the employer could not recover a profit made out of such lot.³

2. To Purchaser — *a. RETURN OF DEPOSIT* — (1) *On Failure of Sale.* — Where a real-estate agent, acting for a disclosed principal, has made a sale or entered into a contract for the sale of property, and has received a deposit on the sale, which he has paid over to his principal, he is not, on a subsequent failure of the sale, liable to the purchaser for the return of such deposit.⁴ And in one case the court has held this to be true regardless of whether or not the agent has actually paid over the deposit to his principal.⁵

Where There Is a Personal Undertaking on the part of the agent or broker to return the deposit in case the sale should fail, he is, of course, liable.⁶

(2) *On Variance of Terms of Sale.* — A real-estate agent who receives a part payment of purchase money on a sale conditioned that the offer be accepted by the owner on the terms and conditions specified, or the money be refunded, is not liable in an action by the purchaser for the money, if the offer is accepted by the owner, though at the time of acceptance the owner and purchaser, by mutual agreement, vary the terms and conditions upon which the agent sold.⁷

b. MISREPRESENTATION, CONCEALMENT, ETC. — It has been held that when a broker has represented to the purchaser that the price fixed by the owner, and the least he will accept for the property, is a larger amount than the price actually fixed by the owner, and has thereby induced the purchaser to pay a much larger amount and has converted such excess to his own use, the purchaser may recover such excess;⁸ but the purchaser has been denied any relief against the broker where the latter deceived him concerning a former transfer of the property, when the property was sold for the price demanded by the owner, and was worth the amount paid for it, and the broker was in the transaction the representative of the vendor and not the agent of the purchaser.⁹

c. FAILURE TO BIND PRINCIPAL. — A broker who enters into a contract of sale with a purchaser, which purports to bind his principal, but does not actually bind him, by reason of a lack of authority in the broker to make such a contract, is liable in damages to the purchaser upon the owner's refusal to carry out the contract, and the measure of damages is the difference between

1. *Healey v. Martin*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 236; *Collins v. Case*, 23 Wis. 230.

Evidence Insufficient to Show Employment of Defendant as Broker of Plaintiff. — *Lazarus v. Sands*, (Brooklyn City Ct. Gen. T.) 7 Misc. (N. Y.) 282.

2. **Broker Liable to Employer for Profit.** — *Warren v. Burt*, (C. C. A.) 58 Fed. Rep. 101; *Cornwell v. Foord*, 96 Ill. App. 366; *Smitz v. Leopold*, 51 Minn. 455; *Merriam v. Johnson*, (Minn. 1902) 90 N. W. Rep. 116; *Bell v. Bell*, 3 W. Va. 183.

3. **When Employer Not Entitled to Profit.** —

Kavanaugh v. Ballard, (Ky. 1900) 56 S. W. Rep. 159.

4. **Not Liable for Return of Deposit.** — *Bogart v. Crosby*, 80 Cal. 196; *Bailey v. Cornell*, 66 Mich. 107.

5. *McCubbin v. Graham*, 4 Kan. 397.

6. **Personal Undertaking.** — *Mead v. Altgeld*, 136 Ill. 298, *affirming* 33 Ill. App. 373; *Read v. Riddle*, 48 N. J. L. 359. See also *Evans v. George*, 80 Ill. 51.

7. *Fowler v. Quall*, 36 Kan. 507.

8. *Kice v. Porter*, (Ky. 1899) 53 S. W. Rep. 285, (Ky. 1901) 61 S. W. Rep. 266.

9. *Baker v. Brown*, 82 Cal. 64.

the value of the principal's title to the property and the price named in the contract of sale.¹

IX. RULE AGAINST ACTING FOR BOTH PARTIES — 1. Rule Stated. — The general rule is that a real-estate broker or agent who is negotiating a sale of property or otherwise acting in the usual line of his business cannot represent both parties to the transaction without their mutual knowledge and consent, and if he attempts to do so he forfeits all right to any compensation or commission from either.²

2. Limitations of the Rule. — The rule above stated does not apply where the broker was employed as a mere middleman to bring together the two parties in order that they might personally negotiate their own bargain without any interference, assistance, or participation by the broker in the negotiations,³ nor where both parties are cognizant of the double employment and consent thereto,⁴ and few cases seem to consider the rule to be that the

1. *Gestring v. Fisher*, 46 Mo. App. 603.

2. **Rule Against Acting for Both Parties** — *California*. — *Clark v. Allen*, 125 Cal. 276.

Colorado. — *Deutsch v. Baxter*, 9 Colo. App. 58.

Connecticut. — *Weinhouse v. Cronin*, 68 Conn. 250.

District of Columbia. — *Mannix v. Hildreth*, 2 App. Cas. (D. C.) 259.

Illinois. — *Warrick v. Smith*, 137 Ill. 504; *Van Vlissingen v. Blum* 92 Ill. App. 145; *Hampton v. Lackens*, 72 Ill. App. 442; *Boyd v. Dullaghan*, 33 Ill. App. 266; *Kronenberger v. Fricke*, 22 Ill. App. 550. See also *Horne v. Ingraham*, 125 Ill. 198.

Iowa. — *Wilson v. Webster*, 88 Iowa 514.

Kentucky. — *Stratton v. Samuel H. Jones Co.*, (Ky. 1899) 50 S. W. Rep. 33; *Delph v. Wainscott*, 14 Ky. L. Rep. 304.

Maryland. — *Schwartz v. Yearly*, 31 Md. 270. *Massachusetts*. — *Carpenter v. Fisher*, 175 Mass. 9.

Michigan. — *Friar v. Smith*, 120 Mich. 411; *McDonald v. Maltz*, 94 Mich. 172, 34 Am. St. Rep. 331; *Moore v. Mandlebaum*, 8 Mich. 433; *Hannan v. Prentis*, 124 Mich. 417; *Horwitz v. Pepper*, (Mich. 1901) 87 N. W. Rep. 1034. See also *Leathers v. Canfield*, 117 Mich. 277.

Minnesota. — See *Dartt v. Sonnesyn*, (Minn. 1902) 90 N. W. Rep. 115.

Missouri. — *Reese v. Garth*, 36 Mo. App. 641; *Kearness v. Briscoe*, 47 Mo. App. 196; *Rosenthal v. Drake*, 82 Mo. App. 358. But compare *Hayden v. Grillo*, 26 Mo. App. 289.

Nebraska. — *Campbell v. Baxter*, 41 Neb. 729.

New York. — *Southack v. Lane*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 141, *reversing* (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 515; *Brierly v. Connelly*, (Supm. Ct. App. T.) 31 Misc. (N. Y.) 268; *Norman v. Reuther*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 161; *Harris v. Burnett*, 2 Daly (N. Y.) 189; *Robinson v. Clock*, 38 N. Y. App. Div. 67; *Abel v. Disbrow*, 15 N. Y. App. Div. 536; *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70. See also *Condit v. Sell*, (C. Pl. Gen. T.) 18 N. Y. Supp. 97; *Wolff v. Debousky*, (N. Y. City Ct. Gen. T.) 36 Misc. (N. Y.) 643; *Curry v. Terry*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 797, 69 N. Y. Supp. 932; *Perkins v. Brainard Quarry Co.*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 328.

Pennsylvania. — *Addison v. Wanamaker*, 185 Pa. St. 536; *Wireman's Estate*, 7 Pa. Dist. 759; *Maxwell v. West*, 23 Pa. Co. Ct. 302.

Texas. — *Armstrong v. O'Brien*, 83 Tex. 635.

Virginia. — *Ferguson v. Gooch*, 94 Va. 1.

Washington. — *Shepard v. Hill*, 6 Wash. 605.

Wisconsin. — *Meyer v. Hanchett*, 43 Wis. 246.

Contract of Sale Not Enforceable When Agent Acted for Both Parties. — *De Steiger v. Hollington*, 17 Mo. App. 382.

The Amount of the Commission Paid by One Party is not material in an action against the other for a commission, though the fact that a commission was paid is material. *Lindt v. Schlitz Brewing Co.*, 113 Iowa 200.

Circumstances Showing for Whom Broker Acted. — See *Lorimer v. Boylan*, 98 Mich. 18; *Macfee v. Horan*, 45 Minn. 519.

Evidence Insufficient to Establish Double Employment. — *Lebowitz v. Colligan*, (Supm. Ct. App. Div.) 45 N. Y. Supp. 373, 18 N. Y. App. Div. 624.

Finding of Jury on Conflicting Evidence Not Disturbed. — *Rosenthal v. Drake*, 82 Mo. App. 358.

3. Employment as Middleman — *California*. — *Clark v. Allen*, 125 Cal. 276.

Kentucky. — *Delph v. Wainscott*, 14 Ky. L. Rep. 304.

Michigan. — *Montress v. Eddy*, 94 Mich. 100, 34 Am. St. Rep. 323; *Friar v. Smith*, 120 Mich. 411; *Leathers v. Canfield*, 117 Mich. 277. See also *Hannan v. Prentis*, 124 Mich. 417.

Minnesota. — *Hobart v. Sherburne*, 66 Minn. 171.

Nebraska. — *Strawbridge v. Swan*, 43 Neb. 781.

New York. — *Knauss v. Krueger Brewing Co.*, 142 N. Y. 70; *Gracie v. Stevens*, 56 N. Y. App. Div. 203, *affirmed* 171 N. Y. 658; *Norton v. Genesee Nat. Sav., etc., Assoc.*, 57 N. Y. App. Div. 520; *Wyckoff v. Bliss*, 12 Daly (N. Y.) 324; *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587; *Bonwell v. Auld*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 65. See also *Southack v. Lane*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 141, *reversing* (N. Y. City Ct. Gen. T.) 23 Misc. (N. Y.) 515.

4. Consent of Both Parties — *Iowa*. — See *Lindt v. Schlitz Brewing Co.*, 113 Iowa 200.

Michigan. — *Friar v. Smith*, 120 Mich. 411.

Missouri. — *De Steiger v. Hollington*, 17 Mo. App. 382.

Nebraska. — *Campbell v. Baxter*, 41 Neb. 729.

North Carolina. — *Lamb v. Baxter*, 130 N. Car. 67.

broker is entitled to commissions from the party who knew of the double employment, though not from the other party.¹

X. RULES AGAINST BROKER ACTING FOR HIMSELF. — The general rule that an agent cannot be allowed to place himself in a position in which duty and interest conflict, or to make any profit out of his agency beyond his compensation as agent, applies in the case of a real-estate broker.² He cannot purchase the property which he was employed to sell, directly or indirectly, individually or together with others,³ nor become the vendor where he is employed to purchase property;⁴ neither can he purchase for himself property which he has undertaken to purchase for his employer.⁵ And where he has been employed to take charge of property he will not be allowed to acquire title thereto as against his employer.⁶

XI. COMPENSATION — 1. Right to — a. GENERAL RULE.—In order to

Pennsylvania. — Maxwell v. West, 23 Pa. Co. Ct. 302.

Texas. — Armstrong v. O'Brien, 83 Tex. 635.

See also cases cited in preceding paragraph.

1. See Lansing v. Bliss, 86 Hun (N. Y.) 205; Geery v. Pollock, 16 N. Y. App. Div. 321; Glacie v. Stevens, 56 N. Y. App. Div. 203, affirmed 171 N. Y. 658.

2. **Cannot Make Profit Out of Agency.** — See Glover v. Layton, 145 Ill. 92; Crump v. Ingersoll, 44 Minn. 84; Grumley v. Webb, 44 Mo. 444, 100 Am. Dec. 304.

3. **Cannot Purchase Property He Was Employed to Sell — United States** — Warren v. Burt, 12 U. S. App. 591; Warren v. Burt, (C. C. A.) 58 Fed. Rep. 101; Walker v. Derby, 5 Biss. (U. S.) 134. *Illinois.* — Kronenberger v. Fricke, 22 Ill. App. 550; Kerfoot v. Hyman, 52 Ill. 512; Reardon v. Washburn, 59 Ill. App. 161.

Kentucky. — See Taylor v. Knox, 1 Dana (Ky.) 391.

Louisiana. — See Shepherd v. Percy, 4 Mart. N. S. (La.) 267.

Michigan. — Kimball v. Ranney, 122 Mich. 160. See also Moore v. Mandlebaum, 8 Mich. 433.

Minnesota. — Merriam v. Johnson, (Minn. 1902) 90 N. W. Rep. 116.

Nebraska. — Bookwalter v. Lansing, 23 Neb. 291.

New York. — Clark v. Bird, 66 N. Y. App. D. 284.

Pennsylvania. — Finch v. Conrade, 154 Pa. St. 326.

Texas. — Pridgen v. Adkins, 25 Tex. 388; Armstrong v. O'Brien, 83 Tex. 635. See also Smith v. Trips, 2 Tex. Civ. App. 267; Ryan v. Kahler, (Tex. Civ. App. 1898) 46 S. W. Rep. 71.

Virginia. — Colbert v. Shepherd, 89 Va. 401; Wren v. Moncure, 95 Va. 369.

Broker Cannot Sell to His Employee. — Powers v. Black, 159 Pa. St. 153. Compare Bogart v. McWilliams, (Tex. Civ. App. 1895) 31 S. W. Rep. 434.

After the Termination of the Agency agents have the same right as any other persons to deal in the property. Walker v. Derby, 5 Biss. (U. S.) 134; Oberlin College v. Blair, 45 W. Va. 812. See also Hawley v. Tesch, 88 Wis. 218.

The Purchase by the Agent Is Not Absolutely Void, but may be effectual and valid either by the express ratification of the principal with a knowledge of all the facts or by the principal's

acquiescence for a great length of time with a like knowledge of the facts. Pridgen v. Adkins, 25 Tex. 388. See also Grant v. Hardy, 33 Wis. 668.

Ratification by Employer of Purchase by Broker. — Bassett v. Brown, 105 Mass. 551.

This Rule Does Not Apply where the broker has in good faith, and without any design to obtain the property for himself, sold to a purchaser, and afterwards purchased from such purchaser. Bookwalter v. Lansing, 23 Neb. 291. And where an agent employed to sell property on commission had also an option to purchase the property himself, and upon his finding a purchaser the owner refused to convey, and the agent was forced, in order to keep his engagement with the purchaser, to fall back on his option and take title himself and thus make himself the channel through which the title passed to the purchaser, there was nothing in these facts which prevented the agent from recovering his commissions to which he had become fully entitled when he procured a bona fide purchaser. Riemer v. Rice, 88 Wis. 16.

4. Kronenberger v. Fricke, 22 Ill. App. 550; Finch v. Conrade, 154 Pa. St. 326; Colbert v. Shepherd, 89 Va. 401.

5. **Cannot Purchase for Himself.** — Rose v. Hayden, 35 Kan. 106, 57 Am. Rep. 145; Matthews v. Light, 32 Me. 305.

This Has Been Denied in cases where the agreement to purchase for another rested in parol and no part of the consideration was paid by the principal, the court holding that in such case the principal cannot compel a conveyance to him. Burden v. Sheridan, 36 Iowa 125, 14 Am. Rep. 505; Dorsey v. Clarke, 4 Har. & J. (Md.) 551.

The Rule Does Not Apply where the broker has made all reasonable efforts to purchase the property for his employer at the price named as the most that he will pay, and after such efforts have failed has purchased the property for himself at a higher price. Pearsall v. Hirsh, 59 N. Y. Super. Ct. 410.

After the Termination of the Agency the agent may purchase the property for himself. Moore v. Stone, 40 Iowa 259.

6. **Cannot Acquire Title Against Principal.** — Bowman v. Officer, 53 Iowa 640; Krutz v. Fisher, 8 Kan. 90; McMahon v. McGraw, 26 Wis. 614; Fox v. Zimmermann, 77 Wis. 414; Geisinger v. Beyl, 80 Wis. 443. See also Jansen v. Williams, 36 Neb. 869.

entitle a real-estate broker to compensation for, or commissions on, a sale or exchange of property, he must have been the procuring cause thereof; that is, it must have been the direct result of his exertions to bring it about.¹ But when he is the procuring cause of the sale which has been actually made he is always entitled to commissions or compensation,² even though the sale is

1. Broker Must Have Been the Procuring Cause — *England*. — *Antrobus v. Wickens*, 4 F. & F. 291. See also *Lumley v. Nicholson*, 34 W. R. 716.

Colorado. — *Babcock v. Merritt*, 1 Colo. App. 84; *Carson v. Baker*, 2 Colo. App. 248; *Lawrence v. Weir*, 3 Colo. App. 401. See also *Quinby v. Tedford*, 4 Colo. App. 210.

Delaware. — *Hawkins v. Chandler*, 8 Houst. (Del.) 434.

Idaho. — *Jacobs v. Shenon*, 2 Idaho 1002.

Illinois. — *Commercial Nat. Bank v. Hawkins*, 35 Ill. App. 463; *Davis v. Gassette*, 30 Ill. App. 41; *Carlson v. Nathan*, 43 Ill. App. 354; *Clark v. Nessler*, 50 Ill. App. 550; *Watts v. Howard*, 51 Ill. App. 243; *Baumgartl v. Hoyne*, 54 Ill. App. 496; *Hinds v. McIntire*, 89 Ill. App. 611.

Iowa. — See *Newton v. Ritchie*, 75 Iowa 91.

Kentucky. — *Greene v. Owings*, (Ky. 1897) 41 S. W. Rep. 264; *Collier v. Johnson*, (Ky. 1902) 67 S. W. Rep. 830.

Louisiana. — *Walton v. New Orleans, etc.*, R. Co., 23 La. Ann. 398.

Massachusetts. — *Gleason v. Nelson*, 162 Mass. 245; *Whitcomb v. Dickinson*, 169 Mass. 16. See also *Viaux v. Old South Soc.*, 133 Mass. 1.

Michigan. — *Kelso v. Woodruff*, 88 Mich. 299; *Thuner v. Kanter*, 102 Mich. 59.

Minnesota. — *Armstrong v. Wann*, 29 Minn. 126.

Missouri. — *Ramsey v. West*, 31 Mo. App. 676; *Vandyke v. Walker*, 49 Mo. App. 381; *Pollard v. Banks*, 67 Mo. App. 187; *Crowley v. Somerville*, 70 Mo. App. 376; *Campbell v. Vanstone*, 73 Mo. App. 84.

Nebraska. — *Hodgman v. Thomas*, 37 Neb. 568; *St. Felix v. Green*, 34 Neb. 800; *Wasmer v. Leon*, 32 Neb. 519.

New York. — *Tyng v. Constable*, (Supm. Ct. App. T.) 35 Misc. (N. Y.) 283; *Burke v. Pfeffer*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 774, 68 N. Y. Supp. 799; *Roos v. Decker*, (Supm. Ct. App. T.) 34 Misc. (N. Y.) 168; *McNulty v. Rowe*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 523; *McCloskey v. Thompson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 735; *Woods v. Burton*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 326; *Randrup v. Schroeder*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 52; *Markus v. Kenneally*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 517; *Von Hermann v. Wagner*, 81 Hun (N. Y.) 431; *Hay v. Platt*, 66 Hun (N. Y.) 488; *White v. Twitchings*, 26 Hun (N. Y.) 503; *Bellesheim v. Palm*, 54 N. Y. App. Div. 77; *Wallon v. McMorrow*, (Supm. Ct. App. Div.) 57 N. Y. Supp. 691, 39 N. Y. App. Div. 667, mem.; *Harris v. Burnett*, 2 Daly (N. Y.) 189; *Colwell v. Tompkins*, 6 N. Y. App. Div. 93, *affirmed* 158 N. Y. 690; *Ware v. Dos Passos*, 4 N. Y. App. Div. 32; *Bennett v. Kidder*, 5 Daly (N. Y.) 512; *Hamm v. Weber*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 485; *Weinstein v. Golding*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 613; *Buehler v. Weiffenbach*, 21 Misc. (N. Y.) 30; *McKnight v. Thayer*, (Super.

Ct. Tr. T.) 21 N. Y. Supp. 440; *Summers v. Carey*, 69 N. Y. App. Div. 428; *Ludlow v. Carman*, 2 Hilt. (N. Y.) 107; *Cushman v. Gori*, 1 Hilt. (N. Y.) 356; *Walton v. McMorrow*, 63 N. Y. App. Div. 147; *Hamilton v. Gillender*, 26 N. Y. App. Div. 156; *Johnson v. Lord*, 25 N. Y. App. Div. 325; *Wychoff v. Bissell*, 24 N. Y. App. Div. 66; *Colwell v. Tompkins*, 6 N. Y. App. Div. 93, *affirmed* 158 N. Y. 690.

Oregon. — *Booth v. Moody*, 30 Oregon 222.

Pennsylvania. — *Kifer v. Yoder*, 198 Pa. St. 308; *Hartley v. Anderson*, 150 Pa. St. 391; *Johnson v. Seidel*, 150 Pa. St. 396; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618.

Texas. — *Duval v. Moody*, 24 Tex. Civ. App. 627; *Wilson v. Alexander*, (Tex. 1892) 18 S. W. Rep. 1057; *Brown v. Shelton*, (Tex. Civ. App. 1893) 23 S. W. Rep. 483; *Wilson v. Weber*, (Tex. Civ. App. 1902) 68 S. W. Rep. 800.

See also *White v. Templeton*, 79 Tex. 454.

Evidence as to Whether Broker Was Procuring Cause. — *Hiltz v. Williams*, 167 Mass. 454; *Hosmer v. Fuller*, 168 Mass. 274; *Cadigan v. Crabtree*, 179 Mass. 474; *Huff v. Cole*, 127 Mich. 351; *Burke v. Cogswell*, 39 Minn. 344.

Where a Broker Employed to Sell Negotiates a Lease for three years with an option to purchase within a year, and such option is exercised, the broker is entitled to his commission. *Morson v. Burnside*, 31 Ont. 438. See also *Rimmer v. Knowles*, 22 W. R. 574, 30 L. T. N. S. 496.

2. Broker Who Is Procuring Cause Entitled to Commissions — *England*. — *Mansell v. Clements*, L. R. 9 C. P. 139; *Green v. Bartlett*, 14 C. B. N. S. 681, 108 E. C. L. 681, 32 L. J. C. Pl. 261, 8 L. T. N. S. 503, 11 W. R. 834.

Alabama. — *Henderson v. Vincent*, 84 Ala. 99.

Connecticut. — *Schlegel v. Allerton*, 65 Conn. 260; *Hoadley v. Danbury Sav. Bank*, 71 Conn. 599.

Colorado. — *Williams v. Bishop*, 11 Colo. App. 378.

District of Columbia. — *Armes v. Cameron*, 19 D. C. 435.

Georgia. — See *Mousseau v. Dorsett*, 80 Ga. 566; *Mousseau v. La Roche*, 80 Ga. 568.

Illinois. — *Keeler v. Grace*, 27 Ill. App. 427; *Watts v. Howard*, 51 Ill. App. 243; *Baumgartl v. Hoyne*, 54 Ill. App. 496; *Singer, etc., Stone Co. v. Hutchinson*, 83 Ill. App. 668, *affirmed* 184 Ill. 160; *Henry v. Stewart*, 85 Ill. App. 170, *affirmed* 185 Ill. 448; *Griswold v. Pierce*, 86 Ill. App. 406; *Munson v. Fenno*, 87 Ill. App. 655.

Iowa. — *Staufer v. Bell*, 99 Iowa 545; *Rounds v. Allee*, (Iowa 1902) 89 N. W. Rep. 1098.

Kentucky. — See *West v. Prewitt*, (Ky. 1897) 43 S. W. Rep. 467; *Prewitt v. West*, (Ky. 1900) 55 S. W. Rep. 884.

Maryland. — *Attrill v. Patterson*, 58 Md. 226.

Massachusetts. — See *Chapin v. Bridges*, 116 Mass. 105.

Michigan. — *Ellsmore v. Gamble*, 62 Mich.

made by the owner directly to the purchaser without the intervention of the broker.¹

The Broker Is the Procuring Cause of the sale within the above rule if he brings it about by his exertions² or advertisements,³ or if he introduces the purchaser to the principal⁴ or gives the latter as a possible purchaser the name of the

543; *Brooks v. Leathers*, 112 Mich. 463. See also *Scribner v. Hazeltine*, 79 Mich. 370.

Minnesota. — *Crevier v. Stephen*, 40 Minn. 288. See also *Hubachek v. Hazzard*, 83 Minn. 437.

Missouri. — *Wright v. Brown*, 68 Mo. App. 577; *Grether v. McCormick*, 79 Mo. App. 325; *Fisher, etc., Real Estate Co. v. Stated Realty Co.*, 159 Mo. 562.

Nebraska. — *Craig v. Wead*, 58 Neb. 782; *Hambleton v. Fort*, 58 Neb. 282; *Nicholas v. Jones*, 23 Neb. 813; *Butler v. Kennard*, 23 Neb. 357.

New Jersey. — *Somers v. Wescoat*, 66 N. J. L. 551.

New York. — *Goldstein v. Walters*, 15 Daly (N. Y.) 397; *Konner v. Anderson*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 511; *Esmond v. Kingsley*, (Supm. Ct. Spec. T.) 3 N. Y. Supp. 606; *Turner v. Putnam*, (Brooklyn City Ct. Gen. T.) 13 N. Y. Supp. 567; *Johnson v. Bernheimer*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 37. See also *Whitehead v. Halsey*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 378.

Ohio. — *Roush v. Loeffler*, 6 Ohio Cir. Dec. 760, 18 Ohio Cir. Ct. 806.

Pennsylvania. — *Heffner v. Chambers*, 121 Pa. St. 84.

Rhode Island. — *Peckham v. Ashhurst*, 18 R. I. 376.

Texas. — *Bowser v. Field*, (Tex. 1891) 17 S. W. Rep. 45.

Wisconsin. — *Bell v. Siemens, etc., Electric Co.*, 101 Wis. 320.

Purchaser Need Not Know of Broker's Connection with Transaction. — *McCampbell v. Cavis*, 10 Colo. App. 242.

Deed to Third Person. — The broker's right is not affected by the fact that the real purchaser whom he has procured has had the deed executed to another person. *Konner v. Anderson*, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 511.

1. Sale by Owner — *Alabama*. — *Henderson v. Vincent*, 84 Ala. 99.

California. — See *Wilson v. Sturgis*, 71 Cal. 226.

Delaware. — *Hawkins v. Chandler*, 8 Houst. (Del.) 434.

District of Columbia. — *Kilbourn v. King*, 6 D. C. 310.

Illinois. — *Keeler v. Grace*, 27 Ill. App. 427; *McConaughy v. Mahannah*, 28 Ill. App. 160; *Buhl v. Noe*, 51 Ill. App. 622; *Pate v. Marsh*, 65 Ill. App. 482; *Snyder v. Fearer*, 87 Ill. App. 275; *Loehde v. Halsey*, 88 Ill. App. 452; *Hafner v. Herron*, 165 Ill. 242.

Iowa. — *Blodgett v. Sioux City, etc., R. Co.*, 63 Iowa 606.

Kansas. — *Dreisback v. Rollins*, 39 Kan. 268.

Maryland. — *Schwartz v. Yearly*, 31 Md. 270.

Massachusetts. — *French v. McKay*, (Mass. 1902) 63 N. E. Rep. 1068.

Michigan. — *Douville v. Comstock*, 110 Mich. 693.

Minnesota. — *Putnam v. How*, 39 Minn. 363; *Crevier v. Stephen*, 40 Minn. 288; *Haug v. Haugan*, 51 Minn. 558.

Missouri. — *Goffe v. Gibson*, 18 Mo. App. 1; *Blackwell v. Adams*, 28 Mo. App. 61; *Jones v. Berry*, 37 Mo. App. 127; *Veatch v. Norman*, (Mo. App. 1902) 69 S. W. Rep. 472; *Bell v. Kaiser*, 50 Mo. 150; *Timberman v. Craddock*, 70 Mo. 638; *Lipscomb v. Cole*, 81 Mo. App. 53; *Crone v. Mississippi Valley Trust Co.*, 85 Mo. App. 607; *Fisher, etc., Real Estate Co. v. Stated Realty Co.*, 159 Mo. 562.

Nebraska. — *Nicholas v. Jones*, 23 Neb. 813; *Butler v. Kennard*, 23 Neb. 357. See also *Gregg v. Loomis*, 22 Neb. 174.

New York. — *Atwater v. Wilson*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 117, *affirming* (City Ct. Gen. T.) 10 Misc. (N. Y.) 777; *Dailey v. Young*, (Supm. Ct. Spec. T.) 13 N. Y. Supp. 435, 59 Hun (N. Y.) 619; *Ludlow v. Carman*, 2 Hilt. (N. Y.) 107; *Doran v. Bussard*, 18 N. Y. App. Div. 36; *McKnight v. Thayer*, (Buffalo Super. Ct. Tr. T.) 21 N. Y. Supp. 440.

Rhode Island. — *Peckham v. Ashhurst*, 18 R. I. 376.

South Dakota. — *Scott v. Clark*, 3 S. Dak. 486.

Tennessee. — *Royster v. Mageveney*, 9 Lea (Tenn.) 148.

Texas. — *Hoefling v. Hambleton*, 84 Tex. 517; *Byrd v. Frost*, (Tex. Civ. App. 1894) 29 S. W. Rep. 46; *Wilson v. Weber*, (Tex. Civ. App. 1902) 68 S. W. Rep. 800.

Washington. — *Barnes v. German Sav., etc., Soc.*, 21 Wash. 448.

Wisconsin. — *Bell v. Siemens, etc., Electric Co.*, 101 Wis. 320.

The Broker's Introduction of the purchaser must be the foundation of the negotiations. *Blake v. Stump*, 73 Md. 160.

Formal Introduction of Purchaser by Broker Not Necessary. — *Leach v. Clemons*, 14 Colo. App. 45.

2. Exertions of Broker. — *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Sack*, 19 Mo. App. 470; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Wetzell v. Wagoner*, 41 Mo. App. 509; *Bell v. Kaiser*, 50 Mo. 150; *Henderson v. Mace*, 64 Mo. App. 393; *Wright v. Brown*, 68 Mo. App. 579. See also *Anderson v. Cox*, 16 Neb. 10.

3. Advertisements. — *Kilbourn v. King*, 6 D. C. 310; *Goffe v. Gibson*, 18 Mo. App. 1; *Gaty v. Sack*, 19 Mo. App. 470; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Bell v. Kaiser*, 50 Mo. 150; *Doran v. Bussard*, 18 N. Y. App. Div. 36.

4. Introduction. — *Beauchamp v. Higgins*, 20 Mo. App. 514; *Wetzell v. Wagoner*, 41 Mo. App. 509; *Campbell v. Vanstone*, 73 Mo. App. 84; *Goodwin v. Brennecke*, 21 N. Y. App. Div. 138; *Wyckoff v. Bliss*, 12 Daly (N. Y.) 324. See also *Ex p. Durrant*, 5 Mor. Bankr. Cas. 37; *Walton v. Cheseborough*, (Supm. Ct. App. Div.) 57 N. Y. Supp. 687, 39 N. Y. App. Div. 665, *affirmed* 167 N. Y. 606.

person who does purchase, whereby the sale is perfected by the principal.¹

The Burden of Proof is on the broker to show that he was the procuring cause.²

A Question for the Jury. — Whether or not the broker was the procuring cause is a question of fact for the jury.³

Special Contract. — Where the contract between the broker and his employer prescribes certain conditions or contingencies which must be performed or must happen in order for the broker to be entitled to a commission, the contract of course governs.⁴

b. NECESSITY FOR EMPLOYMENT — (1) *Rule Stated.* — In order to entitle the broker to recover compensation for his services it is necessary that the person from whom he claims shall have employed him to render the services out of which his claim arises,⁵ or that there should have been such an acceptance and ratification of his services by such person as will in the eye of the law amount to the same thing as an original employment.⁶

1. *Beauchamp v. Higgins*, 20 Mo. App. 514; *Wetzell v. Wagoner*, 41 Mo. App. 509; *Campbell v. Vanstone*, 73 Mo. App. 84.

2. **Burden of Proof.** — *Newton v. Ritchie*, 75 Iowa 91; *Hodgman v. Thomas*, 37 Neb. 568; *Bellsheim v. Palm*, 54 N. Y. App. Div. 77; *Colwell v. Tompkins*, 6 N. Y. App. Div. 93, *affirmed* 158 N. Y. 690; *Gale v. Roll*, 75 Hun (N. Y.) 14; *Woolley v. Buhler*, 73 Hun (N. Y.) 158; *Kifer v. Yoder*, 198 Pa. St. 308.

3. **Question of Fact.** — *Murray v. Currie*, 7 C. & P. 584, 32 E. C. L. 641; *Mansell v. Clements*, L. R. 9 C. P. 139; *Duncan v. Kearney*, 72 Conn. 585; *Kelso v. Woodruff*, 88 Mich. 299; *Brooks v. Leathers*, 112 Mich. 463; *West v. Demme*, (Mich. 1901) 87 N. W. Rep. 95; *Holschen v. Fehlig*, 55 Mo. App. 375; *Crone v. Mississippi Valley Trust Co.*, 85 Mo. App. 601; *Palmer v. Durand*, 62 N. Y. App. Div. 467; *Walton v. Cheseborough*, (Supm. Ct. App. Div.) 57 N. Y. Supp. 687, 39 N. Y. App. Div. 665, *affirmed* 167 N. Y. 606; *Bell v. Siemens*, etc., *Electric Co.*, 101 Wis. 320.

4. *Cobb v. Kenner*, (Tenn. 1897) 42 S. W. Rep. 277; *Lyle v. University Land & Inv. Co.*, (Tex. Civ. App. 1895) 30 S. W. Rep. 723.

5. **Necessity for Employment** — *Colorado*. — *Merrill v. Lathan*, 8 Colo. App. 263; *Duncan v. Borden*, 13 Colo. App. 481.

Connecticut. — See *Morehouse v. Remson*, 59 Conn. 392.

Illinois. — *Day v. Hale*, 50 Ill. App. 115.

Kentucky. — *Jones v. Brand*, 106 Ky. 410.

Maryland. — *Canby v. Frick*, 8 Md. 163.

Minnesota. — *Walton v. Clark*, 54 Minn. 341.

Nebraska. — *Huffman v. Ellis*, (Neb. 1902) 90 N. W. Rep. 552.

New Jersey. — *Callaway v. Equitable Trust Co.*, (N. J. 1902) 50 Atl. Rep. 900.

New York. — *Myers v. Dean*, 132 N. Y. 65; *Goodspeed v. Robinson*, 1 Hilt. (N. Y.) 423; *Loeffler v. Friedman*, (Supm. Ct. Gen. T.) 26 Misc. (N. Y.) 750; *Benedict v. Pell*, 70 N. Y. App. Div. 40; *Fish v. Calvin*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 64; *Bonwell v. Howes*, 15 Daly (N. Y.) 43; *Fowler v. Hoshke*, 53 N. Y. App. Div. 327; *Whitehouse v. Drisler*, 37 N. Y. App. Div. 525. See also *Curry v. Terry*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 797, 69 N. Y. Supp. 932; *Smyth v. Mack*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 347; *Hollev v. Townsend*, (C. Pl. Gen. T.) 16 How. Pr. (N. Y.) 125.

Pennsylvania. — *Copeland v. Stoneham Tannery Co.*, 142 Pa. St. 446; *Hartley v. Anderson*, 150 Pa. St. 391.

Texas. — *Burnett v. Edling*, 19 Tex. Civ. App. 711; *Meston v. Davies*, (Tex. Civ. App. 1896) 36 S. W. Rep. 805; *Pipkin v. Horne*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1000.

See also *Dunn v. Price*, 87 Tex. 318; *Hand v. Conger*, 71 Wis. 292.

Employment Must Be in Force When Services Rendered. — See *Hensel v. Maas*, 94 Mich. 563.

An Employment to Sell to a Particular Person does not entitle the broker to commissions on a sale to another person. *Breen v. Ravis*, (Supm. Ct. App. Div.) 44 N. Y. Supp. 672, 16 N. Y. App. Div. 632.

Admissibility of Evidence on Question of Employment — *Colorado*. — *Dexter v. Collins*, 21 Colo. 455.

Illinois. — *Boyd v. Jennings*, 46 Ill. App. 290.

Michigan. — *Waterman Real Estate Exch. v. Stephens*, 71 Mich. 104; *Moore v. Daiber*, 92 Mich. 402; *Horwitz v. Pepper*, (Mich. 1901) 87 N. W. Rep. 1034.

Missouri. — *Childs v. Crithfield*, 66 Mo. App. 422.

New Hampshire. — *Jackson v. Higgins*, 70 N. H. 637.

Washington. — *Going v. Cook*, 1 Wash. 224; *Dillon v. Folshom*, 5 Wash. 439.

Parol Evidence Admissible. — *Houston v. Boagni*, McGloin (La.) 164.

Declaration of Broker as to Employment Not Admissible. — *Ehrenworth v. Putnam*, (Tex. Civ. App. 1900) 55 S. W. Rep. 190.

Facts or Evidence Sufficient to Show Employment. — *Eichberg v. Ware*, 92 Ga. 508; *Ellis v. Dunsworth*, 49 Ill. App. 187; *Stephens v. Scott*, 43 Kan. 285; *Hall v. Grace*, 179 Mass. 400; *Crevier v. Stephen*, 40 Minn. 288; *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587.

Facts Not Showing Employment. — *Duncan v. Borden*, 13 Colo. App. 481; *Thomas v. Merrifield*, 7 Kan. App. 660; *Rees v. Spruance*, 45 Ill. 308; *Fowler v. Hoshke*, 53 N. Y. App. Div. 327; *White v. Templeton*, 79 Tex. 454; *Ehrenworth v. Putnam*, (Tex. Civ. App. 1900) 55 S. W. Rep. 190.

Evidence of Acceptance of Employment. — *Bornstein v. Lans*, 104 Mass. 214.

Where the Broker Forms a Partnership After His Employment and the efforts of the firm result in a sale the partners may sue jointly as a firm for the commission. *Welsh v. Lemert*, 92 Iowa 116.

6. **Acceptance and Ratification.** — *Duncan v. Borden*, 13 Colo. App. 481; *Viley v. Pettit*, 96

The Time of Employment Is Immaterial when the broker was actually employed.¹

(2) *Burden of Proof*.—The burden of proving the existence of the employment is upon the person claiming compensation for his services.²

(3) *Question for Jury*.—Whether or not there was an employment of the broker who claims commissions is a question for the jury on conflicting evidence.³

c. *NECESSITY FOR LICENSE*.—In some jurisdictions it has been asserted that a broker doing business without a license required by statute or ordinance is not entitled to recover any compensation for his services,⁴ but in others the rule is that the broker's failure to procure a license will not deprive him of his right to commissions, where the loss of commissions is not one of the penalties provided for doing business without a license.⁵

Contract for Fixed Amount.—In *Pennsylvania* the rule is that a person who is not a licensed real-estate dealer has no right to recover commissions for the sale of real property unless he has a contract fixing a specific amount. If, however, there is such a contract the person employed to make the sale may recover upon it.⁶

d. *NECESSITY FOR AGREEMENT TO PAY COMMISSIONS*.—While a broker cannot recover for his services in the sale of property in the absence of any agreement on the part of the owner of the property to compensate him therefor,⁷ it is not necessary that such agreement be express, but it may be implied from the contract of employment⁸ or the acceptance of the broker's services

Ky. 576; *Jones v. Brand*, 106 Ky. 410; *Copeland v. Stoneham Tannery Co.*, 142 Pa. St. 446; *Hartley v. Anderson*, 150 Pa. St. 391.

Knowledge Necessary to Ratification.—*Merrill v. Lathan*, 8 Colo. App. 263.

Facts Showing Ratification.—*Lyle v. Bennett*, (Supm. Ct. Tr. T.) 34 Misc. (N. Y.) 476.

A Promise to Pay for services rendered shows an intention to ratify a previous unauthorized employment by the promisor's attorney. *Markham v. Washburn*, (C. Pl. Gen. T.) 18 N. Y. Supp. 355.

Facts Not Showing Ratification.—*Fowler v. Hoshcke*, 53 N. Y. App. Div. 327.

1. *Crevier v. Stephen*, 40 Minn. 288. See also *Donohue v. Padden*, 93 Wis. 20.

2. *Burden of Proof*.—*Morehouse v. Remson*, 59 Conn. 392; *Hammond v. Mitchell*, 61 Ill. App. 144; *Huffman v. Ellis*, (Neb. 1902) 90 N. W. Rep. 552; *Strawbridge v. Swan*, 43 Neb. 781; *Goodspeed v. Robinson*, 1 Hilt. (N. Y.) 423; *Loeffler v. Friedman*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 750; *Gale v. Roll*, 75 Hun (N. Y.) 14.

3. *Stewart v. Woodward*, 7 Kan. App. 633; *Brooks v. Leathers*, 112 Mich. 463; *Myers v. Dean*, 132 N. Y. 65; *Palmer v. Durand*, 62 N. Y. App. Div. 467; *De Mars v. Boehm*, (N. Y. City Ct. Gen. T.) 6 Misc. (N. Y.) 38; *Tinkham v. Knox*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 579, *affirming* (N. Y. City Ct. Gen. T.) 46 N. Y. St. Rep. 20.

4. *Necessity for License*.—*Eckert v. Collot*, 46 Ill. App. 361; *Saule v. Ryan*, (Tenn. 1899) 53 S. W. Rep. 977. See also *Cobb v. Kenner*, (Tenn. 1897) 42 S. W. Rep. 277. See the titles *BROKERS*, vol. 4, p. 982, notes 4 and 6; *OCCUPATION, BUSINESS, AND PRIVILEGE TAXES*, vol. 21, p. 823, note 12.

Proof of License Not Necessary in First Instance.—*Weaver v. Snow*, 60 Ill. App. 624; *Munson v. Fenno*, 87 Ill. App. 655. See also *Friestedt v. Dietrich*, 84 Ill. App. 604.

Construction of License Ordinance.—*Hamilton v. Harvey*, 33 Ill. App. 499; *Spear v. Bull*, 49 Ill. App. 348.

Evidence as to License—Burden of Proof.—*Eckert v. Collot*, 46 Ill. App. 361.

Pennsylvania Statutes Construed.—*Jadwin v. Hurley*, 10 Pa. Super. Ct. 104.

5. *License Not Necessary*.—*Houston v. Boagni*, McGloin (La.) 164; *Prince v. Eighth St. Baptist Church*, 20 Mo. App. 332; *Amato v. Dreyfus*, (Tex. Civ. App. 1896) 34 S. W. Rep. 450. See also the title *BROKERS*, vol. 4, p. 982, note 5.

6. *Coles v. Meade*, 5 Pa. Super. Ct. 334. See also *Yedinsky v. Strouse*, 6 Pa. Super. Ct. 587; *Chadwick v. Collins*, 26 Pa. St. 138.

7. *Coffin v. Linxweiler*, 34 Minn. 320; *Whitehouse v. Drisler*, 37 N. Y. App. Div. 525; *Dunn v. Price*, 87 Tex. 318; *Meston v. Davies*, (Tex. Civ. App. 1896) 36 S. W. Rep. 805; *Pipkin v. Horne*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1000. See also *Martin v. Bliss*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 686.

Power of Attorney to Bind Client to Pay Commissions.—*Callaway v. Equitable Trust Co.*, (N. J. 1902) 50 Atl. Rep. 900.

Consideration for Employer's Agreement to Pay.—*Myers v. Dean*, 132 N. Y. 65.

When Agreement Need Not Be in Writing.—*Griffith v. Daly*, 56 N. J. L. 466.

When the Broker Is Told that He Must Look to the Purchaser for his commissions he cannot recover from the owner. *King v. Benson*, 22 Mont. 256.

8. *Implied Agreement to Pay*.—*Ford v. Brown*, 120 Cal. 551; *Weinhouse v. Cronin*, 68 Conn. 250; *Nolan v. Swift*, 111 Mich. 56; *Bonwell v. Auld*, (C. Pl. Gen. T.) 9 Misc. (N. Y.) 65. See also *Harrison v. Long*, 4 Desaus. (S. Car.) 110.

The law favors that construction of the contract and that interpretation of the circumstances and the conduct of the parties which will best secure to the broker the payment of

with knowledge that he expects to be paid therefor.¹

e. COMPENSATION DEPENDENT UPON SUCCESS. — As a general rule and in the absence of any contrary provision in his contract, the broker is entitled to be compensated for his efforts only in case they meet with success, unless the failure is attributable to the fault of his employer. It matters not how great have been his efforts nor how meritorious his services, if he is unsuccessful in accomplishing the object of his employment he is entitled to nothing.²

In Pennsylvania, however, it has been held that an agent employed to sell land may, upon his authority being revoked, recover on a *quantum meruit* for his services in attempting to sell.³

f. SERVICES NEED NOT BE BENEFICIAL. — It has been said that if a real-estate broker fully discharges his duty and performs all he undertakes to do he is entitled to compensation for his services whether or not they are in fact beneficial to his employer.⁴

g. KNOWLEDGE OF OWNER THAT CUSTOMER SENT BY BROKER. — Where the sale is made by the owner to a purchaser procured and sent to him by the broker, who is thus the procuring cause of the sale, it is not necessary, to entitle the broker to his compensation, that the owner should have known that the person to whom he sold was sent by the broker or that the latter had any connection with the sale.⁵

h. SALE THROUGH EFFORTS OF BROKER'S SUB-AGENT OR EMPLOYEE. — Where the sale results from the efforts of a sub-agent or employee of the broker, he has the same right to his commissions as though the sale had been the result of his own personal efforts,⁶ though it has been held otherwise where the sub-agent concealed from the owner the fact that he was acting for the broker.⁷

i. SALE DIRECTLY BY OWNER — (1) *General Rule.* — The owner of property who, desiring to dispose of it, employs a broker for that purpose, does not thereby relinquish the right to endeavor to sell it himself, and he may dispose of the property to a purchaser found by his independent efforts without any liability to the broker for commissions on, or compensation for, the

his commissions. *Duncan v. Borden*, 13 Colo. App. 481.

When the Action Is Based upon an Express Promise, this must be shown in order to entitle the broker to recovery, as in such case no implied agreement is involved. *Harrison v. Pusteoska*, 97 Iowa 166.

1. *Weinhouse v. Cronin*, 68 Conn. 250.

The Owner Must Know of the Expectation of Payment, and there can be no recovery where he did not know this and the person claiming commissions did not announce himself to the owner, before the sale, as a broker. *Fraser v. Born*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 591.

It Is a Question for the Jury whether the broker's services were intended to be rendered gratuitously or whether they were understood between the parties to be rendered for the usual compensation allowed to brokers on similar transactions. *Darling v. Howe*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 561.

2. Compensation Dependent upon Success — *Maine*. — *Garcelon v. Tibbetts*, 81 Me. 148.

Massachusetts. — *Cadigan v. Crabtree*, 179 Mass. 474.

Michigan. — *West v. Demme*, (Mich. 1901) 87 N. W. Rep. 95.

Missouri. — *Green v. Wright*, 36 Mo. App. 298.

Nebraska. — *Langshorst v. Coon*, 53 Neb. 765. Compare *McMurtry v. Madison*, 18 Neb. 291.

New York. — *McCloskey v. Thompson*, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 735; *White v. Twitchings*, 26 Hun (N. Y.) 503; *Ware v. Dos Passos*, 4 N. Y. App. Div. 32.

North Carolina. — *Abbott v. Hunt*, 129 N. Car. 403.

Pennsylvania. — *Pierce v. Truitt*, (Pa. 1888) 12 Atl. Rep. 661.

Texas. — *Duval v. Moody*, 24 Tex. Civ. App. 627.

3. *Jaekel v. Caldwell*, 156 Pa. St. 266; *Vincent v. Woodland Oil Co.*, 165 Pa. St. 402.

4. *Schwartz v. Yearly*, 31 Md. 270. See also *Hart v. Hopson*, 52 Mo. App. 177.

5. **Knowledge of Owner Not Necessary** — *Illinois*. — *Adams v. Decker*, 34 Ill. App. 17.

Indiana. — See *Clifford v. Meyer*, (Ind. App. 1893) 33 N. E. Rep. 127.

Iowa. — *Rounds v. Allee*, (Iowa 1902) 89 N. W. Rep. 1098; *Kelly v. Stone*, 94 Iowa 316.

Missouri. — *Geffe v. Gibson*, 18 Mo. App. 1; *Millan v. Porter*, 31 Mo. App. 563.

Nebraska. — *Craig v. Wead*, 58 Neb. 782.

6. Sale through Sub-agent or Employee. — *Leech v. Clemons*, 14 Colo. App. 45; *Munson v. Fenno*, 87 Ill. App. 655; *Mullen v. Bower*, 26 Ind. App. 253; *Boyd v. Watson*, 101 Iowa 214. See also *Antrobus v. Wickens*, 4 F. & F. 291.

7. *Mullen v. Bower*, 22 Ind. App. 294.

Concealment a Question for Jury. — *Mullen v. Bower*, 22 Ind. App. 294.

sale.¹ It is, however, essential that in so doing he should act in good faith, for he cannot be permitted to deprive the broker of his compensation by stepping in after the broker has found a person ready, willing, and able to purchase the property or to make a satisfactory exchange, and concluding the transaction directly with the broker's customer to the exclusion of the broker.²

(2) *Contracts Varying the Rule.* — In some cases the contract between the owner and the broker is such as to deprive the owner of the right stated in the preceding section to sell by his own efforts without liability to the broker.³ This is the case where the owner gives to the broker the exclusive and irrevocable right to sell for a specified time,⁴ or undertakes to pay a commission on all sales within a certain time no matter by whom made.⁵

j. FULL DUTY MUST BE PERFORMED — (1) *General Rule Stated.* — The

1. *Sale by Owner* — *Alabama.* — Henderson v. Vincent, 84 Ala. 99; Cook v. Forst, 116 Ala. 395.

Illinois. — Metzen v. Wyatt, 41 Ill. App. 487; Curtis v. Wagner, 98 Ill. App. 345.

Kentucky. — Hobbs v. Miller, 14 Ky. L. Rep. 719; Tamplet v. Saffel, 15 Ky. L. Rep. 94.

Minnesota. — Armstrong v. Wann, 29 Minn. 126; Putnam v. How, 39 Minn. 363; Cathcart v. Bacon, 47 Minn. 34.

Nebraska. — Buck v. Hogeboom, (Neb. 1902) 90 N. W. Rep. 635.

New York. — Goldsmith v. Cook, (C. Pl. Gen. T.) 14 N. Y. Supp. 878; Brumfield v. Pottier, etc., Mfg. Co., (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 92. See also Bennett v. Kidder, 5 Daly (N. Y.) 512.

Texas. — McLane v. Maurer, (Tex. Civ. App. 1902) 66 S. W. Rep. 693.

Wisconsin. — Darrow v. Harlow, 21 Wis. 302, 94 Am. Dec. 541.

2. *Sale to or Exchange with Broker's Customer* — *Alabama.* — Day v. Porter, 60 Ill. App. 386, affirmed 161 Ill. 235; Cook v. Forst, 116 Ala. 395.

Arkansas. — Boysen v. Robertson, (Ark. 1902) 68 S. W. Rep. 243.

Colorado. — Williams v. Bishop, 11 Colo. App. 378.

Georgia. — Gresham v. Connally, 114 Ga. 906.

Illinois. — Biester v. Evans, 59 Ill. App. 181.

Indiana. — Barnett v. Gluting, 3 Ind. App. 415; Mullen v. Bower, 26 Ind. App. 253.

Louisiana. — Lestrade v. Perrera, 6 La. Ann. 398.

Maine. — Veazie v. Parker, 72 Me. 443 (this was a case of an ice broker).

Maryland. — Attrill v. Patterson, 58 Md. 226.

Kentucky. — Tamplet v. Saffel, 15 Ky. L. Rep. 94.

Minnesota. — Armstrong v. Wann, 29 Minn. 126; Putnam v. How, 39 Minn. 363.

New York. — Esmond v. Kingsley, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 696; Hobbs v. Edgar, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 618, affirming (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 510; Woolley v. Loew, 80 Hun (N. Y.) 294; Briggs v. Rowe, 1 Abb. App. Dec. (N. Y.) 189. See also Fox v. Byrnes, 52 N. Y. Super. Ct. 150.

Pennsylvania. — Gibson's Estate, 161 Pa. St. 177, affirming 14 Pa. Co. Ct. 241.

Tennessee. — Glascock v. Vanfleet, 100 Tenn. 603.

Texas. — McLane v. Maurer, (Tex. Civ. App. 1902) 66 S. W. Rep. 693.

See also *supra*, this section, 1. *a. General Rule.*

Where the Broker Has Been Unsuccessful in his endeavors to sell to a certain person, and the negotiations have been broken off or the broker's authority revoked, he is not entitled to a commission because the owner subsequently sells the property to the same person at a smaller price or on terms less favorable to the owner, such sale being the result of independent negotiations and there being no evidence of collusion between the owner and the purchaser to deprive the broker of his commissions. Bailey v. Smith, 103 Ala. 641; Cullen v. Bell, 43 Miss. 226.

3. *Contract to Pay Half Commissions on Sale if Brokers Abstain from Further Efforts to Sell.* — Ware v. Kerwin, 24 N. Y. App. Div. 198.

4. *Exclusive Authority to Sell.* — Blood v. Shannon, 29 Cal. 393; Attix v. Pelan, 5 Iowa 336; Metcalf v. Kent, 104 Iowa 487; Wright v. Beach, 82 Mich. 469; Green v. Cole, 127 Mo. 587; Levy v. Rothe, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 402; Schultz v. Griffin, (Buffalo Super. Ct. Tr. T.) 5 Misc. (N. Y.) 499; Stringfellow v. Powers, 4 Tex. Civ. App. 199.

Broker Must Prove His Exclusive Right to Sell. — Wyckoff v. Taylor, 13 Daly (N. Y.) 564.

Validity of Such Agreement. — Gregory v. Bonney, 135 Cal. 589.

Mutuality. — Where the broker has accepted as binding, and acted upon, such an agreement, it is not void for lack of mutuality because signed only by the owner. Attix v. Pelan, 5 Iowa 336. But see *contra*, Stensgaard v. Smith, 43 Minn. 11, 19 Am. St. Rep. 205.

Consideration. — The time and labor, and the expenditures of the broker in endeavoring to sell are a sufficient consideration for a promise to give him the exclusive right to sell for a specified time. Attix v. Pelan, 5 Iowa 336. See also Metcalf v. Kent, 104 Iowa 487.

5. *Commissions on All Sales.* — Shainwald v. Cady, 92 Cal. 83; Crane v. McCormick, 92 Cal. 176; Kimmell v. Skelly, 130 Cal. 555; Goward v. Waters, 98 Mass. 596. See also Campbell v. Thomas, 87 Cal. 428.

Consideration. — Hoskins v. Fogg, 60 N. H. 402.

Seal on Agreement Imports Consideration. — Owens v. Wehrle, 14 Pa. Super. Ct. 536.

Acceptance of Agreement Signed Only by Owner. — Lapham v. Flint, (Minn. 1902) 90 N. W. Rep. 780.

Commissions Payable Only on Actual Sales. — Terry v. Wilson, 50 Minn. 570.

general rule is that in order for a real-estate broker to be entitled to compensation or commissions he must have performed his full duty towards his employer and have accomplished all he undertook to do.¹ That is to say, he must, as a general rule, have found and produced a person who was ready, willing, and financially able to purchase, lease, or make an exchange for his employer's property at the price and upon the terms fixed by his employer, or to make a loan of the required amount for the time and upon the terms and security which his employer offers, or, in the case of an employment to purchase, he must secure the property for his employer at the price and upon the terms specified.² His duty having been fully performed, he then becomes

1. Full Duty Must Be Performed. — *Gilbert v. Judson*, 85 Cal. 105; *Manby v. Turner*, 13 Colo. App. 358; *Lawrence v. Rhodes*, 188 Ill. 96; *Harkness v. Briscoe*, 47 Mo. App. 196; *Armstrong v. O'Brien*, 83 Tex. 635; *Eidson v. Saxon*, (Tex. Civ. App. 1895) 30 S. W. Rep. 957.

2. What Constitutes Duty of Broker — *England*. — *Mason v. Clifton*, 3 F. & F. 899.

United States. — *McGavock v. Woodlief*, 20 How. (U. S.) 221; *Sullivan v. Milliken*, (C. C. A.) 113 Fed. Rep. 93. See also *Hammond v. Crawford*, (C. C. A.) 66 Fed. Rep. 425.

Alabama. — *Henderson v. Vincent*, 84 Ala. 99; *Cook v. Forst*, 116 Ala. 396.

California. — *Masten v. Griffing*, 33 Cal. 111; *Phelps v. Prusch*, 83 Cal. 626; *Daley v. Russ*, 86 Cal. 114; *Fiske v. Soule*, 87 Cal. 313; *Martin v. Ede*, 103 Cal. 157; *Lindley v. Fay*, 119 Cal. 239; *Coward v. Clanton*, 122 Cal. 451; *Blumenthall v. Goodall*, (Cal. 1890) 25 Pac. Rep. 131.

Colorado. — *Babcock v. Merritt*, 1 Colo. App. 84; *Carson v. Baker*, 2 Colo. App. 248; *Lawrence v. Weir*, 3 Colo. App. 401; *Millett v. Barth*, 18 Colo. 112; *Farmer v. Phelps*, 18 Colo. 126.

District of Columbia. — *Mannix v. Hildreth*, 2 App. Cas. (D. C.) 259; *Jones v. Holladay*, 2 App. Cas. (D. C.) 279.

Illinois. — *Kerfoot v. Steele*, 113 Ill. 610; *Peabody v. Dewey*, 153 Ill. 657, *affirming* 51 Ill. App. 260; *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Goodridge v. Holladay*, 18 Ill. App. 363; *Illingsworth v. Slosson*, 19 Ill. App. 612; *Leahy v. Hair*, 33 Ill. App. 461; *Greene v. Hollingshead*, 40 Ill. App. 195; *Metzen v. Wyatt*, 41 Ill. App. 487; *Smith v. Keeler*, 51 Ill. App. 267, *affirmed* 151 Ill. 518; *Lang v. Hand*, 57 Ill. App. 134; *Hammond v. Mitchell*, 61 Ill. App. 144; *Jenkins v. Hollingsworth*, 83 Ill. App. 139.

Indiana. — *Higman v. Hood*, 3 Ind. App. 456; *Vinton v. Baldwin*, 95 Ind. 433; *Lockwood v. Rose*, 125 Ind. 588.

Iowa. — *Iselin v. Griffith*, 62 Iowa 668; *Blodgett v. Sioux City, etc.*, R. Co., 63 Iowa 606; *Dent v. Powell*, 93 Iowa 711; *Hurd v. Neilson*, 100 Iowa 555; *Smith v. Allen*, 101 Iowa 608.

Kansas. — *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718; *Davis v. Lawrence*, 52 Kan. 383.

Kentucky. — *Higgins v. Miller*, (Ky. 1900) 58 S. W. Rep. 580.

Maine. — *Garcelon v. Tibbetts*, 84 Me. 148.

Massachusetts. — *Burnham v. Upton*, 174 Mass. 408; *Caston v. Quimby*, 178 Mass. 153.

Michigan. — *McCreery v. Green*, 38 Mich. 172; *Scribner v. Hazeltine*, 79 Mich. 370; *Han-*

nan v. Fisher, 82 Mich. 208; *Wright v. Beach*, 82 Mich. 469; *Antisdel v. Canfield*, 119 Mich. 229; *Hannan v. Prentis*, 124 Mich. 417.

Minnesota. — *Armstrong v. Wann*, 29 Minn. 126; *Goss v. Stevens*, 32 Minn. 472; *Putnam v. How*, 39 Minn. 363; *Grosse v. Cooley*, 43 Minn. 188; *Peet v. Sherwood*, 47 Minn. 347; *Hubachek v. Hazzard*, 83 Minn. 437; *Fairchild v. Cunningham*, 84 Minn. 521.

Missouri. — *Blackwell v. Adams*, 28 Mo. App. 61; *Millan v. Porter*, 31 Mo. App. 563; *Harwood v. Triplett*, 34 Mo. App. 273; *Zeidler v. Walker*, 41 Mo. App. 118; *Cox v. Bowling*, 54 Mo. App. 289; *Brauckman v. Leighton*, 60 Mo. App. 38; *Chiple v. Leathe*, 60 Mo. App. 15; *Hackmann v. Gutweiler*, 66 Mo. App. 244; *Childs v. Crithfield*, 66 Mo. App. 422; *Warren v. Cram*, 71 Mo. App. 638; *Yoder v. White*, 75 Mo. App. 155; *Finley v. Dyer*, 79 Mo. App. 604; *Butts v. Ruby*, 85 Mo. App. 405.

Nebraska. — *Langhorst v. Coon*, 53 Neb. 765; *Stewart v. Smith*, 50 Neb. 631; *Hodgman v. Thomas*, 37 Neb. 568; *Huffman v. Ellis*, (Neb. 1902) 90 N. W. Rep. 552.

New Hampshire. — *Parker v. Estabrook*, 68 N. H. 349.

New Jersey. — See *Dickinson v. Updike*, (N. J. 1901) 49 Atl. Rep. 712.

New York. — *Briggs v. Rowe*, 1 Abb. App. Dec. (N. Y.) 189; *Gerding v. Haskin*, 141 N. Y. 514; *Smith v. Nicoll*, 91 Hun (N. Y.) 173, *affirmed* 158 N. Y. 606; *Curtiss v. Mott*, 90 Hun (N. Y.) 439; *Woolley v. Lowenstein*, 83 Hun (N. Y.) 155; *Crandall v. Phillips*, 13 N. Y. App. Div. 118; *Heinrich v. Korn*, 4 Daly (N. Y.) 74; *Burling v. Gunther*, 12 Daly (N. Y.) 6; *Barnes v. Roberts*, 5 Bosw. (N. Y.) 73; *Conduct v. Cowdrey*, 57 N. Y. Super. Ct. 66, *reversed* on other grounds 123 N. Y. 463; *Powell v. Lamb*, (N. Y. City Ct. Gen. T.) 1 N. Y. Supp. 431. See also *Finck v. Menke*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 769, 67 N. Y. Supp. 954; *Steinfeld v. Storm*, (N. Y. City Ct. Gen. T.) 31 Misc. (N. Y.) 167.

North Carolina. — *Mallonee v. Young*, 119 N. Car. 549.

Ohio. — *Woolley v. Schmal*, 5 Ohio Cir. Ct. Rep. 76, 3 Ohio Cir. Dec. 39.

South Dakota. — *Howie v. Bratrud*, 14 S. Dak. 648.

Texas. — *O'Brien v. Gilliland*, 4 Tex. Civ. App. 40; *Burnett v. Edling*, 19 Tex. Civ. App. 711; *Kiam v. Turner*, 21 Tex. Civ. App. 417; *Montgomery v. Biering*, (Tex. Civ. App. 1895) 30 S. W. Rep. 508; *Thornton v. Stevenson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 232; *Howell v. Denton*, (Tex. Civ. App. 1902) 68 S. W. Rep. 1002.

Virginia. — *Crockett v. Grayson*, 98 Va. 354.

entitled to his compensation.¹

(2) *Minds of Parties Must Meet.* — A broker cannot recover commissions where the mind of his employer and that of the customer produced by him never met as to a sale or exchange and none was actually made.²

Washington. — Jones v. Eilenfeldt, (Wash. 1902) 69 Pac. Rep. 368.

Wisconsin. — Ames v. Lamont, 107 Wis. 531. See also Darrow v. Harlow, 21 Wis. 302, 94 Am. Dec. 541.

Presumption of Solvency of Purchaser. — Grosse v. Cooley, 43 Minn. 188; Krahner v. Heilman, 16 Daly (N. Y.) 132.

The Customer or His Written Contract Must Be Produced. — Gunn v. State Bank, 99 Cal. 349; Hayden v. Grillo, 35 Mo. App. 647; Stinde v. Scharff, 36 Mo. App. 15; Hackmann v. Gutweiler, 66 Mo. App. 244; Huggins v. Hearne, 74 Mo. App. 86. See also Fisher, etc., Real Estate Co v. Stated Realty Co., 159 Mo. 562.

Unless This Is Waived by the Owner. — Gerhart v. Peck, 42 Mo. App. 644.

Procuring of Option Contract Not Sufficient. — Block v. Ryan, 4 App. Cas. (D. C.) 283; Reiger v. Bigger, 29 Mo. App. 421; Zeidler v. Walker, 41 Mo. App. 118; Butts v. Ruby, 85 Mo. App. 405; Dwyer v. Raborn, 6 Wash. 213; Jones v. Eilenfeldt, (Wash. 1902) 69 Pac. Rep. 368. See also Crockett v. Grayson, 98 Va. 354.

A Broker Is Not Entitled to a Pro Tanto Commission where he is employed to obtain a deed for a one-half interest in certain property, and only succeeds in obtaining a deed for a one-third interest. Witte v. Taylor, 110 Cal. 224.

Customer Must Be Able to Contract. — A broker is not entitled to commissions for procuring a lease where one of the proposed lessors is a minor who will attain his majority before the expiration of the term of the lease. Folsom v. Hesse, (Supm. Ct. App. T.) 24 Misc. (N. Y.) 713.

Unlawful Device. — Where the purchaser cannot perform without resorting to an unlawful device, the broker is not entitled to commissions. Zittle v. Schlesinger, 46 Neb. 844.

Where the Broker Is Intrusted with the Closing of the Contract with the purchaser, he must, in order to be entitled to commissions, procure a purchaser who enters into a binding and enforceable contract for the purchase of the property. Harris v. McKinley, 57 Minn. 108.

Where the Terms of Sale Are Not Definitely Fixed, the broker must, in order to be entitled to a commission, procure a purchaser whose terms are so satisfactory to the owner that a definite arrangement may be made in respect to which the minds of the parties may meet. Forrester v. Price, (N. Y. Super. Ct. Gen. T.) 6 Misc. (N. Y.) 308.

Promise to Pay Commission for Securing "Location" of Factory. — See Harvey v. Hamilton, 155 Ill. 377, affirming 54 Ill. App. 507.

1. *United States.* — Watson v. Brooks, 13 Fed. Rep. 540.

California. — Smith v. Schiele, 93 Cal. 144. *Colorado.* — Hildenbrand v. Lillis, 10 Colo. App. 522.

Illinois. — Lawence v. Atwood, 1 Ill. App. 217; McConaughy v. Mahannah, 28 Ill. App. 160; Foster v. Wynn, 51 Ill. App. 401.

Indiana. — Indiana Bermudez Asphalt Co.

v. Robinson, (Ind. App. 1902) 63 N. E. Rep. 797.

Massachusetts. — Fitzpatrick v. Gilson, 176 Mass. 477.

Minnesota. — Burke v. Cogswell, 39 Minn. 344; Cullen v. Bell, 43 Minn. 226.

Missouri. — Love v. Owens, 31 Mo. App. 501.

Nebraska. — Jones v. Stevens, 36 Neb. 849; Siemssen v. Homan, 35 Neb. 892; Traynor v. Morse, 55 Neb. 595; Barber v. Hildebrand, 42 Neb. 400.

New York. — Smith v. Smith, 1 Sweeny (N. Y.) 552; Schlesinger v. Judd, 61 N. Y. App. Div. 453; Inge v. McCreery, 60 N. Y. App. Div. 557; Miller v. Barth, (N. Y. City Ct. Gen. T.) 35 Misc. (N. Y.) 372; Chambers v. Peters, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 756; Van Orden v. Morris, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 497, affirming (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 579; Moses v. Helmke, (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 357; Levy v. Ruff, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 180, affirming (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 147.

Pennsylvania. — Hartley v. Anderson, 150 Pa. St. 391.

South Dakota. — McLaughlin v. Wheeler, 1 S. Dak. 497.

Texas. — Gibson v. Gray, 17 Tex. Civ. App. 646; Sullivan v. Hampton, (Tex. Civ. App. 1895) 32 S. W. Rep. 235; Brackenridge v. Claridge, 91 Tex. 527; McLane v. Maurer, (Tex. Civ. App. 1902) 66 S. W. Rep. 693; McLane v. Goode, (Tex. Civ. App. 1902) 68 S. W. Rep. 707. See also Orynski v. Menger, 15 Tex. Civ. App. 448.

Utah. — Lawson v. Thompson, 10 Utah 462.

Washington. — Barnes v. German Sav., etc., Soc., 21 Wash. 448.

Wisconsin. — Donohue v. Padden, 93 Wis. 20. See also cases cited in the preceding note.

2. **Minds of Parties Must Meet** — *Connecticut.* — Rockwell v. Newton, 44 Conn. 333.

Kentucky. — Stratton v. Samuel H. Jones Co., (Ky. 1899) 50 S. W. Rep. 33.

Minnesota. — See Buxton v. Beal, 49 Minn. 230.

Nebraska. — Morrill v. Davis, 27 Neb. 775.

New York. — Mainhart v. Poerschke, (Supm. Ct. App. T.) 32 Misc. (N. Y.) 97; Rohner v. Lenisch, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 315; Loeffler v. Friedman, (Supm. Ct. App. T.) 26 Misc. (N. Y.) 750; Byrne v. Korn, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 509; Bennett v. Egan, (N. Y. Super. Ct. Gen. T.) 3 Misc. (N. Y.) 421; Condict v. Cowdrey, 57 N. Y. Super. Ct. 66, reversed on other grounds 123 N. Y. 463; Bruce v. Hurlbut, 47 N. Y. App. Div. 163, affirmed 54 N. Y. App. Div. 616; Pullich v. Casey, 43 N. Y. App. Div. 122.

Pennsylvania. — Michener v. Beirn, 9 Pa. Co. Ct. 637.

Offer Held Sufficiently Definite. — The employer cannot escape liability for the broker's commissions on the ground that the minds of the parties never met as to what lands were to be conveyed, where the purchaser produced

(3) *Broker Entitled to Commissions Where Binding Contract of Sale Made.*—

The general rule is that where the purchaser presented by the broker is accepted by his employer and they enter into a binding, valid, and enforceable contract of sale, the broker is entitled to his commissions, whether or not the contract is actually carried into effect and the sale made.¹

by the broker was ready to purchase the land offered for sale and described as "two hundred and ninety thousand feet of land to be taken from" a parcel of five hundred thousand square feet, "said two hundred and ninety thousand feet to be divided as to front and back lands from the whole parcel as nearly equal as possible." *Monk v. Parker*, 180 Mass. 246.

Where a Dispute over Taxes Prevented the Sale the broker was not entitled to a commission, the minds of the parties not having met. *Gothmann v. Meyer*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 810, 63 N. Y. Supp. 971.

1. Broker Entitled to Commissions Where Binding Contract of Sale Made—*Georgia*.—*Odell v. Dozier*, 104 Ga. 203.

Illinois.—*Pratt v. Hotchkiss*, 10 Ill. App. 603; *Granger v. Griffin*, 43 Ill. App. 421; *Foster v. Wynn*, 51 Ill. App. 401; *Springer v. Orr*, 82 Ill. App. 558; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Friedstedt v. Dietrich*, 84 Ill. App. 604; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, *affirming* 57 Ill. App. 325.

Iowa.—*Burns v. Oliphant*, 78 Iowa 456.

Kansas.—*Betz v. Williams, etc., Land, etc., Co.*, 46 Kan. 45.

Maine.—*Veazie v. Parker*, 72 Me. 443 (this was a case of an ice broker).

Massachusetts.—*Rice v. Mayo*, 107 Mass. 550; *Chapin v. Bridges*, 116 Mass. 105; *Pearson v. Mason*, 120 Mass. 53; *Ward v. Cobb*, 148 Mass. 518, 12 Am. St. Rep. 587; *Roche v. Smith*, 176 Mass. 595. See also *Alvord v. Cook*, 174 Mass. 120; *Carnes v. Howard*, 180 Mass. 569.

Michigan.—*Whitaker v. Engle*, 111 Mich. 205.

Minnesota.—*Francis v. Baker*, 45 Minn. 83; *Rothschild v. Burnitt*, 47 Minn. 28.

Missouri.—*Love v. Owens*, 31 Mo. App. 501; *Hayden v. Grillo*, 35 Mo. App. 647; *Wright v. Brown*, 68 Mo. App. 577.

Nebraska.—*Potvin v. Curran*, 13 Neb. 302. See also *Gibbons v. Sherwin*, 28 Neb. 146.

New Hampshire.—*Parker v. Estabrook*, 68 N. H. 349.

New York.—*Kelley v. Baker*, 132 N. Y. 1, *affirming* 8 N. Y. Supp. 851; *Gilder v. Davis*, 137 N. Y. 504, *reversing* (Supm. Ct. Gen. T.) 18 N. Y. Supp. 544; *Thain v. Philbrick*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 829; *Rosenberg v. Smith*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 774; *Moskowitz v. Hornberger*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 558; *Brown v. Helmut*, (N. Y. Super. Ct. Gen. T.) 2 Misc. (N. Y.) 566, 21 N. Y. Supp. 615; *Gilder v. Davis*, 137 N. Y. 504, *reversing* 63 Hun (N. Y.) 633, 18 N. Y. Supp. 544; *Brady v. Foster*, 72 N. Y. App. Div. 416; *Sullivan v. Frazier*, 40 N. Y. App. Div. 288; *Baumann v. Nevins*, 52 N. Y. App. Div. 290; *Norton v. Genesee Nat. Sav., etc., Assoc.*, 57 N. Y. App. Div. 520; *Simonson v. Kissick*, 4 Daly (N. Y.) 143; *Condict v. Cowdrey*, 57 N. Y. Super. Ct. 66, *reversed* on other grounds 123 N. Y. 463; *Hodgkins v. Mead*, (Brooklyn City Ct. Gen. T.) 8 N. Y.

Supp. 854; *Donohue v. Flanagan*, (N. Y. City Ct. Gen. T.) 9 N. Y. Supp. 273; *Brown v. Grassman*, (Supm. Ct. App. Div.) 65 N. Y. Supp. 1126, 53 N. Y. App. Div. 640; *Hattenbach v. Gundersheimer*, (C. Pl. Gen. T.) 13 N. Y. Supp. 814. See also *Heinrich v. Korn*, 4 Daly (N. Y.) 74.

Pennsylvania.—*Hipple v. Laird*, 189 Pa. St. 472; *Burchfield v. Griffith*, 10 Pa. Super. Ct. 618; *Moore's Estate* 9 Pa. Dist. 675.

South Dakota.—*Mattes v. Engel*, (S. Dak. 1902) 69 N. W. Rep. 651.

Tennessee.—See *Gilchrist v. Clarke*, 86 Tenn. 583.

Texas.—*Conkling v. Krakauer*, 70 Tex. 735.

Washington.—See *Livermore v. Crane*, 26 Wash. 529.

Wisconsin.—*Willes v. Smith*, 77 Wis. 81.

Contract Must Be Binding and Enforceable.—*Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Wilson v. Mason*, 158 Ill. 304, 49 Am. St. Rep. 162, *affirming* 57 Ill. App. 325; *Carnes v. Howard*, 180 Mass. 569; *Ramsey v. West*, 31 Mo. App. 676; *Condict v. Cowdrey*, 139 N. Y. 273, *reversing* 19 N. Y. Supp. 609; *Crombie v. Waldo*, 137 N. Y. 129, *reversing* 60 N. Y. Super. C. 123; *Montgomery v. Knickerbocker*, 29 N. Y. App. Div. 117; *Gilchrist v. Clarke*, 86 Tenn. 583; *Lawson v. Thompson*, 10 Utah 462.

Rule Applies Though Contract Not Specifically Enforceable.—*Mattes v. Engel*, 15 S. Dak. 330.

A Verbal Agreement of the purchaser that he will buy has been held sufficient to entitle the broker to his commission under the Iowa statute which permits sales of real estate by oral contracts. *Bird v. Phillips*, (Iowa 1901) 87 N. W. Rep. 414.

Option Contract Not Sufficient.—*Pierce v. Powell*, 57 Ill. 323; *Lawrence v. Rhodes*, 188 Ill. 96, *reversing* 87 Ill. App. 672; *Aigler v. Carpenter Place Land Co.*, 51 Kan. 718; *Kimberly v. Henderson*, 29 Md. 512; *Zeidler v. Walker*, 41 Mo. App. 118; *Runyon v. Wilkinson*, 57 N. J. L. 420; *Ward v. Zborowski*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 66, *reversing* (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1151; *Iusco v. Bullowa*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 573; *Levy v. Kottman*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 372. See also *Follinsbee v. Sawyer*, 157 N. Y. 196, *reversing* (Buffalo Super. Ct. Gen. T.) 15 Misc. (N. Y.) 293; *Brackenridge v. Claridge*, 91 Tex. 527.

Contract Providing Liquidated Damages for Failure to Perform.—*Leete v. Norton*, 43 Conn. 219; *Gilder v. Davis*, 137 N. Y. 504, *reversing* 63 Hun (N. Y.) 633, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 544.

A Contract of Sale Must Be Made in order to entitle the broker to commissions, the signing of an agreement preliminary to such a contract is not sufficient. *Walsh v. Gay*, 49 N. Y. App. Div. 50.

Broker Not Entitled to Commission Where His Customer Unable to Complete Exchange.—*Norman v. Reuther*, (Supm. Ct. App. T.) 25 Misc. (N. Y.) 161.

Knowledge of Broker that His Customer Cannot Perform. — It has been held in *Massachusetts* that a broker is not entitled to a commission for an exchange where he brings to his employer a person who assumes to contract for an exchange of certain property as owner, but who is not the owner thereof, this fact being known to the broker but not to his employer, and such person being unable to perform his contract and irresponsible.¹

Where Broker Executes Contract. — Where the broker, as a part of his employment, assumes to execute for his principal an executory contract of sale or exchange, he does not become entitled to his commission unless the other contracting party is able to perform the contract on his part.²

(4) **Burden of Proof.** — The burden of proof is upon the broker claiming commissions to show all facts necessary to a full performance by him of his undertaking.³

(5) **Acceptance of Services Performed as Compliance with Contract.** — An acceptance by the employer of the services performed by the broker as a compliance with his contract entitles the broker to be compensated for such services, notwithstanding a departure from some of the conditions of the contract.⁴

k. CONSUMMATION OF SALE. — Where the contract is such that the right of the broker to compensation is made dependent upon the actual consummation of a sale or the payment of the entire purchase money, a fulfilment of those conditions is, of course, a prerequisite to his right to recover compensation.⁵ And it has also been held that the prevention of a sale by a contingency which was contemplated by the owner and the purchaser at the time the agreement for the sale was made will deprive the broker of his right to compensation.⁶

l. VARIATION OF TERMS OR PRICE — (1) **Rule Stated.** — Where a broker is the procuring cause of a sale which is actually consummated, he is entitled to his commissions notwithstanding the fact that the sale is made upon terms different from those upon which he was authorized to negotiate,⁷ or at a price

1. *Burnham v. Upton*, 174 Mass. 408. In this case, however, the court recognized the general rule to be as has been stated in the preceding paragraph.

2. *Inge v. McCreery*, 60 N. Y. App. Div. 557.

3. **Burden of Proof** — *United States*. — *Sullivan v. Milliken*, (C. C. A.) 113 Fed. Rep. 93.

Illinois. — *Leahy v. Hair*, 33 Ill. App. 461; *Schmidt v. Keeler*, 63 Ill. App. 487; *Jenkins v. Hollingsworth*, 83 Ill. App. 139.

Kansas. — *Stewart v. Fowler*, 37 Kan. 677; *Betz v. Williams, etc., Land, etc., Co.*, 46 Kan. 45.

Missouri. — *Hayden v. Grillo*, 26 Mo. App. 289; *Butts v. Ruby*, 85 Mo. App. 405.

Nebraska. — *Huffman v. Ellis*, (Neb. 1902) 90 N. W. Rep. 552.

New Hampshire. — *Parker v. Estabrook*, 68 N. H. 349.

New York. — *Schultz v. Griffin*, 121 N. Y. 294; *Powell v. Lamb*, (N. Y. City Ct. Gen. T.) 1 N. Y. Supp. 431; *Gerding v. Haskin*, 141 N. Y. 514; *Kirchner v. Reichardt*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 530; *Markus v. Kenneally*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 517.

South Dakota. — *Howie v. Bratrud*, 14 S. Dak. 648.

Texas. — *Thornton v. Stevenson*, (Tex. Civ. App. 1895) 31 S. W. Rep. 232.

4. *Stewart v. Fowler*, 53 Kan. 537. See also *Giles v. Swift*, 170 Mass. 461.

5. *Lindley v. Fay*, 119 Cal. 239; *Boyd v.*

Watson, 101 Iowa 214; *Yeager v. Kelsey*, 46 Minn. 402; *Cremer v. Miller*, 56 Minn. 52.

6. *Reid v. Thompson*, (Ky. 1899) 50 S. W. Rep. 248.

7. **Change of Terms** — *England*. — See *Mason v. Clifton*, 3 F. & F. 809.

Alabama. — *Cook v. Forst*, 116 Ala. 395.

Colorado. — *Carson v. Baker*, 2 Colo. App. 248; *Knowles v. Harvey*, 10 Colo. App. 9.

Illinois. — *Hafner v. Herron*, 165 Ill. 242; *Lawrence v. Atwood*, 1 Ill. App. 217; *McConaughy v. Mahannah*, 28 Ill. App. 169; *Adams v. Decker*, 34 Ill. App. 17; *Lapsley v. Holridge*, 71 Ill. App. 652; *Snyder v. Fearer*, 87 Ill. App. 275.

Iowa. — *Welch v. Young*, (Iowa 1899) 79 N. W. Rep. 59.

Kentucky. — *Higgins v. Miller*, (Ky. 1900) 58 S. W. Rep. 580.

Louisiana. — *Lestrade v. Perrera*, 6 La. Ann. 398.

Missouri. — *Wetzell v. Wagoner*, 41 Mo. App. 509; *Beauchamp v. Higgins*, 20 Mo. App. 514; *Henderson v. Mace*, 64 Mo. App. 393; *Wright v. Brown*, 68 Mo. App. 577; *Larow v. Bozarth*, 68 Mo. App. 406; *Page v. Griffin*, 71 Mo. App. 524.

Nebraska. — *Potvin v. Curran*, 13 Neb. 302.

Texas. — *Kiam v. Turner*, 21 Tex. Civ. App. 417. See also *Thornton v. Moody*, (Tex. Civ. App. 1893) 24 S. W. Rep. 331; *Blair v. Slosson*, (Tex. Civ. App. 1900) 66 S. W. Rep. 712.

lower than that at which the owner had authorized him to offer the property.¹ Nor is his right to commissions in such case affected by the fact that the sale, as finally made by the owner, includes property which the broker was not authorized to sell.²

(2) *Special Contracts*. — Where the contract provides that no commission shall be paid unless a purchaser is found at the price fixed, the contract governs and the broker must find a purchaser at such price in order to be entitled to his commission.³ So in a case where a commission was promised to the broker if he could purchase a particular house for his employer on certain terms, and the owner refused to sell on such terms, but the employer afterwards purchased directly from the owner on terms much less favorable to him, it was held that the broker was not entitled to any commissions.⁴

m. WHERE SALE DEFEATED BY ACT OF OWNER — (1) *General Rule Stated*. — Where the broker has fully performed his undertaking by producing a person who is ready, willing, and able to purchase or lease his employer's property at the price or rental and upon the terms stipulated for, or to make the required exchange, or to lend upon the desired terms, he is entitled to his commission, and his right is not defeated by the fact that his employer has failed or refused to consummate the transaction by making the proposed sale, lease, or exchange, or accepting the loan, or that the consummation of the transaction is otherwise prevented through the fault of his employer.⁵ This

Exchange Instead of Sale. — *Hewitt v. Brown*, 21 Minn. 163; *Grether v. McCormick*, 79 Mo. App. 325; *Kennerly v. Somerville*, 68 Mo. App. 222. See also *Rabb v. Johnson*, 28 Ind. App. 665.

Exchange for Property Other than That Originally Proposed. — *French v. McKay*, (Mass. 1902) 63 N. E. Rep. 1068.

1. Change of Price — *Alabama*. — *Cook v. Forst*, 116 Ala. 395.

Colorado. — *Williams v. Bishop*, 11 Colo. App. 378.

Connecticut. — *Hoadley v. Danbury Sav. Bank*, 71 Conn. 599; *Schlegel v. Allerton*, 65 Conn. 260.

District of Columbia. — *Armes v. Cameron*, 19 D. C. 435.

Illinois. — *Hafner v. Herron*, 165 Ill. 242; *Snyder v. Fearer*, 87 Ill. App. 275; *Henry v. Stewart*, 85 Ill. App. 170, *affirmed* 185 Ill. 448; *Rees v. Spruance*, 45 Ill. 308; *Loehde v. Halsey*, 88 Ill. App. 452.

Indiana. — *Mullen v. Bower*, 22 Ind. App. 294.

Kentucky. — *Curry v. Fetter*, 15 Ky. L. Rep. 494; *Alexander v. Breeden*, 14 B. Mon. (Ky.) 125.

Minnesota. — *Hubachek v. Hazzard*, 83 Minn. 437.

Missouri. — *Wetzell v. Wagoner*, 41 Mo. App. 509; *Crone v. Mississippi Valley Trust Co.*, 85 Mo. App. 601; *Veatch v. Norman*, (Mo. App. 1902) 69 S. W. Rep. 472. See also *Wolff v. Rosenberg*, 67 Mo. App. 403.

New York. — *Atwater v. Wilson*, (C. Pl. Gen. T.) 13 Misc. (N. Y.) 117, *affirming* (N. Y. City Ct. Gen. T.) 10 Misc. (N. Y.) 777; *Dailey v. Young*, (Supm. Ct. Gen. T.) 13 N. Y. Supp. 435, 59 Hun (N. Y.) 619.

Rhode Island. — *Peckham v. Ashhurst*, 18 R. I. 376.

Texas. — *Hoefling v. Hambleton*, 84 Tex. 517; *Byrd v. Frost*, (Tex. Civ. App. 1894) 29 S. W. Rep. 46.

Washington. — *Barnes v. German Sav., etc.*, Soc., 21 Wash. 448.

2. *Ranson v. Weston*, 110 Mich. 240. *Compare Buhl v. Noe*, 51 Ill. App. 622.

3. *Rees v. Spruance*, 45 Ill. 308; *Schwartz v. Yearly*, 31 Md. 270; *Largent v. Storey*, (Tex. Civ. App. 1901) 61 S. W. Rep. 977. See also *Armes v. Cameron*, 19 D. C. 435.

Voluntary Reduction by Owner. — But if the broker has found a purchaser who is willing to pay the price fixed, the owner cannot defeat the broker's right to his commission by voluntarily selling to such purchaser at a reduced price. *Rees v. Spruance*, 45 Ill. 308.

4. *Lestrade v. Vanzini*, 6 La. Ann. 399.

5. Refusal of Employer to Complete Transaction *England*. — *Fisher v. Drewitt*, 39 L. T. N. S. 253, 27 W. R. 12, 48 L. J. Exch. 32; *Prickett v. Badger*, 1 C. B. N. S. 296, 87 E. C. L. 296, 3 Jur. N. S. 66, 26 L. J. C. Pl. 33.

United States. — *Watson v. Brooks*, 13 Fed. Rep. 540; *Sullivan v. Milliken*, (C. C. A.) 113 Fed. Rep. 93.

California. — *Fiske v. Soule*, 87 Cal. 313.

Colorado. — *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265; *Smith v. Fairchild*, 7 Colo. 510; *Squires v. King*, 15 Colo. 416; *Hildenbrand v. Lillis*, 10 Colo. App. 522; *Millett v. Barth*, 18 Colo. 112.

Georgia. — *Fenn v. Ware*, 100 Ga. 563. See also *Eichberg v. Ware*, 92 Ga. 508.

Illinois. — *Swigart v. Hawley*, 140 Ill. 186, 40 Ill. App. 610; *Jenkins v. Hollingsworth*, 83 Ill. App. 139; *Parmly v. Head*, 33 Ill. App. 134; *Wolven v. Shoudy*, 66 Ill. App. 42; *Smith v. Keeler*, 51 Ill. App. 267, *affirmed* 151 Ill. 518; *Hutten v. Renner*, 74 Ill. App. 124; *Crouse v. Rhodes*, 50 Ill. App. 120. See also *Pratt v. Hotchkiss*, 10 Ill. App. 603; *Weaver v. Snow*, 60 Ill. App. 624.

Indiana. — *Indiana Bermudez Asphalt Co. v. Robinson*, (Ind. App. 1902) 63 N. E. Rep. 797; *Rabb v. Johnson*, 28 Ind. App. 665.

Iowa. — *Bird v. Phillips*, (Iowa 1901) 87 N.

has been held to be true even though the broker has agreed to take his commissions out of the purchase money,¹ or to charge no commissions unless a sale is actually made.²

(2) *Where Reason for Refusal Sufficient if True.* — Of course the above rule does not apply where the owner's refusal to accept a purchaser is for a good

W. Rep. 414; *Felts v. Butcher*, 93 Iowa 414; *Brown v. Wilson*, 98 Iowa 316; *Boland v. Kistle*, 92 Iowa 369; *Blodgett v. Sioux City, etc., R. Co.*, 63 Iowa 606; *Van Gorder v. Sherman*, 81 Iowa 403.

Kansas. — *Cornell v. Hanna*, (Kan. 1898) 53 Pac. Rep. 790; *Davis v. Lawrence*, 52 Kan. 383.

Kentucky. — *Jacob v. Buchanan*, 11 Ky. L. Rep. 861; *Reid v. Thompson*, (Ky. 1899) 50 S. W. Rep. 248.

Louisiana. — *Houston v. Boagni*, McGloin (La.) 164.

Maryland. — See *Schwartz v. Yearly*, 31 Md. 270.

Massachusetts. — *Witherell v. Murphy*, 147 Mass. 417; *Cadigan v. Crabtree*, 179 Mass. 474; *Wright v. Young*, 176 Mass. 100. See also *Fitzpatrick v. Gilson*, 176 Mass. 477.

Michigan. — *Hannan v. Moran*, 71 Mich. 261; *Wright v. Beach*, 82 Mich. 469. See also *Lorimer v. Boylan*, 98 Mich. 18.

Minnesota. — *Vaughan v. McCarthy*, 59 Minn. 199; *Bacon v. Rupert*, 39 Minn. 512.

Missouri. — *Blaydes v. Adams*, 35 Mo. App. 526; *Rice-Dwyer Real Estate Co. v. Ruhlman*, 68 Mo. App. 503; *Wright v. Brown*, 68 Mo. App. 577; *Mullally v. Greenwood*, 127 Mo. 138, 48 Am. St. Rep. 613; *Hayden v. Grillo*, 35 Mo. App. 647; *Huggins v. Hearne*, 74 Mo. App. 86; *Gaty v. Foster*, 18 Mo. App. 639; *Hackmann v. Gutweiler*, 66 Mo. App. 244.

Nebraska. — *Jones v. Stevens*, 36 Neb. 849; *Lunney v. Healey*, 56 Neb. 313; *Griffith v. Woolworth*, 28 Neb. 715; *Greenwood v. Burton*, 27 Neb. 808.

New Hampshire. — *Jackson v. Higgins*, 70 N. H. 637.

New York. — *Michaelis v. Roffman*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 830; *Goldberg v. Gelles*, (N. Y. City Ct. Gen. T.) 33 Misc. (N. Y.) 797; *Lord v. Moran*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 750; *Auten v. Jacobus*, (Supm. Ct. App. T.) 21 Misc. (N. Y.) 632, *affirming* (N. Y. City Ct. Gen. T.) 20 Misc. (N. Y.) 669; *Friend v. Jetter*, (Supm. Ct. App. T.) 19 Misc. (N. Y.) 101, *affirming* (N. Y. City Ct. Gen. T.) 18 Misc. (N. Y.) 368; *Weinstein v. Golding*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 613; *Levy v. Ruff*, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 180, *affirming* (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 147; *McQuillen v. Carpenter*, 72 N. Y. App. Div. 595; *Gatling v. Central Spar Verein*, 67 N. Y. App. Div. 50; *Burling v. Gunther*, 12 Daly (N. Y.) 6; *Gorman v. Scholle*, 13 Daly (N. Y.) 516; *Scott v. Woolsey*, 20 N. Y. App. Div. 541. See also *Kirchner v. Reichardt*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 530; *Smith v. Smith*, 1 Sweeny (N. Y.) 552.

North Carolina. — *Atkinson v. Pack*, 114 N. Car. 597.

Ohio. — *Wheeler v. Knaggs*, 8 Ohio 169.

Oregon. — *Booth v. Moody*, 30 Oregon 222.

Pennsylvania. — *Kifer v. Yoder*, 198 Pa. St. 308.

Texas. — *O'Brien v. Gilleland*, 79 Tex. 602; *De Cordova v. Bahn*, 74 Tex. 643; *Kiam v. Turner*, 21 Tex. Civ. App. 417; *Sullivan v. Hampton*, (Tex. Civ. App. 1895) 32 S. W. Rep. 235; *Brackenridge v. Claridge*, 91 Tex. 527. See also *Orynski v. Menger*, 15 Tex. Civ. App. 448; *Burnett v. Edling*, 19 Tex. Civ. App. 711; *Taylor v. Cox*, (Tex. 1887) 7 S. W. Rep. 69, (Tex. 1891) 16 S. W. Rep. 1063.

Utah. — *Lawson v. Thompson*, 10 Utah 462.

Virginia. — *Crockett v. Grayson*, 98 Va. 354.

Washington. — *Livermore v. Crane*, 26 Wash. 529.

Wisconsin. — *Stewart v. Mather*, 32 Wis. 344; *Delaplane v. Turnley*, 44 Wis. 31; *Magill v. Stoddard*, 70 Wis. 75. *Compare Power v. Kane*, 5 Wis. 265.

Refusal of One of Several Joint Owners. — *Reid v. Thompson*, (Ky. 1899) 50 S. W. Rep. 248.

Refusal of Owner's Wife to Release Dower. — *Cook v. Fryer*, 3 Ky. L. Rep. 612.

Tender of Purchase Money Not Necessary. — *Vaughan v. McCarthy*, 59 Minn. 199.

Written Contract of Sale Not Necessary. — *Hutten v. Renner*, 74 Ill. App. 124; *Vaughan v. McCarthy*, 59 Minn. 199. See also *Smith v. Keeler*, 151 Ill. 518, *affirming* 51 Ill. App. 267.

Where Sale by Assignee Enjoined at Instance of Creditor. — *Gibson v. Gray*, 17 Tex. Civ. App. 646.

Owner Defeating Sale by Inducing Purchaser to Believe Title Defective. — *Phelps v. Prusch*, 83 Cal. 626.

Imposition of New Conditions. — Where the broker's employer and the customer procured by him have agreed upon an exchange, the employer cannot defeat the broker's right to commissions by imposing new conditions when the agreement is reduced to writing, which conditions defeat the completion of the transaction. *Halprin v. Schachne*, (Supm. Ct. App. T.) 27 Misc. (N. Y.) 195, *reversing* (Supm. Ct. App. T.) 25 Misc. (N. Y.) 797, which *affirmed* (N. Y. City Ct. Gen. T.) 21 Misc. (N. Y.) 519.

Evidence that Broker Found Purchaser. — *Boland v. Kistle*, 92 Iowa 369.

An Agent Who Employs a Broker to Sell certain property is liable for commissions where the broker finds and produces a purchaser, even though it is then discovered that the property does not belong to his principal. *Barthell v. Peter*, 88 Wis. 316, 43 Am. St. Rep. 906.

Amount of Recovery. — Where the employer refuses to accept the loan, the broker can recover only the actual loss sustained. Hence a judgment for an amount agreed upon which was to cover lawyers' fees as well as brokerage is erroneous. *Finck v. Menke*, (Supm. Ct. Spec. T.) 31 Misc. (N. Y.) 748, 64 N. Y. Supp. 38.

1. *Millet v. Barth*, 18 Colo. 112; *Swigart v. Hawley*, 140 Ill. 186, 40 Ill. App. 610.

2. *Swigart v. Hawley*, 140 Ill. 186, 40 Ill. App. 610.

and sufficient reason,¹ and where the refusal is for an ostensible reason which if true would be sufficient to justify his action, the broker has the burden of disproving it in order to recover.²

(3) *Where Name of Purchaser Not Disclosed.* — Where the broker does not disclose the name of the purchaser the owner may refuse to sell without being liable for commissions, as he is entitled, in such case, to act upon the supposition that the broker himself is the proposed purchaser.³

(4) *Refusal of Owner to Give Kind of Deed Demanded.* — Where the owner refuses to give the kind of deed demanded by the purchaser, by reason of which the sale falls through, the right of the broker to recover commissions depends upon whether the owner was under any duty to give such a deed.⁴

(5) *Where Broker Required to Submit Offers.* — Where, by the agreement between the broker and his employer, no terms of sale or exchange are fixed, or the broker is required to submit any offer or propositions received by him to his employer for his acceptance or rejection, the broker is not entitled to any commissions until he has secured an offer which his employer accepts.⁵

n. RIGHT TO COMPENSATION A QUESTION FOR THE JURY. — Where, in an action by a real-estate broker for commissions, there is conflicting testimony as to the employment of the plaintiff, his instrumentality in bringing about a sale, and the value of his services, the case should be submitted to the jury.⁶

o. LOSS OF RIGHT TO COMMISSIONS — (1) *Fraud or Bad Faith.* — A real-estate broker loses his right to commissions where, in his dealings in reference to the subject-matter of his employment, he is guilty of fraud or bad faith towards his employer,⁷ and it has been held that the broker's concealment

1. See *Marcus v. Bloomingdale*, 63 N. Y. App. Div. 227.

Reasons Sufficient to Justify Refusal. — *Kirwan v. Barney*, (Supm. Ct. App. T.) 29 Misc. (N. Y.) 614, *affirming* (N. Y. City Ct. Gen. T.) 27 Misc. (N. Y.) 181.

2. **Burden of Proof as to Truth of Reason.** — *Greene v. Hollingshead*, 40 Ill. App. 195.

3. *Hayden v. Grillo*, 35 Mo. App. 647.

4. **Refusal to Give Kind of Deed Demanded — Evidence — Burden of Proof.** — See *Beach v. Travelers' Ins. Co.*, 73 Conn. 118. In this case the purchaser demanded a warranty deed while the owner was willing to give only a quitclaim deed.

5. **When Acceptance by Owner Necessary.** — *Sawyer v. Bowman*, 91 Iowa 717; *Goin v. Hess*, 102 Iowa 140; *Berry v. Tweed*, 93 Iowa 296.

6. *McDonald v. Ortman*, 88 Mich. 645; *Reddin v. Dam*, 51 N. Y. App. Div. 636; *Willey v. Rutherford*, 108 Wis. 35; *Coolican v. Milwaukee, etc., Imp. Co.*, 79 Wis. 471. See also *Meislahn v. Englehard*, (N. Y. City Ct. Gen. T.) 1 Misc. (N. Y.) 412.

7. **Fraud or Bad Faith — United States.** — *Hall v. Gambrill*, (C. C. A.) 92 Fed. Rep. 32, *affirming* 88 Fed. Rep. 709.

Alabama. — *Henderson v. Vincent*, 84 Ala. 99.

Iowa. — *Morey v. Laird*, 108 Iowa 670.

Massachusetts. — *Roche v. Smith*, 176 Mass. 595; *Veasey v. Carson*, 177 Mass. 117.

Michigan. — *Phinney v. Hall*, 101 Mich. 451. See also *Harvey v. Lindsay*, 117 Mich. 267.

Minnesota. — *Hobart v. Sherburne*, 66 Minn. 171.

New York. — *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587. See also *Marcus v. Bloomingdale*, 63 N. Y. App. Div. 227.

Texas. — *Ryan v. Kahler*, (Tex. Civ. App. 1898) 46 S. W. Rep. 71. See also *Smith v. Tripis*, 2 Tex. Civ. App. 267.

Fraud of Broker's Subagent. — *Thwing v. Clifford*, 136 Mass. 482.

Failure to Inform Employer of Interest. — A broker who has an interest in the subject-matter of his employment antagonistic to that of his employer is not in a situation to perform his full duty to his employer, and a failure to inform the employer of the facts is a fraud which will defeat his right to a commission. *Alvord v. Cook*, 174 Mass. 120.

Burden of Proof upon Owner. — *Stem v. Whitney*, (Ky. 1902) 66 S. W. Rep. 820.

Question for Jury. — Whether a broker's failure to inform his employer of a mortgage on property which is proposed to be taken in exchange is such a breach of duty as will deprive him of any right to compensation is a question for the jury. *Page v. Voorhies*, (Brooklyn City Ct. Gen. T.) 16 N. Y. Supp. 101.

Circumstances Not Showing Fraud or Bad Faith. — *Millett v. Barth*, 18 Colo. 112; *Carpenter v. Fisher*, 175 Mass. 9; *Barringer v. Stoltz*, 39 Minn. 63; *Black v. Barr*, 14 Pa. Super. Ct. 98; *Hinion v. Coleman*, 76 Wis. 221. See also *Russell v. Andrae*, 79 Wis. 108.

Commission Not Forfeited by Attempt to Persuade Owner to Reduce Price. — *Gorman v. Hargis*, 6 Okla. 360.

Where the Employer Is Not Injured by the conduct of the broker and no fraud or misconduct is alleged, the broker is entitled to his commission, though his conduct in some particulars is not commendable. So held in a case where the broker cautioned the purchaser whom he sent to the owner not to appear anxious to buy, but a sale was made to such

from his employer of important and material facts, though without any fraudulent purpose, will defeat his right to a commission.¹

Broker Not Required to Misrepresent. — Good faith on the part of the broker does not, however, require him, in the interest of his employer, to make misrepresentations or to conceal the truth regarding the property, even though his statements may otherwise defeat a sale.²

(2) *Failure or Refusal of Broker's Customer to Perform* — (a) **General Rule.** — A broker is not, as a general rule, entitled to commissions where the customer procured by him fails or refuses to consummate the sale or exchange, or to make the loan which the broker was employed to negotiate.³

(b) **Limitations of the Rule** — *aa.* **REFUSAL DUE TO DEFECTS IN TITLE.** — The broker is not placed in any better position by the fact that his customer's ostensible reason for his refusal is an alleged cloud upon or defect in the title, when the title of the broker's employer is in fact good.⁴ But as a vendor always assumes an implied obligation to convey a good title, and a mortgagor impliedly agrees to give a good mortgage, the broker is entitled to his commission where his customer's refusal to complete the transaction is due to the fact that the employer's title is actually defective, for in such case the falling through of the sale or loan is attributable to the default of the broker's employer.⁵

purchaser on terms acceptable to the owner and for a price larger than he had authorized the broker to fix. *Kelly v. Stone*, 94 Iowa 316.

1. *Pratt v. Patterson*, 12 Phila. (Pa.) 460, 34 Leg. Int. (Pa.) 158.

2. *Schwartz v. Yearly*, 31 Md. 270.

3. **Failure or Refusal of Purchaser to Perform** — *England*. — *Beale v. Bond*, 84 L. T. N. S. 313. *United States*. — See *Hammond v. Crawford*, 66 Fed. Rep. 425.

Alabama. — *Louisville, etc., R. Co. v. Shepard*, 126 Ala. 416.

Colorado. — *Hildenbrand v. Lillis*, 10 Colo. App. 522.

Georgia. — *Hanesley v. Bagley*, 109 Ga. 346.

Illinois. — *Parmly v. Head*, 33 Ill. App. 134; *Leahy v. Hair*, 33 Ill. App. 461; *Foster v. Wynn*, 51 Ill. App. 401.

Kentucky. — *Simrall v. Arthur*, 13 Ky. L. Rep. 682.

Missouri. — *Kent v. Allen*, 32 Mo. 87.

Nebraska. — *Siemssen v. Homan*, 35 Neb. 892.

New Hampshire. — *Parker v. Estabrook*, 68 N. H. 349.

New York. — *Feiner v. Kobre*, (N. Y. Super. Ct. Gen. T.) 13 Misc. (N. Y.) 499; *Kronenberg v. Bierling*, (Supm. Ct. App. T.) 37 Misc. (N. Y.) 817. *Compare* *Heinrich v. Korn*, 4 Daly (N. Y.) 74.

Tennessee. — *Gilchrist v. Clarke*, 86 Tenn. 583.

Employment to Exchange — Broker's Customer Unable to Make Title. — *Freedman v. Gordon*, 4 Colo. App. 343; *Barber v. Hildebrand*, 42 Neb. 400.

Failure to Consummate Must Be Chargeable to Broker's Customer. — *Smith v. Schiele*, 93 Cal. 144.

Whether Failure of Sale Attributable to Purchaser & Question for the Jury. — *Hamill v. Baumhover*, 110 Iowa 369.

4. **Groundless Objections to Title.** — *Louisville, etc., R. Co. v. Shepard*, 126 Ala. 416; *Hanesley v. Bagley*, 109 Ga. 346; *Kent v. Allen*, 32 Mo. 87; *Gilchrist v. Clarke*, 86 Tenn. 583.

5. **Refusal Due to Actual Defect of Title** — *England*. — See *Green v. Lucas*, 33 L. T. N. S. 584, affirming 31 L. T. N. S. 731.

United States. — See *Hammond v. Crawford*, 66 Fed. Rep. 425.

California. — *Phelps v. Prusch*, 83 Cal. 626; *Fiske v. Soule*, 87 Cal. 313; *Smith v. Schiele*, 93 Cal. 144. See also *Martin v. Ede*, 103 Cal. 157.

District of Columbia. — *Block v. Ryan*, 4 App. Cas. (D. C.) 283.

Illinois. — *Goodridge v. Holladay*, 18 Ill. App. 363; *Parmly v. Head*, 33 Ill. App. 134. See also *Swigart v. Hawley*, 140 Ill. 186, 40 Ill. App. 610.

Iowa. — *Welch v. Young*, (Iowa 1899) 79 N. W. Rep. 59.

Kansas. — *Davis v. Lawrence*, 52 Kan. 383; *Remington v. Sellers*, 8 Kan. App. 806.

Maine. — *Veazie v. Parker*, 72 Me. 443.

Massachusetts. — *Monk v. Parker*, 180 Mass. 246; *Fitzpatrick v. Gilson*, 176 Mass. 477.

Michigan. — *Stange v. Gosse*, 110 Mich. 153.

Missouri. — *Gerhart v. Peck*, 42 Mo. App. 644; *Hynes v. Brettelle*, 70 Mo. App. 344; *Kent v. Allen*, 24 Mo. 98, 32 Mo. 87; *Carpenter v. Rynders*, 52 Mo. 278.

New York. — *Moskowitz v. Hornberger*, (Supm. Ct. App. T.) 20 Misc. (N. Y.) 558; *Levy v. Ruff*, (N. Y. City Ct. Gen. T.) 3 Misc. (N. Y.) 147; *Putzel v. Wilson*, 49 Hun (N. Y.) 220. See also *Pollatschek v. Goodwin*, (Supm. Ct. App. T.) 17 Misc. (N. Y.) 587.

Oregon. — *Kyle v. Rippey*, 20 Oregon 446.

Tennessee. — *Gilchrist v. Clarke*, 86 Tenn. 583.

Texas. — See *Sullivan v. Hampton*, (Tex. Civ. App. 1895) 32 S. W. Rep. 235.

Broker Must Prove Title Not Good. — *Block v. Ryan*, 4 App. Cas. (D. C.) 283; *Brackenridge v. Claridge*, 91 Tex. 527.

Where Commissions for a Loan Are to Be Deducted from the Amount Obtained, the broker is not entitled to commissions if the lender refuses to make the loan because of a defect in the title. *Hess v. Eggers*, (N. Y. City Ct. Gen. T.) 37 Misc. (N. Y.) 845, 76 N. Y. Supp. 980.

When the Broker Knows the State of His Employer's Title he is not entitled to a commission if a sale falls through by reason of defects therein.¹

Commission Dependent upon Obtaining a Certain Price. — In a case where the broker was employed to sell land at a certain price net to the owner, his commission being dependent upon a larger price being obtained by him, it was held that he was not entitled to compensation where a sale negotiated by him fell through by reason of his employer's lack of title.²

bb. REFUSAL DUE TO VENDOR'S INABILITY TO GIVE POSSESSION. — The broker is entitled to his commission where the refusal of the purchaser to complete is due to his employer's refusal or inability to give possession of the property within a reasonable time.³

cc. REFUSAL DUE TO PROPERTY NOT BEING AS REPRESENTED. — A broker is also entitled to his commission where he has a customer who is ready, willing, and able to buy or exchange, for his employer's property, but who refuses to consummate the transaction because of his discovery that the condition or situation of the property is not such as it has been represented to be by the broker's employer,⁴ though it has been held otherwise where there was only a slight misrepresentation as to the width of the property, which was due to a mere mistake, and the statement as to the width was not intended or understood as a warranty.⁵

(c) Returning Purchaser's Deposit. — Where the purchaser has made a deposit to be returned if the title does not prove good, the broker does not lose his right to his commission by returning such deposit without the knowledge of his employer, where the title has proved defective, or the employer has induced the purchaser to believe that it is defective and to act upon that belief.⁶

(3) Failure of Purchaser to Meet Deferred Payments. — If the purchaser produced by the broker is accepted by his employer and a sale is actually made, the right of the broker to his commission is not affected by the failure of the purchaser to meet deferred payments of the purchase money.⁷

(4) Objectionable Use of Property Sold. — The fact that a slaughter-house has been erected on the property sold does not deprive the broker of his right to commissions on the sale, where such use of the property does not violate the contract.⁸

(5) Effect of Failure to Disclose Name of Purchaser. — While the owner is entitled to know the name of the purchaser,⁹ and it has been asserted that so long as there is uncertainty as to the purchaser the broker cannot claim performance of a contract and demand his compensation,¹⁰ it has also been held

1. Knowledge of Broker. — *Hynes v. Brettelle*, 70 Mo. App. 344. See also *Culp v. Powell*, 68 Mo. App. 238.

Where Examination of Title Made Part of Broker's Duty. — See *Gerhart v. Peck*, 42 Mo. App. 644.

Broker's Knowledge of Owner's Inability to Convey Without Order of Court. — *Folsom v. Lewis*, (C. Pl. Gen. T.) 14 Misc. (N. Y.) 605.

When All Concerned Know State of Title — Time to Perfect. — *Dent v. Powell*, 80 Iowa 456.

2. *Ford v. Brown*, 120 Cal. 551; *Seattle Land Co. v. Day*, 2 Wash. 451.

3. *Beach v. Travelers' Ins. Co.*, 73 Conn. 118; *Reid v. Thompson*, (Ky. 1899) 50 S. W. Rep. 248.

Thirty Days a Reasonable Time. — *Beach v. Travelers' Ins. Co.*, 73 Conn. 118.

Sixty Days a Reasonable Time. — *Nosotti v. Auerbach*, 79 L. T. N. S. 413.

4. Refusal Due to Property Not Being as Represented. — *Washburn v. Bradley*, 169 Mass. 86; *Hannan v. Moran*, 71 Mich. 261; *Veatch v.*

Norman, (Mo. App. 1902) 69 S. W. Rep. 472; *Cohen v. Farley*, (Supm. Ct. App. T.) 28 Misc. (N. Y.) 168.

5. *Diamond v. Hartley*, 47 N. Y. App. Div. 1, 38 N. Y. App. Div. 87.

6. *Phelps v. Prusch*, 83 Cal. 626; *Scott v. Clark*, 3 S. Dak. 486.

7. Failure of Purchaser to Meet Deferred Payments. — *Hallack v. Hinckley*, 19 Colo. 38; *Wray v. Carpenter*, 16 Colo. 271, 25 Am. St. Rep. 265; *Greene v. Hollingshead*, 40 Ill. App. 195; *Stewart v. Fowler*, 53 Kan. 537; *Travis v. Graham*, 23 N. Y. App. Div. 214; *Condict v. Cowdrey*, 57 N. Y. Super. Ct. 66, reversed on other grounds 123 N. Y. 463.

8. *Kavanaugh v. Ballard*, (Ky. 1900) 56 S. W. Rep. 159.

9. *Gerding v. Haskin*, 141 N. Y. 514; *Simpson v. Smith*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 815.

Owner May Waive Right to Know Purchaser's Name. — *Simpson v. Smith*, (Supm. Ct. App. T.) 36 Misc. (N. Y.) 815.

10. *Gerding v. Haskin*, 141 N. Y. 514.

that the failure of the broker to disclose the name of the purchaser is not such a breach of good faith as will deprive him of the right to commissions,¹ unless such information is material to the owner and might affect his action in the premises.²

(6) *Agreement to Divide Commission with Purchaser.* — A broker does not lose his right to his commission on a sale of property because he has agreed to divide the same with the purchaser, even though his employer does not know of this fact.³

(7) *Agreement Between Brokers of Different Parties to Share Commissions.* — It has been held that a broker is not deprived of his right to commissions from his principal for an exchange that he has negotiated, by reason of the fact that he and the broker for the other party to the exchange have agreed to share all commissions which they receive out of the transaction.⁴

(8) *Sale on Sunday.* — The fact that the agreement between the owner and a purchaser found by the broker relative to the sale of property was made on Sunday does not deprive the broker of his right to his commission.⁵

(9) *Consent to Abandonment of Sale.* — A broker has no right to commissions where the sale is abandoned with his consent.⁶

p. **WAIVER OF CLAIM FOR COMMISSIONS.** — A broker may by his conduct waive any right he may have to commissions on a sale which is not consummated.⁷

2. Who Liable for Commissions — a. IN GENERAL. — The general rule undoubtedly is that a broker is entitled to recover commissions from the person who employed him and undertook to pay him,⁸ and cannot hold other persons liable even though they have an interest in the land and share in or even exclusively enjoy the benefits resulting from the broker's employment.⁹

1. *Veasey v. Carson*, 177 Mass. 117.

2. *Veasey v. Carson*, 177 Mass. 117; *Young v. Hughes*, 32 N. J. Eq. 372; *Pratt v. Patterson*, 112 Pa. St. 475; *Wilkinson v. McCullough*, 196 Pa. St. 205.

3. *Agreement to Divide with Purchaser.* — *Scott v. Lloyd*, 19 Colo. 401; *Hobart v. Sherburne*, 66 Minn. 171; *Chase v. Veal*, 83 Tex. 333.

4. *Alvord v. Cook*, 174 Mass. 120.

5. *Boland v. Kistle*, 92 Iowa 369.

6. *Sawyer v. Bowman*, 91 Iowa 717.

Efforts to Sell to Another Purchaser do not show a consent to the abandonment of the deal with the purchaser first procured. *Greene v. Hollingshead*, 40 Ill. App. 195. Compare *Deford v. Shepard*, 6 Kan. App. 428.

7. *Circumstances Amounting to Waiver.* — *Deford v. Shepard*, 6 Kan. App. 428.

Circumstances Rebutting Any Inference of Waiver. — *Granger v. Griffin*, 43 Ill. App. 421.

8. *Husband Employing Broker to Sell Wife's Land Personally Liable.* — *Rounds v. Allee*, (Iowa 1902) 89 N. W. Rep. 1098.

Agent for Undisclosed Principal Personally Liable. — *Finley v. Dyer*, 79 Mo. App. 604; *Whiting v. Saunders*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 332, affirming (N. Y. City Ct. Gen. T.) 22 Misc. (N. Y.) 539.

Where Principal Disclosed. — Where the broker has been employed by an agent for an undisclosed principal, but before the liability for commissions accrued the principal was disclosed, the agent is not liable for commissions. *Brackenridge v. Claridge*, 91 Tex. 527.

Evidence as to Who Employed Broker. — *Church v. Johnson*, 93 Iowa 544; *Monk v. Parker*, 180 Mass. 246.

Employment by One Co-tenant Individually and as Agent for Other. — *Clifford v. Meyer*, (Ind. App. 1893) 33 N. E. Rep. 127.

Partners or Joint Owners Each Bound for Whole Commission. — *Schamberg v. Auxier*, 101 Ky. 292.

Person Employing Broker Liable Though Without Authority to Sell. — *Oliver v. Morawetz*, 97 Wis. 332.

Employer's Lack of Title No Defense to Suit for Commissions. — *Gorman v. Hargis*, 6 Okla. 360.

An Agreement Between the Vendor and the Purchaser that the Latter Shall Pay the Commission which the former has agreed to pay to the broker employed by him does not relieve the vendor of liability to the broker, he having never agreed to look to the purchaser for his commission. *Burnett v. Casteel*, (Tex. Civ. App. 1896) 36 S. W. Rep. 782.

Agreement of Broker to Look to Other Party for Commission. — Where a broker employed to purchase property has procured a contract of sale to be entered into between his employer and the owner, he is entitled to recover damages from his employer for the loss of his commissions where the employer refuses to carry out the contract, notwithstanding the fact that at the time of making the agreement it was understood and agreed that the broker was to get his commission for making the sale from the owner of the property. *Livermore v. Crane*, 26 Wash. 529.

9. See *Schwartz v. Yearly*, 31 Md. 270; *Marshall v. Goble*, 56 Neb. 274; *Brown v. Scott*, 91 Wis. 674.

Where a Broker Sells Land for a Husband and Wife the husband is not liable for commissions for the selling of his wife's interest in the

In the Case of **Fiduciaries** the rule applies to this extent: the fiduciary is personally liable for the broker's commissions when he has personally undertaken to pay them or when the broker is ignorant that his employer acts in a fiduciary capacity,¹ but not when he acts solely as a fiduciary without title to or interest in the property and this is known to the broker.²

b. LIABILITY OF PURCHASER. — Where a broker is employed by the owner of land to sell the same, the purchaser is not liable for the broker's commissions,³ unless he has agreed to conditions of sale which include the payment of the commissions by the purchaser,⁴ or has agreed with the broker to pay them.⁵

3. Amount of Compensation — **a. AMOUNT FIXED BY CONTRACT.** — When the amount of compensation which a broker is to receive for his services is definitely fixed by the contract between him and his employer, the contract, of course, governs,⁶ unless the sale actually made is clearly not such as is contemplated by the contract.⁷

b. REASONABLE VALUE OF SERVICES. — Where the amount to be paid to the broker is not definitely fixed by the contract between him and his employer, he is entitled to the reasonable value of his services, that is, such an amount as is usually charged by and paid to other real-estate brokers for like services.⁸

land, in the absence of any agreement on his part to pay them. *Hansbrough v. Neal*, 94 Va. 722. And see also cases cited in preceding note.

1. Fiduciaries. — *Snyder v. Fearer*, 87 Ill. App. 275; *Moore v. Daiber*, 92 Mich. 402; *Markham v. Washburn*, (C. Pl. Gen. T.) 18 N. Y. Supp. 355. See also *Johnson v. Leman*, 131 Ill. 609, 19 Am. St. Rep. 63.

2. Hudson v. Scott, 125 Ala. 172; *Perkins v. Cooper*, (Cal. 1890) 24 Pac. Rep. 377.

3. Boysen v. Robertson, (Ark. 1902) 68 S. W. Rep. 243.

Property Conveyed to Vendor in Payment of Purchase Price. — An agent who is employed to effect a sale of property and acts in the interest of the vendor cannot recover from the purchaser a commission on the value of property which was transferred by him to the vendor in part payment for the property sold, the purchaser not having agreed to pay any commission nor employed the broker as such. *Browne v. Gault*, 19 Quebec Super. Ct. 523.

4. Miller v. Curtis, 23 La. Ann. 33. See also *Emerson v. Coddington*, 55 N. Y. Super. Ct. 336; *Bab v. Hirschbein*, (C. Pl. Gen. T.) 12 N. Y. Supp. 730.

Joining Another Person in Purchase. — The liability of the original purchaser in such case is not affected by the fact that he has joined with him in the purchase another person who is ignorant of such agreement to pay commissions. *Miller v. Curtis*, 23 La. Ann. 33.

Failure of Sale. — Where the purchaser has agreed with the vendor "to pay all commissions or brokerage arising by reason of the sale of said property" and the sale falls through because of a defect in the vendor's title, the purchaser is not liable to the broker for commissions. *Bab v. Hirschbein*, (C. Pl. Gen. T.) 12 N. Y. Supp. 730. In this case it was further held, *reversing* 11 N. Y. Supp. 766, that where a recovery was sought by the broker on an oral agreement between himself and the purchaser by which the latter was to pay him a commission on the sale, the purchaser could introduce evidence to show that

the agreement was that the broker was not to have a commission unless the title proved good.

5. See Bab v. Hirschbein, (C. Pl. Gen. T.) 12 N. Y. Supp. 730.

Purchase Directly from Owner. — Where the purchaser has promised to pay the broker's commission, he cannot escape liability by purchasing directly from the owner at the net price named by him. *Lynch v. McKenna*, (C. Pl. Gen. T.) 58 How. Pr. (N. Y.) 42.

6. Contract Governs Irrespective of Value of Services. — *Duncan v. Borden*, 13 Colo. App. 481. See also *Humphreys v. Hoge*, (Va. 1896) 25 S. E. Rep. 106.

Construction of Contract. — *Biggs v. Gordon*, 8 C. B. N. S. 638, 98 E. C. L. 638; *Hutten v. Renner*, 74 Ill. App. 124; *Fish v. Hodsdon*, (N. Y. City Ct. Gen. T.) 16 N. Y. Supp. 92.

Evidence to Show What Contract Really Was. — See *Harvey v. Lindsay*, 117 Mich. 267.

When the Amount Agreed On Is in Dispute, the broker may introduce evidence tending to show that the amount claimed by him is reasonable and not unusual. *Greer v. Laws*, 56 Ark. 39.

Amount Agreed on a Question of Fact on Conflicting Evidence. — *Glover v. Henderson*, 120 Mo. 369, 41 Am. St. Rep. 695.

Change in Contract. — *Forbes v. Bushnell*, 47 Minn. 402.

7. Sale Not Such as Contract Contemplates. — *Louisville Bldg. Assoc. v. Hegan*, (Ky. 1899) 49 S. W. Rep. 796.

8. Reasonable Value of Services — Customary Charges. — *Hollis v. Weston*, 156 Mass. 357; *Graves v. Dill*, 159 Mass. 74; *Childs v. Crithfield*, 66 Mo. App. 422. See also *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695; *Lansing v. Johnson*, 18 Neb. 174; *Harrell v. Zimpleman*, 66 Tex. 292; *Hansbrough v. Neal*, 94 Va. 722.

Where the Person Claiming Compensation Is Not a Real Estate Agent by Occupation, though he has in the particular instance performed services as such, evidence of the usual charges of real estate agents for such services is admissible. *Hollis v. Weston*, 156 Mass. 357;

c. PERCENTAGE OF PRICE OBTAINED — (1) In General. — The compensation of real-estate brokers for making a sale is in the majority of cases a certain percentage of the amount obtained, such percentage either being fixed by some express provision in the contract between the broker and his employer, in which case the contract of course governs,¹ or being the rate that is customary among real-estate brokers in the locality and that has become fixed by usage as the regular charge in the absence of any express agreement.²

(2) *Basis of Computation.* — Where the broker has negotiated an exchange, the basis of computation of his commission is the actual value of the property taken in exchange and not an inflated nominal value put upon it for any purpose,³ and in the case of a sale commissions should be allowed only on the amount which was the real consideration for the property sold.⁴ In the case of the negotiation of a lease, the broker's commission cannot be estimated with the value of the fee in the property as a basis,⁵ but in such case the broker is entitled to the agreed proportion of only the amount collected and properly credited to the rent account.⁶

d. CONTRACT TO ALLOW BROKER ALL OVER A CERTAIN AMOUNT. — Frequently property is placed with real-estate brokers for sale under an agreement that the owner is to receive a certain amount net for his property, and the broker is to have for his compensation whatever he can get for the property above that amount.⁷ In such case the contract

Graves v. Dill, 159 Mass. 74; *Levitt v. Miller*, 2 Mo. App. Rep. 1072. But it is not conclusive as to the amount of the recovery. *Kennedy v. Sommerville*, 2 Mo. App. Rep. 918.

1. *Contract Governs Irrespective of Value of Work Done.* — *McConaughy v. Mahannah*, 28 Ill. App. 160; *McDermott v. Abney*, 106 Iowa 749. See also *Jefferson v. Burhans*, (C. C. A.) 85 Fed. Rep. 949; *Wells v. Parrott*, 43 Ill. App. 656.

When Rate Agreed on Not Conclusive. — When a broker was employed to procure a loan of eight thousand dollars for a commission of four per cent., and he procured a person willing to make such loan, but the employer borrowed only two thousand dollars, it was held error to enter judgment for the broker for four per cent. of the amount actually borrowed without any finding as to the value of his services, as the rate agreed on for obtaining the eight thousand dollars was not necessarily the basis for determining the value of the services rendered. *Diltz v. Spahr*, (Ind. App. 1896) 42 N. E. Rep. 823.

Contract May Be Proved by Parol. — *Houston v. Boagni*, McGloin (La.) 164.

Construction of Contract. — *Gregory v. Bonney*, 135 Cal. 589.

2. *Customary Percentage Charges.* — *Sample v. Rand*, 112 Iowa 616; *Thomas v. Brandt*, (Md. 1893) 26 Atl. Rep. 524.

Evidence to Show Customary Charges. — *Ashby v. Holmes*, 68 Mo. App. 23; *Hinton v. Coleman*, 45 Wis. 165.

Question for Jury. — *Ringgold v. Rhodes*, 132 Pa. St. 189.

New York Statute Fixing Commission on Loans. — See *Anderson v. Dwyer*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 793, *affirming* (N. Y. City Ct. Gen. T.) 61 N. Y. Supp. 1114; *Broad v. Hoffman*, 6 Barb. (N. Y.) 177.

3. *Actual Value.* — *Calland v. Trapet*, 70 Ill. App. 228; *Boyd v. Watson*, 101 Iowa 214; *Porter v. Hellingsworth*, (Supm. Ct. App. T.) 30 Misc. (N. Y.) 628.

4. *Craig v. Wead*, 58 Neb. 782.

Sale under Deed of Trust on Default of Purchaser. — Where the purchaser failed to meet deferred payments, and the property was put up for sale under a deed of trust, and bid in by the purchaser, but, under a guaranty which he had given, he actually paid a sum much larger than the amount of his bid, the broker was entitled to his stipulated commission on such larger sum, and not merely on the amount of the bid. *Peters v. Anderson*, (Va. 1895) 23 S. E. Rep. 754.

5. *Daube v. Nessler*, 50 Ill. App. 166.

6. *Shultz v. Goldman*, (Ariz. 1901) 64 Pac. Rep. 425.

Discharge of Broker During Term of Lease. — Where a broker who has negotiated a lease and collected some of the rents is discharged during the term of the lease, he is not entitled to deduct from the rent in his hands a sum equal to his commissions upon the entire term of the lease. *Lucas v. Jackson*, 140 Pa. St. 122; *Wheeler v. Knaggs*, 8 Ohio 169.

7. *Contract Held to Entitle Broker to Excess.* — See *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321.

Employment to Sell for Certain Sum "Net." — Where the owner of property who has employed a broker to sell the same states that he will "take \$7,500 net to me," this means merely that the property must bring to the owner at least \$7,500 free of all expenses and deduction, and not that the broker shall be entitled to any amount which he may sell it for over \$7,500. *Turnley v. Michael*, 4 Tex. App. Civ. Cas., § 223.

The Finding of the Jury Is Conclusive as to whether under the contract the broker's commission was dependent upon the property's being sold for more than a fixed sum, where the evidence is conflicting. *Rosenthal v. Drake*, 82 Mo. App. 358.

Fraud on Purchaser. — Where the owner of land has agreed with a broker that if the latter will sell the land for eight thousand dollars

governs,¹ and if the broker does not sell for more than the amount named, he is entitled to no compensation whatever.²

e. INTEREST. — Where the amount of a broker's commission is certain, or can be made certain by computation, he is entitled to interest thereon from the time it became due.³

4. Time for Payment of Commissions. — As has been seen, the right of the broker to his commissions becomes complete, and he is entitled to payment, as a general rule, when he has fully performed his undertaking with his employer.⁴ But the question sometimes arises whether he is entitled to immediate payment of his entire commission, when time is given the purchaser in which to pay a portion of the purchase money. Of course if this matter is provided for by the contract between the broker and his employer the contract governs, and the broker must, in order to recover his commissions, show that they have become due under the terms of the contract.⁵ It has

he will allow three thousand dollars as a commission, the owner cannot avoid liability to the broker on a sale actually made for eight thousand dollars on the ground that the broker in making the sale was guilty of fraudulent conduct and misrepresentation in inducing the purchaser to pay eight thousand dollars for the property when the owner was willing to take five thousand dollars. *Hardy v. Stonebraker*, 31 Wis. 640. See also *Grant v. Hardy*, 33 Wis. 668.

1. Contract Governs. — See *Songer v. Wilson*, 52 Ill. App. 117.

Construction of Contract. — See *Wisehart v. Dietz*, 67 Iowa 121; *Barrett v. Johnson*, 64 Pa. St. 223.

How Excess Computed. — Where the defendant agreed with the plaintiff to allow him whatever the property brought over a certain amount, with the additional understanding that the plaintiff might secure and reserve for himself from the purchaser a windmill and tank upon the property, the defendant could not claim that the value of the windmill and tank should be credited on the surplus. *Jenkins v. Darling*, (Tex. Civ. App. 1900) 56 S. W. Rep. 931.

Amount of Recovery on Owner's Refusal to Sell. — In a case where brokers having property for sale under a contract of the character under discussion found a purchaser who was willing to pay three hundred dollars more than the price fixed, but the owner would not consummate the sale, it was held that the brokers could recover three hundred dollars, but could not in addition recover fifty dollars which they had paid the owner while negotiations were pending in order to induce him to complete the sale. *Cornell v. Hanna*, (Kan. 1898) 53 Pac. Rep. 790.

Indivisible Contract for Sale of Several Houses. — Where a broker was to have for his services in selling four houses one-third of all over forty-four thousand dollars realized from the sale, he was not entitled, upon a sale of one house only, to one-third of the excess over eleven thousand dollars. *Mayer v. Haaren*, (N. Y. Super. Ct. Gen. T.) 5 N. Y. Supp. 436.

2. Morehouse v. Remson, 59 Conn. 392; *Beatty v. Russell*, 41 Neb. 321; *Ames v. Lamont*, 107 Wis. 531.

3. Right to Interest. — *Martin v. Ede*, 103 Cal. 157.

Where the Commission Is Not Payable in Money but is to consist of an interest in certain land,

the agent is not entitled to interest on the value of the land. *Harvey v. Hamilton*, 54 Ill. App. 507, *affirmed* 155 Ill. 377.

4. Parker v. Estabrook, 68 N. H. 349. And see generally *supra*, this section, *I. j. Full Duty Must Be Performed — General Rule Stated*.

Agreement to Extend Time of Payment Held Invalid. — *McComb v. Von Ellert*, (C. Pl. Gen. T.) 7 Misc. (N. Y.) 59.

5. Contract Governs. — *Crevier v. Stephen*, 40 Minn. 288. See *Holbrook v. Investment Co.*, 30 Oregon 259.

Construction of Contract. — Where commissions on a purchase of land for several persons jointly were to be paid when the land was resold, or if sold in parcels a proportionate part of the commission was to be paid as each parcel was sold, the broker did not become entitled to any payment upon a sale by one of the joint owners of his undivided interest in the whole property. *Johnson v. Sirret*, 153 N. Y. 51, *reversing* 83 Hun (N. Y.) 317.

See also as to construction of particular contracts, *Gresham v. Galveston County*, (Tex. 1896) 36 S. W. Rep. 796; *Bishop v. Averill*, 17 Wash. 209.

Acceptance of Agreement as to Time of Payment. — *Erbacher v. Seefeld*, 92 Wis. 350.

Where Commissions are Payable Out of Instalments of purchase-money the broker, in order to recover, must show that the instalments have been paid or that the fault of the employer has prevented their collection. *Burnett v. Edling*, 19 Tex. Civ. App. 711.

Contract for Payment in Instalments — Foreclosure of Deed of Trust. — When the vendor has agreed to pay the broker his commissions proportionately as instalments of purchase money are paid, and after default by the purchaser the vendor forecloses a deed of trust securing the deferred payments and bids in the property for the amount due him with interest, costs, etc., the broker is entitled to be paid the balance of his commissions at once. *Crane v. Eddy*, 93 Ill. App. 569, *affirmed* 191 Ill. 645.

Commission to Be Paid When Final Purchase Money Paid. — Where the understanding between the broker and the vendor, his employer, was that the full commission should not be paid until the final purchase money was paid in, and the purchaser failed to complete the contract, and thereby, according to the contract of sale, forfeited the amount he had paid

also been said that the only fair and equitable rule where the purchase money is payable in instalments is to allow commissions on the instalments as paid from time to time;¹ but on the other hand it has been held that it does not necessarily follow, from the fact that a broker has consented to receiving in lieu of the customary percentage for his services an amount which his customer stands ready and willing to pay on the owner's net price, that payment of this sum to the broker depends upon or is to be deferred until final and complete satisfaction of the purchaser's obligation to the owner.²

5. Employment of Several Brokers — *a. RIGHT OF OWNER.* — An owner of property desiring to sell the same may employ several different brokers for that purpose, if he so desires.³

b. WHO ENTITLED TO COMMISSIONS. — In such case the broker through whose instrumentality the purchaser is procured — who is the procuring cause of the sale — is entitled to the entire commission to the exclusion of all others,⁴ and the owner cannot defeat his right by actually making the sale through another broker.⁵ Nor can the agent who has first found a purchaser be deprived of his right to a commission by the fact that the property is sold through another broker to a different purchaser.⁶

down, the broker was entitled to commissions on such amount. *Gilder v. Davis*, 137 N. Y. 504, *reversing* 18 N. Y. Supp. 544.

1. *Melvin v. Aldridge*, 81 Md. 650. See also *Peters v. Anderson*, 88 Va. 1051.

2. *Crevier v. Stephen*, 40 Minn. 288.

A Question for the Jury. — *Marx v. Otto*, 117 Mich. 510.

3. *Cook v. Forst*, 116 Ala. 395; *Henderson v. Vincent*, 84 Ala. 99; *Day v. Porter*, 161 Ill. 235, *affirming* 60 Ill. App. 386; *Freedman v. Havemeyer*, 37 N. Y. App. Div. 518; *Duval v. Moody*, 24 Tex. Civ. App. 627.

Construction of Contract. — When the owner of property employed two brokers to sell the same, and agreed with one of them that if he succeeded in selling he should have one per cent. and the other broker the same amount, the first broker was not, on a sale by him, entitled to the entire commission of two per cent., and he had not the right to sue for it. *Lorimer v. Boylan*, 98 Mich. 18.

4. Broker Who Procured Sale Entitled to Commission — *England.* — *Murray v. Currie*, 7 C. & P. 584, 32 E. C. L. 641. See also *Bray v. Chandler*, 18 C. B. 718, 86 E. C. L. 718.

Alabama. — *Henderson v. Vincent*, 84 Ala. 99.

Colorado. — *Carper v. Sweet*, 26 Colo. 547; *Scott v. Lloyd*, 19 Colo. 401; *Williams v. Bishop*, 11 Colo. App. 378.

District of Columbia. — *Daniel v. Columbia Heights Land Co.*, 9 App. Cas. (D. C.) 483.

Illinois. — *Farrar v. Brodt*, 35 Ill. App. 617; *Tinsley v. Scott*, 69 Ill. App. 352; *Davis v. Gassette*, 30 Ill. App. 41.

Indiana. — *Bowser v. Mick*, (Ind. App. 1902) 62 N. E. Rep. 513.

Iowa. — *Rounds v. Allen*, (Iowa 1902) 89 N. W. Rep. 1098.

Kentucky. — *Higgins v. Miller*, (Ky. 1900) 58 S. W. Rep. 580.

Massachusetts. — *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317; *Dowling v. Morrill*, 165 Mass. 491.

Michigan. — *Douville v. Comstock*, 110 Mich. 693. Compare *Fox v. Rouse*, 47 Mich. 558.

Minnesota. — *Francis v. Eddy*, 49 Minn. 449.

Missouri. — *Wright v. Brown*, 68 Mo. App. 577; *McCann v. Bailey*, 60 Mo. App. 456.

New York. — *Shipman v. Frech* (N. Y. City Ct. Gen. T.) 1 N. Y. Supp. 67, *reversed* on other grounds 15 Daly (N. Y.) 151; *Feldman v. O'Brien*, (Supm. Ct. App. T.) 23 Misc. (N. Y.) 341; *Freedman v. Havemeyer*, 37 N. Y. App. Div. 518. See also *Hendricks v. Daniels*, (C. Pl. Gen. T.) 19 N. Y. Supp. 414.

Tennessee. — *Glascocock v. Vanfleet*, 100 Tenn. 603.

Texas. — *Duval v. Moody*, 24 Tex. Civ. App. 627.

Wisconsin. — See *Terry v. Reynolds*, 111 Wis. 122.

The Owner May Sell to the Buyer First Procured by any of the brokers without the necessity of deciding which broker is the primary cause of the sale, provided he remains neutral between them and is not guilty of any wrong. *Day v. Porter*, 161 Ill. 235, *affirming* 60 Ill. App. 386.

Evidence. — *Creager v. Johnson*, 114 Iowa 249.

Which Broker Procured Sale a Question for the Jury. — *Smith v. Smith*, 1 Sweeney (N. Y.) 552.

Right Not Affected by Owner's Previous Payment of Commission to Another. — *Winans v. Jaques*, 10 Daly (N. Y.) 487; *Cohen v. Hershfield*, 16 Daly (N. Y.) 96.

5. Sale Through Another Broker — *District of Columbia.* — See *Armes v. Cameron*, 19 D. C. 435.

Illinois. — *Day v. Porter*, 161 Ill. 235, *affirming* 60 Ill. App. 386; *Tinsley v. Scott*, 69 Ill. App. 352; *Barton v. Rogers*, 84 Ill. App. 49.

Michigan. — *Wood v. Wells*, 103 Mich. 320.

Missouri. — *Lipscomb v. Cole*, 81 Mo. App. 53.

New York. — *Gillen v. Wise*, 14 Daly (N. Y.) 480; *Shipman v. Frech*, (N. Y. City Ct. Gen. T.) 1 N. Y. Supp. 67, *reversed* on other grounds 15 Daly (N. Y.) 151.

Texas. — *Duval v. Moody*, 24 Tex. Civ. App. 627.

Owner Must Have Known of Facts. — *Tinges v. Moale*, 25 Md. 480, 90 Am. Dec. 73.

6. *Stewart v. Woodward*, 7 Kan. App. 63; *Peckham v. Ashhurst*, 18 R. I. 376.

Previous Payment to Another Broker No Defense. — *Peckham v. Ashhurst*, 18 R. I. 376.

Merely Calling the Purchaser's Attention to the Property is not sufficient to entitle the broker to commissions if another broker was the efficient and procuring cause of the sale.¹

Where Two or More Brokers Have Each Found a Purchaser, the owner is bound to pay a commission only to the one who has first found and introduced a purchaser to whom the sale is made; the other brokers are entitled to nothing.²

Special Contracts. — Where the owner of property has agreed to pay a broker a certain commission if he effects a sale, and one-half that commission if any other broker makes a sale, naming the lowest price at which he will sell, the broker is not entitled to a commission on a sale made through another broker for a less amount.³

6. Right to Recover in Cash. — When a broker who is entitled to a cash commission has consented to take real estate, he may upon his employer's refusal to convey recover his commission in cash,⁴ but he cannot, after having agreed that his commission should be paid by a conveyance to him of certain land, refuse a deed which is tendered to him, and recover his commission in cash.⁵

7. Assignment of Claim for Commissions. — A claim for commissions on a sale of real estate may be assigned, even during the pendency of an action to recover such commissions.⁶

8. Lien for Commissions. — While a real-estate broker does not usually possess the right of a general lien for his commission,⁷ and it has been held that such a broker has no lien on moneys or papers placed in his hands to use in the purchase of land,⁸ a broker has been held to have a lien on the specific deed delivered to him by his principal,⁹ and it has also been asserted that a broker who is employed to procure a loan has a lien for his commissions and may deduct them out of the amount procured.¹⁰

9. Reimbursement for Expenses. — As a general rule a broker is not entitled to be reimbursed for the expenses he has incurred in endeavoring to make a sale,¹¹ though a recovery has been allowed of the amount paid for an abstract of title necessarily procured for the benefit of his employer.¹²

In Pennsylvania it has been held that if a real-estate broker has incurred expenses in connection with his employment prior to a revocation of his authority, he may recover such expenses.¹³

10. Limitation of Actions. — The statute of limitations begins to run against a broker's claim for commissions at the time an actual and *bona fide* sale is made, notwithstanding there has been a previous nominal sale for the purpose of showing briskness in sales.¹⁴

XII. AGREEMENT BETWEEN BROKERS TO SHARE COMMISSIONS — 1. Not a Partnership. — An agreement between real-estate brokers to share the commissions received for the sale of certain property does not constitute them partners.¹⁵

2. Whether Writing Necessary. — A contract between brokers to share the

1. *Dowling v. Morrill*, 165 Mass. 491; *Crowninshield v. Foster*, 169 Mass. 237; *Whitcomb v. Bacon*, 170 Mass. 479, 64 Am. St. Rep. 317; *Haines v. Barney*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 748, 67 N. Y. Supp. 164. See *Glascock v. Vanfleet*, 100 Tenn. 603.

2. *Goldsmith v. Cook*, (C. Pl. Gen. T.) 14 N. Y. Supp. 878, *reversing* (N. Y. City Ct. Gen. T.) 13 N. Y. Supp. 578. See also cases cited *supra*, this section.

3. *Powell v. Anderson*, 15 Daly (N. Y.) 219.

4. *Morey v. Harvey*, 18 Colo. 40.

5. *Bailey v. Gardner*, (C. Pl. Spec. T.) 6 Abb. N. Cas. (N. Y.) 147.

6. **Assignment.** — *Sample v. Rand*, 112 Iowa 616.

7. **Lien.** — *Richards v. Gaskill*, 39 Kan. 428. See also *Carpenter v. Momsen*, 92 Wis. 449.

8. *Robinson v. Stewart*, 97 Mich. 454.

9. *Richards v. Gaskill*, 39 Kan. 428.

10. *Vinton v. Baldwin*, 95 Ind. 433.

11. **Reimbursement for Expenses.** — *McDonald v. Ortman*, 98 Mich. 40; *Thuner v. Kanter*, 102 Mich. 59.

12. *Quitow v. Perrin*, 120 Cal. 255.

13. *Hill v. Jones*, 152 Pa. St. 433; *Jaekel v. Caldwell*, 156 Pa. St. 266; *Vincent v. Woodland Oil Co.*, 165 Pa. St. 402.

14. *Ross v. Fickling*, 11 App. Cas. (D. C.) 442.

15. *Mason v. Sieglitz*, 22 Colo. 320; *Wass v. Atwater*, 33 Minn. 83.

commissions realized on a sale or sales of realty is not required to be in writing.¹

3. Rights Arising Out of Agreement. — Where the broker having charge of the sale of property has employed another broker to assist him in the sale for a certain proportion of the commission, if successful, the latter is entitled to his agreed commission if his efforts are the procuring cause of the sale,² and can recover the specified proportion of the whole commission which the first broker has received, regardless of any other agreement of such broker regarding the commissions, which is unknown to him.³

Where the Original Time for Sale Has Expired, but the sale is made before the expiration of an extension thereof, through the efforts of the parties to the agreement to divide commissions, there must be a division according to the agreement.⁴

Commissions Must Have Been Received. — In order to entitle a broker to recover from another broker on an agreement of the latter to divide with him the commission on the sale of certain property, the commission must have been actually received by the broker whom it is sought to charge with liability.⁵ Hence, where the commission is payable in proportion as the purchase money is received by the vendor, a judgment should not be entered against the broker to whom the commission is payable for the other broker's share of the entire commission, where all of the purchase money has not been paid at the time of such judgment, and consequently all of the commission has not been received.⁶

Rights as Against Employer. — The broker who was directly employed is entitled to recover the whole commission from his employer, and the only remedy of the broker who was employed to assist in the sale is against the first broker, who is his employer.⁷

Where the Brokers for Both Parties to an Exchange Have Agreed to Divide their commissions, and one broker has collected the commissions from both principals, the other broker may recover his share of the commissions from the broker who received them.⁸

XIII. REVOCATION OF AUTHORITY — 1. Right to Revoke — a. GENERAL RULE. — Where the contract of employment specifies no time during which the broker's authority to sell or to negotiate for a sale shall continue, the authority is subject to revocation at any time before a sale is made, or a purchaser found who is ready, willing, and able to purchase on the required terms, without liability on the part of the owner to the broker.⁹ If, however,

1. *Gorham v. Heiman*, 90 Cal. 346.

2. *Leonard v. Roberts*, 20 Colo. 88.

Sale Must Be at Price Designated in Agreement to Divide. — *Whitcomb v. Dickinson*, 169 Mass. 16.

Violation of Instructions, Waiver. — In *Russell v. Andrae*, 84 Wis. 374, 79 Wis. 108, the defendant, who was the agent for the sale of certain land at a certain price, employed the plaintiff to find a purchaser under an agreement to pay him a share of the commission, and the plaintiff employed one M. to assist him. Certain persons applied to M. to purchase the property and he gave them a price larger than that which the owner had fixed, but such persons subsequently purchased the property from the owner at the price originally fixed and the owner paid the agreed commission to the defendant on the sale. It was held that by paying the stipulated commission the owner waived the violation of his instructions and such waiver estopped the defendant from asserting such violation of instructions as a defense to an action by the plaintiff for his share of the commission, and would also estop

the plaintiff, after receiving his commission, from asserting it in an action brought by M. to recover his stipulated share of the plaintiff's commission.

3. *Gorham v. Heiman*, 90 Cal. 346. See also *Parker v. Merrill*, 173 Mass. 391.

4. *Mason v. Sieglitz*, 22 Colo. 320.

5. *McCann v. Sawyer*, 59 Mo. App. 480.

Liability Fixed When Full Compensation Received. — *Olsen v. Jodon*, 38 Minn. 466.

6. *Gorham v. Heiman*, 90 Cal. 346.

7. *Morse v. Traynor*, 26 Neb. 594; *Kohn v. Jacobs*, (N. Y. City Ct. Gen. T.) 4 Misc. (N. Y.) 265; *Carroll v. Tucker*, (C. Pl. Gen. T.) 2 Misc. (N. Y.) 397.

8. *Dearing v. Sears*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 31, 50 Hun (N. Y.) 604 mem.

9. Right to Revoke Authority — England. — *Toppin v. Healey*, 11 W. R. 466.

Alabama. — *Bailey v. Smith*, 103 Ala. 641; *Henderson v. Vincent*, 84 Ala. 99.

California. — *Blumenthall v. Goodall*, (Cal. 1890) 25 Pac. Rep. 131.

District of Columbia. — *Armes v. Cameron*, 19 D. C. 435.

his authority is revoked after he has found a purchaser ready, willing, and able to purchase on the required terms, he is entitled to his commission, though the sale be not made through him.¹

b. PARTICULAR CONTRACTS VARYING THE RULE. — Where the contract between the broker and his employer provides that the broker shall be entitled to compensation if the property is withdrawn from sale within the time limited in the contract, the broker is, of course, entitled to the stipulated compensation upon such withdrawal.²

A Contract Giving the Broker the Exclusive Right to Negotiate a Sale of the property for a limited time has been held to exclude the right of the owner to revoke the broker's authority within the time limited.³

Where the Broker's Authority Is Coupled with an Interest, it is not revocable at the pleasure of the owner of the property.⁴

2. Notice. — The broker is entitled to notice of the revocation of his authority,⁵ and is entitled to commissions on a sale made before receiving such notice.⁶

3. Burden of Proof. — Where, in an action for commissions, the employer resists the broker's claim on the ground that his authority was revoked prior to the sale, the burden of proving such revocation is upon the employer.⁷

REALIZE. — See note 8.

Kentucky. — *Collier v. Johnson*, (Ky. 1902) 67 S. W. Rep. 830; *Kavanaugh v. Ballard*, (Ky. 1900) 56 S. W. Rep. 159.

Massachusetts. — *Cadigan v. Crabtree*, 179 Mass. 474.

Minnesota. — *Fairchild v. Cunningham*, 84 Minn. 521.

Missouri. — *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695; *Vandyke v. Walker*, 49 Mo. App. 381; *Green v. Wright*, 36 Mo. App. 298; *Gaty v. Sack*, 19 Mo. App. 470.

Nebraska. — *Woods v. Hart*, 50 Neb. 497.

New York. — *Alden v. Earle*, 56 N. Y. Super. Ct. 366; *Slater v. Holt*, (Buffalo Super. Ct. Gen. T.) 10 N. Y. St. Rep. 257; *Geery v. Pollock*, 16 N. Y. App. Div. 321; *Van Siclen v. Herbst*, 30 N. Y. App. Div. 255.

North Carolina. — *Abbott v. Hunt*, 129 N. Car. 403.

Pennsylvania. — *Hill v. Jones*, 152 Pa. St. 433; *Shisler's Estate*, 2 Pa. Dist. 588.

Compare *McLane v. Maurer*, (Tex. Civ. App. 1902) 66 S. W. Rep. 693.

Employer May Revoke Though Employment in Terms Irrevocable. — *Stamets v. Deniston*, 193 Pa. St. 548; *Blackstone v. Buttermore*, 53 Pa. St. 266.

Where Negotiations Were Broken Off When the Broker's Authority Was Revoked, he is not entitled to commissions upon a subsequent sale of the property to the person with whom he had been negotiating, such sale being the result of independent negotiations. *Stedman v. Richardson*, 100 Ky. 79. See also *Gillett v. Corum*, 5 Kan. 608.

Circumstances Amounting to Revocation. — *Yingling v. West End Imp. Co.*, 5 Pa. Dist. 607. See also *Hutchinson v. Holmes Sanitarium*, 93 Wis. 23.

Circumstances Not Amounting to Revocation. — See *Fuller v. Brady*, 22 Ill. App. 174; *Lipscomb v. Cole*, 81 Mo. App. 53.

The Revocation Does Not Affect the Broker's Right to Enforce Performance upon the part of the principal when the broker has performed his part of the contract. *Stamets v. Deniston*, 193 Pa. St. 548.

1. *Gaty v. Foster*, 18 Mo. App. 639; *Geery v. Pollock*, 16 N. Y. App. Div. 321; *Martin v. Holly*, 104 N. Car. 36. See also *infra*, this title, *Compensation — Right to — General Rule; Sale Directly by Owner*.

2. *Maze v. Gordon*, 96 Cal. 61.

Construction of Contract. — *Chapin v. Bridges*, 116 Mass. 105.

The Execution of a Lease for five years giving the tenant the exclusive privilege of purchasing constitutes a sale or a withdrawal from sale by the owner within the meaning of a contract to pay the broker half commissions in such event. *Rucker v. Hall*, 105 Cal. 425.

3. *Attix v. Pelan*, 5 Iowa 336.

Liability for Wrongful Revocation. — See *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695.

4. *Bird v. Phillips*, (Iowa 1901) 87 N. W. Rep. 414. See also *Durkee v. Gunn*, 41 Kan. 496, 13 Am. St. Rep. 300; *Glover v. Henderson*, 120 Mo. 367, 41 Am. St. Rep. 695; *Shisler's Estate*, 2 Pa. Dist. 588.

An Interest in the Proceeds of Sale by way of compensation for services is not sufficient. *Shisler's Estate*, 2 Pa. Dist. 588.

5. **Notice.** — *Henderson v. Vincent*, 84 Ala. 99; *Nolan v. Swift*, 111 Mich. 56; *Jones v. Berry*, 37 Mo. App. 125; *Van Siclen v. Herbst*, 30 N. Y. App. Div. 255.

6. *Gaty v. Sack*, 19 Mo. App. 470; *Van Siclen v. Herbst*, 30 N. Y. App. Div. 255.

A Notice of Revocation Sent Through the Mails takes effect only when it is received by the broker. Hence he is entitled to compensation for a sale made (so far as it is in his power to complete it) before knowledge of the revocation is actually received by him, though after the letter containing the notice was mailed. *Robertson v. Cloud*, 47 Miss. 208.

7. *Bourke v. Van Keuren*, 20 Colo. 95.

8. **Realize — Give Effect To.** — In *Com. v. Johnson*, 33 Gratt. (Va.) 301, it was said: "To 'realize' the preferred liens of the state" evidently means to give effect to them."

To Bring into Actual Possession. — In *Lorillard v. Silver*, 36 N. Y. 579, *reversing* 35 Barb. (N.

REALM. — See note 1.

REAL PARTY IN INTEREST. (See also the title PARTIES TO ACTIONS, 15 ENCYC. OF PL. AND PR. 476, 710.) — "In statutes requiring suits to be brought in the name of the 'real party in interest,' this term means the person who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal, formal, or technical interest in it or connection with it."²

Y.) 132, where land was sold for a specified sum with a condition that if the vendee should resell it for a certain other specified amount and *realize* the price, then five hundred dollars more should be paid to the vendor, it was held that the vendor acquired no right to the additional compensation except in the event of an actual sale and realization of the proceeds; that an offer of the required amount made to the vendee by a responsible party, and refused, was not enough. The court said: "To *realize* means to bring into actual possession; it is ordinarily used in contrast to hope or anticipation."

An article of association of a building and investment society provided that "no dividend shall be payable except out of the *realized* profits arising from the business of the company." Upon the interpretation of the word *realized*, as here used, the court, *per* Kay, J., said: "*Realized* must there have its ordinary commercial meaning, which, if not equivalent to 'reduced to actual cash in hand,' must at least be 'rendered tangible for the purpose of division.' The article is in a negative form. It is a prohibition against payment, and against the payment of dividends except out of *realized* profits arising from the business of the company. The precise thing intended to be prohibited is the payment of dividends in respect of 'estimated' profits as distinguished from *realized*. The meaning of the word in this article is the direct converse of the word 'estimated.'" *In re Oxford Ben. Bldg., etc., Soc.*, 35 Ch. D. 510, 17 Am. & Eng. Corp. Cas. 179.

Executory Contract. — Where the plaintiff was to be paid "out of the first moneys and government scrip there is *realized*" by the defendant from the sale of certain lands, it was held that an executory contract for the sale of such lands did not make the defendant liable upon his contract. *Stanford v. Greene County*, 18 Iowa 218.

Indebtedness. — The payee of a draft assigned it to one who gave his promissory note, the payee agreeing to release the assignee from paying the note in case he should be unable to "collect or *realize*" on the draft. The assignee afterwards became indebted to the drawer. It was held that until a suit should be brought by the drawer enabling the assignee to set off the draft against the debt, it could not be predicated that the assignee had been able to *realize* on the draft by means of the indebtedness. *Hall v. Henderson*, 84 Ill. 611.

1. Realm. — In *Reg. v. Keyn*, 2 Ex. D. 197, it was said: "I cannot help thinking that some confusion arises from the term *realm* being used in more than one sense. Sometimes it is used, as in the statute of Richard II., to mean the land of England and the internal sea within it; sometimes as meaning whatever the sovereignty of the crown of England extended, or was supposed to extend, over."

Out of the Realm. — See *BEYOND THE SEAS*, vol. 4, p. 12, and see the title *LIMITATION OF ACTIONS*, vol. 19, p. 237.

2. Real Party in Interest. — *Stewart v. Price*, (Kan. 1902) 67 Pac. Rep. 555, *per* Pollock, J., quoting Black's L. Dict.

REAL PROPERTY.

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CROSS-REFERENCES.

As to the capacity to acquire, hold, and dispose of real property, see the titles ALIENS, vol. 2, p. 64; CORPORATIONS (PRIVATE), vol. 7, p. 620, and the references there given; JOINT-STOCK COMPANIES, vol. 17, p. 636. Particular kinds of real property, see the titles CEMETERIES, vol. 5, p. 701; DAMS, vol. 8, p. 699; ICE, vol. 15, p. 907; LAKES AND PONDS, vol. 18, p. 129; MINES AND MINING CLAIMS, vol. 20, p. 677; NATU-

RAL GAS, vol. 21, p. 417; *PARTY WALLS*, vol. 22, p. 236; *PEWS AND PEW RIGHTS*, vol. 22, p. 761; *PIPE LINES*, vol. 22, p. 825; *ROLLING STOCK*; *STREETS AND SIDEWALKS*; *TREES AND TIMBER*; *TURNPIKES AND TOLL ROADS*.

Particular interests in things real, see the titles EASEMENTS, vol. 10, p. 397; *ESTATES*, vol. 11, p. 364, and the references there given; *GROUND RENTS*, vol. 14, p. 1127; *LICENSE (REAL PROPERTY)*, vol. 18, p. 1127; *LIENS*, vol. 19, p. 3; *MECHANICS' LIENS*, vol. 20, p. 255; *PROFIT A PRENDRE*, ante, p. 186.

The incidents of ownership of things real, see the titles ACCRETION, vol. 1, p. 467; *CROPS*, vol. 8, p. 201; *EMINENT DOMAIN*, vol. 10, p. 1043; *FIXTURES*, vol. 13, p. 594; *IMPROVEMENTS*, vol. 16, p. 62; *LATERAL AND SUBJACENT SUPPORT*, vol. 18, p. 541; *LIGHT AND AIR*, vol. 19, p. 112; *RIPARIAN RIGHTS*; *WASTE*; *WATERS AND WATERCOURSES*.

Interests of persons in peculiar relations, see the titles COMMUNITY PROPERTY, vol. 6, p. 293; *GUARDIAN AND WARD*, vol. 15, p. 16; *INDIANS*, vol. 16, p. 211; *RECEIVERS*, post; *SEPARATE PROPERTY OF MARRIED WOMEN*.

The qualification of rights in real property, see the titles BUILDING RESTRICTIONS AND RESTRICTIVE AGREEMENTS, vol. 5, p. 2; *PERPETUITIES AND TRUSTS FOR ACCUMULATION*, vol. 22, p. 701; *POLICE POWER*, vol. 22, p. 914.

The remedies for wrongs in respect to real property, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 17, p. 674.

For other matters of SUBSTANTIVE LAW and EVIDENCE relating to this subject, see the titles BOUNDARIES, vol. 4, p. 756; *CLOUD ON TITLE*, vol. 6, p. 149; *COVENANTS*, vol. 8, p. 43; *EJECTMENT*, vol. 10, p. 467; *FENCES*, vol. 12, p. 1035; *FORCIBLE ENTRY AND DETAINER*, vol. 13, p. 742; *RECORDING ACTS*; *TRESPASS*.

I. DEFINITIONS. — Real Property in its strict legal sense denotes the right or interest which one may have in things real.¹

Things Real are such as can be comprehended under the term "lands, tenements, and hereditaments,"² being such things as on the death intestate of the owner of the fee pass to his heirs at law, in contradistinction to things personal, which pass to his personal representatives.³

II. TENURE BY WHICH THINGS REAL ARE HOLDEN — 1. In England — *a. ORIGIN AND HISTORY OF TENURE.* — The fundamental maxim of the English law of real property is "that the king is the universal lord and original proprietor of all the lands in his kingdom and that no man doth or can possess any part of it but what has mediately or immediately been derived as a gift from him,

1. **Real Property Defined.** — It is in this sense that Blackstone uses the term when he speaks of things not as property but as the objects of property. 2 Bl. Com. 15. See the title *PROPERTY*, ante, p. 259.

2. **The Term "Lands, Tenements, and Hereditaments"** is a series of names of which each succeeding one is broader than the preceding; yet the last is not inclusive even of the first. See generally Challis on Real Prop. 36; 2 Bl. Com. 17; Washb. on Real Prop. *2, and the definitions of these several terms in this work.

The Term "Real Property" is coextensive with "lands, tenements, and hereditaments." *La Crosse v. Cameron*, (C. C. A.) 80 Fed. Rep. 273; *Porter v. Williams*, 9 N. Y. 148, 59 Am. Dec. 519; *Rogers v. Kimsey*, 101 N. Car. 564; *State v. South Penn Oil Co.*, 42 W. Va. 80; *Van Camp v. Peerenboom*, 14 Wis. 65.

The Words "Real Property" include lands,

tenements, and hereditaments and all rights thereto, and interest therein, equitable as well as legal. *Burton v. Hintrager*, 18 Iowa 351; *Scarborough v. Smith*, 18 Kan. 409; *Lewis v. Glass*, 92 Tenn. 147.

As to what is to be considered real property within statutes providing for taxation, see *Union Compress Co. v. State*, 64 Ark. 136; *State v. Minneapolis Mill Co.*, 26 Minn. 229; *Cincinnati College v. Yeatman*, 30 Ohio St. 276; *Chapman v. Wellington First Nat. Bank*, 56 Ohio St. 310; *Ross v. Outagamie County*, 12 Wis. 39; *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 332; *State v. Anderson*, 90 Wis. 550. And see the title *TAXATION*.

3. **Things Real and Things Personal Distinguished** — For a detailed discussion of what things are considered real and what personal, see the title *PERSONAL PROPERTY*, vol. 22, p. 369.

to be held upon feudal services." ¹ This maxim embodies the essential principle of the feudal system, without some general acquaintance with which an accurate comprehension of the laws which regulate real property is impossible.

Feudal System. — The feudal system is generally regarded as having arisen gradually in the countries once a part of the Roman Empire, out of the interaction of the remains of Roman law and the primitive customs of the Teutonic tribes which settled in those countries. ² At its root lies the need of mutual co-operation for the defense of society in a period of wild lawlessness. ³ Later legal systematists, who were acquainted with it in its developed form, conceived of it as a set of rules consciously devised to serve certain purposes and adopted or forced upon the communities in which it prevailed. ⁴ In very general terms the developed feudalism which lies at the basis of the English land laws may be thus described: ⁵ The ultimate title to all land resided in the king, who was charged with the defense of the whole state. One step below him were the great nobles, the king's tenants *in capite*, among whom the land was divided in large districts, which were held on a basis of military service or military exactions. This estate of a tenant *in capite* was subdivided among his subordinates into smaller districts, and their estates might be again and again subdivided in the same way until the tenant paravail, terre-tenant, or actual cultivator of the soil was reached. Thus the land was divided among a regularly graded body of owners from the lord paramount through the mesne lords to the terre-tenant. A feudal holding, known as fief, fee, or feud ⁶ (in contradistinction to allodial lands), ⁷ created the relation of lord and tenant, who were bound to one another by mutual obligations, the lord being bound to protect his tenant, the tenant to render services and feudal dues to his lord.

b. VARIOUS KINDS OF TENURE — (1) *In General.* — The kinds of tenure or modes in which lands in England have been held since the conquest may be divided, according to the nature of the service or return due by the tenant to his lord, into four general species, being in respect to the quality of such service either free or base, and in respect to its quantity and time of performance either certain or uncertain. ⁸

(2) *Tenure in Chivalry.* — The first, and formerly the most general, species of tenure was that by knight-service or tenancy in chivalry. This was the tenure by which a knight's fee was held, ⁹ and it was esteemed the most honorable because of the nature of the service to be rendered by the tenant, which consisted in attending his lord to the wars for forty days in every year when called upon, ¹⁰ but its incidents also made it the most oppressive. ¹¹

1. **Theory of Tenure.** — 2 Co. Litt. 65a; 2 Bl. Com. 51; 3 Kent's Com. 377; Challis on Real Prop. 4; Atty.-Gen. v. Mercer, 8 App. Cas. 767.

2. See Digby Hist. Law Real Prop., c. 1, § 2; Spence Equit. Juris., part i. bk. 1, c. 7 *et seq.*

3. Pollock Land Laws (3d ed.) 54.

4. Digby Hist. Law Real Prop. (5th ed.) 33.

5. See the sketch in 2 Bl. Com., and compare the later authorities above.

6. See FEE, vol. 12, p. 890; FEUD, vol. 13, p. 1, and the title ESTATES, vol. 11, p. 366, note.

7. See ALLODIAL, vol. 2, p. 150.

8. **Tenures Divided According to Nature of the Services.** — 1 Crabb's Law Real Prop. 738.

Free services were such as were not unbefitting a freeman to perform; base services were those of a menial and servile nature; certain services, whether free or base, were such as were reduced to a certainty both as to their quantity and the time of their perform-

ance; uncertain services were such as depended upon unknown contingencies in both these respects. 2 Bl. Com. 60.

9. **A Knight's Fee Does Not Imply Any Particular Acreage.** — 1 Pollock & M. Hist. Eng. Law (2d ed.) 256. See also Digby Hist. Laws Real Prop. (5th ed.) 61, note.

10. **Knight-Service.** — 2 Co. Litt., c. 3, § 95. See 2 Poll. & M. Hist. Eng. Law (2d ed.) 254.

11. **Incidents of Tenure in Chivalry.** — These incidents as enumerated by Blackstone are seven in number, viz., aids (to the ransom of the lord's person, the knighting of his son, and the marriage portion of his daughter); reliefs and primer seisin (payable by the heir on succeeding to the estate); wardship (see title GUARDIAN AND WARD, vol. 15, p. 21); marriage (the disposition of infant wards in marriage); fines for alienation and escheat (see the title ESCHEAT, vol. 11, p. 315). 2 Bl. Com. 63.

Military tenures (having been discontinued during the period of the commonwealth) were finally swept away by the statute 12 Car. II., c. 24, which abolished all forms of military tenure except tenure by the honorary service of grand serjeanty,¹ and converted them all into tenure by free and common socage.

(3) *Tenure in Free Socage.* — The second species of tenure to which the military tenures were reduced consists in holding land by any free and honorable but certain and determinate service,² and subsists in England to this day as the one general form of tenure by which, with the single exception before noted, all frank tenements in lay hands are held.

(4) *Copyhold Tenure.* — Copyhold tenure, or tenure by copy of court roll, is the mode in which lands in a manor are held, and is of ancient though humble origin, copyholders, it is said, being no other than villeins who, by a long series of immemorial encroachments upon their lord, have at last established a right to those lands which they before held merely at his pleasure and upon the basest and most uncertain services.³ It derives its name from the fact that copies of the rolls of the manor court are the only evidence of the tenure.⁴

(5) *Tenure in Ancient Demesne.* — The fourth and last species of lay tenure is that of tenure in ancient demesne, which is a sort of copyhold tenure by which lands are held in manors which are, or once were, the property of the crown.⁵

(6) *Tenure in Frankalmoign.* — Tenure in frankalmoign, or free alms, is the tenure by which almost all of the ancient monasteries and religious houses held their lands, and by which the parochial clergy and many ecclesiastical and eleemosynary foundations hold them in England to this day. It has none of the incidents of the feudal tenures, but is recompensed by services merely spiritual, and hence cannot subsist in lay hands.⁶

2. In Canada. — The tenure by which land is held in the Dominion of Canada varies in the different provinces. In *Ontario*, the mode is largely regulated by the imperial statute 31 Geo. III., c. 31, § 43, which provided that all lands which should be thereafter granted within the province of Upper Canada should be granted in free and common socage in like manner as lands

1. Grand Serjeanty is a species of tenure derived immediately from the crown, and is distinguished by the nature of the service to be performed by the tenant, which is always of an honorable and dignified kind closely connected with the person or the service of the king, such as to carry his sword or spurs at his coronation, to keep guard over one of the royal castles, or to perform some other useful or honorable office. 2 Co. Litt., c. 8, § 53; Challis on Real Prop. 8.

Cornage Tenure was a species of grand serjeanty, and is so denominated from the nature of the service, which consisted in winding a horn when the Scots or other enemies crossed the border. 2 Co. Litt., c. 8, § 156; 2 Bl. Com. 74.

Petit Serjeanty is also a form of tenure which can be of none but the crown, and though it is military inasmuch as the service always consists in rendering some small instrument of war, yet, from the fact that the service is certain both in respect to the character of the implement and the time when it is rendered, petit serjeanty is classed as a form of socage tenure. 2 Co. Litt., c. 9, § 159; 2 Bl. Com. 81; 1 Crabb's Law Real Prop. 748.

2. Tenure in Free Socage. — 2 Co. Litt., c. 5. § 117.

Burgage Tenure Is a Species of Town Socage. — See BURGAGE TENURE, vol. 5, p. 43.

Tenure in Gavelkind is a species of socage tenure existing principally in Kent, but occasionally met with in other parts of the kingdom. Land so held was distinguished principally by four characteristics: it was alienable by the tenant at the age of fifteen, was devisable by will before the passage of the statute, was not forfeited by felony, and descended to all the sons of the tenant alike. 2 Bl. Com. 84.

3. Origin of Copyhold Tenure. 2 Bl. Com. 95. See also COPYHOLD, vol. 7, p. 507.

4. Co. Litt., l. 1, c. 9, § 75.

5. Tenure in Ancient Demesne. — 2 Bl. Com. 99.

6. Tenure in Frankalmoign. — 2 Co. Litt., c. 6; Challis on Real Prop. 9.

This seems to be an old Saxon tenure which escaped the Norman revolution, through the reverence paid to religious men. No fealty was due to the lord, and his only redress, if the service was not performed, was to complain to the ordinary or visitor. This service originally consisted in praying for the souls of the donor and his heirs, but the character of it was somewhat altered by the Reformation. 2 Bl. Com. 101.

were then holden in free and common socage in England.¹ In *Quebec*, lands were formerly held by a seigniorial tenure of French feudal origin, but this tenure was abolished by the Seigniorial Act of 1854 and its amendments, which provided for the payment of an indemnity by the government to the seigniorial proprietors for the extinction of their rights.²

3. **In the United States.** — In the United States, although the nomenclature of feudal tenure has been retained, and although land is sometimes said to be held in free and common socage, yet all the incidents of feudal tenure have been abolished and land is everywhere in effect,³ and in some states has been expressly declared by the constitution or statutes to be,⁴ allodial. Escheat, which was originally an incident of the feudal relation, does, in fact, remain, but it exists as an incident of sovereignty and not of tenure,⁵ and the right of eminent domain, which is inherent in the state, is exercised, not by virtue of an ultimate ownership of the soil, but as an incident of police power.⁶ So, the oath of allegiance, which has superseded the oath of fealty, is merely the acknowledgment of a political obligation due from all citizens to the state, and has no relation whatever to the ownership of land.⁷

III. CHARACTER OF PROPERTY WHICH MAY SUBSIST IN THINGS REAL. — The character of property which may subsist in things real — signified by the word "estate" — may, in respect to the jurisdiction in which it is cognizable, be either legal or equitable.

A Legal Estate is such an interest in things real as is cognizable in, and will be protected by, a court of law.⁸

An Equitable Estate is a right to the beneficial enjoyment of a thing, the legal title of which is in another. It is termed equitable because it is not recognized at law, but is enforceable in a court of equity only. It arises from the decomposition of the estate into its constituent elements by means of a trust, either expressly created in the instrument by which the legal estate is vested⁹ or raised by implication of law from the circumstances of the transfer.¹⁰

IV. TITLE, AND THE MODE OF ACQUIRING AND LOSING IT — 1. **Title Defined.** — Title has been defined as "the means whereby the owner of lands hath the just possession of his property,"¹¹ and is said in the older books to consist of three several stages or degrees, the union of which in one person is necessary to create in him a complete title. These several stages or degrees of title are distinguished as the mere possession, the right of possession, and the right of property.¹² Whatever merit this distinction may have had in the days of real

1. **Tenure in Dominion of Canada** — Ontario. — *Atty.-Gen. v. Mercer*, 8 App. Cas. 707, *reversing* 5 Can. Sup. Ct. 538.

2. **Quebec.** — Those statutes are now embodied in the Consolidated Statutes of Lower Canada, cap. 41, and the Statute of Canada 23 Vict., cap. 50. *Stuart v. Gagné*, 5 Quebec 227; *Panet v. Boisseau*, 5 Quebec 377.

3. **Tenure in the United States.** — 1 Washb. on Real Prop., c. 2, par. 98; *Matthews v. Ward*, 10 Gill & J. (Md.) 443; *Jackson v. Ingraham*, 4 Johns. (N. Y.) 163.

4. See the constitutions and statutes of *Connecticut*, *Georgia*, *Kentucky*, *New Jersey*, *New York*, and *Wisconsin*.

Indian Lands. — For a discussion of the tenure by which Indian lands are held, see the title **INDIANS**, vol. 16, p. 211.

5. See the title **ESCHEAT**, vol. 11, p. 315.

6. *Wallace v. Harmstad*, 44 Pa. St. 492. And see the title **EMINENT DOMAIN**, vol. 10, p. 1043.

7. *Cook v. Hammond*, 4 Mason (U. S.) 467; *Wallace v. Harmstad*, 44 Pa. St. 492. And see **ALLEGIANCE**, vol. 2, p. 148.

8. **Legal Estate.** — For a discussion of the

degree, quantity, nature, and extent of interests which may subsist in things real, see the title **ESTATES**, vol. 11, p. 364, and the references to particular titles there given.

9. **Equitable Estates.** — See the titles **CHARITIES AND TRUSTS FOR CHARITABLE USES**, vol. 5, p. 893; **SPENDTHRIFTS AND SPENDTHRIFT TRUSTS**; **TRUST DEEDS AND POWER OF SALE MORTGAGES**; **TRUSTS AND TRUSTEES**.

10. See the titles **EQUITABLE MORTGAGES**, vol. 11, p. 122; **EQUITY OF REDEMPTION**, vol. 11, p. 205; **FRAUDULENT SALES AND CONVEYANCES**, vol. 14, p. 210; **IMPLIED TRUSTS**, vol. 15, p. 1119; **VENDORS' LIENS**.

11. **Title Defined.** — 2 Bl. Com. 195; 2 Crabb's Real Prop. 1000; *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 29 Am. Rep. 184.

It is defined by Sir Edward Coke to be "the means whereby a man cometh to land." 1 Inst. 345b.

The Code of *Georgia* (§ 3208) defines title as "the means whereby a person's right to property is established." *Pratt v. Fountain*, 73 Ga. 261.

12. **Stages or Degrees of Title.** — 2 Bl. Com. 195; 4 Kent's Com. 373; 2 Crabb Law of Real

actions passed away with their abolition and need not as a practical question concern us now.

2. Mode of Acquiring and Losing — *a. IN GENERAL.* — The various modes by which title to real property may be lost and acquired may be reduced to two general classes, viz., title by descent and title by purchase.¹

b. TITLE BY DESCENT. — Descent, or hereditary succession, is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as his heir at law. It is a title acquired solely by operation of law, the estate of the ancestor being cast upon the heir without his consent and even against his expressed disclaimer.²

c. TITLE BY PURCHASE — (1) *In General.* — Every other mode of acquiring title is denominated a purchase. This has been defined as a title "which a man hath by his own act or agreement."³ It may arise either by act of the parties or by operation of law, but it cannot vest in a person unless he expressly or impliedly assents to it.⁴

(2) *Original and Derivative Titles.* — A title by purchase may be either original or derivative. An original title is one acquired solely by the act of him who claims it; a derivative title is one acquired by transfer from a former owner.⁵

(3) *Occupancy.* — A title by occupancy is acquired by taking possession of a thing which before belonged to no one.⁶ It is a familiar mode of acquiring property in things personal,⁷ but is not predicable of things real, for in contemplation of law land can never be without an owner.⁸

Common Occupancy — *Estates Per Autre Vie.* — To this fundamental principle, however, there was at common law a single exception. If a man had an estate granted to him for the life of another and died during the life of the *cestui que vie*, he who first entered on the land might retain the possession so long as the *cestui que vie* lived, for the reason that there was no one who could lawfully dispute the possession.⁹ Common occupancy has been abolished both in *England*¹⁰ and the *United States*¹¹ by statute.

Special Occupancy. — Title by special occupancy, however, exists in *England* and perhaps in some of the *United States* to this day.¹²

(4) *Adverse Possession.* — A title to land by adverse possession is acquired

Prop. 1000. And see the title TITLE, OWNERSHIP, AND POSSESSION.

1. Mode of Acquiring Title. — 2 Bl. Com. 201; 4 Kent's Com. 423; 2 Crabb's Law Real Prop. 1011; 3 Washb. on Real Prop. 401.

2. Title by Descent. — See the title SUCCESSION.

3. Title by Purchase. — 1 Co. Litt., l. 1, c. 1, § 12.

Purchase includes every mode of coming into an estate except by inheritance. *Martin v. Strachan*, 1 Wils. C. Pl. 66, Willes 444; *Greer v. Blanchard*, 40 Cal. 194. See also *Radcliffe v. Roper*, 10 Mod. 92.

4. Tied. on R. P., § 659.

5. Original and Derivative Titles. — 1 Bouvier's L. Dict. 549; 2 Rapalje & Law. L. Dict. 1276.

6. See OCCUPANCY, vol. 21, p. 765.

7. See the title PERSONAL PROPERTY, vol. 22, p. 752.

8. 2 Bl. Com. 168.

9. Common Occupancy — *Estates Per Autre Vie.* — See the title ESTATES, vol. 11, p. 377.

10. Abolition of Common Occupancy — *English Statutes.* — Statute of Frauds (29 Car. II., c. 3), § 12; 14 Geo. II., c. 20, § 9. These acts are virtually re-enacted and extended by § 6 of the Statute of Wills (1 Vict., c. 26).

11. Statutes in the United States. — In *Rhode*

Island the statute (Gen. L. 1896, c. 203, § 28), extends the power to dispose of property by will to estates *per autre vie*.

In *North Carolina* the statute declares (Code of N. Car., vol. 1, c. 28, r. 11), that every estate for the life of another not devised shall be deemed an inheritance of the deceased owner.

In *New Jersey* (Gen. Stat., vol. 3, p. 3757), estates *per autre vie* not devised go to the executors or administrators of the party who had the estate thereof by virtue of the grant, and are assets in their hands and are applied and distributed in the same manner as the personal estate of the testator or intestate.

In some other states the statutes declare that an estate *per autre vie*, whether limited to his heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee, and after his death shall be regarded as a chattel real. Code Ala., c. 118, art. 1, par. 4246; Comp. Laws Mich., c. 237, par. 8788; Stat. Minn., c. 45, par. 4367; Rev. Stat. N. Y. (Heydecker), c. 46, art. 1, § 23; Wis. Stat. (1898), c. 95, § 2030.

12. Challis on Real Prop. 287. See also the title ESTATES, vol. 11, p. 378; *Norton v. Frecker*, 1 Atk. 524; *Doe v. Robinson*, 8 B. & C. 296, 15 E. C. L. 222.

by an actual, notorious, exclusive, and continuous possession of it under a claim of right, and adversely to the title of the true owner for the period prescribed by the statute of limitations. The facts necessary to constitute these elements are treated elsewhere in this work.¹

(5) *Prescription*. — Prescription is the mode of acquiring title to property by immemorial or long-continued possession, use, and enjoyment. It is applicable to incorporeal rights in the same way that adverse possession creates a title to land. The requisites of this mode of acquiring title are discussed elsewhere in this work.²

(6) *Escheat*. — In its original signification, escheat was an incident of feudal tenure, by virtue of which the lord of the fee succeeded to the estate on the death of his tenant without lawful heirs. It was, therefore, not strictly a mode of acquiring title, but was rather the coming into possession of an interest which already existed in expectancy. In the *United States*, however, where estates are essentially allodial, and where the state succeeds to the title, not by virtue of any proprietary right, but in its capacity as sovereign, escheat may properly be regarded as an original mode of acquiring title, being a sort of occupancy, or the taking possession of that which belonged to no one.³

(7) *Forfeiture*. — Forfeiture as a means of acquiring title to land was formerly an incident of sovereignty by which, on conviction of certain high crimes and misdemeanors, the crown or state succeeded to the estate which the offender forfeited by his misconduct.⁴ This mode of acquisition, having been almost universally abrogated by statute in the *United States*,⁵ requires no discussion.

(8) *Estoppel*. — The rule is well settled that if a grantor makes a conveyance of land to which he has a defective title, or no title whatever, by deed which contains any of the usual covenants, or which sets forth by averment or recital, either in express terms or by necessary implication, that the grantor is seized or possessed of a particular estate in the premises, which estate the deed purports to convey, he, and all persons in privity with him, will be estopped from ever afterwards denying that he was seized and possessed of such title at the time, or from setting up an after-acquired title against his grantee, or any one holding under or in privity with him. Whether the estoppel has the effect of actually passing such after-acquired title to the grantee, or whether it merely precludes the grantor from asserting such title in derogation of his own grant, is a disputed question which has been adequately discussed elsewhere in this work.⁶

(9) *Bankruptcy*. — Under the National Bankruptcy Act of 1898, a trustee in bankruptcy, upon his appointment and qualification, becomes vested by operation of law with title to all the property of the bankrupt⁷ owned by him at the time of the filing of the petition⁸ not exempt from the claims of creditors.⁹ This title takes effect by virtue of the act from the date of the

1. See the title ADVERSE POSSESSION, vol. I, p. 787.

2. See the title PRESCRIPTION, vol. 22, p. 1180.

3. See the title ESCHATEAT, vol. II, p. 315.

4. *Forfeiture*. — 2 Bl. Com. 267; 4 Kent's Com. 426. See also FORFEITURE, vol. 13, p. 1073, and references there given.

5. See Stimson's Am. Stat. L., §§ 143, 144.

For *Forfeiture of Particular Estates* to the holders of the residuary interests, see the titles LEASE, vol. 18, p. 367; WASTE; and the title CONDITIONS, vol. 6, p. 499.

6. See the title ESTOPPEL, vol. II, p. 417.

7. Title by *Bankruptcy*. — National Bankruptcy Act of 1898, § 70a; *In re Lesser*, 100

Fed. Rep. 433; *In re Mullen*, 101 Fed. Rep. 413. And see the title INSOLVENCY AND BANKRUPTCY, vol. 16, p. 630.

A court of bankruptcy has jurisdiction to order the trustee to take possession of mortgaged property when it is in the interest of creditors that such property should be administered with the balance of the bankrupt's estate, and may enjoin the mortgagee from selling or otherwise disposing of the property. *In re Booth*, 96 Fed. Rep. 943.

8. *Property Which a Bankrupt May Acquire After the Filing of a Petition* and before the adjudication in bankruptcy does not vest in the trustee. *In re Burka*, 104 Fed. Rep. 326.

9. *Exemptions*. — *In re Woodard*, 95 Fed.

adjudication,¹ and is subject to all equitable and valid liens existing against the property on that date,² but is not subject to the lien of a judgment entered against the bankrupt after the adjudication and before the appointment of the trustee.³ Upon the confirmation of a composition offered by a bankrupt, the title to his property revests in him.⁴

(10) *Receivership*. — The appointment of a receiver by a court of equity does not vest in him any title to the property given into his charge; but the court may, if occasion require, compel the person over whose property the receiver is appointed, to execute a formal conveyance to him.⁵ In some of the states, however, the legal effect of the appointment of a receiver in proceedings supplementary to execution is to vest the receiver with the property of the judgment debtor from the time of the filing of the orders, and a legal assignment is therefore unnecessary.⁶

(11) *Abandonment*. — The rule has been broadly stated that every owner of property, whether real or personal, may abandon it.⁷ As regards personalty this rule is unquestionably sound;⁸ but in respect to realty the decisions do not justify so broad a statement. It is not disputed that easements and other incorporeal hereditaments may be lost by abandonment,⁹ or that incipient rights to land, such as may arise from location and survey, or other merely equitable titles, not perfected into a grant, or vested by deed, may be abandoned.¹⁰ But that a perfect legal title may be so lost cannot be supported. Under the Spanish law, as it existed in territory now a part of the United States, abandonment was a recognized mode of parting with title to land,¹¹ but except in *Texas*, where the survival of this principle seems to have unsettled the question,¹² the decisions are unanimous in asserting that under

Rep. 260; *In re* Russie, 96 Fed. Rep. 609; *In re* Daubner, 96 Fed. Rep. 805; *In re* Moran, 105 Fed. Rep. 601; *In re* Mayer, (C. C. A.) 108 Fed. Rep. 599. And see the titles EXEMPTIONS FROM EXECUTION, vol. 12, p. 59; HOMESTEAD, vol. 15, p. 516.

1. Title Dates from Adjudication. — Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514; Keegan v. King, 96 Fed. Rep. 758.

2. Southern L. & T. Co. v. Benbow, 96 Fed. Rep. 514.

3. *In re* Engle, 105 Fed. Rep. 893.

4. National Bankruptcy Act of 1898, § 70f.

5. See the title RECEIVERS, *ante*.

6. See the title SUPPLEMENTARY PROCEEDINGS.

7. Abandonment. — Holmes v. Cleveland, etc., R. Co., (Ohio 1860) 8 Am. L. Reg. 716.

8. See ABANDONMENT, vol. 1, p. 1.

9. Abandonment of Incorporeal Hereditaments. — French v. Braintree Mfg. Co., 23 Pick. (Mass.) 216; Corning v. Gould, 16 Wend. (N. Y.) 530. And see the title EASEMENTS, vol. 10, p. 434.

10. Incipient Rights and Equitable Interests. — Keane v. Cannovan, 21 Cal. 291, 82 Am. Dec. 738; Davis v. Perley, 30 Cal. 630; Judson v. Malloy, 40 Cal. 299; Blaisdell v. Martin, 9 N. H. 253; Jones v. Merrimack River Lumber Co., 31 N. H. 381; Kirk v. King, 3 Pa. St. 436; Phillips v. Shaffer, 5 S. & R. (Pa.) 215; Dikes v. Miller, 24 Tex. 417; Pickett v. Dowdall, 2 Wash. (Va.) 107. And see the title STATE AND PUBLIC LANDS.

Abandonment of Adverse Holding. — Although one holds another's land adversely for seven years under color of title and claim of right, yet if he then abandons the land he cannot claim the benefit of the statute of limitations. Vickery v. Benson, 26 Ga. 582. See also Com. v. Dudley, 10 Mass. 403.

No doubt a disseisor may abandon the land or surrender his possession by parol to the disseisee at any time before his disseisin has ripened into a title, and thus put an end to his claim. His declarations are admissible in evidence to show the character of his seisin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseisin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by parol abandonment or relinquishment; it must be transferred by deed. One having such title may go out of possession, declaring that he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding on them. A parol conveyance of land creates nothing more than an estate or lease at will. School Dist. No. 4 v. Benson, 31 Me. 381, 52 Am. Dec. 618.

11. Abandonment under the Spanish Law. — Landes v. Perkins, 12 Mo. 244; Fine v. St. Louis Public Schools, 30 Mo. 166; Clark v. Hammerle, 36 Mo. 620.

12. Texas Doctrine. — Dikes v. Miller, 24 Tex. 417, where Wheeler, C. J., delivering the opinion of the court, says: "If a person having the disposing power absolutely, does an act sufficient in itself legally to divest his title, with the express intention of relinquishing and abandoning the property, it is not easy to perceive why he may not do so. * * * If the owner sees proper to abandon his property, and evidences his intention by an act legally sufficient to vest or divest the ownership, why may he not do so in the case of land as well

the common law abandonment is not predicable of a perfect legal title.¹ It may safely be stated as a legal principle that in no case can a man lose his title to land by any act or oral declaration of abandonment unless it comes within the principle of estoppel,² or is followed by such possession by a person claiming adversely as brings the case within the statute of limitations.³

(12) *Alienation* — (a) *In General*. — Alienation, conveyance, or purchase in its limited sense comprehends any method, as by sale, gift, settlement, devise, or the like, whereby an alienor either voluntarily or in pursuance of some lawful authority divests himself or another of title to an estate and by the same act vests it in an alienee, who voluntarily accepts it.⁴ In early times a transfer of real property was always accompanied by some symbolical ceremony which served to impress the fact upon the minds of witnesses who might afterwards be called to testify concerning it, as induction into an office, instalment in a dignity, or livery of seisin of land.⁵ But when the art of writing became a more general accomplishment this ceremony as legal evidence was superseded by the more convenient method of making some written memorandum or record of the conveyance, and this was afterwards made a legal requisite.⁶ The modes by which alienations are thus evidenced, and the alienees assured in the lawful possession of their acquisitions, are three in number, viz., by deed, by matter of record, and by will.

(b) *Modes of Assurance* — aa. *BY DEED*. — Assurance by deed, the most usual method of evidencing the transfer of real property, is effected by the proper execution of a written instrument by the alienor describing the thing and quantity of interest therein intended to be conveyed, setting forth the conditions of the alienation, and, if it be made on the behalf of another, reciting the authority therefor. The various sorts of deeds and the requisites and component parts of each are treated elsewhere in this work.⁷

bb. *BY MATTER OF RECORD* — (aa) *In General*. — An assurance by matter of record is such evidence of alienation as is derived from the rolls of some court, office, or legislative body, the sanction of whose authority has been invoked by the parties to substantiate, preserve, and be a perpetual testimony of the transfer.⁸

(bb) *Private Acts of Legislature* — *In England*. — Of this nature are private acts of Parliament. These are not unfrequently resorted to in cases where the alienation of real property would be expedient, and yet where, because of the entangled condition of the estate, or the disability of some person interested therein, an ordinary deed would be ineffectual to pass the title and the courts are powerless to give relief.⁹ In such cases the omnipotent power of Parliament is called in to solve the difficulty by giving its sanction to the conveyance, and thus assuring to the purchaser the estate freed from the latent or remote claims of all who are concluded by the act. In dealing with private bills, Parliament exercises judicial as well as legislative functions, and the

as of a chattel? It might go to the government instead of the first occupant upon the principle upon which land escheated or become derelict belongs to the state. But I do not perceive that that would affect the question of power in the owner to abandon the property." *Quoted in Tiebout v. Millican*, 61 Tex. 517.

1. *Abandonment Not Predicable of Perfect Legal Title*. — *Great Falls Co. v. Worster*, 15 N. H. 412; *Robie v. Sedgwick*, 35 Barb. (N. Y.) 319; *Philadelphia v. Riddle*, 25 Pa. St. 259; *Perkins v. Blood*, 36 Vt. 273; *Pickett v. Dowdall*, 2 Wash. (Pa.) 107.

2. See the title *ESTOPPEL*, vol. II, p. 385.

3. See the title *STATUTE OF LIMITATIONS*.

4. See *ALIENATE—ALIENATION*, vol. 2, p. 60.

For discussion of the various modes of

alienation, see the titles *EXCHANGE OF PROPERTY*, vol. II, p. 569; *FAMILY AGREEMENTS AND SETTLEMENTS*, vol. 12, p. 875; *JUDICIAL SALES*, vol. 17, p. 948; *MARRIAGE SETTLEMENTS*, vol. 19, p. 1224; *RECEIVERS' SALES; SHERIFFS' SALES; TAX SALES; TRUSTEE SALES; VENDOR AND PURCHASER*.

5. 2 Bl. Com. 311.

6. See the title *STATUTE OF FRAUDS*.

7. See the title *DEEDS*, vol. 9, p. 87, and the cross-references there given.

8. *Assurance by Matter of Record*. — 2 Bl. Com. 344.

9. *Private Acts of Parliament*. — *Westby v. Kiernan*, Amb. 697. In this case it was held that a private act passed to enable a tenant in tail to raise money bound the remainderman.

act, though it binds all parties concerned, is yet looked upon rather as a private conveyance than as a solemn act of the legislature, and has been relieved against when obtained upon fraudulent suggestions.¹ Such acts were very numerous just after the Restoration, but they are, at present, enacted with great deliberation and caution, nothing being done without the consent expressly given of all persons in being and capable of consent that have the remotest interest in the matter; and an equivalent in money or other estate is usually settled upon infants or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by the act.²

In the United States, private statutes passing title to land, and in various ways operating upon the property rights of individuals, have frequently been enacted, and their constitutionality has been upheld in all cases where their provisions have not transcended the legitimate exercise of legislative functions.³

Authorizing Conversion of Realty into Personality. — The most conspicuous instances of such legislation are acts authorizing the conversion of realty into personality where a change in the character of the property would be advantageous to those beneficially interested in it. In the case of infants,⁴ lunatics,⁵ or trusts for charitable uses,⁶ the power of the legislature as *parens patrie* to sanction such change is undoubted. But the legislature has no power by special statute to authorize the sale of land in which adults, competent to act for themselves, have an interest, vested or contingent,⁷ unless they consent to the sale,⁸ or it is authorized for the purpose of discharging debts which constitute charges against the estate.⁹

1. 2 Bl. Com. 345.

2. 1 Steph. Com. 429.

3. See the title CONSTITUTIONAL LAW, vol. 6, pp. 1020, 1052.

A Private Act of the Legislature, Obtained by Fraud, where the fraud is clearly made out, may be annulled by a decree of the Chancery Court. *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715, 41 Am. Dec. 636.

4. **Authorizing Sales of Infants' Lands** — *United States*. — *Hoyt v. Sprague*, 103 U. S. 613; *Ward v. New England Screw Co.*, 1 Cliff. (U. S.) 565; *Lobrano v. Nelligan*, 9 Wall. (U. S.) 295. *Illinois*. — *Mason v. Wait*, 5 Ill. 127.

Maryland. — *Dorsey v. Gilbert*, 11 Gill & J. (Md.) 87.

Massachusetts. — *Rice v. Parkman*, 16 Mass. 326.

Mississippi. — *McComb v. Gilkey*, 29 Miss. 146; *Boon v. Bowers*, 30 Miss. 246, 64 Am. Dec. 159.

Missouri — *Stewart v. Griffith*, 33 Mo. 13; *Gannett v. Leonard*, 47 Mo. 205.

New York. — *Leggett v. Hunter*, 19 N. Y. 445; *Cochran v. Van Surlay*, 20 Wend. (N. Y.) 365, 32 Am. Dec. 570; *Clark v. Van Surlay*, 15 Wend. (N. Y.) 436; *Towle v. Forney*, 14 N. Y. 423.

5. **The Legislature Has Power to Authorize the Guardian of a Person Non Compos Mentis** to sell a part of his ward's real estate and apply the proceeds to discharge incumbrances on other parts thereof. And notice need not be given to the ward before granting such authority to his guardian. *Davison v. Johannot*, 7 Met. (Mass.) 388, 41 Am. Dec. 448.

6. **Trusts for Charitable Uses.** — The legislature has power to direct a sale of real estate devised to charitable purposes — even though it be provided by the devise that the estate shall never be sold — in cases where lapse of time,

or change in the condition of the property, or circumstances attending it, make it prudent and beneficial to the charity to alien the specific land and invest the proceeds in other securities, taking care, however, that no diversion of the gift be permitted. *Stanley v. Colt*, 5 Wall. (U. S.) 119.

7. **Estate of Persons Sui Juris.** — The legislature cannot, against the consent of persons *sui juris* seized of a vested estate, authorize the sale of their real estate. *Brenham v. Story*, 39 Cal. 179; *Powers v. Bergen*, 6 N. Y. 358; *Brevoort v. Grace*, 53 N. Y. 245; *Ervine's Appeal*, 16 Pa. St. 256, 55 Am. Dec. 499; *Hegarty's Appeal*, 75 Pa. St. 503.

8. **Sale of Land by Trustees for Benefit of Cestuis Que Trustent.** — An act authorizing the sale of land by a trustee for the benefit of and with the express consent of the *cestuis que trustent* is valid. *Suydam v. Williamson*, 24 How. (U. S.) 427; *Williamson v. Suydam*, 6 Wail. (U. S.) 723; *Sohier v. Massachusetts Gen. Hospital*, 3 Cush. (Mass.) 483; *Carroll v. Olmsted*, 16 Ohio 251; *Norris v. Clymer*, 2 Pa. St. 277; *Sergeant v. Kuhn*, 2 Pa. St. 393; *Kerr v. Kitchen*, 17 Pa. St. 433. See also *Williamson v. Williamson*, 3 Smed. & M. (Miss.) 715.

9. **Authorizing Sale for Payment of Debts.** — A private act authorizing an administrator to sell the real estate of the decedent for the payment of his debts is invalid. *Watkins v. Holman*, 16 Pet. (U. S.) 25; *Holman v. Norfolk Bank*, 12 Ala. 369; *Davenport v. Young*, 16 Ill. 548, 63 Am. Dec. 320; *Kibby v. Chitwood*, 4 T. B. Mon. (Ky.) 91. But see *Jones v. Perry*, 10 Yerg. (Tenn.) 59, 30 Am. Dec. 430.

A private act of the legislature authorizing a widow to sell the lands of her deceased husband, and to apply so much of the proceeds thereof as might be necessary to the payment of his debts without the expense of a regular

Act Transferring Legal Title. — For stronger reasons a private act transferring the legal title of land from one person to another is unconstitutional and void,¹ unless all interested in the property consent to the alienation,² or the act merely conveys a bare legal title to one who is already the equitable owner.³

(cc) *Public Grants.* — In England, all grants from the crown are assured to the subject by matter of record, effected by enrollment of a letter patent, issued by the crown office and delivered to the grantee upon a warrant drawn by and signed by the lord chancellor and countersigned first by the law officers of the crown and finally by the king himself. Letters patent formerly issued for grants of corporeal as well as incorporeal property, but they are now confined to the creation of offices, dignities, and the like, the disposal of crown lands being vested by various acts of Parliament in certain fiscal officers.⁴

In the United States. — A grant of public lands by special act of Congress is likewise an assurance by matter of record. For while it is customary for such a grant to be evidenced by the issuance of a patent, yet, if the act be couched in words of present grant, it operates as a conveyance and passes title⁵ irrespective of the fact whether any patent is issued or not,⁶ and the statute of limitations begins to run against the grantee from the date such act becomes effective.⁷

(dd) *Fines and Common Recoveries.* — A fine and a common recovery are both assurances derived from the record of a collusive suit instituted by the alienee against the alienor, in which the title to the land intended to be conveyed is determined to be in the former by a judgment founded, in the case of a fine, upon an acknowledgment of the alienee's superior right, entered of record by the alienor, by leave of the court, and, in the case of a recovery, upon the default of the fictitious warrantor whom the alienor has vouched to defend his title.⁸ They are of very ancient origin, but derive their importance from the encouragement which the courts, by what has been characterized as a bold and unexampled stretch of judicial legislation, gave to their use as a means of barring an estate tail and thus evading the statute *de donis*, the repeal of

administration upon the estate, is constitutional. *Bruce v. Bradshaw*, 69 Ala. 360.

A state legislature may, constitutionally, pass a private act authorizing a court to decree, on the petition of an administrator, private sale of the real estate of an intestate to pay his debts, even though the act should not require notice to heirs or to any one, and although the same general subject is regulated by general statute much more full and provident in its nature. *Florentine v. Barton*, 2 Wall. (U. S.) 210.

Act Vesting Intestate's Estate in Commissioners to Sell for Debts Is Constitutional. — *Shehan v. Barnett*, 6 T. B. Mon. (Ky.) 594.

But the Power to Determine the Existence of Debts Is Judicial, not legislative, and a private act authorizing an administrator to sell land and apply the proceeds to the payment of the debts of the estate, without any judicial inquiry as to the existence of such debts before paying them, is unconstitutional. *Rozier v. Fagan*, 46 Ill. 404; *Lane v. Doe*, 4 Ill. 238, 36 Am. Dec. 543.

1. Act Transferring Legal Title. — *Bowman v. Middleton*, 1 Bay (S. Car.) 252. See also *Burke v. Mechanics' Sav. Bank*, 12 R. I. 513.

2. Distribution of Entailed Estate by Consent of Those Interested. — *Croxall v. Shererd*, 5 Wall. (U. S.) 268. See also *Edwards v. Pope*, 4 Ill. 465.

3. Act Declaring Legal Title to Be in Equitable Owner. — *Reformed Protestant Dutch Church v. Mott*, 7 Paige (N. Y.) 77.

Act Authorizing Conveyance of Legal Title to Equitable Owner. — *Estep v. Hutchman*, 14 S. & R. (Pa.) 435.

And so is an act authorizing the administrator of a vendor of land, who had given a bond for title, to execute a conveyance of the legal title to the purchaser. *Moore v. Maxwell*, 18 Ark. 469.

Acts Ratifying Defective Conveyances. — A private statute ratifying and confirming a sale and conveyance of land, made by an executor without legal authority, is valid. *Wilkinson v. Leland*, 2 Pet. (U. S.) 627. Compare *Sohier v. Massachusetts Gen. Hospital*, 3 Cush. (Mass.) 483.

So is an act ratifying a private sale of an infant's land, made under an order of the Probate Court, without appraisement. *Davis v. State Bank*, 7 Ind. 316.

4. Grants from the Crown. — 1 *Broom & Hadley's Bl.* 552.

5. Grant of Land by Special Act of Congress. — *Hannibal, etc., R. Co. v. Smith*, 9 Wall. (U. S.) 95; *Leroy v. Doe*, 32 Fed. Rep. 516, 13 Sawy. (U. S.) 30.

6. Northern Pac. R. Co. v. Cannon, 46 Fed. Rep. 224.

7. Leroy v. Doe, 32 Fed. Rep. 516, 13 Sawy. (U. S.) 30; *Jatunn v. Smith*, 95 Cal. 154. And see generally the title PUBLIC LANDS; STATE LANDS.

8. See FINE AND COMMON RECOVERY, vol. 13, p. 51.

which it was found impossible to secure.¹ They were abolished in England by statute 3 & 4 Wm. IV., c. 74.² Though not unknown, they appear never to have been very extensively used in the United States,³ and seem to have become obsolete where they have not been expressly abolished by statute.⁴

cc. By WILL. — An assurance by will is such evidence of title as proceeds from the probate of the instrument,⁵ the requisites and interpretation of which will be treated elsewhere in this work.⁶

dd. SURRENDER OR DESTRUCTION OF TITLE DEED. — The rule seems to be well settled that the voluntary surrender or destruction of a deed of conveyance, whether recorded or not, does not divest the grantee of the title which he derived by means of it, or revest such title in the grantor;⁷ though it has been held that the grantee may, by his act, be afterwards estopped from setting up the deed or showing its contents by parol.⁸

1. 2 Bl. Com. 348; and see the title ESTATES, vol. II, p. 374.

2. Fines and Recoveries Abolished. — In its place was substituted a simple deed executed by the tenant in tail, and enrolled in the Court of Chancery. Williams on Real Prop. 48.

3. Instances of Use in the United States. — For cases in which the validity of fines and recoveries have been adjudicated in the United States, see the following:

Maryland. — Carroll v. Maydwell, 3 Har. & J. (Md.) 292.

Massachusetts. — Dudley v. Sumner, 5 Mass. 438; Dow v. Warren, 6 Mass. 328; Hawley v. Northampton, 8 Mass. 3, 5 Am. Dec. 66.

New Hampshire. — Frost v. Cloutman, 7 N. H. 9.

New York. — Roseboom v. Van Vechten, 5 Den. (N. Y.) 414; McGregor v. Comstock, 17 N. Y. 162.

Pennsylvania. — Toman v. Dunlop, 18 Pa. St. 72; Ransley v. Stott, 26 Pa. St. 126; Sharp v. Thompson, 1 Whart. (Pa.) 139; Stump v. Findlay, 2 Rawle (Pa.) 168; Sharp v. Petit, 4 Yeates (Pa.) 413; Lyle v. Richards, 9 S. & R. (Pa.) 322; Abbott v. Jenkins, 10 S. & R. (Pa.) 296; Carter v. McMichael, 10 S. & R. (Pa.) 429.

In Delaware and Pennsylvania common recoveries are still recognized in the statutes as a mode of barring estates tail. Laws Del., Rev. Code of 1852, as amended in 1893, c. 83, § 26; Bright. Purd. Dig. (Pa.), p. 809.

4. Abolition by Statute. — Fines and common recoveries are prohibited in Florida. Rev. Stat. Fla. 1892, § 1953.

They were abolished in New Jersey in 1799 (Gen. Stat. N. J., title Conveyances, art. 137; Croxall v. Shererd, 5 Wall. (U. S.) 268). But in 1806 there is the report of a recovery suffered under special act of the legislature authorizing it. Richman v. Lippincott, 29 N. J. L. 44.

They were abolished in New York in 1830, and a simpler system substituted. McGregor v. Comstock, 17 N. Y. 162.

In many of the states they have been rendered obsolete by the conversion of estates tail into estates in fee simple. See the title ESTATES, vol. II, p. 376.

5. For a discussion of the admissibility of unprobated wills as evidence of title, see the title PROBATE AND LETTERS OF ADMINISTRATION, ante, p. 109.

6. See the title WILLS.

7. Surrender or Destruction of Title Deed — *England.* — Bolton v. Carlisle, 2 H. Bl. 259.

United States. — Holmes v. Trout, 7 Pet. (U. S.) 171.

Alabama. — Fawcetts v. Kimmey, 33 Ala. 261.

California. — Kearsing v. Kilian, 18 Cal. 491.

Connecticut. — Botsford v. Morehouse, 4 Conn. 550; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57.

Iowa. — Blaney v. Hanks, 14 Iowa 400.

Maine. — Patterson v. Yeaton, 47 Me. 308.

Massachusetts. — Holbrook v. Tirrell, 9 Pick. (Mass.) 105; Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76.

New Jersey. — Wilson v. Hill, 13 N. J. Eq. 143.

New York. — Fonda v. Sage, 46 Barb. (N. Y.) 109.

Tennessee. — Howard v. Huffman, 3 Head (Tenn.) 562, 75 Am. Dec. 783.

Wisconsin. — Parker v. Kane, 4 Wis. 12.

But it seems that the surrender or cancellation of an unregistered mortgage, or any instrument of defeasance only, revests the title in the mortgagor. Patterson v. Yeaton, 47 Me. 308.

8. Grantee Estopped to Set Up Deed. — Speer v. Speer, 7 Ind. 178, 63 Am. Dec. 418; Dodge v. Dodge, 33 N. H. 487; Sawyer v. Peters, 50 N. H. 143; Howard v. Huffman, 3 Head (Tenn.) 562, 75 Am. Dec. 783; Parker v. Kane, 4 Wis. 12.

Rights of Grantee's Creditors. — A creditor of the grantee may levy an execution against the land and recover possession by ejectment against the grantor. Botsford v. Morehouse, 4 Conn. 550. Or he may attach it in the possession of a subsequent purchaser with notice. Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76.

But in Blaney v. Hanks, 14 Iowa 400, it was held that a court of equity will not enforce the lien of a judgment against the grantee rendered after such cancellation, if the cancellation was made in good faith upon a repayment of the consideration, and with no intention to defraud creditors.

Title of Subsequent Purchasers. — A subsequent conveyance by the grantor vests a good title in the grantee, if he be a bona fide purchaser without notice of the former deed. Patterson v. Yeaton, 47 Me. 308. But not if he purchased with notice. Marshall v. Fisk, 6 Mass. 24, 4 Am. Dec. 76.

Yet if A conveys land to B by a deed

REAL RELEASE. — See note 1.

REAL REPRESENTATIVES. (See also the titles EXECUTORS AND ADMINISTRATORS, vol. 11, p. 720; LEGAL REPRESENTATIVES, PERSONAL REPRESENTATIVES, ETC., vol. 18, p. 813; SUCCESSION.) — Real representatives are the heirs at law; the heirs or devisees of the real property of a deceased person.²

REAL RESIDENT OCCUPIER. — See note 3.

REAL SECURITIES. — See note 4.

REAL SERVICE. — See note 5.

REAL STATUTE. (See generally the title PRIVATE INTERNATIONAL LAW, vol. 22, p. 1314.) — A real statute is one which "has property directly for its object, or its destination to certain persons, or its preservation in families, so that it is not the interest of the person whose rights or acts are examined, but the interest of others to whom it is intended to assure the property, or the real rights, which were the cause of the law."⁶

REALTY. — See REAL ESTATE, *ante*, and the title REAL PROPERTY, *ante*.

REAL WARRANTY. — See note 7.

REAR. — See note 8.

REARGUMENT. — See the title REHEARING, 18 ENCYC. OF PL. AND PR. 1.

REASON. — See note 9.

which is not recorded, and B, wishing to convey the same land to C, surrenders the deed to A, and A makes a new deed to C, B is estopped from claiming title as against C. *Lawrence v. Stratton*, 6 Cush. (Mass.) 163. And it has been held that C's title to the land will prevail against that of a creditor of B, to whom it was subsequently set off on execution. *Holbrook v. Tirrell*, 9 Pick. (Mass.) 105.

1. **Real Release.** — In *Booth v. Kinsey*, 8 Gratt. (Va.) 568, it was said: "A *real release* is where the creditor declares that he considers the debt as acquitted; it is equivalent to a payment, and renders the thing no longer due; 'consequently it liberates all the debtors of it, as there can be no debtors without something due.'" See also the title RELEASE AND DISCHARGE.

2. **Real Representatives.** — *Lee v. Dill*, 39 Barb. (N. Y.) 520, *affirmed* 41 N. Y. 619; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. Rep. 145.

3. **Real Resident Occupier.** — It has been held that to constitute a person a *real resident occupier*, within the meaning of an English statute regulating the sale of intoxicating liquors, he must sleep upon the premises. *Reg. v. Allmey*, 35 J. P. 534; *Reg. v. Manchester*, (1899) 1 Q. B. 574, 68 L. J. Q. B. D. 358.

4. **Real Securities — Investment.** (See also the title INVESTMENTS, vol. 17, pp. 439, 445.) — By the English Trustees Act, § 1, trustees are empowered to invest in *real* or inheritable securities. As to what mortgages are real securities within this provision, see *Sheffield, etc., Permanent Bldg. Soc. v. Aizlewood*, 44 Ch. D. 412; *Want v. Campaign*, 9 Times L. R. 254; *Webb v. Jonas*, 39 Ch. D. 660, 57 L. J. Ch. 671; *Swaffield v. Nelson*, (1876) W. N. 255.

5. **Real Services — Civil Law.** (See also the title EASEMENTS, vol. 10, p. 397.) — A *real service* is defined to be "a service which one estate owes to another; or the right of doing something, or of having a privilege in one man's estate for the advantage and convenience of the owner of another estate. * * *

The estate unto which the service is due is called *prædium dominans*, or the ruling estate, and the other estate which suffers or yields the service is called *prædium serviens*, or an estate subject to a privilege or service. To constitute such service it is therefore necessary that there be two estates, the one giving and the other receiving the advantage." *Angell on Watercourses*, § 142, *quoted* in *Morgan v. Mason*, 20 Ohio 409.

6. **Real Statute.** — *Saul v. His Creditors*, 5 Mart. N. S. (La.) 594, *quoting* 4 *Œuvres D'Agusseau* 669.

"*Real statutes* are those which have principally for their object property, and which do not speak of persons except in relation to property." *Story on Conflict of Laws*, § 13, *quoted* in *Companhia de Mocambique v. British South Africa Co.*, (1892) 2 Q. B. 396.

In *Prats v. His Creditors*, 2 Rob. (La.) 507, it was said: "The peculiar character and true effect of a *real statute* is to operate upon and regulate immovable property, without reference to the persons owning the same."

7. **Real Warranty.** — See *Hardy v. Pecot*, 104 La. 136.

8. **Rear.** — In *Read v. Clarke*, 109 Mass. 82, it was held, where a testator devised his messuage and "the two stable lots in the *rear* thereof," that the word *rear* did not necessarily mean directly behind the messuage.

Rear of the Lot. — See *Keening v. Ayling*, 126 Mass. 404.

9. **Reason of.** — The charter of a bridge company required the payment of "damages, if any, * * * by *reason* of the erection of the bridge." It was held that the words "by *reason* of," in the connection in which they stood, meant the same thing as "on account of" or "because of" the erection of the bridge. *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. St. 287.

Where, in building a railway, the defendant cut down and removed timber on the plaintiff's lands, it was held that the loss of the trees was damage or injury sustained by the plain.

REASONABLE — REASONABLY. (See also JUST, vol. 18, p. 1.) — Reasonable means conformable to reason; just; rational; equitable.¹ Reasonably

tiff by *reason* of the railway. *McArthur v. Northern, etc., R. Co.*, 15 Ont. 733, *affirmed* 17 Ont. App. 86.

Mere Glimmering of Reason — Testamentary Capacity. — In *Potts v. House*, 6 Ga. 352, the doctrine was stated as deducible from the authorities that "a mere glimmering of *reason*" was sufficient to sustain a will. For explanation of the term, as thus used, see *Terry v. Buffington*, 11 Ga. 345. See generally the title **TESTAMENTARY CAPACITY**.

1. A Reasonable Act has been defined as such an act as the law requires. *Bouv. L. Dict.*; *Levering v. Union Transp., etc., Co.*, 42 Mo. 95, 97 Am. Dec. 320. And see **ACT**, vol. 1, p. 576, note.

Reasonable Appearance of Danger. — See the titles **REASONABLE DOUBT**, *post*; **SELF-DEFENSE**.

"Reasonable Certainty is the being free from *reasonable doubt*." *State v. Shaw*, 4 Jones L. (49 N. Car.) 443. See also the title **REASONABLE DOUBT**, *post*.

Reasonable and Competent Support. — Where a will provided that a beneficiary was to have a *reasonable* and competent support out of the estate, it was held that this did not mean merely the food and clothing necessary to sustain life, but a support in a place and manner in which the party had been accustomed to live. *Ellerbe v. Ellerbe*, Spears Eq. (S. Car.) 329, 40 Am. Dec. 623. See also the title **SUPPORT AND MAINTENANCE**.

Reasonable Creature — Murder. — *State v. Jones*, Walk. (Miss.) 85.

Reasonable Expectation. — A person who begins business without capital and with a mortgage on all his assets, and who afterwards becomes bankrupt, has contracted his debts without *reasonable* or probable ground of expectation of being able to pay, within the *English Bankruptcy Act*, 1883, 46 & 47 Vict., c. 52, § 28, subsec. 3 (c). *Ex p. White*, 14 Q. B. D. 600. See also *Ex p. Downman*, 9 Jur. N. S. 811, 32 L. J. Bankr. 49; *Ex p. Mortimore*, 3 De G. F. & J. 599. And see the title **INSOLVENCY AND BANKRUPTCY**, vol. 16, pp. 795, 796.

Reasonable Facilities. — Under an *English* statute providing that railroad companies shall afford, according to their respective powers, all "*reasonable facilities*" for the receiving, forwarding, etc., of traffic upon their respective lines, it was held that the mere refusal by a railway company to receive and forward the traffic of persons in general, except upon the prepayment of charges somewhat in excess of the maximum authorized rates, was not a denial of "*reasonable facilities*." *Reg. v. Railway Com'rs*, 22 Q. B. D. 642, 40 Am. & Eng. R. Cas. 59. See also the titles **CARRIERS OF GOODS**, vol. 5, pp. 167 *et seq.*, 177 *et seq.*; **INTERSTATE COMMERCE**, vol. 17, p. 149 *et seq.*

"Reasonable" and "Fair" Synonymous. — See **FAIR — FAIRLY**, vol. 12, p. 710.

Fit and Appropriate to the End in View. — *State v. Vandersluis*, 42 Minn. 131.

Reasonable Fitness — Master and Servant. — In *Garnett v. Phoenix Bridge Co.*, 98 Fed. Rep. 194, it was said: "The obligation referred to

has frequently been said to require that the machinery and appliances provided for the use of the servant shall be *reasonably*, not absolutely, fit; but this terse statement of the matter is deficient because of its omission to define the term '*reasonably* fit,' and to supply this omission those cases must be consulted in which it has been held that *reasonable* fitness is such as may be attained by the bestowal of that degree of care and diligence which, under the circumstances, and in view of the nature of the work to be done, an ordinarily prudent master, if properly regardful of the welfare of his servants, would exercise for their safety." See also *Reilly v. Campbell*, 20 U. S. App. 334; *Hough v. Texas, etc., R. Co.*, 100 U. S. 213; *Wabash R. Co. v. McDaniels*, 107 U. S. 454; *Tuttle v. Detroit, etc., R. Co.*, 122 U. S. 189; *Baulec v. New York, etc., R. Co.*, 59 N. Y. 356; *Titus v. Bradford, etc., R. Co.*, 136 Pa. St. 626; *Geno v. Tall Mountain Paper Co.*, 68 Vt. 568. And see the title **MASTER AND SERVANT**, vol. 20, p. 74 *et seq.*

Impartial. — *Stone v. Stevens*, 12 Conn. 219, 30 Am. Dec. 611; *Thompson v. Beacon Valley Rubber Co.*, 56 Conn. 498.

Reasonable and Just. — In *Sweet v. Rechel*, 159 U. S. 400, it was said: "*Reasonable* compensation and just compensation mean the same thing." See also *Osgood v. Nelson*, L. R. 5 H. L. 636; *Rhinehart v. Schuyler*, 7 Ill. 536; and see **JUST**, vol. 18, p. 4, note.

Reasonable Man — Self-defense. — See the title **SELF-DEFENSE**, and see *State v. Cain*, 20 W. Va. 705.

Reasonable Mind. — "A *reasonable* mind is a sensible one, fairly judicious in its action, and at least somewhat cautious in reaching its conclusions." *Brewer v. Jacobs*, 22 Fed. Rep. 229.

Reasonable Portion. — A power to charge estates "with *reasonable* portions or fortunes for younger children, and for their maintenance and education," is sufficiently certain to be capable of execution; and the word *reasonable* there is applicable not only to the amount of the portion, but also to the time and occasion on which the child would want it. *Edgeworth v. Edgeworth*, Beatty 328.

"Ordinary" and "Reasonable" Synonymous. — See **ORDINARY — ORDINARILY**, vol. 21, p. 1006, note, and see *Illinois Cent. R. Co. v. Noble*, 142 Ill. 578; *Taylor v. Ballard*, 24 Wash. 191; *Read v. Morse*, 34 Wis. 315.

Reasonable Possibility. — In *Bonner v. State*, 107 Ala. 107, it was said that "*reasonable possibility*" is at last no more than a possibility." See also *Sims v. State*, 100 Ala. 23.

Reasonably Practicable — Negative Direction. — In *Wales v. Thomas*, 16 Q. B. D. 347, a direction that a set of affirmative and negative rules should be observed so far as *reasonably* practicable was held not to apply to the negative rules unless under very exceptional circumstances. *Day, J.*, said: "It is always possible to do nothing."

Reasonable and Probable Damage. — In an action for the condemnation of land for railroad purposes, the jury was instructed that the owner was entitled to just compensation for

means in a reasonable manner; consistently with reason; not extravagantly or excessively; tolerably; moderately; in a moderate degree; fairly.¹

REASONABLE CARE. — See the titles BAILMENTS, vol. 3, p. 732; NEGLIGENCE, vol. 21, p. 455; and the cross-references there given.

REASONABLE CAUSE. (See also the titles MALICIOUS PROSECUTION, vol. 19, p. 647; SEARCHES AND SEIZURES. And see REASONABLE, *ante*.) — See note 2.

REASONABLE DILIGENCE. — See the title NEGLIGENCE, vol. 21, p. 455; and see DILIGENCE, vol. 9, pp. 455, 456, and the cross-references there given.

the land taken and for all "reasonable and probable damages" to the balance of the land not taken. It was held that such instruction did not include possible, speculative, or remote damages, and was proper. *Chicago, etc., R. Co. v. Bowman*, 122 Ill. 606. For the general rule in such a case, see the title EMINENT DOMAIN, vol. 10, p. 1164 *et seq.*

Reasonable Cause and Probable Cause Synonymous. — See the title MALICIOUS PROSECUTION, vol. 19, p. 658, note, and see *Hicks v. Brantley*, 102 Ga. 269.

Reasonable Question. — In *Harding v. Long*, 103 N. Car. 5, the court said: "We are unable to draw any distinction between 'proving beyond reasonable doubt' and 'beyond reasonable question,' unless we treat the latter expression as the stronger of the two." See also the title REASONABLE DOUBT, *post*.

Question for Jury. — "What is reasonable is a question for the jury." *Chamberlain v. New Hampshire F. Ins. Co.*, 35 N. H. 265. See also the title QUESTIONS OF LAW AND FACT, *ante*, p. 543.

Reasonable Rates. — See the title INTERSTATE COMMERCE, vol. 17, p. 131 *et seq.*

Reasonable Regulation. — Authority "to cause the streets" of a city "to be lighted" and to make "reasonable regulations" with reference thereto has been held not to empower a city government to grant to one company an exclusive right to light the streets with gas, to the exclusion of all other methods of illumination, for thirty years. *Saginaw Gas-Light Co. v. Saginaw*, 28 Fed. Rep. 529, 16 Am. & Eng. Corp. Cas. 562.

Reasonable Right of Way — Fences. — In *Sizer v. Quinlan*, 82 Wis. 390, it was held that a reservation in a deed of a reasonable right of way across land conveyed did not entitle the owner of the dominant estate to enclose the right of way with fences.

Reasonable Provocation. — See *State v. Ellis*, 74 Mo. 217, and see ADEQUATE, vol. 1, p. 632. See also the titles MURDER AND MANSLAUGHTER, vol. 21, p. 174 *et seq.*; SELF-DEFENSE.

Reasonable Prudence. — "Reasonable prudence" is a relative term. *Grand Trunk R. Co. v. Ives*, 144 U. S. 408, *quoted* in *Sommer v. Carbon Hill Coal Co.*, (C. C. A.) 89 Fed. Rep. 59; *Crooker v. Pacific Lounge, etc., Co.*, (Wash. 1902) 69 Pac. Rep. 361.

Self-defense — Reasonable Danger. — See the titles REASONABLE DOUBT, *post*; SELF-DEFENSE.

Reasonable Use. — In *Bartels v. Brain*, 13 Utah 162, evidence as to the condition, situation, and adaptation of land for a particular use, the declarations of the parties as to the use to which the land was to be put, and that it had no rental value for any other purpose, was held admissible to show the intent of the

parties in the use of the phrase "reasonable use" in a lease.

What is a reasonable use of a river by a millowner, and by those who want to float logs past the mill, is a question of fact and depends upon the size and nature of the stream, the extent and kinds of business upon it, and all other circumstances. *Pearson v. Rolfe*, 76 Me. 380. See also *Pool v. Lewis*, 41 Ga. 169.

Reasonable Wear and Tear Excepted. (See also the title LANDLORD AND TENANT, vol. 18, pp. 246, 250, 254.) — Where the lessee of goods covenanted to restore them to the lessor at the expiration of the term in as good order as they were before, "reasonable wear and tear only excepted," it was held that the phrase "reasonable wear and tear only excepted" referred to the order and condition of the goods, so as to exclude bad repair, breakages, etc., not arising from reasonable wear and tear, but did not amount to a guaranty of the continued existence of the goods. *Chamberlen v. Trenouth*, 23 U. C. C. P. 497.

And that the term does not include a total loss, see *Anglin v. Henderson*, 21 U. C. Q. B. 27.

In *Green v. Kelly*, 20 N. J. L. 544, it was held that in an article of agreement for the sale of real estate by which the vendor stipulated to deliver possession of the premises, at a future day, in as good repair as they were in at the time of the execution of the contract, "natural and reasonable wear and tear excepted," the exception covered only such decay or depreciation in value of the property as might arise from ordinary and reasonable use; an injury to the property by a freshet was held not to be within the exception. See also the title VENDOR AND PURCHASER.

1. *Horn v. Territory*, 8 Okla. 56.

Attendant Circumstances. — Where the question was whether a street was in reasonably safe condition to travel, the court said that the word reasonably may involve the consideration of many attendant circumstances. *Denver v. Moewes*, 15 Colo. App. 31. See also the titles STREETS AND SIDEWALKS.

2. **Reasonable Cause.** (See also the title DIVORCE, vol. 9, pp. 765 (note), 766.) — In *Eshbach v. Eshbach*, 23 Pa. St. 345, it was held that a reasonable cause which would justify a wife's desertion and abandonment of her husband must be such as would entitle her to a divorce. See also *Butler v. Butler*, 4 Pa. L. J. Rep. 284, 1 Am. L. J. N. S. 388.

Reasonable Cause to Believe Debtor to Be Insolvent. — See the title INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 735, 736, and see *Daniels v. Palmer*, 35 Minn. 347; *Daniels v. Zumbrota Bank*, 35 Minn. 351.

REASONABLE DOUBT.

BY THOMAS JOHNSON MICHIE.

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And see *CONCLUSIVE*, vol. 6, p. 432; *FULL — FULLY*, vol. 14, p. 561, *note*.

I. PROOF BEYOND REASONABLE DOUBT NECESSARY IN CRIMINAL CASES — 1. General Doctrine. — It is a well-settled doctrine of the criminal law that in order to find a defendant guilty in a criminal case a preponderance of evidence is not sufficient. The jury must be convinced of his guilt, by the evidence, beyond a reasonable doubt,¹ and it is error to refuse to instruct that guilt must be

1. *Proof Beyond Reasonable Doubt Necessary — United States.* — U. S. v. Brown, 4 McLean (U. S.) 142; U. S. v. Johnson, 4 Cinc. L. Bul. 361, 26 Fed. Cas. No. 15,483; U. S. v. Wright, 16 Fed. Rep. 112; U. S. v. Keller, 19 Fed. Rep. 633; U. S. v. Jackson, 20 Fed. Rep. 504; U. S.

v. Searcey, 26 Fed. Rep. 435; U. S. v. Hughes, 34 Fed. Rep. 732.

Alabama. — State v. Newman, 7 Ala. 69; State v. Stephen, 15 Ala. 534; Winter v. State, 20 Ala. 39; Mose v. State, 36 Ala. 211; Childs v. State, 58 Ala. 349; Coleman v. State, 59

Ala. 52; *Tatum v. State*, 63 Ala. 147; *Farrish v. State*, 63 Ala. 164; *Boswell v. State*, 63 Ala. 307, 35 Am. Rep. 20; *Cross v. State*, 68 Ala. 476; *Ford v. State*, 71 Ala. 385; *Wharton v. State*, 73 Ala. 366; *Bain v. State*, 74 Ala. 38; *Winslow v. State*, 76 Ala. 42; *McKleroy v. State*, 77 Ala. 95; *Kidd v. State*, 83 Ala. 58; *Lane v. State*, 85 Ala. 11; *Riley v. State*, 88 Ala. 188; *Little v. State*, 89 Ala. 99; *Pierson v. State*, 99 Ala. 148; *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28; *Whitaker v. State*, 106 Ala. 30; *Howard v. State*, 108 Ala. 571; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324; *Gunter v. State*, 83 Ala. 96, 10 Crim. L. Mag. 428.

Arkansas. — *Green v. State*, 38 Ark. 304; *Lovejoy v. State*, 62 Ark. 478; *Overman v. State*, 49 Ark. 364; *Hudspeth v. State*, 50 Ark. 534; *Byrd v. State*, 69 Ark. 537.

California. — *People v. Milgate*, 5 Cal. 127; *People v. Ah Fung*, 16 Cal. 137; *People v. Padillia*, 42 Cal. 535; *People v. Woody*, 45 Cal. 289; *People v. Brannon*, 47 Cal. 96; *People v. Ah Sing*, 51 Cal. 372; *People v. Kerrick*, 52 Cal. 446; *People v. Carrillo*, 70 Cal. 643; *People v. Goslaw*, 73 Cal. 323; *People v. Ribolsi*, 89 Cal. 492; *People v. Wynn*, 133 Cal. 72.

Colorado. — *Kent v. People*, 8 Colo. 563; *Boykin v. People*, 22 Colo. 496.

Dakota. — *Territory v. Bannigan*, 1 Dak. 432.

Delaware. — *State v. Reidell*, 9 Houst. (Del.) 470.

Florida. — *Bond v. State*, 21 Fla. 738; *Wallace v. State*, 41 Fla. 547.

Georgia. — *Long v. State*, 38 Ga. 491; *Brewster v. State*, 63 Ga. 639; *Moon v. State*, 68 Ga. 687; *Marshall v. State*, 74 Ga. 26; *Tarver v. State*, 95 Ga. 222; *Mitchum v. State*, 11 Ga. 615; *Rickerson v. State*, 78 Ga. 15; *Weeks v. State*, 79 Ga. 36; *Mitchell v. State*, 110 Ga. 272.

Illinois. — *Reins v. People*, 30 Ill. 256; *Peri v. People*, 65 Ill. 17; *Otmer v. People*, 76 Ill. 149; *Marlatt v. People*, 104 Ill. 364; *Swigar v. People*, 109 Ill. 272; *Ritzman v. People*, 110 Ill. 362; *Spies v. People*, 122 Ill. 8, 3 Am. St. Rep. 320; *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683; *Grady v. People*, 125 Ill. 122; *Westbrook v. People*, 126 Ill. 81; *Watt v. People*, 126 Ill. 9.

Indiana. — *Hiler v. State*, 4 Blackf. (Ind.) 552; *Hipp v. State*, 5 Blackf. (Ind.) 149, 33 Am. Dec. 463; *French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Polk v. State*, 19 Ind. 170, 81 Am. Dec. 382; *Schusler v. State*, 29 Ind. 394; *Bradley v. State*, 31 Ind. 492; *Stewart v. State*, 44 Ind. 237; *Line v. State*, 51 Ind. 172; *Guetig v. State*, 63 Ind. 278; *Best v. State*, 155 Ind. 46.

Iowa. — *Tweedy v. State*, 5 Iowa 433; *State v. Ostrander*, 18 Iowa 435; *State v. George*, 62 Iowa 682; *State v. Clouser*, 69 Iowa 313; *State v. Trout*, 74 Iowa 546, 7 Am. St. Rep. 499; *State v. Perigo*, 80 Iowa 38.

Kansas. — *Horne v. State*, 1 Kan. 42, 81 Am. Dec. 499; *Craft v. State*, 3 Kan. 450; *State v. Tulip*, 9 Kan. App. 454.

Kentucky. — *Payne v. Com.*, 1 Met. (Ky.) 370; *Holloway v. Com.*, 11 Bush (Ky.) 344; *Roberts v. Com.*, (Ky. 1888) 7 S. W. Rep. 401; *Roberts v. Com.*, (Ky. 1888) 8 S. W. Rep. 270; *Com. v. Cozine*, (Ky. 1888) 9 S.

W. Rep. 289; *Arnold v. Com.*, (Ky. 1900) 55 S. W. Rep. 894; *Clark v. Com.*, (Ky. 1901) 63 S. W. Rep. 740; *Calhoon v. Com.*, (Ky. 1901) 64 S. W. Rep. 965.

Michigan. — *People v. Niles*, 44 Mich. 612.

Mississippi. — *Riggs v. State*, 30 Miss. 635; *George v. State*, 39 Miss. 570; *Pitts v. State*, 43 Miss. 472; *Kendrick v. State*, 55 Miss. 436; *Jones v. State*, 57 Miss. 684; *Hawthorne v. State*, 58 Miss. 778; *McKenna v. State*, 61 Miss. 589; *Neims v. State*, 58 Miss. 362; *Jeffries v. State*, 77 Miss. 757; *Blalock v. State*, (Miss. 1900) 27 So. Rep. 642.

Missouri. — *State v. Nueslein*, 25 Mo. 111; *State v. Fugate*, 27 Mo. 535; *State v. Schoenwald*, 31 Mo. 147; *State v. Simms*, 68 Mo. 305; *State v. Anderson*, 86 Mo. 309; *State v. Shaeffer*, 89 Mo. 271; *State v. Tettaton*, 159 Mo. 354; *State v. Jackson*, 96 Mo. 200; *State v. Walker*, 98 Mo. 95; *U. S. v. Babcock*, (Mo. 1876) 3 Cent. L. J. 143.

Montana. — *Territory v. Edmonson*, 4 Mont. 141; *Territory v. Tunnell*, 4 Mont. 148; *Territory v. Adolfsen*, 5 Mont. 237; *Territory v. Rehberg*, 6 Mont. 467; *Territory v. Mantion*, 7 Mont. 162; *Territory v. Clayton*, 8 Mont. 1.

Nebraska. — *Morrison v. State*, 13 Neb. 527; *Casey v. State*, 20 Neb. 138; *Vandeventer v. State*, 38 Neb. 592; *Binkley v. State*, 34 Neb. 757.

Nevada. — *State v. McCluer*, 5 Nev. 132; *State v. Pierce*, 8 Nev. 291; *State v. Hamilton*, 13 Nev. 386.

New Jersey. — *Brown v. State*, 62 N. J. L. 666.

New Mexico. — *Territory v. Lopez*, 3 N. Mex. 104; *Chavez v. Territory*, 6 N. Mex. 455.

New York. — *Bernard's Case*, 1 City Hall Rec. (N. Y.) 51; *Blake's Case*, 1 City Hall Rec. (N. Y.) 99; *People v. Thayer*, (Oyer & T. Ct.) 1 Park. Crim. (N. Y.) 595; *Stephens v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 396; *People v. Friedland*, 2 N. Y. App. Div. 335; *People v. Stephenson*, (Supm. Ct. Spec. T.) 11 Misc. (N. Y.) 141; *Yates v. People*, 32 N. Y. 509; *Gordon v. People*, 33 N. Y. 501; *Brotherton v. People*, 75 N. Y. 159; *People v. Beckwith*, 108 N. Y. 67; *People v. Willson*, 109 N. Y. 345; *People v. Cignarale*, 110 N. Y. 23; *People v. Lyons*, 110 N. Y. 618; *People v. Reich*, 110 N. Y. 660; *People v. O'Bryan*, 1 Wheel. Crim. (N. Y.) 21.

North Carolina. — *State v. Harrison*, 5 Jones L. (50 N. Car.) 115; *State v. Byrd*, 121 N. Car. 684.

Ohio. — *Bailus v. State*, 8 Ohio Cir. Dec. 526, 16 Ohio Cir. Ct. 227; *State v. Gardiner*, Wright (Ohio) 392.

Oregon. — *State v. Lee*, 7 Oregon 237.

Pennsylvania. — *Com. v. Tack*, 1 Brews. (Pa.) 511; *Com. v. Winnemore*, 1 Brews. (Pa.) 356; *Com. v. Irving*, 1 Susq. Leg. Chron. (Pa.) 69; *Com. v. Hanlon*, 8 Phila. (Pa.) 407; *Com. v. Devine*, 18 Pa. Super. Ct. 431; *Williams v. Com.*, 29 Pa. St. 102; *Kilpatrick v. Com.*, 31 Pa. St. 198; *Warren v. Com.*, 37 Pa. St. 45; *Com. v. Drum*, 58 Pa. St. 9; *Oitwein v. Com.*, 76 Pa. St. 414, 18 Am. Rep. 420; *Meyers v. Com.*, 83 Pa. St. 131; *McLain v. Com.*, 99 Pa. St. 86.

South Carolina. — *State v. Taylor*, 57 S. Car. 483, 76 Am. St. Rep. 575.

Tennessee. — *Poe v. State*, 10 Lea (Tenn.) 673;

established beyond a reasonable doubt.¹

Misdemeanors. — The rule that the defendant is entitled to the benefit of a reasonable doubt of his guilt extends alike to all crimes, whether felonies or misdemeanors.²

Matters of Defense. — The better rule, in spite of some conflict in the authorities, is that matters of affirmative defense, such as alibi, justification, excuse, or mitigation need not be proved beyond a reasonable doubt by the defense, nor even by a preponderance of evidence. It is sufficient to warrant an acquittal for the defense to produce such evidence as creates in the minds of the jury a reasonable doubt of the defendant's guilt of the offense charged.³

Henry v. State, 11 Humph. (Tenn.) 224; *Lawless v. State*, 4 Lea (Tenn.) 173; *Persons v. State*, 90 Tenn. 291.

Texas. — *Pilkinton v. State*, 19 Tex. 214; *Brown v. State*, 23 Tex. 195; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Dorsey v. State*, 34 Tex. 651; *Conner v. State*, 34 Tex. 659; *White v. State*, 36 Tex. 347; *Munden v. State*, 37 Tex. 353; *Massengale v. State*, 24 Tex. App. 181; *Rather v. State*, 25 Tex. App. 623; *Bailey v. State*, 26 Tex. App. 706; *Johnson v. State*, 29 Tex. App. 150; *McMillan v. State*, 7 Tex. App. 142; *Grant v. State*, 3 Tex. App. 1; *Brown v. State*, 4 Tex. App. 275; *Harrison v. State*, 6 Tex. App. 42; *Alexander v. State*, 25 Tex. App. 260, 8 Am. St. Rep. 438; *Jackson v. State*, 9 Tex. App. 114; *Smith v. State*, 9 Tex. App. 150; *Holmes v. State*, 9 Tex. App. 313; *Webb v. State*, 9 Tex. App. 490; *King v. State*, 9 Tex. App. 515; *Kemp v. State*, 11 Tex. App. 174; *Holmes v. State*, 11 Tex. App. 223; *Pogue v. State*, 12 Tex. App. 283; *Scott v. State*, 12 Tex. App. 594; *Hogan v. State*, 13 Tex. App. 319; *Hardeman v. State*, 12 Tex. App. 350; *Gomez v. State*, 15 Tex. App. 327; *Williams v. State*, 15 Tex. App. 401; *Barnett v. State*, 17 Tex. App. 191; *Gazley v. State*, 17 Tex. App. 267; *Lane v. State*, 19 Tex. App. 54; *Smith v. State*, 19 Tex. App. 95; *Kunde v. State*, 22 Tex. App. 65; *Rowlett v. State*, 23 Tex. App. 191; *Olivares v. State*, 23 Tex. App. 305; *Gibson v. State*, 23 Tex. App. 414; *Scott v. State*, 23 Tex. App. 452; *Heard v. State*, 24 Tex. App. 103.

Vermont. — *State v. Meyer*, 58 Vt. 457.

Virginia. — *Hatchett v. Com.*, 76 Va. 1026; *Russell v. Com.*, 78 Va. 400; *Sutton v. Com.*, 85 Va. 128; *Tilley v. Com.*, 90 Va. 99, (Va. 1894) 19 S. E. Rep. 738.

Washington. — *Leonard v. Territory*, 2 Wash. Ter. 381; *Timmerman v. Territory*, 3 Wash. Ter. 445; *Miller v. Territory*, 3 Wash. Ter. 554.

West Virginia. — *State v. Abbott*, 8 W. Va. 741.

Wyoming. — *Cornish v. Territory*, 3 Wyo. 95.

See also the title EVIDENCE, vol. 11, p. 493, and for further discussion and statement of the rule, see the title BURDEN OF PROOF, vol. 5, p. 33 *et seq.*

The Credibility of Witnesses in Criminal Cases is to be tested by the preponderance of evidence and the doctrine of reasonable doubt does not apply. *People v. Mitchell*, 63 Cal. 480. See also *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Shipp v. Com.*, 86 Va. 746. But see *McElven v. State*, 30 Ga. 869, holding that a reasonable doubt may arise as to the truth of an explanation offered by the defendant for his conduct.

Where the testimony of witnesses is disbelieved, no reasonable doubt can arise thereon. *Binfield v. State*, 15 Neb. 484. See also the title WITNESSES.

The Omission of the Word "Doubt" After the Word "Reasonable" in an Instruction asked has been held to justify its refusal. *Allen v. State*, 111 Ala. 89. See also *Little v. State*, 89 Ala. 99.

But such an omission in a charge where the word "doubt" can be supplied from the context is not ground for reversal. *Toler v. State*, 41 Tex. Crim. 659.

Charging Proof "Beyond All Reasonable Doubt" to beyond "a" reasonable doubt has been held to be harmless error. *People v. Burns*, 121 Cal. 529.

Reasonable Doubt Must Turn on the Guilt or Innocence of the Prisoner, not on other elements of the case. *Glass v. Com.*, 6 Bush (Ky.) 436. And see the title EVIDENCE, vol. 11, p. 494, note.

Vagueness of Expression "Reasonable Doubt" Criticised. — *Coffee v. State*, 3 Yerg. (Tenn.) 283.

1. Failure or Refusal to Charge. — *People v. Cohn*, 76 Cal. 386; *Godwin v. State*, 73 Miss. 873; *Gardiner v. State*, 14 Mo. 97; *State v. Raymond*, 53 N. J. L. 260. See also the title INSTRUCTIONS, 11 ENCYC. OF PL. AND PR., p. 357.

Mere Definition Not Sufficient. — *State v. Harrison*, 23 Mont. 79.

Charge Held to Be Unnecessary Where there Could Be No Possibility of Doubt. — *Reg. v. Rindeau*, 9 Quebec Q. B. 157. See also *Mackey v. People*, 2 Colo. 13.

2. Misdemeanors as Well as Felonies. — *State v. Murphy*, 6 Ala. 845; *Statterwhite v. State*, 28 Ala. 65; *Jones v. State*, 100 Ala. 88; *State v. King*, 20 Ark. 166; *Giles v. State*, 6 Ga. 285; *Wasden v. State*, 18 Ga. 264; *Stewart v. State*, 44 Ind. 237; *Hiler v. State*, 4 Blackf. (Ind.) 552; *Sowder v. Com.*, 8 Bush (Ky.) 432; *Com. v. Intoxicating Liquors*, 105 Mass. 595; *Com. v. Intoxicating Liquors*, 115 Mass. 142; *Glenwood v. Roberts*, 59 Mo. App. 167; *People v. Judges*, 2 Barb. (N. Y.) 282.

3. Affirmative Defenses — *United States*. — *Davis v. U. S.*, 160 U. S. 469.

California. — *People v. Boling*, 83 Cal. 380. But see *People v. Stonecipher*, 6 Cal. 405.

Georgia. — See *Brewster v. State*, 63 Ga. 639.

Illinois. — *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683.

Iowa. — *State v. Porter*, 64 Iowa 237.

Mississippi. — *Hawthorne v. State*, 58 Miss. 789.

Montana. — *State v. Brooks*, 23 Mont. 146; *State v. Peel*, 23 Mont. 358, 75 Am. St. Rep.

2. Circumstantial Evidence. — Circumstantial evidence is sufficient to warrant a conviction for a crime where it establishes the defendant's guilt beyond a reasonable doubt.¹ But the circumstantial evidence must be such as to exclude to a moral certainty every reasonable hypothesis but that of the guilt of the defendant of the offense imputed to him, or in other words, all the facts proved must not only be consistent with and point to his guilt, but they must be inconsistent with any other reasonable hypothesis.² The hypothesis must,

529, *overruling Territory v. Edmonson*, 4 Mont. 141, and *Territory v. Tunnell*, 4 Mont. 148.

Nebraska. — *Walbridge v. State*, 13 Neb. 236.

Nevada. — *State v. McCluer*, 5 Nev. 132;

State v. Pierce, 8 Nev. 291.

New York. — *People v. Downs*, 123 N. Y. 558; *People v. Schryver*, 42 N. Y. 4.

North Carolina. — *State v. Byrd*, 121 N. Car. 684; *State v. Gooch*, 94 N. Car. 987; *State v. Whitson*, 111 N. Car. 699.

Pennsylvania. — *Meyers v. Com.*, 83 Pa. St. 131.

Texas. — *White v. State*, 23 Tex. App. 154; *White v. State*, 36 Tex. 347; *Dyson v. State*, 13 Tex. App. 402.

See also the titles ALIBI, vol. 2, p. 55 *et seq.*; BURDEN OF PROOF, vol. 5, p. 33 *et seq.*; INSANITY, vol. 16, p. 615 *et seq.*; SELF-DEFENSE.

Rape — Prosecution Must Prove Want of Consent Beyond Reasonable Doubt. — See *ante*, the title RAPE, VII. 13. *Burden of Proof*.

Receiving Stolen Property. — In *State v. Richart*, 57 Iowa 245, it was held that the defendant can be required only to introduce evidence which creates a reasonable doubt whether he honestly came into the possession of stolen goods; and that an instruction that he must overcome the presumption arising from such possession by a preponderance of evidence was erroneous. See also the title RECEIVING STOLEN PROPERTY, *post*.

View that Justification Must Be Established by Defendant by Preponderance of Evidence. — *State v. Yokum*, 11 S. Dak. 544; *People v. Callaghan*, 4 Utah 49. See also the references given above in this note, and see PREPONDERANCE OF EVIDENCE, vol. 22, p. 1177.

1. Circumstantial Evidence Sufficient — *England*. — *Reg. v. Franz*, 2 F. & F. 580.

United States. — *U. S. v. McKenzie*, 35 Fed. Rep. 826.

Alabama. — *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324; *Shepperd v. State*, 94 Ala. 102.

Arkansas. — *Williams v. State*, (Ark. 1891) 16 S. W. Rep. 816.

California. — *People v. Hardisson*, 61 Cal. 378; *People v. Nelson*, 85 Cal. 427; *People v. Morrow*, 60 Cal. 142; *People v. Smith*, 105 Cal. 676.

Connecticut. — *State v. Rome*, 64 Conn. 329.

Florida. — *Coleman v. State*, 26 Fla. 61; *Bird v. State*, (Fla. 1901) 30 So. Rep. 655.

Georgia. — *Wells v. State*, 99 Ga. 206.

Illinois. — *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147.

Indiana. — *Hinshaw v. State*, 147 Ind. 334.

Iowa. — *State v. Kennedy*, 77 Iowa 208.

Kentucky. — *Johnson v. Com.*, 81 Ky. 325.

Michigan. — *People v. Foley*, 64 Mich. 148.

Mississippi. — *McCann v. State*, 13 Smed. & M. (Miss.) 471; *Cicely v. State*, 13 Smed. & M. (Miss.) 211.

Missouri. — *Green v. State*, 13 Mo. 382;

State v. Underwood, 57 Mo. 40; *State v. Mitchell*, 64 Mo. 191; *State v. Lane*, 64 Mo. 319; *State v. Talbott*, 73 Mo. 347; *State v. Grant*, 76 Mo. 236; *State v. Owens*, 79 Mo. 619; *State v. Tabor*, 95 Mo. 585; *State v. Walker*, 98 Mo. 95; *State v. Hunt*, 141 Mo. 626; *State v. Kindred*, 148 Mo. 270.

Nebraska. — *Bradshaw v. State*, 17 Neb. 147; *Kaiser v. State*, 35 Neb. 704.

Nevada. — *State v. Nelson*, 11 Nev. 334.

New York. — *People v. Johnson*, 140 N. Y. 350.

Pennsylvania. — *Com. v. Johnson*, 162 Pa. St. 63.

South Carolina. — *State v. Atkinson*, 40 S. Car. 363, 42 Am. St. Rep. 877, 41 S. Car. 551.

Texas. — *Shultz v. State*, 13 Tex. 401; *Wilkins v. State*, 35 Tex. Crim. 525; *Autre v. State*, (Tex. Crim. 1898) 45 S. W. Rep. 919; *Law v. State*, 33 Tex. 37.

See also the titles EVIDENCE, vol. 11, p. 502; MURDER AND MANSLAUGHTER, vol. 21, p. 213.

2. Circumstantial Evidence Must Exclude Every Other Reasonable Hypothesis — *England*. — *Hodge's Case*, 2 Lewin C. C. 227.

Canada. — *Reg. v. Dowsey*, 6 Nova Scotia 93.

United States. — *State v. Martin*, 2 McLean (U. S.) 256, 26 Fed. Cas. No. 15,731; *U. S. v. Douglass*, 2 Blatchf. (U. S.) 207, 25 Fed. Cas. No. 14,989.

Alabama. — *Chisolm v. State*, 45 Ala. 66; *Ex p. Acre*, 63 Ala. 234; *Gilmore v. State*, 99 Ala. 154; *Howard v. State*, 108 Ala. 571. See also *Pate v. State*, 94 Ala. 14; *Garrett v. State*, 97 Ala. 18; *Roberson v. State*, 99 Ala. 189; *Varbrough v. State*, 105 Ala. 43; *Barnes v. State*, 111 Ala. 56.

Arkansas. — *Cohen v. State*, 32 Ark. 226; *Green v. State*, 38 Ark. 304; *Jones v. State*, 61 Ark. 88.

California. — *People v. Shuler*, 28 Cal. 490; *People v. Strong*, 30 Cal. 151; *People v. Davis*, 64 Cal. 440; *People v. Murray*, 41 Cal. 66; *People v. Ward*, 105 Cal. 335.

Delaware. — *State v. Taylor*, 1 Houst. Crim. Cas. (Del.) 436; *State v. Goldsborough*, 1 Houst. Crim. Cas. (Del.) 302; *State v. Miller*, 9 Houst. (Del.) 564; *State v. Dill*, 9 Houst. (Del.) 495; *State v. Fisher*, 1 Penn. (Del.) 303.

Florida. — *Whitfield v. State*, 25 Fla. 289; *Whetson v. State*, 31 Fla. 240; *Kennedy v. State*, 31 Fla. 428.

Georgia. — *Orr v. State*, 34 Ga. 342; *Martin v. State*, 38 Ga. 293; *Smith v. State*, 63 Ga. 168; *Bryan v. State*, 74 Ga. 393; *Young v. State*, 95 Ga. 456; *Hamilton v. State*, 96 Ga. 302.

Illinois. — *Purdy v. People*, 140 Ill. 46; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346. See also *Campbell v. People*, 159 Ill. 9, 50 Am. St. Rep. 134.

Indiana. — *Schusler v. State*, 29 Ind. 394; *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; *Wantland v. State*, 145 Ind. 38.

however, be a reasonable one to justify an acquittal.¹ It is not essential, in order to establish the guilt of the accused beyond a reasonable doubt, that the crime could not have been committed by another person.²

3. Degree of Crime. — If the jury entertains a reasonable doubt as to which of two degrees of a crime the defendant is guilty, as, for instance, whether of murder in the first or the second degree, the defendant is entitled to the benefit of such doubt, and can be convicted only of the lower offense.³

Iowa. — *State v. Clemons*, 51 Iowa 274; *State v. Ostrander*, 18 Iowa 435; *State v. Johnson*, 19 Iowa 230; *State v. Collins*, 20 Iowa 85; *State v. Maxwell*, 42 Iowa 208.

Kansas. — *Horne v. State*, 1 Kan. 42, 81 Am. Dec. 409; *State v. Grebe*, 17 Kan. 461; *State v. Hunter*, 50 Kan. 302.

Louisiana. — *State v. Vinson*, 37 La. Ann. 794. *Massachusetts.* — *Com. v. Annis*, 15 Gray (Mass.) 197; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

Michigan. — *People v. Foley*, 64 Mich. 148.

Mississippi. — *Algheri v. State*, 25 Miss. 584; *James v. State*, 45 Miss. 572; *Perkins v. State*, (Miss. 1898) 23 So. Rep. 579. See also *Webb v. State*, 73 Miss. 456.

Missouri. — *State v. Moxley*, 102 Mo. 374; *State v. Woolard*, 111 Mo. 248; *State v. David*, 131 Mo. 380. See also *State v. Taylor*, 111 Mo. 538.

Montana. — *Territory v. Rehberg*, 6 Mont. 467.

Nebraska. — *Casey v. State*, 20 Neb. 138; *Dreessen v. State*, 38 Neb. 375; *Walbridge v. State*, 13 Neb. 236.

Nevada. — See *State v. Rover*, 13 Nev. 17.

New York. — *People v. Wileman*, 44 Hun (N. Y.) 187; *People v. Bennett*, 49 N. Y. 144; *Stephens v. People*, (Supm. Ct. Gen. T.) 4 Park. Crim. (N. Y.) 398; *People v. Cunningham*, (Oyer & T. Ct.) 6 Park. Crim. (N. Y.) 398; *People v. Riley*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 374; *Plunket's Case*, 3 City Hall Rec. (N. Y.) 137; *Atwood's Case*, 4 City Hall Rec. (N. Y.) 91; *People v. Maxwell*, 86 Hun (N. Y.) 620, 33 N. Y. Supp. 794.

Ohio. — *State v. Summons*, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407; *State v. Walshenker*, 3 Ohio Leg. News 53.

Oklahoma. — *Dossett v. U. S.*, 3 Okla. 593.

Oregon. — *State v. Glass*, 5 Oregon 83.

South Carolina. — *State v. Milling*, 35 S. Car. 16.

Tennessee. — *Turner v. State*, 4 Lea (Tenn.) 206; *Lancaster v. State*, 91 Tenn. 267; *Lawless v. State*, 4 Lea (Tenn.) 173.

Texas. — *Perkins v. State*, 32 Tex. 109; *Williams v. State*, 41 Tex. 209; *Barnes v. State*, 41 Tex. 342; *Black v. State*, 1 Tex. App. 368; *Hampton v. State*, 1 Tex. App. 652; *Walker v. State*, 6 Tex. App. 576; *Irvin v. State*, 7 Tex. App. 109; *Hunt v. State*, 7 Tex. App. 212; *Wallace v. State*, 7 Tex. App. 570; *Struckman v. State*, 7 Tex. App. 581; *Myers v. State*, 7 Tex. App. 640; *Pogue v. State*, 12 Tex. App. 283; *Brooklin v. State*, 26 Tex. App. 121; *Woods v. State*, 27 Tex. App. 586; *Gallaher v. State*, 28 Tex. App. 247; *Jones v. State*, 34 Tex. Crim. 490; *Smith v. State*, 35 Tex. Crim. 618; *Chitister v. State*, 33 Tex. Crim. 635; *Baldez v. State*, 37 Tex. Crim. 413; *Finlan v. State*, (Tex. App. 1890) 13 S. W. Rep. 866; *Barrett v. State*, (Tex. Crim. 1896) 33 S. W. Rep. 1085.

Wisconsin. — *Kollock v. State*, 88 Wis. 663.

1. Hypothesis Must Be Reasonable. — *Ray v. State*, 50 Ala. 104; *Cohen v. State*, 50 Ala. 108; *Blackburn v. State*, 86 Ala. 596; *Little v. State*, 89 Ala. 99; *Gilmore v. State*, 99 Ala. 154; *Horn v. State*, 102 Ala. 144; *Baldwin v. State*, 111 Ala. 11; *Martin v. State*, 38 Ga. 293; *Com. v. Annis*, 15 Gray (Mass.) 197; *Kendrick v. State*, 55 Miss. 436; *State v. Mathews*, 66 N. Car. 106; *State v. Ford*, 21 Wis. 610. See also *Minich v. People*, 8 Colo. 440; *State v. Schoenwald*, 31 Mo. 147.

In *Com. v. Goodwin*, 14 Gray (Mass.) 55, the rule was stated to be that "the circumstances must be such as to produce a moral certainty of guilt, and to exclude any other reasonable hypothesis."

Hypothesis Should Be Consistent with Evidence in Case. — It is not error to refuse to instruct the jury, in a criminal case, that where the evidence is purely circumstantial, then, if there is any reasonable theory by which the defendant may not be guilty, the jury is bound to acquit. The instruction is bad as wholly ignoring the requirement that the theory or hypothesis of innocence shall be consistent with all the evidence in the case. *Padfield v. People*, 146 Ill. 661. See also *Shultz v. State*, 13 Tex. 428.

2. Commission of Crime by Another. — *Magee v. People*, 139 Ill. 138; *Com. v. Leach*, 160 Mass. 542; *People v. Foley*, 64 Mich. 148.

Incriminating Circumstances. — See *Davis v. State*, 51 Neb. 301, quoted under INCRIMINATING, vol. 16, p. 157.

3. Degree of Crime — California. — See *People v. Chun Heong*, 86 Cal. 329; *People v. Melendrez*, 129 Cal. 549.

Georgia. — *Davis v. State*, 10 Ga. 101. See also *Ramsey v. State*, 92 Ga. 53.

Indiana. — *Stout v. State*, 9 Ind. 12. And see *Jarrell v. State*, 58 Ind. 293.

Kentucky. — *Payne v. Com.*, 1 Met. (Ky.) 370; *Williams v. Com.*, 4 Ky. L. Rep. 3; *Pace v. Com.*, 89 Ky. 204; *Jackson v. Com.*, (Ky. 1890) 14 S. W. Rep. 677; *Clark v. Com.*, (Ky. 1901) 63 S. W. Rep. 740.

Minnesota. — *State v. Laliyer*, 4 Minn. 368.

Montana. — See *Territory v. Manton*, 7 Mont. 162.

New Jersey. — *Brown v. State*, 62 N. J. L. 666.

New York. — *Abbott v. People*, 86 N. Y. 461.

Oregon. — *State v. Lee*, 7 Oregon 258.

Pennsylvania. — *Tiffany v. Com.*, 121 Pa. St. 165, 6 Am. St. Rep. 775.

Texas. — *White v. State*, 23 Tex. App. 154; *Eanes v. State*, 10 Tex. App. 421. See also *Hall v. State*, 28 Tex. App. 146; *Brittain v. State*, (Tex. Crim. 1897) 40 S. W. Rep. 267.

Vermont. — *State v. Meyer*, 58 Vt. 457.

See also the title MURDER AND MANSLAUGHTER, vol. 21, p. 171.

Doubt Must Be Reasonable. — *Jackson v. State*, 91 Ga. 271, 44 Am. St. Rep. 22.

4. Elements of Offense and Each Fact in Case. — To sustain a conviction all the elements of the crime charged must be proved beyond a reasonable doubt;¹ and a reasonable doubt as to a material fact essential to the defendant's guilt will inure to his benefit and entitle him to an acquittal.² But the fact must be material or a reasonable doubt as to it will not warrant an acquittal.³

Circumstantial Evidence — Links in Chain. — Where conviction is sought upon evidence purely circumstantial, it has been held that every material circumstance or link in the chain of testimony must be proved beyond a reasonable doubt.⁴

1. Elements. — *U. S. v. Kie*, 7 West. Coast Rep. 15, 26 Fed. Cas. No. 15,528b; *Jones v. State*, 107 Ala. 93; *People v. Eckert*, 19 Cal. 603; *People v. Cohn*, 76 Cal. 386; *Sate v. Start*, 10 Kan. App. 583, 63 Pac. Rep. 449; *Com. v. Maguire*, 108 Mass. 469; *State v. Gibbs*, 10 Mont. 220; *Comstock v. State*, 14 Neb. 208; *State v. Taylor*, 57 S. Cal. 483, 76 Am. St. Rep. 575; *Lawless v. State*, 4 Lea (Tenn.) 173; *Clark v. State*, 30 Tex. App. 402.

Intent. — When the intent is an element of a crime its existence must be shown beyond a reasonable doubt. *McCoy v. People*, 175 Ill. 224; *Best v. State*, 155 Ind. 46; *Cherry v. State*, (Miss. 1896) 20 So. Rep. 837.

A reasonable doubt must exist in the minds of the jurors as to the intent to kill before they can find a verdict of murder in the second degree. *Warren v. Com.*, 37 Pa. St. 45.

Intent Circumstantial Evidence. — Although where an act itself is sought to be established by circumstantial evidence the proof must exclude every other hypothesis than that of the prisoner's guilt, it is otherwise if the act is admitted or proved by direct testimony and only the intent with which it is committed is in question. *State v. Maxwell*, 42 Iowa 208.

Motive. — Want of motive does not necessarily raise a reasonable doubt. *State v. Morgan*, 35 W. Va. 260.

2. Doubt upon Any Fact. — *U. S. v. Wright*, 16 Fed. Rep. 112; *Holloway v. Com.*, 11 Bush (Ky.) 344; *People v. Niles*, 44 Mich. 612; *State v. Hamilton*, 13 Nev. 386; *Adams v. State*, 31 Ohio St. 462; *State v. Glass*, 5 Oregon 73; *Lawless v. State*, 4 Lea (Tenn.) 173.

Suicide. — *Persons v. State*, 90 Tenn. 291. See also *Com. v. Mudgett*, 174 Pa. St. 211, *affirming* 4 Pa. Dist. 739.

Seduction. — *State v. Judiesch*, 96 Iowa 249. See also the title SEDUCTION.

Abortion — Pregnancy. — *State v. Alcorn*, (Idaho 1901) 64 Pac. Rep. 1014.

Burglary. — *Bush v. State*, 65 Ga. 658.

Proof Beyond Reasonable Doubt Which One of Several Defendants or Several Persons Fired Fatal Shot. — *McCoy v. People*, 175 Ill. 224.

Whole Case. — But it has been said that a reasonable doubt must arise from the whole case and not from a single fact. See *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *State v. Schoenwald*, 31 Mo. 147. And see *infra*, this title, *Definition and Instructions*.

In *Barr v. State*, 10 Tex. App. 507, it was held that the doctrine of reasonable doubt applies to the general issue of guilty or not guilty, and that it was not error to refuse a special instruction which attempted to apply it to each and every fact in proof.

3. Materiality. — *Acker v. State*, 52 N. J. L. 259; *State v. Crane*, 110 N. Car. 530.

The doctrine of reasonable doubt has no

proper application to mere matters of subsidiary evidence. *Wade v. State*, 71 Ind. 535.

Allegations of Indictment. — Where an indictment contained all the necessary allegations to constitute a good charge of the crime alleged to have been committed, it was held to be no error to instruct that if these allegations were sustained beyond a reasonable doubt the state was entitled to a conviction. *Walker v. State*, 136 Ind. 663.

Independent Circumstances. — Where various independent circumstances are relied upon to establish a fact, an instruction that the jury must be satisfied on the whole evidence of the guilt of the defendant is sufficient. *State v. Crane*, 110 N. Car. 530. See also *State v. Frank*, 5 Jones L. (50 N. Car.) 384.

Fact Inconsistent with Guilt. — In *State v. Roberts*, 15 Oregon 187, it was held that the court did not err in refusing to tell the jury that proof by the defendant, by a preponderance of the evidence, of one single fact inconsistent with the defendant's guilt was sufficient to raise a reasonable doubt, and the jury should acquit the defendant. To the same effect see *Davidson v. State*, 135 Ind. 254; *State v. Johnson*, 37 Minn. 493.

Illinois. — The law does not require that the jury should believe that every fact in a criminal case has been proved beyond a reasonable doubt before it can find the accused guilty. The reasonable doubt the jury is permitted to entertain must be as to the guilt of the accused on the whole evidence, and not as to any important fact in the case. *Mullins v. People*, 110 Ill. 42; *Leigh v. People*, 113 Ill. 372; *Davis v. People*, 114 Ill. 86; *Weaver v. People*, 132 Ill. 536; *Lyons v. People*, 137 Ill. 602; *Jamison v. People*, 145 Ill. 357.

Alabama. — In *Dent v. State*, 105 Ala. 14, the following instruction was sustained: "While the law requires the guilt of the accused to be proved beyond a reasonable doubt, it does not require that each fact which may aid the jury in reaching the conclusion of guilt shall be clearly proved, but that on the whole evidence the jury must be able to pronounce that guilt is proved to a moral certainty." See also *Ming v. State*, 73 Ala. 1; *Murphy v. State*, 108 Ala. 10; *Barker v. State*, 126 Ala. 73; *Eggleston v. State*, 129 Ala. 80.

But in *Williams v. State*, 52 Ala. 26, it was held error to charge the jury in a criminal case that although it may have a reasonable doubt of "any single fact in the testimony of any witness," it cannot acquit unless such fact is "material to the issue joined."

4. Each Link in Chain of Circumstances. — *People v. Phipps*, 39 Cal. 326; *People v. Smith*, 106 Cal. 73; *Clare v. People*, 9 Colo. 122; *Graves v. People*, 18 Colo. 170; *Bressler v. People*, 117 Ill. 422; *Sumner v. State*, 5 Blackf.

But in a number of cases it has been held that the jury need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish guilt, but only of the ultimate fact of guilt upon the whole evidence.¹

Right to Instruction. — It has been held in a number of cases that it is sufficient to instruct the jurors that they should acquit if upon the whole case they have a reasonable doubt as to the defendant's guilt. It is not necessary that they should be instructed that they must be satisfied beyond a reasonable doubt of each material fact required to convict. The former instruction necessarily includes the latter, and sufficiently directs the jury that each fact material to conviction must be established beyond a reasonable doubt, while the latter has a tendency to distract the attention of the jury from the consideration of the whole case, and to concentrate it upon some particular fact or hypothesis.² The question, however, is a disputed one, and in some jurisdictions it has been held to be error to refuse an instruction that a particular fact, essential to the defendant's guilt, must be proved beyond a reasonable doubt, although there was a general charge that his guilt must be proved,

(Ind.) 579, 36 Am. Dec. 561; *Rains v. State*, 152 Ind. 69, Com. v. Webster, 5 Cush. (Mass.) 318, 52 Am. Dec. 711; *People v. Aikin*, 66 Mich. 460, 11 Am. St. Rep. 512; *People v. Foley*, 64 Mich. 148; *People v. Fairchild*, 48 Mich. 31; *Territory v. McAndrews*, 3 Mont. 158; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655; *Dossett v. U. S.*, 3 Okla. 593; *Johnson v. State*, 18 Tex. App. 385. See also CHAIN, vol. 5, p. 812.

Where the evidence is circumstantial, each circumstance must be as distinctively proved as if the whole case turned upon it. *State v. Meissimer*, 75 N. Car. 385.

1. Jury Need Not Be Satisfied as to Each Link. — *Siebert v. People*, 143 Ill. 571; *Jamison v. People*, 145 Ill. 357; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *Keating v. People*, 160 Ill. 480; *Gott v. People*, 187 Ill. 249; *Bressler v. People*, (Ill. 1885) 3 N. E. Rep. 521; *State v. Hayden*, 45 Iowa 11; *State v. Myers*, 12 Wash. 77.

Nebraska. — It has been held not to be error to refuse to instruct the jury that each link in the chain of circumstances relied upon to establish the defendant's guilt must be proved beyond a reasonable doubt. The court said: "If it is understood that the words have reference only to such evidentiary facts as strengthen others from which guilt is to be inferred, the form is not objectionable, and may be considered correct." *Jameson v. State*, 25 Neb. 189. See also *Marion v. State*, 16 Neb. 358; *Bradshaw v. State*, 17 Neb. 155; *Walbridge v. State*, 13 Neb. 237. Compare *Heldt v. State*, 20 Neb. 492, 57 Am. Rep. 835.

Circumstantial Evidence Not Necessarily Chain. — In *Tompkins v. State*, 32 Ala. 569, it was held that a charge to the jury in a criminal case where the evidence against the accused was entirely circumstantial that it was bound to acquit the defendant "if there is a single link wanting in the chain of circumstantial evidence" should be refused, as calculated to mislead the jury. The court said: "Coming to the conclusion that circumstantial evidence is not necessarily a chain, or composed of links, we think the tendency of the charge asked was to mislead or embarrass the jury, and that it was rightly refused." To the same effect see

Wharton v. State, 73 Ala. 366; *Tompkins v. State*, 32 Ala. 569.

2. Instruction Not Necessary — *Alabama.* — *Allen v. State*, 60 Ala. 19.

California. — *People v. Milgate*, 5 Cal. 127. *Florida.* — *Woodruff v. People*, 31 Fla. 320.

Illinois. — *Mullins v. State*, 110 Ill. 42; *Weaver v. People*, 132 Ill. 536; *Lyons v. People*, 137 Ill. 602; *Gott v. People*, 187 Ill. 249.

Iowa. — *State v. Hayden*, 45 Iowa 17; *State v. Stewart*, 52 Iowa 284; *State v. Hennessy*, 55 Iowa 299.

Kansas. — See *Wise v. State*, 2 Kan. 419, 85 Am. Dec. 595.

Kentucky. — *Baker v. Com.*, (Ky. 1891) 17 S. W. Rep. 625.

Missouri. — *State v. Dunn*, 18 Mo. 419; *State v. Fletcher*, 18 Mo. 425; *State v. Schoenwald*, 31 Mo. 147; *State v. Christian*, 66 Mo. 138; *State v. Good*, 132 Mo. 114; *State v. Wells*, 111 Mo. 537.

New Jersey. — *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415; *Acker v. State*, 52 N. J. L. 259; *Brown v. State*, 62 N. J. L. 666.

Oregon. — *State v. Roberts*, 15 Oregon 187. *Pennsylvania.* — *Rudy v. Com.*, 128 Pa. St. 500.

Texas. — *Carson v. State*, 34 Tex. Crim. 342; *Barr v. State*, 10 Tex. App. 507; *McCullough v. State*, 23 Tex. App. 620; *Thurmond v. State*, 27 Tex. App. 347; *Sanches v. State*, (Tex. Crim. 1900) 55 S. W. Rep. 44; *Ford v. State*, (Tex. Crim. 1900) 56 S. W. Rep. 338. Compare *Black v. State*, 1 Tex. App. 368.

In *State v. Watkins*, 106 La. 380, it was held that the trial court correctly refused to charge the jury that "this doctrine of reasonable doubt not only applies to the whole case, but to each and every incident connected with it."

An instruction that if the jury entertains a reasonable doubt as to any fact necessary to constitute the defendant's guilt it should acquit him was *disapproved* in *Jolly v. Com.*, (Ky. 1901) 61 S. W. Rep. 49.

Time of Offense. — In *State v. Hopkins*, 94 Iowa 86, where one charge stated that the defendant's guilt must be shown beyond a reasonable doubt, and another, dealing with the time when the offense must be shown to have happened, did not state that it was to be shown

upon a consideration of the whole case, beyond a reasonable doubt.¹

5. Doubt Entertained by One Juror. — Where a reasonable doubt is entertained by one juror the defendant cannot be found guilty, and it has been held error to refuse instructions to that effect.² Of course, this does not involve the idea that the jury must acquit when a single juror has a reasonable doubt.³

6. Reasonable Doubt of Law. — It has been held that in the construction of a penal statute all reasonable doubts concerning the meaning of the statute should operate in favor of the defendant.⁴ But in those jurisdictions in which the juries in criminal cases are the judges both of the law and of the facts, it has been held that it is not a reasonable doubt of the law that entitles the defendant to a verdict of not guilty.⁵

II. DEFINITION AND INSTRUCTIONS — 1. Necessity of Defining Term. — There have been many attempts to define and interpret the term "reasonable doubt," as used in this connection, but it is apprehended that such attempts are futile; that the words are of plain and unmistakable meaning, and that any definition on the part of the court tends only to confuse the jury and to render uncertain an expression which, standing alone, is certain and intelligible. This view has been taken in a number of cases.⁶ Notwithstanding these authorities,

beyond a reasonable doubt, it was held that there was no error.

1. Refusal to Instruct Held to Be Error. — *People v. Eckert*, 19 Cal. 603; *Binns v. State*, 46 Ind. 311; *Kaufman v. State*, 49 Ind. 251; *Sumner v. State*, 5 Blackf. (Ind.) 579, 36 Am. Dec. 561; *Territory v. Lopez*, 3 N. Mex. 104; *State v. Crane*, 110 N. Car. 530. See also *People v. Phipps*, 39 Cal. 326.

2. Doubt Entertained by One Juror. — *Mitchell v. State*, 129 Ala. 23; *People v. Dole*, 122 Cal. 486; *Castle v. State*, 75 Ind. 146; *Fassinow v. State*, 89 Ind. 235; *Aszman v. State*, 123 Ind. 347; *McGuire v. State*, 2 Ohio Cir. Dec. 318, 3 Ohio Cir. Ct. 551. See also *State v. Witt*, 34 Kan. 488.

A reasonable doubt is none the less a reasonable doubt because it does not arise in the minds of all the jurors. *State v. Sloan*, 55 Iowa 217; *State v. Stewart*, 52 Iowa 284.

Instruction Held Not to Be Necessary. — In *State v. Cushing*, 17 Wash. 544, it was held that where the court had given a general instruction upon the question of reasonable doubt, it was not necessary to instruct that if a single juror entertained such doubt the defendant should be acquitted. See also *State v. Powers*, 59 S. Car. 200; *State v. Robinson*, 12 Wash. 491; *State v. Williams*, 13 Wash. 335.

In *Davis v. State*, 63 Ohio St. 173, it was held that a proper charge to a jury in a criminal case was that the jury, and not that each juror, should be convinced beyond a reasonable doubt of the guilt of the accused before finding him guilty. And see *State v. Rorabacher*, 19 Iowa 154; *State v. Hamilton*, 57 Iowa 596.

In *State v. Sloan*, 55 Iowa 217, the following instruction was held to be misleading: "A reasonable doubt is such a doubt as fairly and naturally arises in the minds of the whole jury."

3. Acquittal. — *State v. Rorabacher*, 19 Iowa 154; *State v. Witt*, 34 Kan. 488. Compare *Stitz v. State*, 104 Ind. 359; *Keesier v. State*, 154 Ind. 242.

4. Reasonable Doubt of Law. — *U. S. v. Hart-*

well, 6 Wall. (U. S.) 396; *The Schooner Enterprise*, 1 Paine (U. S.) 34; *U. S. v. Reese*, 5 Dill. (U. S.) 405; *U. S. v. Williams*, 3 Fed. Rep. 491; *U. S. v. Voorhees*, 9 Fed. Rep. 144; *U. S. v. Long*, 10 Fed. Rep. 880; *U. S. v. Hewitt*, 11 Fed. Rep. 245; *U. S. v. Comerford*, 25 Fed. Rep. 903; *U. S. v. Mathias*, 36 Fed. Rep. 895; *U. S. v. Garrison*, 42 Fed. Rep. 22; *Harrison v. Vose*, 9 How. (U. S.) 378; *Gould v. Staples*, 9 Fed. Rep. 162; *Freight Discrimination Cases*, 95 N. Car. 434, 59 Am. Rep. 250; *Com. v. Standard Oil Co.*, 101 Pa. St. 150. See also the title STATUTES.

But this rule was questioned in *U. S. v. Huggett*, 40 Fed. Rep. 636, where Hammond, J., said: "The defendants first insist that where there is a reasonable doubt the construction should be in their favor. I am not quite prepared to hold that this rule of reasonable doubt, by analogy to the well-known principle which governs a jury in trying the facts, should exempt the defendants from that penalty which they have incurred if the statute be against them, for this would be to abrogate by judicial action every dubious and doubtful enactment; and the elasticity of language is such, and the carelessness of legislation is so fruitful of ambiguity in drawing statutes, that it would be a dangerous doctrine to establish by that broad expression of it. Nor do I find that the Supreme Court of the United States has so expressed it in the cases cited for it in *U. S. v. Whittier*, 5 Dill. (U. S.) 35; *U. S. v. Clayton*, 2 Dill. (U. S.) 226, 12 Myer Fed. Dec., § 345, and *U. S. v. Comerford*, 25 Fed. Rep. 903."

Constitutionality of Statute. — *Varner v. Martin*, 21 W. Va. 534.

5. 2 Thompson on Trials, § 2492; *Oneil v. State*, 48 Ga. 66; *State v. Meyer*, 58 Vt. 457.

6. For Cases Remarkable upon Impracticability and Inexpediency of Attempts to Define and Explain Term "Reasonable Doubt," see:

United States. — *Hopt v. Utah*, 120 U. S. 430; *U. S. v. Harper*, 33 Fed. Rep. 483; *U. S. v. Hopkins*, 26 Fed. Rep. 443; *Miles v. U. S.*, 103 U. S. 312; *Dunbar v. U. S.*, 156 U. S. 199.

however, there are decisions holding it to be error to refuse to give a definition of reasonable doubt.¹

2. General Definitions and Particular Terms Considered. — Chief Justice Shaw of Massachusetts has given the following definition of a "reasonable doubt": "It is not mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge."² And this definition has been adopted by the courts in a number of jurisdictions.³ The above definition is perhaps as accu-

Alabama. — *Turbeville v. State*, 40 Ala. 715; *McAlpine v. State*, 47 Ala. 78; *Mckleroy v. State*, 77 Ala. 97; *Fuller v. State*, 117 Ala. 200. See also *Lowe v. State*, 88 Ala. 8.

Connecticut. — *State v. James*, 37 Conn. 360.

Georgia. — *Battle v. State*, 103 Ga. 53.

Idaho. — *Anthony v. State*, (Idaho 1899) 55 Pac. Rep. 884; *State v. Kruger*, (Idaho 1900) 61 Pac. Rep. 464.

Illinois. — *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683; *Little v. People*, 157 Ill. 158.

Indiana. — *Wall v. State*, 51 Ind. 453; *Siberry v. State*, 133 Ind. 689.

Iowa. — *State v. Bodekee*, 34 Iowa 520.

Kansas. — *State v. Kearley*, 26 Kan. 87; *State v. Bridges*, 29 Kan. 140; *State v. Mosley*, 31 Kan. 358; *State v. Davis*, 48 Kan. 1; *State v. Brown*, 55 Kan. 611.

Kentucky. — *Weatherford v. Com.*, 7 Ky. L. Rep. 827; *Mickey v. Com.*, 9 Bush (Ky.) 593; *Jolly v. Com.*, (Ky. 1901) 61 S. W. Rep. 49.

Maine. — *State v. Reed*, 62 Me. 129; *State v. Rounds*, 76 Me. 124.

Michigan. — *Hamilton v. People*, 29 Mich. 194; *People v. Stubenvoll*, 62 Mich. 329; *People v. Cox*, 70 Mich. 247.

Minnesota. — *State v. Staley*, 14 Minn. 105; *State v. Sauer*, 38 Minn. 438.

Mississippi. — *Brown v. State*, 72 Miss. 98; *Burt v. State*, 72 Miss. 408, 48 Am. St. Rep. 563; *Williams v. State*, 73 Miss. 823; *Powers v. State*, 74 Miss. 779; *Lipscomb v. State*, 75 Miss. 559; *Klyce v. State*, 78 Miss. 450; *Ellerbe v. State*, 79 Miss. 10; *Rucker v. State*, (Miss. 1895) 18 So. Rep. 122.

Missouri. — *State v. Wells*, 111 Mo. 533; *State v. Robinson*, 117 Mo. 649. But see the next note *infra*.

Nebraska. — *Barney v. State*, 49 Neb. 515.

New Jersey. — *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 706, 23 Am. Rep. 239.

New Mexico. — *Chavez v. Territory*, 6 N. Mex. 455.

North Carolina. — *State v. Whitson*, 111 N. Car. 695.

Ohio. — *Morgan v. State*, 48 Ohio St. 371.

Oklahoma. — *Patzwald v. U. S.*, 7 Okla. 234.

Oregon. — *State v. Ching Ling*, 16 Oregon 479; *State v. Morey*, 25 Oregon 257; *State v. Crockett*, 39 Oregon 76.

Pennsylvania. — *Com. v. Drum*, 58 Pa. St. 9.

South Carolina. — *State v. Powers*, 59 S. Car. 215; *State v. Aughtry*, 49 S. Car. 285.

Tennessee. — *Butler v. State*, 7 Baxt. (Tenn.) 35.

Texas. — *McGuire v. State*, 43 Tex. 210; *Chapman v. State*, 3 Tex. App. 68; *Holmes v. State*, 9 Tex. App. 313; *Bramlette v. State*, 21

Tex. App. 611, 57 Am. Rep. 622; *Abram v. State*, 36 Tex. Crim. 44; *Hampton v. State*, 1 Tex. App. 660; *Massey v. State*, 1 Tex. App. 566; *Bland v. State*, 4 Tex. App. 15; *Ham v. State*, 4 Tex. App. 645; *Robertson v. State*, 9 Tex. App. 209; *Schultz v. State*, 20 Tex. App. 315; *Robinson v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 869; *Lenert v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 565.

Utah. — *State v. Neel*, 23 Utah 544.

Washington. — *State v. Gile*, 8 Wash. 24.

Canada. — *Reg. v. Riendeau*, 9 Quebec Q. B. 157.

1. Definition of Reasonable Doubt Necessary — *Missouri.* — A charge in a criminal case relative to the question of reasonable doubt should state what constitutes a reasonable doubt. *State v. Christian*, 66 Mo. 138; *State v. Clark*, 147 Mo. 22. Yet in *State v. Leeper*, 78 Mo. 470, it was held that a failure to explain the meaning of "reasonable doubt" was not erroneous when there had been no request for such explanation. And in *State v. Wheeler*, 87 Mo. App. 582, the same holding was made with reference to a trial for misdemeanor, though a distinction was taken in regard to felonies. Missouri cases adopting the view that a definition is unnecessary may be found in the last note *supra*.

Circumstantial Evidence. — In *People v. Lachanais*, 32 Cal. 433, it was held that a defendant, if he desires it, is entitled to a full and clear instruction as to what the law means by a rational doubt, where the evidence is circumstantial.

2. Com. v. Webster, 5 Cush. (Mass.) 320, 52 Am. Dec. 711. A further quotation from this opinion, dealing with the matter under consideration, will be found under CERTAIN — CERTAINTY, vol. 5, p. 799, note.

3. Chief Justice Shaw's Definition in Webster Case Approved — *California.* — *People v. Strong*, 30 Cal. 155; *People v. Ashe*, 44 Cal. 289; *People v. White*, 116 Cal. 17; *People v. Fellows*, 122 Cal. 233.

Georgia. — *Bone v. State*, 102 Ga. 387.

Idaho. — *People v. Dewey*, 2 Idaho 79.

Illinois. — *Little v. People*, 157 Ill. 159.

Massachusetts. — *Com. v. Goodwin*, 14 Gray (Mass.) 57.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Montana. — *Territory v. McAndrews*, 3 Mont. 158; *State v. Gleim*, 17 Mont. 31, 52 Am. St. Rep. 655.

Nebraska. — *Cowan v. State*, 22 Neb. 525.

Nevada. — *State v. Rover*, 11 Nev. 344.

New Jersey. — *Donnelly v. State*, 26 N. J. L. 615.

rate and comprehensive as any that can be given, but in the notes will be found a number of cases in which particular definitions have been approved or disapproved by the courts. By the word "approved" before a case is meant that in that case the appellate court approved of a definition given by the trial court or offered by counsel, or defined the term itself. By "disapproved" is meant that in the case or cases following the appellate court disapproved of the definition given by the trial court, or that it sustained the trial court in refusing to give the definition asked by counsel.¹

Ohio. — *Morgan v. State*, 48 Ohio St. 371.

Oklahoma. — *Patzwald v. U. S.*, 7 Okla. 237.

Oregon. — *State v. Glass*, 5 Oregon 73; *State v. Roberts*, 15 Oregon 196; *State v. Morey*, 25 Oregon 256.

Pennsylvania. — *Com. v. Devine*, 18 Pa. Super. Ct. 431.

South Carolina. — *State v. Powers*, 59 S. Car. 214.

Texas. — *Chapman v. State*, 3 Tex. App. 68.

1. Definitions Approved and Disapproved — United States — Approved.—A reasonable doubt is an honest, substantial misgiving, generated by the insufficiency of proof; not a doubt suggested by the ingenuity of counsel or jury, unwarranted by the testimony, nor one born of a merciful inclination to permit the defendant to escape, nor one prompted by sympathy for him or those connected with him. *U. S. v. Harper*, 33 Fed. Rep. 471; *U. S. v. Newton*, 52 Fed. Rep. 275; *Hopt v. Utah*, 120 U. S. 430; *U. S. v. Keller*, 19 Fed. Rep. 633. See also *U. S. v. Jones*, 31 Fed. Rep. 718; *U. S. v. Hughes*, 34 Fed. Rep. 732; *U. S. v. Barrett*, 65 Fed. Rep. 62; *U. S. v. Babcock*, (Mo. 1876) 3 Cent. L. J. 143.

Alabama — Approved. — *Martin v. State*, 77 Ala. 1; *Lang v. State*, 84 Ala. 1, 5 Am. St. Rep. 324; *Lowe v. State*, 88 Ala. 8; *Elmore v. State*, 92 Ala. 51; *Welsh v. State*, 96 Ala. 92; *Gilmore v. State*, 99 Ala. 154; *Boulden v. State*, 102 Ala. 78; *Dent v. State*, 105 Ala. 14; *Karr v. State*, 106 Ala. 1; *Howard v. State*, 108 Ala. 571; *Bell v. State*, 115 Ala. 25; *Carroll v. State*, 130 Ala. 99.

Disapproved. — *Ray v. State*, 50 Ala. 104; *Carney v. State*, 79 Ala. 14; *Cleveland v. State*, 86 Ala. 1; *Perry v. State*, 87 Ala. 30; *Perry v. State*, 91 Ala. 83; *Gibson v. State*, 91 Ala. 64; *Lundy v. State*, 91 Ala. 100; *Smith v. State*, 92 Ala. 30; *Potter v. State*, 92 Ala. 37; *Hornsby v. State*, 94 Ala. 55; *Garrett v. State*, 97 Ala. 18; *Johnson v. State*, 102 Ala. 1; *Yarbrough v. State*, 105 Ala. 43; *Thomas v. State*, 106 Ala. 19; *Barnes v. State*, 111 Ala. 56; *Hale v. State*, 122 Ala. 85; *Bodine v. State*, 129 Ala. 106.

Arizona — Approved. — *Foster v. Territory*, (Ariz. 1899) 56 Pac. Rep. 738.

Disapproved. — *U. S. v. Romero*, (Ariz. 1894) 35 Pac. Rep. 1059.

Arkansas — Approved. — *Carpenter v. State*, 62 Ark 286.

California — Approved. — *People v. Cronin*, 34 Cal. 191; *State v. Hardisson*, 61 Cal. 278; *People v. Lee Sare Bo.*, 72 Cal. 623; *People v. White*, 116 Cal. 17; *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72; *People v. Bathleman*, 120 Cal. 7; *People v. Burns*, 121 Cal. 529; *People v. Winters*, 125 Cal. 325; *People v. Flannelly*, 128 Cal. 83; *People v. Wynn*, 133 Cal. 72; *People v. Davis*, 135 Cal. 165.

Disapproved. — *People v. Padillia*, 42 Cal. 535; *People v. Lenon*, 79 Cal. 626; *People v. Bemmerly*, 87 Cal. 117; *People v. Schoedde*, 126 Cal. 373.

Colorado — Approved. — *Boykin v. People*, 22 Colo. 496; *Minich v. People*, 8 Colo. 454.

Connecticut — Approved. — *State v. Long*, 72 Conn. 39.

Delaware — Approved. — *State v. Lally*, 2 Marv. (Del.) 424; *State v. Fisher*, 1 Penn. (Del.) 303; *State v. Snow*, (Del. 1901) 51 Atl. Rep. 607.

District of Columbia — Approved. — *U. S. v. Heath*, 20 D. C. 272.

Florida — Approved. — *Ernest v. State*, 20 Fla. 383; *Lovett v. State*, 30 Fla. 163; *Woodruff v. State*, 31 Fla. 320; *Wallace v. State*, 41 Fla. 547; *Bird v. State*, (Fla. 1901) 30 So. Rep. 655.

Disapproved. — *Wood v. State*, 31 Fla. 221; *Gray v. State*, 42 Fla. 174.

Georgia — Approved. — In *Fletcher v. State*, 90 Ga. 468, the following definition was sustained: "A reasonable doubt is such a doubt as the term itself implies. It is difficult to explain what a reasonable doubt is; it means a doubt that has something to rest upon, some reason that it is based on, such a doubt as would control you and you would be governed by in your own important business affairs; it means such a doubt as a sensible, honest-minded man would reasonably entertain in an honest investigation after truth, a doubt that would arise from the evidence or the want of evidence in the case. It does not mean a mere vague conjecture, or a bare possibility of the innocence of the accused."

In *Johnson v. State*, 89 Ga. 107, a reasonable doubt is defined to be "such as a reasonable man would have after a careful investigation of any important subject — that prevents his being able to come to a satisfactory conclusion about it one way or the other." See also *Peterson v. State*, 47 Ga. 524; *Dumas v. State*, 63 Ga. 600; *Hodgkins v. State*, 89 Ga. 761; *Lewis v. State*, 90 Ga. 95.

Disapproved. — *Moughon v. State*, 57 Ga. 102; *Brewster v. State*, 63 Ga. 639.

Idaho — Approved. — *State v. Crump*, (Idaho 1897) 47 Pac. Rep. 814; *People v. Dewey*, 2 Idaho 79; *State v. Kruger*, (Idaho 1900) 61 Pac. Rep. 464; *State v. Gilbert*, (Idaho 1902) 69 Pac. Rep. 63.

Illinois — Approved. — The following definition has been sustained in Illinois: "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause." *Dunn v. People*, 109 Ill. 635; *Little v. People*, 157 Ill. 153. See also *Miller v. People*, 39 Ill. 457; *May v. People*,

The Courts Have Employed a Number of Words and Phrases in Defining the Term, but few

60 Ill. 119; *Mullins v. People*, 110 Ill. 42; *Spies v. People*, 122 Ill. 8, 3 Am. St. Rep. 320; *Weaver v. People*, 132 Ill. 536; *Watt v. People*, 126 Ill. 9; *Gannon v. People*, 127 Ill. 507, 11 Am. St. Rep. 147; *Painter v. People*, 147 Ill. 444; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346.

Indiana — *Approved*. — *Jarrell v. State*, 58 Ind. 293; *Stout v. State*, 90 Ind. 12; *Toops v. State*, 92 Ind. 13; *McIntosh v. State*, 151 Ind. 251; *Musser v. State*, 157 Ind. 423.

Disapproved. — *Batten v. State*, 80 Ind. 394; *Brown v. State*, 105 Ind. 385; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429; *Cross v. State*, 132 Ind. 65.

Iowa — *Approved*. — *State v. Hayden*, 45 Iowa 11; *State v. Stewart*, 52 Iowa 284; *State v. Pierce*, 65 Iowa 85; *State v. Elsham*, 70 Iowa 531; *State v. Case*, 96 Iowa 264; *State v. Harris*, 97 Iowa 407; *State v. Ostrander*, 18 Iowa 436.

Kansas — *Disapproved*. — *State v. Bridges*, 29 Kan. 138.

Kentucky — *Approved*. — *Holloway v. Com.*, 11 Bush (Ky.) 344.

Disapproved. — *Arnold v. Com.*, (Ky. 1900) 55 S. W. Rep. 894.

Louisiana — *Approved*. — In *State v. Jefferson*, 43 La. Ann. 995, this instruction was approved: "A reasonable doubt, gentlemen, is not a mere possible doubt; it should be an actual or substantial doubt. It is such a doubt as a reasonable man would seriously entertain. It is a serious, sensible doubt, such as you could give a good reason for."

Massachusetts — *Approved*. — See *supra*, this subsection, where Chief Justice Shaw's definition is given. See also *Com. v. Costley*, 118 Mass. 1, *quoted* under CERTAIN — CERTAINTY, vol. 5, p. 799, and MORAL CERTAINTY, vol. 20, p. 871.

Disapproved. — *Com. v. Tuttle*, 12 Cush. (Mass.) 502.

Michigan — *Approved*. — "A reasonable doubt is a fair doubt growing out of the testimony in the case; it is not a mere imaginary, captious, or possible doubt, but a fair doubt based upon reason and common sense; it is such a doubt as may leave your minds, after a careful examination of all the evidence in the case, in that condition that you cannot say you have an abiding conviction to a moral certainty" of the defendant's guilt. *People v. Finley*, 38 Mich. 482. See also *Hall v. People*, 39 Mich. 717; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *People v. Cox*, 70 Mich. 247; *People v. Ezzo*, 104 Mich. 341.

Minnesota — *Approved*. — *State v. Staley*, 14 Minn. 105; *State v. Johnson*, 37 Minn. 493.

Mississippi — *Disapproved*. — *Browning v. State*, 33 Miss. 47; *Kendrick v. State*, 55 Miss. 436; *Webb v. State*, 73 Miss. 456; *Williams v. State*, 73 Miss. 820; *Ellerbe v. State*, 79 Miss. 10; *Evans v. State*, (Miss. 1888) 4 So. Rep. 344; *Blalock v. State*, (Miss. 1900) 27 So. Rep. 642.

Missouri — *Approved*. — In *State v. Fisher*, 162 Mo. 171, this instruction was approved: "The law presumes the defendant to be innocent of the offense charged. It devolves upon the state to prove him guilty beyond a reasonable doubt. If you have a reasonable doubt

of his guilt you should acquit him, but a doubt, to authorize an acquittal on that ground, should be a substantial doubt founded upon the evidence and not a mere possibility of innocence." See also *State v. Nueslein*, 25 Mo. 111; *State v. Crawford*, 34 Mo. 200; *State v. Butterfield*, 75 Mo. 297; *State v. Owens*, 79 Mo. 619; *State v. Gee*, 85 Mo. 647; *State v. Wells*, 111 Mo. 533; *State v. David*, 131 Mo. 380; *State v. Good*, 132 Mo. 114; *State v. Duncan*, 142 Mo. 456; *State v. Garrison*, 147 Mo. 548; *State v. Holloway*, 156 Mo. 227; *State v. Tettaton*, 159 Mo. 354; *State v. Adair*, 160 Mo. 391.

Disapproved. — *State v. Shaeffer*, 89 Mo. 271; *State v. Blue*, 136 Mo. 44.

Montana — *Approved*. — *Territory v. McAndrews*, 3 Mont. 158; *State v. Gibbs*, 10 Mont. 220; *State v. Gleim*, 17 Mont. 17, 52 Am. St. Rep. 655; *State v. Clancy*, 20 Mont. 498; *State v. Harrison*, 23 Mont. 79.

Nebraska — *Approved*. — *Polin v. State*, 14 Neb. 540; *Carr v. State*, 23 Neb. 752; *Langford v. State*, 32 Neb. 782; *Willis v. State*, 43 Neb. 102; *Lawhead v. State*, 46 Neb. 607; *Barney v. State*, 49 Neb. 515; *Davis v. State*, 51 Neb. 301; *Catron v. State*, 52 Neb. 389; *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512; *Whitney v. State*, 53 Neb. 287; *Maxfield v. State*, 54 Neb. 44; *McArthur v. State*, 60 Neb. 390; *Bartley v. State*, 53 Neb. 310.

Nevada — *Approved*. — *State v. Millain*, 3 Nev. 409; *State v. Raymond*, 11 Nev. 98; *State v. Nelson*, 11 Nev. 340; *State v. McLane*, 15 Nev. 365; *State v. Jones*, 19 Nev. 365; *State v. Potts*, 20 Nev. 389; *State v. Streeter*, 20 Nev. 403.

Disapproved. — *State v. Johnson*, 16 Nev. 36.

New Jersey — *Approved*. — *Cliver v. State*, 45 N. J. L. 46; *Gardner v. State*, 55 N. J. L. 17; *Brown v. State*, 62 N. J. L. 666.

Disapproved. — *State v. Raymond*, 53 N. J. L. 260.

New Mexico — *Approved*. — *Chavez v. Territory*, 6 N. Mex. 455.

New York — *Approved*. — *People v. Friedland*, 2 N. Y. App. Div. 332; *People v. Stephenson*, (Supm. Ct. Spec. Ct.) 11 Misc. (N. Y.) 141; *People v. Guidici*, 100 N. Y. 509; *People v. Hughes*, 137 N. Y. 29; *People v. Barker*, 153 N. Y. 111.

North Carolina — *Approved*. — *State v. Carland*, 90 N. Car. 668; *State v. Whitson*, 111 N. Car. 699.

Ohio — *Approved*. — *State v. Del Bello*, 8 Ohio Dec. 455; *Clark v. State*, 12 Ohio 483, 40 Am. Dec. 481; *Morgan v. State*, 48 Ohio St. 371.

Oregon — *Approved*. — In *State v. Ching Ling*, 16 Oregon 419, a reasonable doubt is defined to be a conscious uncertainty in the mind of the jury, after a fair consideration of all the proofs in the case, respecting the guilt of the accused. See also *State v. Conally*, 3 Oregon 73; *State v. Glass*, 5 Oregon 73; *State v. Roberts*, 15 Oregon 196; *State v. Morey*, 25 Oregon 256; *State v. Crockett*, 39 Oregon 76.

Pennsylvania — *Approved*. — *Kilpatrick v. Com.*, 3 Phila. (Pa.) 245, 15 Leg. Int. (Pa.) 347; *Com. v. Carey*, 2 Brews. (Pa.) 404; *Com. v. Devine*, 18 Pa. Super. Ct. 431; *Meyers v. Com.*,

of them have been held satisfactory in all jurisdictions.¹ Thus, in defining a reasonable doubt the adjectives actual,² strong,³ clear,⁴ fair,⁵ serious,⁶ sensible,⁷ real,⁸ and well-founded⁹ have been used.

By Proof Beyond Reasonable Doubt Is Not Meant that the Evidence Must Exclude All Doubt from the minds of the jury, and a charge to acquit if the jury has a doubt, or any doubt, of the defendant's guilt is improper, as the doubt must be reasonable.¹⁰

83 Pa. St. 142; *Com. v. Drum*, 58 Pa. St. 9; *Com. v. Mudgett*, 174 Pa. St. 211.

South Carolina — *Approved*. — *State v. Coleman*, 20 S. Car. 455; *State v. Senn*, 32 S. Car. 404; *State v. Powers*, 59 S. Car. 200.

South Dakota — *Approved*. — *State v. Seren*, 7 S. Dak. 277.

Texas — *Approved*. — *McCullough v. State*, 43 Tex. App. 620; *Gallaher v. State*, 28 Tex. App. 247; *Johnson v. State*, 18 Tex. App. 385.

Disapproved. — *Brown v. State*, 23 Tex. 105; *Bray v. State*, 41 Tex. 560; *Smith v. State*, 9 Tex. App. 150; *Robertson v. State*, 9 Tex. App. 209; *Sisk v. State*, 9 Tex. App. 246; *Bookser v. State*, 26 Tex. App. 593; *Robertson v. State*, 10 Tex. App. 602; *Abram v. State*, 36 Tex. Crim. 44.

Utah — *Approved*. — *People v. Kerm*, 8 Utah 268; *State v. McCune*, 16 Utah 171; *State v. Williamson*, 22 Utah 248; *State v. Neel*, 23 Utah 543.

Vermont — *Approved*. — *State v. Meyer*, 58 Vt. 457.

Virginia — *Approved*. — *Shipp v. Com.*, 86 Va. 746.

Washington — *Approved*. — *Leonard v. Territory*, 2 Wash. Ter. 381; *State v. Gile*, 8 Wash. 24; *State v. Rosener*, 8 Wash. 42; *State v. Krug*, 12 Wash. 288; *State v. Harras*, 25 Wash. 416.

Disapproved. — *State v. Cushing*, 17 Wash. 544.

West Virginia — *Approved*. — *State v. Dickey*, 48 W. Va. 325.

Wisconsin — *Approved*. — *Zweifel v. State*, 27 Wis. 401; *Emery v. State*, 101 Wis. 627; *Butler v. State*, 102 Wis. 369.

1. Necessary Conclusion. — An instruction that if the facts would necessarily lead the mind to the conclusion that the accused is guilty he must be convicted has been held to be erroneous. *Rhodes v. State*, 128 Ind. 196, 25 Am. St. Rep. 429.

A Strong Suspicion of guilt is not sufficient. *U. S. v. Babcock*, (Mo. 1876) 3 Cent. L. J. 143.

Artificial Doubt not sufficient. *State v. Ostrander*, 18 Iowa 435.

A Forced Doubt is not sufficient. *State v. Ostrander*, 18 Iowa 435.

2. A Reasonable Doubt Must Be Actual. *Dent v. State*, 105 Ala. 14; *Talbert v. State*, 121 Ala. 33; *State v. Lally*, 2 Marv. (Del.) 424; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *State v. Jefferson*, 43 La. Ann. 995; *Ferguson v. State*, 52 Neb. 432, 66 Am. St. Rep. 512; *Whitney v. State*, 53 Neb. 287; *State v. Del Bello*, 8 Ohio Dec. 455; *State v. Morey*, 25 Oregon 257.

3. Strong. — *State v. Senn*, 32 S. Car. 392; *State v. Bodie*, 33 S. Car. 117; *State v. Summer*, 55 S. Car. 32, 74 Am. St. Rep. 707.

4. Doubt Must Be Clear. — *U. S. v. Babcock*, (Mo. 1876) 3 Cent. L. J. 143. See also **CLEAR**, vol. 6, p. 111, note.

But in *Bowler v. State*, 41 Miss. 578, it was held that a doubt need not be a clear doubt.

And "clearly proven" has been held not to be equivalent to "proven beyond a reasonable doubt." *State v. Stewart*, 52 Iowa 284.

5. Fair. — *People v. Finley*, 38 Mich. 482. See also **FAIR** — **FAIRLY**, vol. 12, p. 711, note. But see *People v. Hubert*, 119 Cal. 216, 63 Am. St. Rep. 72, where the term "fair doubt" was criticised.

6. Serious. — *Collins v. People*, 194 Ill. 506; *Earll v. People*, 73 Ill. 329; *Smith v. People*, 74 Ill. 144; *State v. Jefferson*, 43 La. Ann. 995; *Com. v. Harman*, 4 Pa. St. 269; *State v. Coleman*, 20 S. Car. 455; *State v. Senn*, 32 S. Car. 401; *State v. Bodie*, 33 S. Car. 135; *State v. Summer*, 55 S. Car. 32, 74 Am. St. Rep. 707. But see *People v. Ferry*, 84 Cal. 31.

7. Sensible. — *Woodruff v. State*, 31 Fla. 320; *State v. Jefferson*, 43 La. Ann. 995.

Reasonable Doubt Must Be Based on Common Sense. — *State v. Harrison*, 23 Mont. 79; *State v. McCune*, 16 Utah 170; *Emery v. State*, 101 Wis. 627. Compare *State v. Paulsell*, 115 Cal. 6.

8. Reasonable Doubt Must Be Real Doubt. — *State v. Long*, 72 Conn. 39; *State v. Ostrander*, 18 Iowa 438; *State v. Clancy*, 20 Mont. 502; *State v. Neel*, 23 Utah 543.

In *Missouri* it was held that the use of the word "real," in defining reasonable doubt, did not constitute reversible error. *State v. Davidson*, 95 Mo. 155. See also *State v. Butterfield*, 75 Mo. 297; *State v. Blunt*, 91 Mo. 506; *State v. Williams*, 95 Mo. 247, 6 Am. St. Rep. 46; *State v. Walker*, 98 Mo. 95.

But in *State v. Owens*, 79 Mo. 619, the use of the word "real" was much criticised, though the judgment was not reversed on that ground. See also *State v. Jones*, 86 Mo. 627; *State v. Payton*, 90 Mo. 220; *State v. Smith*, 21 Mo. App. 595.

9. Well-founded. — *Earll v. People*, 73 Ill. 329; *Smith v. People*, 74 Ill. 144; *Collins v. People*, 194 Ill. 506; *State v. Young*, 105 Mo. 634; *State v. Davidson*, 44 Mo. App. 518; *State v. Coleman*, 20 S. Car. 455; *State v. Senn*, 32 S. Car. 401; *State v. Summer*, 55 S. Car. 32, 74 Am. St. Rep. 707.

10. Doubt Must Be Reasonable — *United States v. Brown*, 4 McLean (U. S.) 142; *U. S. v. Wright*, 16 Fed. Rep. 112; *U. S. v. McKenzie*, 35 Fed. Rep. 826; *Dunbar v. U. S.*, 156 U. S. 185.

Alabama. — *Bob v. State*, 29 Ala. 23; *Hum-bree v. State*, 81 Ala. 67; *Kidd v. State*, 83 Ala. 58; *Munkers v. State*, 87 Ala. 94; *Perry v. State*, 91 Ala. 83; *Peagler v. State*, 110 Ala. 13; *Talbert v. State*, 121 Ala. 33; *Lodge v. State*, 122 Ala. 107; *Fleming v. State*, 107 Ala. 11; *McQueen v. State*, 108 Ala. 54; *Daugh-drill v. State*, 113 Ala. 7; *Roberts v. State*, 122 Ala. 47; *Littleton v. State*, 128 Ala. 31.

Substantial Doubt. — A reasonable doubt has been said to be a substantial doubt arising from the evidence.¹

Doubt for Which Reason May Be Given — Founded on Reason. — A reasonable doubt has been defined as a doubt for which a reason or a good reason can be given, a doubt based upon or founded on reason, and these definitions have been sustained in a number of cases.² But in some jurisdictions it has been held to be error to instruct the jury that a reasonable doubt is one that the jury is able to give a reason for,³ while in others such instructions have been disapproved though not held to constitute reversible error.⁴

Arizona. — *Foster v. Territory*, (Ariz. 1899) 36 Pac. Rep. 738.

Florida. — *Ernest v. State*, 20 Fla. 383.

Georgia. — *O'Neal v. State*, 48 Ga. 78; *Poole v. State*, 87 Ga. 526; *Jackson v. State*, 91 Ga. 271, 44 Am. St. Rep. 22.

Illinois. — *Spies v. People*, 122 Ill. 8, 3 Am. St. Rep. 320; *Watt v. People*, 126 Ill. 9.

Kansas. — *State v. Cassidy*, 12 Kan. 550.

Mississippi. — *Kendrick v. State*, 55 Miss. 436.

Missouri. — *State v. Turner*, 110 Mo. 196; *State v. Good*, 132 Mo. 114.

New York. — *People v. Benham*, 160 N. Y. 402.

Oregon. — *State v. Lee*, 7 Oregon 258.

Texas. — *Gibbs v. State*, 1 Tex. App. 12.

Utah. — *People v. Kerm*, 8 Utah 268.

A remark by the trial court that everything human is subject to some kind of doubt has been held not to be error. *Winter v. State*, 123 Ala. 1; *State v. Start*, 10 Kan. App. 583, 63 Pac. Rep. 448.

Term Implies that there May Be Doubts Which Are Not Reasonable. — *State v. Rounds*, 76 Me. 123.

Likelihood. — In *Howard v. State*, 108 Ala. 571, it was held that a charge to the jurors that on a likelihood of the defendant's innocence they should acquit, or that if from the evidence it was more likely that he was guilty they should convict, was erroneous and was properly refused.

Minimizing Signification of Mere Doubt Reasonable and Founded on Evidence. — See *Hoffman v. State*, 97 Wis. 576.

1. Doubt Must Be Substantial — United States. — *U. S. v. Keller*, 19 Fed. Rep. 633; *U. S. v. Newton*, 52 Fed. Rep. 275.

Alabama. — *Owens v. State*, 52 Ala. 400; *Farrish v. State*, 63 Ala. 164; *Little v. State*, 89 Ala. 99; *Talbert v. State*, 121 Ala. 33.

Illinois. — *Earll v. People*, 73 Ill. 329; *Smith v. People*, 74 Ill. 144; *Collins v. People*, 194 Ill. 306.

Maine. — *State v. Rounds*, 76 Me. 123.

Missouri. — *State v. Heed*, 57 Mo. 252; *State v. Gann*, 72 Mo. 374; *State v. Vansant*, 80 Mo. 67; *State v. Payton*, 90 Mo. 220; *State v. Blunt*, 91 Mo. 503; *State v. Davidson*, 95 Mo. 155; *State v. Young*, 105 Mo. 634; *State v. Turner*, 110 Mo. 196.

Pennsylvania. — *Com. v. Harman*, 4 Pa. St. 269.

South Carolina. — *State v. Bodie*, 33 S. Car. 135; *State v. Summer*, 55 S. Car. 32, 74 Am. St. Rep. 707.

See also the last note *supra*.

2. Reason, Based on Reason, Etc. — United States. — *U. S. v. Stevens*, 2 Hask. (U. S.) 164,

27 Fed. Cas. No. 16,392; *U. S. v. Butler*, 1 Hughes (U. S.) 458; *U. S. v. Johnson*, 26 Fed. Rep. 682; *U. S. v. Jackson*, 29 Fed. Rep. 503; *U. S. v. Jones*, 31 Fed. Rep. 718; *U. S. v. King*, 34 Fed. Rep. 302; *U. S. v. Newton*, 52 Fed. Rep. 275; *U. S. v. Cassidy*, 67 Fed. Rep. 782.

Florida. — *Wallace v. State*, 41 Fla. 547.

Georgia. — *Vann v. State*, 83 Ga. 44; *Powell v. State*, 95 Ga. 502.

Idaho. — See *State v. Gilbert*, (Idaho 1902) 69 Pac. Rep. 62.

Louisiana. — *State v. Jefferson*, 43 La. Ann. 995.

Montana. — *State v. Harison*, 23 Mont. 79.

New York. — *People v. Guidici*, 100 N. Y. 509. See also *People v. Barker*, 153 N. Y. 111.

Oregon. — *State v. Morey*, 25 Oregon 258.

South Dakota. — *State v. Serenson*, 7 S. Dak. 277.

Washington. — *State v. Harras*, 25 Wash. 416.

Wisconsin. — *Emery v. State*, 101 Wis. 627; *Butler v. State*, 102 Wis. 369.

Conformable to Reason. — A reasonable doubt is defined as one "conformable to reason; a doubt which would satisfy a reasonable man." *Ernest v. State*, 20 Fla. 383.

3. Error. — *Siberry v. State*, 133 Ind. 678; *Rhodes v. State*, 128 Ind. 189, 25 Am. St. Rep. 429; *State v. Cohen*, 108 Iowa 208, 75 Am. St. Rep. 213; *State v. Lee*, 113 Iowa 348; *Klyce v. State*, 78 Miss. 450; *Cowan v. State*, 22 Neb. 519; *Carr v. State*, 23 Neb. 749; *Childs v. State*, 34 Neb. 236; *Morgan v. State*, 48 Ohio St. 371.

"A Conviction for Which a Reason Can Be Given is not sufficient. The conviction must be such as to exclude any doubt for which a substantial reason can be given." *State v. Sheppard*, 49 W. Va. 610.

4. Not Reversible Error. — *State v. Morey*, 25 Oregon 241. See also *People v. Stubenvoll*, 62 Mich. 329; *State v. Sauer*, 38 Minn. 438.

Neither Giving nor Refusing Such Instruction Is Reversible Error. — *Avery v. State*, 124 Ala. 20, *overruling* *Cohen v. State*, 50 Ala. 108; *Hodge v. State*, 97 Ala. 37, 38 Am. St. Rep. 145, and *Walker v. State*, 117 Ala. 42, and *distinguishing* *Ellis v. State*, 120 Ala. 333, and *Jones v. State*, 120 Ala. 303. See also *Ray v. State*, 50 Ala. 104; *Bain v. State*, 74 Ala. 38; *Peagler v. State*, 110 Ala. 13; *Williams v. State*, 130 Ala. 31; *Carroll v. State*, 130 Ala. 99; *Roberts v. State*, 122 Ala. 47; *Talbert v. State*, 121 Ala. 33; *Harvey v. State*, 125 Ala. 47.

Not Necessarily Reasonable Doubt. — It has been held that a doubt for which a reason may be given is not necessarily a reasonable doubt, although a reasonable doubt may be a doubt for which a reason may be assigned. *Talbert*

Satisfaction.—When the jurors, after an impartial consideration of the evidence, can say that they are not satisfied of the defendant's guilt they entertain a reasonable doubt;¹ and where they are satisfied of his guilt they can have no reasonable doubt.²

Honest Misgiving.—A reasonable doubt has been defined as an honest misgiving generated by an insufficiency of proof.³

The Phrase "a Reasonable Chance of Mistake" has been held not to be equivalent to "reasonable doubt."⁴

Guess or Surmise.—A reasonable doubt is not a mere guess⁵ or surmise⁶ that the defendant may not be guilty.

A Vague Doubt is not a reasonable doubt.⁷

Whim.—A reasonable doubt is not a mere whim, or whimsical doubt.⁸

Speculative.—A reasonable doubt is not a speculative doubt or a doubt resting on mere speculation.⁹

Probability.—Proof that raises only a strong probability of the guilt of the accused is not the proof beyond a reasonable doubt which is necessary to sustain a conviction.¹⁰ But a probability of the defendant's innocence is a reasonable doubt of his guilt.¹¹

v. State, 121 Ala. 37; *Roberts v. State*, 122 Ala. 47.

Man of Reason.—In *Thomas v. State*, 126 Ala. 4, it was held error to charge that "a reasonable doubt is a doubt that a man of reason can give if necessary."

1. Jury Not Satisfied.—*U. S. v. Meagher*, 37 Fed. Rep. 875.

Entirely Satisfied.—See ENTIRE — ENTIRELY, ETC., vol. II, p. 49, note. See also *People v. Padillia*, 42 Cal. 535; *People v. Kerrick*, 52 Cal. 446; *People v. Brown*, 56 Cal. 405; *People v. Caraillo*, 70 Cal. 643.

Fully Satisfied.—Proof beyond a "reasonable doubt" was held to mean "fully satisfied" in *State v. Whitson*, 111 N. Car. 696.

Defense.—An instruction that the defendant must satisfy the jury that his defense is good has been held to be erroneous. *Boykin v. People*, 22 Colo. 496.

2. Jury Satisfied.—*Brown v. State*, 128 Ala. 12; *Collins v. People*, 194 Ill. 506.

But it has been held that satisfaction of guilt is not the equivalent of satisfaction of guilt beyond a reasonable doubt. *Powers v. State*, 74 Miss. 780; *Williams v. State*, 73 Miss. 820.

Clearly Established by Satisfactory Proof.—This has been held equivalent to proof beyond a reasonable doubt. *People v. Wreden*, 59 Cal. 392.

3. Honest Misgiving.—*U. S. v. Means*, 42 Fed. Rep. 599; *U. S. v. Harper*, 33 Fed. Rep. 471.

4. Bonner v. State, 107 Ala. 97, *quoted under* CHANCE, vol. 5, p. 846, note.

5. Not Mere Guess.—*U. S. v. Johnson*, 26 Fed. Rep. 682; *U. S. v. Murphy*, 84 Fed. Rep. 609.

6. A Mere Surmise Is Not a Reasonable Doubt. *U. S. v. Johnson*, 26 Fed. Rep. 682; *Welsh v. State*, 96 Ala. 92.

7. Vague Doubt.—*State v. Gilbert*, (Idaho 1902) 69 Pac. Rep. 63; *State v. Morey*, 25 Oregon 257.

8. Whim.—*U. S. v. Murphy*, 84 Fed. Rep. 609; *Welsh v. State*, 96 Ala. 92; *People v. Barker*, 153 N. Y. 111; *McGuire v. State*, 43 Tex. 210.

9. Speculative Doubt Not Sufficient.—*U. S. v. Knowles*, 4 Sawy. (U. S.) 521; *U. S. v. Keller*, 19 Fed. Rep. 633; *U. S. v. Murphy*, 84 Fed. Rep. 609; *Fararish v. State*, 63 Ala. 164; *Humbree v. State*, 81 Ala. 67; *Kidd v. State*, 83 Ala. 58; *Little v. State*, 89 Ala. 99; *People v. Finley*, 38 Mich. 482; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *State v. Summons*, 1 Ohio Dec. (Reprint) 416, 9 West. L. J. 407; *State v. Krug*, 12 Wash. 288; *State v. Gile*, 8 Wash. 24.

Not Every Slight Doubt Is a Reasonable Doubt. *Warren v. Com.*, 37 Pa. St. 45.

In *Anthony v. State*, (Idaho 1899) 55 Pac. Rep. 884, it was held not to be error for the court to refuse to instruct the jury that however slight the reasonable doubt might be, if it was fairly based on the evidence the defendant must be acquitted.

10. Probability of Guilt.—*Reg. v. White*, 4 F. & F. 383; *Guiteau's Case*, 10 Fed. Rep. 164; *U. S. v. Searcey*, 26 Fed. Rep. 435; *U. S. v. Babcock*, 3 Dill. (U. S.) 581, 3 Cent. L. J. 143; *Byrd v. State*, 69 Ark. 537; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Binkley v. State*, 34 Neb. 757; *Kilpatrick v. Com.*, 3 Phila. (Pa.) 237, 15 Leg. Int. (Pa.) 347; *Pilkinton v. State*, 19 Tex. 214; *Grant v. State*, 3 Tex. App. 1; *Hardeman v. State*, 12 Tex. App. 350; *Barnett v. State*, 17 Tex. App. 191. See also PROBABILITY, *ante*, p. 108, note.

But an instruction that the guilt of the defendant was to be determined upon the strong probabilities of the case, and that the probabilities of guilt, to warrant a conviction, need not be so strong as to exclude all doubt or possibility of error, has been held not to be erroneous. *Dunbar v. U. S.*, 156 U. S. 185; *State v. Harras*, 25 Wash. 416.

11. Probability of Defendant's Innocence.—*Bain v. State*, 74 Ala. 38; *Smith v. State*, 92 Ala. 30; *Winslow v. State*, 76 Ala. 42; *Whitaker v. State*, 106 Ala. 33; *Croft v. State*, 95 Ala. 3; *Browning v. State*, 30 Miss. 656; *Nelms v. State*, 58 Miss. 362.

In *Prince v. State*, 100 Ala. 144, 46 Am. St. Rep. 28, it was held that a charge that "if there is a probable doubt of the guilt of the defendant the jury must acquit" was prop-

Abiding Conviction — Moral Certainty. — Where the jury entertains an abiding conviction to a moral certainty of the truth of the charge, it has been held that its truth has been established beyond a reasonable doubt.¹ The two phrases "beyond a reasonable doubt" and "to a moral certainty" are said to be legal equivalents of each other; and when the jury is not convinced to a moral certainty of the defendant's guilt, it entertains a reasonable doubt.² So a juror is said to be satisfied beyond a reasonable doubt if, from a consideration of the whole evidence, he has an abiding conviction of the truth of the charge.³

erly refused. It was further held in that case that a charge that "if there is a probability of the defendant's innocence" the jury must acquit was free from error, and should be given when requested in writing by the defendant.

An instruction that "a reasonable doubt may arise though there is no probability of the defendant's innocence in the testimony" has been sustained. *Carroll v. State*, 130 Ala. 99.

A Charge Requiring the Exclusion of a Probable Possibility instead of a reasonable doubt was held to have been properly refused. *Tidwell v. State*, 70 Ala. 33.

1. Abiding Conviction to Moral Certainty. — *Miles v. U. S.*, 103 U. S. 309; *Carroll v. State*, 130 Ala. 99; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *State v. Vansant*, 80 Mo. 67; *State v. Harrison*, 23 Mont. 79; *State v. Clancy*, 20 Mont. 502; *Carr v. State*, 23 Neb. 749; *State v. Del Bello*, 8 Ohio Dec. 455; *Com. v. Devine*, 18 Pa. Super. Ct. 431; *State v. McCune*, 16 Utah 170. See also **ABIDING CONVICTION**, vol. 1, p. 184.

2. Beyond Reasonable Doubt Equivalent to Moral Certainty — *United States*. — *Guiteau's Case*, 10 Fed. Rep. 164; *U. S. v. Zes Cloya*, 35 Fed. Rep. 493; *Miles v. U. S.*, 103 U. S. 304.

Alabama. — *Winter v. State*, 20 Ala. 39; *Mose v. State*, 36 Ala. 211; *Turbeville v. State*, 40 Ala. 717; *Ray v. State*, 50 Ala. 104; *Cohen v. State*, 50 Ala. 108; *Williams v. State*, 52 Ala. 26; *Coleman v. State*, 59 Ala. 52; *Lowe v. State*, 88 Ala. 8; *Jones v. State*, 100 Ala. 88.

California. — *People v. Ashe*, 44 Cal. 288; *People v. Brannon*, 47 Cal. 96; *People v. Beck*, 58 Cal. 212; *People v. Wreden*, 59 Cal. 395.

Connecticut. — *State v. Long*, 72 Conn. 39.

Delaware. — *State v. Miller*, 9 Houst. (Del.) 564.

Georgia. — *Giles v. State*, 6 Ga. 276; *Bone v. State*, 102 Ga. 387; *Heard v. State*, 70 Ga. 597; *Jesse v. State*, 20 Ga. 167.

Illinois. — *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346.

Indiana. — *Sullivan v. State*, 52 Ind. 309; *Siterry v. State*, 133 Ind. 690.

Iowa. — *State v. Ostrander*, 18 Iowa 435; *State v. Bodekee*, 34 Iowa 520.

Kansas. — *State v. Start*, 10 Kan. App. 583, 63 Pac. Rep. 448.

Massachusetts. — *Burt v. Merchants' Ins. Co.*, 115 Mass. 1.

Michigan. — *People v. Finley*, 38 Mich. 482; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265; *People v. Cox*, 70 Mich. 257; *People v. Flynn*, 96 Mich. 276, *People v. Swartz*, 118 Mich. 300.

Mississippi. — *Browning v. State*, 33 Miss. 47; *James v. State*, 45 Miss. 572.

Missouri. — *State v. Crawford*, 34 Mo. 201.

Minnesota. — *State v. Staley*, 14 Minn. 105.

Montana. — *Territory v. Owings*, 3 Mont. 137.

Nebraska. — *Parrish v. State*, 14 Neb. 60; *Willis v. State*, 43 Neb. 102; *Davis v. State*, 51 Neb. 301.

Nevada. — *State v. Van Winkle*, 6 Nev. 340.

New Jersey. — *Donnelly v. State*, 26 N. J. L. 615.

North Carolina. — *State v. Whitson*, 111 N. Car. 699.

Ohio. — *Morgan v. State*, 48 Ohio St. 371.

Texas. — *Chapman v. State*, 3 Tex. App. 67; *Smith v. State*, 10 Tex. App. 420; *Shelton v. State*, 12 Tex. App. 513; *Pullen v. State*, 28 Tex. App. 114; *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317.

See also **CERTAIN — CERTAINTY**, vol. 5, p. 799; **MORAL CERTAINTY**, vol. 20, p. 871.

An instruction that if the jury is not morally certain as to the defendant's guilt or innocence a reasonable doubt exists has been held correct. *State v. David*, 131 Mo. 380. But *compare* *Young v. State*, 95 Ala. 4.

Phrases Distinguished. — But belief beyond reasonable doubt and belief to a moral certainty have been held not to be the same. *McAlpine v. State*, 47 Ala. 78; *Territory v. Barth*, (Ariz. 1887) 15 Pac. Rep. 673; *Territory v. Clanton*, (Ariz. 1889) 20 Pac. Rep. 94; *Heldt v. State*, 20 Neb. 493, 57 Am. Rep. 835. See also *People v. Schoedde*, 126 Cal. 373. But *compare* the list of cases above.

Certainty. — An instruction that of course the jury cannot convict unless it can reach a conclusion amounting to a certainty was held to have been properly refused. The court said that the word "certainty" should have been qualified by the word "moral," or some equivalent word or phrase. *State v. Powers*, 59 S. Car. 214.

Reasonable Doubt Not Equivalent to Moral Certainty of Defendant's Innocence. — *Young v. State*, 95 Ala. 4. See also *infra*, **Innocence**, and *State v. Murphy*, 6 Ala. 845.

3. Abiding Conviction of Truth of Charge Equivalent to Proof Beyond Reasonable Doubt — *United States*. — *U. S. v. Meagher*, 37 Fed. Rep. 881.

Alabama. — *Coleman v. State*, 59 Ala. 52; *McKee v. State*, 82 Ala. 32; *Battles v. Tallman*, 96 Ala. 403.

California. — *People v. Ashe*, 44 Cal. 288; *People v. Brannon*, 47 Cal. 96.

Dakota. — *Territory v. Bannigan*, 1 Dak. 432.

Illinois. — *Spies v. People*, 122 Ill. 8, 3 Am. St. Rep. 320; *Painter v. People*, 147 Ill. 444.

Iowa. — *State v. Elsham*, 70 Iowa 531; *State v. Ostrander*, 18 Iowa 435.

Absolute Certainty. — Proof beyond reasonable doubt does not mean proof to an absolute certainty or absolute proof.¹

Possibility. — A mere possibility that the defendant may be innocent is not a reasonable doubt of his guilt.²

Massachusetts. — *Com. v. Webster*, 5 Cush. (Mass.) 320, 52 Am. Dec. 711.

Michigan. — *People v. Finley*, 38 Mich. 482.

Montana. — *State v. Gibbs*, 10 Mont. 220.

Nebraska. — *Willis v. State*, 43 Neb. 102; *Maxfield v. State*, 54 Neb. 44; *Davis v. State*, 51 Neb. 301.

Nevada. — *State v. Van Winkle*, 6 Nev. 340; *State v. McLane*, 15 Nev. 365.

New Jersey. — *Donnelly v. State*, 26 N. J. L. 601.

Texas. — *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Chapman v. State*, 3 Tex. App. 67.

Washington. — *State v. Gile*, 8 Wash. 24.

See also ABIDING CONVICTION, vol. 1, p. 184, and compare *Williams v. State*, 73 Miss. 820.

Conviction. — The trial court instructed that a reasonable doubt must be "such a doubt that convinces you that the fact does not exist." The appellate court said: "This was an error. A doubt never convinces." *Arnold v. State*, 23 Ind. 170.

Full Conviction of Guilt has been held not to be equivalent to proof beyond a reasonable doubt. *Lipscomb v. State*, 75 Miss. 560.

Abiding Faith. — See FAITH, vol. 12, p. 713, note.

1. Absolute. — *Martin v. State*, 77 Ala. 1; *Welsh v. State*, 96 Ala. 92; *Whatley v. State*, 91 Ala. 108; *Jackson v. State*, (Ala. 1894) 18 So. Rep. 728; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *State v. Start*, 10 Kan. App. 583, 63 Pac. Rep. 448; *State v. Hogard*, 12 Minn. 293; *Browning v. State*, 33 Miss. 47; *St. Louis v. State*, 8 Neb. 405; *Donnelly v. State*, 26 N. J. L. 601; *People v. Benham*, 160 N. Y. 402; *State v. Glass*, 5 Oregon 73; *Zweifel v. State*, 27 Wis. 401; *Cornish v. State*, 3 Wyo. 95. See also ABSOLUTE, vol. 1, pp. 207, 208.

Absolute Belief. — *Whatley v. State*, 91 Ala. 108.

Instruction that Opinion of Guilt Must Nearly Approach Absolute Conviction Held Not to Be Error. — *People v. Ferry*, 84 Cal. 31. Compare *People v. Hecker*, 109 Cal. 451.

Instruction that Jury Must Believe Defendant Cannot Be Guiltless Properly Refused. — *Webb v. State*, 106 Ala. 52. See also *U. S. v. Murphy*, 84 Fed. Rep. 609; *Thomas v. State*, 107 Ala. 13; *Allen v. State*, 111 Ala. 80; *McGuire v. People*, 44 Mich. 286, 38 Am. Rep. 265.

Indubitably Certain. — A charge that the jury must be "indubitably certain" of the defendant's guilt was held to have been properly refused. *Ross v. State*, 92 Ala. 28, 25 Am. St. Rep. 20.

Indisputable Evidence. — Proof beyond reasonable doubt is not equivalent to "indisputable evidence." *U. S. v. Heath*, 20 D. C. 272.

2. Possibility. — *United States.* — *U. S. v. McKenzie*, 35 Fed. Rep. 826; *U. S. v. Barrett*, 65 Fed. Rep. 62; *Dunbar v. U. S.*, 156 U. S. 185.

Alabama. — *Mose v. State*, 36 Ala. 211; *Owens v. State*, 52 Ala. 400; *Farrish v. State*, 63 Ala. 164; *Booker v. State*, 76 Ala. 22; *Martin v. State*, 77 Ala. 1; *Lang v. State*, 84 Ala.

1, 5 Am. St. Rep. 324; *Humbree v. State*, 81 Ala. 67; *Kidd v. State*, 83 Ala. 58; *Little v. State*, 89 Ala. 99; *Smith v. State*, 92 Ala. 30; *Young v. State*, 95 Ala. 4; *Sims v. State*, 100 Ala. 23; *Boulden v. State*, 102 Ala. 78; *Dent v. State*, 105 Ala. 14; *Bonner v. State*, 107 Ala. 97.

Connecticut. — *State v. Long*, 72 Conn. 39.

Florida. — *Woodruff v. State*, 31 Fla. 320.

Georgia. — *Giles v. State*, 6 Ga. 276; *Fletcher v. State*, 90 Ga. 468; *Powell v. State*, 95 Ga. 502.

Idaho. — *People v. Dewey*, 2 Idaho 79.

Illinois. — *Pate v. People*, 8 Ill. 644; *Eaill v. People*, 73 Ill. 329; *Magee v. People*, 139 Ill. 138; *Collins v. People*, 194 Ill. 506.

Indiana. — *Rhodes v. State*, 128 Ind. 190, 25 Am. St. Rep. 429; *McIntosh v. State*, 151 Ind. 251.

Louisiana. — *State v. Jefferson*, 43 La. Ann. 995.

Michigan. — *People v. Finley*, 38 Mich. 482.

Mississippi. — *Cicely v. State*, 13 Smed. & M. (Miss.) 210; *Bowler v. State*, 41 Miss. 570.

Missouri. — *State v. Nueslein*, 25 Mo. 111; *State v. Evans*, 55 Mo. 460; *State v. Heed*, 57 Mo. 252; *State v. Vansant*, 80 Mo. 67; *State v. Gee*, 85 Mo. 647; *State v. Payton*, 90 Mo. 228; *State v. Blunt*, 91 Mo. 503; *State v. Wells*, 111 Mo. 537; *State v. David*, 131 Mo. 380; *State v. Good*, 132 Mo. 114; *State v. Duncan*, 142 Mo. 456; *State v. Butterfield*, 75 Mo. 297; *State v. Adair*, 160 Mo. 391; *State v. Fisher*, 162 Mo. 171; *State v. Turner*, 110 Mo. 196.

Montana. — *State v. Harrison*, 23 Mont. 79.

Nebraska. — *Parrish v. State*, 14 Neb. 60; *Carr v. State*, 23 Neb. 752; *Davis v. State*, 51 Neb. 301; *Whitney v. State*, 53 Neb. 287; *Dreessen v. State*, 38 Neb. 375.

Nevada. — *State v. Van Winkle*, 6 Nev. 340; *State v. McLane*, 15 Nev. 365; *State v. Rover*, 13 Nev. 17.

New Mexico. — *Chavez v. Territory*, 6 N. Mex. 455.

New York. — *People v. Riley*, (Supm. Ct. Gen. T.) 3 N. Y. Crim. 374; *Poole v. People*, 80 N. Y. 645; *Murphy v. People*, 4 Hun (N. Y.) 102.

Ohio. — *State v. Del Bello*, 8 Ohio Dec. 455.

Oregon. — *State v. Glass*, 5 Oregon 73.

Pennsylvania. — *Com. v. Devine*, 18 Pa. Super. Ct. 431; *Com. v. Harman*, 4 Pa. St. 269.

South Carolina. — *State v. Bodie*, 33 S. Car. 135.

Texas. — *Billard v. State*, 30 Tex. 367, 94 Am. Dec. 317; *Jackson v. State*, 9 Tex. App. 114.

Utah. — *People v. Kerm*, 8 Utah 268; *State v. McCune*, 16 Utah 170; *State v. Neel*, 23 Utah 543.

Wisconsin. — *Zweifel v. State*, 27 Wis. 401; *Emery v. State*, 101 Wis. 627.

Wyoming. — *Cornish v. State*, 3 Wyo. 95.

See also *People v. Chun Heong*, 86 Cal. 329.

Instructions Demanding the Following Degrees of Proof have been held to be properly refused: *Precluding All Possibility of Another's Guilt.* — *People v. Foley*, 64 Mich. 148.

Mathematical Certainty. — Proof of the guilt of the accused beyond a reasonable doubt does not mean that the prosecution should demonstrate to a mathematical certainty the guilt of the defendant, as such demonstration is manifestly impossible.¹

Ingenuity of Counsel. — It has been held that a reasonable doubt is not a doubt suggested by the ingenuity of counsel for the defense.²

Far-fetched Doubt. — A reasonable doubt is not a far-fetched doubt.³

Chimerical, Conjectural, or Fanciful Doubts. — By a reasonable doubt is not meant a chimerical, conjectural, or fanciful doubt. A mere conjecture cannot be said to be a reasonable doubt.⁴

Imaginary Doubt. — A reasonable doubt is not an imaginary doubt, and proof beyond a reasonable doubt does not mean proof beyond all imaginary doubt.⁵

Caprice — Captious. — The doubt which will warrant an acquittal is not one arising from mere caprice. By a reasonable doubt something more is meant than a captious doubt.⁶

Sympathy. — A doubt produced by undue sensibility in the mind of any juror in view of the consequences of his verdict, or a doubt born only of a merciful desire to permit the defendant to escape the penalties of the law, is not a reasonable doubt.⁷

Innocence. — A belief in the innocence of the accused is not essential in order to warrant his acquittal under the doctrine of reasonable doubt.⁸

Beyond Reasonable Supposition of Innocence. — Brown v. State, 128 Ala. 12.

Circumstantial Evidence Demonstrating Guilt Beyond Possibility of Innocence. — Hamlin v. State, 39 Tex. Crim. 579.

Precluding Possibility of Doubt. — People v. Smith, 105 Cal. 678.

1. **Mathematical Certainty.** — Lang v. State, 84 Ala. 1, 5 Am. St. Rep. 324; Hicks v. State, 123 Ala. 15; Winter v. State, 123 Ala. 1; Giles v. State, 6 Ga. 276; Davis v. State, 114 Ga. 104; Bone v. State, 102 Ga. 387; State v. Brown, 55 Kan. 611; James v. State, 45 Miss. 575; St. Louis v. State, 8 Neb. 405. See also McTyier v. State, 91 Ga. 254.

2. **Ingenuity of Counsel.** — U. S. v. Harper, 33 Fed. Rep. 471; U. S. v. Means, 42 Fed. Rep. 599; U. S. v. Newton, 52 Fed. Rep. 275; U. S. v. Murphy, 84 Fed. Rep. 609. See also People v. Wells, 112 Mich. 648.

3. **Far-fetched.** — McGuire v. People, 44 Mich. 286, 38 Am. Rep. 265.

4. **Chimerical, Conjectural, or Fanciful Doubts Not Sufficient** — *United States*. — U. S. v. Darton, 6 McLean (U. S.) 46, 25 Fed. Cas. No. 14,919; U. S. v. Foulke, 6 McLean (U. S.) 349, 25 Fed. Cas. No. 15,143; U. S. v. Knowles, 4 Sawy. (U. S.) 517, 26 Fed. Cas. No. 15,540; U. S. v. Barrett, 65 Fed. Rep. 62; U. S. v. Cassidy, 67 Fed. Rep. 782; U. S. v. Murphy, 84 Fed. Rep. 609. See also U. S. v. Jones, 31 Fed. Rep. 718.

Delaware. — State v. Snow, Del. (1901) 51 Atl. Rep. 607.

Georgia. — Giles v. State, 6 Ga. 276; Hodgkins v. State, 89 Ga. 761; Fletcher v. State, 90 Ga. 468; Powell v. State, 95 Ga. 502.

Illinois. — Spies v. People, 122 Ill. 8, 3 Am. St. Rep. 320; Watt v. People, 126 Ill. 9; Painter v. People, 147 Ill. 444.

Indiana. — Kennedy v. State, 107 Ind. 144, 57 Am. Rep. 99.

Mississippi. — Cicely v. State, 13 Smed. & M. (Miss.) 210; Bowler v. State, 41 Miss. 570.

Nebraska. — Carr v. State, 23 Neb. 752; Davis v. State, 51 Neb. 301.

Ohio. — State v. Neil, Tappan (Ohio) 120.

Pennsylvania. — Com. v. Drum, 58 Pa. St. 9; Com. v. Lynch, 3 Pittsb. (Pa.) 412; Com. v. Shaub, 5 Lanc. L. Rev. 121.

South Dakota. — State v. Serenson, 7 S. Dak. 277.

Texas. — Brown v. State, 1 Tex. App. 154.

Washington. — State v. Gile, 8 Wash. 24; State v. Krug, 12 Wash. 288.

The doubt must not be forced or fanciful. State v. Bodekee, 34 Iowa 520.

5. **Reasonable Doubt Not Imaginary Doubt.** — U. S. v. Keller, 19 Fed. Rep. 633; U. S. v. Cassidy, 67 Fed. Rep. 782; Kidd v. State, 3 Ala. 58; People v. Dewey, 2 Idaho 79; People v. Ezzo, 104 Mich. 341; State v. Harrison, 23 Mont. 79; Parrish v. State, 14 Neb. 60; People v. Guidici, 100 N. Y. 509; State v. Morey, 25 Oregon 257; State v. McCune, 16 Utah 170; State v. Neel, 23 Utah 543; Zweifel v. State, 27 Wis. 401.

6. **Caprice — Captious.** — U. S. v. Butler, 1 Hughes (U. S.) 457, 25 Fed. Cas. No. 14,700; U. S. v. Newton, 52 Fed. Rep. 275; People v. Dewey, 2 Idaho 79; State v. Ostrander, 18 Iowa 438; State v. Serenson, 7 S. Dak. 277; State v. McCune, 16 Utah 170. See also State v. Swain, 68 Mo. 605.

7. **Sympathy.** — U. S. v. Harper, 33 Fed. Rep. 471; U. S. v. Means, 42 Fed. Rep. 599; U. S. v. Newton, 52 Fed. Rep. 275; U. S. v. Barrett, 65 Fed. Rep. 62; U. S. v. Murphy, 84 Fed. Rep. 609; Watt v. People, 126 Ill. 9; State v. Start, 10 Kan. App. 583, 63 Pac. Rep. 448; McArthur v. State, 60 Neb. 390; Davis v. State, 51 Neb. 301; State v. Robinson, 27 S. Car. 615.

8. **Belief in Defendant's Innocence Not Essential.** — Wade v. State, 71 Ind. 535; State v. Raymond, 53 N. J. L. 260; State v. Moss, 106 Tenn. 359; Smith v. State, 9 Tex. App. 150; Robertson v. State, 9 Tex. App. 209; Blocker v. State, 9 Tex. App. 279; Wallace v. State, 9

Good Character. — The good character of the accused may give rise to a reasonable doubt of his guilt of the crime charged.¹

Conscience — Conscientious. — Proof beyond a reasonable doubt has been held to be such proof as satisfies the judgment and conscience of the jury.² But in other cases it has been held that conscientious belief was not necessarily belief beyond a reasonable doubt.³

Belief. — It has been held that an instruction undertaking to define a reasonable doubt which reduced it to a mere matter of belief was fatally erroneous.⁴

Belief as Juror and Belief as Man. — An instruction that the jurors were not at liberty to disbelieve as jurors if from the evidence they believed as men has been sustained in a number of cases.⁵ But in other cases this instruction has been held to be erroneous as relieving the jurors of their responsibility as jurymen;⁶ and a third class of authorities, while disapproving the instruction as calculated to mislead the jury, hold that it is not reversible error.⁷

"Reasonable Man" Standard — Proof that Jury Would Act upon in Own Affairs. — A reasonable doubt has been defined as one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable and prudent man to pause and hesitate.⁸ Proof beyond a reasonable doubt has been held to be such proof as satisfies the jurors, as reasonable men, of the guilt of the accused.⁹ Evidence has been held sufficient to remove all reasonable doubt when it is sufficient to convince the judgment of ordinarily prudent or reasonable men with such force that they would act upon that conviction without hesitation in their most important affairs or concerns of life.¹⁰ It has also been said that the conviction must be

Tex. App. 299; *Landers v. State*, (Tex. Crim. 1901) 63 S. W. Rep. 557. See also *Ware v. State*, (Tenn. 1902) 67 S. W. Rep. 853.

Instruction that Proof Should Exclude Rational Probability of Innocence Condemned. — *Gilmore v. State*, 99 Ala. 154.

1. **Good Character.** — *People v. Wileman*, 44 Hun (N. Y.) 190; *People v. Kerr*, (Oyer & T. Ct.) 6 N. Y. Crim. 406; *Com. v. Carey*, 2 Brews. (Pa.) 406. Compare *State v. Cushing*, 17 Wash. 563. See further the title CHARACTER (IN EVIDENCE), vol. 5, p. 867.

To Be Considered with All Other Evidence. — *Coleman v. State*, 59 Miss. 484. See also *Powers v. State*, 74 Miss. 781; *Hammond v. State*, 74 Miss. 214.

2. **Conscience.** — *U. S. v. Babcock*, (Mo. 1876) 3 Cent. L. J. 143; *People v. Ezzo*, 104 Mich. 341; *Meyers v. Com.*, 83 Pa. St. 142; *Com. v. Drum*, 58 Pa. St. 9.

3. **Conscientious Belief.** — *Brown v. State*, 72 Miss. 95; *Orr v. State*, (Miss. 1895) 18 So. Rep. 118; *Rucker v. State*, (Miss. 1895) 18 So. Rep. 121. See also *Batten v. State*, 80 Ind. 402; *Burt v. State*, 72 Miss. 408; *Powers v. State*, 74 Miss. 777; *Hemphill v. State*, (Miss. 1894) 16 So. Rep. 491.

4. **Belief.** — *Jeffries v. State*, 77 Miss. 757; *Webb v. State*, 73 Miss. 456.

Exclusion of "Any Reasonable Belief" of Defendant's Guilt Not Equivalent to "Beyond Reasonable Doubt." — *Wallace v. State*, 9 Tex. App. 299.

5. **Belief as Jurors and Belief as Men.** — *Watt v. People*, 126 Ill. 30; *Spies v. People*, 122 Ill. 8, 3 Am. St. Rep. 320; *Willis v. State*, 43 Neb. 102; *Davis v. State*, 51 Neb. 301; *Barney v. State*, 49 Neb. 515; *Savary v. State*, 62 Neb. 166; *Bartley v. State*, 53 Neb. 310; *State v. Potts*, 20 Nev. 389; *People v. Johnson*, 140 N. Y. 350; *Com. v. Harman*, 4 Pa. St. 273; *Nevling v. Com.*, 98 Pa. St. 334.

6. **Relieving Jurors of Obligation of Oath.** — *Siberry v. State*, 133 Ind. 678; *State v. Collins*, 20 Iowa 85; *State v. Ruby*, 61 Iowa 86.

7. **Instruction Disapproved but Held Not to Be Reversible Error.** — *McNeen v. Com.*, 114 Pa. St. 300. See also *People v. Whitney*, 53 Cal. 420; *Fife v. Com.*, 29 Pa. St. 438.

8. **Reasonable Man to Hesitate and Pause.** — *State v. Gilbert*, (Idaho 1902) 69 Pac. Rep. 63; *Miller v. People*, 39 Ill. 467; *May v. People*, 60 Ill. 119; *Connaghan v. People*, 88 Ill. 460; *Dunn v. People*, 109 Ill. 635; *Wacaser v. People*, 134 Ill. 438, 23 Am. St. Rep. 683; *Collins v. People*, 194 Ill. 506; *Willis v. State*, 43 Neb. 102; *Maxfield v. State*, 54 Neb. 44; *State v. Crockett*, 39 Oregon 76; *Com. v. Burton*, 1 Susq. Leg. Chron. (Pa.) 66; *Com. v. Irving*, 1 Susq. Leg. Chron. (Pa.) 69; *State v. Williamson*, 22 Utah 248; *State v. Rosener*, 8 Wash. 42; *State v. Harras*, 25 Wash. 416; *State v. Dickey*, 48 W. Va. 325. See also *Leonard v. Territory*, 2 Wash. Ter. 381; *State v. Krug*, 12 Wash. 288; *McAllister v. State*, 112 Wis. 406.

Such Instructions Held to Be Erroneous. — *Allen v. State*, 111 Ala. 80 [explaining and modifying *Welsh v. State*, 96 Ala. 92; *Boulden v. State*, 102 Ala. 78]; *Brown v. State*, 105 Ind. 385. See also *Toops v. State*, 92 Ind. 13.

9. **"Reasonable Man" Standard.** — *U. S. v. Johnson*, 26 Fed. Rep. 682; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *People v. Ezzo*, 104 Mich. 341; *People v. Barker*, 153 N. Y. 111; *People v. Friedland*, 2 N. Y. App. Div. 335; *People v. Kerm*, 8 Utah 268. See also *Peterson v. State*, 47 Ga. 524 (upright man).

"It is not every doubt that may exist in the mind of a reasonable man that rises to the dignity of a reasonable doubt, such as would govern him in the graver affairs of life." *Padfield v. People*, 146 Ill. 660.

10. **Prudent Men — Important Affairs.** — *Car-*

such as would justify action, not only in matters of importance, but in those of the highest importance, involving the dearest interests.¹ But instructions of this character have been held in some cases to constitute error,² while in other cases they have merely been disapproved.³

Doubt Must Be Based on Evidence or Want of Evidence. — A doubt, to be reasonable, must arise out of the evidence,⁴ or want of evidence,⁵ after a full considera-

penter *v.* State, 62 Ark. 286; People *v.* Bemmerly, 87 Cal. 117; People *v.* Dewey, 2 Idaho 79; McGregor *v.* State, 16 Ind. 9; Arnold *v.* State, 23 Ind. 170; Jarrell *v.* State, 58 Ind. 293; State *v.* Kearley, 26 Kan. 77; Polin *v.* State, 14 Neb. 540; Willis *v.* State, 43 Neb. 102; Lawhead *v.* State, 46 Neb. 607; Whitney *v.* State, 53 Neb. 287; People *v.* Friedland, 2 N. Y. App. Div. 335; Com. *v.* Miller, 139 Pa. St. 94, 23 Am. St. Rep. 170; State *v.* Serenson, 7 S. Dak. 277.

Dearest Personal Interests. — Miles *v.* U. S., 103 U. S. 309; Territory *v.* McAndrews, 3 Mont. 158; State *v.* Gleim, 17 Mont. 17, 52 Am. St. Rep. 655; State *v.* Clancy, 20 Mont. 502.

Act or Decline to Act When Own Concerns Involved. — U. S. *v.* Jones, 31 Fed. Rep. 718; U. S. *v.* Cassidy, 67 Fed. Rep. 782.

Jurors Convinced So that They Would Not Hesitate to Act in a very grave and serious matter affecting their own affairs. Miles *v.* U. S., 103 U. S. 304; U. S. *v.* Heath, 20 D. C. 272; Bradley *v.* State, 31 Ind. 497; Garfield *v.* State, 74 Ind. 60; State *v.* Nash, 7 Iowa 347; People *v.* Wayman, 128 N. Y. 585; People *v.* Hughes, 137 N. Y. 29. See also U. S. *v.* Wright, 16 Fed. Rep. 112; State *v.* Start, (Kan. 1901) 63 Pac. Rep. 448.

1. Highest Importance. — Bradley *v.* State, 31 Ind. 492; Emery *v.* State, 92 Wis. 146. See also State *v.* Dineen, 10 Minn. 407; State *v.* Shettleworth, 18 Minn. 208; State *v.* Rover, 11 Nev. 343 [overruling State *v.* Millain, 3 Nev. 481]; Com. *v.* Miller, 139 Pa. St. 77, 23 Am. St. Rep. 170; Anderson *v.* State, 41 Wis. 430; Butler *v.* State, 102 Wis. 364.

2. Instructions Held to Be Erroneous. — People *v.* Bemmerly, 87 Cal. 117; People *v.* Wohlfrom, (Cal. 1891) 26 Pac. Rep. 236; Territory *v.* Bannigan, 1 Dak. 432; Lovett *v.* State, 30 Fla. 142; Bradley *v.* State, 31 Ind. 492; State *v.* Oscar, 7 Jones L. (52 N. Car.) 305; Bray *v.* State, 41 Tex. 561; Leonard *v.* Territory, 2 Wash. Ter. 381; Palmerston *v.* Territory, 3 Wyo. 333. See also People *v.* Ah Sing, 51 Cal. 372; People *v.* Lenon, 79 Cal. 625; People *v.* Brannon, 47 Cal. 96; Jenkins *v.* State, 35 Fla. 737 (circumstantial evidence); Jane *v.* Com., 2 Met. (Ky.) 30; People *v.* Marble, 38 Mich. 125; Carver *v.* People, 39 Mich. 786; Territory *v.* Lopez, 3 N. Mex. 104.

3. Instruction Disapproved. — State *v.* Crawford, 34 Mo. 201. See also State *v.* Neel, 23 Utah 543; Ryan *v.* State, 83 Wis. 486.

4. Doubt Must Be Founded on Evidence — United States. — U. S. *v.* Darton, 6 McLean (U. S.) 46, 25 Fed. Cas. No. 14,919; U. S. *v.* Foulke, 6 McLean (U. S.) 349, 25 Fed. Cas. No. 15,143; U. S. *v.* Johnson, 26 Fed. Cas. No. 15,483; U. S. *v.* Knowles, 4 Sawy. (U. S.) 517, 26 Fed. Cas. No. 15,540; U. S. *v.* Harper, 33 Fed. Rep. 471; U. S. *v.* Means, 42 Fed. Rep. 599.

Georgia. — See Long *v.* State, 38 Ga. 491.

Idaho. — State *v.* Gilbert, (Idaho 1902) 69 Pac. Rep. 63.

Illinois. — Spies *v.* People, 122 Ill. 1, 3 Am. St. Rep. 320.

Indiana. — Kennedy *v.* State, 107 Ind. 144, 57 Am. Rep. 99.

Mississippi. — See Cicely *v.* State, 13 Smed. & M. (Miss.) 210; Bowler *v.* State, 41 Miss. 571.

Missouri. — State *v.* Gee, 85 Mo. 647; State *v.* Fisher, 162 Mo. 171.

Montana. — State *v.* Harrison, 23 Mont. 79.

New Mexico. — Chavez *v.* Territory, 6 N. Mex. 455.

Ohio. — State *v.* Neil, Tappan (Ohio) 120.

Pennsylvania. — Com. *v.* Lynch, 3 Pittsb. (Pa.) 412; Com. *v.* Shaub, 5 Lanc. L. Rev. 121; Com. *v.* Drum, 58 Pa. St. 9.

South Dakota. — State *v.* Serenson, 7 S. Dak. 277.

Texas. — Brown *v.* State, 1 Tex. App. 154; Holmes *v.* State, 9 Tex. App. 313. And see McDade *v.* State, 27 Tex. App. 641, 11 Am. St. Rep. 216.

Utah. — State *v.* Neel, 23 Utah 543.

Washington. — State *v.* Krug, 12 Wash. 288.

Affirmative Evidence Unnecessary for Reasonable Doubt. — Abram *v.* State, 36 Tex. Crim. 44.

Doubt Must Arise from Evidence. — Long *v.* State, 23 Neb. 33.

5. Doubt Must Arise from Evidence or Want of Evidence — United States. — U. S. *v.* Cassidy, 67 Fed. Rep. 782; U. S. *v.* Gleason, Woolw. (U. S.) 128, 25 Fed. Cas. No. 15,216.

Arkansas. — Williams *v.* State, (Ark. 1891) 16 S. W. Rep. 816.

Florida. — Wallace *v.* State, 41 Fla. 547.

Georgia. — Long *v.* State, 38 Ga. 491; Malone *v.* State, 49 Ga. 210; Hodgkins *v.* State, 89 Ga. 761.

Illinois. — Miller *v.* People, 39 Ill. 457; Moeck *v.* People, 100 Ill. 242, 39 Am. Rep. 38; Graff *v.* People, 134 Ill. 380.

Indiana. — Voght *v.* State, 145 Ind. 12.

Iowa. — State *v.* Porter, 34 Iowa 131; State *v.* Case, 96 Iowa 264.

Michigan. — People *v.* Finley, 38 Mich. 482.

Missouri. — State *v.* Walker, 98 Mo. 95; State *v.* Wells, 111 Mo. 537.

Nebraska. — Langford *v.* State, 32 Neb. 782; Whitney *v.* State, 53 Neb. 287; Heldt *v.* State, 20 Neb. 492, 57 Am. Rep. 835.

New York. — People *v.* Friedland, 2 N. Y. App. Div. 335.

Pennsylvania. — McMeen *v.* Com., 114 Pa. St. 300.

South Carolina. — State *v.* Robinson, 27 S. Car. 615.

Lack of Evidence. — A reasonable doubt may arise from the lack of evidence as well as from the evidence. Mackey *v.* People, 2 Colo. 13; Densmore *v.* State, 67 Ind. 306, 33 Am. Rep. 96; Wright *v.* State, 69 Ind. 163, 35 Am. Rep. 212; Batten *v.* State, 80 Ind. 394; Brown *v.* State, 105 Ind. 385; Hale *v.* State, 72 Miss.

tion by the jury of all the evidence in the case.¹ But this rule does not require that the proof shall be free from conflict.²

3. Presumption of Innocence Distinguished.—A presumption of innocence is said to be a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted unless he is proven to be guilty, while a reasonable doubt is defined as a condition of mind produced by the proof resulting from the evidence in the cause.³

4. Instructions Clear upon the Whole.—When the instruction as to reasonable doubt is clear and correct upon the whole, a conviction will not be set aside because in part the charge was confusing, nor for mere omissions or errors in detail.⁴

140; *State v. Blue*, 136 Mo. 41; *People v. Wileman*, 44 Hun (N. Y.) 190; *State v. Morey*, 25 Oregon 258; *Massey v. State*, 1 Tex. App. 563. But see *State v. Duncan*, 142 Mo. 456; *State v. Garrison*, 147 Mo. 548; *Emery v. State*, 101 Wis. 655.

It has been held that an instruction that a reasonable doubt must arise from a candid and impartial investigation of all the evidence was not erroneous as depriving the accused of a reasonable doubt arising from a lack of evidence. *Bartley v. State*, 53 Neb. 310.

Where the Doubt Must Arise from the Testimony, as where there is positive evidence on both sides, it has been held not to be error to fail to instruct the jury that a doubt may arise from want of testimony. *Whitesides v. State*, (Tex. Crim. 1900) 58 S. W. Rep. 1016.

"Deduced from Testimony"—*Instruction Sustained*.—*Bland v. State*, 4 Tex. App. 15.

Desire for More Evidence—Not Necessarily Reasonable Doubt.—*Shepperd v. State*, 94 Ala. 102.

1. Must Arise from Evidence Considered as Whole—*Arizona*.—*Foster v. Territory*, (Ariz. 1899) 56 Pac. Rep. 738.

Arkansas.—*Lovejoy v. State*, 62 Ark. 478.

Illinois.—*Mullins v. People*, 110 Ill. 42; *Leigh v. People*, 113 Ill. 372; *Davis v. People*, 114 Ill. 86; *Weaver v. People*, 132 Ill. 536; *Lyons v. People*, 137 Ill. 602; *Little v. People*, 157 Ill. 158; *Keating v. People*, 160 Ill. 480.

Iowa.—*State v. Hayden*, 45 Iowa 11; *State v. Pierce*, 65 Iowa 90.

Kentucky.—*Baker v. Com.*, (Ky. 1891) 17 S. W. Rep. 625.

Mississippi.—See *Evans v. State*, (Miss. 1888) 4 So. Rep. 344.

Missouri.—*State v. Butterfield*, 75 Mo. 297; *State v. Vansant*, 80 Mo. 67; *State v. Good*, 132 Mo. 114; *State v. Adair*, 160 Mo. 391.

New Mexico.—*Chavez v. Territory*, 6 N. Mex. 455.

Pennsylvania.—*Tiffany v. Com.*, 121 Pa. St. 165, 6 Am. St. Rep. 775.

Texas.—*Camplin v. State*, 1 Tex. App. 108. **May Grow Out of Evidence of Prosecution or of Defendant.**—*People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52; *State v. McCluer*, 5 Nev. 132.

Doubt Arising from Consideration of Part of Evidence Only.—An instruction that if the jurors have a reasonable doubt as to the defendant's guilt, arising out of any part of the evidence, they must acquit has been held to be misleading and was properly refused. *Gordon v. State*, 129 Ala. 113; *Hurd v. State*, 94 Ala. 100. See also *Nicholson v. State*, 117 Ala.

32; *Liner v. State*, 124 Ala. 1; *Bryant v. State*, 34 Fla. 291.

But it has been held that a party is entitled to an acquittal if the jurors have a reasonable doubt of his guilt arising out of any part of the evidence upon a consideration of the whole evidence. *Murphy v. State*, 108 Ala. 10.

2. Conflict of Evidence.—*Goddard v. People*, 42 Ill. App. 487.

Where there is a plain conflict of testimony and one side or the other must be believed without qualification, there is no room for reasonable doubt, and an error defining it to the jury is immaterial. *People v. Marble*, 38 Mich. 117.

3. Presumption of Innocence Distinguished from Reasonable Doubt.—*Coffin v. U. S.*, 156 U. S. 460. The court said further: "To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted." *Quoted in Cochran v. U. S.*, 157 U. S. 300. See also *North Carolina v. Gosnell*, 74 Fed. Rep. 734; *State v. Harrison*, 23 Mont. 79; *Horn v. Territory*, 8 Okla. 52.

But in *People v. Parsons*, 105 Mich. 177, it was held that the omission to charge as to the presumption of innocence was not error where the court charged that the jury must be satisfied, beyond a reasonable doubt, of the guilt of the accused.

See generally, as to the presumption of innocence, the title PRESUMPTIONS, vol. 22, p. 1281.

4. Instruction Clear upon the Whole—*California*.—*People v. Chun Heong*, 86 Cal. 329; *People v. Winters*, 125 Cal. 325; *People v. Gilmore*, (Cal. 1898) 53 Pac. Rep. 806.

Florida.—*Woodruff v. State*, 31 Fla. 320; *Bird v. State*, (Fla. 1901) 30 So. Rep. 655.

Illinois.—*Steiner v. People*, 187 Ill. 244.

Indiana.—*Musser v. State*, 157 Ind. 423; *McIntosh v. State*, 151 Ind. 251; *Rains v. State*, 152 Ind. 69.

Iowa.—*State v. Pierce*, 65 Iowa 85; *State v. Hopkins*, 94 Iowa 86.

Kansas.—*State v. Brown*, 55 Kan. 611.

Missouri.—*Gardiner v. State*, 14 Mo. 97.

Pennsylvania.—*Com. v. Mudgett*, 174 Pa. St. 211.

Texas.—*King v. State*, 9 Tex. App. 558;

5. Charge of Court Fully Covering Instruction Asked by Counsel. — The trial court may refuse to give an instruction on reasonable doubt at the request of counsel when it has already sufficiently covered the subject in its charge.¹

III. CIVIL ACTIONS — 1. General Rule. — A preponderance of evidence is sufficient in general to entitle a party to a verdict in a civil case. But the rule in *England*, followed in some jurisdictions in the *United States*, is that where crime is imputed in a civil case, its existence must be proved in the same manner as in a criminal prosecution — *i. e.*, beyond a reasonable doubt.² This rule, however, is not in accord with the majority of decisions in the *United States*, which hold that in civil cases it is sufficient to prove a crime, like any other fact in issue, by a preponderance of evidence, discarding entirely the doctrine of reasonable doubt in civil actions.³

McCullough v. State, 23 Tex. App. 620; *Parks v. State*, (Tex. Crim. 1899) 54 S. W. Rep. 585; *Spears v. State*, 41 Tex. Crim. 527; *Nowlen v. State*, 33 Tex. Crim. 141.

Utah. — See *People v. Kerm*, 8 Utah 268.

Wisconsin. — *Butler v. State*, 102 Wis. 364.

See also the title INSTRUCTIONS, II ENCYC. OF PL. AND PR. 47.

Case Entirely Free from Doubt. — In *Mackay v. People*, 2 Colo. 13, it was held that where the case was entirely free from doubt, an error in a charge as to reasonable doubt was not ground for reversal.

1. Charge of Court Fully Covering Instruction Asked by Counsel. — *People v. Lenon*, 79 Cal. 626; *Peri v. People*, 65 Ill. 17; *State v. Start*, 10 Kan. App. 583, 63 Pac. Rep. 448; *State v. Rover*, 13 Nev. 17; *State v. Hamilton*, 13 Nev. 386; *State v. O'Connor*, 11 Nev. 416; *Schultz v. State*, 13 Tex. 401; *State v. Gile*, 8 Wash. 12; *State v. Cushing*, 17 Wash. 544. See also the title INSTRUCTIONS, II ENCYC. OF PL. AND PR. 47.

2. Civil Actions — When Crime Imputed, Proof Beyond Reasonable Doubt Necessary — England. — *Melville's Case*, 29 How. St. Tr. 764; *Chalmers v. Shackell*, 6 C. & P. 475, 25 E. C. L. 496. *Arkansas*. — *Lavender v. Hudgens*, 32 Ark. 763.

Florida. — *Williams v. Dickenson*, 28 Fla. 113; *Schultz v. Pacific Ins. Co.*, 14 Fla. 73.

Illinois. — *Darling v. Banks*, 14 Ill. 46; *McConnel v. Delaware Mut. Safety Ins. Co.*, 18 Ill. 228; *Germania F. Ins. Co. v. Klewer*, 129 Ill. 599; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523.

South Carolina. — *Burckhalter v. Coward*, 16 S. Car. 440.

Virginia. — *Warner v. Com.*, 2 Va. Cas. 105. And see the cases in the succeeding note.

Rule Applies Only Where Pleadings Charge Offense. — Those courts which recognize the rule that a criminal offense charged in a civil action must be proved beyond a reasonable doubt have held that the offense must be charged in the pleadings or the rule does not apply. *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Wallace v. Wallace*, 8 Ill. App. 71; *Sinclair v. Jackson*, 47 Me. 102, 74 Am. Dec. 476.

Establishing Principal's Fraudulent Breach of Trust in Action Against Surety. — *Murray v. Aiken Min., etc., Co.*, 37 S. Car. 463. See also the title SURETSHIP.

3. Civil Action — Proof Beyond Reasonable Doubt Not Required — United States. — *Howell*

v. Hartford F. Ins. Co., 3 Ins. L. J. 649, 12 Fed. Cas. No. 6,780; *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105, 21 Fed. Cas. No. 12,533; *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59; *U. S. v. Shapleigh*, (C. C. A.) 54 Fed. Rep. 134; *New York Acc. Ins. Co. v. Clayton*, (C. C. A.) 59 Fed. Rep. 559.

Alabama. — *Adams v. Thornton*, 78 Ala. 489, 56 Am. Rep. 49, overruling *Steele v. Kinkle*, 3 Ala. 352, and *Tompkins v. Nichols*, 53 Ala. 197.

Connecticut. — *Munson v. Atwood*, 30 Conn. 102; *Mead v. Husted*, 52 Conn. 53, 52 Am. Rep. 554; *Fay v. Reynolds*, 60 Conn. 217.

Delaware. — *State v. Goldsborough*, 1 *Houst. Crim. Cas. (Del.)* 302.

Georgia. — *Schnell v. Toomer*, 56 Ga. 168.

Indiana. — In a number of early cases the *English* rule was adopted. *Gants v. Vinard*, 1 Ind. 476; *Shoulty v. Miller*, 1 Ind. 544; *Byrket v. Monohon*, 7 Blackf. (Ind.) 83, 41 Am. Dec. 212; *Lanter v. McEwen*, 8 Blackf. (Ind.) 495; *Wonderly v. Nokes*, 8 Blackf. (Ind.) 589; *Tucker v. Call*, 45 Ind. 31. But by *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194, the rule requiring proof by a preponderance of evidence only was established. See also *Bissell v. Wert*, 35 Ind. 54. In *Fowler v. Wallace*, 131 Ind. 347, the court, while deprecating the rule, held that justification in libel and slander must be proved beyond a reasonable doubt.

Iowa. — Early decisions followed the *English* rule. *Bradley v. Kennedy*, 2 *Greene (Iowa)* 231; *Forshoe v. Abrams*, 2 *Iowa* 571; *Fountain v. West*, 23 *Iowa* 9, 92 Am. Dec. 405; *Ellis v. Lindley*, 38 *Iowa* 461; *Barton v. Thompson*, 46 *Iowa* 30, 26 Am. Rep. 131. But these cases are overruled by a long line of decisions. *Lillie v. McMillan*, 52 *Iowa* 464; *Bixby v. Carskaddon*, 55 *Iowa* 534; *Welch v. Jugenheimer*, 56 *Iowa* 11, 41 Am. Rep. 77; *Wood v. Porter*, 56 *Iowa* 162; *Lewis v. Garretson*, 56 *Iowa* 278; *State v. McGlothlen*, 56 *Iowa* 544; *Barton v. Thompson*, 56 *Iowa* 572; *Behrens v. Germania Ins. Co.*, 58 *Iowa* 26; *Kendig v. Overhulser*, 58 *Iowa* 195; *Coit v. Churchill*, 61 *Iowa* 296; *Riley v. Norton*, 65 *Iowa* 306; *State v. Severson*, 78 *Iowa* 654; *State v. Ginger*, 80 *Iowa* 574.

Kentucky. — *Ætna Ins. Co. v. Johnson*, 11 *Bush (Ky.)* 587, 21 Am. Rep. 223.

Louisiana. — *Wightman v. Western M. & F. Ins. Co.*, 8 *Rob. (La.)* 442; *Hoffman v. Western M. & F. Ins. Co.*, 1 *La. Ann.* 216.

Maine. — The *English* rule was adopted in early cases. *Thayer v. Boyle*, 30 *Me.* 475;

2. Presumption of Innocence. — It must be remembered that a party is entitled to the presumption of innocence in civil as well as in criminal cases, and there cannot be said to be a preponderance of evidence establishing a crime unless such evidence outweighs the presumption of innocence as well as the opposing evidence.¹

Butman v. Hobbs, 35 Me. 227; *Paul v. Currier*, 53 Me. 526. But the contrary doctrine is now established. *Knowles v. Scribner*, 57 Me. 495; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406; *Camden v. Belgrade*, 75 Me. 131; *Campbell v. Burns*, 44 Me. 136.

Maryland. — *McBee v. Fulton*, 47 Md. 403, 28 Am. Rep. 465.

Massachusetts. — *Schmidt v. New York Union Mut. Ins. Co.*, 1 Gray (Mass.) 529; *Gordon v. Parmalee*, 15 Gray (Mass.) 413; *Laughran v. Kelly*, 8 Cush. (Mass.) 199; *Young v. Makepeace*, 103 Mass. 50; *Roberge v. Burnham*, 124 Mass. 277. *Compare Sperry v. Wilcox*, 1 Met. (Mass.) 267.

Michigan. — *Watkins v. Wallace*, 19 Mich. 57; *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668; *Semon v. People*, 42 Mich. 141; *People v. Evening News Assoc.*, 51 Mich. 11; *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238; *Hough v. Dickinson*, 58 Mich. 89.

Minnesota. — *Burr v. Willson*, 22 Minn. 206; *Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107; *State v. Nichols*, 29 Minn. 357.

Missouri. — *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356; *Edwards v. Knapp*, 97 Mo. 432, *overruling Polston v. See*, 54 Mo. 291.

New Hampshire. — *Matthews v. Huntley*, 9 N. H. 150; *Folsom v. Brawn*, 25 N. H. 114.

New Jersey. — *Traphagen v. Voorhees*, 44 N. J. Eq. 24; *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239, *reversing* 38 N. J. L. 441, 20 Am. Rep. 409. *Compare Berckmans v. Berckmans*, 17 N. J. Eq. 457.

New York. — The early cases in New York adopted the English rule. *Hopkins v. Smith*, 3 Barb. (N. Y.) 602; *Woodbeck v. Keller*, 6 Cow. (N. Y.) 118; *Clark v. Dibble*, 16 Wend. (N. Y.) 601. These cases, however, have been overruled by a long line of decisions. *Roberts v. Champlin*, 14 Wend. (N. Y.) 20; *New York Guaranty, etc., Co. v. Gleason*, 78 N. Y. 503, 7 Abb. N. Cas. (N. Y.) 334; *Freund v. Patten*, (C. Pl. Gen. T.) 10 Abb. N. Cas. (N. Y.) 311; *New York, etc., Ferry Co. v. Moore*, 102 N. Y. 667, 18 Abb. N. Cas. (N. Y.) 106; *Marshall v. Buffalo*, 50 N. Y. App. Div. 156; *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251; *People v. Briggs*, 47 Hun (N. Y.) 266, *affirmed* 114 N. Y. 56; *Davis v. Rome, etc., R. Co.*, 56 Hun (N. Y.) 373; *Lewis v. Shull*, 67 Hun (N. Y.) 543; *Weir v. Aetna Ins. Co.*, 91 Hun (N. Y.) 217; *Stearns v. Field*, 90 N. Y. 640; *Seybolt v. New York, etc., R. Co.*, 95 N. Y. 562; *Allen v. Allen*, 101 N. Y. 658, 5 N. E. Rep. 341; *Dean v. Raplee*, 145 N. Y. 319.

North Carolina. — *Rippee v. Miller*, 1 Jones L. (46 N. Car.) 479, 62 Am. Dec. 177; *Kincade v. Bradshaw*, 3 Hawks (10 N. Car.) 63; *Outlaw v. Hurdle*, 1 Jones L. (46 N. Car.) 150; *Barfield v. Britt*, 2 Jones L. (47 N. Car.) 41, 62 Am. Dec. 190; *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. Car. 821.

Ohio. — *Strader v. Mullane*, 17 Ohio St. 625; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *Lyon v. Fleahmann*, 34 Ohio St. 151.

Oregon. — *Smith v. Smith*, 5 Oregon 187.

Pennsylvania. — *Young v. Edwards*, 72 Pa. St. 257; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80, 56 Am. Rep. 307. *Rhode Island.* — *State v. Bowen*, 14 R. I. 165; *Nelson v. Pierce*, 18 R. I. 539.

Tennessee. — *Cox v. Crumley*, 5 Lea (Tenn.) 529; *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 Am. Rep. 5. *Compare Coulter v. Stuart*, 2 Verg. (Tenn.) 225.

Texas. — *Sparks v. Dawson*, 47 Tex. 138; *March v. Walker*, 48 Tex. 372; *Heiligmann v. Rose*, 81 Tex. 222.

Vermont. — *Bradish v. Bliss*, 35 Vt. 326; *Weston v. Gravlin*, 49 Vt. 507.

West Virginia. — *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474.

Wisconsin. — *Washington Union Ins. Co. v. Wilson*, 7 Wis. 169; *Wright v. Hardy*, 22 Wis. 348; *Blaeser v. Milwaukee Mechanic's Mut. Ins. Co.*, 37 Wis. 31, 19 Am. Rep. 747; *Poertner v. Poertner*, 66 Wis. 645; *U. S. Express Co. v. Jenkins*, 73 Wis. 471; *F. Dohmen Co. v. Niagara F. Ins. Co.*, 96 Wis. 52. *Compare Pryce v. Security Ins. Co.*, 29 Wis. 271; *Freeman v. Freeman*, 31 Wis. 235.

Libel and Slander — **Charge of Crime.** — See the title LIBEL AND SLANDER, vol. 18, p. 1071.

Fraud. — See the title FRAUD AND DECEIT, vol. 14, p. 201.

Malicious Mischief — **Proof Beyond Reasonable Doubt Required.** — *Heiligmann v. Rose*, 81 Tex. 222.

Adultery — **Divorce.** — See the title DIVORCE, vol. 9, p. 750, and see *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239; *Traphagen v. Voorhees*, 44 N. J. Eq. 24.

Death by Wrongful Act — **Preponderance of Evidence Sufficient.** — *Rome R. Co. v. Barnett*, 94 Ga. 447.

Seduction — **Proof Beyond Reasonable Doubt Not Required.** — *Nelson v. Pierce*, 18 R. I. 539. See also the title SEDUCTION.

Assault with Intent to Rape — **Preponderance of Evidence Sufficient in Civil Case.** — *Elliott v. Van Buren*, 33 Mich. 49, 20 Am. Rep. 668. See also *Dean v. Raplee*, 145 N. Y. 319 (rape).

Trespass. — See the title TRESPASS.

1. Civil Action — **Presumption of Innocence.** — *Fay v. Reynolds*, 60 Conn. 217; *Sprague v. Dodge*, 48 Ill. 142, 95 Am. Dec. 523; *Ellis v. Buzzell*, 60 Me. 209, 11 Am. Rep. 204; *Knowles v. Scribner*, 57 Me. 497; *Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107; *Davis v. Rome, etc., R. Co.*, 56 Hun (N. Y.) 372; *New York, etc., Ferry Co. v. Moore*, 102 N. Y. 667, 1 N. Y. St. Rep. 374; *Jones v. Greaves*, 26 Ohio St. 2, 20 Am. Rep. 752; *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 90, 56 Am. Rep. 307; *Hills v. Goodyear*, 4 Lea (Tenn.) 233, 40 Am. Rep. 5; *Bradish v. Bliss*,

3. Bastardy. — It is the general rule that in bastardy proceedings¹ the paternity of the child need not be established beyond a reasonable doubt.²

4. Usury. — It has been held that it is sufficient to sustain the defense of usury by a preponderance of evidence.³

5. Penalties. — In an action for penalties it has been held that proof beyond a reasonable doubt is necessary.⁴ But some authorities hold, to the contrary, that the principle prevailing in criminal prosecutions requiring the jury to be satisfied beyond a reasonable doubt has no application to civil suits for the recovery of statutory penalties.⁵

6. Fire Insurance. — Following the general rule stated above, it is held in most jurisdictions in the *United States* that in an action on a policy of fire insurance, the defense that the plaintiff set fire to the buildings insured need be proved by a preponderance of evidence only.⁶ But a contrary doctrine is held in *England* and in some jurisdictions in the *United States*.⁷

35 Vt. 326. See also the title PRESUMPTIONS, vol. 22, p. 1282.

1. As to the nature of bastardy proceedings, whether criminal or civil, see the title BASTARDY, vol. 3, p. 874.

2. Bastardy — Preponderance of Evidence Sufficient. — See *State v. Severson*, 78 Iowa 654; *State v. Ginger*, 80 Iowa 574; *Knowles v. Scribner*, 57 Me. 497; *Young v. Makepeace*, 103 Mass. 50; *Semon v. People*, 42 Mich. 141.

3. Usury. — *Chew v. Ferrari*, 29 N. J. Eq. 380; *Warwick v. Marlatt*, 25 N. J. Eq. 188. See also *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 706, 23 Am. Rep. 239; *Aeby v. Rapelye*, 1 Hill (N. Y.) 9. Compare *Conover v. Van Mater*, 18 N. J. Eq. 481; *Taylor v. Morris*, 22 N. J. Eq. 606. And see the title USURY.

4. Proof Beyond Reasonable Doubt Necessary. — *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *Chaffee v. U. S.*, 18 Wall. (U. S.) 516; *Ewbanks v. Ashley*, 36 Ill. 177; *Glenwood v. Roberts*, 59 Mo. App. 167; *White v. Comstock*, 6 Vt. 405; *Riker v. Hooper*, 35 Vt. 457, 82 Am. Dec. 646.

Proceedings in Rem to Enforce Forfeiture of Vessel under Revenue Laws — Proof Beyond Reasonable Doubt Essential. — *U. S. v. Burdett*, 9 Pet. (U. S.) 682. See also *Boyd v. U. S.*, 116 U. S. 616; *Chaffee v. U. S.*, 18 Wall. (U. S.) 516. Compare *Lilienthal's Tobacco v. U. S.*, 97 U. S. 238.

5. Proof Beyond Reasonable Doubt Not Necessary. — *Jordan v. Mann*, 57 Ala. 595; *Webster v. People*, 14 Ill. 365; *Campbell v. Burns*, 94 Me. 127; *Roberge v. Burnham*, 124 Mass. 277; *Hitchcock v. Munger*, 15 N. H. 97; *People v. Briggs*, 114 N. Y. 56. See also the title FINES AND PENALTIES, vol. 13, p. 64.

Patents — Preponderance Sufficient for Recovery of Penalty. — *Hawloetz v. Kass*, 25 Fed. Rep. 765. See also *Nichols v. Newell*, 1 Fish. Pat. Cas. 647.

Double Damages — Preponderance Sufficient. — *Burnett v. Ward*, 42 Vt. 80. See also the title EXEMPLARY DAMAGES, vol. 12, p. 50. But see *U. S. v. Shapleigh*, (C. C. A.) 54 Fed. Rep. 126; *Munson v. Atwood*, 30 Conn. 102.

6. Preponderance of Evidence Sufficient — United States. — *Huchbetger v. Merchants' F. Ins. Co.*, 4 Biss. (U. S.) 265; *Mack v. Lancashire Ins. Co.*, 4 Fed. Rep. 59, 2 McCrary (U. S.) 211; *Scott v. Home Ins. Co.*, 1 Dill. (U. S.) 105, 21 Fed. Cas. No. 12,533; *Sibley v. St. Paul F. & M. Ins. Co.*, 9 Biss. (U. S.) 31.

Connecticut. — *Mead v. Husted*, 52 Conn. 53, 52 Am. Rep. 554.

Indiana. — *Continental Ins. Co. v. Jachnichen*, 110 Ind. 59, 59 Am. Rep. 194.

Iowa. — *Barton v. Thompson*, 46 Iowa 30, 26 Am. Rep. 131; *Behrens v. Germania Ins. Co.*, 58 Iowa 26.

Kansas. — *Kansas Ins. Co. v. Berry*, 8 Kan. 159.

Kentucky. — *Ætna Ins. Co. v. Johnson*, 11 Bush (Ky.) 587, 21 Am. Rep. 223; *Sloan v. Gilbert*, 12 Bush (Ky.) 51, 23 Am. Rep. 708.

Louisiana. — *Hoffman v. Western M. & F. Ins. Co.*, 1 La. Ann. 216; *Regnier v. Louisiana State M. & F. Ins. Co.*, 12 La. 336; *Wightman v. Western M. & F. Ins. Co.*, 8 Rob. (La.) 442.

Maine. — *Decker v. Somerset Mut. F. Ins. Co.*, 66 Me. 406.

Massachusetts. — *Schmidt v. New York Union Mut. F. Ins. Co.*, 1 Gray (Mass.) 529.

Michigan. — *Monaghan v. Agricultural F. Ins. Co.*, 53 Mich. 238.

Minnesota. — *Thoreson v. Northwestern Nat. Ins. Co.*, 29 Minn. 107.

Missouri. — *Marshall v. Thames F. Ins. Co.*, 43 Mo. 586; *Rothschild v. American Cent. Ins. Co.*, 62 Mo. 356.

New Jersey. — *Kane v. Hibernia Ins. Co.*, 39 N. J. L. 697, 23 Am. Rep. 239, reversing 38 N. J. L. 441, 20 Am. Rep. 419.

New York. — *Johnson v. Agricultural Ins. Co.*, 25 Hun (N. Y.) 251; *Weir v. Ætna Ins. Co.*, 91 Hun (N. Y.) 217.

North Carolina. — *Blackburn v. St. Paul F. & M. Ins. Co.*, 116 N. Car. 821; *Kincade v. Bradshaw*, 3 Hawks (10 N. Car.) 63; *Magee v. Mark*, 11 Ir. L. R. 449.

Pennsylvania. — *Somerset County Mut. F. Ins. Co. v. Usaw*, 112 Pa. St. 80, 56 Am. Rep. 307.

West Virginia. — *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474.

Wisconsin. — *Washington Union Ins. Co. v. Wilson*, 7 Wis. 160; *Blaeser v. Milwaukee Mechanic's Mut. Ins. Co.*, 37 Wis. 37, 19 Am. Rep. 747. Compare *Pryce v. Security Ins. Co.*, 29 Wis. 270; *Freeman v. Freeman*, 31 Wis. 235.

Railroad Fires. — The same rule has been held with regard to fires by railroads. See the title FIRES, vol. 13, p. 532.

7. Proof Must Be Beyond Reasonable Doubt — England. — *Thurtell v. Beaumont*, 8 Moo. 612, 1 Bing. 339, 8 E. C. L. 538.

Canada. — *Richardson v. Canada West*

REASONABLE SKILL. — See the titles ATTORNEY AND CLIENT, vol. 3, p. 278; BAILMENTS, vol. 3, p. 732; CONTRIBUTORY NEGLIGENCE, vol. 7, p. 368; NEGLIGENCE, vol. 21, p. 455; PHYSICIANS AND SURGEONS, vol. 22, p. 778.

REASONABLE TIME. (See also the titles ABSTRACT OF TITLE, vol. 1, pp. 214, 215; ACCIDENT INSURANCE, vol. 1, p. 324; ACCOUNTS, vol. 1, p. 451; AGENCY, vol. 1, p. 1205; ARBITRATION AND AWARD, vol. 2, p. 698; BILLS OF EXCHANGE AND PROMISSORY NOTES, vol. 4, pp. 92, 350, 431; CARRIERS OF GOODS, vol. 5, pp. 217, 244, 270; CARRIERS OF PASSENGERS, vol. 5, pp. 596, 597; CHATTEL MORTGAGES, vol. 5, pp. 1002, 1003, 1009; CHECKS, vol. 5, p. 1041; CONTRACTS OF AFFREIGHTMENT AND CHARTER-PARTIES, vol. 7, p. 287; DEMURRAGE, vol. 9, p. 255; DEPOSITIONS, vol. 9, p. 326; EQUITABLE ELECTION, vol. 11, p. 106; FIRES, vol. 13, p. 475; FIXTURES, vol. 13, p. 648; GUARANTY, vol. 14, pp. 1147, 1148; IMPLIED OR QUASI CONTRACTS, vol. 15, p. 1096; IMPOUNDING, vol. 16, p. 5; INFANTS, vol. 16, p. 299; RESCISSION; SURETYSHIP; TENDER. And see FORTHWITH, vol. 13, p. 1158; IMMEDIATE — IMMEDIATELY, vol. 15, p. 1022.) — The term "reasonable time" is relative and its meaning depends entirely upon circumstances.¹

Farmers' Ins. Co., 17 U. C. C. P. 343. And see Gould v. British America Assur. Co., 27 U. C. Q. B. 479.

Florida. — Schultz v. Pacific Ins. Co., 14 Fla. 73.

Illinois. — Germania F. Ins. Co. v. Klewer, 129 Ill. 599; McConnel v. Delaware Mut. Safety Ins. Co., 18 Ill. 228.

Maine. — Butman v. Hobbs, 35 Me. 227, overruled in Decker v. Somerset Mut. F. Ins. Co., 66 Me. 406.

Ohio. — Lexington F., etc., Ins. Co. v. Paver, 16 Ohio 332, probably overruled by Bell v. McGinness, 40 Ohio St. 204, 48 Am. Rep. 673.

1. **Reasonable Time Dependent upon Circumstances.** — Tindal v. Brown, 1 T. R. 167; The D. M. French, 1 Lowell (U. S.) 44; Doe v. Waterloo Min. Co., (C. C. A.) 70 Fed. Rep. 460; Southern R. Co. v. Carnegie Steel Co., (C. C. A.) 76 Fed. Rep. 497; Clark v. Mowyer, 5 Mich. 472; McNew v. Booth, 42 Mo. 189; Randolph v. Frick, 57 Mo. App. 407; Bryant v. Saling, 4 Mo. 522; Bishop v. O'Connell, 56 Mo. 158; Taylor v. Great Northern R. Co., L. R. 1 C. P. 385; Hick v. Raymond, (1893) A. C. 37; Wright v. New Zealand Shipping Co., 4 Ex. D. 165.

Reasonable Time Held to Mean as Soon as Convenient. — Murry v. Smith, 1 Hawks (8 N. Car.) 41.

Least Possible Time. — *Reasonable time* after an event held to be the least possible time after: Hawley v. Kenoyer, 1 Wash. Ter. 611.

When It Begins to Run. — "*Reasonable time* will not begin to run until some one interested in the matter calls for something to be done respecting it." Graham v. Van Diemen's Land Co., 11 Exch. 101, 30 Eng. L. & Eq. 579, quoted in Cameron v. Wells, 30 Vt. 633.

Contracts. — Where a contract is to be performed within a *reasonable time*, such time must be determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the contract is to be performed. Toms v. Wilson, 32 L. J. Q. B. 382, 4 B. & S. 455, 116 E. C. L. 455; Atwood v. Emery, 26 L. J. C. Pl. 73, 1 C. B. N. S. 110, 87 E. C. L. 110; Brighty v. Norton, 32 L. J. Q. B. 38, 3 B. &

S. 305, 113 E. C. L. 305; Hales v. London, etc., R. Co., 32 L. J. Q. B. 292, 4 B. & S. 66, 116 E. C. L. 66; Briddon v. Great Northern R. Co., 28 L. J. Exch. 51. See also the title SALES.

When no time is set within which a contract must be performed or a duty discharged, performance must be made within a *reasonable time*. What amount of time constitutes such *reasonable time* depends upon the facts and circumstances of the case, not upon mere opinion or expectation. 2 Chitty on Contracts (11th Am. ed.) 1062, note *u*; Cocker v. Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; Atchison, etc., R. Co. v. Burlingame Tp., 36 Kan. 634, 59 Am. Rep. 578; Howe v. Taggart, 133 Mass. 284; Byram v. Gordon, 11 Mich. 531; Stange v. Wilson, 17 Mich. 342 (parol evidence inadmissible to alter this implication); Abell v. Munson, 18 Mich. 306, 100 Am. Dec. 165; Youmans v. Heartt, 34 Mich. 397; Bolton v. Riddle, 35 Mich. 13; Grant v. Merchants', etc., Bank, 35 Mich. 515; Calkins v. Chandler, 36 Mich. 320; Bryant v. Saling, 4 Mo. 522; Morse v. Bellows, 7 N. H. 566; Dennis v. Stoughton, 55 Vt. 376.

Even where a covenant provides for the payment of money "immediately upon demand," the party owing is entitled to a *reasonable time* to get the money and pay it over. Toms v. Wilson, 4 B. & S. 455, 116 E. C. L. 455.

In Roberts v. Mazeppa Mill Co., 30 Minn. 415, it was said that "the question of *reasonable time* is determined by a view of all the circumstances of the case — by placing the court and jury in the same situation as the contracting parties were at the time they made the contract; that is, by placing before them all the circumstances known to both parties at the time. Ellis v. Thompson, 3 M. & W. 445; Cocker v. Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530. And for that purpose it has been held that evidence of the conversations of the parties may be admitted to show the circumstances under which the contract was made, and what they thought was a *reasonable time*. Cocker v. Franklin Hemp, etc., Mfg. Co., 3 Sumn. (U. S.) 530; Coates v. Sangston, 5 Md. 121."

Same — Vendor and Purchaser. — In an action

REASSIGN. — See note 1.

REASSURANCE. — See REINSURANCE.

REBATE. — To rebate is to abate or deduct from; to make a discount from for prompt payment.²

REBELLION. — “The term ‘rebellion’ is applied to an insurrection of large extent or long duration; and is usually a war between the legitimate government of a state and portions or parts of the same who seek to overthrow the government, or to dissolve their allegiance to it and to set up one of their own. The war of the ‘Great Rebellion’ in England, and of the rebellion of the southern states of the United States, may be referred to as examples under this head.”³

REBUILD. (See also RECONSTRUCT; REPAIRS. And see the title FIRE INSURANCE, vol. 13, p. 86.) — To rebuild is to build up again; to build or construct after having been demolished.⁴

REBUTTAL — REBUTTING EVIDENCE. — Rebuttal is a briefer expression for “rebutting evidence.”⁵

REBUTTER. (See also the title REJOINDERS AND SUBSEQUENT PLEADINGS, 18 ENCYC. OF PL. AND PR. 70.) — In common-law pleading, the rebutter is the defendant's answer to the plaintiff's surrejoinder.

on a contract to convey land there must have been a demand of a deed and a tender of payment by the purchaser within a *reasonable time*. Two years was held to be unreasonable in *Force v. Dutcher*, 18 N. J. Eq. 401. See also the title VENDOR AND PURCHASER.

Question of Law or Fact. — Whether the determination of what is *reasonable time* is a question of law for the court or of fact for the jury is a matter upon which there is much conflict of authority. See the subject discussed in the title QUESTIONS OF LAW AND FACT, *ante*. See also *Paine v. Central Vermont R. Co.*, 118 U. S. 160; *Wiggins v. Burkham*, 10 Wall. (U. S.) 129; *Morgan v. U. S.*, 113 U. S. 477; *Luckhart v. Ogden*, 30 Cal. 558; *Patterson v. Hitchcock*, 3 Colo. 540; *Hill v. Hobart*, 16 Me. 168; *Campbell v. Whoriskey*, 170 Mass. 67; *Druse v. Wheeler*, 26 Mich. 189; *Gridley v. Globe Tobacco Co.*, 71 Mich. 533; *Bowen v. Detroit City R. Co.*, 54 Mich. 501; *Morgan v. McKee*, 77 Pa. St. 228.

1. **Reassign.** — A pleading alleged that before the suit certain parties, at the request of the plaintiff and all persons interested, reconveyed and *reassigned* certain property which had been assigned to them in trust. It was held that the word *reassign* implied that the property was assigned back to the assignors, and that it would have been a breach of trust to assign to others. *Parsons v. Crabb*, 31 U. C. Q. B. 434.

2. **Rebate.** — *Webst. Dict.*, quoted in *State v. Schwarzschild*, 83 Me. 265.

In *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 354, it was held that an account filed was not rendered incorrect by the omission of a credit for a sum which would have been due under a *rebate*. The court said: “A

debtor is not entitled to a promised *rebate* until he has paid or tendered the price of the thing sold. This is the true import of the term *rebate*, arising both from the sense given to it in the ordinary use and in the definitions of the lexicographers.”

3. **Rebellion.** — *Martin v. Hortin*, 1 Bush (Ky.) 633, quoting *Halleck on Elements Int. Law* 151.

4. **Board of Education v. Townsend**, 63 Ohio St. 522, quoting *Cent. Dict.*

Mechanics' Liens. — See the title MECHANICS' LIENS, vol. 20, p. 255, and see *Armstrong v. Ware*, 20 Pa. St. 519.

5. **Rebutting Evidence.** (See also the titles EVIDENCE, vol. 11, p. 484; WITNESSES.) — The word *rebutting* has a twofold signification, both in common and legal parlance. It sometimes means contradictory evidence only; at other times, conclusive or overcoming testimony.” *Fain v. Cornett*, 25 Ga. 186.

“**Rebutting Evidence** is defined to be that which is given to explain, repel, counteract, or disprove facts given in evidence by the adverse party. * * * It is a general rule * * * that anything may be given as *rebutting evidence* which is a direct reply to that produced on the other side.” *People v. Page*, 1 Idaho 194; *Bouv. L. Dict.*

“**Rebutting evidence** in such cases means not merely evidence which contradicts the witnesses on the opposite side and corroborates those of the party who began, but evidence in denial of some affirmative fact which the answering party has endeavored to prove.” *Marshall v. Davies*, 78 N. Y. 420. See also *Silverman v. Foreman*, 3 E. D. Smith (N. Y.) 322.

Rebutting and Cumulative Evidence Distinguished. — *Yeaton v. Chapman*, 65 Me. 126.

RECAPTION.

BY C. LOUIS WEEKS.

I. NATURE OF RIGHT, 973.

II. EXERCISE OF RIGHT, 973.

1. *Personal Property*, 973.
 - a. *Statement of Right*, 973.
 - b. *Degree of Force Which May Be Used*, 974.
 - c. *Right to Enter on Premises*, 975.
2. *Real Property*, 976.

CROSS-REFERENCES.

As to Recapture of Escaped Prisoners, see the title ESCAPE, vol. 11, p. 310 *et seq.* For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the titles *ACCESSION*, vol. 1, p. 247; *ASSAULT AND BATTERY*, vol. 2, p. 952; *CHattel MORTGAGES*, vol. 5, p. 945; *CONDITIONAL SALES*, vol. 6, p. 436; *CONFUSION OF GOODS*, vol. 6, p. 592; *EVICTION*, vol. 11, p. 457; *FORCIBLE ENTRY AND DETAINER*, vol. 13, p. 742; *JOINT TENANTS AND TENANTS IN COMMON*, vol. 17, p. 646; *LANDLORD AND TENANT*, vol. 18, p. 149; *LARCENY*, vol. 18, p. 456; *LICENSE (REAL PROPERTY)*, vol. 18, p. 1127; *SALES; TRESPASS; TROVER AND CONVERSION*.

I. NATURE OF RIGHT. — The right of recaption is a right which the law affords to a person who is wrongfully deprived of the possession of his property, of retaking possession thereof by his own act and without process of law.¹

II. EXERCISE OF RIGHT — 1. *Personal Property* — a. **STATEMENT OF RIGHT.** — It may be laid down as a general rule that the owner of personal property who is entitled to the possession thereof and from whom the possession is wrongfully withheld by another may take possession thereof if he can do so without a breach of the peace.² A previous demand is not necessary.³ An officer of a corporation may exercise the right in behalf of the corporation,⁴ as may the servants or agents of an individual when the circumstances would justify the principal in so doing.⁵ One whose property has been taken from him by another may be deprived of his right to retake it by reason of the operation of the doctrine of accession, whereby its form or value has been so

1. See 3 Black. Com. 4.

2. **Statement of Right.** — *Anthony v. Haney*, 8 Bing. 186, 21 E. C. L. 265; *Sabre v. Mott*, 88 Fed. Rep. 780; *Street v. Sinclair*, 71 Ala. 110; *Hendrix v. State*, 50 Ala. 148; *Stuyvesant v. Wilcox*, 92 Mich. 233, 31 Am. St. Rep. 580; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265; *Davis v. Whitridge*, 2 Strobh. L. (S. Car.) 232. See also *Goodhart v. Lowe*, 2 Jac. & W. 349; *Bryant v. Ware*, 30 Me. 295.

Taking from Possession of Officer. — Where under process an officer has levied on the property of a person other than the debtor in the execution, the owner of the property so levied on may peaceably retake the property from the possession of the officer. *Bristol v. Wilsmore*, 1 B. & C. 514, 8 E. C. L. 218;

Spencer v. M'Gowen, 13 Wend. (N. Y.) 256. See also *Sims v. Reed*, 12 B. Mon. (Ky.) 51.

Notice of Exercise of Right Unnecessary. — Where a person wrongfully took a timber belonging to another and incorporated it in a staging on which he was working, it was held that the owner might retake it without giving notice to the wrongful taker, and was not liable to the wrongful taker for injuries sustained by the falling of the staging as a consequence of the removal of the timber. *White v. Twitchell*, 25 Vt. 620, 60 Am. Dec. 294.

3. *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265.

4. **Officer of Corporation.** — *Heminway v. Heminway*, 58 Conn. 443.

5. **Servant or Agent.** — *Blades v. Higgs*, 10 Volume XXIII.

changed as to deprive him of his right to the specific property.¹ For a discussion of the circumstances and conditions under which the owner will be so deprived of his property, reference should be made to another part of this work.² On the other hand, one wrongfully mingling the goods of another with his own may under some circumstances confer on the owner of the goods so commingled a title to and right to take possession of the whole mass. A full discussion of the circumstances under which such right may arise will be found under another title in this work.³ Where the goods wrongfully commingled are capable of identification by the owner he may, of course, retake possession thereof peaceably.⁴ So, too, where the goods intermixed are of equal value, he may retake his aliquot part of the whole.⁵

When Right Conferred by Contract. — When a chattel mortgage authorizes the mortgagee to take possession of the mortgaged property in case of default, the mortgagee may take possession peaceably, but is not justified in resorting to force or violence.⁶ The rights of a vendor to retake possession under the terms of a conditional sale of personal property have been fully treated elsewhere.⁷

b. DEGREE OF FORCE WHICH MAY BE USED. — The owner of property possession of which is unlawfully withheld will not be justified in committing an assault and battery on the person in possession;⁸ but he may use such force as is necessary to retake the property⁹ without incurring any civil liability therefor,¹⁰ though he may be held liable for injuries resulting from the use of unnecessary force.¹¹ Even though the manner of retaking constitutes a breach of the peace, such fact does not subject the owner to a restoration of the property to the person from whom he has taken it,¹² though he may be answerable criminally.¹³

Manner in Which Wrongful Possession Acquired. — In some jurisdictions the right of the owner entitled to possession to use such force as is necessary to retake is limited to those instances where the possession of the person from whom the owner seeks to retake possession was acquired wrongfully by force or fraud.¹⁴ Where property has been feloniously taken the owner can, as a general rule, if he immediately pursue the wrongful taker, exercise the same degree of force

C. B. N. S. 713, 100 E. C. L. 713; *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167.

1. See *Worth v. Northam*, 4 Ired. L. (26 N. Car.) 102.

2. See title ACCESSION, vol. 1, p. 247.

Owner May Retake Where Identity Not Lost. — *Burris v. Johnson*, 1 J. J. Marsh. (Ky.) 196.

3. See title CONFUSION OF GOODS, vol. 6, p. 592.

Where a purchaser of mortgaged chattels mingles some of his own property therewith and refuses to separate his own from the mortgaged property when requested so to do, the mortgagee may take the whole, and is not liable in trespass for so doing, though under some circumstances he may be liable in trover. *Fuller v. Paige*, 26 Ill. 358; 79 Am. Dec. 379.

4. See the cases cited *infra*, this section, *passim*; and see the title CONFUSION OF GOODS, vol. 6, p. 595.

5. See the title CONFUSION OF GOODS, vol. 6, p. 597.

6. See the title CHATTEL MORTGAGES, vol. 5, pp. 1001, 1002, notes.

7. See the title CONDITIONAL SALES, vol. 6, p. 479.

8. **Degree of Force Permissible.** — *Sabre v. Mott*, 88 Fed. Rep. 780; *Watson v. Rinder-*

knecht, 82 Minn. 235. See also *Sampson v. Henry*, 11 Pick. (Mass.) 387.

9. *Hamilton v. Arnold*, 116 Mich. 684; *Barr v. Post*, 56 Neb. 698.

For Other Authorities see the title ASSAULT AND BATTERY, vol. 2, pp. 983, 984.

10. *Blades v. Higgs*, 10 C. B. N. S. 713, 100 E. C. L. 713; *Wright v. Southern Express Co.*, 80 Fed. Rep. 85; *Heminway v. Heminway*, 58 Conn. 443; *Hopkins v. Dickson*, 59 N. H. 235; *Sterling v. Warden*, 51 N. H. 217; 12 Am. Rep. 80; *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167.

11. **Liability for Unnecessary Force.** — *Hamilton v. Arnold*, 116 Mich. 684; *Davis v. Whitridge*, 2 Strobb. L. (S. Car.) 232.

Whether the degree of force used was or was not necessary is a question for the jury. *Com. v. Donahue*, 148 Mass. 529, 12 Am. St. Rep. 591.

12. *Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258; *Moore v. Shenk*, 3 Pa. St. 13, 45 Am. Dec. 618.

13. **Criminal Prosecution.** — *Hendrix v. State*, 50 Ala. 148; *State v. Boynton*, 75 Iowa 753; *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265.

14. *Andre v. Johnson*, 6 Blackf. (Ind.) 375;

for the recaption of his property as he would have been authorized to exercise in defending his possession. In the latter case he can exercise such reasonable force as the exigency of the occasion requires to effect the retaking.¹

Conflicting Claims of Title. — Where there is a contest over the title to property and one of the claimants gets actual possession peaceably, the other cannot retake it by violence. He may interfere if the property is taken in his view, but he must stop short of a breach of the peace, and cannot commit an assault and battery over and above *molliter manus imponere*.²

c. RIGHT TO ENTER ON PREMISES. — The mere fact that one has personal property within the inclosure of another does not authorize him to enter the inclosure for the purpose of taking such property into his possession.³ But if a person wrongfully takes the goods of another and places them on his own land⁴ or on the land of a third person with the latter's consent,⁵ the owner of the goods can enter upon such land for the purpose of retaking possession of the property, and is not liable in trespass for the necessary damage occasioned by so doing. An owner of chattels who has placed them on another's land has no right to enter on such other's land against his will for the purpose of taking away his property, and the owner of the land can use such force as is necessary to repel the invasion of his premises,⁶ or he can recover as for a trespass.⁷ So if chattels are deposited on the land of one who is not a participant in the wrongful taking of them from the owner, without the consent of the landowner, the owner of the chattels cannot without permission of the landowner enter upon the latter's land to retake his chattels except in case of theft and fresh pursuit.⁸ The right of a purchaser of personal property situated on the land of the vendor to enter thereon for the purpose of taking possession of the purchased property, as well as the right of the vendor under a contract of conditional sale to enter on the land of the purchaser to retake possession after default, has been treated under other titles in this work.⁹

Bowman v. Brown, 55 Vt. 184. See also the title LARCENY, vol. 18, p. 533.

1. Degree of Force to Prevent Asportation. — *Baldwin v. Hayden*, 6 Conn. 453; *Winter v. Atkinson*, 92 Ill. App. 162; *State v. Elliot*, 11 N. H. 540; *Anderson v. State*, (Tenn. 1875) 2 Cent. L. J. 159. See also the title ASSAULT AND BATTERY, vol. 2, p. 983.

2. Conflicting Claims. — *Harris v. Marco*, 16 S. Car. 575. And see the title ASSAULT AND BATTERY, vol. 2, p. 984, note.

3. Mere Ownership Does Not Authorize Entry. — *Chess v. Kelly*, 3 Blackf. (Ind.) 438; *Roach v. Damron*, 2 Humph. (Tenn.) 425.

Mortgagee. — The right to enter the premises of the mortgagor without legal process is not essential to the security of the mortgagee of personal property. Permission to do so is not implied from the existence of that relation alone. *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 439. See also the titles CHATTEL MORTGAGES, vol. 5, p. 1001; LICENSE (REAL PROPERTY), vol. 18, p. 1132.

Tenant in Common. — One tenant in common of personal property cannot invade the premises of another to take the chattel owned by them jointly, although that one is in the exclusive enjoyment thereof and refuses to permit the other to participate therein. *Vin. Abr.*, tit. Trespass, I. a. 16; *Herndon v. Bartlett*, 4 Port. (Ala.) 481; *Crocker v. Carson*, 33 Me. 436. See also the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 670.

4. Owner May Enter on Lands of Wrongful Taker. — *Patrick v. Colerick*, 3 M. & W. 483; *Webb v. Beavan*, 6 M. & G. 1055, 46 E. C. L.

1055; *Allen v. Feland*, 10 B. Mon. (Ky.) 306; *Wheelden v. Lowell*, 50 Me. 499; *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 439; *Madden v. Brown*, 8 N. Y. App. Div. 454; *Chambers v. Bedell*, 2 W. & S. (Pa.) 225, 37 Am. Dec. 508; *Chase v. Jefferson*, 1 Houst. (Del.) 257; *Richardson v. Anthony*, 12 Vt. 273. See also the title TRESPASS.

Slaves. — In *Collomb v. Taylor*, 9 Humph. (Tenn.) 689, the court, recognizing the right of the owner of property which had been wrongfully taken from him to enter without breach of the peace upon the premises of the wrongful taker for the purpose of retaking it, held that with reference to slaves such right of entry should, in the interests of the public peace, be denied to the owner, since, because of the nature of the property involved, the exercise of such right would necessarily tend to a violation of the public peace.

5. Owner May Enter on Lands of Third Person. — *Chapman v. Thumblethorpe*, Cro. Eliz. 329; *Webb v. Beavan*, 6 M. & G. 1055, 46 E. C. L. 1055; *Yale v. Seely*, 15 Vt. 221; *Richardson v. Anthony*, 12 Vt. 273.

6. *Webb v. Beavan*, 6 M. & G. 1055, 46 E. C. L. 1055; *Newkirk v. Sabler*, 9 Barb. (N. Y.) 656.

7. *Agnew v. Jones*, 74 Miss. 347; *Blake v. Jerome*, 14 Johns. (N. Y.) 406; *Heermance v. Verney*, 6 Johns. (N. Y.) 5.

8. *Anthony v. Haney*, 8 Bing. 186, 21 E. C. L. 265; *McLeod v. Jones*, 105 Mass. 403, 7 Am. Rep. 439.

9. See the titles CHATTEL MORTGAGES, vol. 5, p. 1001; CONDITIONAL SALES, vol. 6, p. 479;

Where one purchases property situated on the premises of another, under such circumstances as to imply a license from the vendor to the purchaser to enter upon the premises and take away the purchased property, the purchaser has a right to enter within a reasonable time thereafter and take away his property, and is not guilty of trespass for so doing, even though he forcibly breaks into the premises of the vendor, provided that in so doing he does no more injury than is reasonably necessary to obtain and carry away the property; and the fact that the vendor has prohibited the taking of the property is immaterial.¹ The purchaser is not, however, justified in committing an assault or a breach of the peace.²

2. Real Property.—In analogy to the right of recaption as applied to personal property, an owner of real estate who is entitled to the possession thereof and from whom the possession is wrongfully withheld may, if he can do so peaceably and without a breach of the peace, take possession thereof without process of law.³ The owner may use such force as is reasonably necessary to expel the person in possession without incurring any civil liability, though he may be held liable in a criminal prosecution for an assault and battery or for a breach of the peace,⁴ or under the statutes prohibiting forcible entries.⁵ He is, of course, liable in a civil action for injuries resulting from any unnecessary force or violence.⁶ One rightfully in possession of premises can recover damages for a forcible eviction therefrom by the owner;⁷ but mere physical possession of premises by a person is not alone sufficient to justify him in using force or violence to prevent the entry of the lawful occupant or to evict him after entry.⁸

RECAPTURE. (See also the titles INTERNATIONAL LAW, vol. 16, pp. 1186, 1189; MARINE INSURANCE, vol. 19, p. 1029.)—See note 9.

RECEIPTOR. (See also the titles FORTHCOMING AND DELIVERY BONDS, vol. 13, p. 1129; SHERIFFS, MARSHALS, AND CONSTABLES; SURETYSHIP.)—A receiptor is a person other than the execution debtor who gives a receipt for property attached, engaging, as surety to the officer who makes the levy, that the property will be forthcoming to answer any final judgment the plaintiff may recover.¹⁰

LICENSE (REAL PROPERTY), vol. 18, p. 1133; SALES.

1. *Mills v. Wooters*, 59 Ill. 234; *Miller v. State*, 39 Ind. 267; *White v. Elwell*, 48 Me. 360, 77 Am. Dec. 231; *Yale v. Seely*, 15 Vt. 221.

2. *Mills v. Wooters*, 59 Ill. 234; *Churchill v. Hulbert*, 110 Mass. 42, 14 Am. Rep. 578.

3. **Real Property—Georgia.**—*Clower v. Maynard*, 112 Ga. 340.

Illinois.—*Lee v. Mound Station*, 118 Ill. 316; *Ft. Dearborn Lodge No. 214 v. Klein*, 115 Ill. 177, 56 Am. Dec. 133; *Bloomington v. Brophy*, 32 Ill. App. 400, *distinguishing Gage v. Hampton*, 127 Ill. 87. *Compare Wahl v. Laubersheimer*, 174 Ill. 338.

Michigan.—*Burke v. Douglass*, 115 Mich. 197.

New York.—*Bliss v. Johnson*, 73 N. Y. 529.

Ohio.—*Pitford v. Armstrong, Wright* (Ohio) 94.

Pennsylvania.—*Kellam v. Janson*, 17 Pa. St. 467.

See also the titles LANDLORD AND TENANT, vol. 18, p. 432; TRESPASS.

4. See the title LANDLORD AND TENANT, vol. 18, p. 433, and also the following cases: *Taylor v. Cole*, 3 T. R. 292; *Manning v. Brown*, 47 Md. 506; *Winter v. Stevens*, 9 Allen (Mass.) 526; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265; *Souter v. Codman*, 14 R. I. 119, 51 Am. Rep. 364; *Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633. *Compare Parsons v. Brown*, 15 Barb. (N. Y.) 590.

5. See the title FORCIBLE ENTRY AND DETAINER, vol. 13, p. 757 *et seq.*

6. **Unnecessary Force.**—*Manning v. Brown*, 47 Md. 506; *Mengedocht v. Van Dorn*, 48 Neb. 880.

7. *Bristor v. Burr*, 120 N. Y. 427. And see generally the title EVICTION, vol. 11, p. 457.

8. *Liebstadter v. Federgreen*, 80 Hun (N. Y.) 245.

9. **Recapture.**—In *Seventy-eight Bales Cotton*, 1 Lowell (U. S.) 16, it was said: "*Recapture* is a matter of statute, and its meaning is not necessarily the converse of that of capture. By definition it denotes a taking from hostile possession."

10. **Receiptor.**—And. L. Dict., *citing Story on Bailments*, § 124; *Hunter v. Peaks*, 74 Me. 363; *Stevens v. Bailey*, 58 N. H. 564.

RECEIPTS.

By C. LOUIS WEEKS.

- I. SCOPE OF TITLE, 977.
- II. DEFINITION AND NATURE, 977.
- III. DEBTOR'S RIGHT TO RECEIPT, 979.
- IV. RECEIPTS AS EVIDENCE, 980.
 - 1. Admissibility, 980.
 - a. In General, 980.
 - b. As Evidence of Collateral Facts, 980.
 - c. As Evidence Against Strangers, 981.
 - 2. Other Proof Not Precluded by Taking Receipt, 982.
 - 3. Effect of Receipts as Evidence, 983.
 - a. Conclusiveness of Receipts, 983.
 - (1) *Prima Facie* Evidence but Not Conclusive, 983.
 - (2) Questions for Jury, 987.
 - b. Receipts in Full, 987.
 - c. Receipts in Contracts, 989.
- V. OPERATION OF RECEIPTS AS ESTOPPEL, 989.

CROSS-REFERENCES.

For related matters of Substantive Law, see the titles *ACCORD AND SATISFACTION*, vol. 1, p. 408; *ADMISSIONS*, vol. 1, p. 670; *DECLARATIONS (IN EVIDENCE)*, vol. 9, p. 5; *DOCUMENTARY EVIDENCE*, vol. 9, p. 877; *PAYMENT*, vol. 22, p. 513; *RELEASE AND DISCHARGE; TENDER*.

I. SCOPE OF TITLE. — This title will be confined to the treatment of receipts for money paid. A full treatment of other varieties of receipts and acknowledgments in the nature of receipts will be found under appropriate titles in other parts of this work.¹

II. DEFINITION AND NATURE — In General. — A receipt has been defined as "a written acknowledgment of payment of money or delivery of chattels."² It is merely the admission of the party giving it that money or something else has been received by him.³

1. See the titles *BILLS OF LADING*, vol. 4, p. 507; *CERTIFICATES OF DEPOSIT*, vol. 5, p. 801; *WAREHOUSE AND WAREHOUSEMEN*. As to the effect of acknowledgment of payment in deeds, see the title *CONSIDERATION*, vol. 6, p. 760 *et seq.* For receipts in cases of levy of execution, see the titles *FORTHCOMING AND DELIVERY BONDS*, vol. 13, p. 1129; *SHERIFFS, MARSHALS, AND CONSTABLES*. Generally, as to the operations of recitals as receipts, see the title *RECITALS, post*; entries by bank in depositor's pass book, see the titles *BANKS AND BANKING*, vol. 3, p. 840; *DOCUMENTARY EVIDENCE*, vol. 9, p. 940.

2. Bouv. L. Dict.

Other Definitions. — "A receipt is the written acknowledgment of the receipt of money, or a thing of value, without containing any affirmative obligation upon either party to it — a mere

admission of a fact, in writing; but when a receipt contains stipulations which amount to a contract, it becomes a contract, and must be governed by the law of contracts, and can be avoided only by fraud, mistake, failure of consideration, rescission, or some way known to the law." *Krutz v. Craig*, 53 Ind. 561.

"A receipt may be defined to be such a written acknowledgment by one person of his having received money from another as will be *prima facie* evidence of that fact in a court of law." *Kegg v. State*, 10 Ohio 75.

3. **Mere Admission by Party Giving It** — *England*. — *Lee v. Lancashire, etc., R. Co.*, L. R. 6 Ch. 527; *Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137; *Graves v. Key*, 3 B. & Ad. 313, 23 E. C. L. 79; *Bowes v. Foster*, 2 H. & N. 779.

Alabama. — *Strange v. Watson*, 11 Ala. 334. Volume XXIII.

Is Not Contract. — A simple receipt is not a contract, but is merely evidence of the performance in whole or in part of a contract.¹ A receipt may, however, contain stipulations which amount to a contract, and it then becomes a contract governed by the law of contracts.² So far as it partakes of the character of a mere receipt it may be varied and controlled by parol evidence, but in other respects it stands like any other written contract, and cannot be so contradicted.³

California. — *Brannan v. Mesick*, 10 Cal. 95.
Indiana. — *Krutz v. Craig*, 53 Ind. 561.

New York. — *Foster v. Beals*, 21 N. Y. 247.

North Carolina. — *Newbern v. Dawson*, 10 Ired. L. (32 N. Car.) 436.

Pennsylvania. — *Shoemaker v. Stiles*, 102 Pa. St. 549.

South Carolina. — *Union Bank v. Sollee*, 2 Strobb. L. (S. Car.) 390; *Clarke v. Deveaux*, 1 S. Car. 172.

Virginia. — *Wilcox v. Pearman*, 9 Leigh (Va.) 144.

Presumption that Payment Was Made in Money. — A receipt reciting that a designated debt has been paid raises a presumption that it was paid in money; hence, a forgery of a writing reciting that the person whose name purported to be signed had "received of J. D. his book account in full" was held, in *State v. Dalton*, 1 Hawks (8 N. Car.) 3, to be an offense within the purview of a statute prohibiting the forgery of a "receipt for money." See also the title FORGERY, vol. 13, p. 1097.

Acknowledgment of Payment. — A memorandum importing that A B has paid a sum to C D, but not importing any acknowledgment from C D of his having received it, is not such a receipt as the statute makes it an offense to forge or utter. *Rex v. Harvey*, R. & R. C. C. 227.

Receipt Implied by Use of Word "Settled" with Signature. — In *Rex v. Martin*, 7 C. & P. 549, 32 E. C. L. 626, it was held that the words "Settled — Samuel Hughes," at the foot of a bill of parcels imported a receipt and acquittance, and that in an indictment for forging the acquittance, it was sufficient to set out the bill of parcels with the word "settled" and the supposed signature at the foot of it, without any averment that the word "settled" imported a receipt or acquittance.

1. Receipt Not Contract. — *Brannan v. Mesick*, 10 Cal. 95; *Annan v. Merritt*, 13 Conn. 478; *Pauley v. Weisart*, 59 Ind. 247; *Sherry v. Picken*, 10 Ind. 375; *Hildreth v. O'Brien*, 10 Allen (Mass.) 104. See also *Winn v. Chamberlin*, 32 Vt. 318.

The Indorsement of a Payment upon a Note, whether of interest or principal, in itself constitutes, when made upon the note, no part thereof. It is a mere admission or evidence of payment, and stands upon the same ground as a receipt for the sum received, executed by the holder to the maker of the note. *Gilpatrick v. Foster*, 12 Ill. 355. *Sears v. Wempner*, 27 Minn. 351; *Kegg v. State*, 10 Ohio 75; *McDaniels v. Lapham*, 21 Vt. 222. See also the title PAYMENT, vol. 22, p. 584.

An Entry on the Margin of the Record of a Mortgage, acknowledging payment of the debt and discharging the mortgage, is, as regards the acknowledgment of payment, a mere receipt explainable by parol evidence, and does

not bar a recovery of the unpaid balance of the debt. *Thompson v. Avery*, 11 Utah 214.

A Certificate Issued by a Bank stating that a certain person has deposited a certain sum of money, but containing no promise on the part of the bank in regard thereto, is of the same force and effect as a receipt for money. The word "certify" gives no additional force to the instrument as purporting a contract. *Hotchkiss v. Mosher*, 48 N. Y. 478.

Instruments Held to Be Receipts and Not Contracts. — *White v. Merrell*, 32 Ill. 511; *McKinney v. Harvie*, 38 Minn. 18, 8 Am. St. Rep. 640.

Simple Receipt Not Contract in Writing Within Purview of Statute of Limitations. — *Ashley v. Vischer*, 24 Cal. 322, 85 Am. Dec. 65.

It is otherwise, however, if the writing expresses an obligation to return the money, as when it recites that the money is received on deposit. *Ashley v. Vischer*, 24 Cal. 322, 85 Am. Dec. 65; *Long v. Straus*, 107 Ind. 94, 57 Am. Rep. 87. See also *Stevens v. Rogers*, 16 Utah 105; and see the title LIMITATION OF ACTIONS, vol. 19, p. 268.

2. Receipts Amounting to Contracts. — *Tatman v. Barrett*, 3 Houst. (Del.) 226; *White v. Merrell*, 32 Ill. 511; *Krutz v. Craig*, 53 Ind. 561; *Morse v. Rice*, 36 Neb. 215; *Randall v. Reynolds*, 52 N. Y. Super. Ct. 145; *Tuley v. Barton*, 79 Va. 387; *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21; *Conant v. Kimball*, 95 Wis. 550. See also the article CONTRACTS, vol. 7, p. 88.

3. Conclusiveness of Receipt as Evidence of Contract. — *United States.* — *Davison v. Davis*, 125 U. S. 90.

Alabama. — *Wayland v. Mosely*, 5 Ala. 430, 39 Am. Dec. 335.

Indiana. — *Tisloe v. Graeter*, 1 Blackf. (Ind.) 353; *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *Dale v. Evans*, 14 Ind. 288; *McKernan v. Mayhew*, 21 Ind. 291; *Krutz v. Craig*, 53 Ind. 561; *Alcorn v. Morgan*, 77 Ind. 184.

Iowa. — *Stapleton v. King*, 33 Iowa 28, 11 Am. Rep. 109.

Kansas. — *Thompson v. Williams*, 30 Kan. 114.

Massachusetts. — *Langdon v. Langdon*, 4 Gray (Mass.) 186; *James v. Bligh*, 11 Allen (Mass.) 4; *Fay v. Gray*, 124 Mass. 500; *Stevens v. Wiley*, 165 Mass. 402.

Minnesota. — *Wykoff v. Irvine*, 6 Minn. 496, 80 Am. Dec. 461; *Sencerbox v. McGrade*, 6 Minn. 484; *Knoblauch v. Kronschnabel*, 18 Minn. 300; *Morris v. St. Paul, etc., R. Co.*, 21 Minn. 91.

Missouri. — *Carpenter v. Jamison*, 75 Mo. 285.

Nebraska. — *Morse v. Rice*, 36 Neb. 212.

New Hampshire. — *Goodwin v. Goodwin*, 59 N. H. 548.

New York. — *Wood v. Whiting*, 21 Barb. (N.

Effect of Receipt and Release Distinguished. — A release is a contract which, when under seal, conclusively implies a consideration and *ipso facto* discharges the cause of action. It cannot be contradicted or explained by parol evidence so long as it remains in force. A receipt not under seal, on the other hand, is only an admission of a payment; it is merely *prima facie* evidence of the fact which it purports to recite, and may be rebutted by parol or other evidence.¹ Neither will be given effect if obtained unfairly or by improper influences.² To have effect as a release an instrument must by its terms purport to be a release and extinguishment of the liability of the person to whom it is given. If it is such in form and is under seal a consideration will be implied;³ if not under seal a consideration must be proven.⁴

Joint Debtors. — A technical release under seal given by a creditor to one of several joint or joint and several debtors operates as a discharge of all, but a receipt for a payment less than the whole debt, given to one of the joint debtors, though expressed to be in full of all demands does not so operate,⁵ since it is without consideration.⁶

Receipt under Seal. — An acknowledgment of the payment of a specified sum of money, under seal, is of the same effect as a receipt not under seal, but no greater.⁷

Effect of Acknowledgment Before Notary. — The fact that a receipt is acknowledged before a notary imparts to it no additional weight.⁸

III. DEBTOR'S RIGHT TO RECEIPT — **Statutory Provision.** — In at least one jurisdiction the statutes provide that a debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.⁹ The only method which the debtor has for the enforcement of the right so conferred appears to be his right to annex a demand for a receipt to a tender, without invalidating the tender.¹⁰ In some instances the statutes make it the duty of a public officer to give a receipt for moneys paid to him in his official capacity. In such case the performance of the duty may be enforced by mandamus.¹¹

Y. 190; *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47; *Graves v. Friend*, 5 Sandf. (N. Y.) 568.

North Carolina. — *Wilson v. Derr*, 69 N. Car. 137; *Smith v. Brown*, 3 Hawks (10 N. Car.) 580.

Ohio. — *Stone v. Vance*, 6 Ohio 246; *Bird v. Huston*, 10 Ohio St. 418.

Vermont. — *McGregor v. Bugbee*, 15 Vt. 734.

Virginia. — *Tuley v. Barton*, 79 Va. 387.

Wisconsin. — *Harrison v. Juneau Bank*, 17

Wis. 351, 84 Am. Dec. 747; *Schultz v. Coon*,

51 Wis. 416, 37 Am. Rep. 839.

See *infra*, this title, *Receipts as Evidence* — *Receipts in Full*, and see also the title PAROL EVIDENCE, vol. 21, p. 1077.

Instruments Held to Constitute Contract and Not Merely Receipt. — *Townsend v. Fisher*, 2 Hilt. (N. Y.) 47; *Schultz v. Coon*, 51 Wis. 416, 37 Am. Rep. 839.

Receipt as Memorandum Within Purview of Statute of Frauds. — As to the sufficiency of a receipt reciting in whole or in part the terms of a contract to constitute a memorandum within the purview of the statutes of fraud, or as constituting a contract in writing, see the title STATUTE OF FRAUDS.

1. Effect of Receipt and Release Distinguished. — *Lee v. Lancashire, etc.*, R. Co., L. R. 6 Ch. 527; *Bowes v. Foster*, 2 H. & N. 779; *Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137; *Vaughne v. Taylor*, 18 Ark. 65; *Hitt v. Hollday*, 2 Litt. (Ky.) 332; *Jones v. Ricketts*, 7 Md. 108; *M'Crea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103. See also *Harden v. Gordon*, 2

Mason (U. S.) 541; *Perkins v. Pitts*, 11 Mass. 125; and see the title RELEASE AND DISCHARGE.

2. Fraud and Undue Influence. — *Mitchell v. Pratt*, Taney (U. S.) 448. See also the title ACCORD AND SATISFACTION, vol. 1, p. 428.

3. Construction of Instrument. — *Gross v. Diller*, 33 Minn. 424. See also *Randall v. Reynolds*, 52 N. Y. Super. Ct. 145.

4. Foersch v. Blackwell, 14 Barb. (N. Y.) 607. See also the title ACCORD AND SATISFACTION, vol. 1, p. 412.

5. Joint Debtors. — *Fitch v. Sutton*, 5 East 230; *Rowley v. Stoddard*, 7 Johns. (N. Y.) 207. But see *Milliken v. Brown*, 1 Rawle (Pa.) 391. And see the title ACCORD AND SATISFACTION, vol. 1, p. 427.

6. Harrison v. Close, 2 Johns. (N. Y.) 448, 3 Am. Dec. 444.

7. Receipt under Seal. — *Jackson v. M'Chesney*, 7 Cow. (N. Y.) 360, 17 Am. Dec. 521; *Daniels v. Moses*, 12 S. Car. 130. See also the title PAROL EVIDENCE, vol. 21, p. 1088.

8. Brannan v. Mesick, 10 Cal. 95.

9. Civ. Code Cal., § 1499.

10. Demand of Receipt Not Invalidating Tender. — *Ferrea v. Tubbs*, 125 Cal. 687.

For a full discussion of the effect of such a demand on a tender, reference should be made to the title TENDER.

11. Mandamus to Compel Issuance of Tax Receipt. — *Perry v. Washburn*, 20 Cal. 318; *Law v. People*, 84 Ill. 142. See also the title MANDAMUS, vol. 19, p. 709.

IV. RECEIPTS AS EVIDENCE — 1. Admissibility — a. IN GENERAL. — A receipt, being the admission of the party signing it, is held to be admissible in evidence in favor of the party to whom it was given and against the party giving it, in accordance with the general principle that the admissions and declarations of a party may be used against him.¹

Foundation for Admission. — The necessity of proving the execution of the receipt by the person against whom it is offered, as a prerequisite to its acceptance as evidence, is treated elsewhere in this work.²

Receipt Purporting to Be Signed by Agent. — A receipt signed by one purporting to be an agent of the creditor is not admissible against the creditor without proof of the agent's authority to make it, or subsequent ratification. The subsequent acceptance of the money from one assuming to act as agent, but without authority to do so, will constitute a ratification of the receipt as an admission of the amount received, but not a recital as to its being in full.³

Delivery of Receipt. — A receipt in the possession of the party by whom it purports to have been signed is not evidence of the payment recited when it does not appear ever to have been delivered to the party claiming to have made the payment.⁴

Alteration of Receipt. — If a receipt is altered by the party holding it or by procurement of such party, it is vitiated as an instrument of evidence; but the rule is otherwise if the alteration is made by a stranger.⁵ Alterations appearing on its face will, however, be *prima facie* presumed to have been made before execution.⁶ The whole inquiry whether there has been an alteration, and if so, whether in fraud of the defending party or otherwise, is to be determined by the jury from an inspection of the receipt itself and the other evidence in the case; hence such a receipt, the signature of the receptor being proven, should be admitted for the consideration of the jury.⁷

Construction of Receipt. — In determining what claims are referred to by a receipt which has been given in evidence, the language of the receipt, in the absence of other evidence, is to be construed so as to give effect to its plain and obvious meaning.⁸

b. AS EVIDENCE OF COLLATERAL FACTS. — While a receipt primarily

1. As Admissions. — See generally notes *infra*, this subsection, and see the title **ADMISSIONS**, vol. 1, p. 670.

2. See the title EXECUTION AND PROOF OF DOCUMENTS, vol. 11, p. 584 *et seq.*

Where a party relies upon a receipt as evidence of payment, the genuineness of the receipt must be proved by a preponderance of the evidence before it constitutes any evidence of payment. *Salazar v. Taylor*, 18 Colo. 538; *Neil v. Miller*, 2 Root (Conn.) 117.

An instrument in writing delivered by an illiterate creditor to his debtor, purporting to be an acknowledgment of the payment of a certain sum of money, though necessarily not in his writing or signed by him, is admissible, in connection with evidence of its delivery, as tending to prove payment. *Mousseau v. Mousseau*, 42 Minn. 212.

Conclusive Presumption in Favor of Execution of Ancient Receipts. — There is a conclusive presumption in favor of the due execution of ancient receipts, and it has been held that when such receipts are thirty years old the mere production is sufficient, and other proof of their execution will not be required. *Bertie v. Beaumont*, 2 Price 303; *Settle v. Alison*, 8 Ga. 206, 52 Am. Dec. 393. See also *McReynolds v. Longenberger*, 57 Pa. St. 13, and see the title **ANCIENT DOCUMENTS**, vol. 2, p. 324.

Receipts in Deeds — What Proof Necessary. — A receipt for purchase money at the foot of a deed is evidence without further proof of its execution than the acknowledgment of the deed. *Kelly v. Dunlap*, 3 P. & W. (Pa.) 136. See also the title **ACKNOWLEDGMENTS**, vol. 1, p. 484.

3. Sewanee Min. Co. v. Best, 3 Head (Tenn.) 701.

4. Nelson v. Boland, 37 Mo. 432.

5. Fraudulent Alteration of Receipt. — *Thrasher v. Anderson*, 45 Ga. 539; *Goodfellow v. Inslee*, 12 N. J. Eq. 355. See also the title **ALTERATION OF INSTRUMENTS**, vol. 2, p. 205.

6. Presumption as to Time of Making Alteration. — *Thrasher v. Anderson*, 45 Ga. 539; *Printup v. Mitchell*, 17 Ga. 458, 63 Am. Dec. 258.

7. Question for Jury. — *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258.

8. Construction of Receipt. — *Haydel v. Rousel*, 1 La. Ann. 35.

Receipt in Full to Principal Discharges Surety. — *Brown v. Ayer*, 24 Ga. 288.

Instruments Construed as Receipts in Full. — In the absence of any proof to the contrary, an instrument reading, "Received from N. one hundred dollars commission on purchase of mill," duly signed, has been held to be a receipt in full. *Elting v. Sturtevant*, 41 Conn. 176.

operates as proof of the facts stated therein, yet it is often used as evidence of collateral facts. Being *prima facie* evidence of payment, a receipt is admissible to support whatever inference may be drawn from the fact of the payment described.¹ So too the recitals of the receipt may be admissible against the party issuing it, as constituting admissions of facts in controversy.²

c. AS EVIDENCE AGAINST STRANGERS. — While a receipt acknowledging payment is evidence of such payment as against the maker thereof, it is usually held that as against strangers to the transaction a receipt is incompetent evidence of such fact.³ In such cases the giver of the receipt⁴ or some person who can testify of his own knowledge to the fact of payment⁵ should be called as a witness to prove such fact; for as against such strangers, such receipt is but the hearsay declaration of the party who signed it, made without opportunity for his cross-examination, and independently of the sanction of his oath.⁶

Exceptions to Rule. — There are cases, however, where a receipt by a third party may be competent evidence, as, for instance, when the person to whom the payment is made is pointed out by law, and such person is required by law to give a receipt; as in the case of the payment of taxes to a public officer,⁷ or where the person to whom the payment is to be made is designated

1. Receipt for Rent — Presumption of Payment of Previous Rent. — The law presumes that previous rent has been paid where a receipt for subsequent rent is given, unless the contrary is made to appear. *Jenkins v. Calvert*, 3 Cranch (C. C.) 216; *Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Decker v. Livingston*, 15 Johns. (N. Y.) 479; *Patterson v. O'Hara*, 2 E. D. Smith (N. Y.) 58; *Saving Fund v. Marks*, 3 Phila. (Pa.) 278, 15 Leg. Int. (Pa.) 357. See also *Johnstone v. Mulcahy*, 132 Cal. 606; *Davis v. Tyler*, 18 Johns. (N. Y.) 490; and see the title LANDLORD AND TENANT, vol. 18, p. 291.

2. Receipt in Name of Corporation as Evidence that Corporation Was Doing Business. — A receipt issued in the name of the defendant corporation, and signed in its name by a party who owned all the stock, is admissible to prove the plaintiff's claim that the defendant was doing business as a corporation at the time when the receipt was signed, where the defendant claims that it was not then doing business. *Orr Water Ditch Co. v. Reno Water Co.*, 19 Nev. 60. See also the title ADMISSIONS, vol. 1, p. 670.

Attorney's Receipt for Note as Evidence of Genuineness of Such Note. — The receipt of an attorney at law acknowledging that he has received a note for collection, in an action against him for negligence in not collecting the note, is *prima facie* evidence of the genuineness and justness of the note described in the receipt. *Hair v. Glover*, 14 Ala. 500. See also the title ATTORNEY AND CLIENT, vol. 3, p. 391.

Time of Payment. — As against the receptor or those claiming as his representatives, the date of a receipt is *prima facie* evidence of the time of making the payment which they acknowledge. *Baylis v. Stanton*, 2 Dorion (Quebec) 350.

3. Receipts Not Admissible Against Strangers. — *Connecticut.* — *Newell v. Roberts*, 13 Conn. 63. *Kentucky.* — *Davidson v. Berthoud*, 1 A. K. Marsh. (Ky.) 354; *Davis v. Shreve*, 3 Litt. (Ky.) 260, 14 Am. Dec. 66.

Maryland. — *Leatherbury v. Bennett*, 4 Har. & M. (Md.) 392. *Compare Prather v. Johnson*, 3 Har. & J. (Md.) 487.

Minnesota. — *Ferris v. Boxell*, 34 Minn. 262. *Nebraska.* — *Ellison v. Albright*, 41 Neb. 93. *Nevada.* — *Moresi v. Swift*, 15 Nev. 215. *New Jersey.* — *Roll v. Maxwell*, 5 N. J. L. 568.

New York. — *Foster v. Beals*, 21 N. Y. 247. *Pennsylvania.* — *English v. Hannah*, 4 Watts (Pa.) 424; *Cutbush v. Gilbert*, 4 S. & R. (Pa.) 551; *Morton v. Morton*, 13 S. & R. (Pa.) 107; *Bolton v. Johns*, 5 Pa. St. 151; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137.

A receipt by the payee of a claim is not evidence of payment as against the assignee of the claim unless it is proven to have been made and delivered prior to the assignment, since the declarations against the interest of the assignor subsequent to his parting with the title are inadmissible against his assignee. *Foster v. Beals*, 21 N. Y. 247; *Morton v. Morton*, 13 S. & R. (Pa.) 107. See also the title ADMISSIONS, vol. 1, p. 685.

In an action by an assignee against a debtor the latter introduced a receipt as evidence of a payment prior to the assignment. It was held that there was no presumption that the date of the receipt was the true date, and that the burden of showing that it was made and delivered before the assignment was upon the debtor. *Wilcox v. Pearman*, 9 Leigh (Va.) 144. But see *Fennerstein's Champagne*, 3 Wall. (U. S.) 145; *Locke v. Porter Gold, etc.*, Min. Co., 41 Cal. 305; *Sherman v. Crosby*, 11 Johns. (N. Y.) 70.

4. Giver of Receipt Should Be Witness. — *Printup v. Mitchell*, 17 Ga. 558, 63 Am. Dec. 258; *Davis v. Shreve*, 3 Litt. (Ky.) 260, 14 Am. Dec. 66; *Davidson v. Berthoud*, 1 A. K. Marsh. (Ky.) 354; *Ellison v. Albright*, 41 Neb. 93; *Cutbush v. Gilbert*, 4 S. & R. (Pa.) 551; *English v. Hannah*, 4 Watts (Pa.) 424.

5. Ford v. Smith, 5 Cal. 314.

6. Reason for Rule. — *Ford v. Smith*, 5 Cal. 314; *Ellison v. Albright*, 41 Neb. 93; *Lloyd v. Lynch*, 28 Pa. St. 419, 70 Am. Dec. 137.

7. Tax Receipts. — *Johnstone v. Scott*, 11 Mich. 232; *Ferris v. Boxell*, 34 Minn. 262.

Production of Tax Receipts by Decedent's Representatives as Evidence of Payment. — *Lloyd v.*

by the contract of the person against whom the receipt is introduced.¹

Receipts Given by Decedent in Course of Business. — It has been held that a receipt given by a person deceased at the time it is offered in evidence is admissible against a third person for the purpose of proving not only the fact of payment, but, where such fact is recited in the receipt, the person from whom the decedent received such payment.²

Receipts Taken by Fiduciaries. — So, too, it would appear that receipts taken by a guardian or executor for money paid out by him in the administration of the affairs of the estate which he represents are *prima facie* evidence of such payments in an accounting by him, as against other creditors or distributees of the estate.³

2. Other Proof Not Precluded by Taking Receipt — In General. — A receipt, though evidence of payment, is not the only evidence, and when the fact can be established without it, is not necessary.⁴ It is not better evidence of the payment than parol evidence within the sense of the rule requiring that the best evidence shall be adduced, and hence the fact that a receipt has been taken will not preclude other evidence of payment, though the failure to produce the receipt is not explained.⁵ Where, however, the receipt is relied

Davis, 123 Cal. 348. See also the title PAYMENT, vol. 22, p. 590.

Tax Collector's Receipt as Evidence of Validity of Taxes Paid. — While a tax collector's receipt may be evidence of the payment of the taxes designated, it is not, of course, sufficient proof of the validity of the taxes paid. Seale v. Doane, 17 Cal. 476.

Receipt of Receiver of Land Office as Evidence of Payments to Him. — Goodwin v. McCabe, 75 Cal. 584; Cluggage v. Swan, 4 Binn. (Pa.) 150, 5 Am. Dec. 400.

Time of Giving Receipt as Affecting Admissibility. — It seems, however, that such a receipt, to be admissible, must have been given at or about the time the payment it purports to acknowledge was made, and must have been given in the usual course of business. Cluggage v. Swan, 4 Binn. (Pa.) 150, 5 Am. Dec. 400.

Sheriff's Receipt to Debtor of Execution Debtor. — Kibbee v. Howard, 7 Wis. 150.

Receipts of De Facto Officer. — The receipts for public money of a county treasurer, given to a tax collector after the expiration of his term, but before he has delivered possession of the office to his successor, are *prima facie* evidence of the receipt of such money by him in his official capacity, in an action to charge the sureties on his official bond. Placer County v. Dickerson, 45 Cal. 12.

1. Where Payee Designated by Defendant's Contract. — Ferris v. Boxell, 34 Minn. 262; Dennis v. Sanger, 15 Tex. Civ. App. 411.

2. Receipts Given by Decedent in Course of Business. — Harrison v. Harrison, 9 Ala. 73; Upson v. Raiford, 29 Ala. 188; Field v. Boynton, 33 Ga. 239. See also Newell v. Roberts, 13 Conn. 63; Wooten v. Nall, 18 Ga. 609; Taylor v. Gould, 57 Pa. St. 152.

Their admissibility seems to be based on the theory that they are declarations against interest made in the usual and ordinary course of business. Harrison v. Harrison, 9 Ala. 73. See also the titles DECLARATIONS (IN EVIDENCE), vol. 9, p. 8; DOCUMENTARY EVIDENCE, vol. 9, p. 938; HEARSAY EVIDENCE, vol. 15, p. 316.

3. Receipts Taken by Fiduciaries. — McCree-liss v. Hinkle, 17 Ala. 459; Beeler v. Hill, 5

Dana (Ky.) 38; Sherman v. Akins, 4 Pick. (Mass.) 283. See also Powell v. Powell, 52 Mich. 432.

4. Fact of Payment May Be Established Without Receipt. — Rambert v. Cohen, 4 Esp. 213; Willimantic School Soc. v. First School Soc., 14 Conn. 457; Elston v. Kennicott, 46 Ill. 187; Southwick v. Hayden, 7 Cow. (N. Y.) 334.

5. Other Proof Not Precluded by Taking Receipt — England. — Jacob v. Lindsay, 1 East 460; Rambert v. Cohen, 4 Esp. 213.

United States. — Meade v. Keane, 3 Cranch (C. C.) 51.

Alabama. — Johnson v. Cunningham, 1 Ala. 249; Wiggins v. Pryor, 3 Port. (Ala.) 430.

Arkansas. — Humphries v. McCraw, 5 Ark. 61; Peterson v. Gresham, 25 Ark. 380.

Connecticut. — Willimantic School Soc. v. First School Soc., 14 Conn. 461.

Illinois. — Hinchman v. Whetstone, 23 Ill. 185.

Kansas. — Wolf v. Foster, 13 Kan. 116.

New Jersey. — Berry v. Berry, 17 N. J. L. 440; Chambers v. Hunt, 22 N. J. L. 552.

New York. — Southwick v. Hayden, 7 Cow. (N. Y.) 334.

North Carolina. — Wilson v. Derr, 69 N. Car. 137; Ashe v. De Rosset, 8 Jones L. (53 N. Car.) 240.

Pennsylvania. — Heckert v. Haine, 6 Binn. (Pa.) 16.

But see Wooten v. Nall, 18 Ga. 609; and see the title PAYMENT, vol. 22, p. 580.

Where Receipt Contains Contract. — Of course, where the receipt contains the terms of a contract, the writing is the best evidence of the contract and is within the rule requiring the production of the writing or the laying of a proper foundation for secondary evidence of its contents. Smith v. Brown, 3 Hawks (10 N. Car.) 580; Wilson v. Derr, 69 N. Car. 137. See also the title SECONDARY EVIDENCE.

Payment of Taxes May Be Proved by Parol whether a receipt was taken for it at the time or not. Elston v. Kennicott, 52 Ill. 272; Hinchman v. Whetstone, 23 Ill. 185; Hammond v. Hannin, 21 Mich. 374, 4 Am. Rep. 490. But it has been held that charges in an administration account for the payment of

on as evidence of the fact of payment, it must be produced or its absence must be satisfactorily accounted for as a foundation for secondary evidence as to the contents of such receipt.¹

3. Effect of Receipts as Evidence — a. CONCLUSIVENESS OF RECEIPTS —

(1) *Prima Facie Evidence but Not Conclusive* — In General. — A receipt is merely evidence, and while it is of the highest and most satisfactory character,² and of greater probative effect than most other evidence,³ it is nevertheless not conclusive, but is merely *prima facie* evidence of the facts recited by it,⁴ and is

taxes by the administrator cannot be proved by the testimony of witnesses, but must be proved by the receipt of the collector. *Hall v. Hall*, 1 Mass. 101.

1. **Necessity to Produce or Account for Absence.** — *Van Ness v. Hadsell*, 54 Mich. 560; *Chambers v. Hunt*, 22 N. J. L. 552; *Terry v. Husbands*, 53 S. Car. 69. See also *Chambers v. Hunt*, 22 N. J. L. 552; and see the title SECONDARY EVIDENCE.

Proof of the Loss of Receipts Without Proof of Their Genuineness was held in *Reynolds v. Jourdan*, 6 Cal. 108, not to be a sufficient predicate for the admission of evidence as to their contents. Compare *Spears v. Chrisman*, 4 J. J. Marsh. (Ky.) 47.

Receipt as Evidence of Collateral Facts. — On an issue as to whether or not the defendant and another were jointly interested in a particular business enterprise, parol evidence that the witness has seen the defendant sign receipts in the name of both parties alleged to be jointly interested is inadmissible. The receipt itself ought to be produced. *Romayne v. Duane*, 3 Wash. (U. S.) 246.

2. **Evidence of Most Satisfactory Character.** — *Guldager v. Rockwell*, 14 Colo. 459; *Winchester v. Grosvenor*, 44 Ill. 425; *Lyons v. Williams*, 15 Ill. App. 27; *Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74. See also *Nicholson v. Frazier*, 4 Harr. (Del.) 206.

3. **Documentary Evidence.** — *Winn v. Chamberlin*, 32 Vt. 318.

4. **Receipt Merely Prima Facie Evidence** — *England*. — *Bowes v. Foster*, 2 H. & N. 779; *Skaife v. Jackson*, 3 B. & C. 421, 10 E. C. L. 137; *Graves v. Key*, 3 B. & Ad. 313, 23 E. C. L. 79.

United States. — *Weed v. Snow*, 3 McLean (U. S.) 265; *Piehl v. Balchen*, Olc. Adm. 24; *New England Mortg. Security Co. v. Gay*, 33 Fed. Rep. 636; *Corbus v. Leonhardt*, (C. C. A.) 114 Fed. Rep. 10.

Alabama. — *Driver v. Hudspeth*, 16 Ala. 348; *Strange v. Watson*, 11 Ala. 334.

Arkansas. — *Burton v. Merrick*, 21 Ark. 358; *Springfield, etc., R. Co. v. Allen*, 46 Ark. 219; *Humphries v. McCraw*, 5 Ark. 61.

California. — *Bergson v. Builders' Ins. Co.*, 38 Cal. 541; *Brannan v. Mesick*, 10 Cal. 95; *Winans v. Hassey*, 48 Cal. 634; *Simmons v. Oullahan*, 75 Cal. 508; *Jackson v. Sacramento Valley R. Co.*, 23 Cal. 269; *Jenne v. Burger*, 120 Cal. 446.

Colorado. — *Salazar v. Taylor*, 18 Colo. 538.

Connecticut. — *Kane v. Morehouse*, 46 Conn. 300.

Delaware. — *Nicholson v. Frazier*, 4 Harr. (Del.) 206; *Tatman v. Barrett*, 3 Houst. (Del.) 226.

Georgia. — *Tarver v. Rankin*, 3 Ga. 210; *Mallard v. Moody*, 105 Ga. 400.

Illinois. — *Walrath v. Norton*, 10 Ill. 437; *Elston v. Kennicott*, 46 Ill. 187; *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587.

Indiana. — *Chandler v. Schoonover*, 14 Ind. 324; *Dale v. Evans*, 14 Ind. 288; *Travellers Ins. Co. v. Chappelow*, 83 Ind. 429.

Kansas. — *Stout v. Hyatt*, 13 Kan. 232; *American Bridge Co. v. Murphy*, 13 Kan. 35; *Missouri Pac. R. Co. v. Lovelace*, 57 Kan. 195; *Solmon R. Co. v. Jones*, 34 Kan. 443.

Kentucky. — *Whitemore v. Stout*, 3 Dana (Ky.) 427.

Louisiana. — *Gray v. Lonsdale*, 10 La. Ann. 749; *Borden v. Hope*, 21 La. Ann. 581; *Croizet's Succession*, 12 La. Ann. 401.

Maine. — *Pearce v. Savage*, 45 Me. 90.

Maryland. — *Hellwig v. Benzinger*, (Md. 1891), 22 Atl. Rep. 265.

Massachusetts. — *Perkins v. Pitts*, 11 Mass. 134.

Michigan. — *Woodbury v. Lewis*, Walk. (Mich.) 256; *McAllister v. Engle*, 52 Mich. 56; *Powell v. Powell*, 52 Mich. 432.

Nebraska. — *Morse v. Rice*, 36 Neb. 215.

New Jersey. — *Elwell v. Lesley*, 7 N. J. L. 349; *Basch v. Humboldt Mut. F. & M. Ins. Co.*, 35 N. J. L. 429; *Kenny v. Kane*, 50 N. J. L. 562.

New York. — *Burns v. Walsh*, (C. Pl. Gen. T.) to Misc. (N. Y.) 699; *Riley v. New York*, 96 N. Y. 331.

North Carolina. — *Newbern v. Dawson*, 10 Ired. L. (32 N. Car.) 436.

Ohio. — *Kegg v. State*, 10 Ohio 75.

Tennessee. — *Kirkpatrick v. Smith*, 10 Humph. (Tenn.) 188.

Vermont. — *Winn v. Chamberlin*, 32 Vt. 318.

See also *infra*, this subsection, *Receipts in Full*, and see the title PAYMENT, vol. 22, pp. 554, 564, 582.

Where Receipt Contains Contract. — "Where a writing in the form of a receipt is the mere acknowledgment of the payment of money, or the delivery of a thing, it is but *prima facie* evidence of the fact; but if it also contains a contract to do something in relation to the thing delivered, in so far as it is evidence of that contract between the parties, it stands on the footing of all other contracts in writing, and cannot be contradicted or varied by parol; except, perhaps, that at law the same circumstances of fraud, mistake, or surprise may be shown to set it aside as might be shown in equity to relieve from a contract." *Dale v. Evans*, 14 Ind. 288. See to the same effect *Coon v. Knap*, 8 N. Y. 402, 59 Am. Dec. 502. And see the titles EVIDENCE, vol. 11, p. 548; PAROL EVIDENCE, vol. 21, p. 1078.

Acknowledgment of Receipt of Consideration in Deed. — A receipt in a deed acknowledging the payment of the consideration is only

open to explanation or contradiction¹ by parol,² or by any other competent evidence.³ Where the receipt is embodied in a contract, this rule does not apply so as to permit the recital of the payment of the consideration to be contradicted for the purpose of showing that the contract has not become operative.⁴

Fraud, Mistake, Undue Influence, Etc. — It may be stated as a universal rule that such circumstances as would lead a court of equity to set aside a contract

prima facie evidence of such payment, and may be contradicted or explained by parol evidence. *Higdon v. Thomas*, 1 Har. & G. (Md.) 139; *Wolfe v. Hauver*, 1 Gill (Md.) 90; *O'Neale v. Lodge*, 3 Har. & M. (Md.) 433; 1 Am. Dec. 377; *Spalding v. Brent*, 3 Md. Ch. 411; *Elysville Mfg. Co. v. Okisko Co.*, 1 Md. Ch. 392. See also *Carr v. Hobbs*, 11 Md. 285; *Watson v. Blain*, 12 S. & R. (Pa.) 131, 14 Am. Dec. 669; and see the titles CONSIDERATION, vol. 6, pp. 760, 778; PAROL EVIDENCE, vol. 21, p. 1088.

Recital as to Application of Money Paid. — The recitals of a receipt as to the claim on which the money paid is intended by the parties to be applied are *prima facie* evidence that the payment was made on the claim named, and the burden of proving the contrary is on the persons disputing such fact. *Snodgrass v. Parks*, 79 Cal. 55; *U. S. v. Jones*, 8 Pet. (U. S.) 399.

Recital as to Person Making Payment. — *Gulick v. Conover*, 15 N. J. L. 420.

Recital as to Purpose of Deposit. — One accepting a receipt for money deposited with a bank is not precluded thereby from showing by other evidence that the money was accepted by the bank for a purpose other than that stated in the receipt. *Ellicott v. Barnes*, 31 Kan. 170.

1. Open to Explanation or Contradiction — *England*. — *Lee v. Lancashire, etc.*, R. Co., L. R. 6 Ch. 527.

Alabama. — *Driver v. Hudspeth*, 16 Ala. 348.

California. — *Winans v. Hassey*, 48 Cal. 635.

Colorado. — *Salazar v. Taylor*, 18 Colo. 538.

Illinois. — *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587; *Ditch v. Vollhardt*, 82 Ill. 134; *Scott v. Bennett*, 8 Ill. 243. See also *Thomas Pressed Brick Co. v. Fowler*, 97 Ill. App. 80.

Maine. — *Pearce v. Savage*, 45 Me. 90.

Massachusetts. — *Hildreth v. O'Brien*, 10 Allen (Mass.) 104.

Michigan. — *Hart v. Gould*, 62 Mich. 262.

Nebraska. — *Price v. Treat*, 29 Neb. 536.

New York. — *Putnam v. Lewis*, 8 Johns. (N. Y.) 389; *Johnson v. Weed*, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; *Burns v. Walsh*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 699; *Foster v. Beals*, 21 N. Y. 247.

Pennsylvania. — *Shepherd v. Busch*, 154 Pa. St. 149, 35 Am. St. Rep. 815; *Shoemaker v. Stiles*, 102 Pa. St. 549. See also *Grier v. Huston*, 8 S. & R. (Pa.) 402, 11 Am. Dec. 627.

Texas. — *Watson v. Miller*, 82 Tex. 279.

See also *Earle v. Earle*, 16 N. J. L. 273, and the title PAROL EVIDENCE, vol. 21, p. 1088. And see the cases cited in the preceding note.

The Mere Negligence of a Person Signing a receipt without reading it will not conclude such person, nor prevent explanation or denial of what it contains, especially if it ap-

pears that such person was induced to sign the paper by the misrepresentation or fraud of the other party. *Missouri Pac. R. Co. v. Lovelace*, 57 Kan. 195; *Solomon R. Co. v. Jones*, 34 Kan. 443.

Payment by Check or Note of Third Person. — Where a receipt acknowledges the payment of a designated sum of money, extraneous evidence is admissible to show that the payment consisted in whole or in part of checks or notes of a third person, and that they were received as collateral and not as absolute payment. *Tobey v. Barber*, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326; *Shepherd v. Busch*, 154 Pa. St. 149, 35 Am. St. Rep. 815. See also the title PAYMENT, vol. 22, p. 564.

2. Parol Evidence — *United States*. — *Maze v. Miller*, 1 Wash. (U. S.) 328; *Weed v. Snow*, 3 McLean (U. S.) 265.

Alabama. — *Driver v. Hudspeth*, 16 Ala. 348.

California. — *Jenne v. Burger*, 120 Cal. 446;

Comptoir D'Escompte v. Dresbach, 78 Cal. 15;

Hawley v. Bader, 15 Cal. 45.

Illinois. — *Starkweather v. Maginnis*, 98 Ill. App. 143, affirmed 196 Ill. 274; *Winchester v. Grosvenor*, 44 Ill. 425; *Hinchman v. Whetstone*, 23 Ill. 185; *Frink v. Bolton*, 15 Ill. 343;

Elston v. Kennicott, 52 Ill. 272; *Gilpatrick v. Foster*, 12 Ill. 355.

Indiana. — *Henry v. Henry*, 11 Ind. 237, 71

Am. Dec. 354; *Pauley v. Weisart*, 59 Ind. 241.

Massachusetts. — *Nelson v. Weeks*, 111 Mass. 223; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Brooks v. White*, 2 Met. (Mass.) 283,

37 Am. Dec. 95.

Minnesota. — *Sears v. Wempner*, 27 Minn. 351.

Nebraska. — *Morse v. Rice*, 36 Neb. 215.

New Jersey. — *Berry v. Berry*, 17 N. J. L. 440.

New York. — *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Hotchkiss v. Mosher*, 48 N. Y. 478.

Pennsylvania. — *Bell v. Bell*, 12 Pa. St. 235.

Tennessee. — *Kirkpatrick v. Smith*, 10 Humph. (Tenn.) 188.

Vermont. — *Ashley v. Hendee*, 56 Vt. 209;

McDaniels v. Lapham, 21 Vt. 222. Compare

Raymond v. Roberts, 2 Aik. (Vt.) 204, 16 Am. Dec. 698.

Virginia. — *Tuley v. Barton*, 79 Va. 387.

See also title PAYMENT, vol. 22, p. 582, and see the cases cited in the two preceding notes.

Parol Evidence to Show Agency. — When a receipt recites payment to have been made by a certain person, parol evidence to show that the payment was made by such person as agent for another is admissible. *Rand v. Scofield*, 43 Ill. 167.

3. *Moore v. Kortv*, 11 Ind. 341.

4. *Basch v. Humboldt Mut. F. & M. Ins. Co.*, 35 N. J. L. 429. See also *infra*, this sub-

section, *Receipts in Contracts*.

may be shown at law to destroy the effect of a receipt;¹ and in accordance with this rule the party disputing a receipt may always show that it was given under a mistake as to the facts,² or in ignorance of material facts,³ or in ignorance of the legal rights surrendered thereby.⁴ So too the *prima facie* evidentiary value of a receipt may be overcome by showing that it was procured by fraud,⁵ duress,⁶ or undue influence,⁷ and that its recitals are not true, or that it was without consideration,⁸ or that it has been rescinded by agreement.⁹

When Unexplained. — In accordance with the rule that in the absence of rebutting proof *prima facie* evidence establishes that which it tends to prove,¹⁰ a receipt remaining uncontradicted and unexplained is conclusive evidence of

1. Where Equity Would Set Aside Contract. — Fuller v. Crittenden, 9 Conn. 401, 23 Am. Dec. 364; Tarver v. Rankin, 3 Ga. 210.

2. Mistake as to Facts. — England. — Thompson v. Vanfort, 1 Prec. Ch. 182.

United States. — Michoud v. Girod, 4 How. (U. S.) 503; Cornell Steam-Boat Co. v. The H. L. Dayton, 38 Fed. Rep. 927. See also Thompson v. Faussat, Pet. (C. C.) 182.

Arkansas. — Burton v. Merrick, 21 Ark. 358.

Colorado. — Guldager v. Rockwell, 14 Colo. 459.

Connecticut. — Fuller v. Crittenden, 9 Conn. 401, 23 Am. Dec. 364; Kane v. Morehouse, 46 Conn. 305.

Delaware. — Nicholson v. Frazier, 4 Harr. (Del.) 206.

Georgia. — Tarver v. Rankin, 3 Ga. 210; Stamper v. Hayes, 25 Ga. 546.

Indiana. — Markel v. Spitler, 28 Ind. 488.

Kansas. — Clark v. Marbourg, 33 Kan. 471.

Louisiana. — Gray v. Lonsdale, 10 La. Ann. 749.

Maryland. — Viridin v. Stockbridge, 74 Md. 481.

Massachusetts. — Bridge v. Gray, 14 Pick. (Mass.) 55, 25 Am. Dec. 358.

New Hampshire. — Gleason v. Sawyer, 22 N. H. 85.

New Jersey. — Elwell v. Lesley, 7 N. J. L. 349.

New York. — Ensign v. Webster, 1 Johns. Cas. (N. Y.) 145, 1 Am. Dec. 108.

North Carolina. — Reid v. Reid, 2 Dev. L. (13 N. Car.) 247, 18 Am. Dec. 570.

Pennsylvania. — Moore v. Com., 8 Pa. St. 260; Gue v. Kline, 13 Pa. St. 60; Russell v. Pottsville First Presb. Church, 65 Pa. St. 9; Shoemaker v. Stiles, 102 Pa. St. 549; Harris v. Hay, 111 Pa. St. 562.

South Carolina. — Clarke v. Deveau, 1 S. Car. 172; McDowall v. Lemaitre, 2 McCord L. (S. Car.) 320; Union Bank v. Sollee, 2 Strobb. L. (S. Car.) 390.

West Virginia. — Ruby v. Chesapeake, etc., R. Co., 8 W. Va. 269.

Mistake in Amount Acknowledged May Be Shown. — Terst v. O'Neal, 108 Ala. 250; Cannon v. Kinney, 3 Harr. (Del.) 317.

3. Ignorance of Fact. — Cornell Steam-Boat Co. v. The H. L. Dayton, 38 Fed. Rep. 927; Anderson v. Armstead, 69 Ill. 452; Brewer v. Vanarsdale, 6 Dana (Ky.) 207.

4. Ignorance of Legal Rights. — Thompson v. Faussat, Pet. (C. C.) 182; Nicholson v. McGuire, 4 Cranch (C. C.) 194; Rued v. Cooper, 119 Cal. 463; Perea v. Barela, 5 N. Mex. 458;

Moore v. Com., 8 Pa. St. 260. Compare Whitman v. The Ship Neptune, 1 Pet. Adm. 180.

5. Fraud. — England. — Skaife v. Jackson, 3 B. & C. 421, 10 E. C. L. 137; Farrar v. Hutchinson, 1 Per. & Dav. 437.

United States. — Thompson v. Faussat, Pet. (C. C.) 183; Nicholson v. McGuire, 4 Cranch (C. C.) 194.

Arkansas. — Humphries v. McCraw, 5 Ark. 61.

Colorado. — Guldager v. Rockwell, 14 Colo. 459.

Georgia. — Tarver v. Rankin, 3 Ga. 210.

Kansas. — Missouri Pac. R. Co. v. Lovelace, 57 Kan. 195.

Kentucky. — Lyme v. Beall, 7 Dana (Ky.) 420.

Louisiana. — Gray v. Lonsdale, 10 La. Ann. 749.

Maryland. — Pheland v. Crosby, 2 Gill (Md.) 462; Trisler v. Williamson, 4 Har. & M. (Md.) 219, 1 Am. Dec. 396.

Massachusetts. — Clapp v. Tirrell, 20 Pick. (Mass.) 247.

New Hampshire. — Gleason v. Sawyer, 22 N. H. 85.

New Jersey. — Snyder v. Findley, 1 N. J. L. 57; Cole v. Taylor, 22 N. J. L. 59.

New York. — Van Nest v. Talmage, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 99.

Pennsylvania. — Moore v. Com., 8 Pa. St. 260; Hamsher v. Kline, 57 Pa. St. 397; Berryhill's Appeal, 35 Pa. St. 245; McGrann v. Pittsburgh, etc., R. Co., 111 Pa. St. 171; Harris v. Hay, 111 Pa. St. 562.

South Carolina. — Clark v. Deveau, 1 S. Car. 172.

See also *infra*, this subsection, *Receipts in Full*.

6. Duress. — Livingston's Case, 3 Ct. Cl. 131; Rourke v. Story, 4 E. D. Smith, (N. Y.) 54; Thomas v. M'Daniel, 14 Johns. (N. Y.) 185. See also Whiteman v. The Ship Neptune, 1 Pet. Adm. 180; Parmentier v. Pater, 13 Oregon 121.

7. Undue Influence. — Mitchell v. Pratt, Taney (U. S.) 448; Lyme v. Beall, 7 Dana (Ky.) 420; Perea v. Barela, 5 N. Mex. 458. See also Nachtrieb v. Harmony Settlement, 3 Wall. Jr. (C. C.) 66.

8. Without Consideration. — Stamper v. Hayes, 25 Ga. 546; Van Nest v. Talmage, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 99; Shaw v. Thompson, Olc. Adm. 144.

9. Rescission by Agreement. — Van Nest v. Talmage, (Supm. Ct. Gen. T.) 17 Abb. Pr. (N. Y.) 99.

10. Lyons v. Williams, 15 Ill. App. 27.

what it contains,¹ and cannot be ignored.²

Necessity for Convincing Evidence in Contradiction or Explanation. — It has been frequently said by the courts that in order to overcome the *prima facie* probative effect of a receipt, the evidence must be clear and convincing, and must not rest on mere impressions.³ There is not, however, any rule in respect to receipts different from that applicable to any other *prima facie* evidence. To destroy its effect it must be overbalanced by other evidence laid before the jury, which is to judge whether there is such a preponderance. No rule can be laid down as to either the kind or quantity of evidence which ought to outweigh the receipt.⁴

Burden of Proof. — Where a receipt is properly introduced in evidence, the burden of proof to contradict or explain such receipt rests upon the party disputing it.⁵

Rule Where Evidence of Equal Weight. — Where the evidence supporting and that impeaching a receipt are balanced, the receipt must have its *prima facie* effect.⁶

1. Receipt Unexplained Is Conclusive — *United States*. — Moore *v.* The Steamboat Fashion, Newb. Adm. 49; Palmer *v.* Priest, 1 Sprague (U. S.) 512.

Arkansas. — Burton *v.* Merrick, 21 Ark. 358.

Illinois. — Vigus *v.* O'Bannon, 118 Ill. 334;

Nielsen *v.* U. S. Rolling Stock Co. 37 Ill. App. 283.

Indiana. — Chandler *v.* Schoonover, 14 Ind. 324.

Kansas. — Scandinavian Coal, etc., Co. *v.* Whittaker, 40 Kan. 123.

Kentucky. — Whittemore *v.* Stout, 3 Dana (Ky.) 429.

Maine. — Cunningham *v.* Batchelder, 32 Me. 316.

Maryland. — Brooke *v.* Quynn, 13 Md. 379.

New Hampshire. — Gleason *v.* Sawyer, 22 N. H. 85.

New York. — Riley *v.* New York, 96 N. Y. 331; Lambert *v.* Seely, (C. Pl. Gen. T.) 17 How. Pr. (N. Y.) 432; Burns *v.* Walsh, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 699.

South Carolina. — McDowall *v.* Lemaitre, 2 McCord L. (S. Car.) 320.

Texas. — Stachely *v.* Peirce, 28 Tex. 328.

See also *infra*, this subsection, *Receipts in Full*.

2. Effect Must Be Given to Receipt. — New Jersey Flax Cotton Wool Co. *v.* Mills, 26 N. J. L. 60. See also Harris *v.* Hay, 111 Pa. St. 562.

3. Testimony to Invalidate Must Be Convincing — *United States*. — U. S. *v.* Jones, 8 Pet. (U. S.) 399; Harden *v.* Gordon, 2 Mason (U. S.) 561.

Colorado. — Guldager *v.* Rockwell, 14 Colo. 459.

Illinois. — Winchester *v.* Grosvenor, 44 Ill. 425; Rosenmueller *v.* Lampe, 89 Ill. 212, 31 Am. Rep. 74; Vigus *v.* O'Bannon, 118 Ill. 334; Neal *v.* Handley, 116 Ill. 418, 56 Am. Rep. 784; Ennis *v.* Pullman Palace Car. Co., 165 Ill. 161.

Indiana. — Chandler *v.* Schoonover, 14 Ind. 324.

Maryland. — Hellwig *v.* Benzinger, (Md. 1891) 22 Atl. Rep. 265.

Missouri. — Gibson *v.* Hanna, 12 Mo. 162.

New Jersey. — Gibbons *v.* Potter, 30 N. J. Eq. 204.

New York. — Robert *v.* Garnie, 3 Cai. (N. Y.) 14.

Pennsylvania. — Chapman *v.* Camden, etc., R. Co., 7 Phila. (Pa.) 204; Harris *v.* Hay, 111 Pa. St. 562; *In re Rhoads*, 189 Pa. St. 462.

South Carolina. — McDowall *v.* Lemaitre, 2 McCord L. (S. Car.) 320.

Canada. — Montgomery *v.* Hart, 11 Nova Scotia 533.

Where a Mistake Is Relied On to Invalidate a Receipt the jury should require the party disputing its validity to show how the mistake arose or in what respect it exists; as by fraud, accident, error in calculation, collusion, etc. Nicholson *v.* Frazier, 4 Harr. (Del.) 206.

The Natural Presumption is in favor of a receipt, and that presumption will prevail until it is displaced by direct proof or strong circumstances. Harden *v.* Gordon, 2 Mason (U. S.) 541; Cunningham *v.* Batchelder, 32 Me. 316.

4. Gleason *v.* Sawyer, 22 N. H. 85.

5. Burden of Proof on Party Disputing Receipt — *United States*. — Moore *v.* The Steamboat Fashion, Newb. Adm. 49; U. S. *v.* Jones, 8 Pet. (U. S.) 399; Thompson *v.* Faussat, Pet. (C. C.) 182.

Alabama. — Scruggs *v.* Bibb, 33 Ala. 481.

Colorado. — Guldager *v.* Rockwell, 14 Colo. 459.

Delaware. — Nicholson *v.* Frazier, 4 Harr. (Del.) 206.

Illinois. — Winchester *v.* Grosvenor, 44 Ill. 425; Vigus *v.* O'Bannon, 118 Ill. 334.

Indiana. — Moore *v.* Korty, 11 Ind. 341.

Louisiana. — Gray *v.* Lonsdale, 10 La. Ann. 749.

New Jersey. — Gibbons *v.* Potter, 30 N. J. Eq. 204.

Pennsylvania. — *In re Rhoads*, 189 Pa. St. 462; Chapman *v.* Camden, etc., R. Co., 7 Phila. (Pa.) 204.

South Carolina. — Union Bank *v.* Sollee, 2 Strobb. L. (S. Car.) 390.

Vermont. — Stephens *v.* Thompson, 28 Vt. 77.

Canada. — Baylis *v.* Stanton, 2 Dorion (Quebec) 350.

See *infra*, this subsection, *Receipts in Full*.

6. Receipt Must Stand Where Evidence of Equal Weight. — Ennis *v.* Pullman Palace Car Co., 165 Ill. 161; Levi *v.* Karrick, 13 Iowa 344; Borden *v.* Hope, 21 La. Ann. 581.

(2) *Questions for Jury* — *Genuineness of Receipt*. — It is for the jury to determine whether or not a receipt offered in evidence is the genuine receipt of the person by whom it purports to have been executed.¹ Likewise it is the function of the jury to determine from the evidence what was the purpose, intention, and understanding of the parties in giving and accepting the receipt, and to give it effect in accordance therewith.²

Where a Mistake Is Alleged. — The jurors must judge whether the evidence submitted is sufficient to satisfy them of the mistake in the receipt, in which case they may correct it according to the truth; otherwise they must take it to be true.³

The Questions What an Attempted Explanation Does Prove, and whether the party disputing a receipt has successfully carried the burden of so explaining or contradicting it as to overcome its force, are for the jury and not for the court.⁴

b. RECEIPTS IN FULL — *Prima Facie Defense*. — It may be stated as a general rule that a receipt in full of all demands is of itself *prima facie* evidence of a mutual settlement and satisfaction of all demands between the parties,⁵ and

1. *Genuineness of Receipt*. — *Nicholson v. Frazier*, 4 Harr. (Del.) 206.

Where Court Is Trier of Fact. — *Aday v. Echols*, 18 Ala. 353, 52 Am. Dec. 225.

See also the titles EXECUTION AND PROOF OF DOCUMENTS, vol. 11, p. 585; FORGERY, vol. 13, p. 1113.

Where the integrity of the recitals of a receipt or the genuineness of the signature thereto is in issue in a civil action, it is to be determined, like other proofs, upon the preponderance of the evidence. *Snodgrass v. Nelson*, 48 Ill. App. 121.

2. *Intention Question for Jury*. — *City Bank v. Kent*, 57 Ga. 283; *Herkimer v. Nigh*, 10 Ill. App. 372; *Daniels v. Burso*, 40 Ill. 307; *Duncan v. Grant*, 87 Me. 429; *Steamboat Charlotte v. Hammond*, 9 Mo. 59, 43 Am. Dec. 536; *O'Hehir v. Middletown-Goshen Traction Co.*, (Supm. Ct. Gen. T.) 36 N. Y. Supp. 140; *Shepherd v. Busch*, 154 Pa. St. 149, 35 Am. St. Rep. 815; *Orton v. Noonan*, 25 Wis. 672.

It is the province of the jury to determine from conflicting evidence whether or not a receipt was intended to embrace or did embrace the claim sued on. *Burton v. Merrick*, 21 Ark. 358; *Bartholomew v. Bartholomew*, 18 Ill. 326; *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95.

3. *Cannon v. Kinney*, 3 Harr. (Del.) 317; *State v. Robinson*, 2 Harr. (Del.) 5.

4. *Jury Must Determine Whether Explanation Sufficient* — *Alabama*. — *Scruggs v. Bibb*, 33 Ala. 481.

Georgia. — *City Bank v. Kent*, 57 Ga. 283; *Mallard v. Moody*, 105 Ga. 400.

Illinois. — *Herkimer v. Nigh*, 10 Ill. App. 372.

Indiana. — *Beedle v. State*, 62 Ind. 26.

Iowa. — *Smith v. Cedar Falls, etc.*, R. Co., 30 Iowa 244.

New Hampshire. — *Gleason v. Sawyer*, 22 N. H. 85.

New Jersey. — *Cole v. Taylor*, 22 N. J. L. 59.

New York. — *Hannon v. Gallagher*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 347.

Pennsylvania. — *McGrann v. Pittsburgh, etc.*, R. Co., Ill. Pa. St. 171.

Texas. — *Bell v. McDonald*, 9 Tex. 378.

5. *Prima Facie Defense* — *United States*. — *Thompson v. Faussat, Pet.* (C. C.) 182; *Law-*

rence v. Schuylkill Nav. Co., 4 Wash. (U. S.) 562.

Alabama. — *Scruggs v. Bibb*, 33 Ala. 481.

Arkansas. — *Burton v. Merrick*, 21 Ark. 358.

California. — *Matter of Sarmant*, 123 Cal.

331.

Delaware. — *State v. Robinson*, 2 Harr. (Del.) 5.

Illinois. — *Marston v. Wilcox*, 2 Ill. 270;

Walrath v. Norton, 10 Ill. 437; *Neal v. Hand-*

ley, 116 Ill. 418, 56 Am. Rep. 784; *Ennis v.*

Pullman Palace Car Co., 165 Ill. 161; *Frink v.*

Bolton, 15 Ill. 343.

Iowa. — *Levi v. Karrick*, 13 Iowa 344.

Kansas. — *Scandinavian Coal, etc., v. Whit-*

taker, 40 Kan. 123.

Kentucky. — *Newton v. Field*, 98 Ky. 186.

Maine. — *Cunningham v. Batchelder*, 32

Me. 316.

Maryland. — *Virdin v. Stockbridge*, 74 Md.

481.

Michigan. — *Houghton v. Ross*, 54 Mich.

335.

Minnesota. — *Cappis v. Wiedemann*, (Minn.

1902) 90 N. W. Rep. 368.

Missouri. — *Gibson v. Hanna*, 12 Mo. 162.

Compare Grumley v. Webb, 44 Mo. 444, 100

Am. Dec. 304, 48 Mo. 562.

New Hampshire. — *Gleason v. Sawyer*, 22

N. H. 85.

New York. — *Burns v. Walsh* (C. Pl. Gen.

T.) 10 Misc. (N. Y.) 699; *Rourke v. Story*, 4

E. D. Smith (N. Y.) 54; *Danziger v. Hoyt*, 46

Hun (N. Y.) 270, 120 N. Y. 190.

North Carolina. — *Reid v. Reid*, 2 Dev. L.

(13 N. Car.) 247, 18 Am. Dec. 570.

Pennsylvania. — *Keim v. Kaufman*, 15 Pa.

Co. Ct. 539; *Hamsher v. Kline*, 57 Pa. St. 397;

Harris v. Hay, 111 Pa. St. 562, *In re Rhoads*,

189 Pa. St. 460.

South Carolina. — *McDowall v. Lemaitre*, 2

McCord L. (S. Car.) 320.

Vermont. — *Paige v. Perno*, 10 Vt. 491; *Guy-*

ette v. Bolton, 46 Vt. 228; *Sparhawk v. Buell*,

9 Vt. 41.

West Virginia. — *Ruby v. Chesapeake, etc.*,

R. Co., 8 W. Va. 269.

Effect on Note Not Due at Time of Giving. —

A receipt in full of all demands to date is

prima facie evidence of the payment of a note

owed to the receptor by the person to whom

casts upon the opposite party the burden of explaining it or in some way destroying its effect as evidence.¹ Like other receipts it is subject to explanation or contradiction by extraneous evidence.² If, however, a receipt in full contains anything in the nature of an agreement, upon the compromise or

the receipt is given, though the note was not due at the time of giving the receipt. *Cash v. Freeman*, 35 Me. 483.

Where Payment Is Made by a Check Which Recites on Its Face "In Full of All Demands," such words will constitute a receipt in full, as against the payee, only when it is shown that he had knowledge of the presence of such words, or when facts are shown which in law would charge him with such knowledge. *Rapp v. Giddings*, 4 S. Dak. 492.

1. Burden of Proof on Opposite Party. — *Levi v. Karrick*, 13 Iowa 344; *Patterson v. Ackerson*, 2 Edw. (N. Y.) 427; *In re Rhoads*, 189 Pa. St. 460; *Guyette v. Bolton*, 46 Vt. 228; *Stephens v. Thompson*, 28 Vt. 77. See also cases in the preceding note, and see *supra*, this subdivision, *Conclusiveness of Receipts*.

2. Not Conclusive — *England*. — *Middleditch v. Sharland*, 5 Ves. Jr. 87; *Benson v. Bennett*, 1 Campb. 394, note.

Canada. — *Bennett v. Murray*, 5 Nova Scotia 614.

United States. — *Harden v. Gordon*, 2 Mason (U. S.) 561; *Thompson v. Faussat*, Pet. (C. C.) 182; *Sutton v. The Albatross*, 2 Wall. Jr. (C. C.) 327; *Cornell Steam-Boat Co. v. The H. L. Dayton*, 38 Fed. Rep. 927.

Arkansas. — *Burton v. Merrick*, 21 Ark. 358.

Delaware. — *State v. Robinson*, 2 Harr. (Del.) 5.

Georgia. — *Dodd v. Mayson*, 39 Ga. 605; *City Bank v. Kent*, 57 Ga. 283; *Armour v. Ross*, 110 Ga. 403. *Compare Tarver v. Rankin*, 3 Ga. 210.

Illinois. — *Bennett v. Hanifin*, 87 Ill. 31; *Culver v. Belt*, 72 Ill. App. 619; *Frink v. Bolton*, 15 Ill. 343.

Indiana. — *Pauley v. Weisart*, 59 Ind. 241; *Beedle v. State*, 62 Ind. 26.

Iowa. — *Smith v. Cedar Falls, etc.*, R. Co., 30 Iowa 244.

Kansas. — *St. Louis, etc., R. Co. v. Davis*, 35 Kan. 464; *Clark v. Marbourg*, 33 Kan. 471.

Kentucky. — *Newton v. Field*, 98 Ky. 186; *Illinois Cent. R. Co. v. Manion*, (Ky. 1902) 67 S. W. Rep. 40.

Maine. — *Cunningham v. Batchelder*, 32 Me. 316; *Duncan v. Grant*, 87 Me. 429.

Maryland. — *Hughes v. O'Donnell*, 2 Har. & J. (Md.) 324; *Jones v. Ricketts*, 7 Md. 108; *Virdin v. Stockbridge*, 74 Md. 481.

Massachusetts. — *Brooks v. White*, 2 Met. (Mass.) 283, 37 Am. Dec. 95; *Nelson v. Weeks*, 111 Mass. 223.

Michigan. — *Michigan Cent. R. Co. v. Dunham*, 30 Mich. 128; *Houghton v. Ross*, 54 Mich. 335. *Compare Pratt v. Castle*, 91 Mich. 484.

Minnesota. — *Cummings v. Baars*, 36 Minn. 350; *Morris v. St. Paul, etc., R. Co.*, 21 Minn. 91; *Cappis v. Wiedemann*, (Minn. 1902) 90 N. W. Rep. 368.

Missouri. — *Gibson v. Hanna*, 12 Mo. 162; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304, 48 Mo. 562.

New Hampshire. — *Gleason v. Sawyer*, 22 N. H. 85.

New Jersey. — *Cole v. Taylor*, 22 N. J. L. 59.

New York. — *Patterson v. Ackerson*, 2 Edw. (N. Y.) 427; *Rourke v. Story*, 4 E. D. Smith (N. Y.) 54; *McDougall v. Cooper*, 31 N. Y. 498; *Ensign v. Webster*, 1 Johns. Cas. (N. Y.) 145, 1 Am. Dec. 108; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Tobey v. Barber*, 5 Johns. (N. Y.) 68, 4 Am. Dec. 326; *Burns v. Walsh*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 699; *Jones v. Rice* (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 357; *Hannon v. Gallagher*, (N. Y. City Ct. Gen. T.) 19 Misc. (N. Y.) 347; *Swanson v. White*, 55 N. Y. App. Div. 631, 66 N. Y. Supp. 787; *Boardman v. Gaillard*, 60 N. Y. 614.

North Carolina. — *Reid v. Reid*, 2 Dev. L. (13 N. Car.) 247, 18 Am. Dec. 570.

Pennsylvania. — *Keim v. Kaufman*, 15 Pa. Co. Ct. 539; *Horton's Appeal*, 38 Pa. St. 294; *Hamsher v. Kline*, 57 Pa. St. 397; *In re Rhoads*, 189 Pa. St. 460.

South Carolina. — *Hogg v. Brown*, 2 Brev. (S. Car.) 223; *McDowall v. Lemaitre*, 2 McCord L. (S. Car.) 320.

Vermont. — *Sparhawk v. Buell*, 9 Vt. 41; *McDaniels v. Lapham*, 21 Vt. 222.

West Virginia. — *Ruby v. Chesapeake, etc.*, R. Co., 8 W. Va. 269.

Wisconsin. — *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21. *Compare Conant v. Kimball*, 95 Wis. 550.

See also citations in the two preceding notes.

Ignorance of Fact. — A receipt reciting a payment "in full settlement of all demands of every kind and nature" does not discharge the debtor from liability for goods sold and delivered to him by the creditor which neither of the parties, at the time the receipt was given, knew had been delivered. *Bloomington Min. Co. v. Brooklyn Hygienic Ice Co.*, 58 N. Y. App. Div. 66.

Consideration. — Although a receipt in full is given with knowledge, and there is no error, fraud, or mistake, yet if there is sufficient proof that no consideration was given, the receipt will not sustain the defense of payment. *Kenny v. Kane*, 50 N. J. L. 562.

It Was Held by an Early English Decision that a receipt in full of all demands, when given with complete knowledge of all the circumstances, is a conclusive bar to an action, and that the party giving it should not be allowed to rip up the transaction so closed and concluded. *Bristow v. Eastman*, 1 Esp. 172, *criticised* in *Bennett v. Murray*, 5 Nova Scotia 614. See also *Alner v. George*, 1 Campb. 393.

In Connecticut the rule is well settled that a receipt in full will operate like a discharge to defeat any further claim by the party giving it, unless it is given under such circumstances of mistake, accident, or surprise, or is procured by such fraud, as will authorize a court of equity to set it aside, and that such facts may be given in evidence in a court of law to

settlement of disputed claims, that one of the parties shall accept and receive from the other a certain sum in satisfaction and discharge of a claim, then the paper signed becomes and is a contract between them and must be treated as such; it cannot be varied or contradicted by parol, but is binding and conclusive upon the parties in the absence of fraud or mistake.¹

Receipt in Full as Evidence of Accord and Satisfaction. — The payment by a debtor, where the debt is liquidated and undisputed, of a sum less than that due, even though the creditor has agreed to accept such sum in satisfaction of the whole claim, is not a conclusive bar to the recovery of the unpaid balance; hence a receipt in full when the whole amount has not been paid is not conclusive, but, as hereinbefore stated, is merely *prima facie* evidence of the payment of the debt.² If the claim is unliquidated and disputed, it is competent for the parties to agree on a sum which shall be paid on the one hand and accepted on the other in settlement of the claim.³ Obviously, where a receipt in full is given in pursuance of such an agreement and with knowledge of all the circumstances, it is, in the absence of fraud or mistake, a conclusive settlement of the claim, not because the receipt as such is conclusive, but because the whole transaction constitutes an accord and satisfaction of which the receipt is evidence.⁴ So where one gives a receipt in full of all demands, knowing that the debtor claims the amount paid to be all that is due, it amounts to an accord and satisfaction.⁵ And where the receptor knows that a tender of a sum is made on condition that it shall be accepted as full payment, the signing and delivery of the receipt is an acceptance by him of the condition.⁶

c. RECEIPTS IN CONTRACTS. — The effect of recitals in contracts acknowledging the payment of the consideration thereof is treated elsewhere in this work.⁷

V. QUESTION OF RECEIPTS AS ESTOPPEL. — A receipt may, when acted upon by third parties without knowledge of the facts, and to their prejudice, estop the party who gave it from denying its purport.⁸ But as against third per-

destroy its evidentiary value. *Fuller v. Crittenden*, 9 Conn. 401, 23 Am. Dec. 364; *Hurd v. Blackman*, 19 Conn. 177; *Bonnell v. Chamberlin*, 26 Conn. 487; *Tucker v. Baldwin*, 13 Conn. 136, 33 Am. Dec. 384. See also *Beam v. Barnum*, 21 Conn. 200; *Kane v. Morehouse*, 46 Conn. 300.

Such receipt in full will discharge the whole debt though given for a payment that was in itself but a part of the entire debt. *Aborn v. Rathbone*, 54 Conn. 444.

Colorado. — A receipt executed with a full knowledge of all the circumstances, and without mistake or surprise on the one part or fraud or imposition on the other, is a good defense to the claim. *Guldager v. Rockwell*, 14 Colo. 459.

1. Compromise. — *Squires v. Amherst*, 145 Mass. 192; *Goss v. Ellison*, 136 Mass. 503; *Cummings v. Baars*, 36 Minn. 350; *Komp v. Raymond*, 42 N. Y. App. Div. 35; *Coon v. Knap*, 8 N. Y. 402, 59 Am. Dec. 502; *Egleston v. Knickerbacker*, 6 Barb. (N. Y.) 458; *Ryan v. Ward*, 48 N. Y. 204, 8 Am. Rep. 539; *Kellogg v. Richards*, 14 Wend. (N. Y.) 116; *Keim v. Kaufman*, 15 Pa. Co. Ct. 539. See also *Brown v. Cambridge*, 3 Allen (Mass.) 474; *Morris v. St. Paul*, etc., R. Co., 21 Minn. 91.

Fraud can be shown to vitiate a receipt which recites that it is given "on compromise in full of all claims and demands." *Horton's Appeal*, 38 Pa. St. 294.

2. See the title **ACCORD AND SATISFACTION**, vol. 1, pp. 413-415.

3. See the title **ACCORD AND SATISFACTION**, vol. 1, pp. 419, 420.

4. Receipt Evidence of Accord and Satisfaction. — *Lawrence v. Schuyllkill Nav. Co.*, 4 Wash. (U. S.) 562; *Thompson v. Faussat, Pet. (C. C.)* 182; *Springfield, etc., R. Co. v. Allen*, 46 Ark. 217; *St. Louis Southwestern R. Co. v. Selman*, 62 Ark. 342; *Rosenmueller v. Lampe*, 89 Ill. 212, 31 Am. Rep. 74; *Small v. Sumner*, 6 Gray (Mass.) 239; *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687; *Green v. Rochester Iron Mfg. Co.*, 1 Thomp. & C. (N. Y.) 5. See also *Gleason v. Sawyer*, 22 N. H. 85; *Holbrook v. Blodget*, 5 Vt. 520.

5. *Tanner v. Merrill*, 108 Mich. 58, 62 Am. St. Rep. 687. Compare *American Bridge Co. v. Murphy*, 13 Kan. 35.

6. Receipt Evidences Acceptance of Condition. — *Price v. Treat*, 29 Neb. 536.

7. See the title **CONSIDERATION**, vol. 6, pp. 760, 765, 778.

Insurance Premiums. — As to acknowledgment of payment of premiums in insurance policies, see the titles **INSURANCE**, vol. 16, pp. 960, 961; **MARINE INSURANCE**, vol. 19, p. 979.

8. Receipt as Estoppel When Acted On Without Knowledge. — *Wyatt v. Hertford*, 3 East 147; *Turner v. Flinn*, 72 Ala. 532; *San Luis Obispo County v. Pettit*, 100 Cal. 442; *Carr v. Miner*, 42 Ill. 179; *Atkins v. Payne*, 190 Pa. St. 5.

sons the party signing a receipt is not estopped to question it where he is himself without fault, as where his signature was procured by fraud or false representations as to the nature of the instrument.¹

RECEIVE — RECEIVING, ETC. — To receive means to get by a transfer; as, to receive a gift; to receive a letter; to receive money.²

See also *Union Bank v. Sollee*, 2 Strobb. L. (S. Car.) 390. And see the title *ESTOPPEL*, vol. 11, p. 385.

Where a Vendor of Property Gives to a Known Agent of the purchaser a receipt in full for the purchase money, and the purchaser in good faith, relying on the truth and validity of the receipt, pays the amount to the agent, the vendor is estopped from denying the truth of the receipt to the prejudice of the purchaser. *Miller v. Sullivan*, 26 Ohio St. 639.

Receipts for Purchase Money may bind the party receipting as to purchasers without notice, and yet be open to explanation between the parties. *Bickerton v. Walker*, 31 Ch. D. 151. See generally the title *PURCHASERS FOR VALUE AND WITHOUT NOTICE*, *ante*.

Receipt to Sheriff as an Estoppel. — See the title *ESTOPPEL*, vol. 11, p. 445.

A Party Accepting a Receipt for Money Paid Which He Knows He Has Not Paid cannot set up such receipt as an estoppel against the party giving it. *Brown v. Massachusetts Mut. L. Ins. Co.*, 59 N. H. 298, 47 Am. Rep. 205.

1. *Gillett v. Wiley*, 126 Ill. 310, 9 Am. St. Rep. 587; *Travellers' Ins. Co. v. Chappelow*, 83 Ind. 429. See also the title *ESTOPPEL*, vol. 11, p. 385.

2. **Receive — Transfer.** — *Hallenbeck v. Getz*, 63 Conn. 388.

Received in Sense of Receivable. — *Bigelow v. Ames*, 18 Minn. 527.

Accept and Receive Distinguished. — See *Thompson v. Douglass*, 35 W. Va. 346; *Bacon v. Eccles*, 43 Wis. 237; *Bullock v. Stcherge*, 4 McCrary (U. S.) 187. And see *ACCEPT*, vol. 1, p. 245.

Same — Receive Bid. — A resolution of a county board of supervisors accepted the plans of an architect for a jail, upon condition that it should *receive* a bid from a reliable party who would give sufficient bonds to erect the jail in conformity with the plans for a specified sum. It was held that the word *receive*, in this connection, was not equivalent to "accept," and that the condition was satisfied if the board found a reliable party who was willing to give the bond and do the work, although it refused his bid. *Hall v. Los Angeles County*, 74 Cal. 502.

Approved. — In *Mixon v. Clevenger*, 74 Miss. 73, it was held that the entry of an order by the board of supervisors that the real-estate assessment roll for a certain year should "be *received* as corrected" sufficiently showed an approval of the roll by the board. The court said: "The word *received*, as here used, cannot have its primary significance, for the former order of the board shows that the roll had already passed into its custody, that it had accepted it from the assessor and taken it up for examination, as required by law." See also *Grayson v. Richardson*, 65 Miss. 222, set out under *APPROVE* — *APPROVER* — *APPROVEMENT*, vol. 2, p. 521, note.

Bought. — See *Schultz v. Coon*, 51 Wis. 418, 37 Am. Rep. 839, stated under *BOUGHT*, vol. 4, p. 750, note, and see generally the title *RECEIPTS*, *ante*.

Charging. — See *Hallenback v. Getz*, 63 Conn. 385, stated under the title *PAWN AND PAWN-BROKER*, vol. 22, p. 509.

Authority to Indorse Not Implied from Authority to Receive. — See the title *AGENCY*, vol. 1, p. 1030.

Receiving Cotton. — In *Reese v. State*, 73 Ala. 18, it was held that an agent of a mortgagee who *received* seed cotton, conveyed by the mortgage, from the mortgagor for his principal after the hour of sunset and before sunrise was guilty under the provisions of the statute making it a misdemeanor to buy, sell, *receive*, barter, or dispose of any cotton within those hours.

Fraudulent Conveyances. (See also the title *FRAUDULENT SALES AND CONVEYANCES*, vol. 14, p. 210.) — The term *received*, as used in a statute against fraudulent conveyances which was worded as follows: "Any one suspected of having fraudulently *received*," etc., "any of the money, goods, effects, or other estate," etc., was held to apply to the obtaining of real estate as well as personal property. *Harlow v. Tufts*, 4 Cush. (Mass.) 453.

Receive and Have. — See *HAVE, HAVING, ETC.*, vol. 15, p. 287.

Received Payment. (See the titles *BILLS OF EXCHANGE AND PROMISSORY NOTES*, vol. 4, p. 65; *PAYMENT*, vol. 22, p. 513; *RECEIPTS*, *ante*; *TENDER*.) — Where the payee of a note, before acceptance of notice or its dishonor, indorsed it "*received payment*," it was held that there was no presumption that the note had been paid. *Flint First Nat. Bank v. Union Cent. L. Ins. Co.*, 107 Mich. 543.

Receiving and Paying Money. — By statute a sheriff was entitled to certain fees for "*receiving and paying money*" to an execution plaintiff. It was held that the sheriff was not entitled to a commission where no sale was made or money paid upon the writ, but the plaintiff satisfied the judgment upon the delivery to him of security for the debt, interest, and costs in full. *Irvin v. Jones*, 16 Pa. Co. Ct. 97, 3 Pa. Dist. 782.

Received into Record. (See also the title *RECORDS*.) — In *Pawlet v. Sandgate*, 17 Vt. 619, it was held that an indorsement upon a paper that it had been *received* into record was not a compliance with a statute which required it to be recorded; the record must be made by actually transcribing the paper into a book kept for that purpose.

Received and Remitted. — See *Holmes v. Gayle*, 1 Ala. 520.

Receive and Retain Distinguished. — In *Swann v. Josselyn*, 14 Smed. & M. (Miss.) 115, it was said: "To *receive* is not to retain, but it implies payment by some other person. The word 'retain' has a very different meaning, to wit, to hold that which one already has."

RECEIVER OF PUBLIC MONEY.— See note 1.

Receive and Sale Distinguished.— A statute made it a misdemeanor to sell to, buy from, or *receive* from a slave any article or commodity, etc. In construing this statute the court said: "The word *receive*, we apprehend, was inserted to obviate the difficulty of proving, in many cases, an actual sale. It is much more comprehensive than the word 'sale.' Its meaning, in this section, is 'to take, as a thing offered; to accept.'" *Shuttleworth v. State*, 35 Ala. 417.

Shipped.— Where a charter-party provided that the bills of lading should be conclusive evidence of the amount of cargo *received*, the word *received* was held to mean "shipped on board." *Lishman v. Christie*, 19 Q. B. D. 333, which, as nearly as possible, *overrules* *Pyman v. Burt*, 1 Cab. & El. 207.

Receiving — Taking — Having.— The word *receiving* in a bequest "in trust for the benefit of said L. during her life, *receiving* her annual interest and income therefrom, the said share to be securely invested as soon as declared, and after her death to be equally divided between her children," was held to mean nothing more than "taking" or "having." *Baker v. Keiser*, 75 Md 339.

Receive and Take — Statute of Anne. (See also the title JOINT TENANTS AND TENANTS IN COMMON, vol. 17, p. 688.)— The statute of 4 Anne, c. 16, § 27, provides that "actions of account shall and may be brought and maintained * * * by one joint tenant and tenant in common * * * against the other, as bailiff for *receiving* more than comes to his just share or proportion," etc. In holding that this statute did not authorize a recovery by the out-tenant against the tenant in possession for the value of the mere use and occupation of the joint estate, the court, in *Henderson v. Eason*, 17 Q. B. 718, 79 E. C. L. 719, said: "Every case in which a tenant in common *receives* more than his share is within the statute, and account will lie when he does

receive, but not otherwise. It is to be observed also that the receipt of issues and profits is not mentioned, but simply the receipt of more than comes to his share; and, further, he is to account when he *receives*, not takes, more than comes to his just share." But see *Shiels v. Stark*, 14 Ga. 435; *West v. Weyer*, 46 Ohio St. 66; *Thompson v. Bostick*, McMull. Eq. (S. Car.) 75; *Hayden v. Merrill*, 44 Vt. 348.

And in *Early v. Friend*, 16 Gratt. (Va.) 47, it was said: "With all deference to the Court of Exchequer Chamber, I think the construction they put upon the word *receiving* is too technical and narrow, at least for our own country. * * * I do not see the force of the distinction drawn by that court between the words *receive* and 'take' in this connection. I think the word *receiving*, in the statute, literally means a *receiving* of profits as well by use and occupation as by renting out the property."

Receiving Will — Louisiana Code.— Article 1578 of the Civil Code of Louisiana requires a nuncupative testament by public act to be *received* by a notary public in the presence of three witnesses. It was contended by counsel that the word *received*, employed in the article, meant that the notary must in the presence of the requisite number of witnesses complete the entire testament, including the signing by testator, notary, and witnesses, but the court held that the word meant the dictation of the will in the presence of the witnesses, and the reading of it to the testator and the witnesses in the presence of each other. *Saux's Succession*, 46 La. Ann. 1426. See also *Langley v. Langley*, 12 La. 114, and see the title WILLS.

1. Receiver of Public Money.— In *U. S. v. Lee*, 2 Cranch (C. C.) 462, it was held that a public officer who received money in advance for the contingencies of his office was a *receiver of public money*, within the meaning of Act Cong. March 3, 1797.

RECEIVERS.

By ARCHIBALD R. WATSON.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 17, p. 675.

*For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BANKS AND BANKING, vol. 3, p. 849; DEBENTURES, vol. 8, p. 978; DISSOLUTION OF CORPORATIONS, vol. 9, p. 566; FOREIGN CORPORATIONS, vol. 13, p. 909; INSANITY, vol. 16, p. 577; INSOLVENCY AND BANKRUPTCY, vol. 16, pp. 699, 744; INSURANCE, vol. 16, p. 896; MUTUAL INSURANCE, vol. 21, p. 295; NATIONAL BANKS, vol. 21, p. 405; NOTICE OF PENDENCY AND LIS PENDENS, vol. 21, p. 637; RECEIVERS OF RAILROADS, *post*; SUPPLEMENTARY PROCEEDINGS.*

I. DEFINITION — 1. In General. — A receiver is an officer of the court through whom the court, by virtue of its jurisdiction, equitable or statutory, takes possession of property which is the subject of a suit, preserves it from waste or destruction, secures and collects the proceeds, and ultimately disposes of them according to the rights of those entitled thereto, whether they are regular parties in the cause or only come before the court in a seasonable

time and in the due course of proceeding to assert and establish their pretensions.¹

2. **Distinguished from Court Depositaries.** — A party with whom money is deposited subject to order of court is not, necessarily, a receiver, as the term is generally understood.²

II. NATURE OF RECEIVERSHIPS — 1. In General. — A receivership is one of the remedial agencies devised to preserve the fund or thing in question from removal beyond the jurisdiction of the court, or from spoliation, waste, or deterioration, pending the litigation, so that it may be appropriated as the final decree shall provide.³ The appointment of a receiver has accordingly been said to be "one of the modes in which the preventive justice of a court of equity is administered."⁴

2. **Receivership Provisional and Ancillary Remedy.** — Receiverships are provisional or auxiliary to the main purpose of the action, and are never resorted to for a final determination of the rights of the parties.⁵ But while it is true that, in general, a receivership is ancillary or incidental to the main purpose of the litigation, yet it does not follow that where a case is presented which demands the relief that can best be given by a receivership, such relief must be refused because the time has not arrived when other substantial relief can be afforded.⁶

3. **Appointment of Receiver as Equitable Execution.** — The appointment of a receiver has been said to be an equitable execution.⁷ By such procedure the court is able to reach only such interest in the property impounded as the creditors on whose application the receiver was appointed might have reached by execution.⁸ It will be seen that a court of equity, in taking possession of

1. *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

"A Receiver Is an Indifferent Person Between Parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this [Supreme] court, pending the suit, where it does not seem reasonable to the court that either party should do it." *Booth v. Clark*, 17 How. (U. S.) 331.

For Other Definitions, differing only in immaterial points, see *Coleman v. Ormond*, 60 Ala. 328; *Kreling v. Kreling*, 118 Cal. 421; *Baker v. Backus*, 32 Ill. 79; *Merritt v. Lyon*, 16 Wend. (N. Y.) 421; *Gadsden v. Whaley*, 14 S. Car. 210.

For Definitions of a More Restricted Character, applicable only to particular phases of a receiver's functions, see *Booth v. Clark*, 17 How. (U. S.) 331; *Ex p. Walker*, 25 Ala. 81; *Devendorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 276; *Berry v. Jones*, 11 Heisk. (Tenn.) 210; *Waters v. Carroll*, 9 Verg. (Tenn.) 102.

"A Receiver Pendente Lite," under which designation would probably come most kinds of receivers, "is a person appointed to take charge of the fund or property to which the receivership extends while the case remains undecided." *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 63.

Common-law Receiver. — This rather misleading expression has been used to designate a person appointed by the court to receive the rents, issues, and profits of land, or any other thing in question in the court of chancery, pending a suit, where it does not seem reasonable to the court that either party should do it. See *Chautauque County Bank v. White*, 6 Barb. (N. Y.) 597; also, in general, *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 452.

2. *Coleman v. Salisbury*, 52 Ga. 471.

3. **Nature of Receivership.** — *Miller v. Bowles*, 10 Nat. Bank. Reg. 515; *Matter of Cohen*, 5 Cal. 496; *Hooper v. Winston*, 24 Ill. 353; *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 277; *Myers v. Estell*, 48 Miss. 401; *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

4. *Mays v. Rose, Freem.* (Miss.) 703.

5. **A Provisional Remedy — England.** — *Cooke v. Gwyn*, 3 Atk. 690; *Hugonin v. Baseley*, 13 Ves. Jr. 105.

Kansas. — *Hottenstein v. Conrad*, 9 Kan. 435.

Maryland. — *Murdock's Case*, 2 Bland (Md.) 469, 20 Am. Dec. 381; *Duval v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350; *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63; *Ellcott v. Warford*, 4 Md. 80.

Massachusetts. — *Ellis v. Boston, etc.*, R. Co., 107 Mass. 1.

Mississippi. — *Mays v. Rose, Freem.* (Miss.) 703.

New York. — *Brown v. Northrup*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 333; *Fellows v. Heermans*, (Ct. App.) 13 Abb. Pr. N. S. (N. Y.) 5; *McCarthy v. Peake*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 140, 9 Abb. Pr. (N. Y.) 166; *Leavitt v. Yates*, 4 Edw. (N. Y.) 162.

Pennsylvania. — *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 91, 6 Phila. (Pa.) 523, 25 Leg. Int. (Pa.) 93.

6. *Brassey v. New York, etc.*, R. Co., 19 Fed. Rep. 669.

7. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Kreling v. Kreling*, 118 Cal. 421; *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117; *Hunt v. Wolfe*, 2 Daly (N. Y.) 303; *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

8. *Longfellow v. Barnard*, 58 Neb. 612, 76 Am. St. Rep. 117.

property by its receiver, reverses, in great measure, the ordinary course of justice, thereby making a general instead of a specific appropriation of the property, subsequently determining who is entitled to the benefit of its *quasi* process.¹

4. Appointment as Equitable Assignment. — It has been held that, in an action to dissolve a partnership, the appointment of a receiver to take charge of the firm assets, collecting the debts due to and paying those due from the firm, operates as an equitable assignment for the benefit of the firm's creditors.²

III. OBJECT AND PURPOSE OF APPOINTMENT. — The object and purpose of the appointment of a receiver may be generally stated to be the preservation of the subject-matter of the litigation pending a judicial determination of the rights of the parties thereto.³

IV. JURISDICTION TO APPOINT RECEIVERS — 1. General Equity Jurisdiction —

a. IN GENERAL. — The appointment of a receiver is a remedy of purely equitable origin, having originated in the English Court of Chancery, where it has been employed from a very early time.⁴ It is, indeed, one of the oldest equitable remedies, and grows out of the inherent power of a court of equity to afford relief where the remedies to be obtained in the courts of ordinary jurisdiction are inadequate.⁵ From its origin in English chancery, where all the leading principles in relation to its exercise were well established long before the American Revolution, the power to create a receivership has naturally and regularly descended to, and become one of the inherent powers of, all courts exercising an equitable jurisdiction.⁶

1. *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Not in Nature of Attachment but of Sequestration. — The order of appointment of a receiver has been said to be not in the nature of an attachment, but a sequestration. *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

2. *Re Hamilton*, 26 Oregon 579.

3. Purpose of Receivership — *England.* — Stitwell v. Williams, 6 Madd. 49; *Hugonin v. Baseley*, 13 Ves. Jr. 105. And see *Tullett v. Armstrong*, 1 Keen 428; *Owen v. Homan*, 4 H. L. Cas. 1032.

United States. — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Lenox v. Notrebe, Hempst.* (U. S.) 226; *Taylor v. Philadelphia, etc.*, R. Co., 7 Fed. Rep. 385; *Latham v. Chafee*, 7 Fed. Rep. 526; *Miller v. Bowles*, 10 Nat. Bankr. Reg. 515.

California. — *Matter of Cohen*, 5 Cal. 496.

Illinois. — *Hooper v. Winston*, 24 Ill. 353.

Kansas. — *Hottenstein v. Conrad*, 9 Kan. 435.

Maryland. — *Blondheim v. Moore*, 11 Md. 374; *Ellicott v. Warford*, 4 Md. 80; *Bosley v. Susquehanna Canal*, 3 Bland (Md.) 63; *Murdock's Case*, 2 Bland (Md.) 469, 20 Am. Dec. 381; *Duval v. Waters*, 1 Bland (Md.) 569, 18 Am. Dec. 350; *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 277.

Massachusetts. — *Ellis v. Boston, etc.*, R. Co., 107 Mass. 28.

Mississippi. — *Myers v. Estell*, 48 Miss. 401; *Mays v. Rose, Freeman*, (Miss.) 718.

New York. — *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Shrady v. Van Kirk*, 51 N. Y. App. Div. 504; *Brown v. Northrup*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 333; *Leavitt v. Yates*, 4 Edw. (N. Y.) 162; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

North Carolina. — *Battle v. Davis*, 66 N. Car. 255.

Vermont. — *Langdon v. Vermont, etc.*, R. Co., 54 Vt. 593, 11 Am. & Eng. R. Cas. 688; *Vermont, etc.*, R. Co. v. *Vermont Cent. R. Co.*, 46 Vt. 792; *Cheever v. Rutland, etc.*, R. Co., 39 Vt. 657.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

West Virginia. — *Krohn v. Weinberger*, 47 W. Va. 127.

4. Origin and Antiquity of Remedy. — The practice of appointing sequestrators and receivers of rents and profits, which was very common in the reign of Elizabeth, seems to have begun in the reign of Edward VI., since in that reign the first bill is to be met with for restraining a party from receiving the rents and profits. 1 Spence's Eq. Jur. 673, citing *Savill v. Romsden*, 1 Cald. 131, and *Jordan v. Armes*, Reg. Lib. 5 Ph. & M. fol. 48. In this latter case the property was sequestered into the hands of the chamberlain of London and one of the aldermen, pending the trial of the right at law, and on May 20, 1588, a sequestrator or receiver of real estate was appointed.

5. See *Hopkins v. Worcester, etc.*, Canal Proprietors, L. R. 6 Eq. 447; *Williamson v. Wilson*, 1 Bland (Md.) 420.

6. Inherent Power of Chancery — *United States.* — *Towle v. American Bldg., etc.*, Soc., 60 Fed. Rep. 131.

District of Columbia. — *Barley v. Gittings*, 15 App. Cas. (D. C.) 427.

Maryland. — *State v. Northern Cent. R. Co.*, 18 Md. 214; *Williamson v. Wilson*, 1 Bland (Md.) 420.

Minnesota. — *Folsom v. Evans*, 5 Minn. 418.

New York. — *Decker v. Gardner*, 124 N. Y. 334; *U. S. Trust Co. v. New York, etc.*, R. Co., 101 N. Y. 478, 25 Am. & Eng. R. Cas. 601; *Hollenbeck v. Donnell*, 94 N. Y. 342.

North Carolina. — *Skinner v. Maxwell*, 66

b. EXHAUSTION OF LEGAL REMEDIES — (1) *General Rule*. — As the appointment of a receiver is a remedy of equitable origin and jurisdiction, one of the prerequisites is, in general, the exhaustion of any existent remedy at law.¹ So a receiver will not be appointed when the controversy is upon a mere question of legal right,² or when the party can assert his right by a direct action at law.³

Power to Issue Execution. — A receiver will not, in general, be appointed where the creditor may issue execution and recover his debt by a sale of the debtor's property.⁴

(2) *Exceptions to General Rule*. — There are, it has been held, exceptions to this general rule where relief is granted in special circumstances of an equitable nature, such as appeal strongly to the conscience of the court,⁵ but the

N. Car. 47, 68 N. Car. 400; *Battle v. Davis*, 66 N. Car. 252.

Pennsylvania. — *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83.

Enforcement of Maritime Lien. — A court of equity having jurisdiction to enforce maritime liens is authorized, though there is no express statute so providing, to appoint a receiver to take charge of the property pending the action. *Washington Iron Works Co. v. Jensen*, 3 Wash. 584.

1. Exhaustion of Legal Remedies — *England*. — *Sollory v. Leaver*, L. R. 9 Eq. 25; *Drewry v. Barnes*, 3 Russ. 106; *Cremen v. Hawkes*, 2 J. & LaT. 674; *Talbot v. Scott*, 4 Kay & J. 96.

United States. — *Wanneker v. Hitchcock*, 38 Fed. Rep. 383.

Iowa. — *Cofer v. Echerson*, 6 Iowa 505.

Michigan. — *Thayer v. Swift*, Harr. (Mich.) 430.

Minnesota. — *Klee v. E. H. Steele Co.*, 60 Minn. 355; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 403; *Rice v. St. Paul, etc., R. Co.*, 24 Minn. 467.

New York. — *Spencer v. Cuyler*, (Supm. Ct. Gen. T.) 9 Abb. Pr. (N. Y.) 382; *Hart v. Tims*, 3 Edw. (N. Y.) 226; *Congden v. Lee*, 3 Edw. (N. Y.) 304; *Bunn v. Daly*, 24 Hun (N. Y.) 526; *Parker v. Moore*, 3 Edw. (N. Y.) 236.

North Dakota. — *Minkler v. U. S. Sheep Co.*, 4 N. Dak. 507.

Pennsylvania. — *Schlecht's Appeal*, 60 Pa. St. 172.

Texas. — *Cahn v. Johnson*, 12 Tex. Civ. App. 304.

Where Probate Court Has Jurisdiction. — A court of equity will not appoint receivers where the probate court has full power in the premises. *Wanneker v. Hitchcock*, 38 Fed. Rep. 383.

In an Action to Set Aside a Mortgage of only half the value of the security, where the defendant's equity was many times the amount of the plaintiff's judgment demand, the latter being subordinate only to the mortgage, it was held that the plaintiff was not entitled to the appointment of a receiver to take charge of and control all of the defendant's property, since the plaintiff could preserve his relation to the realty by filing notice of his action. *Bennett v. Consolidated Apex Min. Co.*, 12 S. Dak. 234.

2. Carrow v. Ferrior, L. R. 3 Ch. 719, 18 L. T. N. S. 806.

Legal Title in Dispute. — *Rollins v. Henry*, 77 N. Car. 469.

Defendant's Insolvency. — Nor does the fact that such defendant is insolvent at all affect the rule. *Rollins v. Henry*, 77 N. Car. 469.

3. Where Action at Law Lies — *England*. — *Lloyd v. Passingham*, 16 Ves. Jr. 59; *Cremen v. Hawkes*, 2 J. & LaT. 674; *Sollory v. Leaver*, L. R. 9 Eq. 25; *Drewry v. Barnes*, 3 Russ. 106. *Illinois*. — *Winkler v. Winkler*, 40 Ill. 179; *Coughron v. Swift*, 18 Ill. 414.

Maryland. — *Pfeltz v. Pfeltz*, 14 Md. 376.

Minnesota. — *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 403; *Rice v. St. Paul, etc., R. Co.*, 24 Minn. 467; *Hart v. Marshall*, 4 Minn. 294.

New Jersey. — *Mullen v. Jennings*, 9 N. J. Eq. 192; *Wooden v. Wooden*, 3 N. J. Eq. 429.

New York. — *Parmly v. Tenth Ward Bank*, 3 Edw. (N. Y.) 395; *Parker v. Moore*, 3 Edw. (N. Y.) 236; *Willis v. Corlies*, 2 Edw. (N. Y.) 281; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 497; *Akrill v. Selden*, 1 Barb. (N. Y.) 316.

Pennsylvania. — *Schlecht's Appeal*, 60 Pa. St. 172.

Virginia. — *Webster v. Couch*, 6 Rand. (Va.) 519; *Poage v. Bell*, 3 Rand. (Va.) 586.

4. Parker v. Moore, 3 Edw. (N. Y.) 234; *Hart v. Tims*, 3 Edw. (N. Y.) 226; *Congden v. Lee*, 3 Edw. (N. Y.) 304; *Bunn v. Daly*, 24 Hun (N. Y.) 526.

Supplementary Proceedings — Issuance of Execution Since Acquisition of Estate. — A receiver will not be appointed to sell an estate of a judgment debtor, disclosed by his examination in supplementary proceedings, where it does not appear that an execution has been issued and returned since the acquisition of the estate. *Bunn v. Daly*, 24 Hun (N. Y.) 526.

Return of Execution Unsatisfied. — Where a creditor recovered a judgment against a corporation, which was, under such creditor's instructions to the sheriff, returned *nulla bona* without any actual or *bona fide* attempt to satisfy it, it was held that there had been no such exhaustion of legal remedies as would support a bill for a receiver. *Stirlen v. Jewett*, 165 Ill. 410.

5. See Corcoran v. Doll, 35 Cal. 476; *Knighton v. Young*, 22 Md. 359; *Rogers v. Marshall*, (Supm. Ct. Gen. T.) 6 Abb. Pr. N. S. (N. Y.) 457; *Rollins v. Henry*, 77 N. Car. 469.

Rule in Supplementary Proceedings. — Under Stat. Minn. (1894), § 5492, a receiver of a judgment debtor's mortgaged property may be appointed in supplementary proceedings, although the judgment creditor and mortgagee

mere fact that the remedy at law has been overlooked¹ or has been lost by the laches of the aggrieved party² is no excuse for the application to a court of equity for a receiver.

(3) *Legal Remedy Must Be "Complete, Prompt, and Efficient."* — But it is not enough to defeat jurisdiction in equity that there is some remedy at law. The remedy at law, to have this effect, must be complete, prompt, and efficient.³

c. RECEIVERS OF CORPORATIONS. — A court of equity has no inherent or common-law jurisdiction to appoint a receiver for a corporation, and it has been held that it cannot, therefore, exercise this power in the absence of a statute so providing.⁴ But the power to appoint a receiver *pendente lite* with power, merely, to care for and preserve the property committed to his charge is one incidental to the jurisdiction of a court of equity. It does not and never did depend upon statute, nor upon the character of the parties whether individuals or corporations, nor upon the nature of the property.⁵ In most states the equitable powers of courts have been enlarged by statutes conferring express jurisdiction to appoint receivers over incorporated companies.⁶ Such statutes are strictly construed, and the appointment of a

has not exhausted his mortgage security. *Bean v. Heron*, 65 Minn. 64.

1. Although It May Be Manifest that Great Injustice Has Been Done to a Defendant at Law by the verdict and judgment against him there, yet if this injustice has not been produced by any fraud or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence or of his counsel's ignorance or bad management, a court of equity can give him no relief. *Tapp v. Rankin*, 9 Leigh (Va.) 478. See also *Faulkner v. Harwood*, 6 Rand. (Va.) 125; *Auditor v. Nicholas*, 2 Munf. (Va.) 31; *Arthur v. Chavis*, 6 Rand. (Va.) 142.

2. *Drewry v. Barnes*, 3 Russ. 94.

3. *Crane v. McCoy*, 1 Bond (U. S.) 422. And see the preceding subdivisions.

Where Legal Remedy Doubtful or Difficult. — The general doctrine seems to be that a receiver is appointed because the remedy at law is not complete or not effectual enough, and the jurisdiction ought at least to be exercised when the legal remedy is shown to be doubtful or difficult. See the opinion of Vice-Chancellor Chatterton in *Beamish v. Austen*, Ir. Rep. 9 Eq. 364; Lord Chancellor Plunket's remarks in *Manly v. Hawkins*, 1 Dr. & Wal. 372; and in *Swift v. Swift*, 3 Ir. Eq. Rep. 275.

4. Receiver for Corporation — *United States*. — See *Converse v. Dimock*, 22 Fed. Rep. 573, 6 Am. & Eng. Corp. Cas. 418.

Alabama. — See *Briarfield Iron Works Co. v. Foster*, 54 Ala. 622.

California. — *Fischer v. Superior Ct.*, 110 Cal. 129; *People's Home Sav. Bank v. Superior Ct.*, 103 Cal. 34; *Harrison v. Hebbard*, 101 Cal. 152; *French Bank Case*, 53 Cal. 405; *Havemeyer v. Superior Ct.*, 84 Cal. 327. See also *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Georgia. — See *Hand v. Dexter*, 41 Ga. 454.

Iowa. — See *French v. Gifford*, 30 Iowa 148.

New Jersey. — *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

New York. — *Matter of Binghamton Gen. Electric Co.*, 143 N. Y. 263; *Decker v. Gardner*, 124 N. Y. 334; *Matter of Atlas Iron Constr. Co.*, (N. Y. Super. Ct. Spec. T.) 2 N. Y.

Annot. Cas. 124; *Atty.-Gen. v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371; *Atty.-Gen. v. Niagara Bank*, Hopk. (N. Y.) 354; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157. See also *Verplanck v. Mercantile Ins. Co.*, 1 Edw. (N. Y.) 84; *Hamilton v. Accessory Transit Co.*, (Supm. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 255.

Ohio. — *Woods v. Equitable Debenture Co.*, 11 Ohio Dec. 154, 8 Ohio N. P. 125.

5. *U. S. Trust Co. v. New York, etc., R. Co.*, 101 N. Y. 478; *Decker v. Gardner*, 124 N. Y. 334; *Hollenbeck v. Donnell*, 94 N. Y. 342.

The Most Common Exercise of This Power to appoint a receiver *pendente lite* was in foreclosure suits, whenever by reason of the insufficiency of the security it became necessary to impound the rents and profits of the mortgaged property during the litigation, in order that they might, after the decree and sale, be applied upon the debt for the security of the mortgagee. *Hollenbeck v. Donnell*, 94 N. Y. 342; *Decker v. Gardner*, 124 N. Y. 334. See also *infra*, this title, *Grounds for Appointment of Receiver — Receivers of Mortgaged Property*.

Railroad Receivers. — This particular jurisdiction has been extended to and is frequently exercised upon the foreclosure of mortgages upon railroads, and receivers of such property are charged with the duty of the operation of the road pending the foreclosure suit, to the end that the value of the property, which necessarily depends largely upon the continuance of its business, may not be depreciated, and also to the end that its income may not be diverted to the payment and satisfaction of debts which are not liens upon the property. See the title RECEIVERS OF RAILROADS, *post*.

6. Statutes — *Illinois*. — *Baker v. Backus*, 32 Ill. 79.

Louisiana. — *Stark v. Burke*, 5 La. Ann. 740.

Maine. — *Hewett v. Adams*, 54 Me. 206.

Michigan. — *Fay v. Erie, etc., R. Bank*, Harr. (Mich.) 194.

New Jersey. — *Van Wagoner v. Paterson Gas Light Co.*, 23 N. J. L. 292; *American Ice Mach. Co. v. Paterson Steam Fire Engine, etc., Co.*, 22 N. J. Eq. 72; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126; *Corrigan v. Tren-*

receiver usually rests within the sound discretion of the court.¹

2. Jurisdiction of Courts of Law. — The jurisdiction to appoint a receiver does not exist in courts of law, as such, unless specially conferred.²

3. Statutory Jurisdiction. — In most states statutory provisions exist conferring jurisdiction for the appointment of receivers by particular courts or in particular proceedings. These should be consulted by the practitioner before resorting to any mere general treatise. "As regards the statutes," it has been said by the United States Supreme Court, "we see no reason why a court of equity, in the exercise of its undoubted authority, may not accomplish all the best results intended to be secured by such legislation without its aid."³ Cases citing or construing such statutes will be found in the notes.⁴

4. Jurisdiction as Dependent on Situs of Property — *a. IN GENERAL.* — A receiver may be appointed for all property within the jurisdiction of the court, irrespective of whether the owner is or is not within such jurisdiction.⁵ And a receiver may be appointed for the express purpose of preventing the removal beyond such jurisdiction of property within the jurisdiction of the court.⁶

b. FOREIGN CORPORATIONS. — So a receiver may be appointed for the

ton Delaware Falls Co., 7 N. J. Eq. 489; Kelly v. Neshanic Min. Co., 7 N. J. Eq. 579; Hager v. Stevens, 6 N. J. Eq. 374; Parsons v. Monroe Mfg. Co., 4 N. J. Eq. 187; Brundred v. Paterson Mach. Co., 4 N. J. Eq. 294; Oakley v. Paterson Bank, 2 N. J. Eq. 173.

New York. — U. S. Trust Co. v. New York, etc., R. Co., 101 N. Y. 478; People v. Security L. Ins. Co., 71 N. Y. 222; Galwey v. U. S. Steam Sugar Refining Co., 36 Barb. (N. Y.) 256; Bell v. Shibley, 33 Barb. (N. Y.) 614; Ward v. Sea Ins. Co., 7 Paige (N. Y.) 294; Atty.-Gen. v. Columbia Bank, 1 Paige (N. Y.) 511.

1. Strict Construction. — Oakley v. Paterson Bank, 2 N. J. Eq. 173; Bangs v. McIntosh, 23 Barb. (N. Y.) 591; Matter of Pyrolusite Manganese Co., 29 Hun (N. Y.) 429; Morgan v. New York, etc., R. Co., 10 Paige (N. Y.) 290, 40 Am. Dec. 244; People v. Washington Ice Co., (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 382.

2. Folsom v. Evans, 5 Minn. 418. See also Bitting v. Ten Eyck, 85 Ind. 357; Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co., 57 Pa. St. 91, 6 Phila. (Pa.) 523, 25 Leg. Int. (Pa.) 93.

Appointment in Action at Law. — There may be no appointment of a receiver in an action at law against a corporation, although it consents to such appointment, and though it is alleged that the corporation is insolvent, that other creditors are threatening to sue, that the defendant has no property out of which to satisfy the judgment demanded, and that the action is brought in behalf of all other creditors willing to come in as plaintiffs. *Smith v. Superior Ct.*, 97 Cal. 348.

3. Davis v. Gray, 16 Wall. (U. S.) 220, *per* Swayne, J.

So, it has been held, the power of the *New York* Supreme Court to appoint a receiver of a corporation after the return of an unsatisfied execution, though conferred by statute, is to be deemed within the general jurisdiction of the court, and the facts to establish such power need not be proved. *Palmer v. Clark*, (C. Pl. Spec. T.) 4 Abb. N. Cas. (N. Y.) 25.

Presumption as to Jurisdiction. — Where it is not shown and it is uncertain whether a particular receiver was appointed under a statute or as an exercise of the general chancery jurisdiction of the court, the latter will be presumed. *Hegewisch v. Silver*, 140 N. Y. 414.

4. Statutory Provisions — *United States.* — *Murray v. American Surety Co.*, 61 Fed. Rep. 273.

Alabama. — *Ex p. Smith*, 23 Ala. 114.

California. — *Fischer v. Superior Ct.*, 110 Cal. 129; *People's Home Sav. Bank v. Superior Ct.*, 103 Cal. 34; *Harrison v. Hebbard*, 101 Cal. 152; *Havemeyer v. Superior Ct.*, 84 Cal. 327; *French Bank Case*, 53 Cal. 495; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508.

Indiana. — *McElwaine v. Hosey*, 135 Ind. 481; *Hellebush v. Blake*, 119 Ind. 349; *Connelly v. Dickson*, 76 Ind. 440.

Iowa. — *Rabb v. Albright*, 93 Iowa 50.

New Jersey. — *Delaware Bay, etc., R. Co. v. Markley*, 45 N. J. Eq. 139.

New York. — See *Fellows v. Heermans*, (Ct. App.) 13 Abb. Pr. N. S. (N. Y.) 7.

North Carolina. — *Battle v. Davis*, 66 N. Car. 256. And see *Skinner v. Maxwell*, 66 N. Car. 45.

Texas. — *Lynn v. McGregor First Nat. Bank*, (Tex. Civ. App. 1897) 40 S. W. Rep. 228.

5. Hutchinson v. American Palace-Car Co., 104 Fed. Rep. 182; *Hellebush v. Blake*, 119 Ind. 350; *Monroe Bank v. Schermerhorn*, Clarke (N. Y.) 216.

Rule by Statute. — But in *Rhode Island* it has been held that under Pub. Stat. (1882), c. 237 (Gen. Laws R. I. 1896, c. 274), the Supreme Court has no jurisdiction to appoint a receiver of the estate of an insolvent nonresident. *Wheelock's Petition*, 18 R. I. 463.

In *England* the court will not appoint a receiver in a cause where the persons representing the estate are out of the jurisdiction and have not appeared in the suit. *Shaw v. Shore*, 5 L. J. Ch. 79.

6. Loaiza v. Superior Ct., 85 Cal. 11, 20 Am. St. Rep. 197; *State v. Second Judicial Dist. Ct.*, 22 Mont. 241. But compare *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385.

property of a foreign corporation.¹ But it has been said that a state court will not, in general, appoint a receiver for a foreign corporation where this will entail the assumption of the management of the affairs of the corporation itself,² or where the appointment is for the purpose of winding up its affairs.³ Where the purpose of a suit is to wind up a corporation, or where a general receivership of the property of such concern is sought, the initial proceedings should be at the place of domicile and other receiverships should be ancillary thereto.⁴

5. Jurisdiction of Person of Owner. — Where a court has jurisdiction of the person of the owner of property, it seems that a receiver may be appointed for the property though it is not within the jurisdiction of the court.⁵ The court may, by a coercion of the person of the debtor, oblige him either to bring the property in dispute within the jurisdiction of the court, or to execute such a conveyance or transfer thereof as will be sufficient to vest the legal title as well as the possession of the property according to the *lex loci rei sitæ*.⁶ But a court has no power to appoint a receiver of debts due to the defendant from persons in foreign jurisdictions who are not parties to the suit where neither the nature of the debts nor the identity of the persons from whom they are due is shown.⁷

6. Appointment by Legislature. — It has been held that the appointment by the legislature of a receiver to settle the affairs of an insolvent bank is not a judicial act, nor is it otherwise unconstitutional as impairing the obligation of contracts.⁸

7. Appointment by Governor. — In rare cases power has been conferred on the governor of a state to appoint a receiver for a particular purpose. A

1. Foreign Corporations. — *Shinney v. North American Sav., etc., Co.*, 97 Fed. Rep. 9; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *MacNabb v. Porter Air-Lighter Co.*, 44 N. Y. App. Div. 102; *Redmond v. Hoge*, 3 Hun (N. Y.) 171.

2. Stockley v. Thoma., 89 Md. 663.

3. Dreyfuss v. Seale, (Supm. Ct. Spec. T.) 18 Misc. (N. Y.) 551; *Day v. U. S. Car Spring Co.*, 2 Duer (N. Y.) 608; *Redmond v. Enfield Mfg. Co.*, (Supm. Ct. Spec. T.) 13 Abb. Pr. N. S. (N. Y.) 332; *Murray v. Vanderbilt*, 39 Barb. (N. Y.) 140.

4. Hutchinson v. American Palace-Car Co., 104 Fed. Rep. 182. See also *infra*, this title, *Ancillary Receivers*. And for questions of pleading and practice relating to venue and jurisdiction in this connection, see 17 ENCYC. OF PL. AND PR. 675, title RECEIVERS.

5. Jurisdiction of Person of Owner — England. — *Codrington v. Johnstone*, 1 Beav. 520; *Bunbury v. Bunbury*, 1 Beav. 320; *Keys v. Keys*, 1 Beav. 425; *Cranstown v. Johnston*, 3 Ves. Jr. 182; *Penn v. Baltimore*, 1 Ves. 444; *Wharton v. May*, 5 Ves. Jr. 71; — *v. Lindsey*, 15 Ves. Jr. 91; *Beckford v. Kemble*, 1 Sim. & St. 7; *Cockburn v. Raphael*, 2 Sim. & St. 454; *Portarlington v. Souby*, 3 Myl. & K. 104; *Toller v. Carteret*, 2 Vern. 494; *Bushby v. Munday*, 5 Madd. 297; *Maclaren v. Stainton*, 16 Beav. 279, 15 Eng. L. & Eq. 500; *Langford v. Langford*, 5 L. J. Ch. 60; *Shaw v. Shore*, 5 L. J. Ch. 80; *Hinton v. Galli*, 24 L. J. Ch. 121; *Davis v. Barrett*, 13 L. J. Ch. 305; *Sheppard v. Oxenford*, 1 Kay & J. 491; *Houlditch v. Donegal*, 8 Bligh N. S. 349; *Houlditch v. Wallace*, 5 Cl. & F. 666; *Barkley v. Reay*, 2 Hare 307. Compare *Faulkner v. Daniel*, 3 Hare 204*n*.

United States. — *Booth v. Clark*, 17 How. (U. S.) 331.

Ohio. — *Merchants' Nat. Bank v. McLeod*, 38 Ohio St. 184.

Owner's Domicil Immaterial. — Where, by statute, the claim of a receiver to the personal property of a debtor is made a lien thereon, the lien will attach to property in the debtor's possession in the state wherein the receiver was appointed, though the debtor's domicil may be at the time in another state; and the lien will follow the property on its being taken into the state of the debtor's domicil. *Falk v. Janes*, 49 N. J. Eq. 484.

Receiver of Corporation. — Where the creditor of a foreign corporation has obtained judgment against the company in the state where it was incorporated, and the company has transferred all of its assets to a company in the state of the forum upon no other consideration than the shares of stock of the new company, a creditor may enforce his judgment in the courts of the latter state against the new company, and may have a receiver to aid his recovery. *Barclay v. Quicksilver Min. Co.*, 9 Abb. Pr. N. S. (N. Y.) 283.

Receivers of Decedents' Estates Situated Abroad. — See *Cockburn v. Raphael*, 2 Sim. & St. 453; *Smith v. Smith*, 10 Hare appendix lxxi.; *Hervy v. Fitzpatrick*, Kay 421.

6. Booth v. Clark, 17 How. (U. S.) 331. And see *Roberdeau v. Rous*, 1 Atk. 544; *Malcolm v. Montgomery*, 1 Hog. 93; *Mitchell v. Bunch*, 2 Paige (N. Y.) 615.

7. Amy v. Manning, 149 Mass. 487, where it was so held, as to the power of the Supreme Judicial Court, under Pub. Stat. Mass. (1882), c. 151, § 2, cl. 11.

8. Carey v. Giles, 9 Ga. 256.

statute of this nature has been held constitutional.¹

V. GROUNDS FOR APPOINTMENT OF RECEIVER — 1. In General. — As the main object of the appointment of a receiver is, as hereinbefore shown, the preservation of the property or thing in controversy pending the litigation concerning it, so the principal ground for the appointment of a receiver is, generally stated, danger of the loss of or injury to such property or thing in controversy before the court can make disposition thereof by a final decree on the merits.²

Where Requisite Danger of Loss Not Shown. — In the absence of a showing of some probable danger of loss of or injury to the property involved, affecting the interest therein of the party applying for the receiver, no appointment will be made.³ Merely technical injuries, or those which involve only nominal consequences to the party seeking the appointment of a receiver, or circumstances which are doubtful, are not sufficient to call into action the conscience of the chancellor,⁴ nor will a receiver be appointed when a *lis pendens* has been filed whereby the rights and interests of the plaintiff are as effectually protected as they would be by a receiver.⁵

Contemplated Removal of Property. — It has been held that the fact that a debtor is about to remove his property out of the state, so that the creditor may lose his debt or have to sue for it in another jurisdiction, does not of itself entitle the creditor to the appointment of a receiver.⁶

2. Under State Statutes. — In almost every state statutes have been enacted

1. *Carey v. Giles*, 9 Ga. 253.

2. **Danger of Loss of or Injury to Property** — *England*. — *Lloyd v. Passingham*, 16 Ves. Jr. 69; *Hugonin v. Baseley*, 13 Ves. Jr. 105.

United States — *Beecher v. Bininger*, 7 Blatchf. (U. S.) 170; *Parkhurst v. Kinsman*, 2 Blatchf. (U. S.) 82; *Lancaster v. Asheville St. R. Co.*, 90 Fed. Rep. 129; *Lenox v. Notrebe*, *Hempst.* (U. S.) 226.

Georgia. — *Clay v. Clay*, 86 Ga. 359.

Idaho. — *Jones v. Quayle*, (Idaho 1893) 32 Pac. Rep. 1134.

Illinois. — *E. A. Moore Furniture Co. v. Prussing*, 71 Ill. App. 666.

Maryland. — *Blondheim v. Moore*, 11 Md. 365.

New Jersey. — *Kean v. Colt*, 5 N. J. Eq. 379.

New York. — *Gillig v. Barrett*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 380; *Smith v. Fitchett*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 207; *Gregory v. Gregory*, 33 N. Y. Super. Ct. 34; *Orphan Asylum Soc. v. McCartee*, *Hopk.* (N. Y.) 435.

North Carolina. — *Stern v. Austern*, 120 N. Car. 107; *Levenson v. Elson*, 88 N. Car. 184; *Twitty v. Logan*, 80 N. Car. 70.

Utah. — *Ogden City v. Bear Lake, etc., Water Works, etc., Co.*, 16 Utah 440.

West Virginia. — And see *Krohn v. Weinberger*, 47 W. Va. 127.

Danger to Property or Revenues Thereof. — Where property itself or the income arising from it is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant, the appointment of a receiver is proper. *Mays v. Rose*, *Freem.* (Miss.) 718.

To Prevent Disposition of Property by Person in Possession. — *Ellett v. Newman*, 92 N. Car. 523; *Lynn v. McGregor First Nat. Bank*, (Tex. Civ. App. 1897) 40 S. W. Rep 228.

Preservation of Property Pending Appeal. — See *Colwell v. Garfield Nat. Bank*, (C. Pl. Spec. T.) 4 N. Y. Supp. 5.

Construction of Statute — Danger of Loss Clause.

— A statute authorizing the appointment of a receiver in an action by a vendor to vacate a fraudulent purchase, or by a creditor to subject any fund to his claim, or between partners or others jointly owning or interested in any property, on application of any person whose right or interest in the property is probable, where the property is in danger of material injury, does not, it has been held, provide an additional case for the appointment of a receiver, but merely provides when, in the instance before mentioned, a receiver may be appointed. *State v. Eighth Judicial Dist. Ct.*, 14 Mont. 577.

Suits for Protection of Remaindermen. — In a proper case a receiver may be appointed in a suit for the protection of remaindermen against the life tenant or other holder of the particular estate. *In re Fowler*, 16 Ch. D. 725.

3. *Bush v. Mattox*, 110 Ga. 472; *Houchin v. Turner*, 89 Ga. 26; *Hager v. Stevens*, 6 N. J. Eq. 374; *Gillig v. Barrett*, (Supm. Ct. Spec. T.) 5 N. Y. Supp. 380; *Venable v. Smith*, 98 N. Car. 524; *Baker v. Fraternal Mystic Circle*, 1 Ohio Dec. 579, 32 Cinc. L. Bul. 84.

In a Creditor's Suit for the Administration of Assets, a receiver will not be appointed for a party found to be heir-at-law, where the title as such is disputed, and it has not been established that the personal estate is deficient. *Topping v. Seanson*, 6 L. T. N. S. 450.

4. *Hutchinson v. American Palace-Car Co.*, 104 Fed. Rep. 187.

5. *Clay v. Clay*, 86 Ga. 359; *Gregory v. Gregory*, 33 N. Y. Super. Ct. 34.

6. *Smith-Dimmick Lumber Co. v. Teague*, 119 Ala. 385.

But under Code Civ. Pro. Mont. (1895), § 951, it was held that a receiver would be appointed where there was imminent danger that property in possession of the defendant would be removed beyond the jurisdiction of the court

with reference to the grounds upon which receivers may be appointed. These statutes should invariably be consulted by the practitioner, as only a general treatment of the grounds for the appointment of receivers, without more than passing reference to any particular statute, will be found herein. It has been held that a state statute which specifies certain cases in which a receiver may be appointed does not of necessity materially alter the equitable jurisdiction of the courts upon the subject;¹ but where the legislature has prescribed the cases in which a receiver may be appointed and other provisional remedies granted, the specification of the cases in which a receivership may be had excludes every other case and prohibits the appointment of a receiver except as authorized.² A few of the questions which have been raised under some of the state statutes will be found in the notes.³

3. Under English Judicature Act. — By the English Judicature Act of 1873, section 25, subsection 8, it is provided that a receiver may be appointed, upon terms or otherwise, "in all cases in which it shall appear to the court to be just or convenient that such order should be made."⁴ But even under this act the court will appoint a receiver in behalf of a judgment creditor only where there is some impediment in the way of getting a legal execution, or where special circumstances exist to bring the case within the terms of the statute.⁵

4. Under Canadian Judicature Act. — An identical provision with that in force in *England* is made under the similar enactment in the province of *Ontario*,⁶ and it is settled that under this act the court will appoint a receiver

and unlawfully disposed of. *State v. Second Judicial Dist. Ct.*, 22 Mont. 241. And see *Loaiza v. Superior Ct.*, 85 Cal. 11, 20 Am. St. Rep. 197.

1. *Skinner v. Maxwell*, 66 N. Car. 48.

2. *Fellows v. Heermans*, (Ct. App.) 13 Abb. Pr. N. S. (N. Y.) 7.

3. Receiver under Insolvent Trader's Act. — Under a statute providing for the appointment of a receiver for an insolvent trader, the appointment of a receiver for one who at the time of the appointment has ceased to be a trader is improper. *Birdsong v. Allen-Dumas Co.*, 94 Ga. 729.

And it has been held that a merchant whose store has been closed and whose stock has been seized by the sheriff in proceedings to foreclose a chattel mortgage is not a trader within the meaning of such an act. *Hobbs v. Sheffield*, 87 Ga. 455.

Receiver under Landlord and Tenant Act. — Under the *North Carolina* landlord and tenant act, a receiver to collect the rents and profits may be appointed where an insolvent tenant wrongfully holds over. *Nesbitt v. Turrentine*, 83 N. Car. 535.

Failure to Pay Employees. — Under Acts of *Maryland* 1878, c. 108, a receiver may be appointed for any persons or corporations engaged in manufacturing who fail to pay persons in their employ. For a construction of this act, see *Clark v. Renninger*, 89 Md. 66.

Presumption of Insolvency from Receivership. — Where a statute authorizes a receivership for other reasons than insolvency, there is no presumption of insolvency from receivership. *Shuey v. Holmes*, 20 Wash. 13.

4. See *Anglo-Italian Bank v. Davies*, 9 Ch. D. 286.

Illustrations. — It has been held, under the English Judicature Act referred to in the text, that there may be an appointment of a receiver

where a sequestration is ineffectual. *Bryant v. Bull*, 10 Ch. D. 155.

The act has also been held to authorize the appointment of a receiver in the following cases:

Where the estates of which the plaintiffs were legal and equitable mortgagees were mixed up together, and there was no adverse possession. *Pease v. Fletcher*, 1 Ch. D. 275.

Until the hearing, in an action of partition, where one of the co-owners was in occupation of the property, though not in exclusive occupation thereof. *Porter v. Lopes*, 7 Ch. D. 359.

Against a defaulting trustee who had failed to pay money into court as ordered, and who was out of the jurisdiction of the court so that he could not be attached. *In re Coney*, 29 Ch. D. 995. And see *Stanger Leathes v. Stanger Leathes*, W. N. (1882) 71.

In favor of a plaintiff who had obtained judgment against husband and wife, over the income of the wife's reversionary interest under a will. *Fuggle v. Bland*, 11 Q. B. D. 711.

In favor of a claimant of property seized on execution pending an interpleader issue order to try the title to the goods. *Howell v. Dawson*, 13 Q. B. D. 68.

Under the special circumstances that the property was wasting and was insufficient security, in favor of the plaintiff in an ejectment action. *Real, etc., Advance Co. v. McCarthy*, 27 W. R. 706.

For Other Instances of the Appointment of a Receiver under This Act, and a construction of its terms, see *Anglo-Italian Bank v. Davies*, 9 Ch. D. 286; *Smith v. Cowell*, 6 Q. B. D. 79; *Harris v. Beauchamp*, (1894) 1 Q. B. 801, 9 Reports 653.

5. *Manchester, etc., Banking Co. v. Parkinson*, 22 Q. B. D. 173, 37 W. R. 264, *doubting* *Whittaker v. Whittaker*, 7 P. D. 15.

6. *Ontario Judicature Act*, § 17, subsec. 8.

only upon a proper case being made out for the exercise of its jurisdiction, according to established principles.¹ It is in such sense only that a receiver can be said to be *ex debito justitiæ*.²

5. Where Title to Property in Dispute. — While the mere fact that the title to property is in dispute is insufficient to warrant the appointment of a receiver,³ this circumstance in connection with others showing the person in possession to be unable or unwilling properly to care for it pending a determination of the conflicting claims presents a proper case for a receiver.⁴

6. Parties Equally Entitled. — A receiver may be appointed where all of several parties are equally entitled to the possession of the property which is the subject-matter of the controversy, but it is not just and proper from the nature of the dispute and the mutual relations of the parties that any one of them should be allowed to retain possession and control during the litigation to the exclusion of the others. An illustration of this is the case of receivers for partnership assets pending a dissolution and winding up of the business,⁵ or pending litigation between joint tenants, tenants in common, or other co-owners, in which rights claimed in or arising out of the common property are in dispute.⁶

7. Fraud. — A receiver will be appointed to prevent a fraudulent transfer or assignment of personal property, or to take possession of property fraudulently conveyed. Such a transaction, contemplated or accomplished, shows a sufficient danger of loss to one showing title to or interest in the property.⁷

1. *Smith v. Port Dover, etc.*, R. Co., 12 Ont. App. 288, 25 Am. & Eng. R. Cas. 640.

2. *Smith v. Port Dover, etc.*, R. Co., 12 Ont. App. 290, 25 Am. & Eng. R. Cas. 640.

3. **Title in Dispute.** — The necessity for showing other grounds than a mere conflict of claim to the title and possession of the property which is the subject of litigation is insisted upon in *Beecher v. Bininger*, 7 Blackf. (U. S.) 173, where the court, *per* Woodruff, J., said that there must be shown "some emergency, some peril of loss which the court will be unable completely to redress; and the danger must be clear and the right, in general, free from reasonable doubt."

4. *Smith v. Dayton*, 94 Iowa 102; *Grainger v. Old Kentucky Paper Co.*, (Ky. 1899) 49 S. W. Rep. 477; *Tregaskis v. Judge*, 47 Mich. 511.

Where an Injunction Has Been Granted which prevents certain claimants of a lien on property in their possession from properly caring for their own interests therein or those of other parties therein, a receiver will be appointed. *Lehigh v. World's Columbian Exposition*, 67 Ill. App. 27.

To Prevent Multiplicity of Suits. — *Hopper v. Morgan*, (N. J. 1898) 42 Atl. Rep. 171.

Where There Are Conflicting Claimants of a Trust Fund who are prosecuting in the same court separate suits to subject the fund to their claims, the appointment of a receiver in one of the suits, on the motion of the plaintiff in that suit, will inure to the benefit of the plaintiff in the other suit, upon the establishment of his superior right to the fund. *Beverly v. Brooke*, 4 Gratt. (Va.) 218.

Operating Expenses Paid by Conflicting Claimants. — *Elk Fork Oil, etc., Co. v. Jennings*, 90 Fed. Rep. 767.

5. See *infra*, this section, *Receivers of Partnerships*.

6. See *infra*, this title, *For What Property Receiver Appointed*.

7. Fraudulent Transfers — *England*. — *Stilwell v. Wilkins*, Jac. 282; *Lloyd v. Passingham*, 16 Ves. Jr. 69. And see *Hugonin v. Baseley*, 13 Ves. Jr. 105.

United States. — *Cox v. Wall*, 59 Fed. Rep. 546, affirming *Wall v. Cox*, (C. C. A.) 101 Fed. Rep. 403.

District of Columbia. — *Clark v. Walter T. Bradley Coal, etc., Co.*, 6 App. Cas. (D. C.) 437.

Georgia. — *Martin v. Burgwyn*, 88 Ga. 78; *Wolfe v. Clafin*, 81 Ga. 65.

Illinois. — *Louisville, etc. R. Co. v. Southworth*, 38 Ill. App. 225.

Minnesota. — *Bean v. Heron*, 65 Minn. 64.

Mississippi. — *Mays v. Rose, Freem.* (Miss.) 718.

New Jersey. — *Bergen v. Littell*, 41 N. J. Eq. 18; *Journeay v. Brown*, 26 N. J. L. 111.

New York. — *People's Bank v. Fancher*, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 545; *Connah v. Sedgwick*, 1 Barb. (N. Y.) 210; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453; *Goodyear v. Betts*, (Supm. Ct. Spec. T.) 7 How. Pr. (N. Y.) 187; *Haggarty v. Pittman*, 1 Paige (N. Y.) 209. And see *Mitchell v. Barnes*, 22 Hun (N. Y.) 194.

North Carolina. — *Pearce v. Elwell*, 116 N. Car. 595.

Ohio. — *Hayes v. Moore*, 5 Ohio Dec. 520, 5 Ohio N. P. 220.

Texas. — *Gassaway v. Heidenheimer*, (Tex. Civ. App. 1896) 37 S. W. Rep. 343.

Virginia. — *Shannon v. Hanks*, 88 Va. 338.

Wisconsin. — *Ford v. Plankinton Bank*, 87 Wis. 363.

The Fraud of a Surviving Partner, colluding with a fictitious creditor to defraud firm creditors, and a wasting of the firm's assets are sufficient to authorize the appointment of a receiver, though on the application of simple contract creditors whose claims have not been reduced to judgment. *Byrne v. Lake Charles First Nat. Bank*, 20 Tex. Civ. App. 194.

Fraudulent Repossession of Property by Vendor. — Relief by receivership is also granted in favor of the vendee where the vendor has fraudulently repossessed himself of the property.¹

Where Attachment Might Have Been Levied. — But an attachment creditor whose attachment could have been levied on property alleged to have been fraudulently conveyed has been held not entitled to the appointment of a receiver.²

8. Insolvency — *a. IN GENERAL.* — It may be stated, as a general rule, that the court will not exercise its discretion in favor of the appointment of a receiver for property in the possession of a person unless it is shown that such person is insolvent, or, at least, that there is some doubt of his ability to respond to a judgment for damages for any loss of or injury to the property.³ Thus it has been decided that a receiver ought not to be appointed in a proceeding for the partition of property theretofore left in the hands of one of the parties to manage in the common interest if there is no allegation of the insolvency of such person.⁴ So, also, the fact that it is not shown or suggested that the adverse party is not able to answer any demands that may be established against him has been held a reason for not granting an application for a receiver based on the fraudulent character of a conveyance.⁵

b. INSOLVENCY AS SOLE GROUND. — Whilst insolvency is not always, or even generally, a sufficient sole ground for the appointment of a receiver,⁶ it appears that in foreclosure cases, and others relating to the rents and profits of real estate, the insolvency of the defendant is sufficient ground for the appointment of a receiver when coupled with the inadequacy of the security.⁷

Fraudulent Concealment of Receipt of Property.

— For appointment of a receiver in such circumstances, see *Bird v. Lanphear*, 92 Hun (N. Y.) 567.

Fraudulent Disposition of Property by Foreign Corporation. — *Dreyfus v. Seale*, 37 N. Y. App. Div. 351.

Fraudulent Mismanagement of Corporate Affairs. — *Texas Consol. Compress, etc., Assoc. v. Storrow*, (C. C. A.) 92 Fed. Rep. 5.

Action to Set Aside Fraudulent Conveyance. — It has been held, however, that a receiver will not be appointed *pendente lite* in an action by a judgment creditor to have an alleged fraudulent conveyance set aside, and the property made subject to his execution, since the debtor would be entitled to the rents and profits of the property until the time of redemption from the execution sale had expired. *National Union Bank v. Riger*, 38 N. Y. App. Div. 123.

Fraudulent Conveyance by Insolvent Firm. — Though a *prima facie* case is made of a fraudulent conveyance by an insolvent firm of all its property to a single creditor, to the injury of its other creditors, yet if the purchasing creditor is solvent, and the complaining creditors are without judgments or other liens, and have no claim to the property by reason of fraud in the creation of their demands or otherwise, an injunction should not be granted nor a receiver appointed. *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100.

Hearsay Evidence of Fraud. — But where a receiver was sought for notes in the possession of the defendant, alleged to be fraudulently held by him, but the evidence of fraud was entirely hearsay, and was denied by one having personal knowledge, and there was no proof of the defendant's insolvency, it was held that a receiver should not be appointed. *Roberts v. Washington Nat. Bank*, 9 Wash. 12.

1. *Dawson v. Yates*, 1 Beav. 301.

2. *Pearce v. Jennings*, 94 Ala. 524.

3. **Insolvency** — *United States*. — *Haines v. Carpenter*, 1 Woods (U. S.) 266; *Kelley v. Boettcher*, 89 Fed. Rep. 125.

Alabama. — *Lehman-Durr Co. v. Griel Bros. Co.*, 119 Ala. 262; *McKinnon v. Pike County Guano Co.*, 94 Ala. 521.

Georgia. — *Turnipseed v. Kentucky Wagon Co.*, 97 Ga. 258; *Sheffield v. Parker*, 96 Ga. 774, 22 S. E. Rep. 450; *Mills v. Webb*, 89 Ga. 734.

Idaho. — *Sweeny v. Mayhew*, (Idaho 1899) 56 Pac. Rep. 85.

Iowa. — *Clark v. Raymond*, 86 Iowa 661.

Maryland. — *State v. Northern Cent. R. Co.*, 18 Md. 215; *Blondheim v. Moore*, 11 Md. 374; *Clark v. Ridgely*, 1 Md. Ch. 71.

Michigan. — *Comstock v. McDonald*, 113 Mich. 626.

Mississippi. — *Buckley v. Baldwin*, 69 Miss. 804.

New York. — *Willis v. Corlies*, 2 Edw. (N. Y.) 286.

North Carolina. — *Bryan v. Moring*, 94 N. Car. 699.

4. *Pierce v. Pierce*, 55 Mich. 629.

5. *Rheinstein v. Bixby*, 92 N. Car. 309.

6. *Onondaga Trust, etc., Co. v. Spartanburg Waterworks Co.*, 91 Fed. Rep. 324; *Lawrence Iron-Works Co. v. Rockbridge Co.*, 47 Fed. Rep. 755; *Cofer v. Echerson*, 6 Iowa 504; *Atlantic Trust Co. v. Consolidated Electric Storage Co.*, 49 N. J. Eq. 402. See also cases cited in the preceding note.

Matter of Discretion for Court. — The defendant's insolvency may or may not be cause for the appointment of a receiver, in the sound discretion of the court. *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 158; *Sheffield v. Parker*, 96 Ga. 774, 22 S. E. Rep. 450.

7. See *Hughes v. Hatchett*, 55 Ala. 634;

It has also been held that the appointment of a receiver will unhesitatingly be made where the party in the actual receipt of the rents and profits is shown to be insolvent, as in such case the rents and profits are exposed to imminent danger, or, indeed, to inevitable loss.¹ It has been declared, accordingly, a safe general rule that a receiver should be appointed when insolvency is alleged and is not denied upon the hearing of the application, and it is made to appear that there is danger that the assets will be misappropriated or wasted.²

c. INSOLVENCY COUPLED WITH DANGER OF LOSS. — As the cases often state, it is only where the insolvency of the party is likely to result in loss of the fund or property in controversy that a receiver may be appointed on the ground of insolvency.³

d. ATTEMPT TO CREATE UNLAWFUL PREFERENCE. — As a general rule, an attempt by an insolvent debtor to create unlawful preferences among his creditors is sufficient to warrant the appointment of a receiver.⁴

9. Nonpayment of Taxes. — Where the party in possession of property fails to pay the taxes thereon, a receiver may be appointed on the application of one with a specific interest in the property, such as a mortgagee or remainderman;⁵ or a receiver may, at least, be appointed for enough of the income of the property to pay the taxes in arrear.⁶ But where a statute provides that a mortgagee, in order to save mortgaged premises from being sold for taxes, may pay the taxes and include the amount in the mortgage debt, equity will not, in general, interfere by the appointment of a receiver, as the statute in question fully protects the mortgagee's rights.⁷ Nor should a receiver be appointed on the ground of unpaid taxes where a reversioner, occupying jointly with the tenant of the precedent estate, mortgages the reversion and agrees with the mortgagee to keep the taxes paid.⁸

10. Where Trustee Neglects, Abuses, or Mismanages Trust — *α. RELUCTANCE OF COURT TO SUPERSEDE TRUSTEE.* — It may be stated as an undoubted general rule in this connection that a court of equity is reluctant to disturb the possession or control of a lawfully constituted trustee and to supersede such authority by the appointment of a receiver.⁹ A trustee will not be displaced and a receiver appointed on slight or insignificant grounds.¹⁰ Thus it has been said that a court would not, at the instance of one of several parties

Connelly v. Dickson, 76 Ind. 444; *Nesbitt v. Turrentine*, 83 N. Car. 538. See also *infra*, this section, *Receivers of Mortgaged Property*.

1. *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 280.

2. *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 397.

3. *Ryder v. Bateman*, 93 Fed. Rep. 16; *Doe v. Northwest Coal, etc., Co.*, 64 Fed. Rep. 928; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Cofer v. Echerson*, 6 Iowa 504; *Cook v. East Trenton Pottery Co.*, 53 N. J. Eq. 29.

4. *Metropolitan Trust Co. v. Northern Trust Co.*, 61 Minn. 462.

Insolvent Transferee of Insolvent's Property. — Where the sister of an insolvent, to whom all his property had been transferred as security for her contingent liability on his paper, was also insolvent, it was held that the appointment of a receiver at the suit of a creditor was proper. *Samuels v. Langfeld*, 94 Ga. 727, 19 S. E. Rep. 900.

5. **Failure to Pay Taxes.** — *Goodman v. Malcolm*, 5 Kan. App. 285; *Union St. R. Co. v. Saginaw*, 115 Mich. 300; *Murch v. J. O. Smith Mfg. Co.*, 47 N. J. Eq. 193; *Sage v. Gloversville*, 43 N. Y. App. Div. 245.

Appointment at Instance of Creditor of Corporation. — *Joliet First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, *affirming* 72 Ill. App. 640.

6. *Sage v. Gloversville*, 43 N. Y. App. Div. 245.

7. *Nathans v. Steinmeyer*, 57 S. Car. 386. And see *Wilson v. Wolf*, 9 Kan. App. 347.

8. *Jenks v. Horton*, 96 Mich. 13.

9. **Trustees.** — *Barkley v. Reay*, 2 Hare 306; *Devlin v. Hope*, (Supm. Ct.) 16 Abb. Pr. (N. Y.) 314.

Appointment of Receiver as Not Removing or Superseding Trustee. — See *Leddel v. Starr*, 19 N. J. Eq. 163.

10. *Middleton v. Dodswell*, 13 Ves. Jr. 268.

Mere Bad Habits and Capricious Conduct on the part of the trustee towards the *cestui que trust* are not sufficient to justify the appointment of a receiver, although they may ultimately be grounds for his removal from the trust. *Poythress v. Poythress*, 16 Ga. 406.

Commingling of Trust Funds — Held Insufficient. — *Orphan Asylum Soc. v. McCartee*, Hopk. (N. Y.) 429.

Appointment of Receiver for Distribution of Funds Held by Trust Company Refused. — *Matter of Home Provident Safety Fund Assoc.*, 129

interested in an estate, displace a competent trustee, or take the possession from him, unless he wilfully or ignorantly permitted the property to be placed in a state of insecurity which due care or conduct would have prevented.¹ And it would require a particularly strong case, it has been held, to warrant the appointment of a receiver of an internal improvement fund, created by the legislature and vested in the governor and other state officers as trustees.²

b. DANGER OF LOSS. — Danger to the trust fund or property is a prerequisite to the interference of the court with the trustee's possession.³ A receiver for property in the hands of trustees should not, therefore, be appointed when it does not appear that the trustees are insolvent, or that the property may be dissipated.⁴ Thus, where a trustee for creditors offers to file a bond in double the value of the property in his hands, he should not be superseded by the appointment of a receiver, though such trustee is the son of the grantor, in the absence of any showing that he is unfit for the position.⁵

c. WHEN RECEIVER WILL BE APPOINTED — (1) *In General.* — Notwithstanding the reluctance of a court to supersede a trustee by the appointment of a receiver, if it appears that the trustee has been guilty of positive misconduct or waste, or an improper disposition of the trust estate, or that he has an undue bias towards one of two conflicting parties, or that the estate is liable to be wasted or destroyed, a proper case is made out for the appointment of a receiver.⁶

Failure to Take Possession of Trust Property. — If trustees fail to do their duty in

N. Y. 288, *reversing* (Supm. Ct. Gen. T.) 15 N. Y. Supp. 211.

That Acting Trustees Have Let a Purchaser into Possession and have not accounted for the purchase money, is not ground for the appointment of a receiver. *Browell v. Reed*, 1 Hare 435.

Where a Dissolved Water Company Is in the Hands of Statutory Trustees, the party applying for a receiver must show that such trustees have failed or will fail to supply water, in order to the appointment of a receiver. *Weatherly v. Capital City Water Co.*, 115 Ala. 156.

1. *Barkley v. Reay*, 2 Hare 306.

2. *Vose v. Reed*, 1 Woods (U. S.) 647.

3. **Danger to Trust Funds.** — *Middleton v. Dodswell*, 13 Ves. Jr. 268; *Browell v. Reed*, 1 Hare 434; *Bainbrigg v. Blair*, 3 Beav. 424; *Evans v. Coventry*, 5 De G. M. & G. 916; *Vose v. Reed*, 1 Woods (U. S.) 650; *Poythress v. Poythress*, 16 Ga. 409; *Richards v. Barrett*, 5 Ill. App. 514; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 279; *Bowling v. Scales*, 2 Tenn. Ch. 66.

4. *City Nat. Bank v. Dunham*, 18 Tex. Civ. App. 184.

Administrator in Possession — Receiver Denied for Defendant's Land. — *St. Louis Nat. Bank v. Field*, 156 Mo. 306.

5. *Branch v. Ward*, 114 N. Car. 148.

6. **General Rule as to Displacing Trustee** — *England.* — *Barkley v. Reay*, 2 Hare 308; *Bainbrigg v. Blair*, 3 Beav. 421; *Middleton v. Dodswell*, 13 Ves. Jr. 266; *Anonymous*, 12 Ves. Jr. 4; *Evans v. Coventry*, 5 De G. M. & G. 918; *Talbot v. Scott*, 4 Kay & J. 90; *Malcolm v. Montgomery*, 1 Hog. 93; *In re Fowler*, 16 Ch. D. 723; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597; *Noad v. Backhouse*, 2 Y. & C.

Ch. 529; *Taylor v. Emerson*, 4 Dr. & War. 117; *Atty.-Gen. v. Bowyer*, 3 Ves. Jr. 727.

Alabama. — *Calhoun v. King*, 5 Ala. 525.

Georgia. — *Hatcher v. Massey*, 66 Ga. 66; *Ware v. Ware*, 42 Ga. 408; *Walker v. Morris*, 14 Ga. 323; *Jones v. Dougherty*, 10 Ga. 287. See also *Robert v. Tift*, 60 Ga. 566.

Iowa. — *Edie v. Applegate*, 14 Iowa 275.

Kansas. — *Elwood v. Greenleaf First Nat. Bank*, 41 Kan. 475.

Maryland. — *Burroughs v. Gaither*, 66 Md. 171.

Mississippi. — *Mays v. Rose*, *Freem.* (Miss.) 718.

New Hampshire. — *Ladd v. Harvey*, 21 N. H. 514.

New Jersey. — *Price v. Price*, 23 N. J. Eq. 428.

New York. — *Clapp v. Clapp*, 49 Hun (N. Y.) 195.

North Carolina. — *Ellett v. Newman*, 92 N. Car. 519; *Rheinstein v. Bixby*, 92 N. Car. 309; *Albright v. Albright*, 91 N. Car. 220; *North Carolina R. Co. v. Wilson*, 81 N. Car. 223. See also *Levenson v. Elson*, 88 N. Car. 184.

South Carolina. — *Stairley v. Rabe*, *McMull. Eq.* (S. Car.) 22.

West Virginia. — *McCandless v. Warner*, 26 W. Va. 754.

Wisconsin. — *Gunn v. Blair*, 9 Wis. 352.

In a Suit to Compel a Trustee to Account it is proper to appoint a receiver to take charge of trust funds admitted to be in the hands of the trustee. *Hagenbeck v. Hagenbeck Zoological Arena Co.*, 59 Fed. Rep. 14.

Receiver for Property Embraced in Invalid Sale by Defaulting Trustee. — *In re Whiteley*, 56 L. T. N. S. 347, *citing In re Pope*, 17 Q. B. D. 743, 55 L. T. N. S. 369; *Ex p. Evans*, 13 Ch.

taking possession of the trust property, the court will, upon the application of one or more bondholders, secured by a lien on the property, appoint a receiver to act in their stead.¹

Acceptance of Inconsistent Trust. — A receiver may be appointed where trustees have accepted another and inconsistent trust.²

If the Trustee under a Corporation Mortgage fails to perform his duty, a receiver may be appointed in his stead.³

(2) *Loss of Trust Funds.* — The loss of a portion of a trust fund is *prima facie* a breach of trust, and sufficient ground for the appointment of a receiver.⁴

(3) *Disputes and Dissensions among Cotrustees.* — Where there are such disputes and dissensions among trustees as to endanger the trust property, a receiver may be appointed.⁵ And where there is a dispute among the parties to a suit as to the continued existence of a trust, it has been held that the court would appoint a receiver if the property involved needed protection, pending the final hearing of the controversy.⁶ But a mere misunderstanding between two executors is not a sufficient ground for the appointment of a receiver.⁷

(4) *Where Trustee Refuses to Act.* — Where a trustee refuses to act a receiver may be appointed for the trust property.⁸ But it has been said that it never has been the practice to appoint a receiver solely because one of several trustees has disclaimed, or is inactive, or has gone abroad.⁹ A receiver may, however, be appointed pending the appointment of new trustees because one or more of several joint trustees refuse to act.¹⁰

(5) *Where Trustee Beyond Jurisdiction.* — A receiver may be appointed where the trustee is beyond the jurisdiction of the court.¹¹ So when an executor removes from the jurisdiction of the court, leaving both his *cestui que trust* and the trust estate within the jurisdiction, it is the duty of the court of equity, on the application of the *cestui que trust*, to appoint a receiver.¹²

(6) *Rule Applied to Executors and Administrators.* — Where a proper case is made out a court of equity will appoint a receiver over the estate of a decedent, but a strong case must be shown to induce the court to dispossess an executor who is willing to act.¹³ A receiver will not be appointed upon

D. 260; *Anglo-Italian Bank v. Davies*, 9 Ch. D. 285, 39 L. T. N. S. 244.

1. **Foundation of Right.** — The application for a receiver in such case is founded on a right independent of any probable deficiency of the trust property to pay the debts secured by the deed of trust, and is simply a demand by the beneficiaries of the deed that the trust be executed according to its terms. *Wilmer v. Atlanta, etc., R. Co.*, 2 Woods (U. S.) 409; *Sacramento, etc., R. Co. v. Superior Ct.*, 55 Cal. 453; *Shaw v. Norfolk County R. Co.*, 5 Gray (Mass.) 162; *Rice v. St. Paul, etc., R. Co.*, 24 Minn. 464.

2. *Talbot v. Scott*, 4 Kay & J. 140.

3. *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S.) 514.

4. *Evans v. Coventry*, 5 De G. M. & G. 911.

5. *Wilson v. Wilson*, 2 Keen 249; *Swale v. Swale*, 22 Beav. 585. And see *Day v. Croft*, 2 Beav. 488. See also *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329.

6. *Hogg v. Hoag*, 80 Fed. Rep. 595.

7. *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390.

8. **Refusal of Trustee to Act.** — *Tait v. Jenkins*, 1 Y. & C. Ch. 492; *Palmer v. Wright*, 10 Beav. 234; *Doe v. Beaumont*, 2 Dowl. N. S. 972; *De*

Rustafjaell v. De Rustafjaell, 43 W. N. C. (Pa.) 56.

9. *Brownell v. Reed*, 1 Hare 434. Compare *Tait v. Jenkins*, 1 Y. & C. Ch. 492.

10. *Brodie v. Barry*, 3 Meriv. 695.

11. **Where Trustee Beyond Jurisdiction.** — *Noad v. Backhouse*, 2 Y. & C. Ch. 529; *Tidd v. Lister*, 5 Madd. 429; *Smith v. Smith*, 10 Hare appendix lxxi.

Property of Defaulting Trustee. — Under the *English Judicature Act* a receiver may be appointed over the equitable interest of a defaulting trustee in property in England in order to enforce a judgment for payment of money into court by him, where he is out of the jurisdiction. *In re Coney*, 29 Ch. D. 995.

12. *Ex p. Galluchat*, 1 Hill Eq. (S. Car.) 148. See *Davy v. Gronow*, 14 L. J. Ch. 134.

13. **Estates of Decedents.** — *Middleton v. Dods-well*, 13 Ves. Jr. 269; *Haines v. Carpenter*, 1 Woods (U. S.) 262, 91 U. S. 254; *Randle v. Carter*, 62 Ala. 95; *Ex p. Walker*, 25 Ala. 104. See also *Brooker v. Brooker*, 3 Smale & G. 475; *Harrup v. Winslet*, 37 Ga. 655; *Powell v. Quinn*, 49 Ga. 523; *Dougherty v. McDougald*, 10 Ga. 121; *Simmons v. Henderson*, *Freem.* (Miss.) 493; *Marvine v. Drexel*, 68 Pa. St. 362; *Delaney v. Tipton*, 3 Hayw. (Tenn.) 14.

light grounds to displace the possession of an executor who has qualified and given bonds for the faithful discharge of his trust.¹ Where, however, an executor or administrator has been guilty of serious waste and gross mismanagement of the estate, or misappropriation of the funds, he may be dispossessed of his possession and a receiver appointed.² And where a receiver of the estate of a decedent has been appointed the court may, for the purpose of preserving the property, restrain the executor from intermeddling with the management of the estate and compel him to give up the control of it to the receiver.³ But a receiver will not, in general, be appointed where the probate court has full power to give relief and protection in the premises,⁴ though where it was shown that an administrator was selling personal property fraudulently conveyed to his decedent, this was held sufficient to justify the appointment of a receiver, although the administrator was making the sales under order of court, and depositing the proceeds in bank.⁵

Effect of Appointment of Receiver. — The appointment of a receiver for the estate of a decedent does not *ipso facto* remove the executor or administrator or destroy his character as the legal representative of the estate.⁶

(7) *Testamentary Trusts.* — In proceedings to enforce a testamentary trust or a devise, a receiver may be appointed if the court is satisfied that the intention of the testator has been disregarded and that the rents and profits are in peril.⁷

(8) *Receiver Superseding Assignee* — (a) **In General.** — Where a general assignment has been made for the benefit of creditors, a court of equity will not assume jurisdiction at the instance of some of the creditors and remove the assignee and appoint a receiver as trustee in his stead, unless it is shown that the assignee is incompetent or unfit for his office, or that he has been guilty of some neglect or breach of duty.⁸ But a receiver may be appointed where an assignee for the benefit of creditors refuses to accept the trust,⁹ or where

1. Haines v. Carpenter, 1 Woods (U. S.) 265.

2. **Misconduct of Personal Representative** — *England.* — Middleton v. Dodswell, 13 Ves. Jr. 266; Anonymous, 12 Ves. Jr. 5.

United States. — Haines v. Carpenter, 1 Woods (U. S.) 265.

Alabama. — Randle v. Carter, 62 Ala. 102. See also *Ex p.* Walker, 25 Ala. 81.

Arkansas. — Du Val v. Marshall, 30 Ark. 230.

Georgia. — Powell v. Quinn, 49 Ga. 523; Ware v. Ware, 42 Ga. 408; Chappell v. Akin, 39 Ga. 177.

New Jersey. — Price v. Price, 23 N. J. Eq. 428.

New York. — Clapp v. Clapp, 49 Hun (N. Y.) 195. See also Barker v. Clark, (Brooklyn City Ct. Gen. T.) 12 Abb. Pr. N. S. (N. Y.) 106.

South Carolina. — Harmon v. Wagener, 33 S. Car. 487; Stairley v. Rabe, McMull. Eq. (S. Car.) 22.

Failure to Get in Estate. — Richards v. Perkins, 3 Y. & C. Exch. 299.

Disregard of Testator's Intentions. — Podmore v. Gunning, 5 Sim. 485.

Refusal to Pay Judgment. — Willis v. Sharp, 46 Hun (N. Y.) 540.

3. Gadsden v. Whaley, 14 S. Car. 210.

Duty of Administrator to Receiver. — Where a receiver of the estate of an intestate was appointed before the death of the latter, it is the duty of the administrator to disclose to the receiver assets belonging to the estate. Reynolds v. Aetna L. Ins. Co., 28 N. Y. App. Div. 591.

Title to Leased Premises. — Under a statute

providing that leases for years of real estate pass to the executor or administrator of a deceased person as personalty, a receiver of the personal estate of a decedent takes title, in his representative capacity, to leased premises. Wells v. Higgins, 132 N. Y. 459.

4. Wanneker v. Hitchcock, 38 Fed. Rep. 383.

5. Werborn v. Kahn, 93 Ala. 201.

6. Gadsden v. Whaley, 14 S. Car. 210.

7. *Hamburgh Mfg. Co. v. Edsall*, 7 N. J. Eq. 298, 8 N. J. Eq. 141.

8. **Assignment for Creditors.** — Jones v. McPhillips, 77 Ala. 319; International Trust Co. v. American L. & T. Co., 62 Minn. 501.

In Aid of General Assignment. — Where, however, after a general assignment, creditors institute an action to set aside certain conveyances of the assignor made prior to the assignment, a permanent common-law receiver may be appointed for the property so conveyed, with the same rights as the assignee would have had if no receiver had been appointed. Badger v. Sutton, (Supm. Ct. App. Div.) 53 N. Y. Supp. 1099, *denying rehearing* 30 N. Y. App. Div. 294.

Rule under Particular Statute. — Under a statute authorizing the appointment of a receiver whenever, in the discretion of the court, it may be necessary in order to secure ample justice to the parties, a receiver may be appointed for property assigned by a corporation for the benefit of certain creditors, although there is no fraud in the deed. Goshen Woolen-Mills Co. v. City Nat. Bank, 150 Ind. 279.

9. Suydam v. Dequindre, Harr. (Mich.) 347.

the assignee mismanages the estate,¹ or where the assignment is fraudulent in law or in fact.² And where an insolvent debtor makes an assignment for the benefit of creditors to a person who is also insolvent, a receiver will be appointed.³

(b) **To Manage Property.** — It may also be necessary to appoint a receiver for assigned property in order that the property may be operated and made productive pending the litigation.⁴

(c) **Poverty, Insolvency, or Bankruptcy of Representative or Trustee.** — It has been held that mere poverty, or even the insolvency of an administrator, executor, or trustee is not a sufficient ground for the appointment of a receiver,⁵ though it seems that an actual adjudication in bankruptcy presents a stronger case for such an appointment.⁶ The insolvency of a trustee or executor coupled with misconduct or abuse of trust is, however, a good ground for the appointment of a receiver,⁷ and where the trustee is not only extremely poor, but is also of a bad character and of drunken habits, a receiver may be appointed.⁸

11. Where No Person Competent to Hold Property — *a. GENERAL RULE.* — Where there is no person entitled to the property who is at the same time competent to hold and manage it pending the litigation, a receiver will be appointed.⁹

b. ESTATES OF DECEDENTS. — Pending the litigation over the probate of a will, and during the interval before an executor or administrator is appointed, a court of equity may appoint a receiver of personal property and of the rents and profits of the realty, where there is danger of loss, misuse, or misapplication.¹⁰ But the necessity of such a receiver has been greatly lessened by

1. *Jones v. Dougherty*, 10 Ga. 274; *Wagner v. Coen*, 41 W. Va. 351.

2. See *Southern Commission Co. v. Porter*, 122 N. Car. 692.

Action to Set Aside Assignment. — Where the directors of a corporation made a general assignment for the benefit of creditors which was repudiated by the stockholders, it was held that the appointment of a receiver *pendente lite* was proper in an action by the shareholders to set aside the assignment. *Powers v. Blue Grass Bldg., etc., Assoc.*, 86 Fed. Rep. 705.

3. *Haggarty v. Pittman*, 1 Paige (N. Y.) 298. See also *Ex p. Walker*, 25 Ala. 81; *Dougherty v. McDougald*, 10 Ga. 121; *Jenkins v. Jenkins*, 1 Paige (N. Y.) 243; *Keyes v. Brush*, 2 Paige (N. Y.) 311; *Ellett v. Newman*, 92 N. Car. 519.

Where Good Faith of Assignment Questioned. — The insolvency of an assignee in an assignment for the benefit of creditors, the good faith of which is questioned, coupled with the assignee's refusal to give bond, has been held to be sufficient to warrant the appointment of a receiver. *City Nat. Bank v. Bridgers*, 114 N. Car. 381.

Receiver Succeeds to Rights of Assignee. — *Whitman v. Mast, etc., Co.*, 11 Wash. 318, 48 Am. St. Rep. 874.

Receiver Entitled to Portion of Fund or Property. — As between an assignee for the benefit of creditors, proceeding in the Court of Common Pleas, and a receiver in the Superior Court, appointed to procure satisfaction of a particular judgment, the assignment in question being vacated for fraud, the receiver is entitled to so much of the fund in the hands of the assignee as is requisite to satisfy the judgment. *Matter of Ginsberg*, (C. Pl. Spec. T.) 9 Misc. (N. Y.) 650.

Receiver for Specific Property on Which Petitioner Has Lien. — *Bristow v. Home Bldg. Co.*, 91 Va. 18.

4. **Temporary Surrender to Receiver.** — *Dickinson v. Earle*, 34 N. Y. App. Div. 559.

5. **Poverty or Insolvency of Trustee or Executor.** — Anonymous, 12 Ves. Jr. 5; *Howard v. Papera*, 1 Madd. 142; *Hathornthwaite v. Russel*, 2 Atk. 127; *Knight v. Duplessis*, 1 Ves. 324; *Havers v. Havers*, 3 Barn. Ch. 23. See also *Johns v. Johns*, 23 Ga. 31; *Jenkins v. Jenkins*, 1 Paige (N. Y.) 243; *Fairbairn v. Fisher*, 4 Jones Eq. (57 N. Car.) 390.

6. **Bankruptcy.** — *In re Johnson*, L. R. 1 Ch. 325. And see *Scott v. Becher*, 4 Price 348; *Gladson v. Stoneman*, 1 Madd. 143, note; *Mansfield v. Shaw*, 3 Madd. 101; *Langley v. Hawk*, 5 Madd. 46.

7. See *Pullis v. Pullis Bros. Iron Co.*, 157 Mo. 565.

8. *Everett v. Prythergch*, 12 Sim. 363.

9. *Skinner v. Maxwell*, 66 N. Car. 48.

10. **Decedents' Estates.** — *Rendall v. Rendall*, 1 Hare 152; *Anderson v. Guichard*, 9 Hare 275; *Wood v. Hitchings*, 2 Beav. 289; *King v. King*, 6 Ves. Jr. 172; *Atkinson v. Henshaw*, 2 Ves. & B. 85; *Ball v. Oliver*, 2 Ves. & B. 97; *Edmunds v. Bird*, 1 Ves. & B. 542; *Watkins v. Brent*, 1 Myl. & C. 97, *affirming* 7 Sim. 518; *Jones v. Goodrich*, 10 Sim. 327, 4 Jur. 98; *Parkin v. Seddons*, L. R. 16 Eq. 36, 6 Moak 625; *Matter of Colvin*, 3 Md. Ch. 294; *Flagler v. Blunt*, 32 N. J. Eq. 522. Compare *Richards v. Chave*, 12 Ves. Jr. 462.

To Prevent Removal of Estate. — As to the appointment of a receiver where no one is appointed to take charge of the estate of a decedent, and there is danger of its removal from the state, see *Flagler v. Blunt*, 32 N. J. Eq. 522.

modern statutes authorizing the probate court to appoint a temporary administrator or an administrator *ad litem*. If a receiver is appointed pending the probate of a will, his duties will in general terminate on the appointment of an administrator *pendente lite*.¹

c. INFANTS' ESTATES. — It is well settled that where there is no guardian or trustee a court of equity will exercise control over the property of its infant ward by the interposition of a receiver.² And though there may be a guardian, the appointment of a receiver of an infant's estate has sometimes been supported on the ground of the inadequacy of the guardian's power of control and management of the estate.³

d. ESTATES OF IDIOTS AND LUNATICS. — Although the control of the court over the property of an idiot or lunatic is generally exercised by means of a committee, the appointment of a receiver has been held proper pending the return or decision upon the inquisition of lunacy, or where no person will act as a committee,⁴ or after the office of the committee is determined by the death of the lunatic.⁵ A receiver may also be appointed to act in connection with the committee,⁶ or the committee may be appointed receiver.⁷ So in an action to set aside conveyances executed by a person of alleged unsound mind, a receiver has been appointed where the grantee who had been in the possession of the property and collecting the rents and profits thereof was shown to be wholly insolvent.⁸

12. To Carry Judgment or Decree into Effect. — A receiver may be appointed wherever necessary to effectuate the court's judgment or decree.⁹ Nor, it has been held, do the general provisions of the *New York Code of Civil Procedure* respecting the appointment of receivers for corporations interfere with the powers of a court of equity to appoint a receiver when necessary in order to execute its judgment.¹⁰

13. Where No Property — *a. IN GENERAL.* — A receiver will not, in general,

1. *Matter of Colvin*, 3 Md. Ch. 279.

2. *Property of Infant.* — *Leg v. Turnbull*, 2 P. Wms. 409; *Ex p. Whitfield*, 2 Atk. 315; *Dillon v. Mount-Cashell*, 4 Bro. P. C. (Toml. ed.) 312; *Skinner v. Maxwell*, 66 N. Car. 48.

3. See *Gardner v. Blane*, 1 Hare 382; *Beaufort v. Berty*, 1 P. Wms. 705.

4. *Estates of Lunatics.* — See the title *INSANITY*, vol. 16, p. 577.

5. *Matter of Colvin*, 3 Md. Ch. 288.

6. *Ex p. Billingham*, Amb. 104.

7. *In re Lawham*, 1 Jur. 281.

Appointment under English Lunacy Regulation Act of Person to Recover, Receive, and Apply Property. — See *Harvey v. Trenchard*, 34 Beav. 243; *In re Faircloth*, 13 Ch. D. 308.

Provisional Protection of Property, etc., in Ireland. — *In re Lawler*, 3 Ir. Eq. 102.

8. *Mitchell v. Barnes*, 22 Hun (N. Y.) 199.

But where two rival claimants had filed bills praying for a receiver of the real estate of a deceased lunatic, and then presented petitions in lunacy for the appointment of a receiver, the court refused the application in lunacy, and also declined to exercise its original jurisdiction in chancery for the appointment of a receiver upon an interlocutory application in the suits. *In re Ferrior*, L. R. 3 Ch. 178. See also *Carrow v. Ferrior*, L. R. 3 Ch. 728 *et seq.*

To Set Aside Conveyance and Protect from Undue Influence. — *Edwards v. Edwards*, 14 Tex. Civ. App. 87.

9. *King v. Barnes*, 51 Hun (N. Y.) 550.

Allowance of Maintenance out of Estate. — *Rice v. Tonnele*, 4 Sandf. Ch. (N. Y.) 568.

Payment of Money into Court. — As to the enforcement, under the rules of 1875, of a judgment for payment of money into court by the appointment of a receiver, see *Stanger Leathes v. Stanger Leathes*, W. N. (1882) 71.

Payment of Costs of Cross-action. — *Bryant v. Bull*, 10 Ch. D. 153.

In Action for Specific Performance under English Judicature Act. — *Hyde v. Warden*, 1 Ex. D. 309.

To Collect Judgment. — *Fox v. Hale, etc.*, Silver Min. Co., 108 Cal. 475.

To Enforce Payment of Alimony. — For the appointment of a receiver to enforce the payment of alimony pursuant to the orders of court, under a particular statute so providing, see *Huellmantel v. Huellmantel*, 124 Cal. 583. See also, for other cases in which receivers have been appointed to enforce a payment of alimony, *Carey v. Carey*, 2 Daly (N. Y.) 425; *Questel v. Questel*, Wright (Ohio) 492; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 172; *Barker v. Dayton*, 28 Wis. 381. And see *Holmes v. Holmes*, 29 N. J. Eq. 10.

In Actions for Divorce. — See *White v. White*, (Cal. 1900) 62 Pac. Rep. 34, order reversed 130 Cal. 597; *Bergen v. Bergen*, 22 Ill. 188; *Vincent v. Parker*, 7 Paige (N. Y.) 66; *Kirby v. Kirby*, 1 Paige (N. Y.) 262.

In Actions for Nonsupport. — See *Murray v. Murray*, 115 Cal. 266, 56 Am. St. Rep. 97.

Receiver Not Appointed to Execute Process of Court of Law. — *Thompson v. Allen County*, 115 U. S. 554.

10. *King v. Barnes*, 51 Hun (N. Y.) 550.

be appointed where there is no property for him to take into his possession,¹ or where the only property which could come into the possession of the receiver is covered by liens for more than its value.² And neither will a receiver for a corporation be appointed at the instance of a stockholder whose stock is of no value, and cannot be made of value by the appointment of a receiver.³

But a Mere Denial by the Defendant that he has any property is not a sufficient ground to refuse the appointment of a receiver.⁴

b. WHERE COSTS WILL EXCEED VALUE OF PROPERTY. — Where the costs of the receivership will probably exceed the value of the property involved, a receiver will not, in general, be appointed.⁵

c. EFFECT OF VOLUNTARY ASSIGNMENT. — After the institution of an action for the appointment of a receiver, the appointment cannot be defeated by a voluntary assignment.⁶

14. Bond in Lieu of Receiver. — Where the person in possession of property or receiving rents and profits offers to execute a bond to secure the person seeking a receiver from any loss pending the litigation, a receiver will not, in general, be appointed.⁷ But where a statutory ground exists for the appointment of a receiver, the fact that the court exercises its discretion in favor of the appointment of a receiver will not be deemed erroneous, although a bond is offered to indemnify from all loss.⁸

15. Consent of Parties. — A receiver should not be appointed in an improper case, even by consent of parties, especially where the rights of third persons may be concerned.⁹ Where a receiver is appointed by agreement between the parties to a suit, in order to accomplish an unlawful purpose, such person will be considered the agent of the owner of the property.¹⁰

16. Receivers of Partnerships — *a. IN GENERAL.* — The principle upon which a receiver is appointed in the case of a dissolution of a copartnership and a disagreement between the partners as to the disposition of the assets has

1. When There Is No Property. — *Fogarty v. Burke*, 1 Con. & Law. 565; *Hale-Berry Co. v. Diamond State Iron Co.*, 94 Ga. 61; *Barton v. Enterprise Loan, etc., Assoc.*, 114 Ind. 226, 5 Am. St. Rep. 608; *Morris v. Hiler*, (C. Pl. Spec. T.) 57 How. Pr. (N. Y.) 322; *Rodman v. Harvey*, 102 N. Car. 1.

When Appointment Not Justified. — Where a corporation leaving the property of another has no assets but the remnant of the term, and the income from the leased property is not sufficient to pay the rental thereof, the appointment of a receiver is not justified. *Cape May v. Cape May, etc., R. Co.*, 59 N. J. Eq. 59.

Conducting Business as Agent. — But where a debtor is conducting a business ostensibly as the agent of his wife, and is employing his minor sons to aid him, his interest is sufficient to warrant a decree appointing a receiver where it appears that the property is in peril. *Penn v. Whitehead*, 12 Gratt. (Va.) 74.

2. McCullough v. Jones, 91 Ala. 186; *Atlanta Brewing, etc., Co. v. Bluthenthal*, 101 Ga. 541.

Substitute for Receivership. — *Continental Nat. Bank v. Myerle*, 24 N. Y. App. Div. 154.

3. Darragh v. H. Wetter Mfg. Co., 78 Fed. Rep. 7, 49 U. S. App. 1.

4. Defendant's Denial of Property. — *Bloodgood v. Clark*, 4 Paige (N. Y.) 574; *Browning v. Bettis*, 8 Paige (N. Y.) 568; *Coates v. Wilkes*, 92 N. Car. 376. In the latter case it was said that it need not be absolutely certain that there is property to justify the appointment of a receiver.

5. Post v. Weeks, 3 Pa. Dist. 380.

6. Voluntary Assignment. — *Belmont Nail Co. v. Columbia Iron, etc., Co.*, 46 Fed. Rep. 8; *M. V. Monarch Co. v. Hardinsburg Bank*, 103 Ky. 276; *State v. New England Bank*, 55 Minn. 139; *Milam County Co-operative Cotton, etc., Alliance v. Tennent-Stribling Shoe Co.*, (Tex. Civ. App. 1897) 40 S. W. Rep. 331; *Oleson v. Tacoma Bank*, 15 Wash. 148.

7. Bond in Lieu of Receiver. — *Barclay v. Quicksilver Min. Co.*, 9 Abb. Pr. N. S. (N. Y.) 283; *Devereux v. Fleming*, 47 Fed. Rep. 177; *Stillwell v. Savannah Grocery Co.*, 88 Ga. 100; *Stephens v. Kaga*, 142 Ind. 523; *Virginia, etc., Steel, etc., Co. v. Wilder*, 88 Va. 942; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81. And see *Harrison v. Cotton States L. Ins. Co.*, 78 Ga. 716.

Receiver of Mining Property. — A receiver will not be directed to take charge of mining property claimed by an executrix as her own and operated by her, without first giving to the claimant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom as the court might subsequently direct. *Stith v. Jones*, 101 N. Car. 360.

8. Rapp v. Reehling, 122 Ind. 255. And see *Harrison v. Cotton States L. Ins. Co.*, 78 Ga. 716.

9. Whelpley v. Erie R. Co., 6 Blatchf. (U. S.) 274.

10. Texas, etc., R. Co. v. Gay, 86 Tex. 571.

been said to be that, ordinarily, each partner has an equal right to the possession and control of the partnership effects and business.¹ It has been held that receivers for a partnership should not be appointed on the application of a member thereof, except on a showing that the partners are unable or unwilling to arrange the matters in controversy themselves, or that there is some abuse of partnership rights and property, or some fraud or mismanagement or violation of partnership duties.²

b. IN ACTIONS FOR DISSOLUTION.—In actions for the dissolution of a partnership where the members thereof cannot agree upon an adjustment, it is proper to appoint a receiver if necessary to protect the partnership assets.³

Facts Must Justify Dissolution—It may be stated generally that equity will not interfere either by injunction or receivership, when the facts as presented do not justify a decree for the dissolution of the partnership.⁴ But a partnership will not be dissolved and a receiver appointed on account of mere differences between the partners where the firm assets are not endangered,⁵ nor on account of the failure of one partner to co-operate with the other,⁶ nor because the business has been unprofitable.⁷

1. Partnerships.—*Gowan v. Jeffries*, 2 Ashm. (Pa.) 296. And see *Speights v. Peters*, 9 Gill (Md.) 472.

2. *Webb v. Allen*, 15 Tex. Civ. App. 605.

3. Dissolution of Partnership—England.—*Hall v. Hall*, 3 Macn. & G. 79; *Chapman v. Beach*, 1 Jac. & W. 574; *Smith v. Jeyes*, 4 Beav. 503; *Madgwick v. Wimble*, 6 Beav. 495; *Clegg v. Fishwick*, 1 Macn. & G. 296.

Alabama.—*Irwin v. Everson*, 95 Ala. 64.

Georgia.—*Dunn v. McNaught*, 38 Ga. 179.

Iowa.—*Taylor v. Well*, 113 Iowa 326; *Loomis v. McKenzie*, 31 Iowa 425.

Louisiana.—*McNair v. Gourrier*, 40 La. Ann. 353.

Maryland.—*Katz v. Brewington*, 71 Md. 79; *Heflebower v. Buck*, 64 Md. 15.

Michigan.—*Kirby v. Ingersoll*, Harr. (Mich.) 172; *Perrin v. Lepper*, 56 Mich. 351; *Morey v. Grant*, 48 Mich. 326; *Simon v. Schloss*, 48 Mich. 233.

Missouri.—*Cox v. Volkert*, 86 Mo. 511.

New Jersey.—*Rhodes v. Wilson*, (N. J. 1890) 19 Atl. Rep. 732; *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 177; *Sutro v. Wagner*, 23 N. J. Eq. 388; *Randall v. Morrell*, 17 N. J. Eq. 343; *Cox v. Peters*, 13 N. J. Eq. 39; *Wilson v. Fitcher*, 11 N. J. Eq. 71; *Renton v. Chaplain*, 9 N. J. Eq. 62; *Wolbert v. Harris*, 7 N. J. Eq. 605; *Sieghortner v. Weissenborn*, 20 N. J. Eq. 177.

New York.—*Day v. Dow*, 46 N. Y. App. Div. 148; *Garretson v. Weaver*, 3 Edw. (N. Y.) 385; *Henn v. Walsh*, 2 Edw. (N. Y.) 129; *Davidge v. Coe*, 54 N. Y. Super. Ct. 360; *Smith v. Fitchett*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 207; *Buchanan v. Comstock*, 57 Barb. (N. Y.) 568; *Hayes v. Heyer*, 4 Sandf. Ch. (N. Y.) 485; *Jackson v. De Forest*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 81; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 135; *Straus v. Heyenga*, (Supm. Ct. Gen. T.) 5 N. Y. St. Rep. 37.

Oregon.—*Fleming v. Carson*, 37 Oregon 252; *Wellman v. Harker*, 3 Oregon 253.

Pennsylvania.—*Slemmer's Appeal*, 58 Pa. St. 168, 98 Am. Dec. 255; *Holden v. M'Makin*, 1 Pars. Eq. Cas. (Pa.) 270.

Texas.—*Shulte v. Hoffman*, 18 Tex. 678.

Receivership for Property Standing in Name of Corporation.—Where, in an action by a partner for a dissolution of the partnership and an accounting, charging the fraud of another partner, it appears that the title to certain assets actually owned by the copartnership stands in the name of a corporation organized for the purpose of operating the property, a receiver will be appointed to take charge thereof. *Fischer v. Superior Ct.*, 98 Cal. 67. *Beatty, C. J., and De Haven, J., dissenting.*

Receiver Appointed to Marshal Assets.—*Smith v. Fitchett*, (Supm. Ct. Spec. T.) 15 Civ. Pro. (N. Y.) 207.

Business Partly Illegal.—If part of a partnership business be legal and part illegal, the court may direct an accounting of that which is legal; and in such case a receiver may be appointed in an action to settle the affairs of the partnership. *Anderson v. Powell*, 44 Iowa 22.

4. *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Garretson v. Weaver*, 3 Edw. (N. Y.) 385.

Qualification of Rule.—In the case of *Const v. Harris*, T. & R. 527, it was held, however, that the court would not appoint a receiver or a manager of any partnership concern unless the suit was so framed that the partnership enterprise should be wholly put an end to, or so that operations could be carried on according to the terms of the instrument which, by agreement of the parties, was to regulate the mode of its being carried on.

5. *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Henn v. Walsh*, 2 Edw. (N. Y.) 129; *Conner v. Belden*, 8 Daly (N. Y.) 257; *Sloan v. Moore*, 37 Pa. St. 222. But compare as to the *New York* doctrine, *Law v. Ford*, 2 Paige (N. Y.) 310; *Marten v. Van Schaick*, 4 Paige (N. Y.) 480.

6. *Roberts v. Eberhardt*, Kay 148.

7. *Shoemaker v. Smith*, 74 Ind. 71; *Moies v. O'Neill*, 23 N. J. Eq. 207.

But a partner who has loaned to the firm more than his agreed capital is entitled to come into equity for relief by the repayment of his loan, and, if the firm is insolvent or in failing circumstances, the appointment of a receiver and an injunction. *Sieghortner v. Weissenborn*, 20 N. J. Eq. 183.

Before Dissolution. — A receiver may, however, be appointed before actual dissolution where the action is of a nature which would authorize a dissolution, and where it is apparent that a dissolution will be decreed on the ground of some breach of duty or contract.¹

After the Dissolution of a Partnership a receiver may be appointed if there is such misconduct or fraud with reference to the partnership assets as seems to render such a course necessary for their preservation,² or, according to other cases, if the parties cannot agree among themselves as to the disposition of the partnership property;³ and this though no insolvency was alleged or proved.⁴ And where all the partners have by agreement divested themselves of the right of winding up the business, a receiver may be appointed.⁵

c. RECEIVER NOT APPOINTED TO CONTINUE BUSINESS. — A court of equity will not appoint a receiver for the purpose of permanently conducting the partnership business.⁶ But a receiver may, for good cause shown, be permitted to continue the business until a sale of the property is made or the litigation is ended.⁷

d. EXCLUSION FROM PARTNERSHIP RIGHTS. — Where there is such an exclusion of one member of a partnership from all voice in the management of its affairs and property as would warrant a dissolution of the partnership, a receiver may be appointed.⁸ It is immaterial in such circumstances that

1. Before Dissolution. — *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Bard v. Bingham*, 54 Ala. 466; *Whitman v. Robinson*, 21 Md. 43; *Veith v. Ress*, 60 Neb. 52; *Heathcot v. Ravenscroft*, 6 N. J. Eq. 113; *Henn v. Walsh*, 2 Edw. (N. Y.) 129; *Marten v. Van Schaick*, 4 Paige (N. Y.) 480; *Law v. Ford*, 2 Paige (N. Y.) 310; *Fox v. Curtis*, 176 Pa. St. 52; *Sloan v. Moore*, 37 Pa. St. 222; *Jordan v. Miller*, 75 Va. 442. And see *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Garretson v. Weaver*, 3 Edw. (N. Y.) 385.

2. After Dissolution — *England*. — *Taylor v. Neate*, 39 Ch. D. 538; *Const v. Harris*, T. & R. 517; *Harding v. Glover*, 18 Ves. Jr. 281; *Wilson v. Greenwood*, 1 Swanst. 481; *Pini v. Roncoroni*, (1892) 1 Ch. 633.

Alabama. — *Word v. Word*, 90 Ala. 81.

Indiana. — *Bufkin v. Boyce*, 104 Ind. 53.

Louisiana. — *McNair v. Gourrier*, 40 La. Ann. 353.

New Jersey. — *Cox v. Peters*, 13 N. J. Eq. 41; *Birdsall v. Colie*, 10 N. J. Eq. 64; *Renton v. Chaplain*, 9 N. J. Eq. 68. And see *Randall v. Morrell*, 17 N. J. Eq. 346.

New York. — *Wilcox v. Pratt*, 125 N. Y. 688, 34 N. Y. St. Rep. 475; *Macdonald v. Trojan Button-Fastener Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 91; *Davis v. Grove*, 2 Robt. (N. Y.) 134.

Virginia. — *Jordan v. Miller*, 75 Va. 442.

3. Bennett v. Smith, 108 Ga. 466; *Martin v. Hurley*, 84 Mo. App. 670; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479; *Law v. Ford*, 2 Paige (N. Y.) 310; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 135; *Sloan v. Moore*, 37 Pa. St. 217. And see *Smith v. Fitchett*, 56 Hun (N. Y.) 473.

Right to Accounting but Not Receivership. — *Alcott v. Vultee*, 33 N. Y. App. Div. 245.

4. Bennett v. Smith, 108 Ga. 466.

5. Davis v. Amer. 3 Drew. 65. And see *Turner v. Major*, 3 Giff. 442; *O'Bryan v. Gibbons*, 2 Md. Ch. 9; *Maynard v. Railey*, 2 Nev. 313.

6. Continuance of Business. — *Const v. Harris*,

T. & R. 527; *Goodman v. Whitcomb*, 1 Jac. & W. 569. See also *Hall v. Hall*, 3 Macn. & G. 79; *Chapman v. Beach*, 1 Jac. & W. 574; *Allen v. Hawley*, 6 Fla. 164, 63 Am. Dec. 198; *Jackson v. DeForest*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 81; *Garretson v. Weaver*, 3 Edw. (N. Y.) 385.

7. Allen v. Hawley, 6 Fla. 164, 63 Am. Dec. 198; *Jackson v. DeForest*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 81; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479. See also *Wolbert v. Harris*, 7 N. J. Eq. 605; *Dayton v. Wilkes*, (N. Y. Super. Ct. Spec. T.) 17 How. Pr. (N. Y.) 510; *Heatherton v. Hastings*, 5 Hun (N. Y.) 459; *Crane v. Ford*, Hopk. (N. Y.) 114; *McMahon v. McClernan*, 10 W. Va. 479.

Sale of Business as Going Concern. — *Taylor v. Neate*, 39 Ch. D. 538, 57 L. J. Ch. 1044, 37 W. R. 190.

8. Where Partner Excluded from Participation — *England*. — *Wilson v. Greenwood*, 1 Swanst. 481; *Katsch v. Schenck*, 18 L. J. Ch. 386; *Hale v. Hale*, 4 Beav. 369; *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Rowe v. Wood*, 2 Jac. & W. 559; *Brenan v. Preston*, 2 De G. M. & G. 813; *Peacock v. Peacock*, 16 Ves. Jr. 49; *Blakeney v. Dufaur*, 15 Beav. 40; *Const v. Harris*, T. & R. 517.

United States. — *Einstein v. Schnebly*, 89 Fed. Rep. 540.

Georgia. — *Terrell v. Goddard*, 18 Ga. 664.

Illinois. — *Leeds v. Townsend*, 74 Ill. App. 444.

Kansas. — *Hottenstein v. Conrad*, 9 Kan. 435.

Maryland. — *Katz v. Brewington*, 71 Md. 79; *Heflebower v. Buck*, 64 Md. 15; *Haight v. Burr*, 19 Md. 130; *Speights v. Peters*, 9 Gill (Md.) 472.

Michigan. — *Kirby v. Ingersoll*, 1 Dougl. (Mich.) 477.

Nevada. — *Maynard v. Railey*, 2 Nev. 313.

New Jersey. — *Wolbert v. Harris*, 7 N. J. Eq. 605.

New York. — *Wilcox v. Pratt*, 125 N. Y. 688, 34 N. Y. St. Rep. 475.

the partnership is not insolvent.¹

e. DEATH OF PARTNER. — The death of a partner is not of itself a sufficient ground for the appointment of a receiver, because the surviving partner is vested with the partnership assets in trust to wind up the business and to account to all parties in interest.² But where all of two or more partners die a receiver will be appointed.³ If, however, the surviving partner or partners misappropriate the assets, or seek to continue the business on their own account with the assets of the deceased partner, or unreasonably delay in closing up the business, a receiver will be appointed.⁴

f. MISCONDUCT OF PARTNER. — A receiver of a partnership will, in general, be appointed for the misconduct of a copartner where the conduct is of a nature to amount to or warrant a dissolution of the partnership compact.⁵ Thus, a receiver has been appointed where a partner wilfully violated the terms of the partnership agreement;⁶ where one of the partners had been wasting the joint assets;⁷ where a partner was so mismanaging the business that the partnership assets were in peril;⁸ where a partner had been in collusion with the debtors of the firm and allowed them to delay in paying their debts;⁹ where the evidence showed a deliberate intent on the part of a partner to ruin the firm business;¹⁰ where one of the partners was carrying on a separate trade for his own benefit with the firm's property;¹¹ where insolvent members of a firm attempted to appropriate the firm assets to the payment of their

Pennsylvania. — *Gowan v. Jeffries*, 2 Ashm. (Pa.) 296; *Page v. Vankirk*, 1 Brews. (Pa.) 282; *Seibert v. Seibert*, 1 Brews. (Pa.) 531.

Texas. — *Shulte v. Hoffman*, 18 Tex. 678.

Washington. — *Cole v. Price*, 22 Wash. 18.

Strongest Ground for Receivership. — It has been said that the exclusion of a partner from his full share of management is the strongest ground for appointing a receiver. *Const v. Harris*, T. & R. 496.

1. *Cole v. Price*, 22 Wash. 18.

2. **Death of Partner.** — *Philips v. Atkinson*, 2 Bro. C. C. 272; *Painter v. Painter*, (Cal. 1894) 36 Pac. Rep. 865; *Comstock v. McDonald*, 113 Mich. 626; *Perrin v. Lepper*, 56 Mich. 351; *Booth v. Smith*, 79 Hun (N. Y.) 384; *Holden v. M'Makin*, 1 Pars. Eq. Cas. (Pa.) 270.

3. *Philips v. Atkinson*, 2 Bro. C. C. 272.

4. **Misconduct of Surviving Partner.** — *Madgwick v. Wimbble*, 6 Beav. 495; *Word v. Word*, 90 Ala. 81; *Miller v. Jones*, 39 Ill. 54; *Walker v. House*, 4 Md. Ch. 39; *Dawson v. Parsons*, 66 Hun (N. Y.) 628, 21 N. Y. Supp. 212; *Holden v. M'Makin*, 1 Pars. Eq. Cas. (Pa.) 270. See also *Clegg v. Fishwick*, 1 Macn. & G. 294; *Hale v. Hale*, 4 Beav. 369; *Dick v. Laird*, 4 Cranch (C. C.) 667; *Helme v. Littlejohn*, 12 La. Ann. 298; *Connor v. Allen*, Harr. (Mich.) 371; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510.

Failure to Keep Proper Accounts. — *Word v. Word*, 90 Ala. 81. See also as to improper entries, *Read v. Bowers*, 4 Bro. C. C. 441; *Goodman v. Whitcomb*, 1 Jac. & W. 569.

5. See *Sheppard v. Oxenford*, 1 Kay & J. 499; *Evans v. Coventry*, 5 De G. M. & G. 916; *Blakeney v. Dufaur*, 15 Beav. 41; *Allen v. Hawley*, 6 Fla. 164, 63 Am. Dec. 209.

On Application of Creditor. — Both an injunction and a receiver have been refused where, under a judgment and execution against one partner, his interest in the partnership effects was sold, and the purchaser filed a bill praying for such relief against the partners, but did not show any such gross misconduct by

the other partner as would alone justify interference with him in winding up the partnership. *Renton v. Chaplain*, 9 N. J. Eq. 71.

Insolvency, Mismanagement, and Fraud. — A receiver may be appointed for a copartnership at the instance of a member of the firm, where it appears that the firm is insolvent and that the other partners have been guilty of gross management and fraud, and have confessed judgments which can only be satisfied out of their partnership interests. *Watson v. Bettman*, 88 Fed. Rep. 825.

6. *Whitman v. Robinson*, 21 Md. 30; *New v. Wright*, 44 Miss. 202.

7. *Williamson v. Wilson*, 1 Bland (Md.) 418; *Todd v. Rich*, 2 Tenn. Ch. 107.

8. **Partnership Assets in Peril** — *England.* — *Jefferys v. Smith*, 1 Jac. & W. 298; *Hall v. Hall*, 3 Macn. & G. 79; *Chaplin v. Young*, 6 L. T. N. S. 97; *Chapman v. Beach*, 1 Jac. & W. 574; *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Smith v. Jeyes*, 4 Beav. 503; *Sheppard v. Oxenford*, 1 Kay & J. 491; *Brenan v. Preston*, 2 De G. M. & G. 813.

Georgia. — *Boyce v. Burchard*, 21 Ga. 74.

Indiana. — *Wallace v. Milligan*, 110 Ind. 408; *Barnes v. Jones*, 91 Ind. 161.

Iowa. — *Saylor v. Mockbie*, 9 Iowa 209.

Maryland. — *Shannon v. Wright*, 60 Md. 520; *Hamill v. Hamill*, 27 Md. 679; *Haight v. Burr*, 19 Md. 130; *Walker v. House*, 4 Md. Ch. 45; *Drury v. Roberts*, 2 Md. Ch. 157.

Missouri. — *Weinrich v. Koelling*, 21 Mo. App. 133.

New Jersey. — *Renton v. Chaplain*, 9 N. J. Eq. 62.

New York. — *Geortner v. Canajoharie*, 2 Barb. (N. Y.) 625.

Rhode Island. — *Arnold v. Providence Lumbar Co.*, 15 R. I. 15; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510.

9. *Estwick v. Conningsby*, 1 Vern. 118.

10. *New v. Wright*, 44 Miss. 202; *Suero v. Wagner*, 23 N. J. Eq. 388.

11. *Harding v. Glover*, 18 Ves. Jr. 281.

individual debts;¹ where partners continuing the business violated their agreement with a retiring partner;² and where, after dissolution, the remaining partners continued to carry on the business on their own account with the partnership assets.³

g. **NECESSITY FOR PARTNERSHIP.** — The court will not appoint a receiver to take charge of a business and wind up the affairs of a concern unless it appears that there is a partnership existing between the parties.⁴ A mere unexecuted agreement for partnership is not sufficient. It must be so far completed as to entitle the parties to a participation in the profits.⁵ But where a contract of partnership has been actually entered into, and the person seeking the receivership has paid a portion of his share of the price of the partnership property and given his notes for the balance, and the partnership has gone into operation, the appointment of a receiver is proper.⁶ So, where a partnership was merely nominal, the real relation between the parties being that of employer and employee, a receiver was denied on the application of the latter.⁷

h. **DOUBT AS TO EXISTENCE OF PARTNERSHIP.** — In case of doubt as to the existence of a partnership, courts of equity will not interfere by a receiver.⁸

i. **AGREEMENT AS TO WINDING UP BUSINESS.** — Where it is expressly agreed that one or more of the partners shall wind up the business on dissolution of the partnership, a receiver will not be appointed in the absence of fraud or mismanagement.⁹

17. Receivers of Corporations — *a.* **GENERAL RULE.** — A court of equity is, as a rule, disinclined to take the control and management of the affairs of a corporation out of the hands of its officers and directors and substitute its receiver therefor.¹⁰

1. *Davis v. Grove*, 2 Robt. (N. Y.) 134.

2. *West v. Chasten*, 12 Fla. 315; *Drury v. Roberts*, 2 Md. Ch. 157; *White v. Colfax*, 33 N. Y. Super. Ct. 297.

3. *Harding v. Glover*, 18 Ves. Jr. 281; *Madgwick v. Wimble*, 6 Beav. 495; *Miller v. Jones*, 39 Ill. 54; *Simon v. Schloss*, 48 Mich. 233; *Macdonald v. Trojan Button-Fastener Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 91; *Holden v. M'Makin*, 1 Pars. Eq. Cas. (Pa.) 270; *Allyn v. Boorman*, 30 Wis. 684.

4. **Necessity for Existing Partnership.** — *Peacock v. Peacock*, 16 Ves. Jr. 49; *Chapman v. Beach*, 1 Jac. & W. 574; *Fairburn v. Pearson*, 2 Macn. & G. 144; *Katsch v. Schenck*, 18 L. J. Ch. 386; *Hobart v. Ballard*, 31 Iowa 521; *Russell v. White*, 63 Mich. 409; *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 177; *Goulding v. Bain*, 4 Sandf. (N. Y.) 716; *Popper v. Scheider*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 56; *Gregory v. Gregory*, 1 Sweeney (N. Y.) 624.

Agreement Partaking of Nature of Partnership. — For the appointment of a receiver in litigation between parties to an agreement partaking of the nature of a partnership, see *Davidge v. Coe*, 54 N. Y. Super. Ct. 360. And see *Wilcox v. Pratt*, 125 N. Y. 688, 34 N. Y. St. Rep. 475.

Receiver of Books and Papers. — A receiver of books and papers necessary to the winding up of a transaction may be appointed, irrespective of any question of partnership, where the plaintiff has an interest in profits as such under a business arrangement between him and the defendant. *Davidge v. Coe*, 54 N. Y. Super. Ct. 363.

5. *Hobart v. Ballard*, 31 Iowa 521.

6. *Taylor v. Bilely*, 86 Ga. 154.

7. *Kerr v. Potter*, 6 Gill (Md.) 404; *Nutting v. Colt*, 7 N. J. Eq. 539. And see *Wesby v. Bowers*, 58 Mo. App. 419.

8. *Leeds v. Townsend*, 74 Ill. App. 444.

9. **Express Agreement as to Winding Up Business.** — *Heflebower v. Buck*, 64 Md. 15; *Drury v. Roberts*, 2 Md. Ch. 157; *Simon v. Schloss*, 48 Mich. 233; *Wagoner v. Warne*, (N. J. 1888) 14 Atl. Rep. 215; *Meyer v. Reimers*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 307, *affirmed* 63 N. Y. Supp. 1112; *Weston v. Watts*, (First Dept. Gen. T.) 1 N. Y. St. Rep. 763. And see *Macdonald v. Trojan Button-Fastener Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 91. See also *Hayes v. Heyer*, 4 Sandf. Ch. (N. Y.) 485.

10. *Ranger v. Champion Cotton-Press Co.*, 52 Fed. Rep. 609.

Receivership Not Ordinary Incident of Collection of Debt. — *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550.

Action on Note. — That a receiver for a corporation is not authorized in an action at law against it on a note, see *Miller v. Perkins*, 154 Mo. 629.

More Threatened Suits by Creditors Not Ground for Appointment of Receiver. — *Moss Nat. Bank v. Lakeside Co.*, 10 Ohio Cir. Dec. 542, 19 Ohio Cir. Ct. 365.

Corporation Winding Up Affairs — Receivership Refused. — *Sjoberg v. Security Sav., etc., Assoc.*, 73 Minn. 203, 72 Am. St. Rep. 616. See also *Pringle v. Eltringham Constr. Co.*, 49 La. Ann. 301.

Foreign Corporation — No Receiver for Experimental Purposes. — *Leary v. Columbia River, etc., Nav. Co.*, 82 Fed. Rep. 775.

Construction of Particular Statute. — Under a statute providing for the appointment of a receiver when a corporation has been dissolved,

Where No Beneficial Purpose Will Be Accomplished. — It may be stated as a general rule, without qualification, that a court of equity will never appoint a receiver for a corporation where such appointment would subserve no beneficial purpose.¹

Danger of Loss. — In the case of corporations, as in other instances, the court will appoint a receiver only when such a course is necessary to preserve the corporate assets from loss or destruction.²

Power to Consent to Appointment. — The president has no power, without the authority of the directors or stockholders, to consent to the appointment of a receiver to wind up the affairs of the corporation.³

b. TO PREVENT FORFEITURE OF FRANCHISE. — A receiver may be appointed for a corporation to prevent the forfeiture of its franchise granted by Congress, by reason of the probable failure of the company to complete certain work within the time limited in the grant.⁴

c. FAILURE TO PURSUE OBJECTS OF CREATION. — Where a corporation fails to pursue the objects of its creation and by reason of insolvency or otherwise is disabled from further operations a receiver is, in general, proper.⁵

d. DISPUTES AMONG MANAGING OFFICERS. — Where there are such disputes and discussions in the board of directors or among the governing officers of a corporation as prevent the management of its affairs a receiver may be appointed.⁶ And where there are two boards of directors each claiming

or is in immediate danger of insolvency, or has forfeited its corporate rights, a receiver may not be appointed to take charge of and control the affairs of a corporation where the primary object of the appointment is to wind up the affairs of such corporation or take the management thereof from the directors. *Cincinnati, etc., R. Co. v. Duckworth*, 1 Ohio Cir. Dec. 618.

Rule under Texas Statute. — The appointment of a receiver for a corporation in any case where a receiver would be appointed by the usages of courts of equity is authorized by Rev. Stat. Tex. (1895), art. 1465, subdiv. 4. For a construction of this statute see *New Birmingham Iron, etc., Co. v. Blevens*, 12 Tex. Civ. App. 410.

Receiverships Denied under Particular Circumstances. — For cases in which the appointment of a receiver was denied under the particular circumstances thereof, see *Original Vienna Bakery, etc., Co. v. Heissler*, 50 Ill. App. 406; *Hart v. Mt. Pleasant Park Stock Co.*, 97 Iowa 353; *Miller v. Southern Land, etc., Co.*, 53 S. Car. 364.

Appointment under Particular Circumstances. — For a case in which the appointment of a receiver was held proper under the particular circumstances thereof, see *State v. Second Judicial Dist. Ct.*, 15 Mont. 324, 48 Am. St. Rep. 682.

1. *Sternberg v. Wolff*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494.

And clearly a receiver will not be appointed for a corporation where the only effect of such course would be to hinder and delay the collection of a valid claim. *Bell v. Wood*, 181 Pa. St. 175.

2. That a Corporation Has Lost the Greater Part of Its Property and permanently abandoned its business is not alone ground for the appointment of a receiver for its remaining assets on the application of minority stockholders. It must be shown in addition that its officers have been guilty of such mismanagement of

its affairs as renders a receivership necessary to preserve the existing corporate property. *Clark v. National Linseed Oil Co.*, (C. C. A.) 105 Fed. Rep. 787.

Receivership to Prevent Destruction of Business, Depreciation of Assets, Etc. — *Arents v. Blackwell's Durham Tobacco Co.*, 101 Fed. Rep. 338.

Management and Danger of Loss — Receiver Appointed. — *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 72 Am. St. Rep. 26.

To Prevent Sacrifice at Execution Sale. — *Sage v. Memphis, etc., R. Co.*, 125 U. S. 361.

Receiver for Municipal Corporation. — A receiver will not be appointed for a municipal corporation merely because its officers are neglecting to exercise its franchises, and contemplate illegally paying out corporate funds. It should appear, in addition, that the corporate franchises are abused, or that the corporation or its officers are insolvent, or that the persons applying for the receiver or the corporation will sustain irreparable damage if a receiver is not appointed. *Hurlbut v. Look-out Mountain*, (Tenn. Ch. 1898) 49 S. W. Rep. 301.

3. *Walters v. Anglo-American Mortg., etc., Co.*, 50 Fed. Rep. 316.

4. *Boston Invest. Co. v. Pacific Short Line Bridge Co.*, 104 Iowa 311.

5. *Sjoberg v. Security Sav., etc., Assoc.*, 73 Minn. 203, 72 Am. St. Rep. 616; *De Bemer v. Drew*, 57 Barb. (N. Y.) 438; *Cheney v. Maumee Cycle Co.*, 10 Ohio Cir. Dec. 717, 20 Ohio Cir. Ct. 19.

Attachment of Corporate Property. — *Kanawha Coal Co. v. Ballard, etc., Coal Co.*, 43 W. Va. 721.

Mismanagement — Insolvency — Cessation of Operations. — *St. Louis, etc., Coal, etc., Co. v. Edwards*, 103 Ill. 472.

6. **Disagreements Among Officers.** — *Featherstone v. Cooke*, L. R. 16 Eq. 301; *Trade Auxiliary Co. v. Vickers*, L. R. 16 Eq. 303; *D. A. Tompkins Co. v. Catawba Mills*, 82 Fed. Rep. 780; *Schmidt v. Mitchell*, 101 Ky. 570, 72

authority as such and attacking the existence of the other, and neither is able to protect the corporation against mismanagement and misappropriation of funds, a receiver will be appointed until the authority of one or the other of the contending boards is established although the corporation is solvent.¹ But where one corporation owns stock in another, a dispute as to the management of the latter between the two sole owners of the stock of the former will not authorize the appointment of a receiver for the former to take charge of the stock in the latter.²

2. MISCONDUCT OF OFFICERS OR DIRECTORS — (1) *In General*. — The subject of the appointment of a receiver for a corporation on the ground of misconduct of officers or directors has given rise to much apparent conflict in the cases. But however much the decisions seem to differ on the particular facts, the rule generally recognized is that a corporation will be placed in the hands of a receiver for the misconduct of its officers or directors only when necessary to preserve the property or rights of creditors or stockholders.³ The mere misconduct of officers of a corporation is not sufficient ground for the appointment of a receiver, as a court of equity may forbid the misconduct or remove the officer from his position.⁴

Nor Are Mere Irregularities in the management of a corporation, without fraud committed or intended, sufficient for the appointment of a receiver,⁵ courts of equity being very reluctant to appoint receivers for corporations, because

Am. St. Rep. 427; *Sternberg v. Wolff*, 56 N. J. Eq. 389, 67 Am. St. Rep. 494; *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620.

Disagreement as to Business Policy. — A receiver will not be appointed for a corporation because of mere disagreements among the directors as to the proper method of conducting the business, unless there are such dissensions as make it impossible for the corporation to carry on its affairs. *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620.

1. *Jasper Land Co. v. Wallis*, 123 Ala. 652.
2. *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 63 Am. St. Rep. 389.

3. A receiver may be appointed where the property of a corporation is being mismanaged and is in danger of being lost to the stockholders and directors through the collusion and fraud of its officers and directors, who are themselves creditors of the corporation and mortgage the corporate property to themselves. *Haywood v. Lincoln Lumber Co.*, 64 Wis. 645.

4. **Mere Misconduct**. — *Stewart v. Chesapeake, etc., Canal Co.*, 4 Hughes (U. S.) 49; *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Empire Hotel Co. v. Main*, 98 Ga. 176; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *City Pottery Co. v. Yates*, 37 N. J. Eq. 543; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157; *Howe v. Deuel*, 43 Barb. (N. Y.) 504; *Ogden v. Kip*, 6 Johns. Ch. (N. Y.) 160; *Bank Com'rs v. Rhode Island Cent. Bank*, 5 R. I. 12.

Ability to Betray Trust. — That an officer of a corporation is in a position where he may betray the corporate trust will not justify the appointment of a receiver for the corporation when there is no evidence to establish the probability that such officer will be guilty of any misconduct, and although the appointment of a receiver would do no harm. *Young v. Rutan*, 69 Ill. App. 513.

The Apprehension that a Suit Brought by a Corporation against an officer thereof will not be diligently prosecuted, owing to the relations of the parties, will not warrant the appointment of a receiver to take charge of such suit where no laches on the part of the corporation is shown. *Griffing v. A. A. Griffing Iron Co.*, 96 Fed. Rep. 577.

5. **Mere Irregularities**. — *Hardee v. Sunset Oil Co.*, 56 Fed. Rep. 51; *Rothwell v. Robinson*, 44 Minn. 538; *Goebel v. Herancourt Brewing Co.*, 2 Ohio Dec. 377, 7 Ohio N. P. 230.

Dissatisfaction with Management Not Sufficient Ground. — *Fluker v. Emporia City R. Co.*, 48 Kan. 577.

Failure to File Certificate Showing Increase of Capital Stock. — In the absence of evidence that the certificate was improperly suppressed or withheld to accomplish an unlawful purpose, failure to file a certificate showing an increase of capital stock is not cause for the appointment of a receiver pending a suit against the corporation and its directors for an accounting for the alleged overissue of stock. *Thalmann v. Hoffman House*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 140.

That the Refusal of the Officers of a Corporation to Allow a Stockholder to Examine Its Books is not ground for the appointment of a receiver, see *Original Vienna Bakery, etc., Co. v. Heissler*, 50 Ill. App. 406.

Receiver for Collection of Unpaid Stock Assessments Refused. — *Straman v. North Baltimore Waterworks Co.*, 4 Ohio Cir. Dec. 339, 8 Ohio Cir. Ct. 89.

Acts on Advice of Counsel. — The mere fact that directors of a corporation, on advice of their counsel, refused to permit a pledgee of stock to vote it, though it stood in his name, is not ground for appointment of a temporary receiver for the corporation pending a proceeding to declare the election of the directors void. *Thalmann v. Hoffman House*, (Supm. Ct. Spec. T.) 27 Misc. (N. Y.) 140.

such appointment is a practical displacement of the board of directors and the lawfully constituted corporate authorities.¹

A Receiver of a Corporation May, However, Be Appointed at the instance of any stockholder or creditor when the directors or other officers are putting in jeopardy the rights of stockholders or creditors by grossly mismanaging the business, or by misapplying the property or funds of the corporation.²

Where Corporation Is Solvent. — It has been held that a corporation should not be dissolved and a receiver appointed on the ground of mismanagement, fraud, and abuse of corporate powers, where the corporation is solvent.³

Where One Corporation Owns All the Stock of Another, a receiver of the former will not be appointed for official misconduct, mismanagement, and waste in the conduct of the affairs of the latter.⁴

(2) **Failure to Keep Property in Repair.** — Under a statute providing for the appointment of receivers whenever necessary to secure ample justice to the parties, it was held a sufficient ground for the appointment of a receiver of a corporation that the directors allowed the corporate property to remain out of repair and so become unproductive.⁵

f. INSOLVENCY — (1) *In General.* — If a corporation is insolvent and has suspended operations, the court may in its discretion appoint a receiver to protect the interests of both creditors and stockholders.⁶ But where insolvency is the only ground alleged, the application for a receiver is usually denied,⁷ unless it is also made to appear that there is no reasonable prospect

1. Where Directors Have Abdicated Functions.

— But where the directors themselves have in effect abdicated their functions by placing the embarrassed corporation in the hands of a trustee for certain of the creditors, the court may interpose, at the instance of nonpreferred creditors, to manage the property of the corporation through a receiver. *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. Rep. 204.

2. Where Rights of Stockholders or Creditors Jeopardized.

— *Sincer v. Alverson*, 51 La. Ann. 955; *Warren v. Fake*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 430; *Conro v. Gray*, (Supm. Ct. Gen. T.) 4 How. Pr. (N. Y.) 166; *Blatchford v. Ross*, 54 Barb. (N. Y.) 42; *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639.

Mismanagement, Conspiracy — Fraudulent Misapplication of Funds.

— *Matter of Lewis*, 52 Kan. 660.

Negligence of Directors — Absconding of Secretary.

— *Evans v. Coventry*, 5 De G. M. & G. 911.

Usurpation, Ultra Vires Acts, Fraud, or Gross Neglect.

— *Griffing v. A. A. Griffing Iron Co.*, 96 Fed. Rep. 577.

Illegal Conduct, Fraud, Ultra Vires Proceedings.

— *Du Pay v. Transportation, etc., Co.*, 82 Md. 408.

Fraudulent Mismanagement of Affairs.

— For an intimation that the appointment of a receiver is proper where the affairs of a corporation are being fraudulently mismanaged, see *Texas Consol. Compress, etc., Assoc. v. Storrow*, (C. C. A.) 92 Fed. Rep. 5. And see *Aiken v. Colorado River Irrigation Co.*, 72 Fed. Rep. 591.

To Prevent Threatened Fraud and Breach of Trust.

— *North Fairmount Bldg., etc., Co. v. Rehn*, 8 Ohio Dec. 594, 6 Ohio N. P. 185, in which case a receiver for a corporation was appointed. But that a receiver will not be appointed, see *Behrens v. Equality Bldg. Assoc.*, 3 Ohio Dec. 275, 2 Ohio N. P. 259.

Failure to Declare Dividends.

— Where it was alleged that the corporation had not declared a dividend for seven years because the defendant, owning a majority of the stock, had controlled the corporation for his own interest and profit, it was held that equity had power to appoint a receiver and to direct the affairs of the corporation to be wound up. *Miner v. Belle Isle Ice Co.*, 93 Mich. 97.

3. *Mason v. Supreme Ct., etc.*, 77 Md. 483, 39 Am. St. Rep. 433; *Hunt v. American Grocery Co.*, 80 Fed. Rep. 70.

4. *O'Connor v. Long Island Traction Co.*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 501.

5. *Wayne Pike Co. v. Hammons*, 129 Ind. 368.

6. Insolvency.

— *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Buck v. Piedmont, etc., L. Ins. Co.*, 4 Hughes (U. S.) 415; *Meyer v. Johnston*, 53 Ala. 240; *Security Sav., etc., Co. v. Piper*, (Idaho 1895) 40 Pac. Rep. 144; *Turnbull v. Prentiss Lumber Co.*, 55 Mich. 387; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126; *Atty.-Gen. v. Columbia Bank*, 1 Paige (N. Y.) 511; *Com. v. Pennsylvania Bldg., etc., Assoc.*, 20 Pa. Co. Ct. 589.

General Assignment of Property.

— Where a corporation has been financially embarrassed by unlawful speculative operations, and is also indebted to other creditors whose demands have grown out of its legitimate business operations, and has assigned its assets in trust to secure all creditors indiscriminately, a receiver will be appointed. *Leavitt v. Yates*, 4 Edw. (N. Y.) 173. And see *Consolidated Tank-Line Co. v. Kansas City Varnish Co.*, 43 Fed. Rep. 204.

7. *Onondaga Trust, etc., Co. v. Spartanburg Waterworks Co.*, 91 Fed. Rep. 324; *Doe v. Northwest Coal, etc., Co.*, 64 Fed. Rep. 928; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Lawrence Iron-Works Co. v. Rockbridge Co.*, 47 Fed. Rep. 755; *Murray v. Superior Ct.*, 129 Cal. 628; *Ft. Wayne Electric*

that it will soon be able to resume its business with safety to the public and advantage to its stockholders,¹ or that, in addition to insolvency, the directors or other managing officers have been guilty of fraud, negligence, or mismanagement.²

(2) *When Corporation Is Insolvent* — (a) *In General*. — Where it is shown that the assets of a corporation exceed its liabilities by a large sum, the appointment of a temporary receiver is unauthorized under a statute allowing such appointment where a corporation is insolvent;³ nor will a receiver be appointed for a corporation on the mere ground that it has no property subject to levy of execution, if it has equitable rights sufficient to satisfy its debts.⁴ Mere inability to meet current obligations is not conclusive of insolvency,⁵ but a corporation which is largely indebted on past-due claims, the only property of which is not available for the payment of its debts in the ordinary course of business, and which is unable to meet its obligations, has been held insolvent in such sense as to entitle its creditors to have its property sold and the proceeds applied in payment of their claims.⁶

(b) *Return of Unsatisfied Execution*. — In most of the states of the Union courts of equity are empowered to appoint receivers of the property of corporations, at the suit of judgment creditors, after execution has been returned unsatisfied.⁷

g. DISSOLUTION OF CORPORATION. — When a corporation is dissolved and has no office or place of business, and no officers to attend to its affairs, a receiver may be appointed to preserve the assets for the benefit of the stockholders and creditors.⁸ Where, upon dissolution of a corporation, it is

Corp. v. Franklin Electric Light Co., 57 N. J. Eq. 7, (N. J. 1898) 40 Atl. Rep. 441; Atlantic Trust Co. v. Consolidated Electric Storage Co., 49 N. J. Eq. 402; Robison v. Cleveland City R. Co., 7 Ohio Dec. 312, 5 Ohio N. P. 293; Espuela Land, etc., Co. v. Bindle, 5 Tex. Civ. App. 18.

Delinquencies of Stockholders. — The fact that the stockholders of a corporation refuse to aid the company by meeting assessments on their stock or to advance means to relieve it from pecuniary embarrassments when called upon to do so is not ground for the appointment of a receiver, since it is within the power of the trustees to sell out the stock of the delinquent holders. Baker v. Backus, 32 Ill. 79.

Mere Expected Future Insolvency Insufficient. — Edison v. Edison United Phonograph Co., 52 N. J. Eq. 620.

1. Ft. Wayne Electric Corp. v. Franklin Electric Light Co., 57 N. J. Eq. 7, 58 N. J. Eq. 579, 43 Atl. Rep. 1098; Cook v. East Trenton Pottery Co., 53 N. J. Eq. 29; Atlantic Trust Co. v. Consolidated Electric Storage Co., 49 N. J. Eq. 402.

2. Texas Consol. Compress, etc., Assoc. v. Storrow, (C. C. A.) 92 Fed. Rep. 5; Onondaga Trust, etc., Co. v. Spartanburg Waterworks Co., 91 Fed. Rep. 324; Doe v. Northwest Coal, etc., Co., 64 Fed. Rep. 928; Lawrence Iron-Works Co. v. Rockbridge Co., 47 Fed. Rep. 755; Atlantic Trust Co. v. Consolidated Electric Storage Co., 49 N. J. Eq. 402; Porter v. Industrial Information Co., (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 262.

3. Matter of Hitchcock Mfg. Co., 1 N. Y. App. Div. 164.

4. Fox River Paper Co. v. Louis Snider Paper Co., 8 Ohio Dec. 671.

5. *Income Insufficient to Pay Fixed Charges*. — Thoma v. East End Opera House Co., 30 Pittsb. Leg. J. N. S. (Pa.) 230.

Inability to Pay Interest on Bonds Held Insufficient. — Cape May v. Cape May, etc., R. Co., 59 N. J. Eq. 59.

But a Finding of Insolvency Was Held Sustained by evidence that a corporation was unable to meet its current obligations from its own resources, its working capital being raised on the credit of its directors, and its bank account being constantly overdrawn. Taylor v. Mitchell, 80 Minn. 492. And see Ft. Wayne Electric Corp. v. Franklin Electric Light Co., 57 N. J. Eq. 7.

Building and Loan Association — No Obligations but Liability to Stockholders — Held Not Insolvent. — Sjöberg v. Security Sav., etc., Assoc., 73 Minn. 203, 72 Am. St. Rep. 616.

6. Citizens' Bank, etc., Co. v. Union Min., etc., Co., 106 Fed. Rep. 97.

Assets One-fifth of Liabilities. — That a corporation whose assets are only one-fifth of its liabilities is insolvent within the meaning of the law relating to the appointment of receivers, see Kit Carter Cattle Co. v. McGillin, 10 Ohio Dec. 146, 7 Ohio N. P. 575.

Assets Two-thirds of Capital. — Where the officers of a building and loan association have so mismanaged its affairs that its assets amount to less than two-thirds of the capital paid in, the corporate assets should be placed in the hands of a receiver. Towle v. American Bldg., etc., Soc., 60 Fed. Rep. 131.

7. See Covington Drawbridge Co. v. Shepherd, 21 How. (U. S.) 112; Adler v. Milwaukee Patent Brick Mfg. Co., 13 Wis. 57.

8. *Where Corporation Dissolved*. — Midland Co. v. Anderson, 63 Ill. App. 51; Supreme Sitting, etc. v. Baker, 134 Ind. 293; Matter of Louisiana Sav. Bank, etc., Co., 35 La. Ann. 196; Stark v. Burke, 5 La. Ann. 740; Smith v. Danzig, (Supm. Ct. Spec. T.) 64 How. Pr. (N. Y.) 320; Lawrence v. Greenwich F. Ins. Co., 1 Paige (N. Y.) 587; Dobson v. Simonton,

provided by statute that the officers of the company shall be trustees for the creditors and stockholders, a receiver should not be appointed unless it appears that the trustees are misconducting themselves and jeopardizing the property.¹

h. WHERE ADEQUATE REMEDY AT LAW. — A receiver for a corporation will not be appointed at the instance of a stockholder where such stockholder has a full and adequate remedy by action in his own name.²

18. Receivers of Mortgaged Property — *a.* IN GENERAL. — The power of a court of equity to appoint a receiver *pendente lite* in foreclosure proceedings is, it has been held, inherent in such court as a part of its incidental jurisdiction, and is not dependent on statutory authorization.³ But a receiver of rents and profits in an action of foreclosure will not be appointed except in a case clearly invoking the equitable power of the court to grant that relief.⁴

78 N. Car. 63. And see *Olmstead v. Distilling, etc., Co.*, 73 Fed. Rep. 44.

Construction of Particular Statute. — But under a statute authorizing the appointment of a receiver upon the dissolution of a corporation, a receivership is not authorized merely upon a judgment excluding the corporation from usurping certain privileges and franchises not conferred upon it by its charter. *Yore v. Superior Ct.*, 108 Cal. 431.

1. *Parsons v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 305; *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684. And see *Anderson v. Buckley*, 126 Ala. 623.

Mere Fact of Dissolution. — The mere fact that a corporation has been dissolved does not in every instance give to the minority stockholders the right to have a receiver appointed and the assets sold, as there may be circumstances which will justify a court of equity in ascertaining the value of the assets without a sale, and in making a distribution to the members on that basis. *Baltimore, etc., R. Co. v. Cannon*, 72 Md. 493.

2. *Marcuse v. Gullett Gin Mfg. Co.*, 52 La. Ann. 1383.

Where Remedy Supplied by Insolvent Laws. — That a receiver will not be appointed where a remedy is supplied by insolvent laws, see *Falmouth Nat. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550.

3. **Foreclosure Proceedings.** — *U. S. Trust Co. v. New York, etc., R. Co.*, 101 N. Y. 483, 25 Am. & Eng. R. Cas. 602. See *Hollenbeck v. Donnell*, 94 N. Y. 346. And see *Lowell v. Doe*, 44 Minn. 144; *Philadelphia Mortg. etc., Co. v. Goos*, 47 Neb. 804.

A Sale under Attachment at the instance of the unsecured creditors of the mortgagor does not prevent the appointment of a receiver at the instance of the mortgagee, as such sale in no wise affects the paramount lien of the mortgage. *Cooper v. Berney Nat. Bank*, 99 Ala. 119.

Suit to Determine Priority of Incumbrances. — *Smith v. Effingham*, 2 Beav. 233; *Crewe v. Edleston*, 1 De G. & J. 109. See also *Davis v. Marlborough*, 2 Swanst. 137.

Suit to Set Aside Fraudulent Mortgage. — *Hirsch v. Israel*, 106 Iowa 498.

Fact that Mortgagee Not Entitled to Possession Immaterial. — *American Nat. Bank v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 89 Fed. Rep. 610.

Statute Forbidding Appointment. — Under a statute expressly confining the remedy of a

mortgagee to foreclosure and sale, it has been held that a receiver of the rents and profits should not be appointed. *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490.

4. **Must be Clear Case for Exercise of Equitable Powers** — *England.* — *Clanbrassill v. Taylor*, 5 Bro. P. C. (Toml. ed.) 319.

United States. — *Grant v. Phoenix L. Ins. Co.*, 121 U. S. 116; *Kountze v. Omaha Hotel Co.*, 107 U. S. 395; *Cone v. Combs*, 5 McCrary (U. S.) 651; *Allen v. Dallas, etc., R. Co.*, 3 Woods (U. S.) 327; *Warner v. Rising Fawn Iron Co.*, 3 Woods (U. S.) 526; *Wilmer v. Atlanta, etc., R. Co.*, 2 Woods (U. S.) 415; *Pullan v. Cincinnati, etc., R. Co.*, 4 Biss. (U. S.) 50.

Arkansas. — *Weis v. Neel*, (Ark. 1890) 14 S. W. Rep. 1097; *Price v. Dowdy*, 34 Ark. 290.

District of Columbia. — *Phoenix Mut. L. Ins. Co. v. Grant*, 3 MacArthur (D. C.) 223.

Georgia. — *Worrill v. Coker*, 56 Ga. 670.

Illinois. — *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498.

Indiana. — *Reynolds v. Quick*, 128 Ind. 316.

Iowa. — *Swan v. Mitchell*, 82 Iowa 307; *Des Moines Gas Co. v. West*, 44 Iowa 26; *Callanan v. Shaw*, 19 Iowa 185.

Mississippi. — *Phillips v. Eiland*, 52 Miss. 722.

New Jersey. — *Stockman v. Wallis*, 30 N. J. Eq. 450; *Chetwood v. Coffin*, 30 N. J. Eq. 451; *Mahon v. Crothers*, 28 N. J. Eq. 568; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 41, 64 Am. Dec. 478.

South Carolina. — *Hardin v. Hardin*, 34 S. Car. 77, 27 Am. St. Rep. 786.

Tennessee. — *Williams v. Noland*, 2 Tenn. Ch. 153.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 209.

Wisconsin. — *Sales v. Lusk*, 60 Wis. 491; *Morris v. Branchaud*, 52 Wis. 190; *Schreiber v. Carey*, 48 Wis. 211; *Finch v. Houghton*, 19 Wis. 158.

Appointment at Instance of Unsecured Creditors. — A receiver of mortgaged property should not be appointed at the instance of unsecured creditors merely because it appears that the mortgagees have additional security in the way of collaterals from which they may satisfy a part of the mortgage debt. *Burgwyn Bros. Tobacco Co. v. Bentley*, 90 Ga. 508.

Pending Action to Set Aside Deed. — It has been held that a receiver of the rents and profits will not be appointed pending an action to set aside a deed absolute in form and have

b. WHERE NO RENTS OR PROFITS. — A receiver of mortgaged real estate will not be appointed pending a suit to foreclose the mortgage, where it is not necessary to preserve the property and there are no rents or profits accruing therefrom.¹

c. WHERE ADEQUATE REMEDY AT LAW. — A receiver of mortgaged property will not, as a rule, be appointed on the application of a party who has an adequate remedy at law for his protection.² But a receiver may be appointed in aid of a mortgagee prosecuting an ejectment at law to obtain possession of the mortgaged premises, where insolvency, waste, and insufficiency of the security are shown.³

d. APPOINTMENT PENDING PERIOD FOR REDEMPTION. — A receiver may sometimes be appointed after a decree of foreclosure and sale of mortgaged property, during the period allowed for redemption, but such power will be slowly exercised except in an extreme case and to prevent palpable wrong and injustice.⁴

e. INADEQUACY OF SECURITY—INSOLVENCY OF MORTGAGOR. — The two principal grounds for the appointment of receivers to collect the rents and profits of mortgaged property are, first, the inadequacy of the security to discharge the mortgage debt, and second, the insolvency of the mortgagor, or the likelihood that a deficiency judgment would be unavailing.⁵ It has

it declared a mortgage. *McCool v. McNamara*, (Supm. Ct.) 19 Abb. N. Cas. (N. Y.) 344.

1. *Eastern Trust, etc., Co. v. American Ice Co.*, 14 App. Cas. (D. C.) 304.

2. *Eastern Trust, etc., Co. v. American Ice Co.*, 14 App. Cas. (D. C.) 304; *Beardslee v. Citizens' Commercial, etc., Bank*, 112 Mich. 377.

Thus, under the Old English Practice the courts would not appoint a receiver on the application of a legal mortgagee. *Pease v. Fletcher*, 1 Ch. D. 275. See *Reid v. Middleton, T. & R.* 456; *Berney v. Sewell*, 1 Jac. & W. 627. And see *Beverly v. Brooke*, 4 Gratt. (Va.) 187.

But a legal mortgagee who was prevented by the mortgagor from taking possession under the mortgage might obtain the appointment of a receiver. *Truman v. Redgrave*, 18 Ch. D. 547.

Under the Judicature Act, however, it has been held that a legal mortgagee may obtain a receiver instead of taking the risk of entering on the property. *Pease v. Fletcher*, 1 Ch. D. 275.

Assignment of Rents. — That when the mortgage was executed the mortgagor gave to the mortgagee therein named a written assignment of the rents cannot, however, be urged by the mortgagor as a reason against the appointment of a receiver. *Farmers' Nat. Bank v. Backus*, 64 Minn. 43.

3. *Brasted v. Sutton*, 30 N. J. Eq. 463.

A Statute Prohibiting Ejectment by a Mortgagee to recover possession of the mortgaged premises until the title has become absolute by foreclosure has been held ground for refusing to appoint a receiver of mortgaged premises during foreclosure proceedings. *Grand Rapids Fifth Nat. Bank v. Pierce*, 117 Mich. 376.

4. **During Period for Redemption.** — *Thomas v. Davies*, 11 Beav. 29; *Bowman v. Bell*, 14 Sim. 392; *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Merritt v. Gibson*, 129 Ind. 155; *Connelly v. Dickson*, 76 Ind. 444; *Hyman v. Kelly*, 1

Nev. 182; *Astor v. Turner*, 11 Paige (N. Y.) 437, 43 Am. Dec. 766; *Howell v. Ripley*, 10 Paige (N. Y.) 48. See *American Invest. Co. v. Farrar*, 87 Iowa 437.

Insolvency of Mortgagor Insufficient. — *West v. Conant*, 100 Cal. 231.

Appointment Pursuant to Express Provision in Mortgage. — To the effect that a stipulation in a mortgage for the appointment of a receiver of the rents and profits during the period allowed for redemption is valid, see *Hubbell v. Avenue Invest. Co.*, 97 Iowa 135.

Application of Rents Received During Period of Redemption. — It has been held that a receiver appointed in a suit to foreclose a junior mortgage has no right to apply the rents and profits received during the period of redemption to the payment of interest on the first mortgage, as the purchaser at a foreclosure sale takes the title "with all its infirmities and burdens." *Stevens v. Hadfield*, 90 Ill. App. 405.

5. **Inadequacy of Security — Insolvency of Mortgagor — United States.** — *Central Trust Co. v. Chattanooga, etc., R. Co.*, (C. C. A.) 94 Fed. Rep. 275.

Alabama. — *Ashurst v. Lehman*, 86 Ala. 370; *Hughes v. Hatchett*, 55 Ala. 634.

Arkansas. — *Weis v. Neel*, (Ark. 1890) 14 S. W. Rep. 1097.

Georgia. — See *Hart v. Respass*, 89 Ga. 87.

Illinois. — *Christie v. Burns*, 83 Ill. App. 514; *Glos v. Roach*, 80 Ill. App. 283. And see *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498.

Iowa. — *Callanan v. Shaw*, 19 Iowa 183.

Michigan. — *Brown v. Chase*, Walk. (Mich.) 43.

Mississippi. — *Myers v. Estell*, 48 Miss. 372.

Nevada. — *Hyman v. Kelly*, 1 Nev. 179.

New York. — *Syracuse City Bank v. Tallman*, 31 Barb. (N. Y.) 208; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 38; *Astor v. Turner*, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; *Sea Ins. Co. v. Stebbins*, 8 Paige (N. Y.) 565; *Ogdensburgh Bank v. Arnold*, 5 Paige (N. Y.) 39; *Shotwell v. Smith*, 3 Edw. (N. Y.) 588.

been held that in such circumstances equity may appoint a receiver although the mortgage does not, by express words, give a lien upon the income of the property.¹ In some jurisdictions the rule is that the insolvency of the mortgagor and the inadequacy of the security will not justify the appointment of a receiver in the absence of a specific pledge of the rents and profits, or express provision for a receiver on default.² But where, in addition to inadequacy and insolvency, other equitable grounds exist, as the nonpayment of taxes, waste, danger of loss or injury to the mortgaged premises, a receiver will be appointed, and this rule, it is believed, prevails in all jurisdictions.³

f. ADEQUACY OF SECURITY. — It may be stated as a general rule that a receiver of mortgaged property or of the rents and profits thereof will never be appointed where the security is adequate and a receivership is not necessary for its preservation.⁴

g. SOLVENCY OF MORTGAGOR. — It has been held that a receiver will not be appointed where the mortgagor or the persons assuming the mortgage or in possession of the property are solvent and able to respond to any deficiency judgment.⁵

North Carolina. — *Durant v. Crowell*, 97 N. Car. 373; *Kerchner v. Fairley*, 80 N. Car. 25. *Tennessee.* — *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

Virginia. — *Bristow v. Home Bldg. Co.*, 91 Va. 18.

Wisconsin. — *Finch v. Houghton*, 19 Wis. 150.

1. No Express Lien on the Income — *Illinois.* — *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Christie v. Burns*, 83 Ill. App. 514; *Glos v. Roach*, 80 Ill. App. 283.

Iowa. — *Callanan v. Shaw*, 19 Iowa 183. *Michigan.* — *Brown v. Chase*, Walk. (Mich.) 43.

Mississippi. — *Myers v. Estell*, 48 Miss. 372. *Nevada.* — *Hyman v. Kelly*, 1 Nev. 179.

New York. — *Astor v. Turner*, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; *Sea Ins. Co. v. Stebbins*, 8 Paige (N. Y.) 565; *Ogdensburgh Bank v. Arnold*, 5 Paige (N. Y.) 39; *Shotwell v. Smith*, 3 Edw. (N. Y.) 588; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 38.

Tennessee. — *Henshaw v. Wells*, 9 Humph. (Tenn.) 568.

Wisconsin. — *Finch v. Houghton*, 19 Wis. 150.

2. Specific Pledge or Express Provision for Receiver. — *American Invest. Co. v. Farrar*, 87 Iowa 437; *Swan v. Mitchell*, 82 Iowa 308; *Paine v. McElroy*, 73 Iowa 81; *White v. Griggs*, 54 Iowa 650; *Myton v. Davenport*, 51 Iowa 583; *Des Moines Gas Co. v. West*, 44 Iowa 25; *National F. Ins. Co. v. Broadbent*, 77 Minn. 175; *Marshall, etc., Bank v. Cady*, 76 Minn. 112; *Brasted v. Sutton*, 30 N. J. Eq. 463; *Mahon v. Crothers*, 28 N. J. Eq. 568; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Seignious v. Pate*, 32 S. Car. 134, 17 Am. St. Rep. 846. And see *Haugan v. Netland*, 51 Minn. 552.

Disposition of Property Not Mortgaged. — In *Iowa* it has been held that the insufficiency of the mortgaged property to satisfy the debt, the insolvency of the mortgagor, and the fact that he had disposed of certain of his property not included in the mortgage to prevent the collection of the mortgage debt, did not justify the appointment of a receiver. *White v. Griggs*, 54 Iowa 650. And see *American Invest. Co. v. Farrar*, 87 Iowa 437.

3. Waste — Danger of Loss or Injury, etc. — *United States.* — *American Nat. Bank v. Northwestern Mut. L. Ins. Co.*, (C. C. A.) 89 Fed. Rep. 610.

Alabama. — *Hendrix v. American Freehold Land Mortg. Co.*, 95 Ala. 313.

District of Columbia. — *Wood v. Grayson*, 16 App. Cas. (D. C.) 174.

Indiana. — *Reynolds v. Quick*, 128 Ind. 316.

Iowa. — *American Invest. Co. v. Farrar*, 87 Iowa 437; *Swan v. Mitchell*, 82 Iowa 308; *Paine v. McElroy*, 73 Iowa 81; *White v. Griggs*, 54 Iowa 650; *Myton v. Davenport*, 51 Iowa 583; *Des Moines Gas Co. v. West*, 44 Iowa 25.

Minnesota. — *Marshall, etc., Bank v. Cady*, 75 Minn. 241; *Farmers' Nat. Bank v. Backus*, 64 Minn. 43.

New York. — *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Mahon v. Crothers*, 28 N. J. Eq. 567.

New York. — *Veerhoff v. Miller*, 30 N. Y. App. Div. 355.

Wisconsin. — *Winkler v. Madgeburg*, 100 Wis. 421.

In Aid of Ejectment. — So a receiver was appointed in aid of a mortgagee who was prosecuting an ejectment at law, where it appeared that the mortgagor was insolvent, and had removed from the premises and given possession to another who occupied for his own use without paying rent; it appearing also that the mortgagor had committed waste and threatened to commit more, and that the premises were an insufficient security. *Brasted v. Sutton*, 30 N. J. Eq. 462.

4. Where Security Adequate. — *Pullan v. Cincinnati, etc., R. Co.*, 4 Biss. (U. S.) 50; *Morrison v. Buckner, Hempst.* (U. S.) 442; *Lindsay v. American Mortg. Co.*, 97 Ala. 411; *Whitehead v. Wooten*, 43 Miss. 523; *U. S. Life Ins. Co. v. Ettinger*, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 378; *Eidlitz v. Lancaster*, 40 N. Y. App. Div. 446; *Degener v. Stiles*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 474; *Shotwell v. Smith*, 3 Edw. (N. Y.) 588; *Rogers v. Southern Pine Lumber Co.*, 21 Tex. Civ. App. 48.

5. When Mortgagor Solvent. — *Stillwell-Bierce, etc., Co. v. Williamson Oil, etc., Co.*, 80 Fed. Rep. 68; *Warren v. Pitts*, 114 Ala. 65; *Baker v. City Nat. Bank*, 94 Ga. 87.

h. MERE FACT THAT SECURITY INSUFFICIENT. — According to the rule of some cases, the mere fact that real property is insufficient to pay the debt for which it is mortgaged is sufficient for the appointment of a receiver of the rents and profits pending an action of foreclosure.¹

i. PROTECTION FROM WASTE OR DESTRUCTION — (1) *General Rule.* — Irrespective of any distinction made by some authorities between cases where the rents have been specifically pledged and where not, or where there is or is not an express provision for the appointment of a receiver, it may be stated as a general rule that there may always be a receiver for mortgaged property or the rents and profits thereof where a receivership is necessary for the preservation of the *corpus* of the security.² So it has been held that a receiver may be appointed after foreclosure and before the period of redemption has expired, for the purpose of collecting the rents and profits to protect and preserve the mortgaged property from waste, but not to apply such rents and profits to the payment of any deficiency remaining after sale.³

(2) *Appointment Before Default in Mortgage.* — Where it is necessary in order to preserve the security, a receiver for mortgaged property may be appointed before default in the mortgage.⁴

(3) *Appointment at Instance of Mortgagor.* — A receiver of mortgaged property may be appointed at the instance of the mortgagor as against a mortgagee in possession, where the latter is insolvent and is guilty of mismanagement, fraud, and waste.⁵

j. EXPRESS PROVISION AS TO RENTS. — In order to the appointment of

1. *Inadequacy of Security Alone.* — Sweet, etc., Co. v. Union Nat. Bank, 149 Ind. 305; Nesbit v. Wood, (Ky. 1900) 56 S. W. Rep. 714; Waldron v. Greenwood First Nat. Bank, 60 Neb. 245; Philadelphia Mortg., etc., Co. v. Goos, 47 Neb. 804; Ecklund v. Willis, 42 Neb. 737; Browning v. Stacey, 52 N. Y. App. Div. 626, 65 N. Y. Supp. 203; Putnam v. McAllister, (Supm. Ct. Spec. T.) 57 N. Y. Supp. 404; Ogdensburgh Bank v. Arnold, 5 Paige (N. Y.) 38.

Where Security "Probably Insufficient." — A statute authorizing the appointment of a receiver when, in an action to foreclose a mortgage, it is made to appear that the mortgaged premises are "probably insufficient to discharge the mortgage debt" does not warrant the appointment merely because the property at some future time may become insufficient, as it cannot be known that the mortgage debt will not be discharged before such date has arrived. Laune v. Hauser, 58 Neb. 663. Compare State Journal Co. v. Commonwealth Co., 43 Kan. 93.

Where Interest Accumulating and Property Not Increasing in Value — Receiver Appointed. — Hill v. Robertson, 24 Miss. 375.

2. *Preservation of Corpus of Security.* — Peek v. Trinsmaran Iron Co., 2 Ch. D. 116; Union Mut. L. Ins. Co. v. Union Mills Plaster Co., 37 Fed. Rep. 291; American L. & T. Co. v. Toledo, etc., R. Co., 29 Fed. Rep. 419; Rose v. Bevan, 10 Md. 470, 69 Am. Dec. 171; National F. Ins. Co. v. Broadbent, 77 Minn. 175; Marshall, etc., Bank v. Cady, 76 Minn. 112; Cheever v. Rutland, etc., R. Co., 39 Vt. 654; Dunlap v. Hedges, 35 W. Va. 287.

Seizure of Mortgaged Property under Attachment. — A receiver will be appointed and a sale restrained where mortgaged property is seized under attachment as the property of a person other than the mortgagor and is adver-

tised for sale. Wiedemann v. Sann, (N. J. 1895) 31 Atl. Rep. 211.

But in a suit by the mortgagee against the mortgagor, where there is no controversy between such parties, the mere fact that mortgaged goods are being levied upon by creditors of the mortgagor not made parties to the suit will not warrant the appointment of a receiver. Gilbert v. Block, 51 Ill. App. 516.

Mere Disuse of Premises, though attended with incidental depreciation and dilapidation, is not such destruction or waste as to entitle the mortgagee to a receiver on such ground alone. Union Mut. L. Ins. Co. v. Union Mills Plaster Co., 37 Fed. Rep. 286.

Accruing Interest in Default Takes the Character of Waste. — Central Trust Co. v. Chattanooga, etc., R. Co., (C. C. A.) 94 Fed. Rep. 275. See also Teal v. Walker, 111 U. S. 242; Kounize v. Omaha Hotel Co., 107 U. S. 378.

Receiver Appointed in Order that Property May Be Made Productive Pending Sale. — Cochran v. Jackman, (Ky. 1900) 56 S. W. Rep. 507.

3. Marshall, etc., Bank v. Cady, 76 Minn. 112; National F. Ins. Co. v. Broadbent, 77 Minn. 175.

4. *Before Default.* — McMahon v. North Kent Ironworks Co., (1891) 2 Ch. 148; Mayfield v. Wright, (Ky. 1900) 54 S. W. Rep. 864.

5. Sibson v. Hamilton, etc., Co., 21 Wash. 362; Brundage v. Home Sav., etc., Assoc., 11 Wash. 277.

But a Judgment Creditor of a Mortgagor upon covenants in the mortgage cannot obtain a receivership order to enforce payment by a purchaser of the equity of redemption, who on purchasing agreed to assume and pay the mortgage, although such creditor sues and makes the application for the receiver on behalf of himself and all other creditors of the mortgagor. Palmer v. McKnight, 31 Ont. 306.

a receiver of rents and profits, a mortgage need not by express words give a lien on the rents or income of the property, where the mortgaged premises are insufficient security for the debt and the mortgagor is insolvent or of doubtful responsibility.¹ On the other hand, where the rents are not specifically pledged both the insolvency of the mortgagor and the inadequacy of the security must be shown, mere inadequacy of the *corpus* of the property being insufficient.² Where rents and profits are specifically pledged a receiver will be appointed pending foreclosure, if the mortgagor is insolvent and the security inadequate,³ although in the absence of an express mortgage provision as to rents and profits, the insolvency of the mortgagor and the inadequacy of the security alone would not be sufficient.⁴

k. EXPRESS PROVISION AS TO RECEIVER. — Not infrequently the mortgage expressly provides for the appointment of a receiver of the rents and profits on default.⁵ But notwithstanding such a stipulation, a court of equity will not appoint a receiver of mortgaged property where such an appointment would be inequitable;⁶ nor will a receiver be appointed, though specially provided for on default, where the mortgage security is ample,⁷ or where, in addition to this, it appears that the taxes upon the property have been fully paid, that the interest was met when last due, and that the persons liable for the debt are solvent.⁸ It is quite certain, indeed, that a mere provision for the appointment of a receiver contained in a mortgage cannot confer jurisdiction upon the courts for the appointment of a receiver where none would exist irrespective of such mortgage provision.⁹

L. EFFECT OF APPOINTMENT — (1) *In General.* — The possession of a receiver in foreclosure proceedings is not the possession of the mortgagee as against other creditors, nor are priorities thereby affected. The receiver

1. No Express Lien on Rents and Profits. — *Haas v. Chicago Bldg. Soc.*, 89 Ill. 498; *Baker v. Mayo*, 86 Ill. App. 86. And see *Bowman v. Bell*, 14 Sim. 392; *Guy v. Ide*, 6 Cal. 99, 65 Am. Dec. 490; *Callanan v. Shaw*, 19 Iowa 183; *Brown v. Chase, Walk.* (Mich.) 43; *Myers v. Estell*, 48 Miss. 372; *Hyman v. Kelly*, 1 Nev. 179; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 41, 64 Am. Dec. 478; *Astor v. Turner*, 11 Paige (N. Y.) 436, 43 Am. Dec. 766; *Sea Ins. Co. v. Stebbins*, 8 Paige (N. Y.) 565; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 38; *Henshaw v. Wells*, 9 Humph. (Tenn.) 568; *Cheever v. Rutland, etc.*, R. Co., 39 Vt. 654; *Finch v. Houghton*, 19 Wis. 153.

Rule under Particular Statute. — Where it was expressly provided by statute that a mortgagee has no title to land of which the mortgagor is in possession, but only a lien thereon, limited by the terms of the mortgage, and where there was nothing in the mortgage extending the mortgagee's lien to the rents and profits, such mortgagee was held not entitled to the appointment of a receiver of the rents and profits, pending foreclosure proceedings. *Hardin v. Hardin*, 34 S. Car. 77, 27 Am. St. Rep. 786.

2. Butler v. Frazer, (Supm. Ct. Spec. T.) 57 N. Y. Supp. 900; *Degener v. Stiles*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 474; *Quincy v. Cheeseman*, 4 Sandf. Ch. (N. Y.) 406.

Discretion of Court as to Appointment. — Although a mortgage may expressly include rents and profits, the right of the court to exercise its discretion as to the appointment of a receiver is not thereby abrogated. *Brick v. Hornbeck*, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 218.

3. Des Moines Gas Co. v. West, 44 Iowa 23. **Foreclosure Without Regard to Adequacy of Security — Assignment of Rents.** — *Buller v. Frazer*, (Supm. Ct. Spec. T.) 57 N. Y. Supp. 900; *Bryson v. James*, 55 N. Y. Super. Ct. 374; *MacKellar v. Rogers*, 52 N. Y. Super. Ct. 360.

4. See Iowa cases cited supra, this subsection, 18. *e. Inadequacy of Security — Insolvency of Mortgagor.*

5. Express Provision as to Receiver. — *In re Pound*, 42 Ch. D. 402; *White v. Mackey*, 85 Ill. App. 282; *Nicolls v. Peninsular Stove Co.*, 48 Ill. App. 317; *C. B. Keogh Mfg. Co. v. Whiston*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 358; *Fletcher v. Krupp*, 35 N. Y. App. Div. 586; *Jarvis v. McQuaide*, (Supm. Ct. Spec. L.) 24 Misc. (N. Y.) 17; *Browning v. Sire*, 56 N. Y. App. Div. 399.

Receiver's Right to Rents. — Where a receiver is appointed pursuant to a stipulation in a mortgage, the mortgagor and tenant of the premises cannot, by contract with the former's existing creditor, turn over to him the rents as against a receiver so appointed. *Nicolls v. Peninsular Stove Co.*, 48 Ill. App. 317.

6. U. S. Life Ins. Co. v. Ettinger, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 378; *Fletcher v. Krupp*, 35 N. Y. App. Div. 586.

7. Degener v. Stiles, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 474; *Jarvis v. McQuaide*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 17. And see *Browning v. Sire*, (Supm. Ct. Spec. T.) 33 Misc. (N. Y.) 503.

8. U. S. Life Ins. Co. v. Ettinger, (Supm. Ct. Spec. T.) 32 Misc. (N. Y.) 378.

9. Couper v. Shirley, (C. C. A.) 75 Fed. Rep. 168. See *Baker v. Varney*, 129 Cal. 564.

merely holds possession for all parties interested.¹

(2) *Lien upon Unpaid Rents.* — By the appointment of a receiver in a foreclosure suit an equitable lien attaches to the unpaid rents.² Until such appointment, however, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them.³

(3) *Prior Mortgagees.* — Where receivers of mortgaged property are appointed at the instance of junior incumbrancers, it is always without prejudice to the rights of prior mortgagees, incumbrancers, or lienholders.⁴ So the application for a receiver will be refused, although the mortgagors are nonresident and insolvent, where it appears that the mortgagee has precisely the security that he had when he made the contract, but seeks to intercept the rents and profits and divert them to his own use to the prejudice of prior mortgagees, and there is no evidence of mismanagement of the property.⁵

(4) *Possession of First Mortgagee.* — On the question of appointing a receiver, equity not only respects the actual possession of the first mortgagee, but is cautious not to interfere with his right to take or obtain the possession if he should desire it.⁶ The court will not, therefore, unless in a very strong case, disturb a mortgagee in possession by the appointment of a receiver on the application of a subsequent mortgagee or other equitable incumbrancer.⁷

(5) *Subsequent Appointment under Prior Mortgage.* — The court will recognize a lien upon rents in favor of a diligent mortgagee who first obtains the appointment of a receiver, and will not disturb such lien nor compel the

1. *Central Trust Co. v. Worcester Cycle Mfg. Co.*, 90 Fed. Rep. 584.

Crops. — It has been held that growing crops do not, if sold by the mortgagor before foreclosure proceedings begin, pass to the receiver, although still standing on the property at the time of his appointment. *Caldwell v. Alsop*, 48 Kan. 571. And see *Scott v. Hotchkiss*, 115 Cal. 89; *Simpson v. Ferguson*, 112 Cal. 180, 53 Am. St. Rep. 201; *Freeman v. Campbell*, 109 Cal. 360; *West v. Conant*, 100 Cal. 231; *Sexton v. Breese*, 135 N. Y. 387.

2. **Unpaid Rents.** — *Stetson v. Northern Invest. Co.*, 101 Iowa 435; *Rider v. Bagley*, 84 N. Y. 461.

Priorities Between Receiver and Judgment Creditor. — Where a receiver of the rents and profits has been appointed in foreclosure proceedings, his right to such rents is superior to that of a judgment creditor of the mortgagor by judgment rendered subsequent to the appointment of the receiver. *Woodyatt v. Connell*, 38 Ill. App. 475.

Trust Deed Silent as to Rents. — It has been held that the beneficiaries in a trust deed acquire, by the appointment of a receiver in foreclosure proceedings, an equitable lien upon the rents of the property involved, although the deed of trust contained no specific pledge of the rents. *Stephen v. Reibling*, 45 Ill. App. 40.

Discretion of Court. — Where, after a bill of foreclosure was filed, and pending a motion for a receiver, the mortgagor collected certain rents accruing from the mortgaged premises, it was held that the determination whether the court would compel the mortgagor to pay such rents to the receiver after his appointment rested in the discretion of the court. *Rider v. Bagley*, 84 N. Y. 461.

3. *Rider v. Bagley*, 84 N. Y. 461. And see *Alabama Nat. Bank v. Mary Lee Coal, etc., Co.*, 108 Ala. 288.

4. **Prior Incumbrancers.** — *Seibert v. Minne-*

apolis, etc., R. Co., 52 Minn. 246; *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478; *Cincinnati Nat. Bank v. Tilden*, 66 Hun (N. Y.) 635, 22 N. Y. Supp. 11. And see *Bryan v. Cormick*, 1 Cox Ch. 422; *Dalmer v. Dashwood*, 2 Cox Ch. 378.

5. *Sales v. Lusk*, 60 Wis. 493. And see *Cortleyeu v. Hathaway*, 11 N. J. Eq. 40, 64 Am. Dec. 478.

6. *Beverley v. Brooke*, 4 Gratt. (Va.) 209.
Injunction instead of Receiver. — *U. S. v. Masich*, 44 Fed. Rep. 11.

Possession of Receiver Not to Be Disturbed. — *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

Consent of First Mortgagee. — According to an early *English* case, a second mortgagee, the mortgagor living, cannot have a receiver without the consent of the first mortgagee, because the court cannot prevent the first mortgagee from bringing an ejectment against the receiver as soon as he is appointed. *Phipps v. Bath*, 2 Dick. 608. But according to the doctrine of a leading case in the *United States*, if a mortgagee having the right to possession fails to exercise such privilege, the appointment of a receiver is in the nature of an injunction which defeats the mortgagee's power of election. The court takes possession of the property by its receiver, and preserves the security for the mortgagee until his right of priority is established. *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

7. *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Where Nothing Due on Mortgage. — Where a third mortgagee took possession and then bought up the first mortgagee, retaining possession for many years and receiving a considerable sum, a receiver was appointed against him on the application of the second mortgagee, the affidavit of the third mortgagee not satisfactorily showing that anything remained due on the first mortgage. *Hiles v. Moore*, 15 Beav. 175.

transfer of such rents already collected to a receiver subsequently appointed under a prior mortgage.¹ But a subsequent receivership under a prior mortgage will supersede the former in that such latter receiver will thereafter be entitled to the rents to the exclusion of the former.²

(6) *Distinction Between Rights of First and Subsequent Mortgagee.* — It has been said that the rights of a first and a subsequent mortgagee are different with respect to a receiver. The first mortgagee has the legal right to the rents and profits, and has his remedy at law by ejectment. A subsequent mortgagee has a better right to a receiver, because he has no right to the possession at law as against the prior mortgagee, and if the first mortgagee refrains from the exercise of his legal rights, there seems some propriety in the interference of a court of chancery.³

(7) *Tenants Attorning to Receiver.* — Where, in foreclosure proceedings, a receiver of the rents has been appointed, the tenants of the property may be compelled to attorn to him,⁴ or forfeit, at the option of the court, all interest in the mortgaged premises.⁵

m. DUTIES OF RECEIVER IN FORECLOSURE. — The ordinary duties of a receiver in a foreclosure suit are in aid of the mortgagee, by collecting the rents and preserving the property from loss and decay.⁶

VI. WHO MAY BE APPOINTED RECEIVER — 1. **Impartial, Independent, and Disinterested Person.** — The person appointed receiver should, as a rule, be an independent and disinterested person, and impartial and indifferent as between the parties to the controversy.⁷ "Receivers," it has been held, "ought not to be appointed to represent the peculiar interests of one class, and *a fortiori* they should not be appointed to represent one interest out of a class of interests."⁸ The court will not appoint a person, however well qualified in other respects, whose interest in the subject-matter of the controversy or relations with the parties might influence the administration of the trust.⁹

2. **Discretion of Court as to Receiver.** — It has been shown that whether a

1. *Hennessey v. Sweeney*, (Municipal Ct.) 57 N. Y. Supp. 901.

2. *Hennessey v. Sweeney*, (Municipal Ct.) 57 N. Y. Supp. 901. And see *Washington L. Ins. Co. v. Fleischauer*, 10 Hun (N. Y.) 119; *Holland Trust Co. v. Consolidated Gas, etc., Co.*, 85 Hun (N. Y.) 455; *Ranney v. Peyser*, 83 N. Y. 1; *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Post v. Dorr*, 4 Edw. (N. Y.) 412. But compare *Bailey v. Belmont*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 273.

3. *Cortleyeu v. Hathaway*, 11 N. J. Eq. 39, 64 Am. Dec. 478. And see *Berney v. Sewell*, 1 Jac. & W. 627.

4. *Woodyatt v. Connell*, 38 Ill. App. 475.

5. *Gaynor v. Blewett*, 82 Wis. 313, 33 Am. St. Rep. 47.

6. *New Jersey Midland R. Co. v. Wortendyke*, 27 N. J. Eq. 658.

7. **Appointee Should Be Disinterested** — *England*. — *Fripp v. Chard R. Co.*, 17 Jur. 887, 21 Eng. L. & Eq. 53; *Davis v. Marlborough*, 2 Swanst. 118; *Lupton v. Stephenson*, 11 Ir. Eq. 484.

United States. — *Booth v. Clark*, 17 How. (U. S.) 330; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 479; *Atkins v. Wabash, etc., R. Co.*, 29 Fed. Rep. 161. See also *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 469.

Illinois. — *Hooper v. Winston*, 24 Ill. 363. See also *Baker v. Backus*, 32 Ill. 79.

Iowa. — *Kaiser v. Kellar*, 21 Iowa 96.

Maryland. — *Ellicott v. Warford*, 4 Md. 84;

Chase's Case, 1 Bland (Md.) 213, 17 Am. Dec. 280. See also *Williamson v. Wilson*, 1 Bland (Md.) 427.

New Jersey. — See *Runyon v. Farmers', etc., Bank*, 4 N. J. Eq. 481.

New York. — *McArdle v. Barney*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 103. See also *Smith v. New York Consol. Stage Co.*, (Ct. Pl. Spec. T.) 28 How. Pr. (N. Y.) 208; *Matter of Empire City Bank*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 498.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

Virginia. — *Shannon v. Hanks*, 88 Va. 338.

8. *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 278.

9. *Fripp v. Chard R. Co.*, 17 Jur. 887, 21 Eng. L. & Eq. 62; *Eyre v. McDonnell*, 15 Ir. Ch. N. S. 534; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476; *Watson v. Bettman*, 88 Fed. Rep. 825; *Thompson v. Holladay*, 15 Oregon 34; *Monroe Bank v. Schermerhorn, Clarke* (N. Y.) 366.

Appointment Not Void. — But it has been held that the appointment of an interested person as receiver of a corporation is not void *per se*, nor is such person thereby constituted an agent of the corporation. *San Antonio, etc., Pass. R. Co. v. Adams*, 11 Tex. Civ. App. 198.

Rule by Statute. — It is provided by statute in several states that interested parties shall not be appointed receivers. *Robinson v. Dickey*, 143 Ind. 214; *Tait v. Carey*, (Indian Ter. 1899) 49 S. W. Rep. 50.

receiver will be appointed rests within the sound discretion of the court to which the application is made. This rule of discretion, it is held, extends also to the selection of a proper and fit person for the office of receiver.¹ Before appointing a person receiver the court will consider whether such person's existing engagements will permit him to give requisite attention to the receivership;² and in the appointment of a receiver for a particular species of property, the court will consider the qualifications of a suggested appointee to manage such property.³ The court will not, in general, appoint a person receiver who has been engaged in transactions either unlawful or in breach of trust.⁴

3. Relationship with Parties. — The fact that the person proposed for appointment is a near relative of either party is not of itself an absolute disqualification. Such circumstance will be considered, and will, in the discretion of the court, be given its due weight in connection with other facts.⁵ But where a receiver is appointed for the estate of an insolvent or bankrupt, for the purpose of impeaching fraudulent conveyances and discovering concealed property, it is not improper that a relative of the complainant should be appointed, with such added incentive to defeat the debtor's fraudulent acts and designs.⁶

4. Inconsistent Duties or Positions. — A person will not be appointed receiver whose duties or position, already assumed or occupied, would conflict or be inconsistent with his duties as receiver.⁷

5. Person Recommended by Applicant. — Where a receiver is appointed before the appearance or answer of adverse parties, the selection of the person to be appointed must frequently, in the first instance, be made by the chancellor on the *ex parte* recommendation of the party applying for the appointment.⁸

6. Agreement or Recommendation of Parties. — In the selection of a receiver the court will, as a rule, be governed by an agreement or recommendation of the parties in interest as to the person to be appointed.⁹

Secured Creditors, However, Cannot Dictate who shall be appointed receiver, for the receiver is not the representative of such creditors, but the hand of the court, and the interest of creditors of every grade will be considered in making the appointment.¹⁰ In some instances the appointment of an interested person as

1. Discretion of Court. — *Cookes v. Cookes*, 2 De G. J. & S. 528; *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 467; *Jacoby v. Kiesling*, 87 Ga. 28; *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399; *Benneson v. Bill*, 62 Ill. 411; *Robinson v. Dickey*, 143 Ind. 214; *Smith v. New York Consol. Stage Co.*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 209, 18 Abb. Pr. (N. Y.) 424; *Matter of Empire City Bank*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 503; *Shannon v. Hanks*, 88 Va. 338. See also *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 422; *Matter of Eagle Iron Works*, 8 Paige (N. Y.) 387.

2. Wynne v. Newborough, 15 Ves. Jr. 284.

3. It is improper to appoint a person receiver over a kind of property the management of which he does not understand, with an undertaking to act under the direction of another person who does understand it. *Lupton v. Stephenson*, 11 Ir. Eq. 484.

4. Smith v. New York Consol. Stage Co., (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 208, 18 Abb. Pr. (N. Y.) 423.

5. Relationship. — *Williamson v. Wilson*, 1 Bland (Md.) 427.

6. Shainwald v. Lewis, 8 Fed. Rep. 879.

7. Inconsistent Duties. — *Ex p. Fletcher*, 6 Ves. Jr. 427; *Benneson v. Bill*, 62 Ill. 411; *Kilgore v. Hair*, 19 S. Car. 488.

Next Friend of Infant. — Thus, under the

English chancery practice, the next friend of an infant cannot be appointed receiver, because it is his duty to supervise the conduct of the receiver. *Stone v. Wishart*, 2 Madd. 64. And see *Taylor v. Oldham*, Jac. 529, cited in *Benneson v. Bill*, 62 Ill. 411.

8. Recommendation of Applicant. — See *Johns v. Johns*, 23 Ga. 36; *Williamson v. Wilson*, 1 Bland (Md.) 427. And see *Gibbs v. David*, L. R. 20 Eq. 378; *Wilson v. Poe*, 1 Hog. 322.

Receiver of Lunatic. — *In re Bangor*, 2 Molloy 518.

9. Agreement of Parties. — *In re Pound*, 42 Ch. D. 402, 28 Am. & Eng. Corp. Cas. 504; *Williamson v. Wilson*, 1 Bland (Md.) 427; *Merchants', etc., Nat. Bank v. Kent Circuit Judge*, 43 Mich. 297; *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 33 Hun (N. Y.) 542.

10. Richards v. Chesapeake, etc., R. Co., 1 Hughes (U. S.) 32, cited in *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 469.

Although a Previous Assignee of the Property was appointed receiver by consent of parties, it was held that a new receiver would be substituted because it seemed probable that there might be some conflict between the proper respective functions of receiver and assignee. *Eichberg v. Wickham*, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 647.

receiver is made by consent of parties, either to save expense or to secure the services of some one familiar with the property.¹ But where a person sustaining a particular relation to the controversy or the parties is disqualified by statute, his appointment is invalid though by consent of parties.²

7. Nonresidence of Receiver. — The nonresidence of a receiver is not a conclusive objection to his appointment where it appears that he is a fit person in other respects and interests to give the receivership his personal supervision.³

8. Consent of Appointee. — The consent of the person selected, express or implied, is necessary to the appointment of a receiver.⁴

9. Corporation as Receiver. — A corporation, when so authorized by its charter, may act as receiver.⁵

10. Creditors. — A creditor of an individual debtor or corporation is not ineligible as a receiver.⁶

11. Master or Clerk of Court. — It has been said that the master of the court should not in any case be appointed receiver, as his official duties may conflict with the performance of a receiver's functions.⁷ Nor is the clerk of the court, by virtue of his office, a receiver of the court;⁸ and a court of chancery can no more impose the office of receiver upon its clerk and master without his consent than it can upon any private individual.⁹ But in some jurisdictions it is a common practice to appoint the clerk receiver.¹⁰

12. Mortgagees. — A mortgagee of real property may be appointed receiver thereof; and where such an appointment has been made and accepted the mortgagee must be deemed to have assumed the duties and responsibilities of a receiver, unqualified by the fact that he had been declared to be a mortgagee in possession of the same property, or that he claimed to be the absolute owner thereof, and finally might be held to be such.¹¹

13. Parties. — As a general rule, a party to the cause will not be appointed receiver,¹² at least not unless particular circumstances render such a course necessary or beneficial to the trust, or the parties in interest consent thereto.¹³

1. See *Steel v. Holladay*, 19 Oregon 520. Compare, however, in this connection the case of *Watson v. Arundel, Jr.* 10 Eq. 324, in which it was held that the consent of parties cannot make a solicitor for the plaintiff capable of being receiver and thus exercising two opposite functions.

2. *Moss Nat. Bank v. Lakeside Co.*, 10 Ohio Cir. Dec. 542, 19 Ohio Cir. Ct. 365.

3. *Bayne v. Brewer Pottery Co.*, 82 Fed. Rep. 391. And see *Wynne v. Newborough*, 15 Ves. Jr. 283; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 477; *Farmers' L. & T. Co. v. Cape Fear, etc.*, R. Co., 62 Fed. Rep. 675.

Nonresidence in Parish No Objection. — *McGilliard v. Donaldsonville Foundry, etc.*, Works, 104 La. 544.

Corporation Doing Business in Several States. — As to the appointment of a nonresident receiver for a corporation doing business in several states, see *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 467; *Wilmer v. Atlanta, etc.*, R. Co., 2 Woods (U. S.) 477.

4. *Waters v. Carroll*, 9 Yerg. (Tenn.) 108.

5. Corporation as Receiver. — *Roby v. Title Guarantee, etc., Co.*, 166 Ill. 336; *Matter of Knickerbocker Bank*, 19 Barb. (N. Y.) 602; *Matter of Empire City Bank*, (Supm. Ct. Gen. T.) 10 How. Pr. (N. Y.) 498.

6. Creditors. — *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 465; *Moran v. Wayne Circuit Judge*, 125 Mich. 6; *Gypsum Plaster, etc., Co. v. Adsit*, 105 Mich. 497; *Matter of Knickerbocker Bank*, 19 Barb. (N. Y.) 602;

Chamberlain v. Greenleaf, (C. Pl. Spec. T.) 4 Abb. N. Cas. (N. Y.) 94.

But to the effect that a creditor or his representative should not be appointed receiver, see *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

7. Master of Court. — *Benneson v. Bill*, 62 Ill. 411; *Kilgore v. Hair*, 19 S. Car. 488. See also *Ex p. Fletcher*, 6 Ves. Jr. 427.

8. Clerk of Court. — *Hammer v. Kaufman*, 39 Ill. 89.

Waiver of Prescribed Consent of Parties to Appointment of Clerk. — *Southwick v. Moore*, 54 N. Y. Super. Ct. 127; *Moore v. Taylor*, 40 Hun (N. Y.) 58.

9. Waters v. Carroll, 9 Yerg. (Tenn.) 108. See also as to the liability of the sureties of a clerk for his default as receiver, *Rogers v. Odom*, 86 N. Car. 434; *Kerr v. Brandon*, 84 N. Car. 131.

10. Rogers v. Odom, 86 N. Car. 433; *Waters v. Carroll*, 9 Yerg. (Tenn.) 108.

11. Bolles v. Duff, 54 Barb. (N. Y.) 215, 37 How. Pr. (N. Y.) 163.

12. Parties to the Cause. — *In re Lloyd*, 12 Ch. D. 451; *Finance Co. v. Charleston, etc.*, R. Co., 45 Fed. Rep. 436; *Benneson v. Bill*, 62 Ill. 408; *Young v. Rollins*, 85 N. Car. 485; *Kilgore v. Hair*, 19 S. Car. 486. See also *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 469; *Young v. Rollins*, 85 N. Car. 489, 12 Am. & Eng. R. Cas. 457. But see *Downshire v. Tyrrell*, *Hayes Exch.* 354.

13. Special Circumstances. — *In re Lloyd*, 12

But the appointment of a mere nominal party, or one whose interest in the suit or subject-matter of the controversy is but nominal, is not objectionable.¹

14. Counsel or Solicitors of Parties. — Counsel or solicitors of parties to the cause will not, as a rule, be appointed receivers,² nor should an attorney of any party whose interests may conflict with the other parties in interest be employed.³ But if such attorney serves without objection, he should be allowed a reasonable compensation.⁴ An attorney, counselor, or solicitor not concerned in the cause may be appointed receiver.⁵

15. Sheriffs. — A sheriff may be appointed receiver of the property of a judgment debtor, with the same powers and authority as any other person so appointed.⁶

16. Trustees and Assignees. — It has been said that while a trustee will not ordinarily be appointed receiver of the trust estate,⁷ yet if it appears that such an appointment would be for the best interests of the estate, the rule will be departed from.⁸

Trustees in Mortgages of Real Estate are accordingly not infrequently appointed receivers.⁹

An Assignee of Property should not be appointed receiver where his duties in the former capacity would conflict with his proper functions in the latter.¹⁰

Ch. D. 451; *Fingal v. Blake*, 2 Molloy 50; *Jefferys v. Smith*, 1 Jac. & W. 303; *Sargant v. Read*, 1 Ch. D. 603; *Robinson v. Taylor*, 42 Fed. Rep. 803; *Dickinson v. Earle*, 34 N. Y. App. Div. 559. See *Benneson v. Bill*, 62 Ill. 411; *Hanover F. Ins. Co. v. Germania F. Ins. Co.*, 33 Hun (N. Y.) 542. And see *Davis v. Barrett*, 13 L. J. Ch. 304.

Plaintiff in Action for Specific Performance, under Special Circumstances, Appointed Temporary Receiver. — *Taylor v. Eckersley*, 2 Ch. D. 303. See also to like effect *Hyde v. Warden*, 1 Ex. D. 310.

Reversioner. — *Rawson v. Rawson*, 11 L. T. N. S. 595.

Unpaid Vendor. — *Boyle v. Bettws Llantwit Colliery Co.*, 2 Ch. D. 728, holding that such unpaid vendors are really the owners of the colliery and have a right to be appointed receivers and managers of their property, which is threatened with destruction, and *distinguishing* *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 440, and *Campbell v. Compagnie Générale De Bellegarde*, 2 Ch. D. 181.

1. Nominal Party. — *Kehm v. Mott*, 86 Ill. App. 549, judgment affirmed 187 Ill. 519; *Iroquois Furnace Co. v. Kimbark*, 85 Ill. App. 399; *People v. Illinois Bldg., etc., Assoc.*, 56 Ill. App. 642.

2. Counsel of Party to Cause. — *Garland v. Garland*, 2 Ves. Jr. 138; *In re Lloyd*, 12 Ch. D. 451; *State Trust Co. v. National Land Imp., etc., Co.*, 72 Fed. Rep. 575; *Finance Co. v. Charleston, etc., R. Co.*, 45 Fed. Rep. 436; *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

Legal Adviser of Applicant and of Owner of Property, and also a Creditor of the Latter. — *Baker v. Backus*, 32 Ill. 79.

Where, in a mortgage foreclosure, the solicitor and agent of the complainant is appointed receiver at the complainant's instance, the complainant must bear all loss occasioned by such receiver's defalcation and the insufficiency of his sureties. *Sorchan v. Mayo*, 50 N. J. Eq. 288.

Solicitor of Lunatic. — *Ex p. Pincke*, 2 Meriv. 452.

Law Partner of Complainant's Solicitor. — Merchants', etc., Nat. Bank *v. Kent Circuit Judge*, 43 Mich. 296.

Clerk or Agent of Solicitor. — As to a rule forbidding any clerk or agent of a solicitor to be appointed receiver, see *In re Stokes*, 1 J. & LaT. 676. Compare as to *Ireland*, *Meara v. Egan*, 9 Ir. Eq. 260.

3. Geyser Min. Co. v. Salt Lake Bank, 16 Utah 163.

4. Geyser Min. Co. v. Salt Lake Bank, 16 Utah 163.

Attorneys of Both Parties. — Where two receivers were appointed, the fact that one of them was the plaintiff's attorney was not, in *Shannon v. Hanks*, 88 Va. 338, deemed such an abuse of discretion as would warrant the interference of an appellate court, the other being the attorney for the defendant.

5. Garland v. Garland, 2 Ves. Jr. 138; *Wilson v. Poe*, 1 Hog. 322.

6. Teats v. Herington Bank, 58 Kan. 721.

7. Trustees. — *Sutton v. Jones*, 15 Ves. Jr. 584; *Sykes v. Hastings*, 11 Ves. Jr. 363; — *v. Jolland*, 8 Ves. Jr. 72; *Matter of Stuyvesant Bank*, 5 Ben. (U. S.) 568.

8. Hibbert v. Jenkins, cited in *Sykes v. Hastings*, 11 Ves. Jr. 363; *Newport v. Bury*, 23 Beav. 31.

A trustee, it has been held, may be appointed receiver where he is not a trustee solely for particular persons, antagonistic to the plaintiffs, but is trustee for the plaintiffs as much as for others. *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 460.

Additional Expense as Consideration. — The liquidator of a company ought to be appointed receiver where no personal objection is or can be made against him and the appointment of another person would cause great additional expense. *Perry v. Oriental Hotels Co.*, L. R. 5 Ch. 422.

9. Hitz v. Jenks, 16 App. Cas. (D. C.) 530; *Lyons-Thomas Hardware Co. v. Perry Stove Mfg. Co.*, 88 Tex. 468.

Appointment of Surviving Trustee. — *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606.

10. Assignee. — *Eichberg v. Wickham*, (Supm.

17. Receivers of Corporations — a. OFFICERS AND STOCKHOLDERS. — Officers and stockholders of corporations are not, as such, ineligible to appointment as receivers thereof.¹ But a court will not in general appoint as receiver of a corporation any one who has been officially and responsibly connected with the mismanagement of the company's affairs which has rendered necessary the appointment of a receiver,² nor will an officer of a corporation whose interests as an individual may conflict with those of the body of stockholders be appointed its receiver.³

b. SPECULATOR IN CORPORATE STOCK. — One who is a speculator in the stock of a corporation should not be appointed its receiver.⁴

18. Receivers of Partnerships. — While the general rule undoubtedly is that a receiver should be a person wholly disinterested in the subject-matter of the suit, yet where a proper case has been made out for a receivership and the partner in charge of the business is without fault, he will usually be appointed the receiver.⁵

VII. APPOINTMENT OF RECEIVER — 1. Requisite Showing to Obtain. — Questions relating to the appointment of receivers have been to a large extent covered by a preceding section of this title. It is sufficient here to say that in order to obtain the appointment of a receiver the plaintiff must, as a general rule, show first, either that he has a clear right to the property itself, or that he has some lien upon it, or that the property constitutes a special fund to

Ct. Spec. T.) 21 N. Y. Supp. 647; *People's Bank v. Fancher*, (Supm. Ct. Spec. T.) 21 N. Y. Supp. 545.

1. Corporate Officers and Stockholders — *United States.* — *Ralston v. Washington*, etc., R. Co., 65 Fed. Rep. 557; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 61 Fed. Rep. 546; *Clarke v. Central R., etc., Co.*, 54 Fed. Rep. 556; *Atkins v. Wabash*, etc., R. Co., 29 Fed. Rep. 174; *Buck v. Piedmont*, etc., L. Ins. Co., 4 Fed. Rep. 849. See also *Fowler v. Jarvis-Conklin Mortg. Trust Co.*, 66 Fed. Rep. 14.

Alabama. — *Mercantile Trust, etc., Co. v. Florence Water Co.*, 111 Ala. 119.

Illinois. — *People v. Illinois Bldg., etc., Assoc.*, 56 Ill. App. 642.

Louisiana. — *McGilliard v. Donaldsonville Foundry, etc., Works*, 104 La. 544.

Maine. — And see *Wiswell v. Starr*, 48 Me. 406.

Michigan. — *Moran v. Wayne Circuit Judge*, 125 Mich. 6; *Barker v. Wayne Circuit Judge*, 117 Mich. 325; *Gypsum Plaster, etc., Co. v. Adsit*, 105 Mich. 497.

New York. — *Keeler v. Brooklyn El. R. Co.*, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 166; *Matter of Waterbury*, 8 Paige (N. Y.) 380; *Matter of Eagle Iron Works*, 8 Paige (N. Y.) 388; *Monroe Bank v. Schermerhorn, Clarke* (N. Y.) 369.

South Carolina. — And see *Ex p. Brown*, 15 S. Car. 518; *In re Fifty-four First Mortg. Bonds*, 15 S. Car. 313.

Invalid Where Prohibited by Statute. — *Moss Nat. Bank v. Lakeside Co.*, 10 Ohio Cir. Dec. 542, 19 Ohio Cir. Ct. 365.

2. Officers Responsible for Mismanagement. — *Buck v. Piedmont*, etc., L. Ins. Co., 4 Hughes (U. S.) 415, 4 Fed. Rep. 849; *Finance Co. v. Charleston*, etc., R. Co., 45 Fed. Rep. 436; *Freeholders v. State Bank*, 28 N. J. Eq. 166; *People v. Third Ave. Sav. Bank*, (Supm. Ct. Spec. T.) 50 How. Pr. (N. Y.) 22; *Keeler v. Brooklyn El. R. Co.*, (Supm. Ct. Spec. T.) 9

Abb. N. Cas. (N. Y.) 166; *Atty.-Gen. v. Columbia Bank*, 1 Paige (N. Y.) 511. See also *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 218.

Negligence of Stockholder. — It is no objection to the appointment of a stockholder in a corporation as a receiver thereof that he has been negligent in not protecting his own interests, since stockholders are not supposed to manage and direct the corporate affairs. *McGilliard v. Donaldsonville Foundry, etc., Works*, 104 La. 544.

3. Olmstead v. Distilling, etc., Co., 67 Fed. Rep. 24.

4. Olmstead v. Distilling, etc., Co., 67 Fed. Rep. 24.

5. Partner as Receiver — *England.* — *Wilson v. Greenwood*, 1 Swanst. 471; *Maund v. Allies*, 4 Myl. & C. 503; *Sheppard v. Oxenford*, 1 Kay & J. 491; *Hoffman v. Duncan*, 18 Jur. 69; *Blakeney v. Dufaur*, 15 Beav. 40; *Sargant v. Read*, 1 Ch. D. 600; *Ex p. Stoveld*, 1 Glyn & J. 303.

United States. — See *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 470.

Delaware. — *Reynolds v. Austin*, 4 Del. Ch. 24.

Georgia. — See *Bliley v. Taylor*, 86 Ga. 163. *Louisiana.* — *Gridley v. Conner*, 2 La. Ann. 87.

New Jersey. — *Kirkpatrick v. Corning*, 38 N. J. Eq. 234.

New York. — *Hubbard v. Guild*, 2 Duer (N. Y.) 685.

Pennsylvania. — *Slemmer's Appeal*, 58 Pa. St. 178, 98 Am. Dec. 255.

Tennessee. — *Whitesides v. Lafferty*, 3 Humph. (Tenn.) 150; *Todd v. Rich*, 2 Tenn. Ch. 107; *Brien v. Harriman*, 1 Tenn. Ch. 467.

West Virginia. — *McMahon v. McClernan*, 10 W. Va. 419.

Administrator of Deceased Partner May Be Appointed. — *Miller v. Jones*, 39 Ill. 61.

which he has a right to resort for the satisfaction of his claim; and second, that the possession of the property by the defendant was obtained by fraud, or that the property itself, or the income arising from it, is in danger of loss from the neglect, waste, misconduct, or insolvency of the defendant.¹

2. Effect of Delay in Applying for Receiver. — Delay on the part of one who seeks the appointment of a receiver, whether in making or prosecuting the application, will be regarded by the court as a consideration against the appointment.² So a receiver will not be appointed at the suit of a judgment creditor unless the creditor has filed his bill within a reasonable time after the return of the execution unsatisfied.³

3. Effect of Delay in Objecting to Appointment. — Where there has been unreasonable delay in objecting to the appointment of a receiver it will be held tantamount to consent to and acquiescence in the appointment, and an objection to the appointment on the ground of irregularities therein will not be entertained.⁴

4. Estoppel to Question Appointment. — One who has recognized the appointment of a receiver or the validity of his official acts cannot subsequently object to his appointment or to the validity of acts done thereunder on the ground of irregularities in the appointment.⁵ So a creditor who has accepted dividends on his claims from a receiver is estopped to deny the regularity of the appointment.⁶ Nor can a stockholder of a corporation, after having

1. See *Mays v. Rose*, Freem. (Miss.) 718; *Meister v. Adamson*, 61 Minn. 166; *Norris v. Lake*, 89 Va. 513; *Heard v. Murray*, 93 Ala. 127. As to the question who may apply for a receiver and the requisite showing to obtain an appointment, see further 17 ENCYC. OF PL. AND PR. 675, title RECEIVERS.

When Refused to Creditors of Deceased Persons. — If the combined real and personal estate of a deceased person is sufficient to pay his debts, his creditors have no reason to apply to have a receiver appointed to take charge of the rents and profits of the real estate and appropriate them to the payment of such debts. *McKaig v. James*, 66 Md. 584.

2. Delay. — *Jones v. Jones*, 3 Meriv. 173; *Fogarty v. Burke*, 2 Dr. & War. 584; *Skinner's Co. v. Irish Soc.*, 1 Myl. & C. 165; *Commissioners, etc. v. Lockhart*, Ir. R. 3 Eq. 517; *Tibbals v. Sargeant*, 14 N. J. Eq. 451; *Hager v. Stevens*, 6 N. J. Eq. 374; *Bloodgood v. Clark*, 4 Paige (N. Y.) 577.

Delay of Six Years. — An application for the appointment of a receiver which has been allowed to sleep for six years will be denied, although some testimony has been taken in the meantime. *Hood v. Tremont First Nat. Bank*, 29 Fed. Rep. 55.

Acquiescence in Conditions Sought to Be Remedied. — It has been held that acquiescence for forty-seven years in an agreement relating to canal tolls bars an application by the shareholders for a receiver. *Gray v. Chaplin*, 2 Russ. 142.

3. Judgment Creditor. — *Fogarty v. Burke*, 2 Dr. & War. 580; *Gould v. Tryon, Walk.* (Mich.) 353; *National Mechanics' Banking Assoc. v. Mariposa Co.*, 60 Barb. (N. Y.) 423.

4. Delay in Objecting. — *Brown v. Lake Superior Iron Co.*, 134 U. S. 535; *Allen v. Dallas, etc.*, R. Co., 3 Woods (U. S.) 316; *Gypsum Plaster, etc. Co. v. Adsit*, 105 Mich. 497; *Matter of George T. Smith Middlings Purifier Co.*, 86 Mich. 149; *Rumsey v. Peoples R. Co.*,

154 Mo. 215; *Hardt v. Levy*, 79 Hun (N. Y.) 348; *Palen v. Bushnell*, (Supm. Ct. Spec. T.) 18 Civ. Pro. (N. Y.) 56.

5. Estoppel. — *United States.* — *Wallace v. Loomis*, 97 U. S. 146.

Illinois. — *Commercial Nat. Bank v. Burch*, 141 Ill. 519, 33 Am. St. Rep. 331; *Russell v. Chicago Trust, etc., Bank*, 40 Ill. App. 385.

Indiana. — *Stelzer v. La Rose*, 79 Ind. 435.

Iowa. — *Dickerson v. Cass County Bank*, 95 Iowa 392.

Michigan. — *Skinner v. Lucas*, 68 Mich. 424; *Burton v. Schildbach*, 45 Mich. 513.

Missouri. — *Rumsey v. Peoples R. Co.*, 154 Mo. 215; *Greeley v. Provident Sav. Bank*, 103 Mo. 212.

Nebraska. — *Ecklund v. Willis*, 42 Neb. 737.

New York. — *Southwick v. Moore*, 54 N. Y. Super. Ct. 126; *Battershall v. Davis*, 31 Barb. (N. Y.) 327; *Tyler v. Willis*, 33 Barb. (N. Y.) 327; *Hobart v. Frost*, 5 Duer (N. Y.) 672; *Farmers' L. & T. Co. v. Staten Island Belt Line R. Co.*, (Supm. Ct. Spec. T.) 17 Misc. (N. Y.) 168; *Baker v. Herkimer*, 43 Hun (N. Y.) 86; *Baker v. Brundage*, 79 Hun (N. Y.) 382; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453; *Scott v. Duncombe*, 49 Barb. (N. Y.) 73; *Viburt v. Frost*, (N. Y. Super. Ct. Spec. T.) 3 Abb. Pr. (N. Y.) 119; *People v. Globe Mut. L. Ins. Co.*, (Supm. Ct. Spec. T.) 60 How. Pr. (N. Y.) 82; *Bolt v. Hauser*, (County Ct.) 19 Civ. Pro. (N. Y.) 7.

North Carolina. — *Delafield v. Lewis Mercer Constr. Co.*, 118 N. Car. 105.

North Dakota. — *Merchants Nat. Bank v. Braithwaite*, 7 N. Dak. 358, 66 Am. St. Rep. 653.

Ohio. — *Brockman v. Consolidated Bldg., etc., Co.*, 7 Ohio Dec. 291; *Equitable Nat. Bank v. Guckenberger*, 5 Ohio Dec. 438, 5 Ohio N. P. 319.

6. Greeley v. Provident Sav. Bank, 103 Mo. 212.

joined in an application made to the court by the receiver for authority to sell the assets of the corporation, be permitted to question the regularity or validity of the receiver's appointment, or of the order directing the sale.¹ But where the order of appointment is void and not voidable merely, the fact that a judgment creditor intervened in the receivership proceedings and attempted to enforce his judgment will not preclude an attack upon the appointment.²

5. Reluctance of Courts to Appoint Receivers. — It is frequently stated that the courts are very reluctant to resort to the summary remedy of receiverships.³ Some authorities have, indeed, declared that this reluctance should be overcome only by circumstances of "imperative" or "extreme" necessity,⁴ or in cases of manifest danger imminently impending.⁵ At all events, the power of appointing receivers is one which should be sparingly exercised, and with great caution and circumspection,⁶ and only where the circumstances relied upon to warrant the appointment are made to appear by clear proof.⁷ But this does not, of course, mean that the proof of the facts on which the exercise of judicial interference depends must be free from conflict.⁸ Reasonable certainty is sufficient.⁹

6. Fact that Appointment Will Do No Harm. — The appointment of a receiver will never be made merely because the measure will do no harm.¹⁰ Nor, *a*

1. *Battershall v. Davis*, 31 Barb. (N. Y.) 327.

2. *Smith v. Los Angeles, etc.*, R. Co., (Cal. 1893) 34 Pac. Rep. 242. And see further as to the right to object to a void order, *Dickerson v. Cass County Bank*, 95 Iowa 392.

3. *Courts Reluctant to Appoint Receivers — United States.* — *Vose v. Reed*, 1 Woods (U. S.) 650; *Sage v. Memphis, etc.*, R. Co., 18 Fed. Rep. 571; *Overton v. Memphis, etc.*, R. Co., 10 Fed. Rep. 866; *Latham v. Chafee*, 7 Fed. Rep. 526.

Illinois. — *Sioux City First Nat. Bank v. Gage*, 79 Ill. 209; *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 136.

Maryland. — *Blondheim v. Moore*, 11 Md. 374; *Walker v. House*, 4 Md. Ch. 45; *Clark v. Ridgely*, 1 Md. Ch. 71; *Thompson v. Diffenderfer*, 1 Md. Ch. 493.

New Jersey. — *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 178.

New York. — *Patten v. Accessory Transit Co.*, (Supm. Ct. Gen. T.) 4 Abb. Pr. (N. Y.) 238.

North Carolina. — *Levenson v. Elson*, 88 N. Car. 184.

Pennsylvania. — *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 91.

4. *Bigbee v. Summerour*, 101 Ga. 201; *Sioux City First Nat. Bank v. Gage*, 79 Ill. 207. See also *Blondheim v. Moore*, 11 Md. 374; *Heflebower v. Buck*, 64 Md. 22; *People's Invest. Co. v. Crawford*, (Tex. Civ. App. 1898) 45 S. W. Rep. 738.

5. *Crawford v. Ross*, 39 Ga. 49.

6. **The Power to Be Exercised with Caution — United States.** — *Pullan v. Cincinnati, etc.*, R. Co., 4 Biss. (U. S.) 47; *Latham v. Chafee*, 7 Fed. Rep. 526.

Illinois. — *Sioux City First Nat. Bank v. Gage*, 79 Ill. 209; *Black Diamond Co. v. Waterloo*, 62 Ill. App. 206.

Maryland. — *Blondheim v. Moore*, 11 Md. 365; *Walker v. House*, 4 Md. Ch. 39; *Furlong v. Edwards*, 3 Md. 112; *Clark v. Ridgely*, 1 Md. Ch. 70; *Thompson v. Diffenderfer*, 1 Md. Ch. 489.

Mississippi. — *Whitehead v. Wooten*, 43 Miss. 526.

New York. — *Patten v. Accessory Transit Co.*, (Supm. Ct. Gen. T.) 4 Abb. Pr. (N. Y.) 238.

Virginia. — *Shannon v. Hanks*, 88 Va. 338; *Beverly v. Brooke*, 4 Gratt. (Va.) 187.

7. **A Clear Case Necessary — United States.** — *Beecher v. Bininger*, 7 Blatchf. (U. S.) 174; *Dow v. Memphis, etc.*, R. Co., 20 Fed. Rep. 260; *Sage v. Memphis, etc.*, R. Co., 18 Fed. Rep. 571; *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 282; *London Credit Co. v. Arkansas Cent. R. Co.*, 15 Fed. Rep. 49; *Overton v. Memphis, etc.*, R. Co., 10 Fed. Rep. 866.

Iowa. — *Callanan v. Shaw*, 19 Iowa 184.

Kansas. — *Watkins v. National Bank*, 51 Kan. 254.

Maryland. — *Blondheim v. Moore*, 11 Md. 374.

New Jersey. — *Semple v. Flynn*, (N. J. 1887) 10 Atl. Rep. 178.

New York. — *Empire Paving, etc., Co. v. Robinson*, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 540.

North Carolina. — *Hanna v. Hanna*, 89 N. Car. 71.

Pennsylvania. — *Gracey v. Pittsburgh Trolley Co.*, 28 Pittsb. Leg. J. N. S. (Pa.) 109.

Texas. — *People's Invest. Co. v. Crawford*, (Tex. Civ. App. 1898) 45 S. W. Rep. 738.

"The Court Must Be Convinced that it is needful and is the appropriate means of securing a proper end. Such an appointment is a strong measure, and not to be exercised doubtfully." *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83.

8. *Stith v. Jones*, 101 N. Car. 360.

9. *National F. Ins. Co. v. Broadbent*, 77 Minn. 175.

10. *Blondheim v. Moore*, 11 Md. 365; *Walker v. House*, 4 Md. Ch. 39; *Clark v. Ridgely*, 1 Md. Ch. 70; *Thompson v. Diffenderfer*, 1 Md. Ch. 489; *Speights v. Peters*, 9 Gill (Md.) 476; *Orphan Asylum Soc. v. McCartee, Hopk. (N. Y.)* 429; *Smith v. Port Dover, etc.*, R. Co., 12

fortiori, will a receiver be appointed where no perceptible benefit would result therefrom, and no apparent injury from a refusal to appoint, but on the contrary there would be confusion, difficulty, and injury to all concerned if an appointment were made.⁴

7. Interference with Legal Title. — The reluctance of the courts to appoint a receiver is particularly emphasized where such measure would constitute an interference with the legal title,² or with the possession of a party under apparent claim of right,³ and such reluctance may be increased where the defendant's possession has been long continued.⁴

8. Where Other Remedies Exist. — It has been said that a receiver should not be appointed where other and less summary remedies are available and would afford adequate protection, and this whether such other remedies are of a legal or an equitable nature.⁵ Nor will a receiver be appointed where the party has power to help himself.⁶

In the Case of Corporations, a receiver will not be appointed where an injunction against threatened or combined acts or conditions would suffice.⁷

9. Discretion of Court as to Appointment — *a. GENERAL RULE.* — The appointment of a receiver is, as a rule, a matter within the discretion of the court;⁸ not an arbitrary discretion, however, but one to be governed by

Ont. App. 288. See also *Matter of Colvin*, 3 Md. Ch. 301.

1. *Hamburgh Mfg. Co. v. Edsall*, 8 N. J. Eq. 142.

2. *Interference with Legal Title — England.* — *Stilwell v. Wilkins*, Jac. 283, 6 Madd. 49; *Lloyd v. Passingham*, 16 Ves. Jr. 70; *Maguire v. Allen*, 1 Ball & B. 76; *Hugonin v. Baseley*, 13 Ves. Jr. 106; *Lancashire v. Lancashire*, 9 Beav. 127.

United States. — *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 723. See also *Overtown v. Memphis, etc., R. Co.*, 3 McCrary (U. S.) 437; *Schenck v. Peay*, Woolw. (U. S.) 185; *Lenox v. Notrebe, Hempst.* (U. S.) 225; *Morrison v. Buckner, Hempst.* (U. S.) 443; *Wiswall v. Sampson*, 14 How. (U. S.) 64.

Maryland. — *Thompson v. Diffenderfer*, 1 Md. Ch. 493; *Kipp v. Hanna*, 2 Bland (Md.) 31; *Williamson v. Wilson*, 1 Bland (Md.) 422. See also *Speights v. Peters*, 9 Gill (Md.) 479; *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 279.

North Carolina. — See also *Rollins v. Henry*, 77 N. Car. 467.

3. *Owen v. Homan*, 4 H. L. Cas. 1032; *Lenox v. Notrebe, Hempst.* (U. S.) 226; *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 723; *Roxman v. Henry*, 17 N. Y. 482.

Where a Party Is Clothed with Title and Possession such as are conferred by a lease in writing, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless under urgent and peculiar circumstances. *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 91, 6 Phila. (Pa.) 523, 25 Leg. Int. (Pa.) 93.

4. *Commissioners, etc., v. Lockhart, Ir. R.* 3 Eq. 517.

5. *Thayer v. Hart*, 24 Fed. Rep. 558; *Etowah Min. Co. v. Wills Valley Min., etc., Co.*, 106 Ala. 492; *Post v. Weeks*, 7 Kulp (Pa.) 228; *People's Invest. Co. v. Crawford*, (Tex. Civ. App. 1898) 45 S. W. Rep. 738.

6. *Sollory v. Leaver*, L. R. 9 Eq. 25.

7. **When Injunction Adequate.** — *United Electric Securities Co. v. Louisiana Electric Light*

Co., 68 Fed. Rep. 673; *Rawnsley v. Trenton Mut. L., etc., Ins. Co.*, 9 N. J. Eq. 347; *Oakley v. Paterson Bank*, 2 N. J. Eq. 173; *Howe v. Deuel*, 43 Barb. (N. Y.) 504; *Waterbury v. Merchants' Union Express Co.*, 50 Barb. (N. Y.) 157. See also *Neall v. Hill*, 16 Cal. 145, 76 Am. Dec. 508; *Belmont v. Erie R. Co.*, 52 Barb. (N. Y.) 637; *Latimer v. Eddy*, 46 Barb. (N. Y.) 61; *Smith v. Metropolitan Gas Light Co.*, (Supm. Ct. Spec. T.) 12 How. Pr. (N. Y.) 187; *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

8. General Rule — A Matter of Discretion — England. — *Owen v. Homan*, 4 H. L. Cas. 1033, 3 Macn. & G. 412; *Bainbrigge v. Baddeley*, 3 Macn. & G. 419; *Skip v. Harwood*, 3 Atk. 564; *Greville v. Fleming*, 2 J. & LaT. 339.

Canada. — *Smith v. Port Dover, etc., R. Co.*, 12 Ont. App. 289; *Harris v. Beauchamp*, (1894) 1 Q. B. 801.

United States. — *Wilkinson v. Dobbie*, 12 Blatchf. (U. S.) 300; *Tysen v. Wabash R. Co.*, 8 Biss. (U. S.) 253; *Pullan v. Cincinnati, etc., R. Co.*, 4 Biss. (U. S.) 47; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Milwaukee, etc., R. Co. v. Souther*, 2 Wall. (U. S.) 510; *Vose v. Reed*, 1 Woods (U. S.) 650; *Crane v. McCoy*, 1 Bond (U. S.) 431; *Lenox v. Notrebe, Hempst.* (U. S.) 226; *Morrison v. Buckner, Hempst.* (U. S.) 442; *McGeorge v. Big Stone Gap Imp. Co.*, 57 Fed. Rep. 262; *Washington Nat. Bank v. Eckels*, 57 Fed. Rep. 870; *American Biscuit, etc., Co. v. Klotz*, 44 Fed. Rep. 721; *Farmers' L. & T. Co. v. Chicago, etc., R. Co.*, 27 Fed. Rep. 158; *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 467.

District of Columbia. — *Wood v. Grayson*, 16 App. Cas. (D. C.) 174.

Alabama. — *Ex p. Walker*, 25 Ala. 104.

Georgia. — *Humphries v. Shockley*, 110 Ga. 279, 34 S. E. Rep. 845; *Siesel v. Wells*, 94 Ga. 728, 19 S. E. Rep. 908; *Sanders v. Slaughter*, 89 Ga. 34; *Clay v. Clay*, 86 Ga. 359; *Pendleton v. Johnson*, 85 Ga. 840; *Domestic Sewing Mach. Co. v. Johnson*, 83 Ga. 426; *Mathews v. Williams*, 84 Ga. 538; *Willcox v. Dunlap*, 83

sound considerations of judgment, and each case determined upon its own conditions and circumstances.¹ This rule of discretion has been but little impaired or enlarged by the various statutes on the subject, it still being within the sound discretion of the court to say when the statutory grounds for receivership exist.²

b. WHEN APPOINTMENT EX DEBITO JUSTITIÆ. — It has been said that in a very plain case where the plaintiff's right is clear, and the danger of loss apparent, the appointment of a receiver is *ex debito justitiæ*.³ Few cases are met with, however, in which the appointment of a receiver has been held matter of right.

Mortgage Provision for Receiver. — Where, however, a mortgage of real estate expressly provided that the mortgagee should have the right to a receiver to collect the rents after a sale and deficiency judicially ascertained, it was held error to refuse to appoint a receiver after the happening of the stated conditions.⁴

10. Irregular and Collusive Appointments. — It has been held that a receiver of a corporation appointed in a collusive suit will be considered a mere custodian introduced by the corporation,⁵ or as an agent of the corporation

Ga. 417; Buena Vista Mfg. Co. v. Chattanooga Door, etc., Co., 87 Ga. 689, 13 S. E. Rep. 684; Wilcoxon Mfg. Co. v. Atkinson, 78 Ga. 338; Rhodes v. Lee, 32 Ga. 471.

Illinois. — Iroquois Furnace Co. v. Kimbark, 85 Ill. App. 399.

Indiana. — McElwaine v. Hosey, 135 Ind. 481; Rapp v. Reehling, 122 Ind. 255.

Iowa. — Dickerson v. Cass County Bank, 95 Iowa 392; Cofer v. Echerson, 6 Iowa 505.

Kansas. — Watkins v. National Bank, 51 Kan. 254.

Kentucky. — Woodward v. Woodward, (Ky. 1895) 31 S. W. Rep. 734; Harmon v. Kentucky Coal, etc., Co., (Ky. 1893) 21 S. W. Rep. 1054.

Louisiana. — McNair v. Gourrier, 40 La. Ann. 353.

Maryland. — Baltimore, etc., R. Co. v. Cannon, 72 Md. 493.

Minnesota. — Walther v. Seven Corners Bank, 58 Minn. 434; Hyde v. Weitzner, 45 Minn. 35; Flint v. Webb, 25 Minn. 263.

Mississippi. — Mays v. Rose, Freem. (Miss.) 718.

Nebraska. — Provident Life, etc., Co. v. Keniston, 53 Neb. 86.

New Jersey. — American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526; Nichols v. Perry Patent Arm Co., 11 N. J. Eq. 126; Oakley v. Paterson Bank, 2 N. J. Eq. 173.

New York. — Dawson v. Parsons, 137 N. Y. 605, 33 N. E. Rep. 482; Rider v. Bagley, 84 N. Y. 465; Syracuse City Bank v. Tallman, 31 Barb. (N. Y.) 201; Witherbee v. Witherbee, 17 N. Y. App. Div. 181; Gregory v. Gregory, 33 N. Y. Super. Ct. 39; Brick v. Hornbeck, (Supm. Ct. Spec. T.) 19 Misc. (N. Y.) 218; Bird v. Lanphear, 92 Hun (N. Y.) 567; Valentine v. Juch, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 747; Verplank v. Caines, 1 Johns. Ch. (N. Y.) 58; Orphan Asylum Soc. v. McCartee, Hopk. (N. Y.) 435.

North Carolina. — Nimocks v. Cape Fear Shingle Co., 110 N. Car. 230.

Ohio. — Cincinnati, etc., R. Co. v. Sloan, 31 Ohio St. 1.

Pennsylvania. — *In re* Misselwitz, 177 Pa. St. 359; Beaumont v. Beaumont, 166 Pa. St. 615; Chicago, etc., Oil, etc., Co. v. U. S. Pe-

troleum Co., 57 Pa. St. 91, 6 Phila. (Pa.) 523, 25 Leg. Int. (Pa.) 93.

South Dakota. — Simmons Hardware Co. v. Waibel, 1 S. Dak. 488, 36 Am. St. Rep. 755.

Virginia. — Shannon v. Hanks, 88 Va. 338; Lyle v. Commercial Nat. Bank, 93 Va. 487.

Washington. — Cameron v. Groveland Imp. Co., 20 Wash. 169, 72 Am. St. Rep. 26.

West Virginia. — Smith v. Brown, 44 W. Va. 342.

Wisconsin. — Nash v. Maggett, 89 Wis. 486; Hawacek v. Bohman, 51 Wis. 95.

1. Taylor v. Life Assoc. of America, 3 Fed. Rep. 467. And see cases cited in preceding note.

Dependent upon Particular Circumstances. — Each case has been made to depend much upon its own peculiar features, and throws but little light upon any new case, except so far as general principles are recognized and established. Mays v. Rose, Freem. (Miss.) 718.

2. Harris v. Beauchamp, (1894) 1 Q. B. 801, 9 Reports 653; Woodward v. Woodward, (Ky. 1895) 31 S. W. Rep. 734; Hyde v. Weitzner, 45 Minn. 35.

Rule under English Judicature Act. — The phraseology used in the English Judicature Act of 1873, § 25, subsec. 8, that a receiver "may" be appointed when it is "just or convenient," does not deprive the court of its proper discretion to refuse a receiver asked for on behalf of a legal mortgagee who has taken possession and remained in possession for a long time, but who at the last moment declares that he will give up possession and put the mortgagors to the expense of a receivership. *In re* Prytherch, 42 Ch. D. 600.

3. Mercantile Trust Co. v. Missouri, etc., R. Co., 36 Fed. Rep. 221; Smith v. Port Dover, etc., R. Co., 12 Ont. App. 288.

4. Wright v. Case, 69 Ill. App. 535.

5. Taber v. Royal Ins. Co., 124 Ala. 681.

A Person Never Judicially Appointed, and Acting as Manager of Partnership Affairs Only by consent on account of a disagreement between the parties, is not a receiver and will not be recognized as such by a court. Boyd v. Royal Ins. Co., 111 N. Car. 372.

for whose acts the latter is liable.¹

11. Damages for Improper Appointment. — It has been held that the appointment of a receiver is an act of the court, and affords no basis for an action for damages against the applicant.²

12. Constitutional Provisions. — The power possessed by courts of equity of appointing receivers and ordering them to take possession of the property in controversy does not conflict with the constitutional provision that no man shall be deprived of his property without due process of law.³

13. Evidence of Appointment. — The proper record evidence of the appointment of a receiver is conclusive of the right of the party to act as such until it is impeached.⁴

14. Injunction and Receiver. — While injunction and receivership are separate and distinct remedies,⁵ both are frequently invoked by and resorted to upon the same state of facts,⁶ and each is sometimes spoken of as an incident of the other.⁷ In a certain sense, however, a receivership implies and includes an injunction, for, as will be more fully seen hereafter, all persons are restrained from interfering with the receiver's possession, or with the receiver in the performance of his duties.⁸ But it by no means follows, of course, that because an injunction is granted a receiver should be appointed.⁹ A receivership is frequently resorted to in order to supplement an injunction.¹⁰

VIII. EFFECT OF APPOINTMENT OF RECEIVER — **1. Determines No Right.** — The appointment of a receiver, being a mere provisional and precautionary remedy for the purpose of preserving property for the ultimate judgment of the court, determines no right either of parties to the controversy or of strangers thereto.¹¹ The rights of the parties concerned are disposed of by the ultimate judgment

Receiver of Corporation — Partnership. — A corporation which had never been legally organized had acquired, in payment of subscriptions to its capital stock, certain real and personal property formerly belonging to a partnership, under conveyances, part of the consideration being the undertaking of the corporation to pay certain of the partnership debts. It was held that the fact that this property came into the hands of a receiver did not constitute such receiver the receiver of the partnership, and therefore bound by its agreements. *Lamkin v. Baldwin, etc., Mfg. Co.*, 72 Conn. 57.

1. *Texas, etc., R. Co. v. Gay*, 86 Tex. 571.

2. *Saunders v. Kempner*, (Tex. Civ. App. 1895) 32 S. W. Rep. 585. And see *Coverdill v. Sevmour*, 94 Tex. 1.

3. *Matter of Cohen*, 5 Cal. 496.

4. *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

5. **Injunction and Receivership.** — *Hall v. Hall*, 3 Macn. & G. 85.

Receivership for Mere Purposes of Injunction. — A receiver of a corporation will not be appointed for the sole purpose of preventing creditors whose claims are due from enforcing collection by suit. *Matter of Atlas Constr. Co.*, (N. Y. Super. Ct. Spec. T.) 2 N. Y. Annot. Cas. 124.

6. *Whitney v. Buckman*, 26 Cal. 447; *Logan v. Slade*, 28 Fla. 699; *Nichols v. Perry Patent Arm Co.*, 11 N. J. Eq. 126; *Rawnsley v. Tren-ton Mut. L., etc., Ins. Co.*, 9 N. J. Eq. 347; *Ellett v. Newman*, 92 N. Car. 523. See also *McCarthy v. Peake*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 158.

7. *Penn. v. Whitehead*, 12 Gratt. (Va.) 83.

8. **Receivership Implies and Includes Injunction** — *England.* — *Evans v. Coventry*, 3 Drew. 82;

Goodman v. Whitcomb, 1 Jac. & W. 569; *Smith v. Jeyes*, 4 Beav. 503.

Illinois. — *Miller v. Jones*, 39 Ill. 54.

Maryland. — *Rose v. Bevan*, 10 Md. 466, 69 Am. Dec. 170.

New Jersey. — *Sieghortner v. Weissenborn*, 20 N. J. Eq. 172; *Cox v. Peters*, 13 N. J. Eq. 40; *Birdsall v. Colie*, 10 N. J. Eq. 63.

New York. — *Halpin v. Mutual Brewing Co.*, 91 Hun (N. Y.) 220; *Carson v. New York Terminal Express Co.*, 74 Hun (N. Y.) 536; *In re Schuyler Steam Tow-Boat Co.*, (Supm. Ct. Spec. T.) 18 N. Y. Supp. 89, 64 Hun (N. Y.) 384; *Morgan v. New York, etc., R. Co.*, 10 Paige (N. Y.) 290, 40 Am. Dec. 244.

Pennsylvania. — *Gravenstine's Appeal*, 49 Pa. St. 310.

9. *Hall v. Hall*, 3 Macn. & G. 79; *Oakley v. Paterson Bank*, 2 N. J. Eq. 179.

10. *Logan v. Slade*, 28 Fla. 699; *Stockton v. Central R. Co.*, 50 N. J. Eq. 489; *Penn v. Whitehead*, 12 Gratt. (Va.) 83. See also *Dumville v. Ashbrooke*, 3 Russ. 100, note; *Dunn v. McNaught*, 38 Ga. 179; *Maher v. Bull*, 44 Ill. 97; *Osborn v. Heyer*, 2 Paige (N. Y.) 342; *Oakley v. Paterson Bank*, 2 N. J. Eq. 178.

11. **Effect of Appointment.** — *Cooke v. Gwyn*, 3 Atk. 689; *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454; *Ex p. Walker*, 25 Ala. 81; *Matter of Cohen*, 5 Cal. 494; *Jackson v. King*, 9 Kan. App. 160; *Ellcott v. Warford*, 4 Md. 85; *Ellis v. Boston, etc., R. Co.*, 107 Mass. 28; *Brown v. Northrup*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 335; *Leavitt v. Yates*, 4 Edw. (N. Y.) 162; *Ex p. Dunn*, 8 S. Car. 233.

Sureties on Insolvent's Bond Not Concluded by Appointment. — *State v. Sullivan*, 120 Ind. 200.

of the court, or its further action in the premises.¹ In the appointment of a receiver the court will confine itself strictly to the immediate object sought, and abstain as far as possible from prejudging any of the material questions in the cause.² It has been held, therefore, that the effect of the appointment of a receiver is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately be entitled to it; and when the party entitled to the estate has been ascertained, the receiver will be considered his receiver.³

2. Title to Property. — The appointment of a receiver effects no change in the title to the property involved as between conflicting claimants thereto or the parties to the suit.⁴ A receiver is not, as a rule, regarded as having the legal title to the property.⁵ He is a mere custodian to take charge of and hold the property during a pending litigation.⁶

3. Property in Custodia Legis. — It is well settled that property in the receiver's custody is *in custodia legis*, and the possession of the receiver is the possession of the court which appointed him.⁷ But a mere order that a

1. *Miller v. Bowles*, 10 Nat. Bankr. Reg. 517.

2. *Skinners' Co. v. Irish Soc.*, 1 Myl. & C. 162.

3. *Wiswall v. Sampson*, 14 How. (U. S.) 52.

4. **No Change in Title to Property** — *England*. — *Skip v. Harwood*, 3 Atk. 564; *Gresley v. Adderley*, 1 Swanst. 573.

United States. — *Fosdick v. Schall*, 99 U. S. 235; *Bethel Bank v. Pahquioque Bank*, 14 Wall. (U. S.) 383.

Alabama. — *Southern Granite Co. v. Wadsworth*, 115 Ala. 570.

Georgia. — *Field v. Jones*, 11 Ga. 413.

Illinois. — *St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co.*, 111 Ill. 32; *Union Trust Co. v. Weber*, 96 Ill. 355.

Indiana. — *Manlove v. Burger*, 38 Ind. 211.

Kansas. — *Jackson v. King*, 9 Kan. App. 160.

Maryland. — *Ellicott v. U. S. Insurance Co.*, 7 Gill (Md.) 320; *Ellicott v. Marford*, 4 Md. 80; *Matter of Colvin*, 3 Md. Ch. 278; *Williamson v. Wilson*, 1 Bland (Md.) 421.

Massachusetts. — *Ellis v. Boston, etc., R. Co.*, 107 Mass. 28.

New York. — *Shrady v. Van Kirk*, 51 N. Y. App. Div. 504; *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Wilson v. Allen*, 6 Barb. (N. Y.) 545; *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592; *Fincke v. Funke*, 25 Hun (N. Y.) 618.

Pennsylvania. — *Yeager v. Wallace*, 44 Pa. St. 294.

Rhode Island. — *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510.

South Carolina. — *Ex p. Dunn*, 8 S. Car. 207.

Virginia. — *Davis v. Bonney*, 89 Va. 755.

West Virginia. — *Krohn v. Weinberger*, 47 W. Va. 127.

Title to Property in Dispute. — *Sharp v. Carter*, 3 P. Wms. 375; *Boehm v. Wood, T. & R.* 332; *Walker v. Bell*, 2 Madd. 21; *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Interpleader. — *Winfield v. Bacon*, 24 Barb. (N. Y.) 154.

Does Not Change Title or Even Right to Possession. — *Union Bank v. Kansas City Bank*, 136 U. S. 223.

5. *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60. See further *infra*, this title, XII. 7. *Receivers' Title*.

6. *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Dec. 60; *Yeager v. Wallace*, 44 Pa. St. 294; *Hagedon v. Wisconsin Bank*, 1 Pin. (Wis.) 63, 39 Am. Dec. 276.

7. **In Custodia Legis** — *England*. — *Delany v. Mansfield*, 1 Hog. 234; *Angel v. Smith*, 9 Ves. Jr. 335; *Ames v. Birkenhead Docks*, 20 Beav. 353; *Hutchinson v. Massareene*, 2 Ball & B. 55.

United States. — *In re Tyler*, 149 U. S. 164; *Booth v. Clark*, 17 How. (U. S.) 330; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Davis v. Gray*, 16 Wall. (U. S.) 203; *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 235; *In re Merchants Ins. Co.*, 3 Biss. (U. S.) 165; *Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 555.

California. — *Coburn v. Ames*, 57 Cal. 203.

Illinois. — *Hooper v. Winston*, 24 Ill. 363.

Indiana. — *Ohio, etc., R. Co. v. Fitch*, 20 Ind. 498.

Iowa. — *Montreal Bank v. Chicago, etc., R. Co.*, 48 Iowa 518.

Kansas. — *Jackson v. King*, 9 Kan. App. 160.

Maryland. — *Ellicott v. Warford*, 4 Md. 80; *Matter of Colvin*, 3 Md. Ch. 302.

Michigan. — *Tremper v. Brooks*, 40 Mich. 335, 29 Am. Rep. 534.

Mississippi. — *State Bank v. Duncan*, 52 Miss. 743; *Mays v. Rose*, *Freem.* (Miss.) 703.

Nebraska. — *Veith v. Ress*, 60 Neb. 52.

New Jersey. — *Higgins v. Gillesheiner*, 26 N. J. Eq. 308.

New York. — *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 498, 12 Abb. Pr. N. S. (N. Y.) 434; *Devendorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 276; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 139; *Albany City Bank v. Schermehorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; *Watkins v. Pinkney*, 3 Edw. (N. Y.) 533; *Hunt v. Wolfe*, 2 Daly (N. Y.) 303.

North Carolina. — *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837; *Skinner v. Maxwell*, 66 N. Car. 48, 68 N. Car. 400; *Battle v. Davis*, 66 N. Car. 256.

Pennsylvania. — *Robinson v. Atlantic, etc., R. Co.*, 66 Pa. St. 160.

Tennessee. — *Jones v. Moore*, 106 Tenn. 188.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

receiver shall be appointed, before his actual appointment, does not place the property *in custodia legis*.¹

4. No Personal Interest in Receiver. — The receiver of property has in his official character no personal interest therein further than that arising out of his responsibility for the correct and faithful discharge of his duties.² It is therefore of no consequence to the receiver how or when or to whom the court may dispose of the funds or property in his hands provided the order or decree of the court furnishes to him a sufficient protection.³

5. Receiver's Possession Not Adverse. — The possession of the receiver is therefore not technically adverse to either party to the litigation, so as to oust or affect any right.⁴

6. Relieves Previous Holder from Further Responsibility. — Where property is taken from the custody of the defendant or the person in possession and placed in the possession of a receiver, the previous holder is, of course, relieved from further responsibility for the property.⁵

7. Appointment Creates No Lien. — The appointment of a receiver creates no lien upon the property which goes into the possession of the receiver,⁶ nor does the appointment of a receiver affect the priority of existing liens.⁷

8. No Advantage to Applicant. — The order of appointment of a receiver gives no advantage to the party applying for it, and at whose instance it is made, over other claimants of the property.⁸

9. Priorities After Appointment. — After the appointment of a receiver and the taking possession of the property by him, there is a suspension of the right to obtain priority out of the property by voluntary conveyance, or by assignment, attachment, or other process.⁹ And after the appointment of a receiver a creditor within the jurisdiction of the appointing court may be restrained from obtaining a lien in the property of the debtor, though in another jurisdiction.¹⁰

10. Statute of Limitations. — It has been held that the appointment of a receiver does not in any manner affect the running of the statute of limitations;¹¹ nor will a payment made by a receiver to one of the parties in a cause, out of funds collected in his receivership, be regarded as such a payment by the

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Property in Possession of Adverse Claimant. — If an adverse claimant of the property of a corporation, in possession therein, is a party to the suit in which the receiver is appointed for such property, the mere appointment vests the receiver with constructive possession of the property so adversely held. *Appleton Waterworks Co. v. Central Trust Co.*, (C. C. A.) 93 Fed. Rep. 286.

1. *Dutcher v. Culver*, 24 Minn. 593.

2. *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

3. *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

4. Anonymous, 2 Atk. 15; *Whitley v. Lowe*, 2 De G. & J. 704; *Fincke v. Funke*, 25 Hun (N. Y.) 616.

5. *Lee v. Cone*, 4 Coldw. (Tenn.) 392.

6. **No Lien Created.** — *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454; *Ellis v. Boston*, etc., R. Co., 107 Mass. 1; *Krohn v. Weinberger*, 47 W. Va. 127.

7. *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454.

8. *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454; *Ellis v. Boston*, etc., R. Co., 107 Mass. 28; *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

9. *New Haven Wire Co. Cases*, 57 Conn.

352; *Atty.-Gen. v. Continental L. Ins. Co.*, 28 Hun (N. Y.) 360; *Barrett v. East Tennessee*, etc., R. Co., (Tenn. Ch. 1898) 48 S. W. Rep. 817. See *Jackson v. Lahee*, 114 Ill. 287; *Ellcott v. U. S. Insurance Co.*, 7 Gill (Md.) 307; *Ex p. Brown*, 18 S. Car. 87.

But the Pendency of an Application for the appointment of a receiver does not, in advance of any actual appointment, affect the rights of a debtor to alienate his property, or that of creditors to attach, if they act in good faith. *Smith v. Sioux City Nursery, etc., Co.*, 109 Iowa 51.

10. *Schindelholz v. Cullum*, (C. C. A.) 55 Fed. Rep. 885; *Besuden v. E. Besuden Co.*, 4 Ohio Dec. 144, 3 Ohio N. P. 165.

11. Anonymous, 2 Atk. 15; *Whitley v. Lowe*, 2 De G. & J. 704; *Harrison v. Dignan*, 1 Con. & Law 376; *Kyme v. Dignan*, 4 Ir. Eq. 562; *Fincke v. Funke*, 25 Hun (N. Y.) 616. Compare *Wrixon v. Vize*, 3 Dr. & War. 104.

A Temporary Receiver of a National Bank is not necessarily such a representative of the bank that limitations provided in a policy of insurance intended to indemnify the bank against the defalcations of its officers will commence to run when the receiver discovers the defalcations. *Jackson v. Fidelity, etc., Co.*, (C. C. A.) 75 Fed. Rep. 359.

debtor as will amount to an acknowledgment of the debt and so take the case out of the statute.¹ But where, in the order of appointment, there is an injunction against suits, the time during which such injunction is in operation will be excluded.²

11. Pending Suits. — The mere appointment of a receiver does not of necessity abate pending suits, either by or against the individual or corporation for whose property the receiver is appointed.³ But in the case of corporations it has been held that while the appointment of a receiver does not abate actions pending against the corporate body, such appointment operates as a suspension of the right of the corporation to prosecute actions in which it is plaintiff.⁴

Where Corporation Dissolved. — Where, in addition to the appointment of a receiver, the corporation is dissolved, all pending suits by or against the corporation abate, in the absence of a statute to the contrary.⁵

12. Corporations — *a. CORPORATION NOT DISSOLVED.* — It is well settled that the mere appointment of a receiver for a corporation does not, *ipso facto*, dissolve the corporate body,⁶ even though the decree appointing the receiver

1. *Whitley v. Lowe*, 2 De G. & J. 704. And see the title LIMITATION OF ACTIONS, vol. 19, p. 305.

2. *Fincke v. Funke*, 25 Hun (N. Y.) 616. And see the title LIMITATION OF ACTIONS, vol. 19, p. 218.

3. **Effect of Pending Suits** — *United States.* — *Wilder v. New Orleans*, (C. C. A.) 87 Fed. Rep. 843; *Pine Lake Iron Co. v. La Fayette Car Works*, 53 Fed. Rep. 853; *Paterson Second Nat. Bank v. New York Silk Mfg. Co.*, 11 Fed. Rep. 532.

Georgia. — *Branch v. Augusta Glass Works*, 95 Ga. 573.

Illinois. — *People v. Barnett*, 91 Ill. 422; *Toledo, etc., R. Co. v. Beggs*, 85 Ill. 80, 28 Am. Rep. 613.

Indiana. — *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180.

Iowa. — *Weigen v. Council Bluffs Ins. Co.*, 104 Iowa 410.

Kansas. — *Kelley v. Union Pac. R. Co.*, 58 Kan. 161; *Patrick v. Eells*, 30 Kan. 680. And see *Scannell v. Felton*, 57 Kan. 468.

Maine. — *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 592.

Massachusetts. — *Buswell v. Supreme Sitting, etc.*, 161 Mass. 224; *Kittredge v. Osgood*, 161 Mass. 384.

Missouri. — *St. Louis, etc., R. Co. v. Holladay*, 131 Mo. 440; *Heath v. Missouri, etc., R. Co.*, 83 Mo. 617.

New York. — *U. S. Vinegar Co. v. Spamer*, 143 N. Y. 676; *Honegger v. Wettstein*, 94 N. Y. 252; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Glenville Woolen Co. v. Ripley*, 43 N. Y. 206; *Tracy v. Selma First Nat. Bank*, 37 N. Y. 523; *People v. Commercial Alliance L. Ins. Co.*, 5 N. Y. App. Div. 273; *Del Valle v. Navarro*, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 136; *Voorhees v. Seymour*, 26 Barb. (N. Y.) 569; *Wilson v. Wilson*, 1 Barb. Ch. (N. Y.) 592; *Fleischauer v. Dittenhoefer*, 49 N. Y. Super. Ct. 311; *Knauer v. Globe Mut. L. Ins. Co.*, 46 N. Y. Super. Ct. 370; *People v. Troy Steel, etc., Co.*, 82 Hun (N. Y.) 303; *Auburn Button Co. v. Sylvester*, 68 Hun (N. Y.) 401; *Mickles v. Rochester City Bank*, 11 Paige (N. Y.) 118, 42 Am. Dec. 103; *Waverly*

Co. v. Worthington Co., (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 447.

Ohio. — *Mather v. Cincinnati R. Tunnel Co.*, 2 Ohio Cir. Dec. 161, 3 Ohio Cir. Ct. 284.

Pennsylvania. — *Wagner v. Keystone Mut. Ben. Assoc.*, 8 Pa. Dist. 231.

Texas. — *San Antonio, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 30 S. W. Rep. 693.

A Person May Sue for Damages for Breach of Contract, although a receiver has been appointed for his entire estate. *American Well Works v. De Aguayo*, (Tex. Civ. App. 1899) 53 S. W. Rep. 350.

Injunction Against Suit. — But it has been held, under a statute vesting all the corporate assets in the receiver, that the receiver of an insolvent corporation may enjoin the further prosecution of an action against the corporation which was pending when he was appointed. *Morton v. Stone Harbor Imp. Co.*, (N. J. 1899) 44 Atl. Rep. 875.

4. *Kokomo City St. R. Co. v. Pittsburgh, etc., R. Co.*, 25 Ind. App. 335.

5. **Dissolution of Corporation.** — *Selma First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609; *Greëley v. Smith*, 3 Story (U. S.) 657; *Read v. Frankfort Bank*, 23 Me. 318; *Kittredge v. Osgood*, 161 Mass. 384; *Buswell v. Supreme Sitting, etc.*, 161 Mass. 224; *Thornton v. Marginal Freight R. Co.*, 123 Mass. 32; *Merchants L. & T. Co. v. Clair*, 107 N. Y. 663; *McCulloch v. Norwood*, 58 N. Y. 562; *Clafin v. Farmers, etc., Bank*, 54 Barb. (N. Y.) 228; *Pickersgill v. Myers, etc., Ins. Co.*, 99 Pa. St. 602; *Milwaukee Mut. F. Ins. Co. v. Sentinel Co.*, 81 Wis. 207. And see *People v. Knickerbocker L. Ins. Co.*, 106 N. Y. 619.

6. **Corporation Not Dissolved by Appointment** — *United States* — *Chemical Nat. Bank v. Hartford Deposit Co.*, 161 U. S. 1; *Johnson v. Southern Bldg., etc., Assoc.*, 99 Fed. Rep. 646.

Colorado. — *Steinhauer v. Colmar*, 11 Colo. App. 494; *Jones v. Leadville Bank*, 10 Colo. 464.

Illinois. — *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522.

Indiana. — *Hasselman v. Japanese Development Co.*, 2 Ind. App. 180.

also enjoins the corporation from the exercise of its powers and franchises.¹ Notwithstanding the appointment of a receiver the corporation still exists and may exercise any of its franchises, if it does not thereby interfere with the rightful management of its affairs by the receiver, in the exercise of his duties as defined by the court appointing him.²

b. CORPORATE FUNCTIONS AND POWERS — (1) *In General*. — The appointment of a receiver for a corporation gives to the receiver the temporary management of its affairs under the direction of the court;³ and it has been held that the power of the court to assume control and management of the corporate affairs necessarily includes the power to collect, marshal, and distribute the corporate assets.⁴ But a corporation is deprived of the right to exercise its corporate powers by the appointment of a receiver, only so far as the statute or the decree of the court transfers such powers to the receiver. If the corporation is enjoined from exercising any of its franchises, of course its corporate activity in such respects ceases; but if the receiver has conferred upon him only a portion of the corporate powers, then, if not otherwise decreed, the corporation may exercise the remaining powers conferred upon it by its charter.⁵

(2) *Statutory Duties*. — While, as has been seen, a corporation is not dissolved by the appointment of a receiver, it may thereby be relieved from the performance of certain statutory duties, such as the requirement for annual reports by the trustees or directors.⁶

c. CORPORATE PROPERTY — (1) *In General*. — When a receiver of a corporation is appointed he becomes, as a rule, entitled to the custody and control of the property of the company.⁷ It has been held that a decree

Massachusetts. — Taylor v. Columbian Ins. Co., 14 Allen (Mass.) 353.

Montana. — State v. Second Judicial Dist. Ct., 22 Mont 220.

New Jersey. — Taylor v. Gray, 59 N. J. Eq. 621; Linn v. Joseph Dixon Crucible Co., 59 N. J. L. 28.

New York. — Decker v. Gardner, 124 N. Y. 334; Pringle v. Woolworth, 90 N. Y. 502; Kincaid v. Dwinelle, 59 N. Y. 553.

South Carolina. — Ex p. Williams, 17 S. Car. 403.

Washington. — Allen v. Olympia Light, etc., Co., 13 Wash. 307.

1. Kincaid v. Dwinelle, 59 N. Y. 548.

"**Virtual Dissolution**." — But a final order or decree appointing a receiver for a corporation has been described as a "virtual dissolution" thereof, after which the court may decree dissolution in fact. Bank Com'rs v. Buffalo Bank, 6 Paige (N. Y.) 497.

2. Ohio, etc., R. Co. v. Russell, 115 Ill. 52; Decker v. Gardner, 124 N. Y. 334.

Election of Directors. — State v. Merchant, 37 Ohio St. 251.

Steps to Effect Reorganization. — Linn v. Joseph Dixon Crucible Co., 59 N. J. L. 28.

3. Ohio, etc., R. Co. v. Russell, 115 Ill. 52. See also Rand v. Mutual F. Ins. Co., 58 Ill. App. 528.

Succession to Corporate Powers and Franchises. — Decker v. Gardner, 124 N. Y. 334.

Acquiescence in Distribution of Assets — Surrender of Franchises. — Hollingshead v. Woodward, 107 N. Y. 96; Bradt v. Benedict, 17 N. Y. 93; Verplanck v. Mercantile Ins. Co., 2 Paige (N. Y.) 438.

Powers and Authority of Officers. — It has been held that the mere appointment of a receiver for a corporation does not necessarily displace

the officers thereof. Ex p. Williams, 17 S. Car. 403.

But where a corporation had directed its officers to make a particular application of the corporate funds in the payment of a debt, it was held that the authority of the officers to act in accordance with such instructions was terminated by the appointment of a receiver for said corporation. Crawfordsville First Nat. Bank v. Dovetail Body, etc., Co., 143 Ind. 534.

4. Hedley v. Geissler, 90 Ill. App. 565.

5. Terms of Statute or Decree. — Ohio, etc., R. Co. v. Russell, 115 Ill. 52; State v. Wabash R. Co., 115 Ind. 466; Kain v. Smith, 80 N. Y. 458; Cardot v. Barney, 63 N. Y. 281, 20 Am. Rep. 533; Rochester v. Bronson, (Supm. Ct. Gen. T.) 41 How. Pr. (N. Y.) 82; Ferry v. Central New York Bank, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 445; Mickles v. Rochester City Bank, 11 Paige (N. Y.) 118, 42 Am. Dec. 103.

Acts Necessary to Preserve Corporate Existence. — Decker v. Gardner, 124 N. Y. 334.

Rule under Canadian "Winding-up Act". — Chatham Nat. Bank v. McKeen, 24 Can. Sup. Ct. 348.

6. Huguenot Nat. Bank v. Studwell, 74 N. Y. 621. But see further in this connection the title RECEIVERS OF RAILROADS, *post*.

7. Brandt v. Allen, 76 Iowa 50.

Property in Possession of Licensee Passes to Receiver Subject to Former's Rights. — Comer v. Felton, (C. C. A.) 61 Fed. Rep. 731.

Duty of Officers to Surrender Property to Receiver. — Brandt v. Allen, 76 Iowa 50.

When Receivers Not Entitled to Possession. — The receivers of an insolvent life-insurance company are not entitled to the possession and control of securities deposited by the company, before its insolvency, with the state treasurer,

appointing a receiver for a corporation vests in him the title to the corporate personal property, but not the real estate, with the title to which the receiver becomes clothed only by formal conveyance.¹

(2) *Trust Fund Doctrine*. — After the dissolution or insolvency of a corporation, all of its property is, according to the doctrine of modern cases, considered a trust fund to be held for the benefit of creditors and shareholders. When, therefore, a receiver is appointed after dissolution, all of the property vests in him as trustee for all persons entitled to share in its distribution.² But where a statute provides that the directors or managers of a corporation at the time of its dissolution shall be trustees of the creditors and stockholders, the trustees become vested with title to the corporate property and the receiver takes no title.³

d. CORPORATE CONTRACTS — (1) *In General*. — The appointment of a receiver for a corporation does not terminate existing contracts in the sense that there is no liability of the corporate assets for a breach thereof,⁴ though, as will be seen more fully in another place, a receiver is not bound to adopt and carry out existing contracts unless he deems it for the benefit of his trust.⁵ A corporation may, therefore, after the appointment of a receiver, be sued for damages caused by its failure to carry out the provisions of a lease.⁶ But it has been held that where the performance of a contract by a corporation is prevented solely by the appointment of a receiver and an injunction against interference with the corporate business and property, damages are not recoverable against the corporation for the nonperformance, the breach of contract in such case being *damnum absque injuria*.⁷

(2) *Building and Loan Associations*. — In the case of a building and loan association it has been held that the appointment of a receiver terminates the liability of the stockholders for the monthly payments on their stock,⁸ at the same time causing the debts due to the association by borrowing members and the mortgage securities to mature.⁹

e. RECEIVERS' CONTRACTS. — In the absence of statutory provision to the contrary, a corporation is not liable for the contracts or acts of the receiver, or his agents or subordinates, in the management of the company's business.¹⁰

f. TORTS OF RECEIVER. — A corporation is not, in general, liable for the

in compliance with a state statute, but the receivers are entitled to the income and dividends from the securities while they remain in the hands of the treasurer. *Cooke v. Warner*, 56 Conn. 234, 22 Am. & Eng. Corp. Cas. 662.

Reacquisition by Corporation of Property Sold by Receiver. — *City Water Co. v. State*, 88 Tex. 600.

1. **Rule Stated.** — "The personal estate becomes vested in the receiver from the time and by virtue of his appointment; the real estate only by virtue of a conveyance to him which the court has power to compel." *Chautauque County Bank v. Risley*, 19 N. Y. 374, 75 Am. Dec. 347. See further *infra*, this title, XII. 7. *Receiver's Title*.

Judgment Liens Not Divested Where No Conveyance to Receiver. — *Montgomery v. Merrill*, 18 Mich. 338.

2. *In re Waddell-Entz Co.*, 67 Conn. 324; *Owen v. Smith*, 31 Barb. (N. Y.) 641. And see *Decker v. Gardner*, 124 N. Y. 334.

3. *People v. O'Brien*, 111 N. Y. 1, 7 Am. St. Rep. 684.

4. *Bolles v. Crescent Drug, etc., Co.*, 53 N. J. Eq. 614.

5. See *infra*, this title, XIII. 4. c. *Contracts Prior to Receivership*.

6. *Chemical Nat. Bank v. Hartford Deposit Co.*, 156 Ill. 522.

Contracts with Officers and Employees May Not Be Violated. — *Rosenbaum v. U. S. Credit-System Co.*, 61 N. J. L. 543.

But where a receiver was appointed for all the assets of a corporation, and to assume entire management and control of its affairs, the corporation was held not liable to an officer for salary during such receivership, since the performance of the contract between the corporation and the officer was rendered impossible by an act of the law, and not by the fault of the corporation. *Lenoir v. Linville Imp. Co.*, 126 N. Car. 922.

7. *Malcomson v. Wappoo Mills*, 88 Fed. Rep. 680.

8. *Buist v. Bryan*, 44 S. Car. 121, 51 Am. St. Rep. 787.

9. *Strauss v. Carolina Inter State Bldg., etc., Co.*, 117 N. Car. 308, 53 Am. St. Rep. 585.

10. *Meitz v. Buffalo, etc., R. Co.*, 58 N. Y. 61, 17 Am. Rep. 201. And see *Rogers v. Wheeler*, 43 N. Y. 598; *Murphy v. Holbrook*, 20 Ohio St. 137, 5 Am. Rep. 633.

torts of its receiver, or his servants or agents, committed in the management of the corporate affairs or property.¹

g. OFFENSES OF RECEIVER'S SERVANTS. — A corporation in the hands of a receiver cannot be prosecuted for the criminal offenses of the agents or servants of the receiver, the latter having full possession of its property and entire charge of its affairs.²

h. ACTIONS BY AND AGAINST CORPORATIONS. — The appointment of a receiver for a corporation does not necessarily affect its right subsequently to sue for injuries to its property or in the enforcement of its corporate rights.³ Nor does the mere appointment of a receiver for a corporation, in the absence of any injunction against suits, prevent the subsequent institution of an action against the corporation,⁴ or prevent the subsequent recovery of judgments against the corporation on valid claims.⁵

i. PROCEEDINGS AGAINST DIRECTORS. — The fact that the affairs of a corporation have been placed in the hands of a receiver does not take away or suspend a creditor's right of action against the directors.⁶

13. Partnerships — *a.* NOT AN ADJUDICATION OF RIGHTS. — Pursuant to the general rule elsewhere stated that the appointment of a receiver is a mere provisional remedy, determining no material elements of the controversy, it has been held that the appointment of a receiver of a partnership is not an adjudication of the allegations of the petition under which the appointment was made as to the rights of creditors and parties.⁷

b. AS DISSOLUTION OF FIRM. — The appointment of a receiver in an action between partners has been held, in effect, a practical termination and dissolution of the partnership.⁸

c. PARTNERSHIP PROPERTY. — While a receiver for a partnership becomes entitled to the custody and control of all of the firm's assets,⁹ such a receiver

1. Torts. — Bartlett v. Cicero Light, etc., Co., 177 Ill. 68, 69 Am. St. Rep. 206, 69 Ill. App. 576; Lock v. Franklin, etc., Turnpike Co., 100 Tenn. 163.

But where the net income derived from the business of a corporation during the receivership has been diverted from the payment of operating expenses and applied to the permanent improvement of the property, the property turned over to the corporation is liable for the torts occurring during the receivership to the extent of the net income applied in improvements. Bartlett v. Cicero Light, etc., Co., 177 Ill. 68, 69 Am. St. Rep. 206.

2. State v. Wabash R. Co., 115 Ind. 466.

3. Actions by Corporation. — Hasselman v. Japanese Development Co., 2 Ind. App. 180; American Bank v. Cooper, 54 Me. 441; Decker v. Gardner, 124 N. Y. 334; Mutual Brewing Co. v. New York, etc., Ferry Co., 16 N. Y. App. Div. 149; Waverly Co. v. Worthington Co., (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 447.

4. May Move to Vacate Attachment Against Corporate Property. — Waverly Co. v. Worthington Co., (N. Y. Super. Ct. Gen. T.) 4 Misc. (N. Y.) 447.

5. May Appeal from Judgment and Remove Controversy to Federal Court. — Paterson Second Nat. Bank v. New York Silk Mfg. Co., 11 Fed. Rep. 532.

Appointment as Suspending Right to Sue. — But for the appointment of a receiver as suspending the right of the company to sue, see Davis v. Ladoga Creamery Co., 128 Ind. 222.

4. Actions Against Corporation. — Decker v. Gardner, 124 N. Y. 334; Pringle v. Woolworth,

90 N. Y. 502; Allen v. Olympia Light, etc., Co., 13 Wash. 307. And see Davis v. Gray, 16 Wall. (U. S.) 203; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Taylor v. Columbian Ins. Co., 14 Allen (Mass.) 353; State v. Merchant, 37 Ohio St. 251; Moseby v. Burrow, 52 Tex. 396.

Does Not Affect Existing Rights Against Corporation. — Central Appalachian Co. v. Buchanan, (C. C. A.) 90 Fed. Rep. 454.

Where Appointment Collusive. — The appointment of a receiver for a corporation does not prevent a proceeding by a creditor to subject the corporate property to the payment of his claim where the appointment of the receiver was collusive and with the connivance of the officers and some of the stockholders of the corporation, for the purpose of hindering, delaying, and defrauding creditors. The Coliseum v. Inter State Lumber Co., 123 Ala. 512.

5. Chemical Nat. Bank v. Hartford Deposit Co., 161 U. S. 1; Taylor v. Gray, 59 N. J. Eq. 621.

Rule under Particular Statute — Report of Referee. — Del Valle v. Navarro, (Supm. Ct. Spec. T.) 21 Abb. N. Cas. (N. Y.) 136.

6. Patterson v. Stewart, 41 Minn. 92, 28 Am. & Eng. Corp. Cas. 644.

7. McGrath v. Cowen, 57 Ohio St. 385.

8. McGrath v. Cowen, 57 Ohio St. 385.

9. Operates as Assignment of Firm Assets. — Winslow v. Wallace, 116 Ind. 317.

Property of Firm in Custody of Individual Partner. — Ferguson v. Bruckman, 23 N. Y. App. Div. 182.

Money in Bank. — A receiver for a partner-

has no power or jurisdiction over the individual property of the partners.¹

d. PREFERENCES. — The appointment of a receiver for a partnership will prevent a creditor who obtains judgment after the appointment from having or obtaining any lien which would give preference over other partnership creditors.²

e. SALE OF INTEREST BY PARTNER. — The fact that partnership property is in the hands of a receiver pending a suit for dissolution of the partnership and for an accounting does not prevent the sale by one of the partners of his interest in the partnership property.³ But one who purchases the interest of a partner after a receiver of the firm's assets is appointed cannot interfere with the property in the possession of the receiver.⁴

IX. FOR WHAT PROPERTY RECEIVER APPOINTED — 1. *In General.* — It has been said that every kind of property of such a nature that if legal it might be taken in execution may if equitable be put into the receiver's possession.⁵

2. *Portion Only of Defendant's Property.* — The courts may and frequently do appoint receivers for a portion only of a defendant's property.⁶ But it has been held that a statute relating to the appointment of receivers for insolvent corporations did not contemplate the administration of less than the whole of the corporate property for the payment of the corporate debts.⁷

3. *Equitable Property.* — A receivership may include equitable assets and property as well as that to which the title is cognizable at law.⁸

4. *Incorporeal Property.* — Receivers may be appointed over incorporeal as well as over corporeal property, such as the profits of a clerical office,⁹ or returns of an ecclesiastical character,¹⁰ like those of a rectory,¹¹ or the right to tolls of various kinds.¹² But a court cannot, as a provisional remedy, appoint

ship is entitled to all moneys deposited in bank, though in the name of a new partnership composed of the surviving members of the old partnership and the heirs of a deceased partner thereof. *Bollenbacher v. Bloomington First Nat. Bank*, 8 Ind. App. 12.

1. *Adams v. Hannah*, 97 Ga. 515.

Individual Creditors — *Individual Property.* — *Winslow v. Wallace*, 116 Ind. 317.

Order for Receiver Should Distinguish Between Firm and Individual Property. — *Morey v. Grant*, 48 Mich. 326.

2. *Jackson v. Lahee*, 114 Ill. 287.

3. *Sale of Partner's Interest.* — *Schurtz v. Romer*, 82 Cal. 474. And see *Noonan v. McNab*, 30 Wis. 280; *Noonan v. Orton*, 31 Wis. 280.

4. *Noonan v. McNab*, 30 Wis. 277.

5. *General Rule as to Property for Which Appointed.* — *Davis v. Gray*, 16 Wall. (U. S.) 217; *Booth v. Clark*, 17 How. (U. S.) 331. See also *Hunt v. Wolfe*, 2 Daly (N. Y.) 303; *Beverley v. Brooke*, 4 Gratt. (Va.) 208; *Davis v. Marlborough*, 2 Swanst. 132; *Blanchard v. Cawthorne*, 4 Sim. 572; *Meriwether v. Garrett*, 102 U. S. 508.

In Supplementary Proceedings. — Under the *New York Code* the appointment of a receiver in proceedings supplementary to execution vests in such receiver all the property of the debtor, real as well as personal. *Porter v. Williams*, 9 N. Y. 148, 59 Am. Dec. 519, citing as to the law before the code *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257; *Wilson v. Allen*, 6 Barb. (N. Y.) 545; *Scouton v. Bender*, (Supm. Ct. Gen. T.) 3 How. Pr. (N. Y.) 185, and *Chautauque County Bank v. White*, 6 Barb. (N. Y.) 602.

6. *Calvert v. Adams*, 2 Dick. 478; *Corbet v.*

Mahon, 2 J. & LaT. 671. See also *Hargrave v. Hargrave*, 9 Beav. 551. And see *Wardell v. Leavenworth*, 3 Edw. (N. Y.) 244.

When Limited to Property Described in Judgment. — *Kreling v. Kreling*, 118 Cal. 421. And see *Staples v. May*, 87 Cal. 178.

7. *Showalter v. Laredo Imp. Co.*, 83 Tex. 162.

The Word "Assets," in a statute, has been held to include all the property of a company, including its real estate. *Atty. Gen. v. Atlantic Mut. L. Ins. Co.*, 100 N. Y. 282.

8. *Equitable Assets.* — *Cadogan v. Lyric Theatre*, (1894) 3 Ch. 338, 7 Reports 594; *Dwelle v. Hinde*, 8 Ohio Dec. 177.

Equitable Mortgages — *English Judicature Act.* — *Pease v. Fletcher*, 1 Ch. D. 275.

An Equity of Redemption in Land is the subject of a receivership. *Freeman v. Stewart*, 119 Ala. 158.

9. *Incorporeal Property.* — *Palmer v. Vaughan*, 3 Swanst. 173.

10. *Metcalfe v. York*, 6 Sim. 232; *Cullen v. Kildare*, 2 Ir. Ch. 134; *Strange v. Ormsby*, 2 Hog. 55; *Grenfell v. Windsor*, 2 Beav. 548. But *compare contra*, as to benefice of clergymen, *Hawkins v. Gathercole*, 6 De G. M. & G. 16, reversing 1 Sim. N. S. 70; *Bates v. Brothers*, 2 Smale & G. 515.

11. *White v. Peterborough*, 3 Swanst. 109; *Silver v. Norwich*, 3 Swanst. 112, note.

12. *Right to Tolls.* — *Knapp v. Williams*, 4 Ves. Jr. 430, note; *Dumville v. Ashbrooke*, 3 Russ. 100, note; *De Winton v. Brecon*, 26 Beav. 539; *Crewe v. Edleston*, 1 De G. & J. 111; *Fripp v. Chard R. Co.*, 11 Hare 252; *Hopkins v. Worcester, etc., Canal Proprietors*, L. R. 6 Eq. 437, 37 L. J. Ch. 731; *Gray v. Chaplin*, 2 Russ. 141; *Kingston v. Cowbridge*

a receiver of a market stand in a city market, as a permit to occupy stalls in such a market does not constitute property, and confers upon its holder no right or interest cognizable in the courts.¹

5. Personal Property. — Personal chattels may of course be placed in charge of a receiver.²

6. Debts. — Debts due to the individual or the corporation for whose property a receiver is appointed are assets which pass to the receiver.³ So debts due from the individual members of a partnership, like other debts due to the firm, become assets in the hands of a receiver, and should be collected and applied to the payment of firm debts accordingly.⁴

7. Incomes and Annuities. — A receiver of incomes and annuities may be appointed as well as a receiver of the property on which they are charged.⁵ But a receiver will not be appointed where there is ample remedy, by distress or otherwise, to collect the arrears of annuity.⁶

8. Taxes and Rates. — A receiver cannot be appointed to collect taxes levied by a municipal or quasi-municipal corporation;⁷ nor does the fact that the remedy at law by mandamus for levying and collecting taxes has proved ineffectual, or that there is no person willing to accept the office of collector of taxes, change the rule.⁸ Similarly, a court of equity will not appoint a receiver of rates which are to be assessed by commissioners and collected at a future period;⁹ nor will a receiver be appointed over rates upon the security whereof a municipal corporation has been authorized to borrow money.¹⁰

9. Rents and Profits — *a. IN GENERAL.* — Where, pending litigation in which real property is involved, it appears that unless a receiver is appointed the current rents and profits of such realty will probably be lost to the party properly entitled thereto, a receiver of such rents and profits will be appointed.¹¹

R. Co., 41 L. J. Ch. 153; *Furness v. Caterham R. Co.*, 25 Beav. 619; *Ames v. Birkenhead Docks*, 1 Jur. N. S. 529, 3 W. R. 382; *Potts v. Warwick*, etc., Canal Nav. Co., Kay 145; *Covington Drawbridge Co. v. Shepherd*, 21 How. (U. S.) 123; *State v. Northern Cent. R. Co.*, 18 Md. 214.

1. *Barry v. Kennedy*, (N. Y. Super. Ct. Spec. T.) 11 Abb. Pr. N. S. (N. Y.) 425.

2. **Personal Property.** — *Taylor v. Eckersley*, 2 Ch. D. 303.

Rings and Jewelry. — *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Personal Property in Process of Manufacture. — *See Valley Nat. Bank v. H. B. Claflin Co.*, 108 Iowa 504.

3. Debts. — *Candler v. Candler*, Jac. 229; *Borcherling v. U. S.*, 35 Ct. Cl. 311; *Wheat v. State Bank*, 119 Cal. 4; *Gilbert v. Hewetson*, 79 Minn. 326; *Mills v. Pittman*, 1 Paige (N. Y.) 491.

May Receive Debts Before Due. — *Olcott v. Heermans*, 3 Hun (N. Y.) 431.

4. *Winslow v. Wallace*, 116 Ind. 317.

If Such Debts Are Secured by Mortgage or otherwise, the security, like the debt, stands for the benefit of the firm creditors, unless, of course, the security was taken in violation of the rights of individual creditors. *Winslow v. Wallace*, 116 Ind. 317.

5. Incomes and Annuities. — *Cupit v. Jackson*, 13 Price 731; *O'Neill v. Ward*, 1 Hog. 112; *Hogan v. Bodkin*, 1 Hog. 374; *Lyne v. Lockwood*, 2 Molloy 498; *Richards v. Goold*, 1 Molloy 24; *Tanfield v. Irvine*, 2 Russ. 151; *Dalmer v. Dashwood*, 2 Cox Ch. 382; *McGarry v. White*, 16 L. R. Ir. 324; *Evans v. Cassidy*, 11 Ir. Eq. 247; *Beamish v. Austen*, Ir. R. 9

Eq. 363; *Swift v. Swift*, 3 Ir. Eq. 275; *Kelly v. Butler*, 1 Ir. Eq. 438; *Fay v. Fay*, 2 Jones (Ir.) 350.

Wife's Reversionary Interest under Will — *English Judicature Act.* — *Fuggle v. Bland*, 11 Q. B. D. 711.

Beneficiary in Trust Estate. — *Woodruff v. Johnson*, 8 N. J. Eq. 729, 55 Am. Dec. 247.

But Where the Separate Estate of a Married Woman is subject to a restraint or anticipation, a judgment against the married woman cannot be enforced by the appointment of a receiver of the separate income which, at the date of the judgment, she is restrained from anticipating. *Hood Barrs v. Cathcart*, (1894) 2 Q. B. 559, 9 Reports 802.

6. *Kelsey v. Kelsey*, L. R. 17 Eq. 495; *Solory v. Leaver*, L. R. 9 Eq. 22.

7. Taxes. — *Thompson v. Allen County*, 115 U. S. 560. See also *Meriwether v. Garrett*, 102 U. S. 501; *Garrett v. Memphis*, 5 Fed. Rep. 865.

But as holding that a receiver may be appointed to receive and distribute certain municipal taxes for designated years, see *State v. New Orleans*, 43 La. Ann. 829.

8. *Thompson v. Allen County*, 115 U. S. 554. And see *Grand Rapids School Furniture Co. v. School Dist. No. 29*, 102 Ky. 556.

9. *Drewry v. Barnes*, 3 Russ. 105.

10. *Preston v. Great Yarmouth*, 20 W. R. 358.

11. General Rule as to Rents and Profits. — *McNair v. Pope*, 96 N. Car. 506. See also *Durant v. Crowell*, 97 N. Car. 373. And see *Roberts v. Mullinder*, 94 Ga. 493.

Party Restrained by Injunction. — *Atlas Sav., etc., Assoc. v. Kirklin*, 110 Ga. 572.

The principal duty, indeed, which a receiver of real estate is required to perform is, as a rule, to collect the rents and profits of the land. To enable him to perform this duty where the real estate is under lease, an order of court requiring the tenants to pay their rent to the receiver may be made.¹

In a Proceeding for Apportionment of Dower, if it appears that the person in possession is insolvent and that there is risk of the rents and profits being lost, a receiver will be appointed.²

Where an Equitable Incumbrancer or a Creditor obtains a decree for the sale of real estate, or shows by his bill a clear case entitling him to enforce his claim out of real estate, he may be protected, as to the rents and profits accruing during the litigation, by the appointment of a receiver.³ But a husband who expends money upon his wife's realty will not be entitled to a receiver of the rents and profits to enforce his claim for a repayment of the money.⁴

Where an Annuity Charged on Land is in arrears and the property is an insufficient security for its payment, a receiver of rents and profits may be appointed.⁵

But Where a Person Is Clothed with Title and Possession under a lease, and is in the enjoyment of rights apparently legal, a receiver will not be appointed unless the plaintiff shows a clear right, with such attending circumstances of danger

Where Party in Possession Insolvent. — *Patterson v. Clark*, 89 Ga. 700.

Where Tenant for Life Neglects to Pay Taxes from the Rents and to Make Necessary Repairs. — *Hart v. Tulk*, 6 Hare 611; *Brigstocke v. Mansel*, 3 Madd. 47; *In re Fowler*, 16 Ch. D. 723; *Murch v. J. O. Smith Mfg. Co.*, 47 N. J. Eq. 193; *Carter v. Youngs*, 42 N. Y. Super. Ct. 418; *King v. King*, 41 N. Y. Super. Ct. 516; *Cairns v. Chabert*, 3 Edw. (N. Y.) 312.

Pending Suit to Enforce Lien. — *Grantham v. Lucas*, 15 W. Va. 431.

Pending Supersedes of Decree of Sale. — *Beard v. Arbuckle*, 19 W. Va. 147.

Receiver to Collect Debt. — Where the agent of certain remaindermen was not authorized so to contract with reference to the property as to subject it to a mechanic's lien, it was held that the contractor might have a receiver of the rents and profits appointed and thereby collect his debt. *Rudd v. Littell*, (Ky. 1898) 45 S. W. Rep. 451.

Produce of Colonial Estates. — As to the rights, duties, and liabilities of a receiver, consignee, or manager of property in the West Indies, or of persons acting as such, see *Scott v. Nesbitt*, 14 Ves. Jr. 438; *Chambers v. Goldwin*, 9 Ves. Jr. 271; *Morris v. Elme*, 1 Ves. Jr. 139; *Forrest v. Elwes*, 2 Meriv. 60.

May Be Authorized to Collect Both Future and Past Rents. — *Cox v. Volkert*, 86 Mo. 505.

Prospective Operation of Appointment as a Lien. — *Beverly v. Brooke*, 4 Gratt. (Va.) 187.

For Particular Circumstances Held Not to Warrant Receivership, see *Rollwagen v. Rollwagen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 635.

In a Suit to Set Aside, as Against a Subsequent Grantee, a Deed Absolute in Form, on the ground of a trust in favor of the grantor, a receiver of rents and profits *pendente lite* will not be appointed. *McCool v. McNamara*, (Supm. Ct.) 19 Abb. N. Cas. (N. Y.) 344.

Where the Legal Title in the Premises is the Principal Question in Dispute, equity will not ordinarily appoint a receiver in an action for an accounting of the rents and profits brought by a person claiming title against the party in possession. *Bennallack v. Richards*, 125 Cal. 427.

1. *Hobson v. Sherwood*, 19 Beav. 575. See also *Commissioners v. Harrington*, 11 L. R. Ir. 127; *Reid v. Middleton*, T. & R. 455; *Hobhouse v. Holcombe*, 2 De G. & Sm. 208; *McDonnell v. White*, 11 H. L. Cas. 570; *Garr v. Hill*, 5 N. J. Eq. 639.

The Receiver Usually Serves Notice of His Appointment upon the Tenant, who, from the date of the service, must pay the rents to the receiver. *Russell v. Baker*, 1 Hog. 180; *Hollier v. Hedges*, 2 Ir. Ch. N. S. 370; *M'Loughlin v. Longan*, 4 Ir. Eq. 325; *Beechey v. Smyth*, 11 L. R. Ir. 88; *McDonnell v. White*, 11 H. L. Cas. 570; *Hunt v. Wolfe*, 2 Daly (N. Y.) 298.

Under North Carolina Landlord and Tenant Act. — In an action under the Landlord and Tenant Act of North Carolina carried by appeal to the Superior Court, it is within the power of the court to appoint a receiver to collect the rents, etc., upon an uncontroverted affidavit by the plaintiff that the defendants entered into possession as tenants of the plaintiff, held over after the expiration of their term, and are insolvent, and that the plaintiff has no security for the rents. *Nesbitt v. Turrentine*, 83 N. Car. 536.

2. *Knighon v. Young*, 22 Md. 359; *Chase's Case*, 1 Bland (Md.) 206, 17 Am. Dec. 277; *Rollwagen v. Rollwagen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 635; *Bryan v. Moring*, 94 N. Car. 694.

3. *Pritchard v. Fleetwood*, 1 Meriv. 54. See also *Shee v. Harris*, 1 J. & LaT. 91; *Webb v. Van Zandt*, (C. Pl.) 16 Abb. Pr. (N. Y.) 314, note.

4. *Wiles v. Cooper*, 9 Beav. 294. And see *Drought v. Percival*, 2 Molloy 502.

5. **Arrears of Annuity Charged on Land.** — *Hayden v. Shearman*, 2 Ir. Ch. 137; *Kelly v. Butler*, 1 Ir. Eq. 435; *Lyne v. Lockwood*, 2 Molloy 498; *Sollory v. Leaver*, L. R. 9 Eq. 22; *Buxton v. Monkhouse*, Coop. 1 Eld. 41; *Beamish v. Austen*, Ir. R. 9 Eq. 361; *White v. Smale*, 22 Beav. 72; *Milhouse v. Dunham*, 78 Ala. 48; *Baltimore v. Chase*, 2 Gill & J. (Md.) 376; *Probasco v. Probasco*, 30 N. J. Eq. 108; *Rollwagen v. Rollwagen*, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 635. But see *D'Alton v. Trimleston*, 2 Dr. & War. 531.

to the rents and profits as will move the conscience of a chancellor to interfere.¹

b. COLLECTION OF RENTS IN ARREAR. — It has been held that a receiver may ordinarily distrain for rents in arrear without a special order of court. If, however, the arrears are for more than a year, or there is a question as to who is entitled to the rent, an order of court should be obtained.²

10. Public Offices. — A court of equity has no power to appoint a receiver of the fees and emoluments of a public office to discharge the duties and functions thereof pending a contest between rival claimants of the office, the contest being based upon alleged illegality of election or appointment.³ But receivers of the profits of public offices have been appointed,⁴ though the reverse would be the rule where the emoluments of a public office were exempt by law.⁵

11. Real Property — *a.* IN GENERAL. — A receiver of real property may, of course, be appointed in a proper case shown.⁶

The Object of the Appointment of a Receiver of Real Estate is not to determine *in limine* the question of possession as between adverse claimants, but merely to preserve the *status quo* pending the litigation, and for that purpose to take such precautionary measures as may be necessary.⁷

Conflicting Claims to Public Lands. — A receiver may be appointed for public lands claimed by two parties under the mining laws of the *United States*, in order that the proper steps may be taken to perfect the claim for the benefit of the party entitled thereto, where the proof shows that the complainant has reasonable ground for his claim of ownership.⁸

b. REQUISITES TO APPOINTMENT. — A court of equity will appoint a receiver over real estate, pending litigation as to title, only where it appears, first, that the plaintiff has a reasonable probability of establishing his title, and

1. Chicago, etc., Oil, etc., Co. *v.* U. S. Petroleum Co., 57 Pa. St. 83.

2. See the title DISTRESS, vol. 9, p. 632. See also Anonymous, 1 Hog. 335; Mills *v.* Fry, 19 Ves. Jr. 277; Nugent *v.* Nugent, 1 Hog. 169; Raincock *v.* Simpson, 1 Dick. 120, note; Sturgeon *v.* Douglas, 1 Hog. 400.

3. Public Officers. — Tappan *v.* Gray, 9 Paige (N. Y.) 507.

No Appointment Pending Quo Warranto Proceedings. — Stone *v.* Wetmore, 42 Ga. 601.

4. See Palmer *v.* Vaughan, 3 Swanst. 173; Blanchard *v.* Cawthorne, 4 Sim. 572.

But a Motion by an Incumbrancer on a College Fellowship for a Receiver and an injunction was refused with costs in Berkeley *v.* King's College, 10 Beav. 604. Compare Feistel *v.* King's College, 10 Beav. 502.

Not Appointed Where Salary Not Assignable. — Cooper *v.* Reilly, 2 Sim. 564.

Injunction and Receivership in Action Between Officer and Deputy Concerning Fees. — Cheek *v.* Tilley, 31 Ind. 121.

5. See *infra*, this title, XII. 7. *g.*

Repayment of Pension. — A receiver who collected from the police commissioners a quarterly payment on an annual pension granted to the defendant as an ex-policeman was ordered to repay the money to the defendant. Nagle *v.* Stagg, (C. Pl. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 348.

6. In Forcible Entry and Detainer Proceedings. — See Bromley *v.* McCall, (Ky. 1892) 18 S. W. Rep. 1016.

In Action to Cancel Mortgage. — See Lovett *v.* Sloumb, 109 N. Car. 110.

To Compel Production of Title Deeds. — See Brigstocke *v.* Mansel, 3 Ma. Id. 48.

Sale of Land by Commissioner in Suit Subsequently Dismissed — Second Suit Pending. — Northern Pac. R. Co. *v.* St. Paul, etc., R. Co., 47 Fed. Rep. 536.

Pending Sale under Decree. — Kreling *v.* Kreling, 118 Cal. 421.

Sale for Arrears of Rent Charge. — Shee *v.* Harris, 1 J. & LaT. 93.

Pending Period of Redemption. — Merritt *v.* Gibson, 129 Ind. 155.

Pending Suit to Subject to Liens. — Bailey *v.* Bailey, (Ky. 1889) 10 S. W. Rep. 660; Ogden *v.* Chalfant, 32 W. Va. 559.

To Protect Purchasers of Land at Judicial Sales. — Corcoran *v.* Doll, 35 Cal. 476; Mays *v.* Rose, Freem. (Miss.) 703.

Pending Appeal from Decree of Sale. — Merrill *v.* Elam, 2 Tenn. Ch. 516.

Pending Suit to Quiet Title. — Metcalfe *v.* Pulvertoft, 1 Ves. & B. 180.

Action to Sell Leasehold Estate for Rent. — Doane *v.* Donough, 5 Ohio Dec. 166, 1 Ohio N. P. 22.

To Prevent Waste — Insolvency of Person in Possession. — Smith *v.* Jones, 101 N. Car. 360. See also Whitney *v.* Buckman, 26 Cal. 447.

Suit by Numerous Grantees of Rent Charge. — White *v.* Smale, 22 Beav. 75.

Upon Bill by Creditors Claiming Satisfaction against Real as well as Personal Estate. — Jones *v.* Pugh, 8 Ves. Jr. 71.

After Decree Declaring Plaintiff's Right but Not Ordering Defendant to Deliver Up Possession. — Wright *v.* Vernon, 3 Drew. 112.

7. Bigbee *v.* Summerow, 101 Ga. 201.

8. Nevada Sierra Oil Co. *v.* Home Oil Co., 98 Fed. Rep. 673.

second, that there is imminent danger of the rents and profits of the land being lost or squandered by the person in possession. Both of these conditions must appear or the court will refuse the application.¹

c. ACTIONS FOR SPECIFIC PERFORMANCE. — Upon a bill in equity to enforce the specific performance of a contract for the sale of real estate, a receiver may be appointed if it appears that the vendee is insolvent and that he is about to assign or convey the property the conveyance of which is desired.²

d. ACTIONS FOR RESCISSION. — A receiver may be appointed in an action to regain possession of money and securities given for land, brought by a vendee of land who has repudiated his purchase because of the vendor's fraud.³

e. ACTION BY VENDOR FOR PURCHASE MONEY. — In a suit for a recovery of the purchase price, brought by the vendor in a contract for the sale of land, where the vendee is insolvent, is in possession, has committed waste, and threatens material injury to the property, an injunction and receiver are proper.⁴

f. DISTURBANCE OF LEGAL TITLE OR POSSESSION — (1) *General Rule.* — A court of equity proceeds with extreme reluctance and caution in disturbing the legal possession of real estate by the appointment of a receiver.⁵ This is particularly true where possession is held by a third person not a party to the proceedings.⁶ But a court of equity will appoint a receiver of real property, even against a party having possession under the legal title, if it is satisfied that such party has wrongfully obtained that interest in the property.⁷ So a receiver of land in possession of an heir at law will be appointed at the instance of a devisee, where the latter satisfies the court that there is a reasonable probability of his succeeding on the issue, and that the property will be endangered by being left in the possession of the heir at law.⁸

(2) *In Aid of Ejectments.* — A court of equity will not, except in extreme cases, interfere to appoint a receiver pending an action of ejectment. If,

1. **Essentials.** — *Bainbrigg v. Baddeley*, 3 Macn. & G. 414; *Davis v. Marlborough*, 1 Swanst. 74; *Wilson v. Wilson*, 2 Keen 249; *Scott v. Scott*, 13 Ir. Eq. 212; *Nevada Sierra Oil Co. v. Home Oil Co.*, 98 Fed. Rep. 673; *Robinson v. Taylor*, 42 Fed. Rep. 803; *Mayo v. McPhaul*, 71 Ga. 758; *Kipp v. Hanna*, 2 Bland (Md.) 26; *Chase's Case*, 1 Bland (Md.) 213, 17 Am. Dec. 277; *Venable v. Smith*, 98 N. Car. 523; *Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co.*, 57 Pa. St. 83.

The Plaintiff Must Show a Clear Right to the Property, or that he has some lien upon it, or that the property constitutes a special fund to which he may resort for satisfaction. *Tredenick v. Graydon*, 1 Dr. & War. 316; *Vause v. Woods*, 46 Miss. 120; *Wilson v. Chichester*, 107 N. Car. 386. See also *Jones v. Pugh*, 8 Ves. Jr. 71; *Sweet v. Partridge*, 1 Cox Ch. 433; *Davis v. Marlborough*, 1 Swanst. 74, 2 Swanst. 108; *Cole v. O'Neill*, 3 Md. Ch. 174.

Receiver Appointed in Order to Prevent Prescription. — *Thomas v. Davies*, 11 Beav. 30.

2. *Hall v. Jenkinson*, 2 Ves. & B. 125; *Boehm v. Wood*, 2 Jac. & W. 236. Compare *Walters v. Walters*, 132 Ill. 467.

3. *Loaiza v. Superior Ct.*, 85 Cal. 35. And see *Gibbs v. David*, L. R. 20 Eq. 376.

4. *McCaslin v. State*, 44 Ind. 151.

5. **Rights of Claimant of Realty Out of Possession.** — As to real estate, the doctrine seems to be, according to another statement of the rule on the subject, that a court of equity will not interfere by the appointment of a receiver to

take the property from the party in possession, on the application of a party out of possession, claiming a dry legal title only, but will leave him to his remedy at law. *Mapes v. Scott*, 4 Ill. App. 270. And see *Talbot v. Scott*, 4 Kay & J. 111. It is only in cases where some special circumstances arise of an equitable nature, and in aid of an equitable title, that the court will appoint a receiver over real estate in behalf of a claimant out of possession. *Mapes v. Scott*, 4 Ill. App. 271. See *Talbot v. Scott*, 4 Kay & J. 112; *Carrow v. Farrior*, L. R. 3 Ch. 728; *Schlecht's Appeal*, 60 Pa. St. 176. But see as to the present *English* rule under the Judicature Act, *Berry v. Keen*, 51 L. J. Ch. 912.

In an action to recover land claimed by the plaintiff and in the possession of the defendant, together with damages and rents, a mere showing that the defendant is renting the premises and collecting the rents, that the premises are mortgaged, and that the plaintiff is in need of the rents to pay interest on the mortgage, does not show sufficient equitable grounds for the appointment of a receiver. *State v. District Ct.*, 13 Mont. 416.

Property in Possession of Equitable Incumbrancer. — *Bates v. Brothers*, 2 Smale & G. 509.

6. See *Coates v. Wilkes*, 94 N. Car. 174.

7. *Wiswall v. Sampson*, 14 How. (U. S.) 65.

8. *Clark v. Dew*, 1 Russ. & M. 109. Compare *Fingal v. Blake*, 1 Molloy 113, 2 Molloy 60; *Lloyd v. Trimleston*, 2 Molloy 83; *Dobbin v. Adams*, 8 Ir. Eq. 157.

however, the plaintiff shows a *prima facie* case, and at the same time it appears that the defendant in possession is insolvent or is mismanaging the property, and that the rents and profits are in peril, the court may at its discretion interfere and appoint a receiver for the protection of the property.¹

(3) *Appointment to Enforce Equitable Claim.* — As a general rule, in making an appointment of a receiver on behalf of a party seeking to enforce an equitable claim against real estate, or a claim which is the subject of equitable jurisdiction, the court will take care not to interfere with the rights of a person holding a prior legal interest in the property.²

g. WHERE ADEQUATE REMEDY AT LAW. — The general rule that equity will not interfere where there is an adequate remedy at law is strictly applied in cases involving receiverships of real property.³ So a receiver will not be appointed on behalf of an heir at law against a devisee unless there are strong circumstances to induce such appointment, as the heir has his remedy at law by bringing ejectment.⁴

12. Mines. — Receivers are frequently appointed for mines where such a course is necessary to maintain operations pending the litigation, and to secure the output for the party properly entitled.⁵ Mining property is

1. Pending Action of Ejectment. — Cortleyeu v. Hathaway, 11 N. J. Eq. 39, 64 Am. Dec. 478; People v. New York, (Supm. Ct. Gen. T.) 10 Abb. Pr. (N. Y.) 111; Rollins v. Henry, 77 N. Car. 469. See also Scott v. Scott, 13 Ir. Eq. 213; Mordaunt v. Hooper, Amb. 311. And see generally Fingal v. Blake, 2 Molloy 79; Buckland v. Soultien, 4 Y. & C. Exch. 373, note; Bainbrigg v. Baddeley, 3 Macn. & G. 419; Clark v. Dew, 1 Russ. & M. 109.

Receiver Refused Where Defendant Bona Fide Purchaser. — Whitworth v. Wofford, 73 Ga. 260.

Constructive Possession of Receiver — What Constitutes. — Delozier v. Bird, 125 N. Car. 493, denying rehearing 123 N. Car. 689.

Ejectment under New York Code. — In Guernsey v. Powers, 9 Hun (N. Y.) 78, followed in Burdell v. Burdell, (Supm. Ct. Spec. T.) 54 How. Pr. (N. Y.) 91, it was held that under the New York code a receiver could not be appointed before judgment, in an action of ejectment. The court refused to follow Ireland v. Nichols, (N. Y. Supr. Ct. Gen. T.) 37 How. Pr. (N. Y.) 230.

Receiver Appointed upon Terms — English Judicature Act. — Real, etc., Advance Co. v. McCarthy, 27 W. R. 707.

2. Wiswall v. Sampson, 14 How. (U. S.) 52.

3. Where Legal Remedies Adequate — England. — Carrow v. Ferrior, L. R. 3 Ch. 719; Talbot v. Scott, 4 Kay & J. 97; Lloyd v. Passingham, 16 Ves. Jr. 59; Mordaunt v. Hooper, Amb. 311; Owen v. Homan, 3 Macn. & G. 378; Lancashire v. Lancashire, 9 Beav. 120; Skinners' Co. v. Irish Soc., 1 Myl. & C. 162; Commissioners, etc., v. Lockhart, Ir. R. 3 Eq. 515; Parkin v. Seddons, L. R. 16 Eq. 34; Cremen v. Hawkes, 8 Ir. Eq. 153.

Georgia. — Clay v. Clay, 86 Ga. 359, 12 S. E. Rep. 1064; Mayo v. McPhaul, 71 Ga. 758.

Illinois. — Walters v. Walters, 132 Ill. 467.

Iowa. — Cofer v. Echerson, 6 Iowa 502.

Maryland. — Pfeltz v. Pfeltz, 14 Md. 376; Clark v. Ridgely, 1 Md. Ch. 70; Chase's Case, 1 Bland (Md.) 206, 17 Am. Dec. 277.

Mississippi. — Vause v. Woods, 46 Miss. 120.

Montana. — State v. District Ct., 13 Mont. 416.

New York. — Gregory v. Gregory, 33 N. Y. Super. Ct. 1; McCool v. McNamara, (Supm. Ct.) 19 Abb. N. Cas. (N. Y.) 344; Rollwagen v. Rollwagen, 59 Hun (N. Y.) 625, 13 N. Y. Supp. 635; Empire Paving, etc., Co. v. Robinson, 58 Hun (N. Y.) 603, 11 N. Y. Supp. 540; Willis v. Corlies, 2 Edw. (N. Y.) 281.

Pennsylvania. — Schlecht's Appeal, 60 Pa. St. 172; Chicago, etc., Oil, etc., Co. v. U. S. Petroleum Co., 57 Pa. St. 83.

To Prevent Trespass — Injunction Appropriate Remedy. — Tarvin v. Walker's Creek Coal, etc., Co., (Ky. 1901) 60 S. W. Rep. 185.

Claimants under Legal Title. — It has been held that as between conflicting claimants of land under legal titles, in the absence of special circumstances of an equitable nature, a receiver will not be appointed, but the parties will be left to their remedies at law. See Talbot v. Scott, 4 Kay & J. 112; Toldervy v. Colt, 1 Y. & C. Exch. 621; Jones v. Goodrich, 10 Sim. 328; Hugonin v. Baseley, 13 Ves. Jr. 107; Clark v. Dew, 1 Russ. & M. 109; Stilwell v. Wilkins, Jac. 283; Chappell v. Boyd, 56 Ga. 582; Williams v. Jenkins, 11 Ga. 598; Jones v. Dougherty, 10 Ga. 287; Mapes v. Scott, 4 Ill. App. 270; Guernsey v. Powers, 9 Hun (N. Y.) 79; Twitty v. Logan, 80 N. Car. 71; Rollins v. Henry, 77 N. Car. 470; Davis v. Reaves, 2 Lea (Tenn.) 651; Johnson v. Tucker, 2 Tenn. Ch. 400. Compare Battle v. Davis, 66 N. Car. 256; Mays v. Wherry, 3 Tenn. Ch. 35.

Receiver Appointed Where Elegit Inadequate — English Judicature Act. — Anglo-Italian Bank v. Davies, 9 Ch. D. 282.

4. Knight v. Duplessis, 1 Ves. 324. And see Middleton v. Sherburne, 4 Y. & C. Exch. 377.

5. Mining Property. — Jefferys v. Smith, 1 Jac. & W. 302; Parker v. Parker, 82 N. Car. 168. See Falls v. McAfee, 2 Ired. L. (24 N. Car.) 239; Deep River Gold Min. Co. v. Fox, 4 Ired. Eq. (39 N. Car.) 75.

Receiver under Trust Deed — Liability to General Creditor of Corporation for Mining Operations upon Property Not Embraced in Deed. — Staples v. May, 87 Cal. 178.

Receiver During Period for Redemption from Judicial Sale. — Hill v. Taylor, 22 Cal. 191.

regarded as standing upon a peculiar footing in this respect, because of the loss and depreciation which result from an interruption of operations.¹

13. Trust Property. — It has been shown that a receiver may be appointed for trust funds or property where there is no trustee, or where the trustee removes, absconds, or abuses the trust.² It has been held, however, that a receiver cannot reach a trust fund where the trust is to receive rents and profits and apply them to the use of the beneficiary, but that the creditor must himself proceed in equity therefor. But the rule is different where the trust is merely to convert and distribute.³ A receiver will not, at the instance of a creditor, be appointed for trust property or the income thereof unless such property or its income can be subjected to the debts of the beneficiary.⁴

14. Joint Property — a. IN GENERAL. — It has been held that a receiver should not be appointed for property owned by a debtor jointly with others unless the equities of the case clearly demand it.⁵ So a court of equity will not, at the instance of one tenant in common, wrest from another cotenant his share of the property, to the enjoyment of which he is legally entitled, unless such action is necessary to secure and protect the rights of the complaining cotenant.⁶

b. EXCLUSION FROM PARTICIPATION. — A court of equity has, however, power to appoint a receiver, upon the ground of the inadequacy of the remedy at law, at the instance of one tenant in common against his cotenants, when such cotenants are insolvent, are in possession of undivided valuable property, receiving the whole of the rents and profits, and exclude their associate from the receipt of any portion thereof;⁷ a rule held particularly applicable where

1. *Gibbs v. David*, L. R. 20 Eq. 373; *Hill v. Taylor*, 22 Cal. 191; *Carter v. Hoke*, 64 N. Car. 348.

2. See *supra*, this title, *Grounds for Appointment of Receiver — Where Trustee Neglects, Abuses, or Mismanages Trust*.

Action to Recover Trust Funds. — Where trust funds were loaned without legal authority, the want of such authority is not a good defense in an action by a receiver subsequently appointed over the trust estate, on the note given for such loan. *Corbin v. De La Vergne*, 44 N. J. L. 70.

Proceeds of Sale of Property Impressed with Resulting Trust. — That a fund arising from the proceeds of a sale of property impressed with a resulting trust goes to the receiver of a corporation in favor of which the trust has resulted, see *Hebberd v. Southwestern Land, etc., Co.*, 55 N. J. Eq. 18.

3. *In re Beecher*, (Supm. Ct. Gen. T.) 19 N. Y. Supp. 971.

4. *Campbell v. Foster*, 35 N. Y. 361. And see *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *McEwen v. Brewster*, 17 Hun (N. Y.) 223; *Manning v. Evans*, 19 Hun (N. Y.) 500.

5. *Holmes v. Stix*, 104 Ky. 351; *Lamaster v. Elliott*, 53 Neb. 424. And see *Warwick v. Stockton*, 55 N. J. Eq. 61.

Fraud — Mismanagement — Danger to Assets. — That either fraud, mismanagement, or actual danger to the joint assets must exist to warrant the appointment of a receiver at the suit of one of the parties to a joint adventure, see *Warwick v. Stockton*, 55 N. J. Eq. 61.

Rule by Statute. — It has been held that a statute authorizing the appointment of receivers between partners or joint owners of property does not apply to the appointment of receivers for corporations. *New Birmingham Iron, etc., Co. v. Blevens*, 12 Tex. Civ. App. 410.

When Property Should Be Discharged from Receiver's Possession. — *Branner v. Webb*, (Kan. App. 1901) 63 Pac. Rep. 274.

6. *Blood v. Blood*, 110 Mass. 548; *Low v. Holmes*, 17 N. J. Eq. 151; *Kell v. Murdock*, 6 Ohio Dec. 390, 4 Ohio N. P. 247. And see *Vaughan v. Vincent*, 88 N. Car. 119; *Cassetty v. Capps*, 3 Tenn. Ch. 526.

Disagreement Between Co-owners. — But for the appointment of a receiver of a vessel where the co-owners could not agree upon a sale or for the working of it, see *Andrews v. Betts*, 8 Hun (N. Y.) 323.

Dispute over Proceeds of Sale of Joint Property. — *McIntosh v. Perkins*, 13 Mont. 143.

7. **Cotenant Excluded.** — *Tyson v. Fairclough*, 2 Sim. & St. 143; *Milbank v. Revett*, 2 Meriv. 406; *Evelyn v. Evelyn*, 2 Dick. 800; *Street v. Anderton*, 4 Bro. C. C. 415; *Sandford v. Ballard*, 33 Beav. 401; *Williams v. Jenkins*, 11 Ga. 599; *Varnum v. Leek*, 65 Iowa 751; *Low v. Holmes*, 17 N. J. Eq. 151. See also *Hargrave v. Hargrave*, 9 Beav. 551. Compare *Holmes v. Bell*, 2 Beav. 299.

Denial of Complainant's Title — Unwillingness to Account — Receiver May Be Appointed. — *Duncan v. Campau*, 15 Mich. 416.

Mere Notice by Cotenant to Lessee Not to Pay Rent to Associate Insufficient Ground. — *Tyson v. Fairclough*, 2 Sim. & St. 144, *distinguishing* *Street v. Anderton*, 4 Bro. C. C. 414; *Evelyn v. Evelyn*, 2 Dick. 800, and *Milbank v. Revett*, 2 Meriv. 406. See also *Spratt v. Ahearne*, 1 Jones (Ir.) 51; *Scurrah v. Scurrah*, 14 Jur. 874. But compare *Searle v. Smales*, 3 W. R. 438.

Under the English Judicature Act, however, a receiver may be appointed although there is no exclusive occupation by the co-owner. *Porter v. Lopes*, 7 Ch. D. 359.

Appointment at Instance of Mortgagee of Undivided Share. — *Sumsion v. Crutwell*, 31 W. R.

the common property consists of mines or timber lands.¹

In Suits Between Co-owners of Mines, it has been said that receivers would be appointed on much the same grounds and under the same circumstances as in actions between partners.²

c. PENDING ACTION FOR PARTITION. — It is also competent for a court of equity, in some cases, to appoint a receiver in a partition suit.³ It has been shown that the exclusion of a cotenant from all participation in property rights is a ground for the appointment of a receiver of joint property;⁴ but a mere colorable ouster, and the fact that the care of the property involves considerable expense, will not warrant the appointment of a receiver in a partition suit.⁵

15. **Miscellaneous Property.** — Receivers of the various sorts of property indicated in the notes have been appointed.⁶

399. See also *Holmes v. Bell*, 2 Beav. 299. Compare *Stockman v. Wallis*, 30 N. J. Eq. 450; *Chetwood v. Coffin*, 30 N. J. Eq. 451.

Receiver to Lease Property During Minority of Parties Refused. — *Ames v. Ames*, 148 Ill. 321.

1. *Goodale v. Fifteenth Dist. Ct.*, 56 Cal. 32, per *Morrison, C. J.*; *Hill v. Taylor*, 22 Cal. 194; *Parker v. Parker*, 82 N. Car. 167.

2. **Co-owners of Mines.** — See *Jefferys v. Smith*, 1 Jac. & W. 302; *Crawshay v. Maule*, 1 Swanst. 523; *Fereday v. Wightwick*, 1 Russ. & M. 49; *Bentley v. Bates*, 4 Y. & C. Exch. 189; *Dodds v. Preston*, 59 L. T. N. S. 718; *Bissell v. Foss*, 114 U. S. 260; *Duryea v. Burt*, 28 Cal. 577; *Snyder v. Burnham*, 77 Mo. 54; *Grubb's Appeal*, 66 Pa. St. 128.

Where however, two persons are owners or tenants in common of a mine and have agreed to work it together, the court will not appoint a manager and receiver of the mine on a bill not asking for a dissolution of the partnership, where one of the tenants in common has taken no steps to obstruct the other. See *Roberts v. Eberhardt*, Kay 156, citing *Jefferys v. Smith*, 1 Jac. & W. 298; *Story v. Windsor*, 2 Atk. 630; *Wynget v. Heathcote*, cited in *Bentley v. Bates*, 4 Y. & C. Exch. 182; *Goodman v. Whitcomb*, 1 Jac. & W. 569; *Crawshay v. Maule*, 1 Swanst. 495; *Waters v. Taylor*, 15 Ves. Jr. 26; and *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42.

Nor, in general, will a receiver be appointed against a tenant in common of a mining concern unless he is wasting the property, or excluding from a fair opportunity of interfering in the concern those who are equally entitled with him to participate in its benefits. *Norway v. Rowe*, 19 Ves. Jr. 159, per Lord Chancellor Eldon.

3. **Partition Suits — England.** — *Searle v. Smales*, 3 W. R. 438.

Illinois. — *Ames v. Ames*, 148 Ill. 321.

Michigan. — *Pierce v. Pierce*, 55 Mich. 640; *Duncan v. Campau*, 15 Mich. 416.

New York. — *Darwin v. Wells*, (Supm. Ct. Gen. T.) 61 How. Pr. (N. Y.) 259.

And see the title **PARTITION**, vol. 21, p. 1173.

Rule under Statute — Suit for Divorce and Partition. — Under a statute authorizing the appointment of a receiver at the request of a party jointly interested in property which is in danger of being lost, removed, or materially injured, a receiver may be appointed for property involved in a suit for divorce and partition. *Stone v. Stone*, 18 Tex. Civ. App. 80.

Appointment of Receiver over Lands Not Involved in Suit Improper. — *Branner v. Webb*, (Kan. App. 1901) 63 Pac. Rep. 274.

Where Defendant Tenant by Curtesy — Receiver Not Appointed. — *Bender v. Van Allen*, (Supm. Ct. Spec. T.) 28 Misc. (N. Y.) 304.

4. See *supra*, this section, subdiv. *Exclusion from Participation*.

Disagreement and Hostility Between Co-owners — Attempted Exclusion. — Where the joint owners of property are hostile to each other and each has attempted to collect the rents from the numerous tenants of the property to the exclusion of the other, and there is a probability of future injury to their interests unless a receiver is appointed, a receivership is proper. *Goldberg v. Richards*, (N. Y. Super. Ct. Spec. T.) 5 Misc. (N. Y.) 419.

5. *Heinze v. Kleinschmidt*, 25 Mont. 89.

6. **Coupon Bonds and Investment Securities.** — *Fidelity Ins., etc., Co. v. Huber*, 36 Leg. Int. (Pa.) 164, 13 Phila. (Pa.) 53.

Escheated Property. — *People v. Norton*, 1 Paige (N. Y.) 17.

Growing Crops. — See *Rodgers v. Black*, 15 Pa. Super. Ct. 498.

Live Stock. — For the appointment of a receiver for a trotting horse held under an attachment, where a co-owner was alleged to be insolvent and to be seeking collusively to obtain the animal, see *Shehan v. Mahar*, 17 Hun (N. Y.) 130.

Insurance Policies. — *Reynolds v. Etna L. Ins. Co.*, 28 N. Y. App. Div. 591.

And it has been held that a receiver takes title to life endowment policies payable to the debtor though their existence was unknown to the receiver at the time of his appointment. *Reynolds v. Etna L. Ins. Co.*, 160 N. Y. 635.

Machinery of Ship. — *Brenan v. Preston*, 2 De G. M. & G. 838.

Newspapers. — See *Chaplin v. Young*, 6 L. T. N. S. 98; *Kelly v. Hutton*, 17 W. R. 427.

But a receiver will not be appointed for a newspaper plant pending the foreclosure of a mortgage on it, simply because the mortgagor is insolvent, when it appears that the property is not depreciating but is increasing in value, that all indebtedness is controverted, and that the appointment of a receiver would destroy the value of the security. *Whitehead v. Hale*, 118 N. Car. 601.

Seal of Corporation. — An order of court appointing a receiver for a corporation and providing for the delivery to such receiver of

X. RELATION OF RECEIVER TO COURT — 1. General Rule. — The rule is well settled that a receiver is to be regarded as the arm, officer, or representative of the court appointing him.¹ The custody of the receiver is, as has already been seen, the custody of the court appointing him;² his acts and possession are the acts and possession of the court;³ and his contracts and liabilities are, in contemplation of law, the contracts and liabilities of the court.⁴

Depository of Receiver's Funds. — It has been intimated that a bank designated by the court as a depository of funds coming into the hands of receivers appointed by the court becomes, by acceptance of the deposit in a sense an officer of the court, and that, furthermore, such bank or its officers might be liable as for contempt for misconduct in the use or appropriation of such funds.⁵

2. Judicial Control of Receiver. — As a receiver derives his official existence

"all and every part of the properties," etc., of the corporation, includes the corporate seal. *American Constr. Co. v. Jacksonville, etc., R. Co.*, 52 Fed. Rep. 937.

Wrongful Possession of Secret Trade or Price List. — *Simmons Hardware Co. v. Waibel*, 1 S. Dak. 488, 36 Am. St. Rep. 755.

Subscription Moneys. — *Bailey v. O'Mahony*, 33 N. Y. Super. Ct. 242.

Seat in Exchange. — *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 69, note; *Powell v. Waldron*, 89 N. Y. 328, 42 Am. Rep. 301.

1. Receiver Officer of Court — England. — *In re Burke*, 1 Ball & B. 74; *Fairfield v. Weston*, 2 Sim. & St. 98; *Bryan v. Cormick*, 1 Cox Ch. 422; *Broad v. Wickham*, 1 Sm. Ch. Pr. 500; *Angel v. Smith*, 9 Ves. Jr. 335.

United States. — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Booth v. Clark*, 17 How. (U. S.) 322; *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454; *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 268; *U. S. v. Murphy*, 44 Fed. Rep. 39.

California. — *Matter of Cohen*, 5 Cal. 494.

Georgia. — *Field v. Jones*, 11 Ga. 413.

Illinois. — *Hooper v. Winston*, 24 Ill. 353; *Chicago Title, etc., Co. v. Caldwell*, 58 Ill. App. 219.

Kansas. — *Jackson v. King*, 9 Kan. App. 160.

Maryland. — *Ellicott v. Warford*, 4 Md. 80; *Matter of Colvin*, 3 Md. Ch. 300; *Williamson v. Wilson*, 1 Bland (Md.) 418.

New Jersey. — *Higgins v. Gillesheimer*, 26 N. J. Eq. 308; *Runyon v. Farmers, etc., Bank*, 4 N. J. Eq. 480; *Cammack v. Johnson*, 2 N. J. Eq. 163.

New York. — *Shrady v. Van Kirk*, 51 N. Y. App. Div. 504; *Gillig v. Grant*, 23 N. Y. App. Div. 596; *Kelney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Curtis v. Leavitt*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 274, 10 How. Pr. (N. Y.) 481; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 135; *Matter of Van Allen*, 37 Barb. (N. Y.) 225; *Chautauque County Bank v. White*, 6 Barb. (N. Y.) 589; *Miller v. Levy*, 46 N. Y. Super. Ct. 207; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

North Carolina. — *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837.

South Carolina. — *In re Fifty-four First Mortg. Bonds*, 15 S. Car. 314; *Gadsden v. Whaley*, 14 S. Car. 210.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Where Receiver Transferred to Another Court. — A receiver appointed in an attachment suit begun at the Common Pleas and transferred to the Circuit Court of another county becomes an officer of the latter court. *Ex p. Haley*, 99 Mo. 150.

Analogy to Sheriff. — It has been observed in this connection that the receiver of a court of chancery is its executive officer in much the same manner as a sheriff is the executive of a common-law court. *In re Merchants Ins. Co.*, 3 Biss. (U. S.) 165.

Qualification of Rule. — But it has been well said that while a receiver is, in a general sense, the representative of the court, he has also certain obligations to the parties owning or interested in the property in his custody, and certain rights and powers with reference thereto, to be exercised independently of the court, as by appeal from certain judgments affecting his personal rights or the rights of the parties, though rendered in the court of his appointment and from which his official authority is derived. *Bosworth v. St. Louis Terminal R. Assoc.*, 174 U. S. 182.

Receiver's Reports Prima Facie Correct. — As a receiver is an officer of the court of his appointment, it has been held that the verification of his report is *prima facie* evidence of its correctness, that it is entitled to the same consideration as the return of any other officer of the court, and that to be impeached it must be overcome by other competent evidence. *State v. Nebraska Sav., etc., Bank*, 61 Neb. 496.

2. Simmons v. Allison, 118 N. Car. 761. And see *supra*, this title, *Effect of Appointment of Receiver*.

3. Farmers' L. & T. Co. v. Oregon Pac. R. Co., 31 Oregon 237, 65 Am. St. Rep. 822.

If a Receivership Interferes with the Rights of a Stranger, such rights, on the application of such person to the court, will be protected against any inequitable interference by the receiver. *Howell v. Ripley*, 10 Paige (N. Y.) 43.

4. Farmers' L. & T. Co. v. Oregon Pac. R. Co., 31 Oregon 237, 65 Am. St. Rep. 822.

5. Southern Development Co. v. Houston, etc., R. Co., 27 Fed. Rep. 344; *Matter of Western M. & F. Ins. Co.*, 38 Ill. 289.

But though this were conceded, it has been held that it would not follow that every servant or agent of the bank should be considered *pro hac vice* an officer of the court, and amen-

from the court whose creation he is, so at every step he is subject to the control and supervision of such court in his management of the property or funds placed in his charge.¹

Effect of Appeal and Supersedeas. — Though the order appointing the receiver has been appealed from and a supersedeas granted, the court has power, pending the appeal, to make all proper orders for the conservation of the property or funds in the receiver's hands.²

3. Protection of Receiver — a. IN GENERAL. — It is the duty of the court to protect the possession of its receiver, and to prevent all interference with him in the performance of his official functions and duties.³ It is, indeed, an incident of the power of appointment of a receiver to protect his possession

able thereto as stated. *Southern Development Co. v. Houston*, etc., R. Co., 27 Fed. Rep. 344.

1. Subject to Court's Control — England. — *In re Burke*, 1 Ball & B. 75.

United States. — *Davis v. Gray*, 16 Wall. (U. S.) 218; *Booth v. Clark*, 17 How. (U. S.) 331; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 479; *Green v. Hanberry*, 2 Brock. (U. S.) 419. See *Chambers v. McDougal*, 42 Fed. Rep. 694.

Alabama. — *Ex p. Walker*, 25 Ala. 104.

California. — *Coburn v. Ames*, 57 Cal. 203.

Illinois. — *Hooper v. Winston*, 24 Ill. 363.

Iowa. — *Kaiser v. Kellar*, 21 Iowa 96.

Maine. — *Morrill v. Noyes*, 56 Me. 463.

Maryland. — *Matter of Colvin*, 3 Md. Ch. 300; *Williamson v. Wilson*, 1 Bland (Md.) 418; *Ellicott v. U. S. Insurance Co.*, 7 Gill (Md.) 320.

Massachusetts. — *Ellis v. Boston*, etc., R. Co., 107 Mass. 28.

Mississippi. — *State Bank v. Duncan*, 52 Miss. 743.

New Jersey. — *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N. J. Eq. 426; *Runyon v. Farmers, etc., Bank*, 4 N. J. Eq. 482.

New York. — *Brown v. Northrup*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 335; *Curtis v. Leavitt*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 276; *De Groot v. Jay*, 30 Barb. (N. Y.) 484; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 498; *Devendorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 276; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 138; *Osborn v. Heyer*, 2 Paige (N. Y.) 343; *Hunt v. Wolfe*, 2 Daly (N. Y.) 303; *Green v. Bostwick*, 1 Sandf. Ch. (N. Y.) 187; *Atty.-Gen. v. North American L. Ins. Co.*, 89 N. Y. 94.

North Carolina. — *Simmons v. Allison*, 118 N. Car. 761; *Battle v. Davis*, 66 N. Car. 255.

South Carolina. — *Ex p. Dunn*, 8 S. Car. 234.

Vermont. — *Poland v. Lamoille Valley R. Co.*, 52 Vt. 175.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

Wisconsin. — *King v. Cutts*, 24 Wis. 629.

Fact of No Funds at Disposal. — It has been held that a receiver who has been directed by the court to make certain improvements and changes with respect to the property in his hands cannot avoid the order by showing that no funds have been placed at his disposal for the purpose. *Peckham v. Dutchess County R. Co.*, 145 N. Y. 385.

That the Court May Compel the Discontinuance of a Public Nuisance by Its Receiver, see *Felton v. Arkerman*, (C. C. A.) 61 Fed. Rep. 225.

2. Hitz v. Jenks, 16 App. Cas. (D. C.) 530.

3. General Rule as to Protection of Receiver — England. — *Skip v. Harwood*, 3 Atk. 564; *Lane v. Sterne*, 3 Giff. 629; *Angel v. Smith*, 9 Ves. Jr. 335; *Aston v. Heron*, 2 Myl. & K. 391; *Ames v. Birkenhead Docks*, 20 Beav. 353; *Defries v. Creed*, 11 Jur. N. S. 360. 34 L. J. Ch. 607; *Evelyn v. Lewis*, 3 Hare 475; *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Hawkins v. Gathercole*, 1 Drew. 17; *Randfield v. Randfield*, 1 Drew. & Sm. 314; *Ex p. Day*, 48 L. T. N. S. 912; *Ex p. Cochrane*, L. R. 20 Eq. 282. See also *Johnes v. Claughton*, Jac. 573.

United States. — *In re Tyler*, 149 U. S. 164; *Selma First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Secor v. Toledo, etc., R. Co.*, 7 Biss. (U. S.) 513; *King v. Ohio, etc., R. Co.*, 7 Biss. (U. S.) 529; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 235; *Ledoux v. La Bee*, 83 Fed. Rep. 761; *Fidelity Trust, etc., Co. v. Mobile St. R. Co.*, 53 Fed. Rep. 687.

Georgia. — *Reynolds v. Hindman*, 88 Ga. 314.

Iowa. — *State v. Rivers*, 66 Iowa 653.

Louisiana. — *State v. Ellis*, 45 La. Ann. 1418.

New Jersey. — *Cammack v. Johnson*, 2 N. J. Eq. 163.

New York. — *Woerishoffer v. North River Constr. Co.*, 99 N. Y. 398; *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Matter of Woven Tape Skirt Co.*, 12 Hun (N. Y.) 111; *Hull v. Thomas*, 3 Edw. (N. Y.) 236. See *Walling v. Miller*, 108 N. Y. 177, 2 Am. St. Rep. 402; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 499, 12 Abb. Pr. N. S. (N. Y.) 435; *De Groot v. Jay*, 30 Barb. (N. Y.) 484; *Albany City Bank v. Schermerhorn*, 10 Paige (N. Y.) 265.

Ohio. — *Spinning v. Ohio L. Ins., etc., Co.*, 2 Disney (Ohio) 336.

Pennsylvania. — *Robinson v. Atlantic, etc., R. Co.*, 66 Pa. St. 160.

Rhode Island. — *Chafee v. Quidnick Co.*, 13 R. I. 442.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

Sale by Third Person of Property in Hands of Receiver. — A sale by a third person of property in the hands of a receiver is invalid when it is in derogation of the receiver's right of possession and of the authority of the court appointing him. *Hitz v. Jenks*, 16 App. Cas. (D. C.) 530.

Federal Receiver — Illegality of State Tax. — So where a receiver appointed by a federal

and to prevent interference therewith,¹ and it has been held that the power of a federal court to protect the possession of its receiver is entirely independent of the amount involved, or the citizenship of the parties, or the existence of any new ground of equitable jurisdiction.²

Where Appointment Without Prejudice. — The doctrine that the possession of a receiver is not to be disturbed without leave of court extends even to cases in which he has been appointed expressly without prejudice to the rights of persons having prior legal or equitable interests.³

Personal Violence. — Any violence offered to the person of the receiver while in discharge of his official duties is a contempt of court.⁴

b. LEAVE TO CLAIMANT TO ASSERT RIGHT. — The court will not allow the possession of its receiver to be interfered with or disturbed by any one, whether claiming paramount to or under the right which the receiver was appointed to protect. One who thinks that he has a right paramount to that of the receiver must, before he presumes to take any steps of his own motion, apply to the court for leave to assert his right against the receiver.⁵

c. INJUNCTION TO PROTECT RECEIVER'S POSSESSION. — In order to protect a receiver in his possession of and control over the fund or property, the court appointing him will grant an injunction restraining adverse claimants from unauthorized interference by suit or otherwise, and compel them to assert their rights in the forum in which the receiver was appointed.⁶

d. ATTACHMENT. — In a proper case the court may interfere by attachment to protect or enforce the receiver's rights.⁷

e. EXTENT AND LIMITS OF RULE OF PROTECTION. — The decree of a court of chancery appointing a receiver entitles him to its protection only in the possession of property of which he is authorized or directed by the decree to take possession. When he assumes to take or hold property not embraced

court believes a state tax levied on property in his hands to be illegal, he should apply for protection to the court appointing him. *Ex p. Chamberlain*, 55 Fed. Rep. 704.

1. *Woerishoffer v. North River Constr. Co.*, 99 N. Y. 398.

2. *In re Tyler*, 149 U. S. 191.

3. *Wiswall v. Sampson*, 14 How. (U. S.) 52.

4. *Davis v. Gray*, 16 Wall. (U. S.) 203.

5. **Application to Court to Assert Right Against Receiver** — *England*. — *Evelyn v. Lewis*, 3 Hare 472; *Angel v. Smith*, 9 Ves. Jr. 335; *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Try v. Try*, 13 Beav. 422; *Ames v. Birkenhead Docks*, 20 Beav. 332; *De Winton v. Brecon*, 28 Beav. 200; *Hawkins v. Gathercole*, 1 Drew. 17; *Randfield v. Randfield*, 1 Drew. & Sm. 314; *Ex p. Cochrane*, L. R. 20 Eq. 282.

United States. — *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Paxson v. Cunningham*, (C. C. A.) 63 Fed. Rep. 132.

Alabama. — *Dugger v. Collins*, 69 Ala. 324.

Georgia. — *Waxelbaum v. Mathews*, 96 Ga. 774, 22 S. E. Rep. 380.

Indiana. — *Ft. Wayne, etc., R. Co. v. Mellett*, 92 Ind. 535.

New York. — *O'Mahoney v. Belmont*, 62 N. Y. 133; *Riggs v. Whitney*, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 388.

North Carolina. — *Skinner v. Maxwell*, 68 N. Car. 400.

Pennsylvania. — *Robinson v. Atlantic, etc., R. Co.*, 66 Pa. St. 160.

Tennessee. — *Brien v. Paul*, 3 Tenn. Ch. 357.

Texas. — *Edwards v. Norton*, 55 Tex. 405.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

Wisconsin. — *Matter of Day*, 34 Wis. 638.

6. **Injunction** — *England*. — *Tink v. Rundle*, 10 Beav. 318; *Johnes v. Cloughton*, Jac. 573; *In re Persse*, 8 Ir. Eq. 111; *Parr v. Bell*, 9 Ir. Eq. 55; *Dumville v. Ashbrooke*, 3 Russ. 100, note c; *Mangle v. Fingall*, 1 Hog. 142; *Mason v. Mason*, Flan. & Kel. 429; *Cronin v. M'Carthy*, Flan. & Kel. 49; *Angel v. Smith*, 9 Ves. Jr. 335; *Brooks v. Greathed*, 1 Jac. & W. 178; *Atty.-Gen. v. St. Cross Hospital*, 18 Beav. 601; *Evelyn v. Lewis*, 3 Hare 472.

United States. — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Ex p. Chamberlain*, 55 Fed. Rep. 704.

Georgia. — *Woodburn v. Smith*, 96 Ga. 241.

Iowa. — *Grant v. Davenport*, 18 Iowa 179.

North Carolina. — *Skinner v. Maxwell*, 68 N. Car. 400.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

So where the alleged interference consists in entering upon land in the possession of a receiver, or in bringing an action at law against him or against a party over whose property he has been appointed, the course of the court is to restrain by injunction the party in contempt from trespassing or from prosecuting the action, as the case may be. *Johnes v. Cloughton*, Jac. 573; *Aston v. Heron*, 2 Myl. & K. 390; *Tink v. Rundle*, 10 Beav. 318; *Ames v. Birkenhead Docks*, 20 Beav. 354; *Bayly v. Went*, 51 L. T. N. S. 765; *Evelyn v. Lewis*, 3 Hare 473; *Turner v. Turner*, 15 Jur. 218; *Noe v. Gibson*, 7 Paige (N. Y.) 513.

7. **Attachment.** — *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 235; *Noe v. Gibson*, 7 Paige

in the decree appointing him, and to which the debtor never had any title, he is not acting as the officer or representative of the court of chancery, but is a mere trespasser, and the rightful owner of the property may sue him in any appropriate form of action for damages, or to recover possession of property illegally taken or detained.¹ So where property is in the possession of a third party under a claim of title, the court will not protect the officer who attempts to obtain possession by violence any further than the law will protect him, his right to take possession of property of which he has been appointed receiver being unquestioned.²

4. Power of Court to Protect Third Persons. — The court appointing a receiver has jurisdiction which it will readily exercise to protect third persons against an abuse of power on the part of the receiver, attempted to be exercised under pretense of authority derived from the court.³

5. Interference with Receiver as Contempt of Court — *a. GENERAL RULE.* — It is well settled that any unauthorized interference with a receiver's possession of the property committed to his charge, or with the receiver in the discharge of his official duties, is a contempt of the court by which he was appointed.⁴

Refusal to Surrender Property. — A defendant who has been ordered to surrender all his property to a receiver is guilty of contempt if he refuses to do so.⁵

(N. Y.) 513; *Hull v. Thomas*, 3 Edw. (N. Y.) 236.

1. When Receiver a Trespasser. — *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63; *Paige v. Smith*, 99 Mass. 395; *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717. And see *Leighton v. Harwood*, 111 Mass. 67, 15 Am. Rep. 4.

2. Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

3. Matter of Merritt, 5 Paige (N. Y.) 131. And see *Lehigh Coal, etc., Co. v. Central R. Co.*, 42 N. J. Eq. 591.

Mandamus Against Receiver. — A court may, in a proper case, entertain mandamus proceedings against its own receiver. *Ft. Dodge v. Minneapolis, etc., R. Co.*, 87 Iowa 389.

4. England. — *Lane v. Sterne*, 3 Giff. 629; *Broad v. Wickham*, 4 Sim. 511; *Aston v. Heron*, 2 Myl. & K. 391; *Defries v. Creed*, 11 Jur. N. S. 360, 34 L. J. Ch. 607; *Evelyn v. Lewis*, 3 Hare 475; *Hawkins v. Gathercole*, 1 Drew. 17; *Hutchinson v. Massareene*, 2 Ball & B. 55; *Ames v. Birkenhead Docks*, 20 Beav. 353; *Atty.-Gen. v. St. Cross Hospital*, 18 Beav. 601.

United States. — *In re Swan*, 150 U. S. 637; *Davis v. Gray*, 16 Wall. (U. S.) 203; *U. S. v. Murphy*, 44 Fed. Rep. 39.

Georgia. — *Reynolds v. Hindman*, 88 Ga. 314.

Michigan. — *Smith v. Hosmer*, 84 Mich. 564.

New York. — *Riggs v. Whitney*, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 388; *Sainberg v. Weinberg*, (N. Y. City Ct. Gen. T.) 25 Misc. (N. Y.) 327; *Levy v. Stanion*, (Supm. Ct. App. Div.) 53 N. Y. Supp. 472; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551; *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; *People v. Rogers*, 2 Paige (N. Y.) 103; *De Groot v. Jay*, 30 Barb. (N. Y.) 483; *Watkins v. Pinkney*, 3 Edw. (N. Y.) 533.

Ohio. — *Spinning v. Ohio L. Ins., etc., Co.*, 2 Disney (Ohio) 336.

Rhode Island. — *Chafee v. Quidnick Co.*, 13 R. I. 442.

Texas. — *Abbey v. International, etc., R. Co.*, 5 Tex. Civ. App. 261.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

And see the title **CONTEMPT**, vol. 7, p. 32.

Exclusive Right of Manufacture. — Where the exclusive right to manufacture certain patented articles was vested in the receiver of a corporation, it was held that the manufacture of such articles by the former presiding officer of the corporation was such an interference with the receiver's rights as to constitute a contempt of court. *Matter of Woven Tape Skirt Co.*, 12 Hun (N. Y.) 111.

Possession by Adverse Claimants. — If third parties claiming adversely obtain possession of property which has gone into the hands of a receiver without consent of the appointing court, it is a contempt for which they may be punished by such tribunal. *O'Mahoney v. Belmont*, 62 N. Y. 133.

But a Mere Formal Levy of Execution upon a particular interest in real estate in the receiver's possession, followed by a sale thereof subject to the claims of the receiver and other persons, is not such a disturbance of the receiver's possession as amounts to a contempt. *Albany City Bank v. Schermerhorn*, 10 Paige (N. Y.) 263.

5. People v. Rogers, 2 Paige (N. Y.) 103.

Demand. — But one who holds notes which he has been ordered to deliver to a receiver is not guilty of contempt in refusing to deliver them to the plaintiff or to the receiver's attorney when the receiver himself has not demanded the notes. *Panton v. Zebbley*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 394.

Purchaser of Property at Sheriff's Sale. — Nor is a purchaser of property of the defendant at a sheriff's sale guilty of contempt for refusing to turn such property over to the receiver if such purchaser has not been made a party, nor has an opportunity of asserting his rights before the court. *Robeson v. Ford*, 3 Edw. (N. Y.) 441.

Seizure for State Taxes. — The rule that interference with a receiver's possession is a contempt of court is applicable to a case of the seizure of such property to enforce the payment of state taxes.¹

b. PROPERTY NOT ACTUALLY IN RECEIVER'S POSSESSION. — A party may be liable in contempt although the property interfered with is not actually in the hands of the receiver. The court will not permit any one, without its sanction and authority, to interrupt or prevent the delivery of or payment for any property which the receiver has been appointed to receive, though it may not be actually in his possession.² This rule applies to rents and tolls which the receiver was appointed to receive, any interference with their collection being a contempt.³ So it is a contempt of court if one removes property which has been ordered into the possession of the receiver, although the decree or order has not been formally prepared and entered.⁴

c. PROPERTY BEYOND JURISDICTION OF COURT. — Where a receiver has been appointed for an insolvent corporation, it is a contempt of court for creditors within the jurisdiction of the appointing court to attach property of the corporation, though such property may be without the jurisdiction of the court.⁵

d. NOTICE OF APPOINTMENT. — Although a party must have some knowledge of the receivership to render him in contempt for interfering with a receiver's possession, or with the receiver in the performance of his duties, formal or written notice is not necessary. Any actual knowledge will suffice.⁶

e. WHERE APPOINTMENT IRREGULAR OR ERRONEOUS. — It is immaterial that the order appointing a receiver is irregular or erroneous, since it is not an excuse for interference with the possession of a receiver that the order appointing him ought not to have been made. That it is a subsisting order is sufficient.⁷

f. ADVICE OF COUNSEL AS DEFENSE. — The advice of counsel is no defense to proceedings for contempt in violating an order of court placing certain property in the possession of a receiver.⁸ It has been held, indeed, that counsel who advise an interference with the possession of a receiver may themselves be guilty of contempt.⁹

g. PUNISHMENT FOR CONTEMPT. — The receiver himself has no power to adjudge a party to be in contempt. Only the court which appointed him can entertain a proceeding to punish for contempt in interference with his possession.¹⁰

6. Advice and Instructions of Court. — General instructions as to the manner in which the receiver shall proceed in the performance of his official duties

1. *In re Tyler*, 149 U. S. 191.

2. **Property Not in Receiver's Possession.** — *Ames v. Birkenhead Docks*, 20 Beav. 353; *Vermont Cent. R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

3. *Ames v. Birkenhead Docks*, 20 Beav. 332; *Barton v. Barbour*, 104 U. S. 126; *Vermont Marble Co. v. Wilkes*, (Supm. Ct. Spec. T.) 30 N. Y. Supp. 381.

4. *Skip v. Harwood*, 3 Atk. 564.

5. *Line v. Carlisle Mfg. Co.*, 18 Pa. Co. Ct. 370, 5 Pa. Dist. 642.

6. **Knowledge of Receivership.** — *Kimpton v. Eve*, 2 Ves. & B. 349; *Skip v. Harwood*, 3 Atk. 564; *Hull v. Thomas*, 3 Edw. (N. Y.) 236; *Howe v. Willard*, 40 Vt. 654.

In the **Absence of a Showing** that the party had knowledge that the property alleged to have been interfered with was in the possession of the receiver or his agent, there should be no conviction for contempt. *U. S. v. Jose*, 63 Fed. Rep. 951.

7. **Effect of Irregular or Erroneous Appointment** — *England*. — *Ames v. Birkenhead Docks*, 20 Beav. 353; *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104.

Illinois. — *Richards v. People*, 81 Ill. 551.

Indiana. — *Cook v. Citizens Nat. Bank*, 73 Ind. 256.

Michigan. — *Howard v. Palmer*, Walk. (Mich.) 391.

New York. — *People v. Sturtevant*, 9 N. Y. 269, 59 Am. Dec. 536; *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

Vermont. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

8. *Delozier v. Bird*, 123 N. Car. 689; *Green v. Griffin*, 95 N. Car. 50; *Baker v. Cordon*, 86 N. Car. 116, 41 Am. Rep. 448. And see the title **ADVICE OF COUNSEL**, vol. 1, p. 898.

9. *Delozier v. Bird*, 123 N. Car. 689.

10. *Geisse v. Beall*, 5 Wis. 224. See the title **CONTEMPT**, vol. 7, p. 25, as to the nature of the punishment.

are usually contained in the order appointing him.¹ He is also entitled to the advice of the court in particular circumstances when in doubt as to the proper conduct of the receivership affairs, for which purpose he should make application to the court.²

7. Responsibility of Receiver to Court. — A receiver is directly responsible to the court by which he was appointed, and is accountable in such manner, or to such persons, as the court may direct.³ So a receiver is liable to punishment for contempt for the violation of an order of the court of his appointment made in the cause,⁴ but not, it has been held, for disobedience to an order directing him to pay a judgment against him where such order was not made in the action in which he was appointed.⁵ Where the bill upon which the receiver was appointed was dismissed for want of equity, it was held that his functions ceased *inter partes*, but that his amenability to the court, as an officer thereof, continued, the fund which had come into his hands remaining subject to the orders of the court.⁶

8. Accounting by Receiver — *a. IN GENERAL.* — The court from which a receiver derives his authority, and under the direction of which he acts, may in its discretion require him to account at any time.⁷ No other tribunal than the appointing court has jurisdiction to require him to account,⁸ but a

1. *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 862.

Illustrations. — Thus, an order appointing a receiver for the estate of several infants directed the receiver to "collect all moneys due them, to secure, loan, invest, and apply the same for the benefit and advantage of said infants under the direction and subject to such rules and orders in every respect as this court may, from time to time, make in regard thereto." This order was held to confer authority upon the receiver to collect money due to the estate and invest it, without an additional order of the court. *Alston v. Massenburg*, 125 N. Car. 582.

2. Advice of the Court. — *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 862; *Ledoux v. La Bee*, 83 Fed. Rep. 761; *Cammack v. Johnson*, 2 N. J. Eq. 163; *Matter of Van Allen*, 37 Barb. (N. Y.) 225; *Smith v. New York Consol. Stage Co.*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 377, 18 Abb. Pr. (N. Y.) 431; *Curtis v. Leavitt*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 274; *Kalbfleisch v. Kalbfleisch*, 59 Hun (N. Y.) 619, 13 N. Y. Supp. 397; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 191; *Weber v. Naltner*, 10 Ohio Dec. 96, 7 Ohio N. P. 209.

Effect of Advice or Instructions to Receiver. — If there are parties in interest and they have their day in court the advice may be decisive and binding on all parties concerned; but if the matter is *ex parte* such advice is binding only on the receiver, "for the judge may change his mind on hearing full argument." *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 31 Fed. Rep. 862.

Premature Instructions. — It has been held, however, that a receiver will not be instructed as to the distribution of funds until he has them in court. *Strauss v. Carolina Inter State Bldg., etc., Assoc.*, 117 N. Car. 308, 53 Am. St. Rep. 585.

3. Conkling v. Butler, 4 Biss. (U. S.) 22; *Henry v. Kaufman*, 24 Md. 1, 87 Am. Dec. 591; *Beverley v. Brooke*, 4 Gratt. (Va.) 187. And see *Continental Trust Co. v. Toledo, etc., R. Co.*, 59 Fed. Rep. 514.

4. *Davies v. Cracraft*, 14 Ves. Jr. 143. And see *In re Bell* L. R. 9 Eq. 172. See also the title CONTEMPT, vol. 7, p. 46.

5. *Merritt v. Sparling*, 88 Hun (N. Y.) 491.

6. *Field v. Jones*, 11 Ga. 413.

7. **Accounting.** — *De Winton v. Brecon*, 28 Beav. 200; *McBride v. Clarke*, 1 Molloy 233; *Adams v. Woods*, 8 Cal. 306; *Mabry v. Harrison*, 44 Tex. 286. And see *Akers v. Veal*, 66 Ga. 302.

Delay in Accounting by Consent of Parties. —

A delay in accounting on the part of a receiver may be justifiable when he has received the consent of all parties interested, provided they are competent to consent; but it is otherwise if some are under disability, as in the case of minors. *Dease v. O'Reilly*, 2 Con. & Law 441, 4 Dr. & War. 284; *Hooper v. Winston*, 24 Ill. 365.

Irregular or Void Appointment. — A receiver will be held to a strict accountability, notwithstanding the order appointing him is void. It is enough that he claims to act and does act as such; he is receiver *de facto* for the time being, and cannot avail himself of an irregular or void appointment under which he has acted, procured by his own instrumentality, and thus escape an accounting for the moneys which come into his hands. *O'Mahoney v. Belmont*, 62 N. Y. 133.

When Not Required to Account. — A receiver for a corporation will not be required to account where it appears that no assets of the corporation have come into his hands. *Lyons v. Atlanta Hill Gold Min., etc., Co.*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 533.

Rents Collected Before Receivership. — The court appointing a receiver in partition proceedings has no power to require him to account for rents received before his appointment under a bond conditioned for the payment of rents collected by him for other parties interested. *Baker v. Baker*, 36 N. Y. App. Div. 485.

8. What Court May Require Accounting. — *Hinckley v. Gilman, etc., R. Co.*, 100 U. S. 153; *Conkling v. Butler*, 4 Biss. (U. S.) 22;

receiver in a suit in a state court which is afterwards removed to a United States court may be required to account by the latter court.¹

If the Receiver Misappropriates the Property in his hands, relief may be had against him at any time, it not being necessary that the parties interested should wait until he files his account.²

Jury Not to Pass upon Accounts. — It has been held that a receiver, being an officer of the court, is not entitled to have a jury pass upon his accounts.³

b. ACCOUNTING BY EXECUTOR OF DECEASED RECEIVER. — It has been held that the court has no jurisdiction to order, in a summary way, the executor of a deceased receiver to bring in and pass his testator's accounts, and to pay the balance to be found due out of the assets.⁴

9. When Jurisdiction of Court Ends. — The jurisdiction of the court over a receiver ends with the latter's discharge and the return of the property.⁵ But though an order of court with reference to the distribution of the fund in the receiver's hands is final, the court still has jurisdiction over the receiver to compel his obedience to the order.⁶

XI. FUNCTIONS, POWERS, AND DUTIES — 1. General Rule. — It has been said that "the scope of the receiver's duty is purely administrative."⁷ Such functionary, however, occupies a fiduciary relation, and the utmost good faith is required of him in his dealing with the trust property.⁸

Protection of Property. — The primary duty of a receiver is to protect the property intrusted to him to the best of his ability for all the interests involved.⁹

Must Act Impartially. — It is also incumbent upon a receiver to act impartially between the parties to the controversy, and not to espouse the cause or interests of one party against another.¹⁰

Tendency Towards Enlargement of Scope. — In recent years, both in *England* and in the *United States*, there has been a tendency towards enlarging the scope of receiverships.¹¹

Bill v. New Albany, etc., R. Co., 2 Biss. (U. S.) 390; *Musgrove v. Nash*, 3 Edw. (N. Y.) 172.

1. *Hinckley v. Gilman, etc., R. Co.*, 100 U. S. 153.

2. *De Winton v. Brecon*, 28 Beav. 200.

3. *Akers v. Veal*, 66 Ga. 302.

4. **Executor of Deceased Receiver.** — *Jenkins v. Briant*, 7 Sim. 171.

But where one of the receivers of an insolvent corporation dies during the pendency of proceedings for an accounting, the court may order the accounting revived and continued against the executors, and compel them to become parties to the proceedings and to abide by such orders and decrees as may be made therein. *Matter of Columbian Ins. Co.*, 30 Hun (N. Y.) 342. See also *Matter of Foster*, 7 Hun (N. Y.) 129.

5. **When Jurisdiction Terminates.** — *Davis v. Duncan*, 19 Fed. Rep. 477; *Bassick Min. Co. v. Schofield*, 15 Colo. 376; *Mobile, etc., R. Co. v. Davis*, 62 Miss. 271; *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60; *Missouri, etc., R. Co. v. Chilton*, 7 Tex. Civ. App. 183; *Texas, etc., R. Co. v. Bailey*, 83 Tex. 19; *Kretz v. Texas, etc., R. Co.*, (Tex. App. 1890) 14 S. W. Rep. 1067.

6. *Baltimore, etc., R. Co. v. Vanderwerker*, 33 W. Va. 191.

7. *Lyman v. Central Vermont R. Co.*, 59 Vt. 180.

8. *Atkins v. Judson*, 33 N. Y. App. Div. 42.

9. *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

10. **Must Act Impartially.** — *Detroit First Nat. Bank v. E. T. Barnum Wire, etc., Works*, 60

Mich. 487; *People v. Security L. Ins., etc., Co.*, 79 N. Y. 267; *People v. Family Fund Soc.*, 31 N. Y. App. Div. 166; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *In re Fifty-Four First Mortg. Bonds*, 15 S. Car. 314; *Gadsden v. Whaley*, 14 S. Car. 210. See also *Detroit First Nat. Bank v. E. T. Barnum Wire, etc., Works*, 58 Mich. 315; *Matter of Van Allen*, 37 Barb. (N. Y.) 230; *Holbrook v. American F. Ins. Co.*, 6 Paige (N. Y.) 220.

Or, as the Rule Has Been Stated: "No preferences are to be shown, no practices tolerated that will give advantage to one class of creditors to the detriment of another class, but the whole business is to be managed on the basis of the broadest equity." *In re Fifty-Four First Mortg. Bonds*, 15 S. Car. 315.

Promotion of Scheme for Reorganization of Corporation. — A receiver of a corporation may promote a scheme for reorganization which is best for the interests of all concerned, but not a plan which is for the benefit of one set of interests at the expense of others. *Clarke v. Central R., etc., Co.*, 66 Fed. Rep. 16.

Dealing with Party. — But though a receiver must, as an officer of the court, stand impartial as between the parties, he is not thereby prohibited from dealing with a party if the party so dealt with is not thereby permitted to obtain any advantage over the others. *Patterson v. Ward*, 6 N. Dak. 609.

11. "In the progress and growth of equity jurisdiction it has become usual to clothe such officers with much larger powers than were formerly conferred." *Davis v. Gray*, 16 Wall. (U. S.) 219.

Receiver to Wind Up Business. — A receiver appointed for a business conducted by an individual, partnership, or corporation, must, as a rule, act with a view to winding up the business, and not to its indefinite continuance;¹ though whether a court of equity can lawfully embark in industrial enterprises property taken possession of by its receiver depends upon how far such course may be necessary to the preservation of the existing status, considering the character of the property, the uses to which it is applicable, and to what extent its use in some manner is necessary to its preservation.² Such a course can be justified only when it is absolutely necessary to the preservation of the rights of the parties, it being borne in mind that preservation of the property is the purpose for which a receiver is primarily appointed.³

2. Authority Derived from Court. — Receivers whose powers are not defined by statute derive their authority solely from the order of the court by which they were appointed, and have only such powers as the court may deem proper to bestow upon them.⁴ The limits of such powers must not be

1. Winding Up of Business. — *Leary v. Columbia River, etc.*, Nav. Co., 82 Fed. Rep. 775; *Terry v. Martin*, 7 N. Mex. 54; *Dunn v. Savannah, etc.*, R. Co., 8 S. Car. 234.

Action for Removal of Trustee. — A court of chancery, in an action for the removal of a trustee for creditors of a private corporation, should not appoint a receiver for the purpose of indefinitely continuing the business of the corporation until the creditors are paid out of the income, but only to hold *pendente lite* for the removal of the trustee. *Etowah Min. Co. v. Wills Valley Min., etc., Co.*, 106 Ala. 492.

2. Bigbee v. Summerour, 101 Ga. 201.

In a Suit Between Partners a receiver may preserve the good will of the establishment until a sale can be effected. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Marten v. Van Schaick*, 4 Paige (N. Y.) 479.

To Conduct Hotel Business. — In an action to foreclose a mortgage upon the furniture and effects of a hotel, the receiver appointed may be authorized to carry on the business and to borrow money for that purpose, where the temporary closing of the hotel would probably result in serious loss to the good will of its business. *Cake v. Mohun*, 164 U. S. 311.

Receiver and Manager. — *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 46 Vt. 792.

3. Bigbee v. Summerour, 101 Ga. 201.

Damages for Loss of Profits While in Receiver's Hands. — In an action on an injunction bond, the injunction having been to restrain a certain corporation from doing business, damages may be recovered as for profits lost and sales prevented during the time the corporation was in the hands of a receiver, although the order of appointment did not expressly authorize the receiver to carry on the business of the corporation. *Steel v. Gordon*, 14 Wash. 521.

4. Authority Derived Solely from Court — General Rule — *United States*. — *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82; *Union Bank v. Kansas City Bank*, 136 U. S. 223; *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Booth v. Clark*, 17 How. (U. S.) 322; *Davis v. Gray*, 16 Wall. (U. S.) 203.

California. — *Staples v. May*, (Cal. 1890) 23 Pac. Rep. 710.

Massachusetts. — *Hills v. Parker*, 111 Mass. 510, 15 Am. Rep. 63.

Michigan. — *Detroit First Nat. Bank v. E. T. Barnum Wire, etc.*, Works, 60 Mich. 487.

New Jersey. — *Runyon v. Farmers', etc., Bank*, 4 N. J. Eq. 480.

New York. — *New York, etc., Tel. Co. v. Jewett*, 115 N. Y. 168; *Atty. Gen. v. North American L. Ins. Co.*, 89 N. Y. 103; *Chautauque County Bank v. White*, 6 Barb. (N. Y.) 589; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 452.

Oregon. — *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 31 Oregon 237, 65 Am. St. Rep. 822.

South Carolina. — *In re Fifty-Four First Mortg. Bonds*, 15 S. Car. 314; *Gadsden v. Whaley*, 14 S. Car. 210; *Ex p. Brown*, 15 S. Car. 531.

Virginia. — *Karn v. Rorer Iron Co.*, 86 Va. 754.

Act of Parties Procuring Appointment. — It is well settled that a receiver does not derive his authority from the act of the parties at whose suggestion or by whose consent he is appointed. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82; *Union Bank v. Kansas City Bank*, 136 U. S. 223; *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 31 Oregon 237, 65 Am. St. Rep. 822.

The Duty of Notifying Members of a Beneficial Association of Assessments for death losses may, after a receiver has been appointed, be conferred upon him by the court. *Clark v. Lehman*, 65 Ill. App. 238.

Suit on Official Bond. — The receiver of an insolvent debtor, appointed at the suit of the creditors, with authority merely to collect and distribute the assets of the insolvent, cannot enforce against the debtor and his sureties the penalty of an official bond executed by them. *State v. Sullivan*, 120 Ind. 107.

The Receiver of an Insolvent Moneyed Corporation, it has been held, has all the powers and authority conferred by law upon the trustees of insolvent debtors and is subject to all the duties and obligations imposed upon them. *Matter of Van Allen*, 37 Barb. (N. Y.) 225.

Distinction Between Permanent and Temporary Receivers. — Receivers appointed *pendente lite* are mere temporary officers of the court, and do not possess the powers of a permanent receiver unless specially conferred upon them by order of the court. *Decker v. Gardner*, 124

exceeded,¹ nor can a receiver, of course, assume powers or risks not within the grant or control of the court whose agent he is.²

Where an Unusual or Extraordinary Power is claimed for a receiver it should appear in express terms or by necessary implication from the order of his appointment or some subsequent order of court.³

Unauthorized Payments — Statute of Limitations. — Payments made by a receiver which were not authorized by the order appointing him do not, it has been held, take the case out of the statute of limitations.⁴

3. Ratification of Receiver's Acts by Court. — While a receiver should, as a rule, take no step in the conduct of his trust without the general or special authority, express or implied, of the court of his appointment, yet where the receiver acts *bona fide* without such authority, and such act redounds to the benefit of the estate in his hands, it will, in general, be ratified and approved by the court.⁵

Test of Ratification. — Perhaps the soundest test of what unauthorized acts of a receiver will or will not be ratified by the court is whether the court would have specially authorized the act if applied to in advance.⁶

4. Receiver May Not Deny His Own Authority. — A receiver will not, as a rule, be heard to deny his own authority to do any act performed by him.⁷

5. Discretionary Power. — Receivers have a certain amount of discretionary power in the management and control of the property intrusted to their care. If they exercise this discretion carefully, and in good faith, they will be sustained by the court.⁸ The extent of discretion which a receiver has depends mainly on the circumstances of the case. That is, where a receiver is appointed to conduct a business, many of its details must of necessity be left to his discretion, as it would be impracticable to apply in every instance to the court for instructions.⁹

N. Y. 334; *Herring v. New York, etc., R. Co.*, 105 N. Y. 375; *Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60.

1. *Davis v. Gray*, 16 Wall. (U. S.) 203; *Chautauque County Bank v. White*, 6 Barb. (N. Y.) 589; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 452. See *Booth v. Clark*, 17 How. (U. S.) 331.

Receiver of Rents, Incomes, and Profits of Real Estate. — A receiver *pendente lite* to take the rents, incomes, issues, and profits of real estate is limited in liability and character to the performance of the acts which he is appointed to do. *Shrady v. Van Kirk*, 51 N. Y. App. Div. 504.

2. *International, etc., R. Co. v. Wentworth*, 8 Tex. Civ. App. 5.

3. *Montreal Bank v. Chicago, etc., R. Co.*, 48 Iowa 518.

4. *Whitley v. Lowe*, 25 Beav. 421. And see the title LIMITATION OF ACTIONS, vol. 19, p. 395 *et seq.*

5. Ratification by Court. — *Atwood v. Knowlson*, 91 Ill. App. 265; *Una v. Newark Sav. Inst.*, (N. J. 1900) 46 Atl. Rep. 660.

What Constitutes Ratification. — Where a receiver executed certain promissory notes without authority, the mere confirmation of the receiver's report showing liabilities against the fund in his hands, but not referring to the execution of the notes, is not a ratification of the receiver's unauthorized act. *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276.

6. See *Una v. Newark Sav. Inst.*, (N. J. 1900) 46 Atl. Rep. 660.

7. So a receiver who has entered into a partnership cannot defeat the right of his copart-

ners to a settlement between them as partners on the ground that he entered into the partnership without authority. *Etowah Min. Co. v. Christopher*, 112 Ala. 554.

8. Receiver's Discretion. — *Knott v. Morris Canal, etc., Co.*, 4 N. J. Eq. 423. And see *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 268.

9. *Continental Trust Co. v. Toledo, etc., R. Co.*, 59 Fed. Rep. 514; *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 660.

Extending Time for Payment of Debts. — It has been held that a receiver of a national bank has the power to extend the time of payment of a debt where by so doing he can, in his judgment, strengthen the security for the payment thereof. *People's State Bank v. Francis*, 8 N. Dak. 369.

Sales of Property. — Where, in making a sale of receivership property, the receiver has in good faith exercised a discretion as to selling in whole or in parcels, it has been held that the sale would not be set aside because the court might differ from the receiver in the opinion as to which was, in the particular case, the best mode of selling. *National Bank v. Sprague*, 20 N. J. Eq. 159.

But the court will set aside the sale where it is clearly of opinion that the mode was not the one calculated to produce the best results. *Case v. Fish*, 63 Wis. 475.

Power to Accept or Reject Bids. — See *Knott v. Morris Canal, etc., Co.*, 4 N. J. Eq. 423.

Leases. — See *Knott v. Morris Canal, etc., Co.*, 4 N. J. Eq. 423.

Power to Lease at Will. — It has been held that in mortgage foreclosure proceedings, a

Application of Funds. — It has been held that a receiver has not, as a rule, any discretion in the application of the funds in his hands, but he must be governed entirely by the orders of court.¹

6. Whom Receiver Represents — *a. IN GENERAL.* — The receiver is primarily the representative of the court, whose duty it is to care impartially and without discrimination for the interests of all persons involved in the receivership assets,² though such interests are, at times, various and conflicting, and sometimes involved in doubt.³ But while it is true that a receiver represents equally the interests of all parties, in some cases, in order to determine to what rights the receiver succeeds and what his liabilities are, it is necessary to consider him as the representative of a single party only, and the extent to which he is substituted in the place of such party.⁴

power conferred on the receiver to lease at will, without notice to the mortgagor or holder of the legal title, and without an order of court made upon notice allowing an opportunity to be heard, confers too broad a discretion on the receiver. *Gooden v. Vinke*, 87 Ill. App. 562.

1. *Johnson v. Gunter*, 6 Bush (Ky.) 534; *Receivership Sheets Lumber Co.*, 52 La. Ann. 1337; *Collins v. Case*, 25 Wis. 651.

2. **Receiver Representative of the Court** — *England.* — See *Ex p. Jay*, L. R. 9 Ch. 133.

United States. — *Davis v. Gray*, 16 Wall. (U. S.) 203; *Booth v. Clark*, 17 How. (U. S.) 331; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 479; *Central Trust Co. v. Worcester Cycle Mfg. Co.*, (C. C. A.) 93 Fed. Rep. 712; *Central Trust Co. v. St. Louis, etc., R. Co.*, 41 Fed. Rep. 555; *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 278.

Alabama. — *Ex p. Walker*, 25 Ala. 104.

California. — *Coburn v. Ames*, 57 Cal. 203.

Illinois. — *Hooper v. Winston*, 24 Ill. 363.

Iowa. — *Kaiser v. Kellar*, 21 Iowa 96.

Kansas. — *McDonald v. Carney*, 8 Kan. 20.

Maine. — *Morrill v. Noyes*, 56 Me. 463, 96 Am. Dec. 488.

Maryland. — *Ellcott v. U. S. Insurance Co.*, 7 Gill (Md.) 320.

Massachusetts. — *Ellis v. Boston, etc., R. Co.*, 107 Mass. 28.

Mississippi. — *State Bank v. Duncan*, 52 Miss. 743; *Mays v. Rose*, *Freem.* (Miss.) 718.

New Jersey. — *Runyon v. Farmers', etc., Bank*, 4 N. J. Eq. 482.

New York. — *Lees v. Dobson*, 26 N. Y. App. Div. 624; *Brown v. Northrup*, (N. Y. Super. Ct. Spec. T.) 15 Abb. Pr. N. S. (N. Y.) 335; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 498, 12 Abb. Pr. N. S. (N. Y.) 434; *Curtis v. Leavitt*, (Supm. Ct. Gen. T.) 1 Abb. Pr. (N. Y.) 276; *De Groot v. Jay*, 30 Barb. (N. Y.) 484; *Devendorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 276; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 138; *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Osborn v. Heyer*, 2 Paige (N. Y.) 343; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 417; *Green v. Bostwick*, 1 Sandf. Ch. (N. Y.) 187; *Hunt v. Wolfe*, 2 Daly (N. Y.) 303; *Shrady v. Van Kirk*, 51 N. Y. App. Div. 504.

North Carolina. — *Battle v. Davis*, 66 N. Car. 255.

Ohio. — *Rogers v. Akron, etc., R. Co.*, 8 Ohio Dec. 107, 6 Ohio N. P. 291.

South Carolina. — *Dunn v. Savannah, etc., R. Co.*, 8 S. Car. 234.

Vermont. — *Poland v. Lamoille Valley R. Co.*, 52 Vt. 175.

Virginia. — *Beverley v. Brooke*, 4 Gratt. (Va.) 208.

Wisconsin. — *King v. Cutts*, 24 Wis. 629.

Receiver Not Appointed for Benefit of Strangers to Suit. — *Howell v. Ripley*, 10 Paige (N. Y.) 43. 3. *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 417.

Receivers of a Corporation represent both the corporation and its creditors, and may, in an action against them, assert any defense to which the creditors, in contradistinction to the corporation, are entitled. *Hamor v. Taylor-Rice Engineering Co.*, 84 Fed. Rep. 392. And see *State v. Hemingford Bank*, 58 Neb. 818; *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Gillet v. Moody*, 3 N. Y. 479.

And in an action by a receiver of a bank, a defense may be held bad as involving a fraud on the creditors and depositors of the bank, though such defense might have prevailed against the bank. *Harrington v. Connor*, 51 Neb. 214.

So also as the representative of creditors, the receiver of an insolvent corporation may disaffirm acts of the corporation, and sue to set aside transfers of the corporate property made in fraud of their rights. *In re Wilcox, etc., Co.*, 70 Conn. 220; *Washington Mill Co. v. Sprague Lumber Co.*, 19 Wash. 165.

But a receiver of a corporation is not the representative of creditors in a foreign state. *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747.

Receiver Not Agent or Servant of Corporation. — *Jackson v. McInnis*, 33 Oregon 529, 72 Am. St. Rep. 755; *Texas, etc., R. Co. v. Bledsoe*, 2 Tex. Civ. App. 88.

Knowledge of Character of Assets. — But a receiver of a bank is chargeable with knowledge of all facts known to the bank as to the character of its assets. *People's State Bank v. Francis*, 8 N. Dak. 369.

4. Representative of Corporation. — See *Mason v. Henry*, 152 N. Y. 529. It has been held that a receiver appointed for the purpose of winding up the affairs of a corporation is, in matters concerning the nature and extent of his title, the representative of the corporate body alone and not of the creditors or stockholders. *Young v. Stevenson*, 81 Ill. App. 40.

Distinction Between Interests of Creditors and Stockholders and Matters Affecting Corporate Property. — In a case of a corporate receivership decided in the New York Court of Appeals, a distinction was made between the

b. NO ADVANTAGE TO PARTY APPLYING FOR APPOINTMENT. — Where a receiver of the property and effects of a corporation or individual is appointed, he becomes a trustee, not only for the creditor upon whose application he was appointed, but for all the other creditors of the corporation.¹ The appointment of a receiver gives no advantage to the person at whose instance it is made.²

7. Power to Contract — *a. GENERAL RULE.* — The primary object of a receivership being the preservation of the property pending the litigation, it has been said that the receiver has not the general power, as incident to his office, to make contracts. The court may, however, authorize the receiver to exercise such power, though without the authority of the court contracts made by the receiver are not binding, and the court may ratify or disaffirm them at discretion.³ It has been held, accordingly, that a receiver, in entering into contracts, or appropriating receivership funds to particular purposes of the trust without the express authority of the court, always takes the risk of final approval by the court of his appointment.⁴ It may be stated, therefore, as a general rule, that all contracts made by a receiver are subject to the control of the court, and it may modify or disregard them.⁵ All persons dealing with receivers, it has been declared, do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court.⁶

parties in interest as the creditors of the corporation and its shareholders, and matters respecting the corporate property. As to the former the receiver was held to be a trustee for both creditors and stockholders. But as to corporate property it was said that the receiver represented only the corporation and not its creditors or shareholders. *Curtis v. Leavitt*, 15 N. Y. 44.

Power of Sale in Mortgage. — It has been held that a receiver of a building and loan association cannot foreclose a mortgage to the association under a power of sale contained therein, the association alone being authorized to foreclose by sale. *Strauss v. Carolina Interstate Bldg., etc., Assoc.*, 117 N. Car. 308, 53 Am. St. Rep. 585.

1. *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

2. *Jackson v. King*, 9 Kan. App. 160; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183; *Lenoir v. Linville Imp. Co.*, 117 N. Car. 471; *Farmers' L. & T. Co. v. Oregon Pac. R. Co.*, 31 Oregon 237, 65 Am. St. Rep. 822; *Beverley v. Brooke*, 4 Gratt. (Va.) 187; *Krohn v. Weinberger*, 47 W. Va. 127.

3. **Receiver's Contracts** — *England.* — *Atty.-Gen. v. Vigor*, 11 Ves. Jr. 563; *De Grelle v. Bull*, 10 Reports 97.

United States. — *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352; *Denniston v. Chicago, etc., R. Co.*, 4 Biss. (U. S.) 414.

Alabama. — *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

Iowa. — *Tripp v. Boardman*, 49 Iowa 470.

New Jersey. — *Kerr v. Little*, 39 N. J. Eq. 83; *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N. J. Eq. 426.

New York. — *Vilas v. Page*, 106 N. Y. 450; *Ryan v. Rand*, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 313. And see *Matter of Punnett Cycle Mfg. Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 310.

South Carolina. — *Hand v. Savannah, etc., R. Co.*, 17 S. Car. 219.

Tennessee. — *State v. Edgefield, etc., R. Co.*, 6 Lea (Tenn.) 353.

Municipal Aid. — A receiver has no power, without special authority from the court, to contract for municipal aid to complete a railroad. *Smith v. McCullough*, 104 U. S. 25.

Delivery to Receiver's Agent — *Statute of Frauds.* — When contracts for the purchase of materials and supplies have been orally made by a receiver, deliveries to his agents authorized to examine and certify whether such goods should be accepted, and the receipt and acceptance thereof upon such examination and certificate, will satisfy the requirements of section 6 of the *New Jersey* statute of frauds, and the contract will bind the fund if otherwise enforceable. *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

Enforcement of Unauthorized Agreement. — Where a receiver of a corporation receives from the sheriff's custodian property which has been levied upon under an execution against the corporation, promising to pay out of it the demand of the judgment creditor, the agreement, although made by the receiver without authority from the court, will be enforced. *People v. National Mut. Ins. Co.*, 19 N. Y. App. Div. 247.

4. *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N. J. Eq. 426.

5. *Chicago Deposit Vault Co. v. McNulta*, 153 U. S. 554; *Kerr v. Little*, 39 N. J. Eq. 83; *Matter of New Jersey, etc., R. Co.*, 29 N. J. Eq. 67; *Knott v. Morris Canal, etc., Co.*, 4 N. J. Eq. 423; *Weeks v. Weeks*, 106 N. Y. 626.

Modification of Lease — *Compensation to Lessee.* — Where a lease has been executed by the receiver under an *ex parte* order of the court for a term extending beyond the close of the litigation, the court has power to modify or vacate the order, although the rights of the lessee may be affected thereby. But the lessees, in such case, will be entitled to indemnity if they sustain injury by the modification of such order. *Weeks v. Weeks*, 106 N. Y. 626.

6. **Persons Deal with Receiver at Their Peril.** — *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N.

b. TO CARRY OUT EXISTING CONTRACTS. — A receiver may, when authorized by the court so to do, adopt and ratify and bind himself to carry out and fulfil the existing contracts of the corporation, individual, or firm whose assets have become receivership property.¹

c. TO CONTRACT DEBTS, BORROW MONEY, ETC. — A receiver appointed to conduct a business will, in general, be permitted to buy goods on credit, in furtherance of the objects of his appointment, where this is a usual and proper course in the conduct of such enterprises.² But a receiver authorized to make purchases of material and stock has no implied authority to execute promissory notes therefor.³ A court of equity has power to authorize a receiver to borrow money where it is necessary for the preservation of the estate in his hands, or to the conduct of necessary and proper operations.⁴

8. To Employ Counsel — *a.* GENERAL RULE. — A receiver may employ an attorney or counsel whenever he requires legal advice as to his duties, or legal services in the prosecution or defense of suits, and it is his duty to do so.⁵ When an attorney has been properly employed, reasonable fees will be allowed to him out of the assets in the hands of the receiver.⁶

J. Eq. 426. And see *Tripp v. Boardman*, 49 Iowa 410; *Matter of New Jersey, etc., R. Co.*, 29 N. J. Eq. 67. Compare *Martin v. New York, etc., R. Co.*, 36 N. J. Eq. 109.

But Where a Contract Entered Into by a Receiver is neither Excessive nor Improvident, and the other contracting party has acted in good faith, a court of equity will not, as a rule, compel the contractor to suffer actual loss in so far as the contract has been performed, although it may refuse to direct its complete performance. *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669. And see *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56.

1. Existing Contracts. — *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15; *Sager Mfg. Co. v. Smith*, 45 N. Y. App. Div. 358; *National Park Bank v. Goddard*, 62 Hun (N. Y.) 31; *Matter of Chasmar*, (Supm. Ct. Spec. T.) 22 Misc. (N. Y.) 680; *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56.

2. Power to Contract Debts. — *Highland Ave. etc., R. Co. v. Thornton*, 105 Ala. 225; *Thornton v. Highland Ave., etc., R. Co.*, 94 Ala. 353; *Esbridge v. Rushworth*, 3 Colo. App. 562; *Cake v. Woodbury*, 3 App. Cas. (D. C.) 60.

Nor does the fact that the receiver when in funds does not discharge such indebtedness or pay cash for supplies as he should deprive the parties who sold supplies in good faith of the right to enforce their claims against the receivership assets. *Highland Ave., etc., R. Co. v. Thornton*, 105 Ala. 225.

3. Peoria Steam Marble Works v. Hickey, 110 Iowa 276.

4. Greenwood v. Algesiras R. Co., (1894) 2 Ch. 205, 7 Reports 620; *Elk Fork Oil, etc., Co. v. Foster*, (C. C. A.) 99 Fed. Rep. 495; *Clarke v. Central R., etc., Co.*, 54 Fed. Rep. 556; *New v. Nicoll*, 73 N. Y. 131; *Rogers v. Wendell*, 54 Hun (N. Y.) 540; *Ellis v. Vernon Ice, etc., Co.*, 86 Tex. 109.

No Funds for Authorized Expenditure. — Where a receiver is authorized to make an expenditure and has no funds, he may by express agreement make the expenditure a charge on the trust estate, or he may advance the money and will have a lien therefor, which he may transfer. *New v. Nicoll*, 73 N. Y. 131; *Rogers v. Wendell*, 54 Hun (N. Y.) 540.

5. Power and Duty to Employ Counsel — *England*. — *Moore v. O'Lughlin*, 3 L. R. Ir. 405.

United States. — *Elk Fork Oil, etc., Co. v. Foster*, (C. C. A.) 99 Fed. Rep. 495; *Sowles v. National Union Bank*, 82 Fed. Rep. 139.

California. — *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606; *Adams v. Woods*, 8 Cal. 306.

Connecticut. — *Walsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264.

District of Columbia. — *Cake v. Woodbury*, 3 App. Cas. (D. C.) 60.

Kentucky. — *Grainger v. Old Kentucky Paper Co.*, (Ky. 1899) 49 S. W. Rep. 477.

Maryland. — *Matter of Colvin*, 4 Md. Ch. 126.

Minnesota. — *Olson v. State Bank*, 72 Minn. 320.

New Mexico. — *Terry v. Martin*, 7 N. Mex. 54.

New York. — *Atty.-Gen. v. North American L. Ins. Co.*, 91 N. Y. 59; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 504; *People v. Knickerbocker L. Ins. Co.*, 31 Hun (N. Y.) 622; *Matter of Niagara Bank*, 6 Paige (N. Y.) 213; *Ryckman v. Parkins*, 5 Paige (N. Y.) 543; *Ray v. Macomb*, 2 Edw. (N. Y.) 105; *Matter of Ainsley*, 1 Edw. (N. Y.) 576.

South Carolina. — *Hubbard v. Camperdown Mills*, 25 S. Car. 496.

Tennessee. — *Kelly v. Mountain City Club*, 101 Tenn. 286; *State v. Edgefield, etc., R. Co.*, 4 Baxt. (Tenn.) 92.

Dismissal and Substitution. — A receiver may at any time dismiss an attorney employed by him and employ another in his place. *In re Herman*, 50 Fed. Rep. 517.

6. Reasonable Counsel Fees — *United States*. — *Platt v. Archer*, 13 Blatchf. (U. S.) 351; *Cowdrey v. Galveston, etc., R. Co.*, 1 Woods (U. S.) 331; *Galveston, etc., R. Co. v. Cowdrey*, 11 Wall. (U. S.) 459; *Internal Imp. Fund v. Greenough*, 105 U. S. 536.

California. — *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606.

District of Columbia. — *Cake v. Woodbury*, 3 App. Cas. (D. C.) 60.

Georgia. — *Seligman v. Saussy*, 60 Ga. 20.

Iowa. — *How v. Jones*, 60 Iowa 70.

Maryland. — *Matter of Colvin*, 4 Md. Ch. 126.

New York. — *Howes v. Davis*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 71.

b. WHEN EMPLOYMENT PROPER AND WHEN NOT — (1) In General. — It is well settled that counsel fees will not be allowed to a receiver in addition to his regular compensation where the services performed by counsel were only such as the receiver himself should have performed.¹

A Fortiori counsel fees will not be allowed to a receiver for unsuccessfully resisting an application to compel him to account.² A receiver is not required, however, because he happens to be an attorney, to perform legal services in behalf of the estate, but may employ counsel for such purpose, whose fees will be paid out of the receivership assets.³

(2) *Litigation Concerning Appointment.* — The weight of authority seems to be that the receiver is entitled to an allowance of counsel fees incurred in the successful resistance of an attempt to remove him.⁴ Where, however, the proceedings result in the removal of the receiver, it follows, it has been held, that he was wrong in resisting the application of the party who proceeded against him, and in such a case it would be improper to allow his counsel fees to be cast upon the estate.⁵ Nor will an allowance of counsel fees be made out of the receivership funds for legal services rendered to the parties to the suit, or for which it was the duty of such parties to provide,⁶

South Carolina. — Hubbard v. Camperdown Mills, 25 S. Car. 496; Hand v. Savannah, etc., R. Co., 21 S. Car. 162.

Tennessee. — State v. Edgefield, etc., R. Co., 4 Baxt. (Tenn.) 92.

Fees of Attorneys though Receiver's Appointment Invalid. — Receiver's attorneys employed by leave of court are entitled to a reasonable compensation out of the funds in the hands of the receiver of mortgaged property, although it is subsequently determined that such appointment was made in violation of the contract rights of the mortgagee. Brundage v. Home Sav., etc., Assoc., 11 Wash. 288.

Allowance to Receiver Before Payment by Him. — It has been held that an allowance for counsel fees will not be made to a receiver in advance of his actual payment of such fees where the employment of counsel, though proper, was made without express authority of court. Henry v. Henry, 103 Ala. 582.

1. General Rule as to Propriety of Employment of Counsel. — Wilkinson v. Washington Trust Co., (C. C. A.) 102 Fed. Rep. 28; Saulsbury v. Lady Ensley Coal, etc., Co., 110 Ala. 585; Henry v. Henry, 103 Ala. 582; Olson v. State Bank, 72 Minn. 320.

2. Matter of Union Bank, 37 N. J. Eq. 420; Clapp v. Clapp, 49 Hun (N. Y.) 195.

Counsel Fees Will Not Be Allowed to a Receiver for services on a hearing before a master in behalf of a claim which included a charge for fees paid to the same counsel; nor for services before the master on the hearing upon the receiver's account where the principal contest was over the charges of such counsel to the receiver. Sowles v. National Union Bank, 82 Fed. Rep. 139.

Legal Services Due to Receiver's Voluntary Resignation. — It has been held that where the necessity for the application to the court for certain orders to succeeding receivers was due to the voluntary resignation of the prior receiver, such receiver is not entitled to compensation for attorney's fees in making the application and procuring the orders. Saulsbury v. Lady Ensley Coal, etc., Co., 110 Ala. 585.

Appointment Superseded. — Nor will counsel fees be allowed to a receiver for services

rendered in obtaining the appointment of a prior receiver whose appointment has been superseded. Sowles v. National Union Bank, 82 Fed. Rep. 139.

3. Olson v. State Bank, 72 Minn. 320.

4. Resisting Attempt to Remove Receiver. — Anderson v. Fidelity, etc., Co., 100 Ga. 739; Kimmerle v. Dowagiac Mfg. Co., 105 Mich. 640.

Apparent Grounds for Attack on Appointment. — The receiver's expenses for counsel's and witnesses' fees incurred in resisting a motion for his removal have been held a proper charge against the fund where it appeared that the receiver acted in good faith and with integrity of purpose, although there may have been apparent grounds for the motion. Cowdrey v. Galveston, etc., R. Co., 1 Woods (U. S.) 334.

5. Matter of Calvin, 4 Md. Ch. 126.

Where Appointment Procured through Fraud. — Expenses in defending his appointment will not be allowed to a receiver when such appointment was procured through fraud, and the order of appointment was reversed on appeal. O'Mahoney v. Belmont, 62 N. Y. 133.

6. Anderson v. Fidelity, etc., Co., 100 Ga. 739. See also Matter of Little, 47 N. Y. App. Div. 22; Ryckman v. Parkins, 5 Paige (N. Y.) 543; State v. Florida Cent. R. Co., 16 Fla. 705.

Subrogation. — But where a receiver has paid the fees of counsel of the parties to the litigation out of the funds in his hands belonging to such parties, he will be subrogated to the liens which such attorneys might have claimed upon their clients' shares. Drake v. Thyng, 37 Ark. 229.

Where Services Not Rendered to Receiver as Such. — An allowance for counsel fees out of receivership funds will not, of course, be made where the services were rendered to the person appointed receiver not as such, but as merely one of the defendants in the suit. Utica Ins. Co. v. Lynch, 2 Barb. Ch. (N. Y.) 573.

Conducting Appointment Suit. — Counsel fees will not be allowed to a receiver for conducting the suit in which he was appointed. Sowles v. National Union Bank, 82 Fed. Rep. 139.

and under this rule it has been held that the expenses of litigation concerning the receiver's appointment should be borne by the parties interested in the estate, and at their own expense.¹

(3) *Criminal Proceedings*. — It has been held no part of the duty of a receiver to institute a criminal proceeding, so that no allowance will be made for attorneys' fees incurred therein.²

(4) *Who May Be Employed*. — A receiver is entitled to counsel of his own. He should not follow the direction of the parties who procured his appointment or of their legal advisers.³ A receiver will not, therefore, be permitted to employ as counsel one whose interests personally or as an attorney for another are hostile to or may conflict with the interests represented by the receiver.⁴ Accordingly the general rule is that the receiver should not employ as his counsel the counsel of the complainant, or the legal adviser of any of the parties to the suit,⁵ or one who is interested in or in the possession of any of the property involved.⁶ But this rule yields to an exception where it is made to appear that there can be no conflict of interest between the party whose counsel is employed and the interests represented by the receiver.⁷

(5) *Transactions with Receivership Property*. — The attorney of a receiver cannot deal for his own benefit with the trust estate, but may be made to account thereto for profits made in such transactions.⁸

(6) *Amount of Allowance for Fees*. — The amount which should be allowed as a fee to the attorney or counsel of a receiver is largely within the discretion of the court.⁹ An attorney, in accepting employment by a receiver, it has

1. *Rule Stated*. — The receiver holds the office at the discretion of the court, and should a dispute arise as to the propriety of continuing him in it or appointing some one in his stead, the controversy should be conducted by the parties interested in the estate and at their own expense. *Matter of Colvin*, 4 Md. Ch. 126.

Plaintiff's Duty to Sustain Appointment. — As it is the duty of the plaintiff in the suit to sustain the appointment of the receiver, compensation will not be allowed to the receiver for services of an attorney in defending an appeal by the defendant from the appointing order. *Saulsbury v. Lady Ensley Coal, etc., Co.*, 110 Ala. 585.

2. *Prosecution of Claimant for Perjury*. — Where criminal proceedings were instituted against a party on the ground that he had committed perjury on the trial of certain claims against the receiver, services rendered by an attorney in such proceedings were held not a charge against the receiver. *Matter of Little*, 47 N. Y. App. Div. 22.

3. *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

Employment of Receiver's Law Partner. — It has been held no objection to the allowance of attorneys' fees to a receiver that the attorney employed was the law partner of the receiver, where the latter was not to share in the compensation paid. *Matter of Simpson*, 36 N. Y. App. Div. 562. Compare *Matter of Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78.

4. *Farwell v. Great Western Tel. Co.*, 161 Ill. 522.

5. *Legal Adviser of Party to Suit*. — *Moore v. O'Loughlin*, 3 L. R. Ir. 405; *Adams v. Woods*, 8 Cal. 306; *In re T. L. Kelly Dry-Goods Co.*, 102 Fed. Rep. 747; *Emmons v. Davis, etc.*, Pottery Co., (N. J. 1888) 16 Atl. Rep. 157; *Hynes v. McDermott*, 14 Daly (N. Y.) 104;

Ryckman v. Parkins, 5 Paige (N. Y.) 543; *Ray v. Macomb*, 2 Edw. (N. Y.) 165; *Matter of Ainsley*, 1 Edw. (N. Y.) 576.

Associate Counsel for Receiver. — Where counsel for the plaintiff in a proceeding for the dissolution of a partnership also acted as associate counsel for the receiver, the court refused to allow compensation. *Adams v. Woods*, 8 Cal. 306.

6. *Veith v. Ress*, 60 Neb. 52; *Matter of Ainsley*, 1 Edw. (N. Y.) 576.

7. *Qualification of Rule*. — *Smith v. New York Consol. Stage Co.*, (C. Pl. Spec. T.) 28 How. Pr. (N. Y.) 377; 18 Abb. Pr. (N. Y.) 419; *Hynes v. McDermott*, 14 Daly (N. Y.) 104; *Bennett v. Chapin*, 3 Sandf. (N. Y.) 673; *Warren v. Sprague*, 11 Paige (N. Y.) 200, affirming 4 Edw. (N. Y.) 416.

In a Creditor's Suit to Set Aside Fraudulent Transfers, it has been held appropriate for the receiver to employ the counsel of the creditors. *Shainwald v. Lewis*, 8 Fed. Rep. 878.

A Receiver in Supplementary Proceedings may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted. *Baker v. Van Epps*, (Supm. Ct. Gen. T.) 60 How. Pr. (N. Y.) 79, overruling *Branch v. Harrington*, (Supm. Ct. Spec. T.) 49 How. Pr. (N. Y.) 196; *Cumming v. Edgerton*, 9 Bosw. (N. Y.) 685.

But the court cannot be required by the receiver as matter of right, even with the consent of all the parties, to authorize the employment by the receiver of any particular attorney to conduct an action attacking an assignment made by the execution debtor. *Rondout First Nat. Bank v. Navarro*, 63 Hun (N. Y.) 630, 17 N. Y. Supp. 900.

8. See *Gilbert v. Murphey*, 103 Fed. Rep. 520.

9. *Amount — Discretion of Court*. — *Walsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264;

been declared, must be held to do so with the understanding that his compensation will depend upon the amount that may be allowed to him therefor by the court upon the final accounting of the receiver.¹ In deciding what amount is proper the court will consider the amount of the property involved,² the nature of the services rendered,³ and the extent to which such services were a benefit to the estate.⁴

(7) *Liens — Priorities.* — It has been held that attorneys' fees do not have priority over fixed liens upon the receivership property.⁵ And where the appointment of a receiver of a corporation by a federal court was imperative because of a prior appointment by a state court, it was held that an attorney rendering services to the receiver appointed by the federal court could not claim priority over the general creditors of the corporation.⁶

9. *Employment of Clerks, Assistants, Etc.* — A receiver has the power, as a rule, to employ such clerks, assistants, and servants as may be necessary or proper to the custody, control, and administration of the receivership property.⁷ But compensation will not be allowed to a receiver in addition to his own for the employment of an agent or assistant who performs duties which the receiver himself should perform,⁸ nor where he employs a special detective to perform certain functions for which he has a right to call upon the officers of the court,⁹ nor where the business is not of sufficient magnitude to reasonably require the particular kind of expert assistance,¹⁰ nor where, in any case, clerks or assistants have been employed to carry on a business, in the absence of authority from the court for its continuance.¹¹

10. *Insurance of Property.* — A receiver has power to insure the property intrusted to him whenever such course is a proper precaution for protection against loss,¹² and in such circumstances a credit for reasonable sums paid for

Crumlish v. Shenandoah Valley R. Co., 40 W. Va. 627; *U. S. v. Church of Jesus Christ, etc.*, 6 Utah 9.

One-third of Proceeds of Assets. — It has been held that the attorney of a receiver should not be allowed, in addition to expenses and disbursements, a sum exceeding one-third of the proceeds of sale of the assets in the receiver's hands, though the legal services may be intrinsically worth a larger sum. *Kernochan v. Ballance*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 435.

Allowance in Excess of Amount Claimed. — Where an attorney employed by a receiver petitions to the court for an allowance for his professional services, and names a certain sum, the court should not grant a larger sum than that named. *Richter v. Schroeder*, 110 Ill. 112.

Personal Knowledge of Court. — In passing upon the reasonableness of charges made for counsel fees, it has been held that the court may properly consider its personal knowledge as to what has been done by the attorney. *Olson v. State Bank*, 72 Minn. 320.

1. *Wafsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264. And see *Barrett v. Henrietta Nat. Bank*, 78 Tex. 222.

Where Suit Without Merit. — Where a particular suit in which counsel are employed by the receiver is without merit, and is so known to be by the receiver, who misleads his counsel, no fee should be paid out of the receivership assets. *Henry v. Henry*, 103 Ala. 582.

2. *Kernochan v. Ballance*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 435.

3. *Olson v. State Bank*, 72 Minn. 320.

4. *Platt v. Archer*, 13 Blatchf. (U. S.) 351; *Utica Ins. Co. v. Lynch*, 2 Barb. Ch. (N. Y.)

573. And see *Anderson v. Fidelity, etc., Co.*, 100 Ga. 739.

5. *Liens.* — *Bound v. South Carolina R. Co.*, 51 Fed. Rep. 58; *Moore v. Lincoln Park, etc., Consol. Co.*, 196 Pa. St. 519.

6. *Crosby v. Morristown, etc., R. Co.*, (Tenn. Ch. 1897) 42 S. W. Rep. 507.

7. *Clerks and Assistants.* — *— v. Lindsey*, 15 Ves. Jr. 91; *Frank v. Denver, etc., R. Co.*, 23 Fed. Rep. 757; *Matthews v. Adams*, 84 Md. 143; *Taylor v. Sweet*, 40 Mich. 736; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 12 Abb. Pr. (N. S. (N. Y.)) 427; *Howes v. Davis*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 71; *Dickerson v. Van Tine*, 1 Sandf. (N. Y.) 724.

Compensation May Be Continued During Servant's Disability. — *Thomas v. East Tennessee, etc., R. Co.*, 60 Fed. Rep. 7. And see *Missouri Pac. R. Co. v. Texas, etc., R. Co.*, 33 Fed. Rep. 701.

Servants of Corporation Not Servants of Receiver. — *In re Marriage*, (1896) 2 Ch. 663.

8. *Joost v. Bennett*, 123 Cal. 424; *Kimmerle v. Dowagiac Mfg. Co.*, 105 Mich. 640; *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 504.

Duty to Take Charge of Property. — A receiver of a corporation appointed *pendente lite* has no authority to appoint a deputy to take charge of the property. *Murray v. Cantor*, (N. Y. City Ct. Gen. T.) 26 Civ. Pro. (N. Y.) 81.

9. *American Trust, etc., Bank v. Frankenthal*, 55 Ill. App. 400.

10. *Chandler v. Cushing-Young, Shingle Co.*, 13 Wash. 89.

11. *Heise v. Starr*, 44 Ill. App. 406.

12. *Insurance.* — *Thompson v. Phenix Ins. Co.*, 136 U. S. 293.

insurance premiums will be allowed to him, even though the contract of insurance was not previously sanctioned by the court.¹

11. Expenditures — a. GENERAL RULE. — The expenditures of a receiver must be authorized in advance or be subsequently ratified by the court. Whatever is not so authorized or ratified cannot be allowed to the receiver in settlement.² Where there is no authority in advance for a particular expenditure the court will not ratify it unless it is of a nature essential to the preservation and use of the receivership property as contemplated by the appointment.³ Or, where the receiver has made an outlay honestly, and the court is satisfied that, had application been made, such outlay would have been directed, it will be ratified though no express authority in advance therefor was obtained.⁴ But where such unauthorized expenses have been contracted for by the receiver, they are not allowed to be paid on the theory of the validity of the receiver's contract. The payment of such expenses depends alone upon their subsequent allowance by the court.⁵

b. DISCRETION AS TO EXPENDITURES. — It has been held that the discretion of a receiver in the matter of expenditures is very limited, and that before making any outlay where the receivership fund will be seriously diminished he must obtain the leave of the court which appointed him.⁶ But this general rule will be relaxed to prevent hardship where the receiver has in good faith incurred reasonable liabilities absolutely necessary for the preservation of the trust estate.⁷

Distinction between Several Classes of Receivers. — But in the matter of discretion as to expenditures, a distinction has been taken between the duties and discretion of a receiver appointed to conduct a business or operate a railroad, and a mere passive receiver appointed to hold and preserve property pending the litigation. With reference to receivers of the former nature, it has been said that all expenditures made by the receiver in good faith, in the ordinary

1. *Atwood v. Knowlson*, 91 Ill. App. 265; *Brown v. Hazlehurst*, 54 Md. 26.

2. *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N. J. Eq. 426.

Interest on Mortgage. — It has been held that the court properly ordered a temporary receiver of mortgaged premises appointed in insolvency proceedings, and authorized to continue the business thereon, to hold, subject to further orders, sufficient funds out of the proceeds of the business to pay interest on the mortgage during the time he occupied the premises. *Matter of Busch Brewing Co.*, 41 N. Y. App. Div. 204.

Payments to Prevent Forfeiture of Lease. — *Asheville Cigar Co. v. Brown*, 100 Ga. 171.

Advancing Money to Corporation, Stock in Which Constitutes Part of Receiver's Assets. — *Kalbfleisch v. Kalbfleisch*, 59 Hun (N. Y.) 619, 13 N. Y. Supp. 397.

Expenses Payable Out of Corpus Where Income Inadequate. — *Reinhart v. Augusta Min., etc., Co.*, (C. C. A.) 94 Fed. Rep. 901.

3. Expenditure Must Be Essential to Preservation of Property — Ratification — England. — *Blunt v. Clitherow*, 6 Ves. Jr. 799; *Tempest v. Ord*, 2 Meriv. 55; *Malcolm v. O'Callaghan*, 3 Myl. & C. 52.

United States. — *Cowdrey v. Galveston, etc., R. Co.*, 93 U. S. 352.

California. — *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606.

Illinois. — *Heise v. Starr*, 44 Ill. App. 406.

Maryland. — *Brown v. Hazlehurst*, 54 Md. 26.

Mississippi. — *Battaile v. Fisher*, 36 Miss. 321.

New Jersey. — *Matter of Union Bank*, 37 N. J. Eq. 420.

New York. — *Corey v. Long*, (N. Y. Super. Ct. Spec. T.) 43 How. Pr. (N. Y.) 504; *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

North Carolina. — *Thompson v. North Carolina Bldg., etc., Assoc.*, 120 N. Car. 420.

Vermont. — *Langdon v. Vermont, etc., R. Co.*, 54 Vt. 593.

Washington. — *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

Expenses Incurred in Unauthorized Exercise of Powers. — That there can be no charge upon the estate for expenditures so incurred, see *Henry v. Henry*, 103 Ala. 582.

4. *Thompson v. Phenix Ins. Co.*, 136 U. S. 287; *Brown v. Hazlehurst*, 54 Md. 26; *Hynes v. McDermott*, 14 Daly (N. Y.) 104. And see the preceding note.

5. *Vilas v. Page*, 106 N. Y. 451; *Wyckoff v. Scofield*, 103 N. Y. 630; *Raht v. Attrill*, 106 N. Y. 434, 60 Am. Rep. 456; *Rogers v. Wendell*, 54 Hun (N. Y.) 546.

6. **Discretion Limited.** — *Waters v. Taylor*, 15 Ves. Jr. 25; *Atty.-Gen. v. Vigor*, 11 Ves. Jr. 563; *Thornhill v. Thornhill*, 14 Sim. 600; *Adams v. Woods*, 15 Cal. 206; *Hooper v. Winston*, 24 Ill. 365.

7. *Blunt v. Clitherow*, 6 Ves. Jr. 799; *Tempest v. Ord*, 2 Meriv. 55; *Wells v. Wales*, 4 De G. M. & G. 816, 31 Eng. L. & Eq. 562; *Wastell v. Leslie*, 31 Eng. L. & Eq. 563, note; *Brown v. Hazlehurst*, 54 Md. 26; *Hynes v. McDermott*.

course, with a view to advance and promote the interests of the business committed to his charge and to render it profitable and successful, are fairly within the line of discretion which is necessarily allowed to such receiver.¹

c. PAYMENT OF DEBTS — DISTRIBUTION OF FUNDS — (1) In General. — After a receiver has collected the assets of the estate it is his duty to pay the debts thereof and distribute the funds to the person or persons entitled.² But where substantial distribution of a fund in a receiver's hand can be made, it has been held that such distribution should not be delayed because of a pending controversy concerning an outstanding claim for a small amount.³

(2) Recovery Back of Disbursements. — A receiver may recover back money paid out by him wrongfully or by mistake, to the prejudice of the fund in his possession as receiver,⁴ or, if the disbursements were made under an order of court improvidently awarded and subsequently revoked, it is proper to require the persons to whom the disbursements were made to return them to the receiver.⁵

d. REPAIRS. — The receiver has the power to make all reasonable and necessary repairs for the preservation of the property committed to his charge,⁶ or, where appointed to operate the property or conduct a business thereon, to make such repairs as are necessary to keep the property in condition for such purpose.⁷ And while, it has been held, receivers have not a general right to expend funds in their hands for repairing the property under their control, and should, as a rule, first apply to the court for an order permitting such expenditure,⁸ if a receiver has made repairs without an order of court, and it appears that such repairs are reasonable, and that the court would have directed them if application had been made, credit may be allowed for them in the receiver's accounts.⁹

e. TAXES — (1) In General. — The property in the hands of a receiver is liable to taxation, and the receiver may, therefore, as a rule, properly pay the taxes thereon.¹⁰

mott, 14 Daly (N. Y.) 104. See also *Flagg v. Manhattan R. Co.*, 20 Blatchf. (U. S.) 142.

1. *Burnham v. Bowen*, 111 U. S. 776; *Cowdrey v. Galveston, etc., R. Co.*, 1 Woods (U. S.) 331, *affirmed* 11 Wall. (U. S.) 459; *U. S. Trust Co. v. New York, etc., R. Co.*, 25 Fed. Rep. 797.

2. *Payment of Debts and Distribution of Funds.* — *Skipp v. Harwood*, 1 Dick. 114; *Maher v. Bull*, 44 Ill. 97; *Kellar v. Williams*, 3 Rob. (La.) 321; *Hospes v. Almstedt*, 13 Mo. App. 270; *Butler v. Sprague*, 66 N. Y. 392.

Payments Not out of Receivership Assets. — A receiver of a bank will not be credited with payments made to creditors of the bank, not out of the receivership assets, but out of the property of a person for whom the receiver was trustee, whereby such person became subrogated to the claims of the creditors to whom the payments were made. *Matter of Guardian Sav. Inst.*, 78 N. Y. 409.

3. *Trayhern v. National Mechanics' Bank*, 57 Md. 590.

Need Not Await Final Judgment — Temporary Receiver — New York Statute. — *People v. North River Bank*, (Supm. Ct.) 26 Abb. N. Cas. (N. Y.) 189.

Receivers of Insurance Companies. — See the title *MUTUAL INSURANCE*, vol. 21, p. 295 *et seq.*

4. *Recovery Back of Disbursements.* — *Stokes v. Hoffman House*, 46 N. Y. App. Div. 120; *Mills v. Ross*, 39 N. Y. App. Div. 563; *Corsicana First Nat. Bank v. Cohen*, (Tex. Civ. App. 1899) 55 S. W. Rep. 530.

But it has been held that a receiver who has

turned over property to a creditor by order of court has no remedy over against the creditor, because the receiver could not be held liable on his official bond for such action. *Corsicana First Nat. Bank v. Cohen*, (Tex. Civ. App. 1899) 55 S. W. Rep. 530.

5. *In re Home Provident Safety Fund Assoc.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 211.

6. *Repairs.* — *Central Trust Co. v. Wabash, etc., R. Co.*, 52 Fed. Rep. 908; *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606; *Atwood v. Knowlson*, 91 Ill. App. 265; *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

Where Repairs Desirable but Not Necessary — Court Disallowed Claim. — *Heffron v. Milligan*, 40 Ill. App. 291.

7. *Lock v. Nashville, etc., Turnpike Co.*, 100 Tenn. 163.

8. *Booth v. Clark*, 17 How. (U. S.) 331.

9. *Ratification.* — *Atty.-Gen. v. Vigor*, 11 Ves. Jr. 563; *Blunt v. Clitherow*, 6 Ves. Jr. 799; *Thornhill v. Thornhill*, 14 Sim. 600; *Wood v. Gaynon*, Amb. 395; *Macartney v. Walsh*, *Hayes* 29, note *b*. But see *Wyckoff v. Scofield*, 103 N. Y. 630. And see *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

Where a Receiver of Several Pieces of Property was directed to apply the income derived from one of such pieces to the support of the others, it was held that no special application for leave to make expenditures for essential repairs was necessary. *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

10. *Payment of Taxes.* — *Ledoux v. La Bee*, 83 Fed. Rep. 761; *Lamkin v. Baldwin, etc., Mfg.*

(2) *Sale of Property to Pay Taxes.* — Where the state and county taxes due upon the property of a corporation in the hands of a receiver had been long in default, and the taxes for another year were about to become due, it was held the duty of the court, on the application of the tax collector, if no other means were available, to sell enough of the corporate property to pay the overdue taxes.¹

(3) *Actions for Taxes* — (a) *In General.* — Though property in the hands of a receiver is liable to taxation, it cannot be seized or sold for taxes except with the consent of the appointing court.²

(b) *Effect of Judgment.* — A judgment against a receiver in an action to recover taxes due from a corporation can be enforced only against the funds in his hands as receiver.³

12. *Power to Sue* — a. *IN GENERAL.* — A receiver succeeds to all rights of action belonging to the party over whose property he has been appointed, and occupies, in general, substantially the same relation which was occupied by the original parties. Contract relations and rights of action remain unchanged, and may be enforced by the receiver by appropriate remedies.⁴

Co., 72 Conn. 57; *Dysart v. Brown*, 100 Ga. 1; *Palmer v. Pettingill*, (Idaho 1898) 55 Pac. Rep. 633; *Wiswall v. Kunz*, 173 Ill. 110; *Spalding v. Com.*, 88 Ky. 135; *State v. Red River Valley Elevator Co.*, 69 Minn. 131; *Greeley v. Provident Sav. Bank*, 98 Mo. 458; *Wells v. Higgins*, 132 N. Y. 459; *Hamacker v. Commercial Bank*, 95 Wis. 359.

Assessment in Name of Former Owner — Tax Not Invalid. — *Wiswall v. Kunz*, 173 Ill. 110.

Mortgaged Property. — Where taxes have become liens on mortgaged premises before decree and sale in foreclosure, it is proper for the receiver to pay them. *Wheeler v. Walton*, etc., Co., 65 Fed. Rep. 720; *Joliet First Nat. Bank v. Illinois Steel Co.*, 174 Ill. 140, *affirming* 72 Ill. App. 640; *Atwood v. Knowlson*, 91 Ill. App. 265.

But where the receiver has in his hands other funds as well as those derived from the foreclosure of a chattel mortgage, the court has jurisdiction to determine out of which fund the taxes shall be paid. *Hart v. Nonpareil Printing, etc., Co.*, 109 Iowa 82.

Considered Not Necessary to Continue Receivership to Pay Tax. — *Bogardus v. Moses*, 181 Ill. 551.

Franchise Tax. — It has been held that where the receiver of an insolvent corporation continues its business and uses his franchise, he must pay the franchise tax assessed while such business is being conducted by him. *Matter of George Mather's Sons' Co.*, 52 N. J. Eq. 607.

But the assets of an insolvent corporation in the hands of receivers are not liable to the payment of a state franchise tax assessed after the adjudication of insolvency against the corporate entity unless the fund arising from the assets is more than sufficient to pay the creditors, or the franchises have been used by the receivers for the benefit of the fund, or in the performance of a duty with reference to the franchise. *Crews v. U. S. Car Co.*, 57 N. J. Eq. 357; *Matter of George Mather's Sons' Co.*, 52 N. J. Eq. 607. Compare *Matter of U. S. Car Co.*, 60 N. J. Eq. 514.

For the general statement that payment of a city tax assessed against an insolvent corporation after the filing of the petition for the

appointment of a receiver should not be allowed by the receiver, see *In re United Mut. F. Ins. Co.*, 22 R. I. 108.

Return of Officer Prior to Receivership — No Estoppel to Question Tax. — *Kirkpatrick v. State Board of Assessors*, 57 N. J. L. 53.

Error of Corporate Officer in Giving in Property for Taxation — Receiver Not Estopped. — *Wilmington v. Ricaud*, (C. C. A.) 90 Fed. Rep. 214.

Rule under Connecticut Statute. — It has been held, however, that receivers of an insolvent insurance company having funds of the insolvent in their hands are not the owners thereof within the meaning of a statute which requires all persons liable to taxation to bring in lists of taxable property belonging to them. *Brooks v. Hartford*, 61 Conn. 112.

Statute Relating to Taxation of Bank Stock. — A state statute requiring banks to pay the taxes assessed against their stockholders on their shares, and giving to the bank a lien on the stock for the amount of the taxes paid, is based on the theory that the bank holds assets of the stockholder from which it can protect itself. Such payment, therefore, cannot be enforced against the receiver of an insolvent national bank, nor against its assets in his hands, because the receiver in such case has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on the shares. *Stapylton v. Thaggard*, (C. C. A.) 91 Fed. Rep. 93. And see *Hewitt v. Traders' Bank*, 18 Wash. 326.

1. *Dysart v. Brown*, 100 Ga. 1.

"Accrued" Taxes. — *Moyer v. Badger Lumber Co.*, (Kan. App. 1900) 62 Pac. Rep. 434.

Taxes "Due." — *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 84 Fed. Rep. 744.

2. *Tax Sale.* — *Ledoux v. La Bee*, 83 Fed. Rep. 761; *Burleigh v. Chehalis County*, 75 Fed. Rep. 873; *Oaks v. Myers*, 68 Fed. Rep. 807; *Lamkin v. Baldwin*, etc., Mfg. Co., 72 Conn. 57; *Cleveland v. McCravy*, 46 S. Car. 252; *Weaver v. Duncan*, (Tenn. Ch. 1899) 56 S. W. Rep. 39. And see *State v. Red River Valley Elevator Co.*, 69 Minn. 131.

3. *Com. v. Runk*, 26 Pa. St. 235.

4. *General Power to Sue — United States.* — *Terry v. Bamberger*, 14 Blatchf. (U. S.) 234.

But a receiver of a bank appointed without authority cannot maintain a suit to collect claims by the bank,¹ nor does a right of action which belongs to a person only in his official capacity and not as an individual pass to a receiver of his property.²

A Receiver of a Corporation has, as a rule, only the right to bring such suits as the corporation itself had.³ So where a particular right of action is in the stockholders of the corporation and not in the corporate entity, it does not pass to nor is it enforceable by the receiver.⁴

Actions for Wrongs to Receiver's Possession. — Where a receiver has been in possession of personal property, he may maintain in his own name actions for wrongs to his right of possession.⁵

When Right of Action Accrues. — The receiver's right of action relates back to the beginning of the title of the party for whose property he is receiver. He acquires, by subrogation, all the rights of the owner for whom he is substituted.⁶

b. DEFENSES TO RECEIVERS' SUITS. — Where a receiver institutes suit on a claim or demand which has come to him as part of the receivership assets, any defense which might have been set up in an action by the original party may be asserted against the receiver.⁷

c. SUITS AGAINST OFFICERS AND DIRECTORS OF CORPORATIONS. — The receiver of a corporation has a right to maintain an action against the officers and directors of a corporation for losses sustained by the corporation prior to the receivership, by reason of the wrongful, fraudulent, or negligent acts of

Connecticut. — *Litchfield Bank v. Peck*, 29 Conn. 384; *Litchfield Bank v. Church*, 29 Conn. 137; *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683.

Indiana. — *Rand v. Wright*, 141 Ind. 226.

Louisiana. — *New Orleans Gas Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 457.

Minnesota. — *McIlrath v. Snure*, 22 Minn. 391.

New Hampshire. — *Insurance Com'r v. People's F. Ins. Co.*, 68 N. H. 51.

New Jersey. — *Willink v. Morris Canal, etc.*, Co., 4 N. J. Eq. 377.

New York. — *Griffin v. Long Island R. Co.*, 102 N. Y. 449; *White v. Haight*, 16 N. Y. 310; *Osgood v. Laytin*, 48 Barb. (N. Y.) 464; *Rogers v. Corning*, 44 Barb. (N. Y.) 229; *Coope v. Bowles*, 42 Barb. (N. Y.) 87, 28 How. Pr. (N. Y.) 10; *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Williams v. Babcock*, 25 Barb. (N. Y.) 109; *Palen v. Bushnell*, (Supm. Ct. Spec. T.) 18 Abb. Pr. (N. Y.) 301; *Bryan v. Grant*, 87 Hun (N. Y.) 68; *Gillet v. Fairchild*, 4 Den. (N. Y.) 80; *Brouwer v. Hill*, 1 Sandf. (N. Y.) 629. And see *Van Dusen v. Worrell*, 4 Abb. App. Dec. (N. Y.) 473.

North Carolina. — *Curtis v. McIlhenny*, 5 Jones Eq. (58 N. Car.) 290.

Trespass Before Appointment. — That a receiver may bring an action for damages for a trespass on the lands of the estate, committed before his appointment, see *Bennett v. Wolfolk*, 80 Hun (N. Y.) 390.

Specific Performance. — The receiver of a corporation may, when directed to do so by the court, sue for the specific performance of a contract of the corporation for the purchase of land. *Davis v. Talbot*, 137 Ind. 235.

Confession of Judgments. — So a receiver of a building and loan association may be authorized to confess judgments on bonds due to

the association and may proceed to their collection. *Interstate Bldg., etc., Assoc. v. Lewis*, 31 Pittsb. Leg. J. N. S. (Pa.) 83.

Claims Due to Corporation De Facto. — That a receiver may sue on claims due to a *de facto* corporation for the assets of which he has been appointed, see *Coxe v. State*, 144 N. Y. 396.

Receiver's Judgment Bar to Subsequent Action. — A judgment recovered by receivers of a corporation is a bar to an action in another state against the same defendants for the same cause of action, brought in the name of the corporation. *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683.

Receiver of Corporation as "Legal Representative" under Statute — Usury. — *Barbour v. National Exch. Bank*, 45 Ohio St. 133.

Use by Officer of Corporate Name. — *American Water Works Co. v. Farmers' L. & T. Co.*, 20 Colo. 203, 46 Am. St. Rep. 285.

1. *Murray v. American Surety Co.*, 59 Fed. Rep. 345.

2. *Norcross v. Hollingsworth*, 83 Hun (N. Y.) 127.

3. *Burch v. West*, 33 Ill. App. 359. And see *Matter of Leeds*, 49 La. Ann. 501.

4. *Young v. Stevenson*, 180 Ill. 608, 72 Am. St. Rep. 236.

5. *Singerly v. Fox*, 75 Pa. St. 112; *Boyle v. Townes*, 9 Leigh (Va.) 158.

6. *Hardwick v. Hook*, 8 Ga. 354.

7. **Defenses Against Receiver.** — *Hatch v. Johnson L. & T. Co.*, 79 Fed. Rep. 828; *Litchfield Bank v. Peck*, 29 Conn. 384; *Litchfield Bank v. Church*, 29 Conn. 137; *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; *Bell v. Shibley*, 33 Barb. (N. Y.) 610; *Thomas v. Whallon*, 31 Barb. (N. Y.) 172; *Williams v. Babcock*, 25 Barb. (N. Y.) 109; *Devendorf v. Beardsley*, 23 Barb. (N. Y.) 656. And see *Woodward v. Winchill*, 14 Wash. 394.

Accounting — Unlawful Partnership. — A receiver of a corporation which has been dis-

such officers or directors.¹ Thus, an officer of the company who has appropriated its funds to his own use may be compelled, in an action by the receiver, to restore them;² and where the directors of an insolvent corporation have appropriated the funds of the company to the payment of a debt due to one of the directors, without providing for payment of the other creditors, the receiver may recover from the director the amount thus paid to him.³

d. STATUTORY LIABILITY OF STOCKHOLDERS — (1) *In General.* — Whether a receiver of a corporation may sue to enforce the statutory liability of the stockholders thereof depends, as a rule, upon the language of the statute by which the liability is created. Such actions are not infrequently instituted and maintained by receivers;⁴ and it has been held that the fact that a receiver of a corporation has been appointed by a state court does not preclude a federal court from entertaining an action at law by such receiver against a stockholder, where the amount of the stockholder's liability is fixed and no accounting is necessary.⁵ On the other hand, the statutory liability of stockholders has been regarded as imposed only for the benefit of such individual creditors as might choose to assert it, and as not being, therefore, a right of action which the receiver could enforce.⁶ Under other statutes it

solved for entering into an illegal partnership is not entitled to an accounting of the partnership property. *Gray v. Oxnard Bros. Co.*, (Supm. Ct. Spec. T.) 11 N. Y. Supp. 118.

1. Suits Against Corporate Officers. — *Porter v. Sabin*, 149 U. S. 473; *Mutual Bldg. Fund, etc., Bank v. Bossieux*, 4 Hughes (U. S.) 387; *Cockrill v. Abeles*, (C. C. A.) 86 Fed. Rep. 505; *Bailey v. Mosher*, (C. C. A.) 63 Fed. Rep. 488; *Stephens v. Overstolz*, 43 Fed. Rep. 771; *Taylor v. Mitchell*, 80 Minn. 492; *Patterson v. Stewart*, 41 Minn. 84, 16 Am. St. Rep. 671; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Brinckerhoff v. Bostwick*, 88 N. Y. 52; *McCarty's Appeal*, 110 Pa. St. 379.

But a statute merely authorizing a receiver to sue in his own name for the purpose of collecting notes, bills, book accounts, or other evidences of debt, has been held not to authorize the receiver of a corporation to sue its directors on account of losses suffered by the corporation though their misconduct. *Thompson v. Greeley*, 107 Mo. 577.

2. Hayes v. Kenyon, 7 R. I. 136.

Defenses to Action. — In an action to recover assets converted by corporation officers, they will not be allowed to set up against the receiver the plea that such assets are not needed for the payment of debts of the corporation. *McCarty's Appeal*, 110 Pa. St. 379.

3. Bradley v. Converse, 4 Cliff. (U. S.) 375; *Rudd v. Robinson*, 54 Hun (N. Y.) 339.

Injunction Against Negotiation of Note. — Equity has jurisdiction, on the application of the receiver of a corporation, to enjoin the negotiations of a note belonging to the corporation by the officers thereof for their own benefit. *Brandt v. Allen*, 76 Iowa 50.

4. Enforcing Statutory Liability of Stockholders — *United States*. — *Howarth v. Ellwanger*, 86 Fed. Rep. 54.

Kansas. — *Sims v. Brown*, (Kan. App. 1900) 62 Pac. Rep. 713

Massachusetts. — *Howarth v. Lombard*, 175 Mass. 570.

Michigan. — *Foster v. Row*, 120 Mich. 1, 77 Am. St. Rep. 565; *Rouse v. Detroit Cycle Co.*, 111 Mich. 251.

Minnesota. — *Ueland v. Haugan*, 70 Minn. 349; *Anderson v. Seymour*, 70 Minn. 358.

Nebraska. — *Brown v. Brink*, 57 Neb. 606. And see *Schaberg v. McDonald*, 60 Neb. 493; *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353.

New York. — *Howarth v. Angle*, 39 N. Y. App. Div. 151; *Stoddard v. Lum*, 32 N. Y. App. Div. 565; *Calkins v. Atkinson*, 2 Lans. (N. Y.) 12.

Ohio. — And see *Zieverink v. Kemper*, 50 Ohio St. 208.

Washington. — *Wilson v. Book*, 13 Wash. 676.

But for the rule under a particular statute, see *Minneapolis Basefall Co. v. City Bank*, 66 Minn. 441.

Right of Corporation. — A receiver appointed to take charge of the property and assets of a corporation cannot maintain an action against the stockholders to enforce an alleged liability which could not have been enforced by the corporation itself. *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150.

Creditors' Adequate Remedy at Law. — It is no objection to a suit by a receiver of a corporation to recover money paid to stockholders thereof in purchases by the corporation of its own stock, that the creditors of the corporation had an adequate remedy at law. *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Action in Foreign State. — But it has been held that the receiver of a bank cannot, in a foreign state, maintain an action at law in his own name against stockholders resident therein to enforce a statutory liability according to the laws of the state of his appointment, although he might have maintained such action against stockholders residing in the latter state. *Murty v. Allen*, 71 Vt. 377, 76 Am. St. Rep. 779.

5. Hale v. Haddon, 89 Fed. Rep. 283.

6. Fidelity Ins., etc., Co. v. Mechanics' Sav. Bank, (C. C. A.) 97 Fed. Rep. 297, *reversing* *Mechanics' Sav. Bank v. Fidelity Ins., etc., Co.*, 91 Fed. Rep. 456; *Brown v. Trail*, 89 Fed. Rep. 641; *Wincock v. Turpin*, 96 Ill. 135; *Colton v. Mayer*, 90 Md. 711, 78 Am. St. Rep. 456; *Howarth v. Lombard*, 175 Mass. 570;

seems that either the receiver or a creditor may sue to recover upon the liability of a stockholder where there is a deficiency of assets.¹

(2) *Prerequisite to Suit*. — It has been held that before an action can be maintained to enforce the statutory liability of stockholders it must be shown that the corporate funds are exhausted, the liability of the stockholders being collateral only.²

e. UNPAID SUBSCRIPTIONS TO STOCK — (1) *General Rule*. — The receiver of a corporation may, as a rule, where it is necessary in order to pay the debts of the corporation, enforce payment by the stockholders of their unpaid subscriptions to the capital stock, or of assessments made pursuant to the corporate by-laws;³ nor is the fact that the receiver may represent all the parties to a subscription for a common purpose, including those sued, any objection to his right of action.⁴ It has been held, moreover, that the mere fact that the whole amount of the balance due upon a subscriber's stock may not ultimately be wanted to pay the debts of the corporation, if all the other solvent stockholders should pay their ratable proportions of what still remains due upon their stock, does not necessarily render it inequitable that the receiver should compel the several stockholders to pay the balances due from them respectively in the first instance.⁵ But the receiver has the same power that was possessed by the corporation for the collection of unpaid stock sub-

Hancock Nat. Bank v. Ellis, 172 Mass. 39, 70 Am. St. Rep. 232; *Farnsworth v. Wood*, 91 N. Y. 308; *Mann v. Pentz*, 3 N. Y. 415; *Tucker v. Gilman*, 45 Hun (N. Y.) 195; *McLaughlin v. Kimball*, 20 Utah 254, 77 Am. St. Rep. 908.

1. *Farmers' L. & T. Co. v. Funk*, 49 Neb. 353. And see *Sims v. Brown*, (Kan. App. 1900) 62 Pac. Rep. 713.

2. *Barton Nat. Bank v. Atkins*, 72 Vt. 33.

Under the **Maine Statute**, before a receiver can maintain an action against stockholders for contribution for losses occasioned by misconduct of directors, it must appear from a judicial decision that there has been a loss to the capital stock occasioned in such manner, and that the directors are unable to make it good. *Hewett v. Adams*, 50 Me. 271.

3. **Unpaid Stock Subscriptions** — *United States*. — *Upton v. Tribilcock*, 91 U. S. 45; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610; *Payson v. Withers*, 5 Biss. (U. S.) 269; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Chandler v. Siddle*, 3 Dill. (U. S.) 477; *Payson v. Stoeve*, 2 Dill. (U. S.) 427; *Young v. Wempe*, 46 Fed. Rep. 354.

Connecticut. — *Links v. Connecticut River Banking Co.*, 66 Conn. 277; *Litchfield Bank v. Church*, 29 Conn. 137.

Illinois. — *Chandler v. Brown*, 77 Ill. 333.

Indiana. — *Big Creek Stone Co. v. Seward*, 144 Ind. 295.

Iowa. — *Schoonover v. Hinckley*, 48 Iowa 82; *Stewart v. Lay*, 45 Iowa 604.

Louisiana. — *New Orleans Gas Co. v. Hynes*, 7 La. Ann. 114; *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 457; *Stark v. Burke*, 5 La. Ann. 740.

Maryland. — *Frank v. Morrison*, 58 Md. 423; *Stillman v. Dougherty*, 44 Md. 380.

Massachusetts. — *Farmers', etc., Bank v. Jenks*, 7 Met. (Mass.) 592.

Minnesota. — *Basting v. Ankeny*, 64 Minn. 133.

Nebraska. — *Wyman v. Williams*, 53 Neb. 670.

New Jersey. — *Barkalow v. Totten*, 53 N. J. Eq. 573.

New York. — *Cutting v. Damerel*, 88 N. Y. 410; *Whittlesey v. Frantz*, 74 N. Y. 456; *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 294; *Dayton v. Borst*, 31 N. Y. 435; *U. S. Trust Co. v. U. S. Fire Ins. Co.*, 18 N. Y. 199; *Rankine v. Elliott*, 16 N. Y. 377; *Mann v. Pentz*, 3 N. Y. 415; *Gray v. Haviland*, (Supm. Ct. App. Div.) 58 N. Y. Supp. 1060; *Armstrong v. Danahy*, 75 Hun (N. Y.) 405; *Dean v. Biggs*, 25 Hun (N. Y.) 122; *Van Wagenen v. Clark*, 22 Hun (N. Y.) 497; *Ruggles v. Brock*, 6 Hun (N. Y.) 164; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Nathan v. Whitlock*, 9 Paige (N. Y.) 152; *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 122; *Calkins v. Atkinson*, 2 Lans. (N. Y.) 12.

Ohio. — *Clarke v. Thomas*, 34 Ohio St. 46; *Voorhees v. Circleville Bank*, 19 Ohio 463.

Pennsylvania. — *Bailey v. Pittsburgh Coal R. Co.*, 139 Pa. St. 213; *Mean's Appeal*, 85 Pa. St. 75.

Rhode Island. — *Tobey v. Russell*, 9 R. I. 58.

South Carolina. — *Ehrl v. Piedmont Land Imp., etc., Co.*, 55 S. Car. 78.

Texas. — *Showalter v. Laredo Imp. Co.*, 83 Tex. 162.

Washington. — *Elderkin v. Peterson*, 8 Wash. 674.

Wisconsin. — *Lathrop v. Knapp*, 27 Wis. 214, 37 Wis. 307.

Demand Held Not Necessary. — *Armstrong v. Danahy*, 75 Hun (N. Y.) 405.

4. *Lathrop v. Knapp*, 27 Wis. 214, 37 Wis. 307.

5. *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 122.

"It might be great injustice to the creditors of an insolvent corporation," it was said in this case, "to compel them to wait for the whole amount of their respective debts until it could be ascertained by a protracted litigation with all of the stockholders how much each of such stockholders was liable and able to pay."

It Is the Receiver's Duty to Call for the Full Balance Due from the stockholders respectively when he has reason to suppose that the whole

scriptions, and no greater.¹ In such an action, therefore, a defendant has the right to avail himself of any defense going to show that he is not liable on his contract of subscription.²

(2) *Necessity for Call or Assessment.* — It has been held, however, that before the institution of an action by a receiver of a corporation on an unpaid stock subscription, some action equivalent to a call or assessment is essential to fix the liability of the stockholder.³ And it is well settled that the receiver, or the court acting by means of such functionary, has the power to make calls or assessments as an incident of the right of collection.⁴

(3) *Suit by Creditors.* — After the appointment of a receiver for a corporation, the creditors thereof have not, as a rule, the right to enforce a payment by the stockholders of their unpaid subscriptions.⁵

f. DIVIDENDS ILLEGALLY DECLARED. — A receiver of a corporation may, it has been held, sue to recover dividends illegally declared and paid by a corporation to the stockholders thereof where such course is necessary in order to meet the demands of creditors.⁶

amount due from those who are solvent will be required. *Pentz v. Hawley*, 1 Barb. Ch. (N. Y.) 122.

How Necessity for Suit Shown. — It has been held that to show the need of collecting unpaid subscriptions to the capital stock in order to pay the debts of the corporation, the inventory and report of commissioners of the assets are admissible in evidence. *Johnston v. Allis*, 71 Conn. 207.

The Statute of Limitations does not begin to run against an action by a receiver of a corporation to collect unpaid assessments on corporate stock until the ascertainment of the deficiency, and the necessity, therefore, for suit. *Howarth v. Angle*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 551.

1. *Republic L. Ins. Co. v. Swigert*, 135 Ill. 150; *Garrigue v. Arnott*, 80 Ill. App. 24; *Billings v. Robinson*, 94 N. Y. 415.

2. *Garrigue v. Arnott*, 80 Ill. App. 24.

3. *Necessity for Call or Assessment.* — *Scovill v. Thayer*, 105 U. S. 143; *Chandler v. Siddle*, 3 Dill. (U. S.) 477; *Barkalow v. Totten*, 53 N. J. Eq. 573.

Demand as Taking Place of Call. — It was held, however, in the case of *Johnston v. Allis*, 71 Conn. 207, which was an action by the trustee of an insolvent corporation on the unpaid subscription of the only delinquent stockholder, that the demand of the trustee of the payment of the balance due to pay the debts and expenses of the corporation and the administration of its assets fulfilled all the purposes of a technical call, the absence of which could not avail as a defense to the action.

Order Not Constituting a Call. — It has been held that an order appointing a receiver of a corporation, and providing that "if there shall be any sums due upon the shares of the capital stock of said company, the said receiver will proceed to collect and recover the same," does not constitute a call for a balance on the subscription contract due and uncalled for, but merely gives authority to collect sums due on calls already made. *Liggett v. Glenn*, 51 Fed. Rep. 381.

4. *Power to Issue Calls.* — *Johnson v. Laffin*, 5 Dill. (U. S.) 65; *Upton v. Hansbrough*, 3 Biss. (U. S.) 417; *Maxwell v. Akin*, 89 Fed. Rep. 178; *Hightower v. Thornton*, 8 Ga. 486,

52 Am. Dec. 412; *Dane v. Young*, 61 Me. 160; *Hall v. U. S. Insurance Co.*, 5 Gill (Md.) 484; *Barkalow v. Totten*, 53 N. J. Eq. 573; *Matter of Equitable Reserve Fund L. Assoc.*, 61 Hun (N. Y.) 299; *Eversmann v. Schmitt*, 53 Ohio St. 174, 53 Am. St. Rep. 632. But for the rule in *England*, under the *Railway Companies Act*, see *In re Birmingham, etc.*, R. Co., 18 Ch. D. 155.

Assessments by Receiver under Order of Court — *New Jersey Statute.* — *Falk v. Whitman Cigar Co.*, 55 N. J. Eq. 396.

Resolution of Directors Held Not Necessary. — *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466.

Collateral Attack. — A stockholder, it has been held, cannot collaterally attack an order made on petition of a receiver of a bank authorizing an assessment on its stock pursuant to statute. *Sheafe v. Larimer*, 79 Fed. Rep. 921.

5. *Right of Creditors.* — *Links v. Connecticut River Banking Co.*, 66 Conn. 277; *Big Creek Stone Co. v. Seward*, 144 Ind. 205; *Merchants' Nat. Bank v. Northwestern Mfg. etc., Co.*, 48 Minn. 361; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Calkins v. Atkinson*, 2 Lans. (N. Y.) 12.

Right of Creditors to Require Receiver to Sue.

— With reference to the right of creditors of a corporation to require the receiver to exercise his power in the matter of collecting unpaid stock subscriptions, see *Stark v. Burke*, 9 La. Ann. 341; *New Orleans Gas Co. v. Haynes*, 7 La. Ann. 114; *New Orleans Gas Light Co. v. Bennett*, 6 La. Ann. 456; *Eppright v. Nickerson*, 78 Mo. 482; *Mann v. Pentz*, 3 N. Y. 415; *Atwood v. Rhode Island Agricultural Bank*, 1 R. I. 376.

6. *Recovery Back of Illegal Dividends.* — *Hayden v. Williams*, (C. C. A.) 96 Fed. Rep. 279; *Hayden v. Brown*, 94 Fed. Rep. 15; *Hayden v. Thompson*, (C. C. A.) 71 Fed. Rep. 60; *Davenport v. Lines*, 72 Conn. 118; *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37; *Osgood v. Laytin*, 3 Keyes (N. Y.) 521, affirming 48 Barb. (N. Y.) 464. But compare in this connection the case of *Butterworth v. O'Brien*, (Supm. Ct.) 24 How. Pr. (N. Y.) 438, holding that the right of action for dividends improperly declared by an insolvent corporation is in the creditors and not in the receiver.

13. Impeachment of Fraudulent Transactions or Conveyances — *a. IN GENERAL.* — A receiver may, as a rule, repudiate illegal or voluntary transfers of property, or illegal incumbrances created, or illegal contracts entered into by the individual or corporation for whose estate the receiver has been appointed, and may institute the proper proceedings for setting them aside.¹ And likewise the receiver of a corporation may sustain an action in equity to reach and apply concealed or misappropriated corporate assets.²

No Recoupment of Consideration Paid. — In an action by the receiver of a cor-

The Receiver of a National Bank cannot recover dividends illegally paid, not out of profits but out of the capital stock, at a time when the bank was not insolvent, and when the stockholders receiving such dividends acted in good faith, believing them to be paid out of the profits. *McDonald v. Williams*, 174 U. S. 397.

1. May Sue to Set Aside Fraudulent Transfers — *United States.* — *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 754; *Werner v. Murphy*, 60 Fed. Rep. 769. And see *Gray v. Davis*, 1 Woods (U. S.) 420; *Skiddy v. Atlantic, etc.*, R. Co., 3 Hughes (U. S.) 334.

Connecticut. — *In re Wilcox, etc., Co.*, 70 Conn. 220.

Illinois. — *Peabody v. New England Water-Works Co.*, 184 Ill. 625, 75 Am. St. Rep. 195, reversing 80 Ill. App. 458; *Thomas v. Van Meter*, 164 Ill. 304. And see *Morris v. Thomas*, 17 Ill. 112.

Indiana. — *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 63 Am. St. Rep. 302; *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330; *Johnson v. McClary*, 131 Ind. 105.

Maryland. — *Linville v. Hadden*, 88 Md. 594.

Massachusetts. — *Holden v. Upton*, 134 Mass. 177.

Minnesota. — *Gallagher v. Rosenfield*, 47 Minn. 507; *Chamberlain v. O'Brien*, 46 Minn. 80; *Parsons v. George*, 44 Minn. 151; *Dunham v. Byrnes*, 36 Minn. 106.

Missouri. — *Alexander v. Relfe*, 74 Mo. 495; *Gill v. Balis*, 72 Mo. 424.

New Jersey. — *Walsh v. Rosso*, (N. J. 1898) 41 Atl. Rep. 669; *Heberd v. Southwestern Land, etc., Co.*, 55 N. J. Eq. 18, *Graham Button Co. v. Spielmann*, 50 N. J. Eq. 120; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Bergen v. Littell*, 41 N. J. Eq. 18. And see *Walsh v. Rosso*, 59 N. J. Eq. 123.

New York. — *Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 635, affirming 28 N. Y. App. Div. 591; *Nealis v. American Tube, etc., Co.*, 150 N. Y. 42; *Stephens v. Perrine*, 143 N. Y. 476; *Mandeville v. Avery*, 124 N. Y. 376, 21 Am. St. Rep. 678; *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Atty. Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 272; *Porter v. Williams*, 9 N. Y. 142, 59 Am. Dec. 519; *Bank Com'rs v. St. Lawrence Bank*, 7 N. Y. 513; *Talmage v. Bell*, 7 N. Y. 328; *Leavitt v. Palmer*, 3 N. Y. 10, 51 Am. Dec. 333; *Gillet v. Moody*, 3 N. Y. 479; *McQueen v. New*, 45 N. Y. App. Div. 579; *Stiefel v. Berlin*, 28 N. Y. App. Div. 103; *Scoville v. Halladay*, (Supm. Ct. Gen. T.) 16 Abb. N. Cas. (N. Y.) 43; *Robinson v. Attica Bank*, 21 N. Y. 405; *Osgood v. Laytin*, 3 Abb. App. Dec. (N. Y.) 418; *Farmers' L. & T. Co. v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 387; *Hedges v. Pol-*

hemus, (C. Pl. Eq. T.) 9 Misc. (N. Y.) 680; *Brown v. Gilmore*, (Supm. Ct.) 16 How. Pr. (N. Y.) 527; *Ward v. Petrie*, 92 Hun (N. Y.) 605, 36 N. Y. Supp. 940; *Nevitt v. Albany First Nat. Bank*, 91 Hun (N. Y.) 43; *Hubbell v. Syracuse Iron Works*, 42 Hun (N. Y.) 182; *Underwood v. Sutcliffe*, 10 Hun (N. Y.) 453; *Leavitt v. Yates*, 4 Edw. (N. Y.) 134; *Leavitt v. Tylee*, 1 Sandf. Ch. (N. Y.) 257; *Passavant v. Bowdoin*, 60 Hun (N. Y.) 433; *Palen v. Bushnell*, (Supm. Ct. Spec. T.) 18 Civ. Pro. (N. Y.) 56; *Rudd v. Robinson*, 54 Hun (N. Y.) 339; *Mandeville v. Avery*, (Supm. Ct. Gen. T.) 3 N. Y. Supp. 745. See also *Bostwick v. Menck*, 4 Daly (N. Y.) 68. And see *Ward v. Petrie*, 157 N. Y. 301.

North Carolina. — *Pender v. Mallett*, 123 N. Car. 57.

Utah. — *U. S. v. Church of Jesus Christ, etc.*, 5 Utah 538.

Washington. — *Oleson v. Tacoma Bank*, 15 Wash. 148.

Wisconsin. — *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Barker v. Dayton*, 28 Wis. 367. See also *Hamlin v. Wright*, 23 Wis. 491.

Fraudulent Release or Discharge. — A receiver may proceed to recover a debt due to a corporation, the liability upon which has been fraudulently discharged by the corporation prior to his appointment. *Nathan v. Whitlock*, 9 Paige (N. Y.) 152.

Statutory Receiver. — But where the statute under which a receiver for a corporation was appointed conferred no power upon the receiver, the creditor, or the corporation, to sue to obtain possession of assets fraudulently conveyed, it was held that the receiver could not maintain such an action. *Cohn v. Waters*, 83 Ill. App. 387.

2. *South Bend Toy Mfg. Co. v. Pierre F. & M. Ins. Co.*, 4 S. Dak. 173.

Suit to Set Aside Mortgage Because Not Filed. — *Stephens v. Perrine*, 143 N. Y. 476; *Bayne v. Brewer Pottery Co.*, 90 Fed. Rep. 754; *Heberd v. Southwestern Land, etc., Co.*, 55 N. J. Eq. 18; *Farmers' L. & T. Co. v. Baker*, (Supm. Ct. Spec. T.) 20 Misc. (N. Y.) 387; *Rudd v. Robinson*, 54 Hun (N. Y.) 339. But compare *Kane v. Lodor*, 56 N. J. Eq. 268.

But a receiver in a suit by one partner to dissolve a partnership has been held not to represent creditors so as to avoid a chattel mortgage of firm property because not recorded as required by law. *Berlin Mach. Works v. Security Trust Co.*, 60 Minn. 161; *Walsh v. St. Paul School Furniture Co.*, 60 Minn. 397.

Rescission of Mortgage After Foreclosure. — *Pettibone v. Drakeford*, 37 Hun (N. Y.) 628.

Rule Stated Held, under Statute, Not to Apply to Ancillary Receiver of Foreign Corporation. — *Buckley v. Harrison*, (C. Pl. Gen. T.) 10 Misc.

poration to recover notes illegally transferred, or their proceeds, a purchaser with knowledge of the illegality is not entitled to recoup or to be allowed the consideration paid by him to the corporation.¹

b. SUMMARY POSSESSION WITHOUT LEGAL PROCEEDINGS. — A receiver has no right to take summary possession of property in the possession of the vendee or grantee on the ground that the transaction was fraudulent, in the absence of any adjudication of the invalidity of the conveyance. The receiver must institute a suit to impeach the transaction². A receiver does not, by virtue of his appointment alone, acquire the legal title to property fraudulently conveyed by the debtor.³

c. DIVERSION OF FUNDS WHILE CORPORATION SOLVENT. — A receiver has no right of action for an improper diversion of corporate funds made by the consent of all the stockholders while the corporation was still a solvent concern.⁴

d. RETURN OF UNSATISFIED EXECUTION. — It has been held that the receiver of a corporation cannot, as representing the creditors thereof, sue to set aside an alleged fraudulent transfer made by the corporation before his appointment, unless there has been a return of an execution unsatisfied against the corporation.⁵ But it has also been held not to be essential to the maintenance of an action to reach assets of an insolvent debtor fraudulently concealed or disposed of that the claims of the creditors represented by the receiver should have been previously reduced to judgment.⁶

e. SUIT BY CREDITOR AFTER APPOINTMENT OF RECEIVER. — As a general rule a creditor cannot, after the appointment of a receiver, institute an action for the impeachment of fraudulent transactions or conveyances, such right being vested in the receiver alone by virtue of his appointment. It has been held, however, that a receiver of a judgment debtor cannot sue to set aside a fraudulent transfer of chattels where the transaction was complete before the judgment was entered, because the right of action to impeach such transfer accrues to the judgment creditor, and does not reside in the

(N. Y.) 683. And see *Filkins v. Nunnemacher*, 81 Wis. 91.

Where Receiver Superseded by Assignee in Whom Right of Recovery Expressly Vested. — *Tibbets v. Cohn*, 116 Cal. 365. And see *Olney v. Tanner*, 21 Blatchf. (U. S.) 540.

Judgment Conferred by Firm. — But while, it has been held, a receiver appointed at the instance of a judgment creditor might successfully invoke the aid of a court of equity in setting aside fraudulent transfers previously made by the judgment debtor, yet a receiver appointed in a suit by two of the partners of an insolvent firm against the other, for the purpose of winding up the business of the firm, succeeds only to the rights of action belonging to the firm. A receiver so appointed, therefore, could not question judgments confessed by the firm for the purpose of giving a fraudulent preference. *Weber v. Weber*, 90 Wis. 467.

Nor could a receiver of an insolvent member of a copartnership sue to set aside, as fraudulent, a conveyance of firm property made to secure firm debts. *Masterman v. Lumbermen's Nat. Bank*, 61 Minn. 299.

When Receiver Estopped to Assert Fraud. — A receiver of an insolvent firm is estopped to assert, as against the creditors of an insolvent corporation, that property levied upon by the latter's creditors was transferred to it by such firm for the purpose of hindering and delaying creditors of the firm. *Gottlieb v. Miller*,

154 Ill. 44. Compare *Kennedy v. Thorp*, 61 N. Y. 174.

1. *Gillet v. Phillips*, 13 N. Y. 114.

2. *Summary Possession.* — *Brown v. Gilmore*, (Supm. Ct.) 16 How. Pr. (N. Y.) 527, *Robinson v. Wood*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 169.

3. *Metcalf v. Del Valle*, 64 Hun (N. Y.) 245. following *Bostwick v. Menck*, 40 N. Y. 383.

4. *Diversion of Corporate Funds.* — *Little v. Garabrant*, 90 Hun (N. Y.) 404. And see *Lawrence v. Greenup*, (C. C. A.) 97 Fed. Rep. 906.

5. *Buckley v. Harrison*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 683.

6. *Chamberlain v. O'Brien*, 46 Minn. 80.

7. *Right of Creditors.* — *Werner v. Murphy*, 60 Fed. Rep. 769, *National State Bank v. Vigo County Nat. Bank*, 141 Ind. 352, 50 Am. St. Rep. 330; *Passavant v. Bowdoin*, 60 Hun (N. Y.) 433.

Where Rights of Creditors Protected in Distribution of Assets. — It has been held that though a judgment valid as to some of the creditors of a corporation is invalid as to others, it will not be set aside by the court in which it was entered at the instance of the receiver of the corporation, since the rights of those creditors as against whom the judgment is invalid can be protected in the distribution of the company's assets. *Beebe v. George H. Beebe Co.*, 64 N. J. L. 497.

Prior Suit by Creditor — Lien. — *Metcalf v. Del Valle*, 64 Hun (N. Y.) 245.

judgment debtor.¹ So it has also been held that a receiver appointed under a particular act to prevent fraudulent trusts and assignments has no power to impeach a conveyance of land made by the debtor in fraud of creditors, such right being personal and peculiar to creditors, and not being expressly vested in the receiver by the statute.²

14. Power to Compromise Claims or Suits. — The court appointing a receiver may authorize him to compromise claims and suits by or against the estate if best for the interest of all parties concerned.³ A receiver may, of course, receive money payable under a contract before it becomes due,⁴ and may satisfy a mortgage on payment of the debt secured thereby before maturity.⁵ So, it has been held, a receiver may exercise an option of having securities deposited as collateral considered as an absolute payment.⁶

15. Receivers' Sales — a. GENERAL RULE. — It is well settled that the court may, *pendente lite*, order or authorize a sale of property in the hands of its receiver whenever the interests of the parties concerned will be promoted thereby.⁷ In some instances, indeed, a receiver is appointed for the very purpose of an immediate sale of property, as where it is shown that property attached is of such a character that its value would be much diminished and impaired by lapse of time.⁸ But a sale of property the title to which is in dispute will not be ordered in advance of the trial and ultimate determination of the rights of the respective parties, unless some necessity therefor is made to appear.⁹

1. *Ward v. Petrie*, 157 N. Y. 301, *reversing* (Supm. Ct. Gen. T.) 36 N. Y. Supp. 940.

2. *Higgins v. Gillesheiner*, 26 N. J. Eq. 308.

3. *Compromise.* — *State v. Rushville Bank*, 57 Neb. 608; *Matter of Croton Ins. Co.*, 3 Barb. Ch. (N. Y.) 642; *In re United Mut. F. Ins. Co.*, 22 R. I. 108; *Insurance Com'r v. Commercial Mut. Ins. Co.*, 20 R. I. 7; *U. S. v. Church of Jesus Christ, etc.*, 6 Utah 9.

Receiver Acting in Good Faith on Advice of Counsel. — Where a receiver, in compromising suits to recover property, acts *bona fide* on advice of counsel, he will be exonerated though his attorneys do not act in good faith in giving the advice relied on. *U. S. v. Church of Jesus Christ, etc.*, 6 Utah 9.

4. *Olcott v. Heermans*, 3 Hun (N. Y.) 431.

5. *Heermans v. Clarkson*, 64 N. Y. 171.

6. *Phoenix Iron Co. v. New York Wrought Iron Railroad Chair Co.*, 27 N. J. L. 484.

7. **Sales by Receivers** — *United States*. — *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352; *Cleveland First Nat. Bank v. Shedd*, 121 U. S. 74; *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 235; *In re Becker*, 98 Fed. Rep. 407.

California. — *Wulff v. Superior Ct.*, 110 Cal. 215, 52 Am. St. Rep. 78; *McLane v. Placerville, etc.*, R. Co., 66 Cal. 606.

Georgia. — *Walker v. Morris*, 14 Ga. 323.

Iowa. — And see *Yetter v. Applegate*, 85 Iowa 121.

Louisiana. — *Metropolitan Bank v. New Orleans Brewing Assoc.*, 51 La. Ann. 1525.

Maryland. — *Loney v. Penniman*, 43 Md. 130.

Minnesota. — *Hospes v. Northwestern Mfg., etc.*, Co., 41 Minn. 256.

New York. — *Brush v. Jay*, 113 N. Y. 482; *Williams v. Wilson*, 4 Sandf. Ch. (N. Y.) 379; *Crane v. Ford, Hopk.* (N. Y.) 114.

North Carolina. — *Forsaith Mach. Co. v. Hope Mills Lumber Co.*, 109 N. Car. 576.

Wisconsin. — *Brande v. Bond*, 63 Wis. 140; *Noonan v. McNab*, 30 Wis. 277; *McNab v. Noonan*, 28 Wis. 434.

Where Property Not Paying Expenses of Receivership — Sale Ordered. — *Smith v. Burton*, 67 Vt. 514.

Where the Receivership Property Was an Uncompleted Bridge which would be, when completed, a public benefit, but the franchise to build which was about to expire, it was held proper for the court to order an immediate sale of the property. *Boston Invest. Co. v. Pacific Short Line Bridge Co.*, 104 Iowa 311.

Order for Sale of Corporate Property and Business Held Not to Authorize Sale of Particular Rights of Action. — *Minnesota Thresher Mfg. Co. v. Langdon*, 44 Minn. 37.

Sale of Realty and Personalty Together. — To the effect that the real and personal property of a corporation may be sold together by a receiver, see *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140.

Erroneous Appointment — Erroneous Sale. — *Empire Hotel Co. v. Main*, 98 Ga. 176.

Sale by Third Person Invalid When in Derogation of Receiver's Possession. — *Hitz v. Jenks*, 16 App. Cas. (D. C.) 530.

May Sell Fallen Timber, under Order of Court. — *Crofts v. Poe, Jones & C.* 193.

Where There Were Conflicting Claims to Receivership Property, the keeping of which would involve expense and deterioration, it was held proper for the court to order an immediate sale of the property, the proceeds to be held subject to its further order. *National Park Bank v. Goddard*, 62 Hun (N. Y.) 31.

8. *State v. Superior Ct.*, 14 Wash. 324.

9. *Brush v. Jay*, 113 N. Y. 482.

The Mere Fact that the Court Has Possession by Its Receiver is not sufficient to authorize an order of sale. *Brush v. Jay*, 113 N. Y. 482.

Collection in Preference to Sale of Debts. — It has been held that a receiver of a corporation to which a large number of persons are indebted should be directed to collect rather than to sell the debts. *Deford v. Macwatty*, 82 Md. 168.

Sale of Mortgaged Property Before Default. — A court may, it has been held, order a sale of mortgaged property in the hands of its receiver before the maturity of the mortgage debt or default in the payment of interest.¹

b. DISCRETION OF COURT. — Whether or not the court will order its receiver to sell property in his hands is, as a rule, a matter of judicial discretion which will not be disturbed by an appellate tribunal in the absence of a clear showing of abuse.²

c. CONFORMITY OF SALE TO TERMS OF ORDER. — A sale of receivership property must, as to manner and terms of sale, conform to the order of court authorizing or directing such sale.³

d. PURCHASERS — (1) *In General.* — One bidding at a receiver's sale makes himself a party to the proceedings and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of the purchase, and with a right to be heard on all questions arising affecting his bid.⁴

(2) *Who May Buy.* — A sale of corporate assets may be made to the directors of the corporation, if made in good faith and for an adequate price.⁵ So judgment creditors of a corporation are at liberty to bid upon and buy in the corporate property at a receiver's sale thereof, and this can be done by all together, or by one for the benefit of all.⁶ At a sale of partnership property including the good will of the business, either of the partners may become the purchaser in order that the best price may be obtained for the good will.⁷

(3) *Rights of Purchaser Where Sale Invalid.* — Where a receiver's sale is set aside for material error on the part of the receiver as to the quantity and value of the property sold,⁸ or because he had no power to sell,⁹ or where the purchaser rightfully refuses to complete the purchase because of defects in the title,¹⁰ the purchaser is entitled to reimbursement of any money paid

1. *Metropolitan Bank v. New Orleans Brewing Assoc.*, 51 La. Ann. 1525.

Sale for Less than Mortgage Debt. — The court may, it has been held, order a sale of mortgaged property in the hands of its receiver for less than the mortgage debt, subject to the laws regarding the appraisal of property disposed of at judicial sale. *Metropolitan Bank v. New Orleans Brewing Assoc.*, 51 La. Ann. 1525.

Redemption of Property Sold by Receiver. — A creditor of a corporation who recovers judgment against it after the appointment of a receiver has no right to redeem real estate of the corporation sold by the receiver under order of court. *Watkins v. Minnesota Thresher Mfg. Co.*, 41 Minn. 150.

2. *State v. Nebraska Sav., etc., Bank*, 60 Neb. 190.

3. *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52; *Ackerman v. Ackerman*, 50 Neb. 54.

Effect of Confirmation by Court. — Where the receiver advertised and sold after the date fixed by the decree for the sale, it was held that such sale was void, and was not validated by a confirmation by the court over objections. *Ackerman v. Ackerman*, 50 Neb. 54.

Private Instead of Public Sale — Not Binding on Court. — *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

Provision Requiring Public Sale. — Where an order of court in receivership proceedings directs that notice of a sale of property shall be given by advertisement, a public sale is required. *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

Where a Bond Was Delivered, conditioned to

pay to the receiver the price of certain property sold if after confirmation of the sale he would deliver the property to the vendee without requiring immediate payment of the purchase price, it was held that the receiver might enforce the bond, although delivery of the property before payment of the price was in violation of the order of court under which the sale was made. *O'Gorman v. Sabin*, 62 Minn. 46.

4. **Rights and Liabilities of Purchasers.** — *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Barron v. Mullin*, 21 Minn. 374.

5. **Purchase by Directors.** — *Janney v. Minneapolis Industrial Exposition*, 79 Minn. 488; *Chatham Nat. Bank v. McKeen*, 24 Can. Sup. Ct. 348.

6. **Judgment Creditors.** — *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

7. **Member of Firm.** — *Williams v. Wilson*, 4 Sandf. Ch. (N. Y.) 379.

Discretion of Receiver. — Where several persons who are desirous of purchasing receivership property are of equal responsibility, a receiver has no discretion to sell to one at a price lower than that offered by another. *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

For the Right of a Receiver to Buy at His Own Sales, see *infra*, this section, *Profits in Transactions with Receivership Property*.

8. **Invalid Sale — Reimbursement of Purchaser.** — *Horse Springs Cattle Co. v. Schofield*, 9 N. Mex. 130.

9. *Bidwell v. Rice*, 19 Wash. 146.

10. *Drake v. Goodridge*, 6 Blatchf. (U. S.) 151.

by him with interest, together with all costs and expenses properly and reasonably incurred in the premises.

(4) *Notice to Purchasers of Terms of Order.* — Purchasers at receivers' sales are, in general, chargeable with notice of the terms of the decree of sale, so that a sale by the receiver made in violation thereof is not binding on the court or enforceable by the vendee.¹

(5) *Rule of Caveat Emptor.* — Only such title and interest passes on a sale by the receiver as was possessed by the party whose interest is being sold. The rule *caveat emptor* applies, and it is for the purchaser to ascertain what that interest is.² This rule applies, it has been held, to the condition of the property as well as to its title, and in an action for the purchase money it is no defense, in the absence of fraud or misrepresentation, that the property was in defective condition.³ But as a purchaser at a receiver's sale takes only the title which the receiver was authorized to convey, so also a purchaser of a note or other evidence of indebtedness from a receiver succeeds to any immunity against a defense which could not be set up against the receiver.⁴

(6) *Compelling Purchaser to Complete Contract.* — Where a sale has been made by a receiver pursuant to an order of court, the court has jurisdiction to compel the proposed purchaser to perform his part of the contract;⁵ or the receiver may, it has been held, immediately sue the purchaser for the amount of his bid.⁶

c. RECEIVER'S DEED. — The authority to sell conferred by the court upon a receiver carries with it authority to give to the purchaser evidence of a transfer of title, and to execute a proper deed or assignment of the property sold.⁷ It is not a question, in this connection, whether the receiver is himself

1. See *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

2. *Caveat Emptor.* — *Barron v. Mullin*, 21 Minn. 374; *Campbell v. Parker*, 59 N. J. Eq. 342; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Manning v. Monaghan*, 23 N. Y. 544; *Foster v. Barnes*, 81 Pa. St. 377. And see *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

Notice of Provisions of Lease. — Where a leasehold estate, the lease of which is recorded, is disposed of at a receiver's sale, the vendee will be deemed to have purchased with full knowledge of the provisions of the lease. *Brookfield v. Sharp*, 88 Md. 713.

Summary as to Duty of Purchaser. — See *Koontz v. Northern Bank*, 15 Wall. (U. S.) 196.

Estoppel of Claimant to Assert Title. — *McAllister v. Stumpp, etc., Co.*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 438.

3. *Newberry v. Trowbridge*, 13 Mich. 263; *Barron v. Mullin*, 21 Minn. 374.

Acquiescence in Ratification. — Where the purchaser acquiesced in and consented to the ratification of the sale, the fact that another piece of real estate was included in the sale, but was omitted in the deed, is not a defense to an action for the purchase money. *Barron v. Mullin*, 21 Minn. 374.

4. *A Purchaser of the Assets of a Bank* in succeeding to the title of the receiver thereto succeeds also to the benefit of exemption from a defense which would involve the enforcement of an agreement with the bank fraudulent as to its creditors and depositors, where such defense could not be set up in an action by the receiver on an evidence of indebtedness constituting a part of such assets. *Harrington v. Connor*, 51 Neb. 214.

5. *Compelling Completion of Contract.* — *Knee-*

land v. American L. & T. Co., 136 U. S. 89; *Matter of Denison*, 114 N. Y. 621, 22 N. Y. St. Rep. 964.

Right to Rent of Leased Premises Between Date of Sale and Substitution of Purchaser. — See *French v. Pittsburg Vehicle, etc., Co.*, 184 Pa. St. 161.

6. *Hanke v. Blattner*, 34 Ill. App. 394.

Suit to Set Aside Fraudulent Conveyance. — But under an order of court directing a receiver to sue a purchaser for nonpayment of the purchase price agreed on, the receiver is not authorized to bring an action to set aside a fraudulent conveyance of other land made by the purchase-money debtors in order to subject it to the payment of the purchase-money debt. *McAllister v. Harman*, 97 Va. 543.

Defenses to Action Against Purchaser. — In an action by a receiver to enforce the terms of a sale made by him, the purchaser cannot object that the sale has not been reported to the court. *Hanke v. Blattner*, 34 Ill. App. 394.

Misdescription — After Confirmation of Sale. — It has been held that after confirmation of sale and acquiescence therein by the purchaser, such person will not be heard to object that there was a misdescription in the property sold and that he therefore refuses to perform his bid, though such fact might have been a valid objection to a confirmation of the sale. *Barron v. Mullin*, 21 Minn. 374.

7. *Execution of Deed.* — *Koontz v. Northern Bank*, 16 Wall. (U. S.) 196; *Watkins v. Minnesota Thresher Mfg. Co.*, 41 Minn. 150; *Russell v. Texas, etc., R. Co.*, 68 Tex. 646; *Atchison v. Davidson*, 2 Pin. (Wis.) 48.

Transfer of Negotiable Paper — Presumption of Receiver's Authority. — *Atchison v. Davidson*, 2 Pin. (Wis.) 48.

Formalities of Execution. — *Assignments and*

vested with title, but merely whether the court, through its receiver, has power to pass the title of the person or corporation to the property in question;¹ but the receiver should not execute the deed until after confirmation of the sale by the court, because if confirmation were refused, the deed would be inoperative.² Where, however, the receiver executes a deed before confirmation of the sale by the court, the instrument is voidable only and not void, and a subsequent confirmation of the sale removes all objection to the regularity of the deed.³

f. CONFIRMATION OF SALE BY COURT. — Where a sale is made by a receiver it should be reported to the court for confirmation,⁴ the court having entire control and supervision over sales by its receivers, which may be confirmed or rejected at its discretion. And, furthermore, purchasers will be presumed to know that they purchase subject to the court's disapproval of the sale.⁵ A sale of property by a receiver will, in general, be confirmed where it is made on good faith and for the best interests of all concerned;⁶ nor will a resale be ordered for the mere purpose of experimenting to see whether an advance in price cannot be obtained.⁷ But a receiver's sale will be set aside where it is based on material errors as to the amount and value of the property;⁸ and where an advertisement is at variance with the terms of the order of sale in any material respect, a sale made thereunder will not, in general, be confirmed.⁹ So if there has been a fraudulent or collusive sale, the court may, even after confirmation, set it aside if the rights of innocent third parties have not intervened.¹⁰

transfers by receivers of corporations are properly executed by them in their own names without the use of the name of the corporation, or the corporate seal. *Hoyt v. Thompson*, 5 N. Y. 320, *reversing* 3 Sandf. (N. Y.) 416.

Effect of Recitals in Deed. — It has been held that recitals in a receiver's deed of his appointment and the order of sale are not, as against a third person, *prima facie* evidence of his authority to make the conveyance, nor does the court's approval of the deed dispense with proof of the facts recited where their existence is properly in issue. *Lawless v. Stamp*, 108 Iowa 601.

Deed Including More than Receiver Entitled to Convey Void as to Excess. — *McCord v. Whitehead*, 98 Ga. 381.

1. *Russell v. Texas, etc., R. Co.*, 68 Tex. 646, *per* Stayton, J. See also *Hoyt v. Thompson*, 5 N. Y. 338; *Karn v. Rorer Iron Co.*, 86 Va. 754.

Deed or Assignment by Owner of Property. — Where it is necessary in order to vest title in the purchaser of receivership property, the owner thereof may be required to execute an assignment or any other instrument requisite for the purpose. *Habenicht v. Lissak*, 78 Cal. 351, 12 Am. St. Rep. 63.

2. *Koontz v. Northern Bank*, 16 Wall. (U. S.) 196; *Simmons v. Wood*, (Supm. Ct. Spec. T.) 45 How. Pr. (N. Y.) 268.

3. *Koontz v. Northern Bank*, 16 Wall. (U. S.) 196.

4. *Hanke v. Blattner*, 34 Ill. App. 394.

5. *Weeks v. Weeks*, 106 N. Y. 626; *Atty.-Gen. v. Continental L. Ins. Co.*, 94 N. Y. 199.

Completion of Executory Contract. — A court, at its discretion, may refuse to compel a receiver to complete an executory contract of sale. *Knot v. Morris Canal, etc., Co.*, 4 N. J. Eq. 423; *Atty.-Gen. v. Continental L. Ins. Co.*, 94 N. Y. 199.

When Confirmation Not Necessary. — Where a sale by a receiver has been specially author-

ized, and the terms and manner thereof expressed in the order, the sale pursuant thereto and in conformity therewith does not require ratification by the court for its validity. *Matter of Denison*, 114 N. Y. 621, 22 N. Y. St. Rep. 964.

6. *Pocatello First Nat. Bank v. Bunting*, (Idaho 1900) 63 Pac. Rep. 694.

7. See *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

Inadequacy of Price Held Not Valid Objection to Confirmation. — *Parker v. Bluffton Car Wheel Co.*, 108 Ala. 140.

But a Private Sale by a Receiver may be set aside where a material advance over the price received has been offered, and there is reasonable ground for anticipating competition among bidders at a resale. See *South Baltimore Brick, etc., Co. v. Kirby*, 89 Md. 52.

Depreciation of Property Since Sale. — The court will not, at the instance of the purchaser, refuse to confirm a sale of property by a receiver on the ground of delay in the confirmation and depreciation of the property in value since the sale, where the delay in having the report of sale ratified has been due to the acts of the purchaser himself. *Brookfield v. Sharp*, 88 Md. 713.

8. **Material Errors.** — *Horse Springs Cattle Co. v. Schofield*, 9 N. Mex. 136.

Where a receiver sold stock of the par value of twenty-seven thousand dollars for a mere nominal consideration, under the mistaken belief that the stock was practically worthless, whereas by reason of the directors' liability it was probably worth par, it was held that the court, in the exercise of a sound discretion, might properly refuse to confirm the sale. *Atty.-Gen. v. Continental L. Ins. Co.*, 94 N. Y. 199.

9. *Slaughter v. Strother*, 99 Ga. 633.

10. *Koontz v. Northern Bank*, 16 Wall. (U. S.) 196.

g. EFFECT OF SALE UPON EXISTING LIENS. — A sale by a receiver does not affect prior existing liens.¹ The property passes to the purchaser subject to all legal incumbrances, and he may, therefore, contest the validity of all such liens and the amount thereof.² But a purchaser of corporate property at a sale under a decree of foreclosure which recites that the sale shall be made subject to liens established on references before had or then pending cannot dispute the validity of liens thus established.³ Receivers are, however, not infrequently directed to sell receivership property free of all liens and clear of all incumbrances thereon, bringing the proceeds into court, there to remain, subject to the same liens and equities in interest as was the property before it was sold.⁴

h. CLAIMS ARISING OUT OF RECEIVERSHIP. — The court may order that the property shall be subject to debts and liabilities incurred by the receiver in its management. The sale in such case is conditional in its nature, and the purchaser takes it *cum onere*.⁵ And notwithstanding a sale of the property under final decree, the court has power to retain jurisdiction of the cause so as to enforce such claims against the property.⁶ In the absence of such provision, however, the purchaser takes free from claims and debts arising out of the receivership.⁷

Failure to Give Proper Information to Purchasers, Etc. — *Deford v. Macwatty*, 82 Md. 168.

1. Liens Not Affected. — *Richards v. Haliday*, 92 Fed. Rep. 798; *Fitch v. Wetherbee*, 110 Ill. 475; *Cooper v. Corbin*, 105 Ill. 224; *Lorch v. Aultman*, 75 Ind. 162; *Snow v. Winslow*, 54 Iowa 200; *Barron v. Mullin*, 21 Minn. 374; *Hackensack Water Co. v. De Kay*, 36 N. J. Eq. 548; *Manning v. Monaghan*, 23 N. Y. 544; *Lowry v. Smith*, 9 Hun (N. Y.) 514.

2. Hackensack Water Co. v. De Kay, 36 N. J. Eq. 548.

Sale Subject to Trust Deed. — The fact that a sale of receivership property was made expressly subject to a trust deed thereon does not preclude a purchaser from questioning the validity of the deed where its validity had not been put in issue and determined. *Rogers v. Southern Pine Lumber Co.*, 21 Tex. Civ. App. 48.

Objections for Champerty or Maintenance. — A sale by receivers is in the nature of a judicial sale, and is not open to objection on the ground of champerty or maintenance. The statute against buying and selling pretended titles cannot apply. *Hoyt v. Thompson*, 5 N. Y. 320.

3. Suann v. Wright, 110 U. S. 590. See also *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

4. See Mellen v. Moline Malleable Iron Works, 131 U. S. 352; *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 235; *Drake v. Goodridge*, 6 Blatchf. (U. S.) 531; *Bradly v. Marine*, etc., Min., etc., Co., 3 Hughes (U. S.) 26; *Walker v. Morris*, 14 Ga. 323; *Stelzer v. La Rose*, 79 Ind. 435; *Middleton v. New Jersey West Line R. Co.*, 25 N. J. Eq. 306; *Potts v. New Jersey Arms*, etc., Co., 17 N. J. Eq. 395; *Rader v. Southeasterly Road Dist.*, 36 N. J. L. 273; *Battershall v. Davis*, 31 Barb. (N. Y.) 323.

Collateral Securities. — Where a corporation, before going into the hands of receivers, assigned certain leases to a bank as security, and afterwards the receivers, under order of court, sold all the property of the corporation free and clear of incumbrances, it was

held that the assignment of the leases was a mere authority to collect and appropriate the rents due thereon, and that the rents which accrued after the sale belonged to the purchaser. *Corrigan v. Trenton Delaware Falls Co.*, 7 N. J. Eq. 489.

Statutory Authority Requisite. — It has been held, however, that in the absence of a statute giving such power a court has no authority to direct a receiver to sell real estate free from judgment liens thereon. *Lebanon Brewing Co.*, 3 Pa. Dist. 260.

Purchaser's Right to Removal of Liens. — A purchaser of property at a receiver's sale has been held entitled to the removal of liens of attachments levied before the property passed into the hands of the receiver, before he will be compelled to comply with the terms of sale. *Brookfield v. Sharp*, 88 Md. 713.

Taxes. — A purchaser of property at a receiver's sale on which a special tax assessment has become a lien prior to the sale is entitled to have such assessment paid by the receiver from the proceeds of the sale. *Sandheger v. Banner Brewing Co.*, 8 Ohio Dec. 592, 6 Ohio N. P. 410.

5. Sale to Pay Receivership Debts. — *Farmers' L. & T. Co. v. Central R. Co.*, 5 McCrary (U. S.) 421; *Farmers' L. & T. Co. v. Central R. Co.*, 2 McCrary (U. S.) 181; *Davis v. Duncan*, 16 Fed. Rep. 477; *Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 537; *Brown v. Wabash R. Co.*, 96 Ill. 297; *Sloan v. Central Iowa R. Co.*, 62 Iowa 728; *Schmid v. New York*, etc., R. Co., 32 Hun (N. Y.) 335; *Ryan v. Hays*, 62 Tex. 43.

6. Farmers' L. & T. Co. v. Central R. Co., 7 Fed. Rep. 537.

7. Davis v. Duncan, 19 Fed. Rep. 477; *White v. Keokuk*, etc., R. Co., 52 Iowa 97; *Chesapeake*, etc., R. Co. *v. Griest*, 85 Ky. 619; *Bell v. Chicago*, etc., R. Co., 34 La. Ann. 785; *Metz v. Buffalo*, etc., R. Co., 58 N. Y. 61, 17 Am. Rep. 201; *Hicks v. International*, etc., R. Co., 62 Tex. 38; *Ryan v. Hays*, 62 Tex. 42.

But See for a Modification of the Rule, based upon the ground that claimants may follow the corpus of the property where the earnings

16. Profits in Transactions with Receivership Property. — A receiver will not be permitted to deal with the trust estate for his own benefit and advantage,¹ but will be required to account to the receivership fund for all profits made in such transactions.² And the rule, it has been held, prohibiting a receiver from dealing with the trust estate is wholly independent of the question of actual fraud in the transaction.³ A receiver may not, therefore, purchase the receivership property, either at his own sale⁴ or even at a judicial sale under a decree against the receiver and paramount to his title.⁵ At all events, such transaction will be voidable at the election of the beneficiaries of the receivership.⁶

In Some Exceptional Cases, However, where all the parties in interest consent, or the transaction is manifestly fair and for the benefit of the trust estate, the receiver has been permitted to deal with the receivership property as though a stranger to the proceedings.⁷

17. Inventories and Accounts. — One of the first duties of a receiver after his appointment is to make a complete inventory of the property and effects coming into his hands.⁸ He should also keep a fair and accurate account thereof, as well as of all moneys received and expended, so that the court

of the receivership have been diverted to the enhancement of the property, to the extent of such diversion, *Burnham v. Bowen*, 111 U. S. 782; *Mobile, etc., R. Co. v. Davis*, 62 Miss. 271.

A Person Who, at an Unconditional Public Sale made by a receiver under order of court, purchases a land contract and notes for the purchase price, executed to the receiver, is entitled to the contract and notes free from any claims or debts arising out of the receivership. *Emerson v. Schwindt*, 108 Wis. 167.

1. Receiver May Not Act for His Own Profit — *Arkansas*. — *Penzel Grocer Co. v. Williams*, 53 Ark. 81.

Georgia. — *Carr v. Houser*, 46 Ga. 477.

Indiana. — *Herrick v. Miller*, 123 Ind. 304.

Kentucky. — *Ryan v. Morrill*, 83 Ky. 352.

Louisiana. — *Receivership Sheets Lumber Co.*, 52 La. Ann. 1337.

Minnesota. — *Gilbert v. Hewetson*, 79 Minn. 326; *Shadewald v. White*, 74 Minn. 208; *Donahue v. Quackenbush*, 62 Minn. 132.

New York. — *Macdonald v. Trojan Button-Fastener Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 91.

Oregon. — *Thompson v. Holladay*, 15 Oregon 34.

Pennsylvania. — *French v. Pittsburg Vehicle, etc., Co.*, 184 Pa. St. 161.

Texas. — *Hammond v. Atlee*, 15 Tex. Civ. App. 267.

Personal Debt Due to Receiver. — A partner who is a receiver cannot apply the funds of the firm which have come into his hands to the payment of a personal debt due to him by the firm. *Gridley v. Conner*, 2 La. Ann. 87. And see *Receivership Sheets Lumber Co.*, 52 La. Ann. 1337.

2. French v. Pittsburg Vehicle, etc., Co., 184 Pa. St. 161; *Hammond v. Atlee*, 15 Tex. Civ. App. 267. And see *Donahue v. Quackenbush*, 62 Minn. 132.

3. Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751.

4. Purchase by Receiver. — *Alven v. Bond*, 3 Ir. Eq. 365; *Anderson v. Anderson*, 9 Ir. Eq. 23; *Eyre v. McDonnell*, 15 Ir. Ch. N. S. 534; *Penzel Grocer Co. v. Williams*, 53 Ark. 81;

Carr v. Houser, 46 Ga. 477; *Herrick v. Miller*, 123 Ind. 304; *Titherington v. Hodge*, 81 Ky. 286; *Jewett v. Miller*, 10 N. Y. 402, 61 Am. Dec. 751; *Macdonald v. Trojan Button-Fastener Co.*, (Supm. Ct. Gen. T.) 10 N. Y. Supp. 91. And see *Donahue v. Quackenbush*, 75 Minn. 43.

Receiver May Not Purchase as Agent. — *Carr v. Houser*, 46 Ga. 477.

5. Jewett v. Miller, 10 N. Y. 402, 61 Am. Dec. 751.

6. Shadewald v. White, 74 Minn. 208; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

Purchase of Annuity. — When a receiver purchased at an undervaluation an annuity charged on land subject to his receivership, and which it was his duty to collect, the personal representatives of the vendor were held entitled to rescind the sale. *Eyre v. McDonnell*, 15 Ir. Ch. N. S. 534.

7. Exceptional Cases. — *Stannus v. French*, 13 Ir. Eq. 161; *Yetzer v. Applegate*, 85 Iowa 121; *Patterson v. Ward*, 6 N. Dak. 609; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

Appraised Value. — It has been held that a receiver who buys the receivership property at a sale under order of court should be held liable for the appraised value of the property, at least, though the sale is not impeached. *Receivership Sheets Lumber Co.*, 52 La. Ann. 1337.

8. Inventory. — *Hooper v. Winston*, 24 Ill. 365; *Matter of Seaman*, 2 Paige (N. Y.) 409.

Jurisdiction to Order Sale. — It is not, however, necessary that receivership property shall be inventoried in order to give to the court jurisdiction to order a sale thereof. *French v. McCready*, (Tex. Civ. App. 1900) 57 S. W. Rep. 896.

Neglect to Make Inventory — Allowance of Accounts. — The fact that the receiver has neglected his duty to make an inventory of the property which has come into his possession is not ground for refusing to allow his account where no injury has ensued from such neglect. *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271.

may properly consider all claims for compensation and disbursements out of the funds in his charge.¹

XII. JURISDICTION AND CONTROL OVER PROPERTY AND FUNDS — 1. In General.

— When a receiver is appointed he is entitled to take possession and control of the property or funds involved, and to manage and dispose of the same under the direction of the appointing court.² Nor may a person duly appointed receiver turn over to another the control and management of the property and business intrusted to his charge, and any contract or agreement looking to such arrangement is void.³ But the mere order of appointment of a receiver does not, it has been held, in contemplation of law, constitute actual possession of the property.⁴

2. Aid of Court in Obtaining Possession. — In order to obtain possession of property or funds, it is not necessary in any case for the receiver to put himself in a situation where he is not entitled to the full protection of the court. He is under no obligation to attempt to take property out of the possession of a third person, or even out of the possession of the defendant himself by force, and without an express order of the court directing him to do so.⁵ Where property or funds to which the receiver is entitled are withheld from his possession the court will make an order requiring delivery to the receiver.⁶

1. Accounts. — *Bertie v. Abingdon*, 8 Beav. 53; *Adams v. Woods*, 8 Cal. 306; *Akers v. Veal*, 66 Ga. 302; *Mabry v. Harrison*, 44 Tex. 286.

2. Rule to Control over Property — United States. — See *American Constr. Co. v. Jacksonville, etc.*, R. Co., 52 Fed. Rep. 937.

Illinois. — *Miller v. Jones*, 39 Ill. 54.

Indiana. — *Wallace v. Milligan*, 110 Ind. 498.

New Jersey. — *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539.

New York. — *New York, etc., Tel. Co. v. Jewett*, 115 N. Y. 168; *Brush v. Jay*, 113 N. Y. 482; *Jackson v. De Forest*, (Supm. Ct. Spec. T.) 14 How. Pr. (N. Y.) 81; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 135; *Higgins v. Bailey*, 7 Robt. (N. Y.) 613; *Gregory v. Gregory*, 1 Sweeny (N. Y.) 613.

Pennsylvania. — *Wallace v. Yeager*, 4 Phila. (Pa.) 251, 18 Leg. Int. (Pa.) 22.

Wisconsin. — *Noonan v. McNab*, 30 Wis. 277.

Character of Receiver's Possession. — Receivers are not assignees, and the principles of the common law applicable to assignees do not define or determine the character of a receiver's possession or its effect upon the rights of those interested in the property in their possession. *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 268.

Constructive Trust for Benefit of Receiver. — It has been held that where a party conceals property to which a receiver is entitled, he will be deemed to hold it under a constructive trust for the benefit of the receiver. *Reynolds v. Aetna L. Ins. Co.*, 160 N. Y. 635, affirming 28 N. Y. App. Div. 591.

3. Shadewald v. White, 74 Minn. 208.

4. Woodland Bank v. Heron, 120 Cal. 614. And see *Elwell v. Goodnow*, 71 Minn. 390.

Effect of Appointment on Right of Possession. — "It is not considered in every case that the right to the possession is transferred by his appointment, for where the property is real, and there are tenants, the court is virtually the landlord, though the tenants may be compelled to attorn to the receiver." *Booth v. Clark*, 17 How. (U. S.) 331.

5. Parker v. Browning, 8 Paige (N. Y.) 388, 35 Am. Dec. 717.

6. Ordering Delivery of Possession to Receiver — England. — *Griffith v. Griffith*, 2 Ves. 400; *Green v. Green*, 2 Sim. 430.

California. — *Matter of Cohen*, 5 Cal. 496.

Georgia. — *Whitley v. Berry*, 105 Ga. 251;

Charters v. Candler, 94 Ga. 210.

Illinois. — *Miller v. Jones*, 39 Ill. 54. And see *Hancock v. American Bonding, etc., Co.*, 86 Ill. App. 630.

Iowa. — *Brandt v. Allen*, 76 Iowa 50.

Minnesota. — *Elwell v. Goodnow*, 71 Minn. 390.

Missouri. — *Vansandt v. Hobbs*, 84 Mo. App. 628.

New York. — *Deming v. New York Marble Co.*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 66; *People v. Central City Bank*, 53 Barb. (N. Y.) 412; *Weld v. Sage*, 34 N. Y. App. Div. 471; *Iddings v. Bruen*, 4 Sandf. Ch. (N. Y.) 223.

North Carolina. — *Delozier v. Bird*, 125 N. Car. 493, denying rehearing 123 N. Car. 689.

Pennsylvania. — *Yeager v. Wallace*, 44 Pa. St. 294.

Virginia. — *Thornton v. Washington Sav. Bank*, 76 Va. 432.

Wisconsin. — *Geisse v. Beall*, 5 Wis. 224.

Assets in Hands of Partner. — Where a partner makes application for a receiver of the copartnership effects for the purpose of liquidating debts, the court will compel him to pay over to the receiver assets collected by him shortly prior to his application. *Murphy v. Du Berg*, (C. Pl. Spec. T.) 11 Abb. N. Cas. (N. Y.) 112.

Action for Conversion. — A receiver may maintain an action against the judgment debtor, of whose property he is appointed receiver, for a conversion thereof, where the debtor has converted the property since it became vested in the receiver. But for a refusal to surrender a mere possession to which neither the debtor nor the receiver has any legal right, and which the debtor holds only by sufferance, no action will lie by the receiver. *Gardner v. Smith*, 29 Barb. (N. Y.) 68.

But as in any particular action the court has jurisdiction over only the property which is the subject of that litigation, that is the only property which it can authorize its receiver to interfere with or to take into his possession.¹

3. Writ of Assistance. — Where necessary to the proper performance of his functions, or to the securing possession of property, the receiver may obtain a writ of assistance from the court.²

4. Order of Sequestration. — Where a party refuses to deliver over property to a receiver, who is entitled to its custody, the receiver may have an order to sequester property.³

5. Question of Privilege. — There is no privilege exempting a person from surrendering property in his possession to a receiver in obedience to order of court, though such person may be under indictment for stealing or embezzling the same. But such person could not be compelled to make any discovery or disclosure with respect to the fact of his possession of such property which would tend to incriminate.⁴

6. Where Third Person in Possession under Claim of Title. — Where property is in the hands of third persons claiming title, the court will not, in general, order its surrender to the receiver, but will refrain from interference until the question of title has been settled.⁵ And where the defendant is in possession of property, avowedly as the agent of a third person not connected with the litigation, who has *prima facie* title thereto, it has been held improper to order the delivery of such property to the receiver, in advance of a judicial determination of the question of ownership.⁶

7. Receiver's Title — *a.* **AT COMMON LAW.** — At common law the mere appointment of a receiver did not vest him with the legal title of the property coming into his possession or control,⁷ though it has been held that in the view of a court of equity the receiver possessed title by virtue of his appointment to both the real and personal estate of the debtor.⁸ With reference to the title of a receiver, however, the courts of some of the states have distinguished between real and personal estate, holding as to the latter that the mere appointment of the receiver and the taking possession thereof vested him with the legal title thereto,⁹ while a different rule prevailed as to the real

Where the Appointment of a Receiver Is Void for want of jurisdiction, the court has no power to make an order requiring a person, not a party to the proceedings, to pay over to the receiver a deposit made by the receiver with such person. *State v. District Ct.*, 21 Mont. 155, 69 Am. St. Rep. 645.

1. *Kreling v. Kreling*, 118 Cal. 421.

Examination of Parties to Ascertain Possession of Corporate Assets. — For such a proceeding under special code provision, see *Rich v. Sargent Granite Co.*, (Supm. Ct. Spec. T.) 23 Civ. Pro. (N. Y.) 359.

And see also for the examination of a defendant who had failed to obey an order of court to deliver to the receiver his books and papers, *Mathushek Piano Mfg. Co. v. Pearce*, 79 Hun (N. Y.) 417.

2. *Green v. Green*, 2 Sim. 394; *Stephenson v. Giltenau*, 5 Ohio N. P. 419. 8 Ohio Dec. 513. And see 1 ENCYC. OF PL. AND PR. 975.

3. *People v. Rogers*, 2 Paige (N. Y.) 103. And see 19 ENCYC. OF PL. AND PR. 540.

4. *Tolleson v. Greene*, 83 Ga. 499.

5. **Dispute About Title.** — *Musgrove v. Gray*, 123 Ala. 376; *Coleman v. Salisbury*, 52 Ga. 470; *Levi v. Karrick*, 13 Iowa 344; *Brown v. Gilmore*, (Supm. Ct.) 16 How. Pr. (N. Y.) 527; *Cassilear v. Simons*, 8 Paige (N. Y.) 273; *Parker v. Browning*, 8 Paige (N. Y.) 388, 35

Am. Dec. 717; *Robeson v. Ford*, 3 Edw. (N. Y.) 441; *Gelpeke v. Milwaukee, etc., R. Co.*, 11 Wis. 454.

Suit by Receiver with Consent of Court. — If a third person, not a party to the proceedings in equity, withholds the property, suit may be brought by the receiver with the consent of the court. *Yeager v. Wallace*, 44 Pa. St. 294.

6. *Rodman v. Henry*, 17 N. Y. 482.

Property in Hands of Assignee. — *Coleman v. Salisbury*, 52 Ga. 470.

Mortgagor in Possession — Default in Mortgage. — *Gardner v. Smith*, 29 Barb. (N. Y.) 68.

7. Common-law Rule as to Receiver's Title. — *Union Trust Co. v. Weber*, 96 Ill. 355; *Chicago Fire-Proofing Co. v. Park Nat. Bank*, 44 Ill. App. 150, *affirmed* on another point 145 Ill. 481; *Thomas v. Van Meter*, 164 Ill. 304; *Hefron v. Gage*, 149 Ill. 182; *Kirkpatrick v. Corning*, 37 N. J. Eq. 59; *State Bank v. Plainfield First Nat. Bank*, 34 N. J. Eq. 456; *Higgins v. Gillesheiner*, 26 N. J. Eq. 308; *Willink v. Morris Canal, etc., Co.*, 4 N. J. Eq. 400.

8. *Mann v. Pentz*, 2 Sandf. Ch. (N. Y.) 257.

Equitable Title and Right to Possession. — *Atty.-Gen. v. Atlantic Mut. L. Ins. Co.*, 100 N. Y. 279.

9. Personal Property. — *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Moak v. Coats*,

estate, a conveyance to the receiver being necessary to vest in him the legal title.¹

b. RULE BY STATUTE — (1) In General. — Under various state statutes relating to the appointment of receivers for corporations, or the appointment of receivers in proceedings supplementary to execution, it has been held that the receiver takes title to both the real and personal property merely by virtue of the order of his appointment.²

(2) *Receivers Pendente Lite.* — But receivers *pendente lite*, appointed merely as custodians to hold the property until the determination of the suit, do not, it has been held, acquire title thereto.³

c. CONVEYANCE OR ASSIGNMENT TO RECEIVER. — It is well settled that wherever necessary or desirable the court may compel the owner of property for which a receiver has been appointed to execute a conveyance or assignment thereof to the receiver.⁴

d. PATENTS. — The legal title to a patent does not pass to the receiver of an insolvent debtor.⁵ The general rule is, therefore, that a receiver cannot convey the legal title to a patent, unless the owner of the legal title joins in the conveyance.⁶ But this rule does not apply to the transfer of a mere equitable title to a patent.⁷

33 Barb. (N. Y.) 498; Wilson v. Allen, 6 Barb. (N. Y.) 542; Cagger v. Howard, 1 Barb. Ch. (N. Y.) 368; McEwen v. Brewster, 19 Hun (N. Y.) 337; Scott v. Elmore, 10 Hun (N. Y.) 68; People v. Hulburt, (Supm. Ct. Gen. T.) 5 How. Pr. (N. Y.) 446; Porter v. Williams, (Supm. Ct.) 5 How. Pr. (N. Y.) 441; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 252; Storm v. Waddell, 2 Sandf. Ch. (N. Y.) 505; Albany City Bank v. Schermerhorn, Clarke (N. Y.) 297.

1. Real Property. — St. Louis, etc., Coal, etc., Co. v. Sandoval Coal, etc., Co., 111 Ill. 32; Chautauque County Bank v. Risley, 19 N. Y. 369; Moak v. Coats, 33 Barb. (N. Y.) 498; Wilson v. Wilson, 1 Barb. Ch. (N. Y.) 592; Wing v. Disse, 15 Hun (N. Y.) 190; Scott v. Elmore, 10 Hun (N. Y.) 68; Chautauque County Bank v. White, 6 N. Y. 236; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257.

2. Statutory Rule — United States. — American Nat. Bank v. National Ben., etc., Co., 70 Fed. Rep. 420.

Massachusetts. — Atlas Bank v. Nahant Bank, 23 Pick. (Mass.) 480.

New Jersey. — Falk v. Whitman Cigar Co., 55 N. J. Eq. 396. And see Wilkinson v. Rutherford, 49 N. J. L. 242; Minchin v. Pater-son Second Nat. Bank, 36 N. J. Eq. 439; Cor-rigan v. Trenton Delaware Falls Co., 7 N. J. Eq. 489.

New York. — Atty.-Gen. v. Atlantic Mut. L. Ins. Co., 100 N. Y. 279; Powell v. Wal-dron, 89 N. Y. 331; Osgood v. Maguire, 61 N. Y. 524; Bostwick v. Menck, 40 N. Y. 383; Moak v. Coats, 33 Barb. (N. Y.) 498; Porter v. Williams, (Supm. Ct.) 5 How. Pr. (N. Y.) 441; People v. Hulburt, (Supm. Ct. Gen. T.) 5 How. Pr. (N. Y.) 446; Manning v. Evans, 19 Hun (N. Y.) 500; Wing v. Disse, 15 Hun (N. Y.) 190; Bank Com'rs v. Buffalo Bank, 6 Paige (N. Y.) 503; Verplanck v. Mercantile Ins. Co., 1 Edw. (N. Y.) 46; Moyer v. Moyer, 7 N. Y. App. Div. 523; Porter v. Williams, 9 N. Y. 142.

Death of Debtor Pending Appointment. — But where, pending the appointment of a receiver in supplementary proceedings the debtor dies,

it has been held that the receiver acquires no title to the debtor's property, but that the debtor's estate must be administered accord-ing to the statute for the distribution of de-ce-dents' estates. Rankin v. Minor, 72 N. Car. 424.

3. Title of Receiver Pendente Lite. — Union Trust Co. v. Weber, 96 Ill. 348; Shady v. Van Kirk, 51 N. Y. App. Div. 504; Felter v. Maddock, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 297; Matthews v. Cooper, 66 Hun (N. Y.) 626, 21 N. Y. Supp. 71; Devlin v. New York, (C. Pl. Gen. T.) 4 Misc. (N. Y.) 106.

4. Compelling Conveyance to Receiver — United States. — Hogg v. Hoag, 80 Fed. Rep. 595; Tomlinson, etc., Mfg. Co. v. Shatto, 34 Fed. Rep. 380.

Illinois. — Heffron v. Gage, 149 Ill. 182; Union Trust Co. v. Weber, 96 Ill. 346; Atkin-son v. Foster, 27 Ill. App. 63.

Minnesota. — Towne v. Campbell, 35 Minn. 231.

New York. — Chautauque County Bank v. Risley, 19 N. Y. 369; Chautauque County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442; Graham v. Lawyers' Title Ins. Co., 20 N. Y. App. Div. 440; Hudson v. Plets, 11 Paige (N. Y.) 180; Chipman v. Sabbaton, 7 Paige (N. Y.) 47; Fitzburgh v. Everingham, 6 Paige (N. Y.) 29; Cagger v. Howard, 1 Barb. Ch. (N. Y.) 368; Green v. Winter, 1 Johns Ch. (N. Y.) 60; Iddings v. Bruen, 4 Sandf. Ch. (N. Y.) 223; Mann v. Pentz, 2 Sandf. Ch. (N. Y.) 257; Fincke v. Funke, 25 Hun (N. Y.) 616; Albany City Bank v. Schermerhorn, Clarke Ch. (N. Y.) 297; Weller v. J. P. Pace Tobacco Co., (Supm. Ct. Spec. T.) 2 N. Y. Supp. 292.

Rhode Island. — Arnold's Petition, 15 R. I. 15.

After a Conveyance of Land to a Receiver under order of court, a judgment obtained against the debtor does not bind the land. Chautau-que County Bank v. White, 6 N. Y. 236, 57 Am. Dec. 442.

5. See the title PATENTS, vol. 22 p. 430. See also Newton v. Buck, 72 Fed. Rep. 777.

6. Gordon v. Anthony, 16 Blatchf. (U. S.) 234; Newton v. Buck, 72 Fed. Rep. 777.

7. Adams v. Howard, 22 Fed. Rep. 656.

A Mere License to Manufacture or Use a patented invention is personal to the licensee,¹ and the receiver of a firm to which such a license has been granted will not succeed to the firm's right.²

e. AFTER-ACQUIRED PROPERTY — INCHOATE RIGHTS, ETC. — The general rule is that a receiver takes no title to property acquired by the debtor or person formerly in possession, subsequent to the appointment.³ And even where a statute provided that on the appointment of a receiver in supplementary proceedings he became entitled to the property and things in action of the judgment debtor, "at the time of issuing said execution or at any time afterwards," it was held that a receiver was not entitled to recover a debt not in existence at the time of his appointment.⁴ But property due a judgment debtor by the terms of a will probated prior to the receiver's appointment is not property "subsequently acquired" under a statute providing that a receiver shall take no title to after-acquired property.⁵ Mere contingent or inchoate rights do not pass to a receiver.⁶

f. PROPERTY IN CUSTODIA LEGIS. — It has been held that where property is already in the custody of the law a receiver will, in general, take no title thereto.⁷ But by statute in some jurisdictions a receiver may be appointed to preserve and sell attached property.⁸ And where the property of a corporation was in danger of being greatly impaired in value by reason of the expiration of its franchise within a short time unless certain operations were completed, it was held that the fact that the property of the corporation was in the possession of the sheriff under execution would not prevent the appointment of a receiver therefor.⁹

g. PROPERTY EXEMPT FROM EXECUTION. — The receiver has no title to property which is by law exempt from levy and sale under execution,¹⁰ nor to the proceeds of insurance policies upon, nor to rights of action for injury to,

1. See the title *PATENTS*, vol. 22, p. 435. See also *Waterman v. Shipman*, (C. C. A.) 55 Fed. Rep. 982. And see *Oliver v. Rumford Chemical Works*, 109 U. S. 82.

2. *Curran v. Craig*, 22 Fed. Rep. 101.

But in *Matter of Woven Tape Skirt Co.*, 12 Hun (N. Y.) 111, it was held that where a corporation was a part owner of a patent with the exclusive right to manufacture patented articles, such right and patent vested in the receiver as assets of the corporation.

3. *After-acquired Property.* — *Willison v. Salmon*, 45 N. J. Eq. 257; *Norcross v. Hollingsworth*, 83 Hun (N. Y.) 127; *Crane v. Beecher*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 225; *Gabert v. Olcott*, (Tex. Civ. App. 1893) 22 S. W. Rep. 286. And see *Graff v. Bonnett*, 31 N. Y. 9, 88 Am. Dec. 236; *Campbell v. Genet*, 2 Hilt. (N. Y.) 290; *Rankin v. Minor*, 72 N. Car. 424.

Future Income from Trust Property. — *Continental Trust Co. v. Wetmore*, 67 Hun (N. Y.) 9.

Possession of Mortgagor's After-acquired Property. — Where the order appointing a receiver of mortgaged property provided that it was without prejudice to any proceedings in insolvency and that the assets of the mortgagor should be preserved for the benefit of all persons entitled thereto, it was held that possession by the receiver of the mortgagor's after-acquired property was not possession by the mortgagee, which would render the mortgage effective as to such property against subsequently appointed assignees in insolvency of the mortgagor. *Harriman v. Woburn Electric Light Co.*, 163 Mass. 85.

4. *Guild v. Meyer*, 56 N. J. Eq. 183.

5. *Crane v. Beecher*, (Supm. Ct. Gen. T.) 6 N. Y. Supp. 227.

6. *Contingent Rights.* — *Willison v. Salmon*, 45 N. J. Eq. 257; *Gibney v. Reilly*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 275.

Rule as to Insurance Policies. — Where a receiver of a judgment debtor has taken into his possession life endowment policies payable to the debtor, such receiver is entitled to the full amount due thereon when the policies become payable, if necessary to pay the judgment, and not merely the surrender value of the policies at the time of his appointment. *Reynolds v. Etna L. Ins. Co.*, 160 N. Y. 635, *affirming* 28 N. Y. App. Div. 591.

7. *Property in Custodia Legis.* — *Williams v. Dismukes*, 106 Ala. 402. And see *Sackhoff v. Vandegrift*, 98 Ala. 192.

8. *Diamond Coal Co. v. Carter Dry Goods Co.*, (Ky. 1899) 49 S. W. Rep. 438.

Funds in Hands of Clerk of Court. — *Ahlhauser v. Doud*, 74 Wis. 400.

9. *Boston Invest. Co. v. Pacific Short Line Bridge Co.*, 104 Iowa 311.

10. *Property Exempt from Execution.* — *Barfield v. Barfield*, 72 Ga. 670; *Laune v. Hauser*, 58 Neb. 663; *Chadron Loan, etc., Assoc. v. Smith*, 58 Neb. 469, 76 Am. St. Rep. 108; *Tillotson v. Wolcott*, 48 N. Y. 188; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524; *Cagger v. Howard*, 1 Barb. Ch. (N. Y.) 368; *Sands v. Roberts*, (C. Pl.) 8 Abb. Pr. (N. Y.) 343; *Andrews v. Rowan*, (Supm. Ct. Gen. T.) 28 How. Pr. (N. Y.) 126; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382; *Hudson v. Plets*, 11 Paige (N. Y.) 180; *Fitzburgh v. Everingham*, 6 Paige (N. Y.) 29; *Moyer v. Moyer*, 7 N. Y. App. Div. 523.

such exempt property.¹ So it has been held that the remedy of appointment of a receiver in foreclosure is not, in general, applicable where the mortgaged property is the debtor's homestead.² But where a judgment debtor is only entitled to an exemption to the extent of a portion of a debt due him, the appointment of a receiver of the entire debt, directing that the proceeds thereof be held subject to the order of the court, is not erroneous.³

h. BOOKS AND PAPERS. — A receiver should take into his possession and control all books of account and papers and documents relating to the property or business necessary for the proper and intelligent discharge of his duties.⁴ The receiver of a corporation may be compelled to allow stockholders to examine the corporate books.⁵ But where the books in possession of a receiver contain matters not relevant to the issues in the case, a disclosure of which might be injurious to interests not involved in the suit, they should be protected by the court.⁶

8. Liability of Receivership Property to Judicial Process — *a. IN GENERAL* — The general rule is that property in the hands of a receiver is exempt from judicial process, except, of course, so far as permitted by the appointing court.⁷ And even though an attachment was levied on property before the appointment of the receiver, it is within the sound discretion of the appointing court to refuse to permit a sale of the property thereunder.⁸ So, also, a judgment decreeing the foreclosure of a mortgage in certain property and

1. *Sands v. Roberts*, (C. Pl.) 8 Abb. Pr. (N. Y.) 343; *Cooney v. Cooney*, 65 Barb. (N. Y.) 524.

2. *Laune v. Hauser*, 58 Neb. 663; *Chadron Loan, etc., Assoc. v. Smith*, 58 Neb. 469, 76 Am. St. Rep. 108.

3. *Globe Phosphate Co. v. Pinson*, 52 S. Car. 185.

4. *Books and Documents.* — *Davidge v. Coe*, 54 N. Y. Super. Ct. 360.

5. *People v. Cataract Bank*, (Supm. Ct. Spec. T.) 5 Misc. (N. Y.) 14.

6. *Haught v. Irwin*, 166 Pa. St. 548.

For the Protection of Private Papers in Receiver's Hands by Private Examination by Master, see *Potter v. Beal*, 49 Fed. Rep. 793, *distinguishing* *Boyd v. U. S.*, 116 U. S. 616.

7. *Exemption from Judicial Process Generally* — *England.* — *De Winton v. Brecon*, 28 Beav. 200; *Try v. Try*, 13 Beav. 422; *Lane v. Sterne*, 3 Giff. 629.

United States. — *In re Tyler*, 149 U. S. 164; *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Schenk v. Peay*, 1 Dill. (U. S.) 267; *Virginia, etc., Steel, etc., Co. v. Bristol Land Co.*, 88 Fed. Rep. 134.

Alabama. — *Dugger v. Collins*, 69 Ala. 324.

Arkansas. — *Walker v. George Taylor Commission Co.*, 56 Ark. 1.

Connecticut. — *Cooke v. Orange*, 48 Conn. 401; *Blake Crusher Co. v. New Haven*, 46 Conn. 473.

Georgia. — *Field v. Jones*, 11 Ga. 413.

Illinois. — *Jackson v. Lahee*, 114 Ill. 287; *Richards v. People*, 81 Ill. 551.

Indiana. — *Premier Steel Co. v. McElwaine-Richards Co.*, 144 Ind. 614.

Iowa. — *McGowan v. Myers*, 66 Iowa 99.

Kentucky. — *Hazelrigg v. Bronaugh*, 78 Ky. 62.

Massachusetts. — *Com. v. Hide, etc., Ins. Co.*, 119 Mass. 155; *Columbian Book Co. v. De Golyer*, 115 Mass. 67.

Montana. — *Gardner v. Caldwell*, 16 Mont. 221.

New Jersey. — *Higgins v. Gillesheiner*, 26 N. J. Eq. 308.

New York. — *Rogers v. Corning*, 44 Barb. (N. Y.) 229; *Smith v. McNamara*, 15 Hun (N. Y.) 447; *Martin v. Black*, 9 Paige (N. Y.) 641, 38 Am. Dec. 574; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Gouverneur v. Warner*, 2 Sandf. (N. Y.) 624. And see *Smith v. Davis*, 63 Hun (N. Y.) 100.

North Carolina. — *Skinner v. Maxwell*, 68 N. Car. 400.

Pennsylvania. — *Thompson v. McCleary*, 159 Pa. St. 189; *Robison v. Atlantic, etc., R. Co.*, 66 Pa. St. 160; *Com. v. Young*, 11 Phila. (Pa.) 606, 33 Leg. Int. (Pa.) 160.

Rhode Island. — *Chafee v. Quidnick Co.*, 13 R. I. 442.

Tennessee. — *Jones v. Moore*, 106 Tenn. 188; *Burke v. Ellis*, 105 Tenn. 702.

Texas. — *French v. McCready*, (Tex. Civ. App. 1900) 57 S. W. Rep. 894; *Southwestern Invest. Co. v. Crawford*, 16 Tex. Civ. App. 475; *Hammond v. Tarver*, 11 Tex. Civ. App. 48; *Harrison v. Waterberry*, (Tex. 1894) 27 S. W. Rep. 109; *Edwards v. Norton*, 55 Tex. 405; *Taylor v. Gillean*, 23 Tex. 508.

Court Will Not Surrender Receivership Assets. — *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344.

Where Appointment Irregular. — It has been held that the possession of a receiver may not be disturbed by process issuing from another court, although the appointment of the receiver is in some respects irregular and imperfect. *Shields v. Coleman*, 157 U. S. 168.

Inhibition to Suitors Not Other Courts. — Inhibitions by courts appointing receivers are never addressed to other courts, but to the suitor personally. *Burke v. Ellis*, 105 Tenn. 702.

8. *Southwestern Invest. Co. v. Crawford*, 16 Tex. Civ. App. 475. Compare *Moran v. Sturges*, 154 U. S. 256.

Seizure and Sale for Taxes. — *In re Tyler*, 149 U. S. 164.

ordering that the bill of sale of the property given at the time of the mortgage be canceled, is void when rendered after the appointment of a receiver for all of the property of the vendee in the bill of sale.¹

b. SALE UNDER EXECUTION. — Property in the hands of a receiver, though subject to a paramount judgment, cannot be sold under execution without leave of court,² and a purchaser of such property at an execution sale acquires no title.³ Nor does it make any difference that the particular person appointed receiver declines to act, as the property is nevertheless in the custody of the law.⁴

Levy Prior to Receivership. — Courts will not ordinarily permit property in the hands of a receiver, even where there has been a valid levy prior to the appointment, to be sold under execution, for the reason that by such means the property in the possession of the court will be dissipated, and the court deprived of jurisdiction to administer it.⁵ The usual course is, after adjudging the lien, to leave the property in the hands of the receiver, directing him to sell it in the usual course of the receivership.⁶ But the court appointing the receiver may, if it sees fit, grant leave to the creditor to proceed and sell upon execution. It is a mere matter of the most advantageous administration of the assets.⁷

Where Possession Not Disturbed. — According to the doctrine of some cases, property in the hands of a receiver may be levied upon and sold, so long as the actual possession of the receiver is not interfered with.⁸ But the soundness of this view has been denied.⁹

Levy on Judgment. — Of course, however, the appointment of a receiver for the property of a judgment debtor does not prevent a levy upon and sale under execution of judgments against such debtor as the property of the judgment creditor, such levies and sales in no way interfering with the performance of his official duties by the receiver of the property of the judgment debtor.¹⁰

9. Receiver's Rights Subject to Existing Liens — *a. GENERAL RULE.* — The appointment of a receiver for property does not affect pre-existing liens upon the property, or vested rights or interests of third persons therein.¹¹ And the

1. *French v. McCready*, (Tex. Civ. App. 1900) 57 S. W. Rep. 894.

2. **Execution Sale.** — *Wiswall v. Sampson*, 14 How. (U. S.) 52; *In re Hall, etc.*, Co., 73 Fed. Rep. 527; *Adams v. Haskell*, 6 Cal. 113, 65 Am. Dec. 491; *Jackson v. Lahee*, 114 Ill. 287; *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837; *Skinner v. Maxwell*, 68 N. Car. 400; *Robinson v. Atlantic, etc.*, R. Co., 66 Pa. St. 160; *Edwards v. Norton*, 55 Tex. 405.

Execution Before Formal Discharge. — But if the title to real estate in the receiver's possession be contested, and be finally vested in one of the parties by decree of the court, it is liable to execution, though not formally discharged from the receiver's custody. *Very v. Watkins*, 23 How. (U. S.) 469.

3. *Skinner v. Maxwell*, 68 N. Car. 400; *Robinson v. Atlantic, etc.*, R. Co., 66 Pa. St. 160; *Edwards v. Norton*, 55 Tex. 405.

Retaining Property for Special Purpose. — But by merely retaining jurisdiction of property after a receiver's sale thereof for the purpose of compelling satisfaction of certain claims by the purchaser of the property, the purchaser going into possession and assuming control of the property, the court does not retain custody thereof in the sense that a sale thereof under execution will be invalid. *Farmers', etc., Nat. Bank v. Scott*, 19 Tex. Civ. App. 22.

4. *Skinner v. Maxwell*, 68 N. Car. 400.

5. **Prior Levy.** — *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Cass v. Sutherland*, 98 Wis. 551; *Ballin v. Merchants Exch. Bank*, 89 Wis. 278, 46 Am. St. Rep. 834; *Ballin v. Loeb*, 78 Wis. 404.

6. *Cass v. Sutherland*, 98 Wis. 551.

7. *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Cass v. Sutherland*, 98 Wis. 551.

8. *Albany City Bank v. Schermerhorn*, 9 Paige (N. Y.) 372, 38 Am. Dec. 551.

9. *Wiswall v. Sampson*, 14 How. (U. S.) 52; *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837.

10. *Wheaton v. Spooner*, 52 Minn. 417.

11. **Effect upon Existing Liens** — *United States*. — *Kneeland v. American L. & T. Co.*, 136 U. S. 89; *Georgia v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 434; *Auten v. City Electric St. R. Co.*, 104 Fed. Rep. 395; *McRae v. Bowers Dredging Co.*, 86 Fed. Rep. 344; *Scott v. Farmers' L. & T. Co.*, (C. C. A.) 69 Fed. Rep. 17; *Philler v. Yardley*, (C. C. A.) 62 Fed. Rep. 645; *Risk v. Kansas Trust, etc., Co.*, 58 Fed. Rep. 45; *Cole v. Oil-Well Supply Co.*, 57 Fed. Rep. 534; *Ex p. Chamberlain*, 55 Fed. Rep. 704.

Alabama. — *McCullough v. Jones*, 91 Ala. 186.

California. — *Woodland Bank v. Heron*, 120

same is true whether the receiver claims by virtue of his appointment alone, or under a conveyance or assignment executed to him by the debtor in aid thereof,¹ or whether the lien or right or interest in question has its origin in contract, or arises by operation of law.² A receiver, it is held, succeeds to

Cal. 614; *Von Roun v. Superior Ct.*, 58 Cal. 358.

Georgia. — *Weihl v. Atlanta Furniture Mfg. Co.* 89 Ga. 297; *Ferris v. Van Ingen*, 110 Ga. 102; *South Carolina R. Co. v. People's Sav. Inst.*, 64 Ga. 18.

Illinois. — *Rickert v. Suddard*, 184 Ill. 149; *Union Trust Co. v. Weber*, 96 Ill. 346; *Pease v. Smith*, 63 Ill. App. 411. And see *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155.

Indiana. — *American Trust, etc., Bank v. McGettigan*, 152 Ind. 582, 71 Am. St. Rep. 345; *Totten, etc., Iron, etc., Foundry Co. v. Muncie Nail Co.*, 148 Ind. 372; *J. W. Dann Mfg. Co. v. Parkhurst*, 125 Ind. 317; *Lorch v. Aultman*, 75 Ind. 162.

Iowa. — *Gallagher v. Gingrich*, 105 Iowa 237; *Kimball v. Gafford*, 78 Iowa 65; *Snow v. Winslow*, 54 Iowa 200.

Maryland. — *Farmers Bank v. Beaton*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

Massachusetts. — *Kittridge v. Osgood*, 161 Mass. 384; *Hubbard v. Hamilton Bank*, 7 Met. (Mass) 340.

Michigan. — *Baldwin v. Hosmer*, 101 Mich. 119, 432.

Minnesota. — *Matter of Shakopee Mfg. Co.*, 37 Minn. 91.

Nebraska. — *Arnold v. Weimer*, 40 Neb. 216; *Arnold v. Globe Invest. Co.*, 40 Neb. 225.

New Jersey. — *Miller v. Savage*, 60 N. J. Eq. 204; *Kuser v. Wright*, 52 N. J. Eq. 825.

New York. — *Corn Exch. Bank v. Blye*, 101 N. Y. 303; *Davenport v. Kelly*, 42 N. Y. 193; *Becker v. Torrance*, 31 N. Y. 631; *Van Alstyne v. Cook*, 25 N. Y. 489; *Chautauque County Bank v. Risley*, 19 N. Y. 369; *Schenck v. Consumers' Coal Co.*, (Supm. Ct. Spec. T.) 26 Abb. N. Cas. (N. Y.) 356; *Badger v. Sutton*, 30 N. Y. App. Div. 204; *Harris v. Taylor*, 22 N. Y. App. Div. 109; *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415; *Matter of Muehlfeld, etc., Piano Co.*, 12 N. Y. App. Div. 492; *Bowling Green Sav. Bank v. Todd*, 64 Barb. (N. Y.) 146; *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 553; *Rich v. Loutrel*, (Supm. Ct. Spec. T.) 18 How. Pr. (N. Y.) 121; *Matter of North American Gutta Percha Co.*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 549; *Gere v. Dibble*, (Supm. Ct. Gen. T.) 17 How. Pr. (N. Y.) 31; *Sayles v. National Water Purifying Co.*, 62 Hun (N. Y.) 618, 16 N. Y. Supp. 555; *Wilkinson v. Paddock*, 57 Hun (N. Y.) 191; *Spencer v. Berdell*, 45 Hun (N. Y.) 179; *Nealis v. Insley*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 742; *Matter of Pond*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 114; *Bailey v. O'Mahony*, 33 N. Y. Super. Ct. 239; *Deady v. Fink*, (N. Y. City Ct. Tr. T.) 24 N. Y. St. Rep. 734; *Waring v. Robinson*, Hoffm. (N. Y.) 524; *Lawrence v. Conlon*, (Supm. Ct. Spec. T.) 26 Misc. (N. Y.) 44; *People v. U. S. Law Blank, etc., Co.*, (Supm. Ct. Spec. T.) 24 Misc. (N. Y.) 535; *Matter of Gres Lith. Co.*, 7 N. Y. App. Div. 550; *Matter of Christie Mfg. Co.*, (Supm. Ct. Spec. T.) 15 Misc. (N. Y.) 588; *Matter of Lewis, etc., Mfg. Co.*, 89 Hun (N. Y.) 208; *Glines v.*

Supreme Sitting, etc., (Supm. Ct. Gen. T.) 21 N. Y. Supp. 736; *National Park Bank v. Goddard*, (Supm. Ct. Gen. T.) 20 N. Y. Supp. 499; *Metcalf v. Del Valle*, 64 Hun (N. Y.) 245; *McCorkle v. Herrmann*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 881. And see *Matter of Hone*, 153 N. Y. 522; *McCorkle v. Herrman*, 117 N. Y. 297; *Finnin v. Malloy*, 33 N. Y. Super. Ct. 382; *Myers v. Myers*, 15 N. Y. App. Div. 448.

North Carolina. — *Pelletier v. Greenville Lumber Co.*, 123 N. Car. 596, 68 Am. St. Rep. 837; *Battery Park Bank v. Western Carolina Bank*, 127 N. Car. 432. And see *Rodman v. Harvey*, 102 N. Car. 1.

Pennsylvania. — *Wilt v. Reed Electric Co.*, 187 Pa. St. 424; *Lane v. Washington Hotel Co.*, 190 Pa. St. 230; *Com. v. Order of Vesta*, 156 Pa. St. 531; *Hays v. Lycoming F. Ins. Co.*, 99 Pa. St. 621; *Malaney v. Mears*, 5 Pa. Dist. 420, 2 Lack. Leg. N. (Pa.) 77.

Tennessee. — *Conley v. Deere*, 11 Lea (Tenn.) 274.

Texas. — *Eck v. Warner*, (Tex. Civ. App. 1901) 60 S. W. Rep. 799; *Florsheim Bros. Dry Goods Co. v. Wettermark*, 10 Tex. Civ. App. 102.

Virginia. — And see *Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co.*, 86 Va. 1, 19 Am. St. Rep. 858.

Washington. — *Cherry v. Western Washington Industrial Exposition Co.*, 11 Wash. 586; *State v. Graham*, 9 Wash. 528; *State v. Superior Ct.*, 7 Wash. 77; *State v. Superior Ct.*, 8 Wash. 210.

Wisconsin. — *Garden City Banking, etc., Co. v. Geilfuss*, 86 Wis. 612.

Property in Possession of but Not Owned by Debtor. — A receiver of an insolvent bank acquires no right to property in the custody of the bank which it does not own, as against the owner. *Corn Exch. Bank v. Blye*, 101 N. Y. 303.

Effect of Knowledge of Insolvency. — An attaching creditor will not be deprived of his lien because at the time the writ was issued he knew that the corporation was insolvent. *White, etc., Mfg. Co. v. Pettes Importing Co.*, 30 Fed. Rep. 864.

Lien Originating in Violation of Injunction. — *Farmers L. & I. Co. v. Bankers, etc., Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690.

1. *Meeker v. Sprague*, 5 Wash. 242.

2. See *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

Water Rights Appurtenant to Land. — *Atlantic Trust Co. v. Woodbridge Canal, etc., Co.*, 86 Fed. Rep. 975.

Rights of Common. — *Johnes v. Claughton*, Jac. 573.

Rights of Debtor's Vendee. — Where, before an insolvent corporation passed into the hands of a receiver, certain goods already manufactured by it had been paid for, and nothing remained to be done but to ship them according to the direction of the buyer, it was held that the receiver should be ordered to deliver the goods according to contract. *Bates v.*

only such right, title, and interest in the property as the individual or corporation for which he is appointed receiver had at the time the appointment was made. The receiver takes his title to the property subject to all the equities to which it was subject in the hands of the debtor.¹

Contribution to Expenses for Preservation of Property. — Property on which there are liens is, nevertheless, while in the hands of a receiver, liable for its proper proportion of the expenses necessary to protect the property or to change it into money for the lienor's benefit.² But it has been held that a lien on receivership property, continued upon the proceeds when sold, cannot be subordinated, against the consent of the lienor, to the fees and expenses of the receiver incurred in continuing the business by authority of court, where such expenses will exhaust the fund.³

Appointment Conditional upon Payment of Unsecured Debts. — It is not, as a rule, proper for a court to make a receivership for the purpose of enforcing mortgage liens conditional on the payment of unsecured claims which have no equitable priority over the mortgage debt.⁴

b. PROPERTY HELD SUBJECT TO LIENS. — Where property on which there are prior liens has come into the possession of a receiver, the receiver must hold and dispose of the same subject to such liens.⁵ So money coming into the receiver's hands from the sale of property upon which liens have attached will, for the purpose of determining the priority of liens thereon, be treated as the property itself.⁶

c. DISTURBANCE OF RECEIVER'S POSSESSION. — But persons having liens on the property for which a receiver is appointed have no right to interfere with the receiver's possession thereof.⁷

d. SALES UNDER EXECUTION — FORECLOSURE, ETC. — Although, it has been held, receivers take property subject to judgment liens thereon, permission will not be given to levy execution on the property in the absence of some urgent necessity for such a course. Instead the receiver will be instructed to administer the estate and distribute the proceeds with due regard to the priority of claims.⁸ But a party who has obtained a judgment

Elmer Glass Mfg. Co., (N. J. 1888) 14 Atl. Rep. 273. But see *Henika v. Heinemann*, 90 Wis. 478.

Sale of Mortgaged Property. — Where a mortgagee takes possession of property and sells it under the mortgage to a *bona fide* purchaser before a creditor of the mortgagor has acquired any lien upon or interest in the property by virtue of legal proceedings, such purchaser obtains a valid title which he can maintain against a receiver of the property of the mortgagor appointed in proceedings supplementary to execution instituted upon a judgment recovered against him. *Merry v. Wilcox*, 92 Hun (N. Y.) 210.

Landlord's Claim for Rent. — The rents which came from the under tenants of a judgment debtor into the hands of a receiver are not subject to distribution among the creditors until the claim of the original landlord for rent has been extinguished. *Riggs v. Whitnev*, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 388.

Specific Appropriation of Fund. — *Le Roy v. Globe Ins. Co.*, 2 Edw. (N. Y.) 657; *Matter of Le Blanc*, 14 Hun (N. Y.) 8, 75 N. Y. 598; *Lowene v. American F. Ins. Co.*, 6 Paige (N. Y.) 482; *Scott v. Eagle F. Ins. Co.*, 7 Paige (N. Y.) 198.

1. Receiver's Title Subject to Equities. — *Auten v. City Electric St. R. Co.*, 104 Fed. Rep. 395; *Kane v. Lodor*, 56 N. J. Eq. 268; *Sayles v. National Water Purifying Co.*, 62 Hun (N. Y.)

618, 16 N. Y. Supp. 555; *Nealis v. Insley*, (Supm. Ct. App. T.) 33 Misc. (N. Y.) 742; *Ryder v. Ryder*, 19 R. I. 188.

Commercial Paper. — *Briggs v. Merrill*, 58 Barb. (N. Y.) 389.

2. *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415. And see *Gallagher v. Gingrich*, 105 Iowa 237.

3. *Mears v. Hayden*, 91 Ill. App. 343.

4. *Kneeland v. American L. & T. Co.*, 136 U. S. 89.

5. Where Property Subject to Liens. — *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82; *Kittredge v. Osgood*, 161 Mass. 384; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400; *Guggenheimer v. Stephens*, (N. Y. City Ct. Spec. T.) 17 Civ. Pro. (N. Y.) 383; *Eck v. Warner*, (Tex. Civ. App. 1901) 60 S. W. Rep. 99. And see *Gary v. Brown*, 33 Ill. App. 435.

6. *Guggenheimer v. Stephens*, (N. Y. City Ct. Spec. T.) 17 Civ. Pro. (N. Y.) 383.

7. *Preston v. Loughran*, 58 Hun (N. Y.) 216.

8. *Wheeler v. Walton, etc., Co.*, 65 Fed. Rep. 720.

Sale under Prior Execution. — Where a sale under execution was made of property for which a receiver had subsequently been appointed the *New York* Court of Appeals said: "Persons having liens upon the property had no right to interfere with its possession by the receiver, and, without any application or adjudication of the court, sell and dispose of it,

of foreclosure of a mortgage may sell the mortgaged property thereunder, though a receiver of the mortgagor's property has been appointed subsequent to the judgment of foreclosure.¹

e. WHERE PROPERTY IN POSSESSION OF LIENOR. — Where the property of the defendant is in the possession of a third party under claim of lien thereon approximating the full value of the property, the court will not, as a rule, order the receiver to disturb such possession.² But the fact, it has been held, that a lien had attached to a part only of the debtor's property would not necessarily render it improper for a receiver to take possession.³

f. PROPERTY HELD AS COLLATERAL. — The holder of collateral security for a debt of the individual or corporation for whose property a receiver is appointed has a right to sell and apply the same, notwithstanding the appointment of a receiver.⁴

g. SET-OFF AGAINST RECEIVER. — In an action by a receiver the defendant is entitled to set up any equity, set-off, or counterclaim which would have been available as against the original owner of the claim or demand.⁵ But a set-off will not be allowed where the claim or demand sought to be set off was acquired subsequent to the receivership,⁶ nor where the liability is to the receiver as such, and the claim sought to be set off antedates the appointment of the receiver;⁷ nor where the effect would be practically to give a preference to the one creditor over others.⁸ Nor will a receiver of a corporation be

and thus dissipate it and deprive the court of jurisdiction to administer it." *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400.

Unauthorized Sale under Execution Passes No Title. — *Ellis v. Vernon Ice, etc., Co.*, 86 Tex. 109.

Private Sale under Direction of Receiver. — *Kennett v. Hopkins*, 40 N. Y. App. Div. 367.

1. *Preston v. Loughran*, 58 Hun (N. Y.) 210.
2. **Property in Possession of Lienor.** — *Baldwin v. Hosmer*, 101 Mich. 119; *State v. Graham*, 9 Wash. 528; *State v. Superior Ct.*, 8 Wash. 210; *State v. Superior Ct.*, 7 Wash. 77. See *Bergin v. Deering*, 70 Hun (N. Y.) 379. And see *Strickland v. Gay*, 104 Ala. 375; *National Park Bank v. Goddard*, 65 Hun (N. Y.) 626, 20 N. Y. Supp. 526.

Surplus After Execution Sale. — Where there has been a levy of execution prior to the receiver's appointment, the receiver takes subject thereto, and is entitled only to the surplus remaining in the sheriff's hands. *Dugger v. Collins*, 69 Ala. 324.

3. *Byrne v. Lake Charles First Nat. Bank*, 20 Tex. Civ. App. 194.

4. **Collateral Security.** — *Fidelity Ins., etc., Co. v. Roanoke Iron Co.*, 81 Fed. Rep. 439; *Brady v. Furlow*, 22 Ga. 613; *National Exch. Bank v. Benbrook School Furnishing Co.* (Tex. Civ. App. 1894) 27 S. W. Rep. 297.

5. **Set-off.** — *Central Appalachian Co. v. Buchanan*, (C. C. A.) 90 Fed. Rep. 454; *Philler v. Yardley*, (C. C. A.) 62 Fed. Rep. 645; *State v. Brobston*, 94 Ga. 95, 47 Am. St. Rep. 138; *Becker v. Seymour*, 71 Minn. 394; *Cox v. Volkert*, 86 Mo. 505; *Matter of Van Allen*, 37 Barb. (N. Y.) 231; *Holbrook v. American F. Ins. Co.*, 6 Paige (N. Y.) 220; *Rt Hamilton*, 26 Oregon 579; *Chase v. Petroleum Bank*, 66 Pa. St. 169. And see *Tourtelot v. Whithed*, 9 N. Dak. 467.

Choses in Action of the defendant pass to the receiver subject to any equitable set-off which might have been set up in defense in an action by the defendant. *Cook v. Cole*, 55 Iowa 70; *Colt v. Brown*, 12 Gray (Mass.) 233; *Cox v.*

Volkert, 86 Mo. 505; *Van Wagoner v. Pater-son Gas Light Co.*, 23 N. J. L. 283; *State Bank v. New Brunswick Bank*, 3 N. J. Eq. 266; *Davis v. Stover*, 58 N. Y. 473; *Berry v. Brett*, 6 Bosw. (N. Y.) 627; *Hade v. McVay*, 31 Ohio St. 231; *Clarke v. Hawkins*, 5 R. I. 219.

But to the Effect that a Temporary Receiver of a Bank has no right to allow a depositor to set off the amount of his deposit against an indebtedness to the bank by note, payment of the deposit not having been demanded, and the insolvency of the bank being neither proved nor admitted, see *People v. St. Nicholas Bank*, 76 Hun (N. Y.) 522.

Secret Agreement with President of Corporation. — *Atwater v. Stromberg*, 75 Minn. 277.

6. **Claim Acquired Subsequent to Receivership.** — *Colt v. Brown*, 12 Gray (Mass.) 233; *Van Dyck v. McQuade*, 85 N. Y. 615; *U. S. Trust Co. v. Harris*, 2 Bosw. (N. Y.) 75; *Smith v. Eighth Ward Bank*, 31 N. Y. App. Div. 6; *Osgood v. Ogden*, 4 Keyes (N. Y.) 70; *Lanier v. Gayoso Sav. Inst.*, 9 Heisk. (Tenn.) 506; *Smith v. Mosby*, 9 Heisk. (Tenn.) 501. And see *Clarke v. Hawkins*, 5 R. I. 219.

Burden of Proof. — To the effect that the burden of proof is upon the defendant to show that such demand accrued in his favor prior to the receivership, see *Smith v. Mosby*, 9 Heisk. (Tenn.) 501.

7. *Behr v. Menendez*, (N. Y. City Ct. Gen. T.) 8 Misc. (N. Y.) 84, 690; *Singerly v. Fox*, 75 Pa. St. 112.

But a Right of Set-off Against a Note May Be Allowed, though the note was not due when the receiver was appointed. *Berry v. Brett*, 6 Bosw. (N. Y.) 627.

8. *Clark v. Brockway*, 3 Keyes (N. Y.) 13.

Action Against Stockholder for Unpaid Subscription. — In a suit by a receiver of an insolvent bank against a stockholder for an unpaid subscription to the capital stock, the defendant stockholder cannot set off a deposit due him from the bank. *Williams v. Traphagen*, 38 N. J. Eq. 57.

allowed to set off against a demand upon him as such, a claim alleged to have accrued to the corporation before the receivership.¹

10. When Receiver's Title Vests — *a. IN GENERAL.* — When a receiver is appointed, the right to the custody of the property in controversy vests in him immediately upon the filing of his bond.² But the receiver's title to the property vests, upon his qualification, by relation back to the date of his appointment,³ so as to exclude the acquisition of liens upon the property by creditors or third persons between the time of his appointment and his qualification by the making of a bond.⁴ And it is well settled, of course, that after the appointment and qualification of a receiver, no lien can be acquired on the receivership property by judgment, levy of execution, garnishment, etc.⁵ The title of the receiver when appointed, it has been held, vests by relation at the time of granting the order, even though he remains out of possession pending the performance of preliminary conditions necessary to qualify him to act.⁶ But the order appointing a receiver cannot, it has been held, as against third persons, so operate as to relate back of the date upon which it was granted.⁷

1. *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 58 Fed. Rep. 257.

2. *When Title Vests.* — *Noyes v. Rich*, 52 Me. 115.

3. *Relation.* — *Connecticut River Banking Co. v. Rockbridge Co.*, 73 Fed. Rep. 709; *Maynard v. Bond*, 67 Mo. 315; *Matter of Schuyler's Steam Tow Boat Co.*, 136 N. Y. 169; *Steele v. Sturges*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 442; *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504; *Battery Park Bank v. Western Carolina Bank*, 127 N. Car. 432.

Order of Reference. — *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 183.

4. *Temple v. Glasgow*, (C. C. A.) 80 Fed. Rep. 441 [affirming *Connecticut River Banking Co. v. Rockbridge Co.*, 73 Fed. Rep. 709]; *Maynard v. Bond*, 67 Mo. 315; *Steele v. Sturges*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 442; *Mosher v. Supreme Sitting*, etc., 88 Hun (N. Y.) 394; *In re Schuyler Steam Tow Boat Co.*, (Supm. Ct. Spec. T.) 18 N. Y. Supp. 89, 64 Hun (N. Y.) 384.

Surrender of Property to Receiver. — In such case a sheriff who levies upon the property between the time of appointment and the qualification of the receiver by the perfecting of the bond will be required to surrender the property to the receiver. *Maynard v. Bond*, 67 Mo. 315; *Steele v. Sturges*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 442. And see *Defries v. Creed*, 11 Jur. N. S. 360, 34 L. J. Ch. 607; *Edwards v. Edwards*, 2 Ch. D. 291; *Ex p. Evans*, 13 Ch. D. 252. But compare *In re Rollason*, 24 Ch. D. 495, 56 L. T. N. S. 303.

Exception to Rule. — It has been held, however, that the rule above stated does not apply so as to defeat the lien of an execution issued on a judgment recovered after the appointment of the receiver, and levied before he qualified, where the debtor had no defense to the creditor's claim, but had prevented the obtaining of the judgment before the appointment of the receiver by interposing a frivolous demurrer. *Matter of Lewis*, etc., Mfg. Co., 89 Hun (N. Y.) 208.

5. *After Qualification of Receiver* — *United States*. — *Fidelity Ins.*, etc., Co. v. *Roanoke Iron Co.*, 81 Fed. Rep. 439; *Clyde v. Richmond*, etc., Co., 56 Fed. Rep. 539.

Alabama. — *Stanton v. Heard*, 100 Ala. 515.
Connecticut. — *Longstaff v. Hurd*, 66 Conn.

350.
Georgia. — *Branan v. Excelsior Shoe Co.*, 94 Ga. 465; *Lang v. Macon Constr. Co.*, 101 Ga. 343.

Indiana. — *Knobe v. Baldrige*, 73 Ind. 54.
Massachusetts. — *Atlas Bank v. Nahant Bank*, 23 Pick. (Mass.) 480.

Missouri. — *In re Osceola Milling Co.*, 76 Mo. App. 23.

New York. — *Dickey v. Bates*, (Supm. Ct. Spec. T.) 13 Misc. (N. Y.) 489; *Mosher v. Supreme Sitting*, etc., 88 Hun (N. Y.) 394; *Hoerle v. McIlhargy*, 61 N. Y. Super. Ct. 184.

Oregon. — *Pope v. Ames*, 20 Oregon 199.
Pennsylvania. — *Cowan v. Pennsylvania Plate Glass Co.*, 184 Pa. St. 1.

Attachment in Foreign State. — *Osgood v. Maguire*, 61 N. Y. 524. And see *Farmers, L. & T. Co. v. Bankers*, etc., Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 600.

Surplus on Foreclosure Sale. — *Atty.-Gen. v. Atlantic Mut. L. Ins. Co.*, 100 N. Y. 279.

6. *Before Possession by Receiver.* — *Hardwick v. Hook*, 8 Ga. 354; *Maynard v. Bond*, 67 Mo. 315; *Murphy v. Du Berg*, (C. Pl. Spec. T. 11 Abb. N. Cas. (N. Y.) 112; *Steele v. Sturges*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 442; *Fessenden v. Woods*, 3 Bosw. (N. Y.) 550; *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610; *McDonald v. Charleston*, etc., R. Co., 93 Tenn. 281.

Reduction of Personality to Possession. — In *Maryland*, however, it has been held that the receiver's title to tangible personality accrues only at the time he actually reduces the property to possession. *Farmers' Bank v. Beaston*, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226.

7. *Artisans' Bank v. Treadwell*, 34 Barb. (N. Y.) 559; *Wilson v. Allen*, 6 Barb. (N. Y.) 545; *Rutter v. Tallis*, 5 Sandf. (N. Y.) 610; *West v. Fraser*, 5 Sandf. (N. Y.) 654; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 191.

Title by Subrogation. — Where the order appointing a receiver authorized him to collect rents of certain property and sue for them, he was subrogated to the defendant's title, and his right of action related back to the commencement of such title. *Hardwick v. Hook*, 8 Ga. 354.

b. AS OF DATE OF INSTITUTION OF PROCEEDINGS. — In some cases it seems to have been held that the receiver's title to the property involved vests as of the date of the institution of the proceedings or the filing of the bill in the course of which, or upon which, he was appointed.¹

c. SUBSEQUENT ASSIGNMENT OF PROPERTY. — Where a court has taken possession of property by its receiver, or has appointed a receiver therefor, a subsequent assignment by the owner is inoperative as against the receiver.² But a receiver subsequently appointed cannot compel an assignee for the benefit of creditors to turn over the assets.³

d. SUBSEQUENT PURCHASERS. — A purchaser with notice of creditor's proceedings for the appointment of a receiver takes subject to the receiver's title,⁴ but the rule does not extend to *bona fide* purchasers without notice.⁵

e. RULE IN SUPPLEMENTARY PROCEEDINGS. — The title of a receiver in supplementary proceedings relates back to the service of the order for the examination of the judgment debtor, except as to *bona fide* purchasers for a valuable consideration.⁶

XIII. LIABILITIES OF RECEIVER — 1. General Rule. — It may be stated as a general rule that the sole liability of a receiver, except in cases where he is personally at fault, is official.⁷ So, in an action against a receiver in his official capacity, judgment cannot be rendered against him personally. It must be entered against him as receiver, and so as to be payable out of funds held by him in that capacity, and enforceable only against property in his custody.⁸

2. Negligence or Misconduct — a. GENERAL RULE. — A receiver is liable to any person who sustains loss by reason of the receiver's negligence or misconduct with reference to the receivership property.⁹ Where, however, a

1. Date of Institution of Proceedings. — *Wishwall v. Sampson*, 14 How. (U. S.) 52; *Merrill v. Commonwealth Mut. F. Ins. Co.*, 166 Mass. 238; *Fogg v. Supreme Lodge, etc.*, 159 Mass. 9; *Willamette Casket Co. v. Cross Undertaking Co.*, 12 Wash. 190.

2. Subsequent Assignment. — *McGowan v. Myers*, 66 Iowa 99; *Levy v. Cavanagh*, 2 Bosw. (N. Y.) 100; *R. Hamilton*, 26 Oregon 579; *Citizens' Sav., etc., Co. v. French*, 4 Ohio Dec. 443, 4 Ohio N. P. 61.

3. Coleman v. Salisbury, 52 Ga. 470; *Com. v. Order of Vesta*, 156 Pa. St. 531; *Garden City Banking, etc., Co. v. Geilfuss*, 86 Wis. 612.

4. Wiswall v. Sampson, 14 How. (U. S.) 52; *Weed v. Smull*, 3 Sandf. Ch. (N. Y.) 273.

5. Dudley v. Gould, 6 Hun (N. Y.) 97.

By Statute in New York it is provided that the title of a receiver in supplementary proceedings shall extend back to the commencement of the proceedings, but not so as to affect the title of a purchaser in good faith, without notice and for a valuable consideration. See *Code Civ. Pro. N. Y.*, § 2469; *Merry v. Wilcox*, 92 Hun (N. Y.) 210.

6. Supplementary Proceedings. — *Matter of Clover*, 154 N. Y. 443, *affirming* 8 N. Y. App. Div. 556; *Whyte v. Denike*, 53 N. Y. App. Div. 425; *Fitzpatrick v. Moses*, 34 N. Y. App. Div. 242; *Youngs v. Klunder*, (N. Y. City Ct. Gen. T.) 7 N. Y. Supp. 498.

Effect of Death of Debtor. — It has been held that the authority of a receiver appointed in proceedings supplementary to execution relates back from the time of filing the bond to the time of the order of appointment, although the bond was not filed until after the death of the debtor and the appointment of an administrator. *Peters v. Carr*, 2 Dem. (N. Y.) 22.

7. Rule as to Receiver's Liability. — *McNulta*

v. Ensich, 134 Ill. 46; *Schmidt v. Gayner*, 59 Minn. 303; *Erskine v. McIlrath*, 60 Minn. 485; *Nason Mfg. Co. v. Garden*, 52 N. Y. App. Div. 363; *In re Home Provident Safety Fund Assoc.*, (Supm. Ct. Gen. T.) 15 N. Y. Supp. 211; *Ryan v. Hays*, 62 Tex. 42.

Disbursement of Fund under Order of Court. — *Pfeffer v. Kling*, 58 N. Y. App. Div. 179. See also *Matter of Home Provident Safety Fund Assoc.*, 129 N. Y. 288; *Decker v. Gardner*, 124 N. Y. 334.

8. Pfeffer v. Kling, 58 N. Y. App. Div. 179; *Woodruff v. Jewett*, 37 Hun (N. Y.) 205; *Com. v. Runk, 26 Pa. St. 235. And see *Hone v. De Peyster*, 106 N. Y. 645; *Fowler v. Westervelt*, 40 Barb. (N. Y.) 374.*

Where Redress Sought. — It has been held that where an injury results from the default or misconduct of a receiver appointed by a court of equity while acting under color of judicial authority, there being no dispute as to the power of the court to make the order under which the receiver claims to have acted, the court of equity may, in its discretion, either take cognizance of the question of the receiver's liability and determine it, or permit the aggrieved party to sue at law. But if the power of the court to make the order under which the receiver acted is disputed, then it has been held that the appointing court must assume exclusive jurisdiction, and inhibit the aggrieved person from seeking redress in any other tribunal. *Klein v. Jewett*, 26 N. J. Eq. 474.

9. Rule as to Negligence or Misconduct — England. — *Knight v. Plymouth*, 3 Atk. 480.

United States. — *Kirker v. Owings*, (C. C. A.) 98 Fed. Rep. 499.

Georgia. — *Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280.

receiver acts with caution, and for what, in his judgment, is for the best interest of the estate, and a loss occurs without any fault on his part, he will not ordinarily be liable for the loss.¹ Nor will a receiver be held liable where the loss occurs by reason of the fault of the parties in interest, and not of the receiver.²

b. LOSS OF MONEY DEPOSITED IN BANK. — Where a receiver uses reasonable care in the selection of a depository, in which he deposits money in his name as receiver, without any arrangement which limits or restricts his control over the fund, he will not, as a rule, be held liable for the loss thereof by reason of a failure of the bank.³ But if a receiver deposits receivership funds to his individual credit, or under some arrangement which limits his proper control over the fund, and a loss occurs, he will be personally liable therefor.⁴

c. WRONGFUL SEIZURE OF PROPERTY. — Where a receiver has taken possession of property not rightfully belonging to his trust in an administrative capacity, he is personally responsible for the trespass committed.⁵ But where, under order of court, possession of property is demanded as

Illinois. — And see *De Wolf v. Royal Trust Co.*, 88 Ill. App. 503.

Kentucky. — *Wagner v. Swift's Iron, etc., Works*, (Ky. 1894) 26 S. W. Rep. 720; *Ryan v. Morrill*, 83 Ky. 352.

Minnesota. — *In re Shea*, 57 Minn. 415.

New Jersey. — *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669; *Matter of Union Bank*, 37 N. J. Eq. 420.

New York. — *Clapp v. Clapp*, 49 Hun (N. Y.) 195.

Oregon. — And see *Thompson v. Holladay*, 15 Oregon 34.

Pennsylvania. — *McCay v. Black*, 14 Phila. (Pa.) 635, 36 Leg. Int. (Pa.) 471.

Texas. — *Hamm v. J. Stone, etc., Live Stock Co.*, 13 Tex. Civ. App. 414.

Virginia. — *Carr v. Morris*, 85 Va. 21.

Value of Property Collusively Sold. — That a receiver of an insolvent is liable to creditors for the value of property collusively sold so that it might be assigned in trust for the insolvent's benefit, see *In re Shea*, 57 Minn. 415.

Liability of Joint Receivers. — In *Com. v. Eagle F. Ins. Co.*, 14 Allen (Mass.) 344, it was held that if two receivers are appointed to close up the concerns of a corporation, and one of them misappropriates the funds by using them for his own profit, and the other is guilty of gross neglect of his duties, giving no attention to the matters intrusted to his care and supervision, they will be jointly liable for the balance found justly due upon stating their account, and will be chargeable with interest.

Accountability to Successor. — But it has been held that where a particular receiver has been superseded for misconduct and neglect, and a successor appointed, the liability of the first receiver is to his successor and not to creditors. *Clapp v. Clapp*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 495.

1. Where Receiver Without Fault. — *Knight v. Plimouth*, 3 Atk. 480; *Eskridge v. Rushworth*, 3 Colo. App. 562; *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271; *Johnston v. Keener*, 23 Ill. App. 220; *Matter of Stafford*, 11 Barb. (N. Y.) 353; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89. And see *Neel v. Carson*, (Ky. 1896) 37 S. W. Rep. 949;

Champlain First Nat. Bank v. Wood, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 278.

Where Title to Land Sold by a Receiver Proves Defective, but the sale has been made without fault on the part of the receiver, he is not liable personally for the expenses to which the purchaser has been subjected. *Manning v. Monaghan*, 23 N. Y. 544; *Drake v. Goodridge*, 6 Blatchf. (U. S.) 151.

Ordinary Care. — To the effect that ordinary care is the test of the receiver's responsibility, see *Hamm v. J. Stone, etc., Live Stock Co.*, 13 Tex. Civ. App. 414.

2. Griffith v. Griffith, 2 Ves. 400.

Deficit in Operation of Mine. — *Welch v. Renshaw*, 14 Colo. App. 526.

3. Loss of Funds in Bank. — *Brett v. Brett*, 42 Hun (N. Y.) 660, 4 N. Y. St. Rep. 704; *Matter of Stafford*, 11 Barb. (N. Y.) 353. See also *Wren v. Kirton*, 11 Ves. Jr. 378; *Drever v. Maudesley*, 8 Jur. 547, 13 L. J. Ch. 433; *Matter of Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78. And see *Barton v. Ridgeway*, 92 Va. 162.

4. Salway v. Salway, 2 Russ. & M. 215; *Collins v. Gooch*, 97 N. Car. 186, 2 Am. St. Rep. 284. And see *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283. But compare *Barton v. Ridgeway*, 92 Va. 162.

Deposit Without Authority. — To the effect that a receiver must account for money lost by the failure of a bank in which he had deposited the money without authority, see *Ficener v. Bott*, (Ky. 1898) 47 S. W. Rep. 251.

5. Wrongful Seizure. — *Curran v. Craig*, 22 Fed. Rep. 102; *Farmers', etc., Nat. Bank v. Scott*, 19 Tex. Civ. App. 22.

When Receiver Not Trespasser. — For a case where, under the particular circumstances thereof, a receiver was held not a trespasser for taking possession of and operating mines not strictly a part of the receivership property, see *Staples v. May*, (Cal. 1890) 23 Pac. Rep. 710.

Return of Money Belonging to Third Person. — For the receiver's right and liability to return money belonging to a third person taken possession of by the receiver, see *Eccles v. Drover*, etc., Nat. Bank, 79 Md. 332.

receiver, and possession is given to the receiver as such, he is not personally liable for conversion.¹

Sale of Greater Interest than Possessed. — So, also, a receiver who attempts to sell a greater interest in chattels than he can legally convey is liable personally for damages which may be sustained thereby by any person having an interest in such chattels.²

3. Torts of Employees — *a.* **GENERAL RULE.** — A receiver as such is not, upon principle and authority, personally liable for the torts of his employees.³ Nor will a receiver, in general, be held personally liable for the misappropriation of the funds of the trust estate by his clerks or employees.⁴ It is only when the receiver himself commits a wrong that he can be held personally liable.⁵ The proceedings against a receiver for an alleged tort by an employee is in the nature of a proceeding *in rem*, rendering only the property in his hands, as such, liable for compensation for such injuries.⁶ A receiver is not liable for torts committed prior to his appointment,⁷ nor can the property in his hands be subjected to such liability, except, of course, as the liability for such tort may be established as a claim against the individual or corporation over whose estate the receiver has been appointed.⁸

b. **NEGLIGENCE OR MISCONDUCT OF ATTORNEYS.** — Where a receiver used proper care in the selection of an attorney, he is not liable for a loss occurring through the attorney's misconduct.⁹

4. Contracts — *a.* **IN GENERAL.** — A receiver is, of course, liable upon any valid and authorized contract made in the course of his duties.¹⁰ The liability of a receiver upon contracts entered into in his official capacity is not, however, personal, but as a representative of the trust.¹¹ The enforcement of such contracts, or the payment of damages for their nonperformance, must fall primarily upon the property and fund in the hands of the court.¹² But a receiver has been held personally liable for contracts made by him without

1. *Tapscott v. Lyon*, 103 Cal. 297.

2. *Manning v. Monaghan*, 23 N. Y. 544.

Actual Damage Necessary. — *Manning v. Monaghan*, 23 N. Y. 544.

Liability to Lien Claimant. — But where a receiver of a corporation under order of court, sold property upon which a creditor claimed a lien, the receiver was held not liable in an action for damages to such creditor, who, instead of taking timely and proper measures to protect his lien, resorted to the aforesaid action. *Remington Paper Co. v. Watson*, 49 La. Ann. 1296.

3. Torts of Employees. — *Davis v. Duncan*, 19 Fed. Rep. 477; *McNulta v. Ensich*, 134 Ill. 46; *Erskine v. McIlrath*, 60 Minn. 485; *Cardot v. Barney*, 63 N. Y. 281, 20 Am. Rep. 533.

4. *Gunn v. Ewan*, (C. C. A.) 93 Fed. Rep. 80.

5. *Davis v. Duncan*, 19 Fed. Rep. 477. Were the reverse the rule, said the court in this case, few men would be found willing to assume the responsibility of such a trust.

6. Proceeding in Rem. — *Hall v. Smith*, 2 Bing. 156, 9 E. C. L. 357; *Barton v. Barbour*, 104 U. S. 126; *Thompson v. Scott*, 4 Dill. (U. S.) 508; *Davis v. Duncan*, 19 Fed. Rep. 477; *McNulta v. Ensich*, 134 Ill. 46; *Camp v. Barney*, 4 Hun (N. Y.) 373; *Com. v. Runk*, 26 Pa. St. 235.

7. *Northern Pac. R. Co. v. Heflin*, (C. C. A.) 83 Fed. Rep. 93; *Finance Co. v. Charleston*, etc., R. Co., 46 Fed. Rep. 508.

8. Rule under Penal Statute. — Under a statute providing that when timber has been wrongfully cut on one's land he may recover its highest value "while in the possession of

the trespasser or any purchaser from him with notice," it was held that there might be a recovery of such value, though a receiver had been appointed for the wrongdoer, and a claim for such amount was presented to the receiver before suit. *Everett v. Gores*, 89 Wis. 421.

9. Attorney's Misconduct. — *Powers v. Loughridge*, 38 N. J. Eq. 396; *Matter of Union Bank*, 37 N. J. Eq. 420; *U. S. v. Church of Jesus Christ*, 6 Utah 9.

10. Contracts. — *Clarke v. Central R., etc., Co.*, 54 Fed. Rep. 556; *Central Trust Co. v. Wabash, etc., R. Co.*, 52 Fed. Rep. 908; *Girard L. Ins., etc., Co. v. Cooper*, (C. C. A.) 51 Fed. Rep. 332; *Florence Gas, etc., Co. v. Hanby*, 101 Ala. 15.

11. Official Not Personal Liability. — *Walsh v. Raymond*, 58 Conn. 251, 18 Am. St. Rep. 264; *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669; *Olpherts v. Smith*, 54 N. Y. App. Div. 514; *Nason Mfg. Co. v. Garden*, 52 N. Y. App. Div. 363; *Meyer v. Lexow*, 1 N. Y. App. Div. 116; *Orpherts v. Smith*, (Supm. Ct. Tr. T.) 62 N. Y. Supp. 409; *Sager Mfg. Co. v. Smith*, 45 N. Y. App. Div. 358; *Livingston v. Pettigrew*, 7 Lans. (N. Y.) 405.

Discretionary Contracts. — Contracts made by a receiver, by virtue of a discretionary authority conferred upon him, are in some respects *sui generis*. They bind the receiver not personally, but as the representative of the trust, and are to be enforced, or redress for their breach accorded, out of the fund. *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

12. *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

specific authority,¹ and likewise it has been held, upon contracts of personal employment.² But there may be no recovery against a receiver for services rendered by a mere volunteer.³ It has been held that a receiver may relieve himself from the personal liability due to lack of specific authority to contract by an express agreement with the party with whom he contracts, that such party shall look only to the estate over which the receiver is appointed.⁴

6. RENT OF PREMISES. — A receiver of an individual or corporation does not, by reason of his appointment, become liable on existing contracts of lease.⁵ Where, however, a receiver adopts an existing lease of premises, he becomes bound thereby to pay rent according to its terms.⁶ And an adoption may, though not necessarily so, be implied by a taking possession and occupancy of the premises under order of court,⁷ unless the understanding of the parties and the order of the court are to a different effect.⁸ But although there is no adoption of a lease, the receiver will be liable for a reasonable rent during his occupancy of leased premises.⁹

7. CONTRACTS PRIOR TO RECEIVERSHIP — (1) *In General.* — A receiver has the right, subject to the order of the court, to elect whether he will perform the executory contracts entered into by the individual or corporation whose estate he represents prior to the receivership.¹⁰ No pre-existing contracts are binding on the receiver unless adopted by him,¹¹ and it is the duty

1. *Unauthorized Contracts.* — *New v. Nicoll*, 73 N. Y. 127, 29 Am. Rep. 111; *Ryan v. Rand*, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 313; *Rogers v. Wendell*, 54 Hun (N. Y.) 540; *Foland v. Dayton*, 40 Hun (N. Y.) 563; *People v. Universal L. Ins. Co.*, 30 Hun (N. Y.) 142; *De Grelle v. Ball*, 10 Reports 97.

Execution of Promissory Notes. — *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276.

2. *Ryan v. Rand*, (N. Y. City Ct. Gen. T.) 20 Abb. N. Cas. (N. Y.) 313; *Rogers v. Wendell*, 54 Hun (N. Y.) 540; *Sayles v. Jourdan*, 50 Hun (N. Y.) 604, 2 N. Y. Supp. 827.

3. *In re Whittemore*, 157 Mass. 46.

4. *New v. Nicoll*, 73 N. Y. 131, 29 Am. Rep. 111; *Davis v. Stover*, (N. Y. Super. Ct. Spec. T.) 16 Abb. Pr. N. S. (N. Y.) 225; *Rogers v. Wendell*, 54 Hun (N. Y.) 540; *Livingston v. Pettigrew*, 7 Lans. (N. Y.) 405; *Exp. Williams*, 17 S. Car. 396.

5. *Leases.* — *Empire Distilling Co. v. McNulta*, (C. C. A.) 77 Fed. Rep. 700; *Minneapolis Baseball Co. v. City Bank*, 74 Minn. 98; *Nelson v. Kalkhoff*, 60 Minn. 305.

But under a statute providing that leases for years go to the personal representative of a deceased person it has been held that a receiver of the personal estate of a decedent takes title to premises demised under a lease, and is liable for the rent. *Wells v. Higgins*, 132 N. Y. 459.

A receiver who, in order to derive an income for the estate from a piece of property unfavorably situated and difficult to rent, himself conducts a boarding house thereon in company with another person, receiving no personal profit therefrom, does not thereby make himself liable for the rent. *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

Rent of Opera House Donated for Charitable and Social Purposes. — That the receiver is not liable for rent on such occasions, see *McKennon v. Pentecost*, 8 Okla. 117.

6. *Adoption of Lease.* — *Empire Distilling Co. v. McNulta*, (C. C. A.) 77 Fed. Rep. 700; *Link Belt Machinery Co. v. Hughes*, 174 Ill. 155;

Nelson v. Kalkhoff, 60 Minn. 305; *Wells v. Higgins*, 132 N. Y. 459; *Moore v. Higgins*, (Supm. Ct. Gen. T.) 5 N. Y. Supp. 895.

7. *Implied Adoption.* — *De Wolf v. Royal Trust Co.*, 173 Ill. 435.

A receiver's adoption of the lease of his insolvent may be implied from his unequivocal acts, inconsistent with the landlord's right of re-entry, indicating his intention to adopt the lease and conform to its conditions. *Spencer v. World's Columbian Exposition*, 163 Ill. 117.

Taking Possession Not Necessarily Adoption of Lease. — See *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481; *Stokes v. Hoffman House*, 46 N. Y. App. Div. 120; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 49 Am. St. Rep. 943.

8. *Thomas v. Cincinnati, etc., R. Co.*, 77 Fed. Rep. 667.

Reasonable Time to Elect. — *Nelson v. Kalkhoff*, 60 Minn. 305.

Recovery of Sums Improperly Paid as Rent. — *Stokes v. Hoffman House*, 46 N. Y. App. Div. 120.

9. *Link Belt Machinery Co. v. Hughes*, 62 Ill. App. 318; *Bell v. American Protective League*, 163 Mass. 558, 47 Am. St. Rep. 481; *Stoepel v. Union Trust Co.*, 121 Mich. 281. And see *Hatch v. Van Dervoort*, 54 N. J. Ch. 511. But see *Stokes v. Hoffman House*, 46 N. Y. App. Div. 120.

Rate Reserved on Lease. — *Nelson v. Kalkhoff*, 60 Minn. 305.

Amount of Rental Fixed by Order of Court. — See *Blackall v. Morrison*, 170 Ill. 152.

10. *Executory Contracts Prior to Appointment.* — *Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co.*, 120 Cal. 521, 65 Am. St. Rep. 186; *Spencer v. World's Columbian Exposition*, 163 Ill. 117; *Com. v. Franklin Ins. Co.*, 115 Mass. 278; *Scott v. Rainier Power, etc., Co.*, 13 Wash. 108.

May Not Annul Contracts. — *In re Marriage*, (1896) 2 Ch. 663; *Wolf v. National Bank*, 178 Ill. 85.

11. *Central Trust Co. v. East Tennessee Land*

of the receiver to refuse to adopt a contract which would prove so burdensome as to imperil the fund.¹ But where an existing executory contract is for the benefit of the receivership, the receiver may, as a rule, adopt its provisions and bind thereby the assets in his hands.²

(2) *Reasonable Time for Election.* — A receiver is entitled to a reasonable time within which to determine whether it will be to the best interests of the estate to adopt executory contracts.³

d. PRESUMPTION OF KNOWLEDGE OF RECEIVER'S AUTHORITY. — A party who enters into a contract with a receiver is presumed to have knowledge of his authority to contract and its extent.⁴ But it has been held that where a contract has been completely performed by the other party, and performance accepted by the receiver, the consideration agreed upon will be ordered paid, though the court may deem the contract to have been injudicious, in the absence of fraud or collusion.⁵ If, however, the contract be unexecuted, it will not, if unauthorized and not for the benefit of the trust, be ordered performed by the court, or damages awarded, in the usual sense, for its nonperformance.⁶

5. Interest. — A receiver is not, as a mere matter of course, liable for interest on funds remaining in his hands.⁷ Nor is a receiver who has properly withheld payment of a claim until he could obtain the instructions of the court thereupon, personally liable for interest to the creditor.⁸ But interest will be allowed against the receiver where he has actually received interest in the receivership funds,⁹ or where he has used the fund himself,¹⁰ or has commingled it with his own,¹¹ or where he has failed in his duty to make invest-

Co., 79 Fed. Rep. 19; General Electric Co. v. Whitney, (C. C. A.) 74 Fed. Rep. 664; United Electric Securities Co. v. Louisiana Electric Light Co., 71 Fed. Rep. 615; Central Trust Co. v. Marietta, etc., R. Co., 51 Fed. Rep. 15, following Southern Express Co. v. Western North Carolina R. Co., 99 U. S. 191; Russ Lumber, etc., Co. v. Muscupiabe Land, etc., Co., 120 Cal. 521, 65 Am. St. Rep. 186; Com. v. Franklin Ins. Co., 115 Mass. 278; Scott v. Rainier Power, etc., Co., 13 Wash. 108.

Contracts of Prior Receiver. — It has been held that a receiver is not bound by a contract made by a prior receiver unless ratified by him. Kansas Pac. R. Co. v. Bayles, 19 Colo. 348. And see Central Trust Co. v. Thurman, 94 Ga. 735; Weber v. Naltner, 10 Ohio Dec. 96, 7 Ohio N. P. 290.

1. General Electric Co. v. Whitney, (C. C. A.) 74 Fed. Rep. 664.

2. **Where Contract Advantageous.** — Central Trust Co. v. East Tennessee Land Co., 79 Fed. Rep. 19; United Electric Securities Co. v. Louisiana Electric Light Co., 71 Fed. Rep. 615; Girard L. Ins., etc., Co. v. Cooper, (C. C. A.) 51 Fed. Rep. 332; Spencer v. World's Columbian Exposition, 163 Ill. 117; Worthington v. Oak, etc., Park Imp. Co., 100 Iowa 39. And see Girard L. Ins., etc., Co. v. Cooper, (C. C. A.) 51 Fed. Rep. 332.

Estoppel to Deny Liability. — Spencer v. World's Columbian Exposition, 163 Ill. 117. And see Central Trust Co. v. Ohio Cent. R. Co., 23 Fed. Rep. 306.

3. Spencer v. World's Columbian Exposition, 163 Ill. 117; Nelson v. Kalkhoff, 60 Minn. 305.

4. Tripp v. Boardman, 49 Iowa 410.

But Where a Receiver Executes Promissory Notes without authority, he may be held liable thereon individually, though the payee knew that they were signed in the receiver's repre-

sentative capacity, but under the mistaken belief that he had the requisite authority to execute them as receiver. Peoria Steam Marble Works v. Hickey, 110 Iowa 276.

5. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669.

Reimbursement of Actual Expenses. — So also, it has been held, one who has in good faith entered on the performance of a contract made by the receiver, but which the court annuls as improvident, will be reimbursed his actual expenses therein out of the fund. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669.

6. Vanderbilt v. Central R. Co., 43 N. J. Eq. 669.

7. Interest — General Rule. — Johnson v. Moon, 82 Ga. 247; How v. Jones, 60 Iowa 70; Champlain First Nat. Bank v. Wood, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 278. And see Richardson v. Louisville Banking Co., (C. C. A.) 94 Fed. Rep. 442; Atty.-Gen. v. North American L. Ins. Co., 89 N. Y. 94.

8. Malcolmson v. Wappoo Mills, 99 Fed. Rep. 633.

9. Interest Actually Received. — Shaw v. Rhodes, 2 Russ. 539; Lonsdale v. Church, 3 Bro. C. C. 41; Foster v. Foster, 2 Bro. C. C. 616; Harman v. Foster, 1 Hog. 318; Battaile v. Fisher, 36 Miss. 321; Adair County v. Ownby, 75 Mo. 282; Atty.-Gen. v. North American L. Ins. Co., 89 N. Y. 94; Schwartz v. Keystone Oil Co., 153 Pa. St. 283.

10. Schwartz v. Keystone Oil Co., 153 Pa. St. 283.

Hire of Property. — Battaile v. Fisher, 36 Miss. 321.

11. Commingling of Funds. — Hinckley v. Gilman, etc., R. Co., 100 U. S. 153; Utica Ins. Co. v. Lynch, 11 Paige (N. Y.) 520; Matter of Commonwealth F. Ins. Co., 32 Hun (N. Y.) 78. But see Radford v. Folsom, 55 Iowa 276,

ments whereby interest would have been received.¹ So, also, in some instances interest seems to have been allowed against a receiver as a punishment for his misconduct or neglect.²

6. Profits Earned upon Receivership Funds.—A receiver is accountable for interest and profits earned upon the trust funds in his hands. Where a receiver has used the funds in his own business, and made a profit thereon, he must account for the whole of the profit.³

7. Costs of Litigation.—A receiver is not personally liable for costs in actions prosecuted or defended by him except where he has been guilty of bad faith or gross mismanagement.⁴

8. When Liability Ends.—The general rule in this respect with reference to receivers has been stated to be, "with the termination of his official existence ends his official liability."⁵ And this rule has been held to apply not only as to contract creditors,⁶ though they may have no notice of the discharge of the receiver,⁷ but also as to claims for torts occasioned by the negligence of the receiver himself, or of his subordinates.⁸ But a receiver to whom land had been fraudulently conveyed was held liable after his accounts had been approved and he had been discharged, to be compelled to account

in which it was held that in the absence of proof that the receiver used any part of the trust fund deposited in bank with his own funds, or in any way derived profit from them, he could not be charged with interest.

1. Failure to Invest.—*Hicks v. Hicks*, 3 Atk. 274.

But a receiver should not invest funds in his hands without an order of court to do so. *Atty.-Gen. v. North American L. Ins. Co.*, 89 N. Y. 94.

2. Com. v. Eagle F. Ins. Co., 14 Allen (Mass.) 344.

Failure to Account at Proper Time.—When a receiver neglects to account at the appointed time, he must pay interest on the balance in his hands from the time he should have accounted or paid the money into court.

— *Jolland*, 8 Ves. Jr. 72; *Fletcher v. Dodd*, 1 Ves. Jr. 85; *Brownhead v. Smith*, 1 Jur. 237. It will not, however, be exacted from the time of receiving the money, but only from the time it should have been paid into court. *Potts v. Leighton*, 15 Ves. Jr. 273. But a receiver of annual rents and profits will be liable for interest from the time of receipt. *Weems v. Lathrop*, 42 Tex. 207.

Interest on Funds Improperly Retained.—*Fletcher v. Dodd*, 1 Ves. Jr. 85; — *v. Jolland*, 8 Ves. Jr. 73; *Johnson v. Moon*, 82 Ga. 247.

Interest Allowed Pending Appeal.—*Wilkinson v. Washington Trust Co.*, (C. C. A.) 102 Fed. Rep. 28.

3. Profits Made from Trust Funds.—See *Hinckley v. Gilman*, etc., R. Co., 100 U. S. 153; *Hooper v. Winston*, 24 Ill. 353; *How v. Jones*, 60 Iowa 70; *Radford v. Folsom*, 55 Iowa 276; *Com. v. Eagle F. Ins. Co.*, 14 Allen (Mass.) 344; *Bataille v. Fisher*, 36 Miss. 321; *Atty.-Gen. v. North American L. Ins. Co.*, 89 N. Y. 107; *Utica Ins. Co. v. Lynch*, 11 Paige (N. Y.) 520; *Matter of Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78.

4. Costs.—*Columbian Ins. Co. v. Stevens*, 37 N. Y. 536; *Devendorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 275; *Bourdon v. Martin*, 74 Hun (N. Y.) 246.

5. Termination of Liability.—*Farmers' L. & T. Co. v. Central R. Co.*, 7 Fed. Rep. 537; *Ryan v. Hays*, 62 Tex. 42. And see *Reynolds v. Stockton*, 140 U. S. 254; *Lehman v. McQuown*, 31 Fed. Rep. 138; *Davis v. Duncan*, 19 Fed. Rep. 477; *Bond v. State*, 68 Miss. 648; *New York, etc., Tel. Co. v. Jewett*, 115 N. Y. 166; *Texas, etc., R. Co. v. Watson*, 13 Tex. Civ. App. 555; *Fordyce v. Beecher*, 2 Tex. Civ. App. 29; *Boggs v. Brown*, 82 Tex. 41.

No Judgment Against Receiver After Discharge and Surrender of Property.—*Ryan v. Hays*, 62 Tex. 42.

But although a receiver has been discharged, and, under order of court, has transferred all assets held by him, it is not improper subsequently to enter judgment against him as receiver, when it is made payable out of funds which may thereafter come into the receiver's hands or under the direction of the court. *Woodruff v. Jewett*, 37 Hun (N. Y.) 205.

Rescission of Order of Appointment.—*Peacock v. Pittsburgh Locomotive, etc., Works*, 52 Ga. 417.

Attachment After Discharge — English Debtor's Act.—*In re Gent*, 40 Ch. D. 190.

Texas Statute.—For the construction of a statute authorizing judgment against receivers after their discharge in actions pending at the time, see *Fordyce v. Du Bose*, 87 Tex. 78.

6. New York, etc., Tel. Co. v. Jewett, 115 N. Y. 166.

7. New York, etc., Tel. Co. v. Jewett, 115 N. Y. 166.

8. Farmers' L. & T. Co. v. Central R. Co., 7 Fed. Rep. 537.

Action for Negligence.—*Ryan v. Hays*, 62 Tex. 42.

Securities on Bond.—*Lehman v. McQuown*, 31 Fed. Rep. 138.

Judgment Before Final Discharge but After Delivery of Property to Purchaser.—It has been held that a receiver is liable to a judgment for tort although he has turned over the property to the purchaser, where he has not been finally discharged. *Houston, etc., R. Co. v. Strycharski*, (Tex. Civ. App. 1896) 35 S. W. Rep. 851.

for the rents and profits received from such lands.¹

XIV. COMPENSATION OF RECEIVERS — 1. In General. — A person appointed receiver of the property of an individual or corporation is, as a rule, entitled to compensation for his services in preserving the property or conducting the business, if so authorized and directed.²

2. Amount or Rate of Compensation — a. WHERE REGULATED BY STATUTE. — In some jurisdictions the rate of compensation allowed to receivers is fixed by statute.³ Where a statute provides that receivers shall receive a certain commission on all funds received or disbursed, the statutory commission must be allowed, notwithstanding it may appear to be more than a reasonable compensation for the services rendered.⁴ So also, it has been held, the amount of a receiver's commissions is to be computed upon the entire fund in his hands, whatever may be the nature of the assets, and is not restricted to that part of the fund which is in the form of cash.⁵ A statute which authorized a certain percentage for receiving and disbursing the trust fund has been construed as allowing one-half the commission for receiving and the other half for disbursing the same.⁶ In some states it is provided by statute

1. *Pondir v. New York, etc., R. Co.*, (Supm. Ct. Gen. T.) 31 Abb. N. Cas. (N. Y.) 29.

2. **Receiver's Compensation.** — *Newport v. Bury*, 23 Beav. 30; *Ex p. Gordon*, L. R. 20 Eq. 291; *Malcolm v. O'Callaghan*, 3 Myl. & C. 52; *Fitzgerald v. Fitzgerald*, 5 Ir. Eq. 525; *Adams v. Woods*, 15 Cal. 206; *Heman v. Britton*, 88 Mo. 549; *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415; *Deven-dorf v. Dickinson*, (Supm. Ct. Spec. T.) 21 How. Pr. (N. Y.) 275; *Martin v. Martin*, 14 Oregon 165; *Price v. White, Bailey Eq.* (S. Car.) 240.

An order ought not to be made directing a receiver to pay over the entire fund without authorizing him to deduct his commissions or in some way providing for their payment. *Weston v. Watts*, 45 Hun (N. Y.) 223; *Galster v. Syracuse Sav. Bank*, 29 Hun (N. Y.) 594.

But where the receiver of an insolvent corporation has no assets in his hands, it is not error to discharge him upon the application of those at whose instance he was appointed, without making the payment of his compensation and charges a condition precedent to the discharge. *Joslyn v. Athens Coach, etc., Co.*, 43 Minn. 534.

3. **Statutory Regulation.** — See the following cases:

New York. — *U. S. Trust Co. v. New York, etc., R. Co.*, 101 N. Y. 478; *People v. McCall*, 94 N. Y. 587, *affirming* (Supm. Ct. Spec. T.) 65 How. Pr. (N. Y.) 442; *Atty.-Gen. v. Guardian L. Ins. Co.*, 93 N. Y. 631; *Atty.-Gen. v. North American L. Ins. Co.*, 89 N. Y. 94, 26 Hun (N. Y.) 294; *Matter of Woven Tape Skirt Co.*, 85 N. Y. 506; *Matter of Little*, 47 N. Y. App. Div. 22; *Gardiner v. Tyler*, 2 Abb. App. Dec. (N. Y.) 247, 4 Abb. Pr. N. S. (N. Y.) 463; *Van Buren v. Chenango County Mut. Ins. Co.*, 12 Barb. (N. Y.) 671, *cited in* *Matter of Hulbert*, (Supm. Ct. Gen. T.) 10 Abb. N. Cas. (N. Y.) 289; *Matter of Orient Mut. Ins. Co.*, 66 Hun (N. Y.) 633, 21 N. Y. Supp. 237; *Clapp v. Clapp*, 49 Hun (N. Y.) 195; *Hanover Ins. Co. v. Germania Ins. Co.*, 46 Hun (N. Y.) 308; *People v. Mutual Ben. Associates*, 39 Hun (N. Y.) 40; *Matter of Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78; *Matter of Security L. Ins., etc., Co.*, 31 Hun (N. Y.) 36; *Matter of*

Niagara Bank, 6 Paige (N. Y.) 213; *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

North Carolina. — *Battery Park Bank v. Western Carolina Bank*, 126 N. Car. 531.

South Carolina. — *Price v. White, Bailey Eq.* (S. Car.) 240; *Massey v. Massey, Cheves Eq.* (S. Car.) 159.

Tennessee. — *Stretch v. Gowdey*, 3 Tenn. Ch. 565. But see *Woodward v. Williams*, 11 Humph. (Tenn.) 325.

Commissions on Sums Ascertained by Periodic Rests. — The courts have, in cases where receivers are allowed a commission or percentage upon the funds received, sometimes permitted them to make annual rests, and to charge their commissions upon the amounts thus ascertained. Under such circumstances, however, a receiver will not be allowed to make a new rest every time he makes a deposit in the bank, or to begin with full commissions from the date of such rest. *Bennett v. Chapin*, 3 Sandf. (N. Y.) 673.

4. *Price v. White, Bailey Eq.* (S. Car.) 240.

5. *Matter of Warren E. Smith Co.*, 31 N. Y. App. Div. 39.

Where Property Is Transferred in Specie, the commission will be computed upon the value of the property, and if the parties cannot agree upon the value, a referee will be appointed to ascertain it. *Bennett v. Chapin*, 3 Sandf. (N. Y.) 673; *Matter of De Peyster*, 4 Sandf. Ch. (N. Y.) 511.

Property in Hand on Settlement of Suit. — The receiver is entitled also, in addition to percentages on money received and paid, to commissions on the value of all the assets, as book accounts and other things in action taken out of his hands and delivered to the parties by an order settling the suit. *Bennett v. Chapin*, 3 Sandf. (N. Y.) 675.

Funds Not Properly in Possession of Receiver. — To the effect that a receiver is not entitled to commissions on funds which were never properly in his hands as receiver, see *Pitts-field Nat. Bank v. Bayne*, 140 N. Y. 321.

6. **One-half for Receiving, One-half for Disbursing.** — *Matter of Warren E. Smith Co.*, 31 N. Y. App. Div. 39; *Howes v. Davis*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 71. And see

that the compensation of receivers shall be left to the discretion of the courts.¹

b. IN ABSENCE OF STATUTE — (1) *Rule as to Discretion of Court.* — In the absence of statute regulating the amount of a receiver's compensation, the matter is one resting within the sound discretion of the appointing court.² And since the allowance to be made a receiver is within the discretion of the court appointing him, which has a fuller knowledge of all the facts upon which a proper amount depends, the appellate court will not disturb the action of the lower court unless the discretion vested in that tribunal has been manifestly abused.³

(2) *Consideration of Particular Circumstances.* — The amount which should be allowed a receiver as compensation depends much upon the particular circumstances of each case, the court having regard to the amount of labor involved, the character of the services rendered, the value of the property in controversy, and the practical benefits derived from the receiver's efforts and attention.⁴

Morgan's Estate, (Surrogate Ct.) 15 Abb. N. Cas. (N. Y.) 201; *Betts v. Betts*, (Supm. Ct. Spec. T.) 4 Abb. N. Cas. (N. Y.) 442; *Matter of Roberts*, 3 Johns. Ch. (N. Y.) 43; *Hosack v. Rogers*, 9 Paige (N. Y.) 468; *Matter of Kellogg*, 7 Paige (N. Y.) 268; *Matter of Niagara Bank*, 6 Paige (N. Y.) 213; *Rowland v. Morgan*, 3 Dem. (N. Y.) 292; *Matter of Roosevelt*, 5 Redf. (N. Y.) 623; *Ward v. Ford*, 4 Redf. (N. Y.) 34.

On the other hand a statute allowing receivers commissions "not exceeding five per cent on the amount received and disbursed," was held to warrant the allowance of commissions on both receipts and disbursements, to the extent of five per cent on each. *Battery Park Bank v. Western Carolina Bank*, 126 N. Car. 531.

1. See Gen. Stat. *Rhode Island*, c. 140, § 46; Code of *Virginia* 1887, § 3411.

2. *Discretion of Court* — *England.* — *Potts v. Leighton*, 15 Ves. Jr. 276; *In re Montgomery*, 1 Molloy 419; *Bristowe v. Needham*, 2 Phil. 100; *Courand v. Hanmer*, 9 Beav. 3; *In re Ormsby*, 1 Ball & B. 189; *Malcolm v. O'Callaghan*, 3 Myl. & C. 52.

United States. — *Cake v. Mohun*, 164 U. S. 311; *Stuart v. Boulware*, 133 U. S. 78; *Northern Alabama R. Co. v. Hopkins*, (C. C. A.) 87 Fed. Rep. 505.

District of Columbia. — *Cake v. Woodbury*, 3 App. Cas. (D. C.) 60.

Illinois. — *Heffron v. Rice*, 149 Ill. 216, 41 Am. St. Rep. 271.

Kentucky. — *Sherley v. Mattingly*, (Ky. 1899) 51 S. W. Rep. 189.

Missouri. — *State v. Greene County Bank*, 69 Mo. App. 536.

Nebraska. — *State v. Nebraska Sav., etc., Bank*, 61 Neb. 496.

North Dakota. — *Patterson v. Ward*, 6 N. Dak. 609.

Oregon. — *Hembree v. Dawson*, 18 Oregon 474.

Pennsylvania. — *Schwartz v. Keystone Oil Co.*, 164 Pa. St. 415.

South Carolina. — *Mann v. Poole*, 48 S. Car. 154.

Utah. — *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

Washington. — *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

West Virginia. — *Weigand v. Alliance Sup-*

ply Co., 44 W. Va. 133; *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627.

Greater Rate than Fixed by Statute. — Where the amount of a receiver's commissions is fixed by statute, the court cannot, of course, exercise a discretion to allow a receiver a greater rate than that so prescribed. *In re Orient Mut. Ins. Co.*, (Supm. Ct. Gen. T.) 21 N. Y. Supp. 237.

3. *Discretion Not Interfered with Unless Abused* — *United States.* — *Stuart v. Boulware*, 133 U. S. 78. And see *Hinckley v. Gilman*, etc., R. Co., 100 U. S. 153.

Georgia. — *Wilkins v. Georgia Iron Works*, 74 Ga. 532; *Morgan v. Hardee*, 71 Ga. 741.

Mississippi. — *Lichtenstein v. Dial*, 68 Miss. 54.

Missouri. — *Greeley v. Provident Sav. Bank*, 103 Mo. 212; *State v. Greene County Bank*, 69 Mo. App. 536.

Nebraska. — *State v. Nebraska Sav., etc., Bank*, 61 Neb. 496.

North Dakota. — *Patterson v. Ward*, 6 N. Dak. 609.

Oregon. — *Hembree v. Dawson*, 18 Oregon 474.

Utah. — *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

Virginia. — *Karn v. Rorer Iron Co.*, 86 Va. 754.

West Virginia. — *Weigand v. Alliance Supply Co.*, 44 W. Va. 133.

The amount of a receiver's compensation is, it has been held, discretionary only in the sense that there are no fixed rules to determine the proper allowance, and it is not discretionary in the sense that the courts are at liberty to give more than a fair and reasonable compensation. *Central Trust Co. v. Wabash*, etc., R. Co., 32 Fed. Rep. 188.

4. *Particular Circumstances to Be Considered* — *United States.* — *Cowdrey v. Railroad Co.*, 1 Woods (U. S.) 331.

Alabama. — *Henry v. Henry*, 103 Ala. 582.

District of Columbia. — *Cake v. Woodbury*, 3 App. Cas. (D. C.) 60.

Iowa. — *French v. Gifford*, 31 Iowa 428.

Kentucky. — *Sherley v. Mattingly*, (Ky. 1899) 51 S. W. Rep. 189.

Maryland. — *Abbott v. Baltimore*, etc., Steam Packet Co., 4 Md. Ch. 310.

Massachusetts. — *Jones v. Keen*, 115 Mass. 181; *Grant v. Bryant*, 101 Mass. 570.

3. When Compensation Paid. — A receiver is not, as a rule, obliged to wait for the whole of his compensation until the termination of his receivership, but may be paid at stated intervals during the continuance thereof.¹

4. Form in Which Compensation Allowed. — The compensation allowed a receiver may be in the form of a monthly or periodic salary,² a lump or gross sum,³ or in the form of commissions on receipts and disbursements.⁴ And where commissions are allowed, their amount is sometimes determined by analogy to the amount allowed by statute to guardians, trustees, executors, or administrators.⁵ This rule seems to have been laid down in *New York* in cases where the compensation is not regulated by statute.⁶

Money Paid into Court. — It has been held that a receiver has not, by virtue of his appointment, such a vested right to the collection of moneys payable to the estate as gives him the right to prevent persons indebted to the estate from paying the money directly into court, thereby saving to the estate the commission or poundage to which the receiver would be entitled if the money passed through his hands.⁷

5. Additional Compensation. — The regular compensation made to a receiver for his services is generally considered sufficient to compensate him for all the

Mississippi. — *Lichtenstein v. Dial*, 68 Miss. 54.

Pennsylvania. — *Schwartz v. Keystone Oil Co.*, 153 Pa. St. 283.

Rhode Island. — *Special Bank Com'rs v. Franklin Sav. Inst.*, 11 R. I. 557.

Tennessee. — *Boring v. Jobe*, (Tenn. Ch. 1899) 53 S. W. Rep. 763.

Utah. — *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

Washington. — *Tompson v. Huron Lumber Co.*, 5 Wash. 527; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89.

Wisconsin. — *Union Nat. Bank v. Mills*, 103 Wis. 39.

Evidence as to Proper Compensation. — That a court should not award compensation to a receiver in the absence of evidence by which the proper amount can be determined, see *Heffron v. Rice*, 40 Ill. App. 244.

What Others Would Have Served For. — It has been held that what another competent person would have done the work for is not a proper standard for fixing the compensation of a receiver. *Cowdrey v. Railroad Co.*, 1 Woods (U. S.) 334. And see *Lichtenstein v. Dial*, 68 Miss. 54. But see, as holding that in fixing the compensation of a receiver the court should determine from the evidence how much is usually paid to persons possessing the requisite capacity and experience, for like services and responsibilities under similar circumstances, *Geyser Min. Co. v. Salt Lake Bank*, 16 Utah 163.

1. *Special Bank Com'rs v. Franklin Sav. Inst.*, 11 R. I. 557.

2. **Periodic Salary.** — *Carlisle v. Berkley*, Amb. 599; *Neave v. Douglas*, 26 L. J. Ch. 756; *Cowdrey v. Railroad Co.*, 1 Woods (U. S.) 331; *Henry v. Henry*, 103 Ala. 582; *Thompson v. Willamette, etc., Mfg. Co.*, 15 Oregon 604; *Martin v. Martin*, 14 Oregon 165; *Chandler v. Cushing-Young Shingle Co.*, 13 Wash. 89; *Tompson v. Huron Lumber Co.*, 5 Wash. 527.

3. **Gross Sum.** — *Wright v. Knoxville Livery, etc., Co.*, (Tenn. Ch. 1900) 59 S. W. Rep. 677; *U. S. v. Church of Jesus Christ*, 6 Utah 9.

See *Central Trust Co. v. Wabash, etc., R. Co.*, 32 Fed. Rep. 187; *Jones v. Keen*, 115 Mass. 181; *Grant v. Bryan*, 101 Mass. 570; *Lichtenstein v. Dial*, 68 Miss. 54; *Greeley v. Provident Sav. Bank*, 103 Mo. 212.

4. **Commissions on Receipts and Disbursements.** — *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 310; *Lichtenstein v. Dial*, 68 Miss. 54; *Kerlin v. Ewen*, 149 Pa. St. 58; *Overholt v. Old Dominion Mfg. Co.*, 98 Va. 654.

Collection of Assigned Accounts. — Where, a few days before the filing of a bill by a member of a firm, asking for the dissolution thereof, and the appointment of a receiver, the firm assigned to a creditor certain of their book accounts, and the receiver afterwards appointed collected these assigned accounts, as well as other claims due the firm, the auditor to whom the receiver's account was referred, properly treated the entire amount in the hands of the receiver as the property of the firm, and allowed the receiver a commission on the accounts so collected. *Kerlin v. Ewen*, 149 Pa. St. 58.

5. **Analogy to Amount Allowed by Statute Guardians, Etc.** — *Magee v. Cowperthwaite*, 10 Ala. 966; *Tome v. King*, 64 Md. 166; *Abbott v. Baltimore, etc., Steam Packet Co.*, 4 Md. Ch. 314; *Greeley v. Provident Sav. Bank*, 103 Mo. 212; *Holcombe v. Holcombe*, 13 N. J. Eq. 417.

6. See *Howes v. Davis*, (Supm. Ct. Spec. T.) 4 Abb. Pr. (N. Y.) 71; *Bennett v. Chapin*, 3 Sandf. (N. Y.) 673; *Muller v. Pondir*, 6 Lans. (N. Y.) 481. *Compare Matter of Kellogg*, 7 Paige (N. Y.) 265. But this is only true, it seems, in the absence of proof as to the amount of labor performed by a receiver, *Muller v. Pondir*, 6 Lans. (N. Y.) 472; otherwise the rule is not binding, and the court by whom a receiver is appointed has the right to determine the rate of his compensation, which may be fixed with reference to the circumstances of the case. *Gardiner v. Tyler*, 3 Keyes (N. Y.) 505, 2 Abb. App. Dec. (N. Y.) 247; *Baldwin v. Eazler*, 34 N. Y. Super. Ct. 274.

7. See *Haigh v. Grattan*, 1 Beav. 201; *Weale*

labor which he performs in connection with the receivership, and hence, as a rule, no additional allowance will be made.¹ But a receiver may be granted allowances beyond his regular compensation for any extraordinary trouble or expense he may have been put to in the performance of his duties,² as in prosecuting or defending any legal proceedings brought by or against him.³ But where the extra compensation is sought for services performed which were no part of the receiver's duty as such, it will not, of course, be allowed.⁴

6. Agreement to Serve Without Compensation. — Where a receiver consents to serve without salary or compensation, none should, as a rule, be allowed him.⁵

7. Resisting Allowance of Compensation. — It has been held that the allowance of compensation to a receiver cannot be resisted on the ground that the court had no power to appoint the receiver, that objection being a collateral attack on the order appointing him.⁶

8. Effect of Receiver's Negligence or Misconduct. — Where a receiver has been guilty of negligence or misconduct in the management of property committed to him, the court may reduce his compensation for such reason, or, if the circumstances warrant, deny him compensation altogether.⁷ But if the receiver has not been guilty of want of integrity or good faith, it has been held that mere want of foresight in regard to the future developments of business is no reason for denying him compensation or for reducing its amount, especially when the trust has been administered with a reasonable degree of success.⁸

9. Where Receiver Acts in Several Capacities. — As a general rule, a receiver will not be allowed additional compensation for acting in more than one capacity in the management or protection of the receivership assets.⁹ So, where a receiver has rendered legal services for which he seeks extra com-

v. Ireland, 5 Jur. 405. And see also *Ex p. Clayton*, 1 Russ. 476; *Ex p. Cranmer*, 1 Russ. 477, note.

1. Additional Allowances. — *In re Ormsby*, 1 Ball & B. 189; *Malcolm v. O'Callaghan*, 3 Myl. & C. 52; *Easton v. Houston*, etc., R. Co., 40 Fed. Rep. 189; *Matter of Niagara Bank*, 6 Paige (N. Y.) 216; *Vanderheyden v. Vanderheyden*, 2 Paige (N. Y.) 287, 21 Am. Dec. 86; *Hynes v. McDermott*, 14 Daly (N. Y.) 104.

2. Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318; *Adams v. Haskell*, 6 Cal. 475; *Chapman v. Young*, 65 Ill. App. 131; *Williamson v. Wilson*, 1 Bland (Md.) 433.

3. Bristowe v. Needham, 2 Phil. 190; *Potts v. Leighton*, 15 Ves. Jr. 276; *Courand v. Hammer*, 9 Beav. 3; *Stuart v. Boulware*, 133 U. S. 78; *Schwartz v. Keystone Oil Co.*, 164 Pa. St. 415. *Compare* *Internal Imp. Fund v. Greenough*, 105 U. S. 527; *Holcombe v. Holcombe*, 13 N. J. Eq. 413.

4. White v. Allen, (Ky. 1889) 11 S. W. Rep. 364.

5. Where Receiver Consents to Serve Gratuitously. — *Steel v. Holladay*, 19 Oregon 517. See *Wilson v. Greenwood*, 1 Swanst. 483; *Blakey v. Dufaur*, 15 Beav. 44; *Sargent v. Read*, 1 Ch. D. 600; *Hoffman v. Duncan*, 18 Jur. 69; *Powys v. Blagrave*, Kay 495, 18 Jur. 462; *Berry v. Jones*, 11 Heisk. (Tenn.) 207, 27 Am. Rep. 742; *Todd v. Rich*, 2 Tenn. Ch. 107; *Brien v. Harriman*, 1 Tenn. Ch. 467.

6. Greeley v. Provident Sav. Bank, 103 Mo. 212. *Compare* *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93.

7. Negligence or Misconduct. — *Harrison v. Boydell*, 6 Sim. 211; *Rex v. Lidwell*, 1 Dr. &

Wal. 26; *In re Sheets Lumber Co.*, 52 La. Ann. 1337; *Matter of Commonwealth F. Ins. Co.*, 32 Hun (N. Y.) 78; *Carl v. Meyer*, 51 N. Y. App. Div. 5; *Champlain First Nat. Bank v. Wood*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 278.

8. Cowdrey v. Railroad Co., 1 Woods (U. S.) 336.

9. Acting in Several Capacities. — *Battaile v. Fisher*, 36 Miss. 321; *Holcombe v. Holcombe*, 13 N. J. Eq. 417; *Matter of Niagara Bank*, 6 Paige (N. Y.) 213; *Martin v. Martin*, 14 Oregon 165; *Arthur v. Master in Equity*, Harp. Eq. (S. Car.) 47. And see *Wilkinson v. Washington Trust Co.*, (C. C. A.) 102 Fed. Rep. 28. *Compare* *State v. Butler*, 15 Lea (Tenn.) 113.

Thus, a Master in Chancery acting as receiver is entitled only to the compensation of a receiver. *Arthur v. Master in Equity*, Harp. Eq. (S. Car.) 47. And see *Wilkinson v. Washington Trust Co.*, (C. C. A.) 102 Fed. Rep. 28.

When a Trustee Is Appointed Receiver he should, it has been held, act without compensation. *Banks v. Banks*, 14 Jur. 659; *Sykes v. Hastings*, 11 Ves. Jr. 363.

As Agent of Mortgagee. — But where, by consent of all parties in interest the receiver of the debtor sold mortgaged property, as the agent of the mortgagee, it was held that the mortgagee should be allowed a sum to pay the receiver's commission, on the amount so sold for the mortgagee. *Leadbetter v. Leadbetter*, 57 Hun (N. Y.) 587, 11 N. Y. Supp. 228.

As Agent of Purchaser. — And where, pending foreclosure, third parties purchased the debt and mortgage from the mortgagee, the receiver assisting the vendees as their agent

pensation, the courts have, as a rule, refused it.¹ But this has not been invariably the case. Some courts have allowed receivers who have attended in person to legal duties in connection with the receivership affairs, the regular fees paid to attorneys or counsel.² So, also, a receiver who had rendered legal services has been allowed, under special legislative act, compensation therefor in addition to his fees as a receiver.³

10. Where Order of Appointment Reversed. — A receiver who has been appointed in an orderly and legal manner by a court having jurisdiction, and who has in good faith entered upon his duties as such, should be protected by the court in his proper action under the order while it is in force, and be compensated and indemnified out of the fund intrusted to his guardianship for his reasonable services, legal charges, and disbursements, although the order of appointment is subsequently reversed for error.⁴ But it is otherwise, if it has been held, if the appointment of the receiver was wholly unauthorized and unwarranted.⁵

11. Where Improper Person Appointed. — Although, it has been held, a creditor or his representative should not be appointed receiver, nevertheless if such a person is appointed receiver and serves without objection being made, he may be allowed a reasonable compensation.⁶

12. Where Receiver Party in Interest. — It has been held that if a trustee or other party in interest, as, for example, a partner or mortgagee, offers himself as receiver, he may be required to serve without compensation.⁷

13. Successive Receivers. — A second receiver who is appointed to succeed a former one, and who receives the funds which were in the hands of the other, is not entitled to any commission thereon, when such commission has already been paid to the former receiver.⁸

14. Death of Co-receiver. — The death of a co-receiver does not, of course, defeat the claim of the survivor to compensation for his services rendered after the death of his colleague.⁹

15. Liability of Receivership Property. — The compensation of a receiver

at their request, in bringing about the purchase, it was held that, in acting as the agent of the purchaser as stated, he did not violate his duties as such, so as to prevent his recovering from the purchaser compensation for the services rendered. *De Jarnatt v. Peake*, 123 Cal. 607.

1. Legal Services. — *Battle v. Fisher*, 36 Miss. 321; *Matter of Niagara Bank*, 6 Paige (N. Y.) 213. And see *Collier v. Munn*, 41 N. Y. 143; *State v. Butler*, 15 Lea (Tenn.) 118.

2. Farmers' L. & T. Co. v. Central R. Co., 2 McCrary (U. S.) 318.

3. State v. Butler, 15 Lea (Tenn.) 114.

4. Order of Appointment Reversed. — *O'Mahoney v. Belmont*, 37 N. Y. Super. Ct. 233; *New Birmingham Iron, etc., Co. v. Blevins*, (Tex. Civ. App. 1897) 40 S. W. Rep. 829; *Espuela Land, etc., Co. v. Bindle*, 11 Tex. Civ. App. 262.

Appointment Set Aside by Consent. — Where a receiver has been appointed in an action to foreclose a chattel mortgage, and there exists any irregularity in such appointment, if, on the application of the defendant to set aside the appointment, the court orders the receiver to be discharged, on condition that the defendant will execute a bond to pay the judgment and costs of the case, and the defendant voluntarily executes the bond and has restored from the receiver all of the property in controversy, such defendant cannot contest the legal costs of the receiver for any irregularity

in his appointment. *State Journal Co. v. Commonwealth Co.*, 43 Kan. 93.

5. McAnrow v. Martin, 183 Ill. 467; *McAnson v. Martin*, 82 Ill. App. 432; *St. Louis, etc., R. Co. v. Wear*, 135 Mo. 230; *O'Mahoney v. Belmont*, 37 N. Y. Super. Ct. 233.

6. Geyser Min. Co. v. Salt Lake Bank, 16 Utah 163.

7. Party in Interest. — *Pilkington v. Baker*, 24 W. R. 234; *Sutton v. Jones*, 15 Ves. Jr. 584; *Sykes v. Hastings*, 11 Ves. Jr. 363. See *Wilson v. Greenwood*, 1 Swanst. 483; *Langstaffe v. Fenwick*, 10 Ves. Jr. 405; *Scott v. Brest*, 2 T. R. 238; *Blakeney v. Dufaur*, 15 Beav. 40; *Sargent v. Read*, 1 Ch. D. 600; *Steel v. Holladay*, 19 Oregon 517; *Berry v. Jones*, 11 Heisk. (Tenn.) 206, 27 Am. Rep. 742; *Todd v. Rich*, 2 Tenn. Ch. 107; *Brien v. Harriman*, 1 Tenn. Ch. 467. But see *Ranney v. Peyser*, 83 N. Y. 1.

So if, under the order of the court, the receiver has permitted the business to be principally conducted by the parties in interest, who have transacted the business as before the receivership, making purchases and sales and receiving and disbursing moneys, the receiver will not be allowed commissions upon their receipts and disbursements. *In re Woven Tape Skirt Co.*, 85 N. Y. 506.

8. Atty.-Gen. v. Continental L. Ins. Co., 32 Hun (N. Y.) 223. Compare, however, *Williamson v. Wilson*, 1 Bland (Md.) 439.

9. Burroughs v. Bunnell, 70 Md. 18.

properly appointed is a charge upon the property or funds that pass through his hands.¹ Where, however, there has been an unauthorized appointment of a receiver for property in the possession of the defendant, which is subsequently set aside and the receiver ordered to restore the property, the receiver's fees and the expenses of the receivership should not be imposed on the defendant.²

16. Liability of Parties. — By agreement between the parties one of them alone may become responsible for the receiver's fees.³ And if the fund in court is insufficient to afford an adequate compensation, the party or parties at whose instance the receiver was appointed may, it has been held, be required to provide the means of payment.⁴ So, also, where a party unwarrantably and improperly obtains the appointment of a receiver, the party so procuring such appointment has been held liable to pay the entire expense of the receivership.⁵ However, the contrary view has been taken, viz., that, the receiver being an officer of the court, his compensation does not depend upon the result of the litigation, but will be paid out of the property in dispute, no matter to which of the parties to the action the possession of such property may be adjudged.⁶

XV. FOREIGN RECEIVERS — 1. Rule as to Extraterritorial Jurisdiction. — It is a rule of universal recognition that a receiver has not, as such, any extraterritorial jurisdiction.⁷ That is, a receiver being a mere creature of the

1. Charge on Receivership Property — England.

— *Courand v. Hanmer*, 9 Beav. 3; *Ex p. Izard*, 23 Ch. D. 75.

Alabama. — *Beckwith v. Carroll*, 56 Ala. 12.

Georgia. — *Seligman v. Saussy*, 60 Ga. 20.

Iowa. — *Jaffray v. Raab*, 72 Iowa 335; *Radford v. Folsom*, 55 Iowa 276.

Kentucky. — *Grainger v. Old Kentucky Paper Co.*, (Ky. 1899) 49 S. W. Rep. 477.

Michigan. — *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 102 Mich. 462.

Montana. — *Hutchinson v. Hampton*, 1 Mont. 39.

New York. — *Hopfensack v. Hopfensack*, (C. Pl. Gen. T.) 61 How. Pr. (N. Y.) 498.

North Carolina. — *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. Car. 475.

Tennessee. — *Hayes v. Ferguson*, 15 Lea (Tenn.) 1, 54 Am. Rep. 398.

Texas. — *Espuela Land, etc., Co. v. Bindle*, 11 Tex. Civ. App. 262. And see *New Birmingham Iron, etc., Co. v. Blevens*, 12 Tex. Civ. App. 410.

The Estate in the Receiver's Hands Is the Primary Fund out of which his proper expenses and compensation are to be paid. *Knickerbocker v. McKindley Coal, etc., Co.*, 67 Ill. App. 291.

Fixed Liens on Property. — To the effect that receivers are not entitled to retain their commissions in preference to fixed liens on the property, see *Moore v. Lincoln Park, etc., Consol. Co.*, 196 Pa. St. 519.

Set-off by Purchaser Against Receiver. — It has been held that the fact that a receiver is authorized by order of court to retain the amount of his fees out of the proceeds of property sold, gives the receiver no specific right to any part of the fund until paid over by the receiver into court; and hence the purchaser cannot set off as against the purchase money debt a debt due him individually by the receiver. *Polk v. Garver Coal, etc., Co.*, 91 Iowa 570.

2. *Weston v. Watts*, 45 Hun (N. Y.) 219.

3. *Kelsey v. Sargent*, 40 Hun (N. Y.) 150.

4. Liability of Parties. — *Knickerbocker v. McKindley Coal, etc., Co.*, 67 Ill. App. 291; *Tome v. King*, 64 Md. 166. And see *Ephraim v. Pacific Bank*, 129 Cal. 589; *Welch v. Renshaw*, 14 Colo. App. 526; *Farmers Nat. Bank v. Backus*, 74 Minn. 264.

5. Liability of Party Improperly Procuring Appointment of Receiver. — *Couper v. Shirley*, (C. C. A.) 75 Fed. Rep. 168; *Moyers v. Coiner*, 22 Fla. 422; *McAnrow v. Martin*, 183 Ill. 467; *Highley v. Deane*, 64 Ill. App. 389; *French v. Gifford*, 31 Iowa 428; *Weston v. Watts*, 45 Hun (N. Y.) 219; *Verplanck v. Mercantile Ins. Co.*, 2 Paige (N. Y.) 438. And see *Radford v. Folsom*, 55 Iowa 287; *O'Mahoney v. Belmont*, 37 N. Y. Super. Ct. 223; *Willis v. Sharp*, (Supm. Ch. Gen. T.) 12 N. Y. Supp. 120, 58 Hun (N. Y.) 608; *Brundage v. Home Sav., etc., Assoc.*, 11 Wash. 288.

6. *Hopfensack v. Hopfensack*, (C. Pl. Gen. T.) 61 How. Pr. (N. Y.) 508. And see *Elk Fork Oil, etc., Co. v. Jennings* 90 Fed. Rep. 767; *Hembree v. Dawson*, 18 Oregon 474.

7. No Extraterritorial Jurisdiction — United States. — *Brigham v. Luddington*, 12 Blatchf. (U. S.) 237; *Booth v. Clark*, 17 How. (U. S.) 331; *Ex p. Norwood*, 3 Biss. (U. S.) 504; *Wigton v. Bosler*, 102 Fed. Rep. 70; *Rogers v. Riley*, 80 Fed. Rep. 759; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 69 Fed. Rep. 871; *The Willamette Valley*, (C. C. A.) 66 Fed. Rep. 565; *The Willamette Valley*, 62 Fed. Rep. 293; *Atkins v. Wabash, etc., R. Co.*, 29 Fed. Rep. 173. And see *The Willamette Valley*, 63 Fed. Rep. 130.

Alabama. — *Boulware v. Davis*, 90 Ala. 207.

California. — *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76.

Connecticut. — *Fawcett v. Supreme Sitting, etc.*, 64 Conn. 170; *Cooke v. Orange*, 48 Conn. 401; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668.

District of Columbia. — *Howard v. Chesapeake, etc., R. Co.*, 11 App. Cas. (D. C.) 300.

court of his appointment, he can manifestly have no greater or wider authority than the power which created him.¹ Nor has the statute of a state conferring certain exemptions upon receivers appointed by its courts any force or effect outside the boundaries of the particular state.²

2. Where Receiver Has Title as Individual. — Where a receiver has title to property by voluntary assignment, such title will be recognized in foreign jurisdictions.³ And where a receiver had recovered a judgment in a suit in the state of his appointment, he was held entitled to sue and recover upon it in a foreign state in his capacity as an individual.⁴

3. Statutory Receivers. — So, also, purely statutory receivers stand upon a different footing from ordinary receivers in chancery, and will, if the terms of the statute so require, be recognized in the courts of a sister state as assignees vested with legal title.⁵

4. Recognition and Rights by Comity — Rule Stated. — While, as already stated, receivers have not, of right, any extraterritorial jurisdiction, receivers appointed by the courts of one state are, as a rule, recognized, protected, and their rights enforced as a matter of comity by the courts of another, where this can be done without conflict with the public policy of the latter state, and without prejudice to the rights and interests of its citizens.⁶

Florida. — *State v. Jacksonville, etc.*, R. Co., 15 Fla. 202.

Illinois. — *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, 50 Ill. App. 547, *affirmed* Chicago, etc., R. Co. *v. Keokuk Northern Line Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557.

Indiana. — *Security Sav., etc., Assoc. v. Moore*, 151 Ind. 174; *Catlin v. Wilcox Silver Plate Co.*, 123 Ind. 477, 18 Am. St. Rep. 338; *Metzner v. Bauer*, 98 Ind. 427.

Iowa. — *Wyman v. Eaton*, 107 Iowa 214, 70 Am. St. Rep. 193; *Parker v. Lamb*, 99 Iowa 265.

Kansas. — *Winans v. Gibbs, etc.*, Mfg. Co., 48 Kan. 777; *Kronberg v. Elder*, 18 Kan. 150.

Kentucky. — *Zacher v. Fidelity Trust, etc.*, Co., (Ky. 1900) 59 S. W. Rep. 493.

Louisiana. — *McAlpin v. Jones*, 10 La. Ann. 552; *Paradise v. Farmers', etc., Bank*, 5 La. Ann. 710.

Maine. — *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 592.

Maryland. — *Southern Bldg., etc., Assoc. v. Price*, 88 Md. 155; *Linville v. Hadden*, 88 Md. 594; *Bartlett v. Wilbur*, 53 Md. 485.

Massachusetts. — *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.) 353.

Minnesota. — *Comstock v. Frederickson*, 51 Minn. 350.

Missouri. — *Seymour v. Newman*, 77 Mo. App. 578; *Weil v. Burr Oak Bank*, 76 Mo. App. 34; *Waters-Pierce Oil Co. v. Bell*, 71 Mo. App. 653; *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569; *Farmers, etc., Ins. Co. v. Needles*, 52 Mo. 17.

New Jersey. — *Falk v. Janes*, 49 N. J. Eq. 484; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Hurd v. Elizabeth*, 41 N. J. L. 1; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Bidlack v. Mason*, 26 N. J. Eq. 230.

New York. — *Howarth v. Angle*, 162 N. Y. 179; *Toronto Gen. Trust Co. v. Chicago, etc., R. Co.*, 123 N. Y. 37; *Johnson v. Wallis*, 112 N. Y. 230, 8 Am. St. Rep. 742; *Matter of Waite*, 99 N. Y. 433; *Osgood v. Maguire*, 61 N. Y. 524; *Hoyt v. Thompson*, 5 N. Y. 338; *Mabon v. Ongley Electric Co.*, 24 N. Y. App. Div. 41; *Le Fevre v. Matthews*, 39 N. Y. App.

Div. 232; *Dyer v. Power*, (Supm. Ct. Gen. T. 14 N. Y. Supp. 873; *Runk v. St. John*, 29 Barb' (N. Y.) 585; *Killmer v. Hobart*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 452; *Barclay v. Quicksilver Min. Co.*, 6 Lans. (N. Y.) 25; *Howarth v. Angle*, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 551; *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747; *Peters v. Foster*, 56 Hun (N. Y.) 607.

North Carolina. — *Kruger v. Bank of Commerce*, 123 N. Car. 16.

Ohio. — *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Wilson v. Gifford*, 5 Ohio Cir. Dec. 680, 12 Ohio Cir. Ct. 597; *Manhattan Co. v. Maryland Steel Co.*, 1 Ohio Dec. 286, 31 Cinc. L. Bul. 100.

Pennsylvania. — *Warren v. Union Nat. Bank*, 7 Phila. (Pa.) 156.

Texas. — *Pool v. Farmers' L. & T. Co.*, 7 Tex. Civ. App. 334; *Morcau v. Du Bellet*, (Tex. Civ. App. 1894) 27 S. W. Rep. 503.

Utah. — *Thum v. Pingree*, 21 Utah 348.

Vermont. — *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

West Virginia. — *Grogan v. Egbert*, 44 W. Va. 75, 67 Am. St. Rep. 763.

Wisconsin. — *Wyman v. Kimberly-Clark Co.*, 93 Wis. 554; *Filkins v. Nunnemacher*, 81 Wis. 91.

1. *Security Sav., etc., Assoc. v. Moore*, 151 Ind. 174; *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569.

2. *Central Trust Co. v. Chattanooga, etc.*, R. Co., 68 Fed. Rep. 685.

3. *Hale v. Harris*, 112 Iowa 372; *Graydon v. Church*, 7 Mich. 36. And see *Iglehart v. Bierce*, 36 Ill. 133; *Hoyt v. Thompson*, 5 N. Y. 320.

4. *Wilkinson v. Culver*, 23 Blatchf. (U. S.) 416.

5. **Statutory Receivers.** — See *Relfe v. Rundle*, 103 U. S. 222; *Weingartner v. Charter Oak L. Ins. Co.*, 32 Fed. Rep. 314; *Parsons v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 305; *Fry v. Charter Oak L. Ins. Co.*, 31 Fed. Rep. 107; *Bockover v. Life Assoc. of America*, 77 Va. 85.

6. **Rule of Comity — United States.** — *Davis v. Gray*, 16 Wall. (U. S.) 219; *Chandler v. Siddle*,

Removal of Funds — Prejudice of Domestic Creditors. — A foreign receiver of a dissolved foreign partnership will not, however, be permitted to remove the funds of such partnership out of the state, to the detriment of the resident creditors thereof; ¹ nor will the receiver be permitted to take the property of a foreign corporation from the state until the claims of domestic creditors are satisfied. ²

3 Dill. (U. S.) 477; *Ex p. Norwood*, 3 Biss. (U. S.) 504; *Hale v. Tyler*, 104 Fed. Rep. 757; *Wigton v. Bosler*, 102 Fed. Rep. 70; *Rogers v. Riley*, 80 Fed. Rep. 759; *Farmers' L. & T. Co. v. Northern Pac. R. Co.*, 69 Fed. Rep. 871; *New York, etc., R. Co. v. New York, etc., R. Co.*, 58 Fed. Rep. 268; *Failey v. Talbee*, 55 Fed. Rep. 892; *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 467.

Alabama. — *Boulware v. Davis*, 90 Ala. 207.

California. — *Humphreys v. Hopkins*, 81 Cal. 554, 15 Am. St. Rep. 78.

Connecticut. — *Cooke v. Orange*, 48 Conn. 401; *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668.

District of Columbia. — *Barley v. Gittings*, 15 App. Cas. (D. C.) 427.

Illinois. — *Sercomb v. Catlin*, 128 Ill. 562, 15 Am. St. Rep. 147; *Chicago, etc., R. Co. v. Keokuk Northern Line Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Hunt v. Gilbert*, 54 Ill. App. 491.

Indiana. — *Catlin v. Wilcox Silver-Plate Co.*, 123 Ind. 479, 18 Am. St. Rep. 340; *Metzner v. Bauer*, 98 Ind. 427.

Iowa. — *Wyman v. Eaton*, 107 Iowa 214, 70 Am. St. Rep. 193; *Parker v. Lamb*, 99 Iowa 265.

Kentucky. — *Zacher v. Fidelity Trust, etc., Co.*, (Ky. 1900) 59 S. W. Rep. 493, 22 Ky. L. Rep. 987.

Louisiana. — *McAlpin v. Jones*, 10 La. Ann. 552; *Paradise v. Farmers', etc., Bank*, 5 La. Ann. 710.

Maine. — *Hunt v. Columbian Ins. Co.*, 55 Me. 298, 92 Am. Dec. 596.

Maryland. — *Bartlett v. Wilbur*, 53 Md. 485.

Massachusetts. — *Taylor v. Columbian Ins. Co.*, 14 Allen (Mass.) 353.

Michigan. — *Cohen v. Supreme Sitting, etc.*, 105 Mich. 283; *Graydon v. Church*, 7 Mich. 50.

Minnesota. — *Comstock v. Frederickson*, 51 Minn. 350.

Missouri. — *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569; *Weil v. Burr Oak Bank*, 76 Mo. App. 34; *Waters-Pierce Oil Co. v. Bell*, 71 Mo. App. 653.

Nebraska. — *Ogden v. Warien*, 36 Neb. 715.

New Jersey. — *Falk v. Janes*, 49 N. J. Eq. 484; *Sobernheimer v. Wheeler*, 45 N. J. Eq. 614; *Hurd v. Elizabeth*, 41 N. J. L. 1; *Bidlack v. Mason*, 26 N. J. Eq. 230.

New York. — *Howarth v. Angle*, 162 N. Y. 179; *Osgood v. Maguire*, 61 N. Y. 524; *Willits v. Waite*, 25 N. Y. 583; *Hoyt v. Thompson*, 5 N. Y. 338; *Mabon v. Ongley Electric Co.*, 24 N. Y. App. Div. 41; *Killmer v. Hobart*, (Supm. Ct. Spec. T.) 58 How. Pr. (N. Y.) 452; *Taylor v. Atlantic, etc., R. Co.*, (Supm. Ct. Spec. T.) 57 How. Pr. (N. Y.) 15; *Pugh v. Hurtt*, (Supm. Ct. Spec. T.) 52 How. Pr. (N. Y.) 24; *Runk v. St. John*, 29 Barb. (N. Y.) 587; *Peters v. Foster*, 56 Hun (N. Y.) 607; *Barclay v. Quick-silver Min. Co.*, 6 Lans. (N. Y.) 31; *Howarth*

v. Angle, (Supm. Ct. Tr. T.) 25 Misc. (N. Y.) 551; *Dyer v. Power*, (Supm. Ct. Gen. T.) 14 N. Y. Supp. 873; *Peters v. Foster*, 56 Hun (N. Y.) 607, 18 Civ. Pro. (N. Y.) 380. And see *Sager Mfg. Co. v. Smith*, 45 N. Y. App. Div. 358.

Ohio. — *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174.

Pennsylvania. — *Bagby v. Atlantic, etc., R. Co.*, 86 Pa. St. 291; *Smith v. Fidelity Bldg., etc., Assoc.*, 4 Pa. Dist. 317. And see *John Ray Clark Co. v. Toby Valley Supply Co.*, 3 Pa. Dist. 518.

Vermont. — *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

Wisconsin. — *Wyman v. Kimberly Clark Co.*, 93 Wis. 554; *Filkins v. Nunnemacher*, 81 Wis. 91.

Securing Possession. — Merely as a matter of comity the court of one state may extend its aid to the receiver of a foreign corporation, for the purpose of enabling him to secure possession of property which should, in equity, be applied in payment of the debts of the corporation. *National Trust Co. v. Miller*, 33 N. J. Eq. 155.

Where a Receiver of a Benevolent Association is appointed in the jurisdiction of its domicile, it is competent and proper for the court of another state, in which is a local branch of such association, to order trust funds held by such local branch to be paid into the hands of the receiver. *Durward v. Jewett*, 46 La. Ann. 559.

Right to Sue. — It is a rule of almost universal recognition that a receiver appointed in one state will be permitted, upon principles of comity, to bring an action in the courts of a sister state for the protection of the estate which he represents, when by so doing the rights of domestic citizens are not infringed or interfered with. *Cooke v. Orange*, 48 Conn. 401; *Toronto Gen. Trust Co. v. Chicago, etc., R. Co.*, 123 N. Y. 37; *Johnson v. Wallis*, 112 N. Y. 230, 8 Am. St. Rep. 742; *Matter of Waite*, 99 N. Y. 433; *Runk v. St. John*, 29 Barb. (N. Y.) 585; *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232; *Barclay v. Quick-silver Min. Co.*, 6 Lans. (N. Y.) 25; *Lycoming F. Ins. Co. v. Wright*, 55 Vt. 526.

Suits Against Foreign Receivers. — A citizen of one state may sue a receiver appointed by the courts of a foreign state, in the courts of the former, where the receiver is a citizen of and the cause of action arose in the state in which the suit is brought, and the suit is not for the purpose of controlling the receiver's official acts, or interfering with the trust property. *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232.

1. *Grogan v. Egbert*, 44 W. Va. 75, 67 Am. St. Rep. 763.

2. *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747.

Receiver to Enforce Judgment. — But a receiver appointed on a creditor's bill to enforce a judgment of the courts of the state wherein the appointment is made, may hold the debtor's assets as against an attaching creditor who is a citizen of the same state, though the complainant in the creditor's bill was a citizen of another state.¹

Citizens of State of Receiver's Appointment. — The courts of a foreign state will not, however, by entertaining proceedings instituted by citizens of the state of the receiver's appointment, permit such persons in such manner to evade the effect of the appointment of the receiver by their own courts.²

Receiver Actually in Possession. — And the general rule is believed to be that where a foreign receiver is actually in possession of assets brought from the state of his appointment, or where he has once been in possession of the same, even citizens of the state into which such assets are brought must respect the right and title of the receiver.³

XVI. ANCILLARY RECEIVERS — 1. General Rule as to Appointment. — Where a receiver has been appointed by the courts of one state, the court of another state may, when necessary or proper, appoint an ancillary receiver.⁴ It is, as a rule, within the discretion of the court of the latter jurisdiction whether to appoint an ancillary receiver, or an independent domestic receiver for the assets found within the domestic jurisdiction,⁵ as it is also discretionary whether, if an ancillary receiver is appointed, the court will appoint the person already appointed and acting as receiver in the foreign state, or some other person selected by the court.⁶

2. Powers and Duties. — An ancillary receiver, it has been held, is a mere common-law receiver, having only the powers conferred upon him by the order of his appointment;⁷ and the appointing court should give him the same remedies and aid in the collection of the assets that it would give to an original and principal receiver appointed by it.⁸ Where the same person has been appointed receiver by the courts of different jurisdictions, such person becomes, as to property within each respective jurisdiction, the officer of,

1. *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917.

2. *Linville v. Hadden*, 88 Md. 594; *Merchants Nat. Bank v. McLeod*, 38 Ohio St. 174; *Bagby v. Atlantic, etc.*, R. Co., 86 Pa. St. 291; *Frowert v. Blank*, 9 Pa. Dist. 573; *Gilman v. Ketcham*, 84 Wis. 60, 36 Am. St. Rep. 899.

3. **A Member of a Mutual Benefit Association**, incorporated under the laws of another state, cannot, by garnishment proceedings instituted after the appointment of a receiver in the state of the corporate domicile, hold property of the corporation in another jurisdiction, though such garnishment proceedings were instituted before the appointment of an ancillary receiver in the latter state. *Wheeler v. Dime Sav. Bank*, 116 Mich. 271, 72 Am. St. Rep. 521.

4. **Effect of Possession by Receiver.** — *Pond v. Cooke*, 45 Conn. 126, 29 Am. Rep. 668; *Chicago, etc.*, R. Co. v. *Keokuk Northern Line Packet Co.*, 108 Ill. 317, 48 Am. Rep. 557; *Robertson v. Staed*, 135 Mo. 135, 58 Am. St. Rep. 569; *Merchants' Nat. Bank v. Pennsylvania Steel Co.*, 57 N. J. L. 336; *Cagill v. Wooldridge*, 8 Baxt. (Tenn.) 580, 35 Am. Rep. 716. And see *Cooke v. Orange*, 48 Conn. 401. Compare *Humphreys v. Hopkins*, 81 Cal. 551, 15 Am. St. Rep. 76; *Lett v. Thurber Whyland Co.*, 15 Pa. Co. Ct. 666, 4 Pa. Dist. 239.

5. **Ancillary Receiver.** — *Williams v. Hintermeister*, 26 Fed. Rep. 889; *Person v. Leary*, 126 N. Car. 504, judgment affirmed on rehear-

ing 127 N. Car. 114; *Evans v. Pease*, 21 R. I. 187.

Application by Stockholder of Foreign Corporation. — A stockholder of a foreign corporation owning property in the domestic jurisdiction cannot, on the ground of a decree of dissolution and annulment of charter by the foreign government, apply for the appointment of a receiver by the domestic courts, where under such decree a stockholder would not be entitled to the appointment of a receiver in the foreign jurisdiction. *Hamilton v. Accessory Transit Co.*, 26 Barb. (N. Y.) 46.

6. **Discretion as to Appointment.** — *Sands v. Greeley*, (C. C. A.) 88 Fed. Rep. 130; *Security Sav., etc., Assoc. v. Moore*, 151 Ind. 174; *Irwin v. Granite State Provident Assoc.*, 56 N. J. Eq. 244; *Walter v. F. E. McAlister Co.*, (Supm. Ct. Spec. T.) 21 Misc. (N. Y.) 747; *Borton v. Brines-Chase Co.*, 175 Pa. St. 209. And see *Corn Exch. Bank v. Rockwell*, 58 Ill. App. 506.

7. *Shinney v. North American Sav., etc., Co.*, 97 Fed. Rep. 9; *Security Sav., etc., Assoc. v. Moore*, 151 Ind. 174; *Irwin v. Granite State Provident Assoc.*, 56 N. J. Eq. 244.

8. **Powers of Ancillary Receiver.** — *Buckley v. Harrison*, (C. Pl. Gen. T.) 10 Misc. (N. Y.) 683.

9. **National Trust Co. v. Miller, 33 N. J. Eq. 155, *Goodrich v. Sanderson*, 35 N. J. App. Div. 546. And see *Minchin v. Paterson Second Nat. Bank*, 36 N. J. Eq. 436; *Bank***

and accountable to, and subject to the control of, the court of such jurisdiction.¹

3. Relation to General or Principal Receiver. — It has been held that receivers appointed for the same corporation in various states are all ancillary to the one first appointed, and should turn over to him the funds collected for proper distribution.²

XVII. CONFLICTING RECEIVERSHIPS — 1. General Rule. — As a general rule, more than one receiver will not be appointed over the same property in the same jurisdiction, or over other property of the same owner therein, except of course in the case of joint receivers, where all act together with the same object in view.³ Where a subsequent receivership is sought on account of other debts or claims of or against the same debtor, or with reference to the same or other property, the first receivership should be extended so as to include the subsequent debt or other property.⁴ More than one receiver may, however, be appointed where their functions do not conflict either by reason of the appointments being in different jurisdictions,⁵ or where they

Com'rs v. Granite State Provident Assoc., 68 N. H. 554.

1. *Kirker v. Owings*, (C. C. A.) 98 Fed. Rep. 499; *Cohen v. Gold Creek Nevada Min. Co.*, 95 Fed. Rep. 580.

A Judgment Against an Ancillary Receiver in the state of his appointment as such will bind only that portion of the assets as have come into his hands as such, and cannot bind the assets in the hands of the receiver in another state, where a receiver was first appointed. *Reynolds v. Stockton*, 140 U. S. 254.

2. Relation of Ancillary to Principal Receiver. — *Bowman v. Harris*, 95 Fed. Rep. 917; *Smith v. Taggart*, (C. C. A.) 87 Fed. Rep. 94; *Farmers' L. & T. Co. v. Northern Pac. R. Co.* 72 Fed. Rep. 26; *Buswell v. Supreme Sitting*, etc., 161 Mass. 224; *Baldwin v. Hosmer*, 101 Mich. 119; *Ware v. Supreme Sitting*, etc., (N. J. 1894) 28 Atl. Rep. 1041; *Schroder v. Supreme Sitting*, etc., 1 Ohio Dec. 408; *Kean v. Supreme Sitting*, etc., 3 Pa. Dist. 323.

But When Receivers' Certificates Have Been Authorized by the court appointing the ancillary receiver, it has been held that the foreign court of primary jurisdiction will remit to the former the matter of ordering the final payment of the certificates, and determine the compensation of the ancillary receiver. *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62.

3. General Rule as to Conflicting Receiverships. — *Kelly v. Rutledge*, 8 Ir. Eq. 228; *Wise v. Ashe*, 1 Ir. Eq. 210; *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 477; *Lloyd v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 351; *Deming v. New York Marble Co.*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 66; *People v. Central City Bank*, 53 Barb. (N. Y.) 412; *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Garfield Nat. Bank v. Bostwick*, (N. Y. City Ct. Gen. T.) 14 N. Y. Supp. 919; *Sparks v. Davis*, 25 S. Car. 381.

4. Extending Original Receivership. — *Valle v. O'Reilly*, 1 Hog. 199; *Lloyd v. Chesapeake, etc., R. Co.*, 65 Fed. Rep. 351; *Mercantile Trust Co. v. Missouri, etc., R. Co.*, 41 Fed. Rep. 9; *State v. Jacksonville, etc., R. Co.*, 15 Fla. 275; *Howell v. Ripley*, 10 Paige (N. Y.) 43; *Osborn v. Heyer*, 2 Paige (N. Y.) 342; *Lottimer v. Lord*, 4 E. D. Smith (N. Y.) 192;

Garfield Nat. Bank v. Bostwick, (N. Y. City Ct. Gen. T.) 14 N. Y. Supp. 919. And see *Schulze v. Sizer*, 14 N. Y. App. Div. 274.

In the Case of a Creditor's Suit, where more than one suit is pending against the debtor the receiver in the first suit may, if he consents, be appointed receiver in the other suits. Where the suits are all before the same chancellor or vice-chancellor he may, having jurisdiction over the receiver, compel him to accept the receivership in the second suit. *Cagger v. Howard*, 1 Barb. Ch. (N. Y.) 368; *Osborn v. Heyer*, 2 Paige (N. Y.) 342.

Receiver in Voluntary Dissolution — Foreclosure of Mortgage. — Where a receiver of a corporation has been appointed in voluntary dissolution proceedings, and subsequent thereto a mortgagee of corporation property applies for a receiver thereof, the person already appointed should be appointed receiver under the mortgage, unless it appears that by such appointment the lien of the mortgage would not be adequately protected. *Farmers' L. & T. Co. v. Hotel Brunswick Co.*, 12 N. Y. App. Div. 626, 42 N. Y. Supp. 350. But compare *British Linen Co. v. South American, etc., Co.*, (1894) 1 Ch. 108, 7 Reports 64, in which a receiver was appointed at the instance of debenture holders to enforce their security upon particular assets, leaving the official receiver in winding up proceedings to be receiver of the rest of the assets.

Second Receiver Supersedes First. — Where, however, a different receiver is appointed, then, if the court has jurisdiction of the subject-matter and parties and is the same court which made the first appointment, the receiver in the first suit must deliver up the trust property to the receiver appointed in the second. *State v. Jacksonville, etc., R. Co.*, 15 Fla. 270; *Glines v. Binghamton Trust Co.*, 68 Hun (N. Y.) 511.

5. Receivership Pending Contest Between Rival Claimants to Office. — The fact that a receiver of a corporation has been appointed pending a contest between rival claimants for office does not prevent a trustee for the bondholders from applying, in a foreign jurisdiction, for a receiver to take charge of assets of the corporation there situated. *Kelly v. Mitchell*, 98 Ky. 218.

are appointed with separate and distinct rights, powers, and duties.¹ Thus, where a receiver has been appointed in an action to foreclose a second mortgage, another person may be appointed in an action to foreclose a first mortgage upon the same property.²

2. Priority of Appointment — a. GENERAL RULE. — In the case of conflicting applications for the appointment of a receiver, the general rule is that the court which first takes cognizance of the controversy and thus obtains jurisdiction will retain it to the end of the litigation,³ and, incidentally, is entitled to take the possession or assume the control of the subject-matter of the controversy, to the exclusion of all interference from other courts of co-ordinate jurisdiction.⁴ One court, therefore, has no power to appoint a receiver for property where a receiver has already been appointed therefor by another court of competent jurisdiction, who has taken possession of the property involved; or rather, a subsequently appointed receiver will not be allowed in any manner to interfere with the rights or possession of the first.⁵ The question of precedence in such case depends upon priority of appointment.⁶

b. INTERFERENCE WITH POSSESSION OF RECEIVER. — Another court of co-ordinate jurisdiction has no right to interfere with property in the hands of a receiver already appointed,⁷ nor to entertain complaint against such receiver, nor attempt to control or call him to account, or undertake to remove him.⁸

1. *De La Vergne Refrigerating Mach. Co. v. Palmetto Brewing Co.*, 72 Fed. Rep. 579; *St. Louis Car Co. v. Stillwater St. R. Co.*, 53 Minn. 129. And see *State v. Port Royal, etc.*, R. Co., 45 S. Car. 470.

Sequestration Receiver and Receiver under Mortgage. — *New York Security, etc., Co. v. Saratoga Gas, etc., Co.*, 159 N. Y. 137, *reversing* 30 N. Y. App. Div. 89.

Receiver in Supplementary Proceedings and Receiver under Mortgage. — *Donlon, etc., Mfg. Co. v. Cannella*, 89 Hun (N. Y.) 21.

2. *Holland Trust Co. v. Consolidated Gas, etc., Co.*, 85 Hun (N. Y.) 454; *Hennessey v. Sweeney*, (Municipal Ct.) 28 Civ. Pro. (N. Y.) 332. And see *Johnson v. Southern Bldg., etc., Assoc.*, 99 Fed. Rep. 646.

3. General Rule as to Priority of Appointment. — *Andrews v. Smith*, 19 Blatchf. (U. S.) 102; *Union Trust Co. v. Rockford, etc., R. Co.*, 6 Biss. (U. S.) 198; *Gaylord v. Ft. Wayne, etc., R. Co.*, 6 Biss. (U. S.) 290; *Lake Bisteneau Lumber Co. v. Mimms*, 49 La. Ann. 1283; *People v. Central City Bank*, 53 Barb. (N. Y.) 417; *McCarthy v. Peake*, (Supm. Ct.) 9 Abb. Pr. (N. Y.) 164; *Palestine Water, etc., Co. v. Palestine*, 91 Tex. 540, *affirming* (Tex. Civ. App. 1897) 41 S. W. Rep. 659; *Riesner v. Gulf, etc., R. Co.*, 89 Tex. 656, 59 Am. St. Rep. 84. See also *Bill v. New Albany, etc., R. Co.*, 2 Biss. (U. S.) 401; *Crane v. McCoy*, 1 Bond (U. S.) 431; *Bruce v. Manchester, etc., R. Co.*, 19 Fed. Rep. 344; *West v. Morris*, 2 Disney (Ohio) 416.

4. *Andrews v. Smith*, 19 Blatchf. (U. S.) 102; *Union Trust Co. v. Rockford, etc., R. Co.*, 6 Biss. (U. S.) 198; *Gaylord v. Ft. Wayne, etc., R. Co.*, 6 Biss. (U. S.) 290.

5. Interference by Subsequently Appointed Receiver Not Allowed. — *Ward v. Swift*, 6 Hare 309; *Young v. Montgomery, etc., R. Co.*, 2 Woods (U. S.) 618; *Hale v. Hardon*, 89 Fed. Rep. 283; *Garner v. Southern Mut. Bldg., etc., Assoc.*, (C. C. A.) 84 Fed. Rep. 3; *Central Trust Co. v. South Atlantic, etc., R. Co.*, 57

Fed. Rep. 3; *Fischer v. Superior Ct.*, 110 Cal. 129; *People v. Murray Hill Bank*, 10 N. Y. App. Div. 328; *Central Nat. Bank v. Seligman*, 64 Hun (N. Y.) 615; *Bonner v. Hearne*, 75 Tex. 242. And see *Shields v. Coleman*, 157 U. S. 168; *Parks v. Sprinkle*, 64 N. Car. 637; *Northwestern Iron Co. v. Land, etc., Imp. Co.*, 92 Wis. 487.

6. *Ward v. Swift*, 6 Hare 309; *Deming v. New York Marble Co.*, (Supm. Ct. Spec. T.) 12 Abb. Pr. (N. Y.) 66; *People v. Central City Bank*, 53 Barb. (N. Y.) 412.

Consideration of Fractions of a Day. — *Worth v. Piedmont Bank*, 121 N. Car. 343; *People v. Central City Bank*, 53 Barb. (N. Y.) 412.

Priority of Possession as Against Priority of Appointment and Qualification. — *People v. Central City Bank*, 53 Barb. (N. Y.) 412.

Where Permanent Receivers Have Been Appointed in separate proceedings by different courts of co-ordinate jurisdiction, priority will be determined by reference to the date of the appointment of the temporary receivers. *Worth v. Piedmont Bank*, 121 N. Car. 343. And see *Parks v. Sprinkle*, 64 N. Car. 637.

7. No Interference by Other Courts. — *Shields v. Coleman*, 157 U. S. 168; *Johnson v. Southern Bldg., etc., Assoc.*, 99 Fed. Rep. 646; *Hale v. Hardon*, 89 Fed. Rep. 283; *Bruce v. Manchester, etc., R. Co.*, 19 Fed. Rep. 345; *Hutchinson v. Green*, 6 Fed. Rep. 837; *Nelson v. Conner*, 6 Rob. (La.) 341; *O'Mahoney v. Belmont*, 62 N. Y. 149, 37 N. Y. Super. Ct. 385; *Bailey v. O'Mahony*, 33 N. Y. Super. Ct. 242; *San Antonio, etc., R. Co. v. Davis*, (Tex. Civ. App. 1895) 30 S. W. Rep. 693; *Bonner v. Hearne*, 75 Tex. 242; *Gelpeke v. Milwaukee, etc., R. Co.*, 11 Wis. 456.

8. *Shields v. Coleman*, 157 U. S. 168; *Young v. Montgomery, etc., R. Co.*, 2 Woods (U. S.) 619; *French v. Union Pac. R. Co.*, 92 Fed. Rep. 26; *Atwood v. State*, 59 Kan. 728, 68 Am. St. Rep. 393. And see *Sanborn v. Gunter*, 84 Tex. 273; *City Water Co. v. State*, 88 Tex. 600.

c. WHERE PREVIOUS APPOINTMENT WITHOUT JURISDICTION. — If, however, an order appointing a receiver is made without jurisdiction, such order presents no obstacle to the appointment of a receiver by a court having jurisdiction to appoint.¹

3. Functions of Second Receiver. — Where a receiver has been appointed *pendente lite* over property in controversy, and another receiver has already been appointed over the same property in another proceeding, the functions of the second receiver are subordinate to those of the first; and he is only entitled to the custody of the property after the first receivership has terminated;² or, as it has been otherwise expressed, a subsequent receiver takes only what is undisposed of by the court in the litigation in which the prior receiver was appointed.³

4. Conflict of Jurisdiction as Between State and Federal Courts. — If a federal court has first taken possession of property by its receiver, a state court will not attempt to oust or disturb such possession by the appointment of a receiver on its own account, and *vice versa*.⁴ A federal court will not, as a rule, interfere with the receiver of a state court by any process or judgment against him or the property under his control,⁵ and the rule is the same in

Reformation of Notes. — Where notes have been executed by a receiver without authority, whereby the receiver individually had become bound, a court other than that in which the receiver was appointed has no jurisdiction to reform the notes so as to bind the receiver in his representative capacity only. *Peoria Steam Marble Works v. Hickey*, 110 Iowa 276.

An Injunction restraining the continuance of business by a corporation is operative against a receiver of the corporation subsequently appointed. *Steel v. Gordon*, 14 Wash. 521.

Decreeing Sale of Property. — And where, some months after the institution of foreclosure proceedings, a receiver was appointed in another suit instituted by persons who were substantially the defendants in the former action, it was held that the possession of the receiver in the latter suit would not prevent the court in the former action from decreeing a sale of the property. *Bridgeport Electric, etc., Co. v. Meader*, 72 Fed. Rep. 115.

1. U. S. Trust Co. v. New York, etc., R. Co., (Supm. Ct.) 67 How. Pr. (N. Y.) 395.

2. *Bailey v. Belmont*, (N. Y. Super. Ct. Gen. T.) 10 Abb. Pr. N. S. (N. Y.) 270; *Bailey v. O'Mahony*, 33 N. Y. Super. Ct. 239.

Subsequent Receiver Subject to Prior Rights. — Where property is in the possession of a receiver appointed in an action pending in one court, it is under the jurisdiction of that court, which alone can determine all claims to it and direct as to its disposition, and an order of another court appointing a receiver of the same property is subject to this right. *O'Mahoney v. Belmont*, 62 N. Y. 133.

3. *O'Mahoney v. Belmont*, 62 N. Y. 133.

Express Provision in Order. — In *Thau v. Bankers, etc., Tel. Co.*, 56 N. Y. Super. Ct. 588, 16 N. Y. St. Rep. 581, a receiver was appointed in a sequestration action against a corporation, although a receiver of the property of the corporation had been previously appointed in the Supreme Court. But the order appointing the second receiver expressly provided that there should be no interference with the first receiver in the exercise of his powers and the performance of his duties.

4. Federal and State Courts. — *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 326; *Union Trust Co. v. Rockford, etc.*, R. Co., 6 Biss. (U. S.) 198; *Lancaster v. Asheville St. R. Co.*, 90 Fed. Rep. 129; *Garner v. Southern Mut. Bldg., etc., Assoc.*, (C. C. A.) 84 Fed. Rep. 3; *Central Trust Co. v. Chattanooga, etc.*, R. Co., 62 Fed. Rep. 950; *Central Trust Co. v. South Atlantic, etc.*, R. Co., 57 Fed. Rep. 3; *East Tennessee, etc.*, R. Co. v. *Atlanta, etc.*, R. Co., 49 Fed. Rep. 608; *Ohio, etc.*, R. Co. v. *Fitch*, 20 Ind. 504; *Milwaukee, etc.*, R. Co. v. *Milwaukee, etc.*, R. Co., 20 Wis. 171, 88 Am. Dec. 735; *Gelpeke v. Milwaukee, etc.*, R. Co., 11 Wis. 454. See also *Davis v. Railroad Co.*, 1 Woods (U. S.) 664; *Conkling v. Butler*, 4 Biss. (U. S.) 24; *Matter of Clark*, 4 Ben. (U. S.) 97; *De La Vergne Refrigerating Mach. Co. v. Palmetto Brewing Co.*, 72 Fed. Rep. 579; *Alden v. Boston, etc.*, R. Co., 5 Nat. Bankr. Reg. 231; *Sanborn v. Gunter*, 84 Tex. 273.

Subsequent Appointment by State Court. — Where, in a prior proceeding still pending, all the assets of a corporation had been sequestered and placed in the hands of a receiver appointed by a federal court for distribution, a so-called receiver subsequently appointed by a state court in proceedings by creditors against the corporation and its stockholders under a state statute for the purpose of enforcing liability of the stockholders is but a master in chancery appointed for the purposes of the litigation, and is vested with none of the rights or assets of the corporation. *Hale v. Hardon*, 89 Fed. Rep. 283.

Libel of Vessel After Appointment of Receiver. — It has been held that a vessel may be libeled to enforce a lien for repairs, though after the appointment of a receiver therefor by a state court, where the warrant was executed by the marshal before the receiver either took possession of the vessel or notified the master or any person on board of his claim. *Roxbury v. Lotta*, 65 Fed. Rep. 319.

5. Federal Court Will Not Interfere with Receiver of State Court. — *Beecher v. Biningher*, 7 Blatchf. (U. S.) 170; *Sedgwick v. Menck*, 6 Blatchf. (U. S.) 156; *Matter of Clark*, 4 Ben.

state courts with reference to federal receivers.¹ And a state court will not attempt by a receivership to take possession of property held under process issuing out of a federal tribunal.²

Qualifications. — But a mere order by a state court restraining the officers of a corporation from using its funds for other than corporate purposes does not show such prior possession by the state court as will prevent the appointment of a receiver by a federal tribunal;³ nor is a federal court precluded from the appointment of a receiver by the pendency of foreclosure proceedings in a state court, where such suit is admittedly an amicable proceeding, and there is no immediate purpose of procuring the appointment of a receiver therein.⁴ And the rule is general in both the state and federal courts, that although a receiver has been appointed by the one court or the other, either may entertain a suit involving the same property, where the relief sought may be granted without interfering with the rights or possession of the receiver.⁵

XVIII. RECEIVER'S BONDS — 1. **General Rule.** — Although a receiver is an officer of the court and subject to its direction and control, he is nevertheless required by the court to give bond with approved sureties for the faithful execution of his trust. Accordingly the general rule is that before entering upon his duties, and particularly before taking possession of the receivership fund or property, the court will require a receiver appointed by it to enter into a bond or personal recognizance, with sufficient security, either to the clerk of the court or to the state, usually conditioned to faithfully perform the duties incident to the trust, and to obey such orders affecting the trust

(U. S.) 88; *Davis v. Railroad Co.*, 1 Woods (U. S.) 661; *Matter of Hulst*, 7 Ben. (U. S.) 40; *Alden v. Boston, etc.*, R. Co., 5 Nat. Bankr. Reg. 230. And see *Platt v. Archer*, 9 Blatchf. (U. S.) 559; *Buck v. Piedmont, etc.*, L. Ins. Co., 4 Hughes (U. S.) 415; *In re Merchants' Ins. Co.*, 3 Biss. (U. S.) 162.

A federal court will not entertain a suit by or against a receiver appointed by a state court which the state court would not authorize or permit. *Porter v. Sabin*, 149 U. S. 473.

A receiver will not, as a rule, be appointed by a federal court with a view to controversy with a receiver in a state court or with reference to proceedings in such tribunal. *Wood v. Oregon Development Co.*, 55 Fed. Rep. 901.

In Some Instances Same Person Appointed Receiver by Both State and Federal Tribunals. — *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 467.

1. *State v. Miller*, 54 Kan. 244.

A Judgment of a State Court declaring forfeit the charter of a corporation does not affect the rights of a receiver of such corporation previously appointed by the federal court. *City Water Co. v. State*, 88 Tex. 600.

Contempt of Court. — An attempt to disturb the possession of a receiver appointed by a federal court, by the institution of unauthorized proceedings in a state court, is a contempt of the former tribunal and punishable as such. *De Visser v. Blackstone*, 6 Blatchf. (U. S.) 236. But see in this connection, as construing the Act of 1887, *Dillingham v. Russell*, 73 Tex. 50.

After Technical Dismissal of Suit. — To the effect that after the technical but not necessarily final dismissal of a suit in the federal court, that court retains jurisdiction to such an extent that its jurisdiction is not superseded by a suit for a receiver in a state court, see *Union Trust Co. v. Rockford, etc.*, R. Co., 6

Biss. (U. S.) 201. See *Gaylord v. Ft. Wayne, etc.*, R. Co., 6 Biss. (U. S.) 290.

Nor will, in general, a federal court appoint a receiver for property in possession of a party under process from a state court. See *Davis v. Railroad Co.*, 1 Woods (U. S.) 664; *Matter of Hulst*, 7 Ben. (U. S.) 18; *Matter of Clark*, 4 Ben. (U. S.) 97; *Marshall v. Knox*, 16 Wall. (U. S.) 555; *Alden v. Boston, etc.*, R. Co., 5 Nat. Bankr. Reg. 230.

Property in Possession of Sheriff. — A receiver will not be appointed by a federal court for property in the possession of a sheriff under execution from a state court. *Buckeye Engine Co. v. Donau Brewing Co.*, 47 Fed. Rep. 6.

Where State Levy Suspended. — But where a levy on property by process from a state court has been suspended by an affidavit of illegality and bond, a federal court does not exceed its jurisdiction by taking possession of the same property by its receiver. *Georgia v. Atlantic, etc.*, R. Co., 3 Woods (U. S.) 434.

2. *Thompson v. Van Vechten*, 5 Duer (N. Y.) 620.

Mere Filing of Petition in Bankruptcy. — But it has been held that the mere filing of a petition in bankruptcy in the federal court will not oust the state court of jurisdiction to compel the transfer and delivery of the property of the bankrupt to a receiver appointed by such a judgment creditor. *Watkins v. Pinkney*, 3 Edw. (N. Y.) 534. Compare *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 502; *Eisenmann v. Thill*, 1 Cinc. Super. Ct. 191.

3. *East Tennessee, etc.*, R. Co. v. *Atlanta, etc.*, R. Co., 49 Fed. Rep. 608.

4. *East Tennessee, etc.*, R. Co. v. *Atlanta, etc.*, R. Co., 49 Fed. Rep. 608.

5. *Mercantile Trust Co. v. Lamoille Valley R. Co.*, 16 Blatchf. (U. S.) 327; *Holladay Case*, 27 Fed. Rep. 843; *Bacon v. Harris*, 62 Fed. Rep. 99.

estate as the appointing court may from time to time make.¹

Premium on Bond. — It has been held that a receiver is entitled to credit for a reasonable amount paid a surety company for becoming surety on his bond.²

2. Not to Act Before Executing Bond. — Where the order of appointment requires the receiver to qualify by the execution of a prescribed bond, he should not, as a rule, do or perform any official act before complying with such provision.³ So, as the execution of the bond required by the order of appointment is essential to the receiver's title, a failure to execute the bond is ground for nonsuit in actions brought by the receiver;⁴ but a mere informality in the execution of the bond is no defense to an action brought by the receiver.⁵

3. Formal Requisites — *a.* **IN GENERAL.** — A receiver's bond should, in general, run to the people of the state or to the state, rather than to the plaintiff in the proceedings or to the clerk of the court.⁶ But, notwithstanding such an irregularity, the instrument may still be upheld as a common-law bond.⁷

b. **NUMBER OF SURETIES.** — Where the order required the receiver to execute a bond with sureties, it was held that at least two sureties were required.⁸ But although two or more sureties are usually required, the court may, in the absence of statute, dispense with two and require only one.⁹

c. **WHO MAY BE SURETIES.** — In *England* it has been held that sureties on a receiver's bond must be residents,¹⁰ and substantial persons.¹¹ But in the *United States* it has been held that such sureties may be nonresidents of the district or jurisdiction of the court appointing the receiver.¹² By statute in most of the states conditions with reference to the property qualifications of sureties on bonds are prescribed, which apply without exception to receivers' bonds.¹³

4. Liability on Bond — *a.* **IN GENERAL.** — A receiver and his sureties will be held liable on the receiver's official bond for any malfeasance or misfeasance in office whereby the estate sustains injury.¹⁴ And it has been held that where the appointment of a receiver is regular on its face, liability on the

1. Receiver's Bonds. — *Mead v. Orrery*, 3 Atk. 237; *Colmore v. North*, 27 L. T. N. S. 405; *Manners v. Furze*, 11 Beav. 30; *Tylee v. Tylee*, 17 Beav. 583; *Tomlinson v. Ward*, 2 Conn. 396; *Williamson v. Wilson*, 1 Bland (Md.) 422; *Banks v. Potter*, (C. Pl. Spec. T.) 21 How. Pr. (N. Y.) 469; *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504; *Matter of Eagle Iron Works*, 8 Paige (N. Y.) 385; *Carper v. Hawkins*, 8 W. Va. 304.

2. *Hamacker v. Commercial Bank*, 95 Wis. 359.

3. Must Give Bond Before Acting. — *Voorhees v. Seymour*, 26 Barb. (N. Y.) 569; *Banks v. Potter*, (C. Pl. Spec. T.) 21 How. Pr. (N. Y.) 469; *Conger v. Sands*, (N. Y. Super. Ct. Spec. T.) 19 How. Pr. (N. Y.) 8; *National Wall Paper Co. v. Gerlach*, (N. Y. City Ct. Gen. T.) 15 Misc. (N. Y.) 640; *Hegewisch v. Silver*, 66 Hun (N. Y.) 633, 23 Civ. Pro. (N. Y.) 41; *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504; *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627.

4. *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504.

Where No Bond Required in Order. — But the fact that the receiver has not given bond is no defense to a suit by him to recover property of the corporation, where the decree appointing such receiver did not require him to give bond. *Wilson v. Welch*, 157 Mass. 77.

Receiver De Facto. — As holding that though

a receiver has given no bond he is nevertheless a receiver *de facto*, whose authority to sue cannot be questioned collaterally, see *Metro-politan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

5. *Morgan v. Potter*, 17 Hun (N. Y.) 403.

6. How Bond Should Run. — *Titus v. Fairchild*, 49 N. Y. Super. Ct. 218; *Carl v. Meyer*, 51 N. Y. App. Div. 5.

7. *Titus v. Fairchild*, 49 N. Y. Super. Ct. 218; *Carl v. Meyer*, 51 N. Y. App. Div. 5.

8. Number of Sureties. — *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504.

9. *Seton on Decrees* 1007; *Mead v. Orrery*, 3 Atk. 237; *Simmons v. Rose*, 31 Beav. 1; *Mechanics' F. Ins. Co.'s Case*, (Supm. Ct. Spec. T.) 5 Abb. Pr. (N. Y.) 446; *Johnson v. Martin*, 1 Thomp. & C. (N. Y.) 504.

10. Who May Be Sureties. — *Cockburn v. Raphael*, 2 Sim. & St. 453.

11. *Beardmore v. Phillips*, 4 M. & S. 173; *Smith v. Scandrett*, 1 W. Bl. 444.

12. *Taylor v. Life Assoc. of America*, 3 Fed. Rep. 470; *Ex p. Milwaukee R. Co.*, 5 Wall. (U. S.) 188.

13. Consult the statutes of the several states.

14. Liability on Bond. — *Baltimore Bldg., etc., Assoc. v. Alderson*, (C. C. A.) 99 Fed. Rep. 489; *Com. v. Leachman*, (Ky. 1900) 55 S. W. Rep. 430, *rehearing denied* 56 S. W. Rep. 151; *H. B. Claflin Co. v. Gibson*, (Ky. 1899) 51 S. W. Rep. 439; *Thomson v. McGregor*, 45 N.

receiver's bond may be enforced although the proceedings in which the receiver was appointed are subsequently dismissed for want of jurisdiction.¹ But a receiver is not liable on his official bond for money which did not come into his hands as receiver.²

b. WHEN LIABILITY OF SURETIES BECOMES ABSOLUTE. — The bond or recognizance becomes absolute upon the failure of the receiver to duly perform his duties and account to the court.³ The regular course, however, it has been held, is to proceed against the receiver in the first instance by rule or order to render his account, and if he fail in the proper discharge of his duty within the scope of his bond, then to obtain leave of court to sue upon the bond.⁴ If, however, the receiver dies, so that it is impossible to pursue the ordinary course, the sureties may be proceeded against directly on the bond.⁵ But the sureties on a receiver's bond are not, as a rule, liable for any default or misconduct of the receiver prior to the execution of the bond.⁶

c. EXTENT OF SURETY'S LIABILITY. — The general rule in this connection is that the liability of a surety on a receiver's bond is determined by the terms of the bond.⁷ A surety, therefore, who has paid the full balance due by his receiver may protect himself by an injunction from having a judgment enforced against his recognizance for anything more.⁸

Liability for Interest. — It has been held that the liability of a receiver's surety for interest on the amount of the receiver's default rests largely in the discretion of the court, upon a consideration of all the facts and circumstances.⁹

5. Discharge of Sureties. — Sureties of a receiver will not, of course, be discharged merely upon their own request,¹⁰ nor will the discontinuance of a suit discharge a receiver therein or the sureties on his bond,¹¹ but the discontinuance of the suit will entitle the receiver to apply for his discharge and to have his account passed, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability, unless the interests of the parties require that he should continue in the receivership to protect their rights.¹²

Y. Super. Ct. 204; *Weems v. Lathrop*, 42 Tex. 212. And see *Lesster v. Lawyers' Surety Co.*, 50 N. Y. App. Div. 181.

Funds in Hand Need Not Be Shown. — In a suit on a receiver's bond, it need not be shown that there are funds in the receiver's hands, if he has been ordered to pay and has been adjudged in contempt for not paying, where the bond is conditioned not only to faithfully discharge the duties of the trust, but also to pay and apply what he had or should receive, as he may from time to time be directed by the court. *Titus v. Fairchild*, 49 N. Y. Super. Ct. 220.

1. *Baltimore Bldg., etc., Assoc. v. Alderson*, (C. C. A.) 99 Fed. Rep. 489.

2. *Ayers v. Hite*, 97 Va. 466.

3. *Ex p. Maunsell*, 9 Ir. Eq. 283.

Sureties Stopped to Deny Receiver's Appointment. — See *Carl v. Meyer*, 51 N. Y. App. Div. 5.

Delay No Defense Where Sureties Not Prejudiced. — *Carl v. Meyer*, 51 N. Y. App. Div. 5.

4. *State v. Gibson*, 21 Ark. 140; *French v. Dauchy*, 57 Hun (N. Y.) 100; *Atkinson v. Smith*, 89 N. Car. 74; *Washington Bank v. Creditors*, 86 N. Car. 323.

Surety Not Subject to Summary Decree on Receiver's Default. — *Kirker v. Owings*, (C. C. A.) 98 Fed. Rep. 490.

Sureties Are Not Concluded by an accounting as to the amount due by the receiver and an order fixing the amount, made in the cause

in which the receiver was appointed, the sureties not being parties to such accounting nor heard therein. *Thomson v. MacGregor*, 81 N. Y. 592; *Carl v. Meyer*, 51 N. Y. App. Div. 5.

Evidence of Breach. — *Com. v. Gould*, 118 Mass. 300. And see *Thompson v. Denner*, 16 N. Y. App. Div. 160.

5. Death of Receiver. — *Ludgater v. Channell*, 3 Macn. & G. 175, *reversing* 15 Sim. 479; *French v. Dauchy*, 57 Hun (N. Y.) 100; *Weems v. Lathrop*, 42 Tex. 207.

6. Default Prior to Execution of Bond. — *U. S. v. Giles*, 9 Cranch (U. S.) 212; *U. S. v. Boyd*, 15 Pet. (U. S.) 187; *Farrar v. U. S.*, 5 Pet. (U. S.) 389; *Myers v. U. S.*, 1 McLean (U. S.) 493; *Rochester v. Randall*, 105 Mass. 205, 7 Am. Rep. 519; *Thomson v. MacGregor*, 81 N. Y. 592; *Scofield v. Churchill*, 72 N. Y. 567; *Bissell v. Saxton*, 66 N. Y. 60; *Vivian v. Otis*, 24 Wis. 518, 1 Am. Rep. 199.

7. Sureties' Liability According to Terms of Bond. — *Dawson v. Raynes*, 2 Russ. 466; *People v. Murdoch*, 50 Ill. App. 311; *Thomson v. MacGregor*, 81 N. Y. 592; *Ross v. Williams*, 11 Heisk. (Tenn.) 410; *State v. Blakemore*, 7 Heisk. (Tenn.) 657.

8. *In re Herrick*, 3 Ir. Ch. N. S. 183.

9. **Interest.** — *In re Herrick*, 3 Ir. Ch. N. S. 183; *Dawson v. Raynes*, 2 Russ. 466.

10. **Discharge.** — *Griffith v. Griffith*, 2 Ves. 400.

11. *State v. Gibson*, 21 Ark. 140.

12. *Whiteside v. Prendergast*, 2 Barb. Ch. (N. Y.) 471.

6. Contribution Against Cosurety. — A surety who pays a debt of his receiver has the same rights against his cosureties that he has against the principal, and will be permitted to put the recognizance in suit as against the cosurety.¹

7. Reimbursement of Surety. — A surety who has been held liable on a receiver's bond is entitled to be reimbursed out of any balance of money in court reported to be due to the receiver.² Upon the same principle the share of a receiver in property which was being administered by the court was held liable to make good to the surety the amount paid by him for the receiver although it was not included in a mortgage which the receiver had given the surety as an indemnity.³ But a surety has no right to indemnify himself for his liability on the receiver's bond by obtaining from the receiver a portion of the estate in his keeping.⁴

8. Additional Security. — If the security becomes inadequate in consequence of the discovery of additional property of the debtor, or of a new acquisition of property by the receiver, the proper course is to require him to give further security. The court that appointed him will, upon the application of any party interested, compel him to do so, and, if he should not, will remove him and appoint another receiver.⁵ So, also, if in any other manner the security of a receiver becomes insufficient, the court may make a rule upon him to show cause why he should not give additional sureties, and, upon his failure to do so, may remove him and appoint another in his place.⁶

9. New Bond. — If a surety, during the continuance of a receivership, procures his discharge, the receiver must enter into a fresh recognizance with new sureties.⁷

10. Collateral Security. — While it has been held not regular to do so, and it is certainly not usual, receivers have been permitted to give collateral security for the faithful performance of their receivership duties.⁸

11. When Security Not Required. — The court may, in a proper case, dispense with the giving of security by a receiver,⁹ as where the parties, on their own authority, nominate a receiver and then apply for liberty for him to act without security.¹⁰ But a receiver will not be appointed without sureties, though not objected to, if persons not competent to consent are interested.¹¹

XIX. FILING AND ALLOWANCE OF CLAIMS — 1. In General. — In some jurisdictions it is held to be the right of the receiver to pass, in the first instance, upon the validity and propriety of claims presented, subject to the control and direction of the court.¹² But the manner of asserting and filing claims in

1. *Contribution.* — Woods v. Creaghe, 2 Hog. 51; Ross v. Williams, 11 Heisk. (Tenn.) 411. And see the title CONTRIBUTION AND EXONERATION, vol. 7, p. 325.

2. Glossup v. Harrison, 3 Ves. & B. 134.

3. Brandon v. Brandon, 5 Jur. N. S. 256, 28 L. J. Ch. 147.

4. Seidenbach v. Denklespeil, 11 Lea (Tenn.) 297.

5. *When Additional Security Required.* — Wise v. Ashe, 1 Ir. Eq. 210; Downshire v. Tyrrell, Hayes 354; Banks v. Potter, (C. Pl. Spec. T.) 21 How. Pr. (N. Y.) 474; Cagger v. Howard, 1 Barb. Ch. (N. Y.) 370.

6. Averall v. Wade, Flan. & Kel. 341. See Callaghan v. Callaghan, 8 Ir. Eq. 572; O'Keefe v. Armstrong, 2 Ir. Ch. 115; Vaughan v. Vaughan, 1 Dick. 90; Blois v. Betts, 1 Dick. 336.

7. *New Bond.* — Vaughan v. Vaughan, 1 Dick. 90; Blois v. Betts, 1 Dick. 336.

Effect of New Bond upon Liability on Old. — Where a receiver is required by the court, at the instance of a party to the case, to execute a new bond, though in the same penalty and conditioned as the old bond, the new bond

will not operate to discharge the surety on the old bond from liability for future defaults of the receiver, unless there be circumstances to show that the second bond was intended as a substitute for, rather than as supplemental to, the first. Stewart v. Johnston, 87 Ga. 97.

A Temporary Receiver, on Being Continued as Permanent Receiver, need not, as a rule, file a new bond. Jones v. Blun, 145 N. Y. 333.

8. Mead v. Orrery, 3 Atk. 237.

9. *When Security May Be Dispensed With.* — Davis v. Barrett, 13 L. J. Ch. 304; Ridout v. Plymouth, 1 Dick. 68; Carlisle v. Berkley, Ambl. 599; Hibbert v. Hibbert, 3 Meriv. 681; Conolly v. Codd, Hayes & J. 624; Banks v. Potter, (C. Pl. Spec. T.) 21 How. Pr. (N. Y.) 471; Dilling v. Foster, 21 S. Car. 339. And see Wilson v. Wilson, 1 De G. & Sm. 152, 11 Jur. 793.

May Be Dispensed with Where Receiver Appointed Without Salary. — Gardner v. Blane, 1 Hare 381.

10. Manners v. Furze, 11 Beav. 30.

11. Tylee v. Tylee, 17 Beav. 583.

12. *Receivers' Right to Pass on Claims.* — Bissell v. Heath, 98 Mich. 472; *In re Minnehaha*

receivership actions varies somewhat in the several states, as the practice may have been modified or changed by statute.¹

Successive Receivers. — Claims arising against successive receivers stand on the same footing, a receivership being not personal but continuous.²

2. Period for Filing Claims. — Where there is or is to be a fund in a receiver's hands for distribution, the court may decree that all claims, in order to participate therein, must be filed within a prescribed period of time, — a right which has not infrequently received express statutory sanction.³ But an order discharging the receiver of a corporation, restoring the property to the company and requiring all claims against the receiver to be presented to the court by a prescribed date, in default whereof they should be barred, does not, it has been held, preclude recovery in a subsequent suit at law against the company on a claim, not presented within the time stipulated, for personal injuries sustained during the receivership.⁴ In the absence of statute it has been held that a court has no power to provide that unless claims are filed within a period prescribed they shall be absolutely barred, since such a provision would be an infringement of the power to fix the limitation of actions.⁵

3. Interest. — Interest is not allowed on the claims against the estate of an insolvent in the hands of a receiver pending a stay of payment by order of court.⁶ Where, at all events, the receivership property has been sold subject to existing claims, a claimant will not be entitled to interest unless he shows that there were funds in the hands of the receiver applicable to the payment of his claim, which would not have been exhausted by the allowance of interest thereon.⁷

4. Collateral Security. — It has been held that the fact that a creditor of the

Driving-Park Assoc., 53 Minn. 423; *Litzenberger v. Jarvis-Conklin Trust Co.*, 8 Utah 15.

Exclusive Jurisdiction of Appointing Court. — A court which has taken possession of an estate through its receiver may, in its discretion, reserve to itself the determination of all claims by or against the receiver. *Bowman v. Harris*, 95 Fed. Rep. 917.

The Right to Share in Funds in the Hands of a Receiver has been held not barred by delay until after the institution of foreclosure proceedings in making claim for supplies furnished shortly before the receivership. *New England R. Co. v. Carnegie Steel Co.*, (C. C. A.) 75 Fed. Rep. 54.

Effect of Allowance of Claim — Judgment Creditor of Claimant. — The allowance of a claim against a receiver has been held to create in the claimant a demand against the receiver, freed from the equities of such claimant's judgment creditors. *Patterson v. Ward*, 8 N. Dak. 87.

Judgment Creditor — Receiver under Mortgage. — It has been held that a judgment creditor is entitled to an order as against a receiver in foreclosure proceedings, subjecting funds in the hands of the receiver, but not covered by the mortgage, in part satisfaction of the judgment. *California Title Ins., etc., Co. v. Consolidated Piedmont Cable Co.*, 117 Cal. 237.

Purchase Price of Claim. — A receiver of an insolvent has no right to refuse the allowance of a claim against the estate on a basis of its par value, for the mere reason that it was purchased by the present owner at a discount. *Dimmick v. W. Fred Quimby Co.*, (N. J. 1898) 41 Atl. Rep. 101.

Foreign Judgments. — A judgment against a corporation over which a receiver has been

appointed in another state is not binding on the receiver in the state of his appointment, when he was not made a party to the action. *McCulloch v. Norwood*, 58 N. Y. 562.

1. Consult the statutes of the several states.
Receiver Must Not Be Referee to Take Proof of Claims, Determining Materiality of Evidence. — *People v. O'Brien*, 111 N. Y. 61.

Allowance of Claim by Receiver Not Conclusive. — *In re United Mut. F. Ins. Co.*, 22 R. I. 108.

2. Receivership Continuous. — *State v. Port Royal, etc., R. Co.*, 84 Fed. Rep. 67.

3. All Claims to Be Filed in Certain Time. — *Leadville Coal Co. v. McCreery*, 141 U. S. 475; *Matter of Pelican Saw Mill, etc., Co.*, 50 La. Ann. 404; *Hove v. Bankers' Exch. Bank*, 75 Minn. 286; *In re Marx*, (N. J. 1899) 43 Atl. Rep. 981; *Blake v. Domestic Mfg. Co.*, (N. J. 1898) 41 Atl. Rep. 376.

Bar Waived by Creditors, Stockholders Cannot Object. — *In re Marx*, (N. J. 1899) 43 Atl. Rep. 981.

4. Claims for Personal Injuries. — Texas, etc., *R. Co. v. Bloom*, 164 U. S. 636; Texas, etc., *R. Co. v. Johnson*, 151 U. S. 81; Texas, etc., *R. Co. v. Watts*, (Tex. 1891) 18 S. W. Rep. 312. And see *Boggs v. Brown*, 82 Tex. 41.

5. Court Cannot Fix Limitation. — Texas, etc., *R. Co. v. Watts*, (Tex. 1891) 18 S. W. Rep. 312, following *Texas Pac. R. Co. v. Johnson*, 76 Tex. 421, 18 Am. St. Rep. 60; Texas, etc., *R. Co. v. Huffman*, 53 Tex. 286; *Kretz v. Texas, etc., R. Co.*, (Tex. App. 1890) 14 S. W. Rep. 1067. Compare *Dillingham v. Kelly*, 8 Tex. Civ. App. 113.

6. Interest. — *Grand Trunk R. Co. v. Central Vermont R. Co.*, 91 Fed. Rep. 569.

7. New England R. Co. v. Carnegie Steel Co., (C. C. A.) 75 Fed. Rep. 54.

person or corporation for which the receiver is appointed holds collateral security for his debt, or has even realized a part of the debt from collateral sources since the appointment of the receiver, does not reduce the amount upon which such creditor is entitled to receive dividends from the receiver until the whole debt is satisfied.¹

XX. PREFERENCES AND PRIORITIES — 1. Costs and Expenses of Receivership. — It is a general rule that fees and expenses of the administration of a receivership, and all incidental expenditures properly incurred or contracted for, take precedence of all claims against the property or its proceeds in the hands of the receiver.²

2. Taxes. — Taxes accruing on property in the hands of a receiver constitute a preferential claim upon receivership funds,³ only subordinate to the costs and expenses of the receivership.⁴

3. Liens, Mortgages, Etc. — a. IN GENERAL. — It has already been seen that a receiver takes property subject to all valid existing liens thereon and without displacing the order of their priority.⁵ Where, however, the receivership is at the instance of or for the benefit of lienholders, all proper charges, expenses, and disbursements incident to the receivership are a first charge on the funds coming into the hands of the receiver, prior to the existing liens upon the property.⁶

1. Collateral Security. — *Aldrich v. Chemical Nat. Bank*, 176 U. S. 618, *affirming* decree *Armstrong v. Chemical Nat. Bank*, (C. C. A.) 83 Fed. Rep. 556; *Malcolmson v. Wappoo Mills*, 99 Fed. Rep. 633; *Matter of Simpson*, 158 N. Y. 720, 53 N. E. Rep. 1132, *affirming order*, 36 N. Y. App. Div. 562. And see *London, etc., Bank v. Willamette Steam-Mill, etc., Co.*, 80 Fed. Rep. 226. But compare *Oyster v. Short*, 177 Pa. St. 601.

2. Fees and Expenses. — *Pennsylvania Co. v. Jacksonville, etc., R. Co.*, (C. C. A.) 93 Fed. Rep. 60; *Mercantile Trust Co. v. Farmers' L. & T. Co.*, 81 Fed. Rep. 254; *Williams v. Groat*, 73 Fed. Rep. 59; *McLane v. Placerville, etc., R. Co.*, 66 Cal. 606; *Knickerbocker v. McKindley Coal, etc., Co.*, 172 Ill. 535, 64 Am. St. Rep. 54, *affirming judgment* 67 Ill. App. 291; *Filkins v. Adams*, 60 Ill. App. 410; *Spencer v. World's Columbian Exposition*, 58 Ill. App. 637; *Gallagher v. Gingrich*, 105 Iowa 237; *Grainger v. Old Kentucky Paper Co.*, (Ky. 1899) 49 S. W. Rep. 477; *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415; *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58. And see *Griffith v. Blackwater Boom, etc., Co.*, 46 W. Va. 56.

Costs and Expenses a First Lien. — *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415.

3. Taxes a Preferential Claim. — *Lamkin v. Baldwin, etc., Mfg. Co.*, 72 Conn. 57; *Waite v. Worcester Brewing Co.*, 176 Mass. 283; *Duryee v. U. S. Credit System Co.*, 55 N. J. Eq. 311; *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415; *Gray v. Logan County*, 7 Okla. 321; *Gehr v. Mont Alto Iron Co.*, 174 Pa. St. 430; *Insurance Com'r v. Commercial Mut. Ins. Co.*, 20 R. I. 7.

4. Lamkin v. Baldwin, etc., Mfg. Co., 72 Conn. 57; *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415.

5. See supra, this title, *Jurisdiction and Control over Property and Funds*.

See, as to When the Lien of a Mortgagee is prior to the charges of a receiver, *Hotchkiss v. Makeel*, 87 Ill. App. 623.

As to Failure to Record Mortgage Prior to Receivership, see *Cheney v. Maumee Cycle Co.*, 10 Ohio Cir. Dec. 717, 20 Ohio Cir. Ct. 19.

As to the Priority of the Claims of Attaching and Preferred Creditors, over general creditors, see *Smith v. Sioux City Nursery, etc., Co.*, 109 Iowa 51.

No Priority Between Simple Contract and Judgment Creditors. — See *In re Lord, etc., Chemical Co.*, 7 Del. Ch. 248.

Receivers of Railroads. — The entire subject of preferences and priorities in this connection is very fully and specifically treated under the title RECEIVERS OF RAILROADS, *post*. Only a very general outline will be here given.

6. Expenses of Receivership Have Priority over Liens. — *Shelburn Coal Min. Co. v. Delashmutt*, 21 Ind. App. 257; *Gallagher v. Gingrich*, 105 Iowa 237; *Grainger v. Old Kentucky Paper Co.*, (Ky. 1889) 49 S. W. Rep. 477; *Farmers' etc., Nat. Bank v. Waco Electric R., etc., Co.*, (Tex. Civ. App. 1896) 36 S. W. Rep. 131; *Ellis v. Vernon Ice, etc., Co.*, 86 Tex. 109. And see *Diamond Match Co. v. Taylor*, 83 Md. 394.

When Attached Property Is Taken into Possession of a Receiver, subject to the attachment, the receiver's possession is subordinate to the attachment lien, and such lien takes priority over the receiver's claim for compensation or disbursements; but if the lienor is a party to the proceedings, and the receiver takes into his possession the property of the lienor, as well as of the former owner, to protect it for all parties, the lienor's interest is chargeable with its due proportion of the expense of protecting the property or of changing it into money. *Matter of Atlas Iron Constr. Co.*, 19 N. Y. App. Div. 415.

Claims under Authorized Contracts whereby money is borrowed for the preservation of the receivership property were held to take precedence over bonds secured by a pre-existing mortgage. *Ellis v. Vernon Ice, etc., Co.*, 86 Tex. 109. And see *Blythe v. Gibbons*, 141 Ind. 332.

When a creditor advances money to com-

b. OPERATING EXPENSES. — Where a receiver is appointed to operate property for the benefit of the lienholders thereon, he may make the operating expenses a first charge upon not only the current earnings, but the corpus of the estate,¹ and in some instances courts have authorized a preference for operating expenses for a limited period prior to the receivership either on the ground that the lienholders were benefited by the maintenance of the enterprise as a going concern, or that the corporation owed a duty to the public to continue operations,² or as necessary, as a practical matter, to enable the receiver to continue operations without difficulty or interruption.³ But the right of a creditor of an insolvent corporation in the hands of a receiver to have a preference over bondholders under a first mortgage is to be regarded as *strictissimi juris*.⁴

c. DIVERSION OF INCOME. — Where there has been a diversion of the current income of property to the payment of interest on a debt secured by mortgage thereon, instead of applying such income to the payment of current expenses, claims for the latter have been sometimes allowed priority over the mortgage debt on this ground alone.⁵

d. CLAIMS PRIOR TO RECEIVERSHIP. — As a general rule, claims or demands accruing prior to the appointment of a receiver are not given a preference over pre-existing liens or mortgages.⁶ But the payment of claims classed as operating expenses incurred during a limited period prior to the receivership is sometimes allowed, as has already been seen.⁷

e. WAGES DUE LABORERS OR EMPLOYEES. — By statute in many states sums due laborers or employees at the time of the appointment of a receiver are made preferential claims on the assets of the receivership.⁸

4. Waiver of Priority. — The ordinary rule of priority of claims may, of course, be changed or modified by agreement and consent of parties.⁹ Where, however, persons entitled to a first lien on funds in the hands of a

promise a claim to a corporation in the hands of a receiver and takes the notes of the corporation without an order of court authorizing such proceeding, he is not entitled to any priority. *Maxwell v. Wilmington Dental Mfg. Co.*, 101 Fed. Rep. 852. See also *Farmers', etc., Nat. Bank v. Waco Electric, etc., Co.*, (Tex. Civ. App. 1896) 36 S. W. Rep. 131.

Doctrine that Expenses a First Lien Irrespective of Who Applies for Receiver. — *Kneeland v. American L. v. T. Co.*, 136 U. S. 89.

1. Receiver Appointed to Operate Property May Give Expenses a First Lien. — *Atlantic Trust Co. v. Woodbridge Canal, etc., Co.*, 79 Fed. Rep. 39; *Keelyn v. Carolina Mut. Telephone, etc., Co.*, 90 Fed. Rep. 29; *Merriam v. Victory Min. Co.*, 37 Oregon 321. And see the title RECEIVERS OF RAILROADS, *post*.

2. Preference for Expenses Before Receivership Authorized. — *Keelyn v. Carolina Mut. Telephone, etc., Co.*, 90 Fed. Rep. 29; *Illinois Trust, etc., Bank v. Ottumwa Electric R. Co.*, 89 Fed. Rep. 235; *Atlantic Trust Co. v. Woodbridge Canal, etc., Co.*, 79 Fed. Rep. 39; *Merriam v. Victory Min. Co.*, 37 Oregon 321.

3. See the title RECEIVERS OF RAILROADS, *post*.

4. Farmers' L. & T. Co. v. Bankers, etc., Tel. Co., 148 N. Y. 315, 51 Am. St. Rep. 690; *Guarantee Trust, etc., Co. v. Philadelphia, etc., R. Co.*, 31 N. Y. App. Div. 511.

5. See Atlantic Trust Co. v. Woodbridge Canal, etc., Co., 79 Fed. Rep. 39. See also the title RECEIVERS OF RAILROADS, *post*.

6. Claims Prior to Receivership Not Preferred. — *Veatch v. American L. & T. Co.*, (C. C. A.)

79 Fed. Rep. 471; *Bound v. South Carolina R. Co.*, 50 Fed. Rep. 312; *Merchants' Bank v. Moore*, 106 Ala. 646; *People v. Remington*, 45 Hun (N. Y.) 329; *Phillips v. Wise*, (Tex. Civ. App. 1894) 31 S. W. Rep. 428; *Ellis v. Vernon Ice, etc., Co.*, 4 Tex. Civ. App. 66. See also *Farmers' L. & T. Co. v. Bankers, etc., Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690.

7. See *supra*, this section, Operating Expenses.

8. Wages a Preferred Claim. — *Meyer v. Chicago, etc., R. Co.*, 88 Ill. App. 373; *In re Barr-Dinwiddie Printing, etc., Co.*, (N. J. 1899) 42 Atl. Rep. 575; *Matter of Stryker*, 158 N. Y. 526, *affirming order* 73 Hun (N. Y.) 327; *Charlton v. Hale*, (Supm. Ct. Spec. T.) 25 Misc. (N. Y.) 34; *Matter of Luxton, etc., Co.*, 35 N. Y. App. Div. 243; *Trust v. Miami Oil Co.*, 10 Ohio Cir. Dec. 372; *Hanner v. Maumee Brewing Co.*, 8 Ohio Dec. 399, 6 Ohio N. P. 305.

Wages Earned Before Passage of Act — Who Entitled. — Under a statute providing that when a receiver of a corporation is appointed, "the wages of the employees, operatives, and laborers" shall be preferred, it has been held that wages earned before the passage of the act were not entitled to the preference; that the superintendent and attorney of a corporation were not within the protection of the act, nor persons employing laborers for the purpose of manufacturing for the corporation, nor a person employed on a salary and commission to sell goods. *People v. Remington*, 45 Hun (N. Y.) 329.

9. Priority Waived. — *Reinhart v. Augusta Min., etc., Co.*, (C. C. A.) 94 Fed. Rep. 901.

receiver waive their right thereto in favor of subordinate claimants, they become common unsecured creditors of the estate.¹

5. Unlawful Preferences. — It is, of course, the receiver's duty to seek to prevent all unlawful preferences in the distribution of the funds in his hands.² The fact that claims not entitled to preference have been paid in advance of preferred claims, does not entitle a mortgagee to insist that the amount of such payments shall be deducted from the fund applicable to preferred claims ahead of his mortgage.³ Nor is a party who had a preferred claim on a fund which never came into the hands of a receiver thereby entitled to a preference on funds which do come into the possession of the receiver.⁴ So also, where a party failed to avail himself of an order of court directing a receiver to distribute the funds then on hand, he does not thereby obtain a lien upon the remaining assets for his *pro rata* share in such fund.⁵

XXI. RECEIVER'S CERTIFICATES — 1. In General. — A complete treatment of this subject will be given in another title.⁶ Only a general outline of the subject of receivers' certificates will here be given.

2. Power to Authorize. — While the courts have the power in proper cases to authorize receivers' certificates which shall be a paramount lien on the receivership assets, it has been held that the power should be exercised with caution, and never without notice to the parties in interest.⁷ As a general rule receivers' certificates are only authorized for purposes necessary to the preservation of the property, except by the consent of persons having valid existing liens thereon,⁸ and, indeed, the power of courts to authorize receivers' certificates, taking precedence of prior liens on the property, except for purposes of necessary preservation, has been expressly limited to receivers of railroads, except with the consent of the lienors.⁹

3. Compliance with Order Authorizing. — Receivers' certificates are, as a rule, valid only when in strict compliance with the order of court authorizing their issuance,¹⁰ and when issued for one or more of the purposes enumerated in the order.¹¹

4. Priority and Lien. — Receivers' certificates are, as a rule, made a first lien on the receivership property.¹² But it may be stated as a general rule that

1. Grand Trunk R. Co. v. Central Vermont R. Co., 78 Fed. Rep. 690.

2. Unlawful Preferences. — Thompson v. Huron Lumber Co., 4 Wash. 600.

3. Grand Trunk R. Co. v. Central Vermont R. Co., 88 Fed. Rep. 620.

4. People v. Grand Lodge, etc., 156 N. Y. 533.

5. Rockwell v. Portland Sav. Bank, 31 Oregon 431.

6. See the title RECEIVERS OF RAILROADS, *post*.

7. Authorizing Certificates. — Osborne v. Big Stone Gap Colliery Co., 96 Va. 58.

Property in Foreign State. — The courts of one state have no power to authorize the issue of receivers' certificates which shall be a lien on property situated in another. Pool v. Farmers' L. & T. Co., 7 Tex. Civ. App. 334.

8. Generally Confined to Purposes Essential to Preservation of Property. — Metropolitan Trust Co. v. Lake Cities Electric R. Co., 100 Fed. Rep. 897; Baltimore Bldg., etc., Assoc. v. Alderson, (C. C. A.) 90 Fed. Rep. 142; Hanna v. State Trust Co., 70 Fed. Rep. 2; Fidelity Ins. Trust, etc., Co. v. Roanoke Iron Co., 68 Fed. Rep. 623; Farmers' L. & T. Co. v. Grape Creek Coal Co., 50 Fed. Rep. 481; International Trust Co. v. United Coal Co., 27 Colo. 246. And see Newton v. Eagle, etc., Mfg. Co., 76 Fed. Rep. 418.

9. International Trust Co. v. United Coal Co., 27 Colo. 246. And see also cases cited in preceding note.

10. Conditions Precedent. — It is sometimes made a condition precedent to the issuance of receivers' certificates that the proceeds or consideration thereof shall first come into the hands of the receiver. This requirement must be complied with. Alabama Iron, etc., R. Co. v. Anniston L. & T. Co., (C. C. A.) 57 Fed. Rep. 25.

Certificates in Excess of Amount Authorized. — Where certificates are issued in excess of the amount authorized, they will not be enforceable against the receivership property unless the proceeds of the certificates were used for the benefit of the property. Wesson v. Chapman, 77 Hun (N. Y.) 144. And see Bucks County R. Co.'s Case, 22 Pa. Co. Ct. 357.

11. Fidelity Ins., etc., Co. v. Shenandoah Iron Co., 42 Fed. Rep. 372.

Holder of Certificates Put on Inquiry as to Their Validity. — See Mercantile Trust Co. v. Kanawha, etc., R. Co., (C. C. A.) 58 Fed. Rep. 6. And see Wesson v. Chapman, 76 Hun (N. Y.) 592. Compare Electrical Supply Co. v. Put-in-Bay Water Works, etc., Co., 84 Fed. Rep. 740; Mercantile Trust Co. v. Kanawha, etc., R. Co., 50 Fed. Rep. 874.

12. Receivers' Certificates Generally Have First Lien. — Mercantile Trust Co. v. Kanawha,

receivers' certificates will not be issued and given priority over existing liens, unless for debts entitled to preference under the doctrines discussed under the next preceding subdivision of this article.¹ And so receivers' certificates which are not given a priority by the order authorizing their issuance, over other claims, are not entitled to a preference over debts contracted by the receiver in carrying on the business pursuant to authority conferred upon him.²

XXII. SUITS BY AND AGAINST RECEIVERS—1. **Leave to Receiver to Sue or Defend**—*a*. **IN GENERAL.**—It has been seen that a receiver is generally empowered to institute all proper suits for the recovery of the assets properly coming into his custody and control,³ though the general rule is, subject to a few exceptions, that the receiver of an insolvent debtor cannot have or be made to possess any right of action not vested in the debtor.⁴ But in order to institute suits or defend actions, a receiver must have either general or special leave to sue or defend.⁵ General authority to sue is usually conferred

etc., R. Co., 50 Fed. Rep. 874; *American Pig Iron Storage Warrant, etc., Co. v. German*, 126 Ala. 194; *Farmers' L. & T. Co. v. Bankers, etc., Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690; *Matter of Muller*, 21 N. Y. App. Div. 629, 47 N. Y. Supp. 277; *Lewis v. Linden Steel Co.*, 27 Pittsb. Leg. J. N. S. (Pa.) 395.

Continuance of Lien.—The lien of receivers' certificates has been held to continue as long as the order authorizing their issuance remains in force. *Mercantile Trust Co. v. Kanawha, etc., R. Co.*, 50 Fed. Rep. 874.

Lien Not Affected by Receiver's Misappropriation of Funds.—*Mercantile Trust Co. v. Kanawha, etc., R. Co.*, 50 Fed. Rep. 874.

Failure to Receive Certificate Due to Creditor's Neglect.—To the effect that no priority can be claimed by the creditor in such circumstances, see *Farmers' L. & T. Co. v. Bankers, etc., Tel. Co.*, 148 N. Y. 315, 51 Am. St. Rep. 690.

1. Priorities—Principles Governing.—See *Doe v. Northwestern Coal, etc., Co.*, 78 Fed. Rep. 62; *Laughlin v. U. S. Rolling-Stock Co.*, 64 Fed. Rep. 25; *Hooper v. Central Trust Co.*, 81 Md. 559; *Lewis v. Linden Steel Co.*, 183 Pa. St. 248; *Osborne v. Big Stone Gap Colliery Co.*, 96 Va. 58. And see *supra*, this title, *Preferees and Priorities*.

2. Lewis v. Linden Steel Co., 27 Pittsb. Leg. J. N. S. (Pa.) 395.

Costs of Receivership.—To the effect that the costs of the receivership are as a rule entitled to preference over receivers' certificates, see *Petersburg Sav., etc., Co. v. Dellatorre*, 70 Fed. Rep. 643.

3. See *supra*, this title, *Functions, Powers, and Duties*. See also *Brown v. Drake*, 101 Ga. 130.

A Receiver in Possession of a Wharf may maintain a bill for an injunction against the authorities of a municipal corporation who interfere with his possession and attempt to collect the wharfage. *Grant v. Davenport*, 18 Iowa 179.

4. State v. Sullivan, 120 Ind. 197. The exceptions referred to in this case are (1) suits to set aside fraudulent conveyances, and (2) suits against stockholders of insolvent corporations.

5. Leave to Sue or Defend Necessary—*England*.—*Pitt v. Snowden*, 3 Atk. 750; *Wynn v. Newborough*, 3 Bro. C. C. 88, 1 Ves. Jr. 164; *Ward v. Swift*, 6 Hare 309; *Swaby v. Dickon*, 5 Sim. 629; *Anonymous*, 6 Ves. Jr. 287; *Conyers v. Crosbie*, 6 Ir. Eq. 657.

United States.—*Booth v. Clark*, 17 How. (U. S.) 331.

California.—*Bishop v. McKillican*, 124 Cal. 321, 71 Am. St. Rep. 68.

District of Columbia.—*Glenn v. Busey*, 5 Mackey (D. C.) 233.

Indiana.—*Wayne Pike Co. v. State*, 134 Ind. 672; *Davis v. Ladoga Creamery Co.*, 128 Ind. 222; *Garver v. Kent*, 70 Ind. 428.

Kansas.—*Patrick v. Eells*, 30 Kan. 680. *Missouri*.—*State v. Gambs*, 68 Mo. 289; *Alexander v. Relfe*, 9 Mo. App. 133.

New York.—*Troy Sav. Bank v. Morrison*, 27 N. Y. App. Div. 423; *Merritt v. Lyon*, 16 Wend. (N. Y.) 405; *Green v. Winter*, 1 Johns. Ch. (N. Y.) 60; *Fincke v. Funke*, 25 Hun (N. Y.) 616; *Matter of Merritt*, 5 Paige (N. Y.) 125; *Morgan v. Bucki*, (Supm. Ct. Spec. T.) 30 Misc. (N. Y.) 245; *Felter v. Maddock*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 297.

North Carolina.—*Battle v. Davis*, 66 N. Car. 252.

Pennsylvania.—*Wisener v. Myers*, 3 Pa. Dist. 687.

Virginia.—*Davis v. Snead*, 33 Gratt. (Va.) 705.

The Receiver's General Authority to collect and keep the assets is not sufficient to warrant the bringing of an action without express permission. *Screven v. Clark*, 48 Ga. 41.

Louisiana.—The rule stated in the text does not seem to prevail in Louisiana, where the receiver is held to have power to bring suits as incident to his general authority to get in the assets. *Helme v. Littlejohn*, 12 La. Ann. 298.

Distress for Rent.—To the effect that a receiver of real estate may, without leave, distrain for rent in arrear short of a year, see *Booth v. Clark*, 17 How. (U. S.) 330 [citing *Morris v. Elme*, 1 Ves. Jr. 139]; *Blunt v. Clitherow*, 6 Ves. Jr. 799; *Hughes v. Hughes*, 3 Bro. C. C. 87; *Brandon v. Brandon*, 5 Madd. 473.

Defense of Action—Irregular Appointment.—Where a receiver was appointed by a master in chancery, who, however, had no power to make the appointment, but the papers had been issued regularly, under the seal of the court, as if the appointment had been regular, it was held that the receiver could nevertheless defend an action for trespass to goods. *Brush v. Blanchard*, 19 Ill. 31.

by the order of appointment.¹ Or, if such authority is not given in the order of appointment it may be conferred by a subsequent order.² But where the suit contemplated is of a peculiar and unusual nature, such as is not an ordinary incident of the receivership, special leave of the court to sue should be obtained.³

b. RULE BY STATUTE. — When the receiver's authority is derived from statute his functions in regard to bringing actions depend, of course, upon the extent of the power conferred thereby, and must be determined with reference thereto.⁴

c. AUTHORITY TO SUE — HOW SHOWN. — The authority of a receiver to prosecute an action has been held sufficiently shown by evidence of his appointment, qualification, and general authority to sue, without showing the necessity of such appointment.⁵

d. SUITS IN FOREIGN JURISDICTIONS. — As will be seen more fully elsewhere, a receiver has not, as a rule, any extraterritorial jurisdiction, except such as may be accorded him under comity between states.⁶ It has been held, accordingly, that a receiver has no power to institute suits outside of the jurisdiction of the court of his appointment.⁷

2. Leave to Sue Receiver — a. GENERAL RULE. — The general rule is, in the absence of a statute to the contrary, that no action can be brought against a receiver without the leave of the appointing court.⁸ And this rule applies as well where the suit is brought to recover a money judgment merely, as where

1. Order of Appointment Conferring General Authority. — *Helme v. Littlejohn*, 12 La. Ann. 298; *Henning v. Raymond*, 35 Minn. 303; *Tillinghast v. Champlin*, 4 R. I. 173, 67 Am. Dec. 510. See also *Alexander v. Relfe*, 9 Mo. App. 133.

2. Lathrop v. Knapp, 37 Wis. 307.

Subsequent Order Approving Suit. — See, to the effect that such order cures the omission to procure authority, *Weems v. Lathrop*, 42 Tex. 212.

3. Special Leave. — *Felter v. Maddock*, (C. Pl. Gen. T.) 11 Misc. (N. Y.) 297; *Pierson v. Cronk*, (Supm. Ct. Gen. T.) 7 N. Y. Supp. 573.

An order authorizing the receiver to sue for all the assets of every kind and character, gives him no authority to sue for waste or injury to property not in his possession, without special order of court. *Alexander v. Relfe*, 9 Mo. App. 133.

When a Receiver Has Obtained Leave He Is Bound to Sue, and is not to be restrained by an injunction out of another court. *Winfield v. Bacon*, 24 Barb. (N. Y.) 154.

4. See in this connection the statutes of the several states.

Construction of Particular Statute. — Where a statute authorized the receiver to sue for all the estate, debts, and things in action, the latter term was construed as extending to all rights to personal property not in possession, which may be enforced by action and including trover. *Gillet v. Fairchild*, 4 Den. (N. Y.) 80.

Suits Without Leave — Maryland Statute. — In *Everett v. State*, 28 Md. 190, it was held that where receivers are in possession of property which is taken from them pending an appeal, and bond given, they have a right, on their appointment being affirmed, to sue on the bond without obtaining leave from the court.

General Authority by Statute. — See *Wilcox v. Continental L. Ins. Co.*, 56 Conn. 468 (such suits as may be necessary in the proper per-

formance of their functions). See also *Hanke v. Blattner*, 34 Ill. App. 394.

Statutory Appointment. — It has been held that though the code of procedure of a state may regulate the appointment of receivers, the practice of courts of equity shall govern as to their power to bring suits. *Screven v. Clark*, 48 Ga. 41.

5. Brown v. Drake, 101 Ga. 130.

6. See supra, this title, *Foreign Receivers*.

7. No Power to Institute Suits Beyond Jurisdiction — United States. — *Booth v. Clark*, 17 How. (U. S.) 322; *Brigham v. Luddington*, 12 Blatchf. (U. S.) 237; *Holmes v. Sherwood*, 3 McCrary (U. S.) 405; *Hazard v. Durant*, 19 Fed. Rep. 471. And see also *Wilkinson v. Culver*, 23 Blatchf. (U. S.) 416.

Maryland. — And see also *Bartlett v. Wilbur*, 53 Md. 485.

Michigan. — And see also *Graydon v. Church*, 7 Mich. 36.

Missouri. — *Farmers', etc., Ins. Co. v. Needles*, 52 Mo. 17.

New York. — *Hope Mut. L. Ins. Co. v. Taylor*, 2 Robt. (N. Y.) 278.

Pennsylvania. — *Warren v. Union Nat. Bank*, 7 Phila. (Pa.) 156. But see *Bagby v. Atlantic etc., R. Co.*, 86 Pa. St. 291.

Texas. — *Moseby v. Burrow*, 52 Tex. 396.

8. Leave to Sue Receiver Necessary — England. — *Angel v. Smith*, 9 Ves. Jr. 335; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *De Winton v. Brecon*, 28 Beav. 200; *Tink v. Rundle*, 10 Beav. 318; *Smith v. Effingham*, 2 Beav. 232; *Evelyn v. Lewis*, 3 Hare 472; *Brooks v. Greathead*, 1 Jac. & W. 176; *Ex p. Cochrane*, L. R. 20 Eq. 282; *Randfield v. Randfield*, 3 De G. F. & J. 766, reversing *1 Drew. & Sm.* 310; *Searle v. Choat*, 25 Ch. D. 723; *Ex p. Clarke*, 1 Russ. & M. 563; *Batchelor v. Blake*, 1 Hog. 95; *Wardle v. Lloyd*, 2 Molloy 388.

United States. — *Barton v. Barbour*, 104 U.

it is to take from the receiver specific property whereof he is in possession by order of court.¹ Where suit is brought against a receiver in another court without the leave of the court of his appointment, the party instituting and prosecuting such unauthorized suit may be proceeded against for contempt.² So, also, injunction will lie to restrain an action brought against a receiver without leave,³ although the action is for a money demand and not for specific property in the receiver's possession.⁴ But a receiver may be sued personally and not as receiver, without leave of court;⁵ and a corporation which has subsequently passed into the hands of a receiver may be sued for claims existing against it before the receivership without the consent of the court which appointed the receiver.⁶

Personal Judgment Against Receiver. — Where a receiver is sued in his official capacity, a personal judgment cannot be entered against him.⁷

S. 126; *Davis v. Gray*, 16 Wall. (U. S.) 203; *Kennedy v. Indianapolis, etc.*, R. Co., 2 Flipp. (U. S.) 704; *American L. & T. Co. v. Central Vermont R. Co.*, 84 Fed. Rep. 917; *Central Trust Co. v. Chattanooga, etc.*, R. Co., 68 Fed. Rep. 685; *Swope v. Villard*, 61 Fed. Rep. 417; *Rejall v. Greenhood*, 60 Fed. Rep. 784.

Connecticut. — *Links v. Connecticut River Banking Co.*, 66 Conn. 277.

Georgia. — *Glover v. Thayer*, 101 Ga. 824; *Hollifield v. Wrightsville, etc.*, R. Co., 99 Ga. 365; *De Graffenried v. Brunswick, etc.*, R. Co., 57 Ga. 22; *Henderson v. Walker*, 55 Ga. 481.

Idaho. — *Martin v. Atchison*, 2 Idaho 590.

Illinois. — *Mulcahey v. Strauss*, 151 Ill. 70.

Indiana. — *Peirce v. Chism*, 23 Ind. App. 505, 77 Am. St. Rep. 441; *Wayne Pike Co. v. State*, 134 Ind. 672; *Keen v. Breckenridge*, 96 Ind. 69; *Ft. Wayne, etc.*, R. Co. v. Mellett, 92 Ind. 535.

Iowa. — *Compare Allen v. Central R. Co.*, 42 Iowa 683.

Kansas. — *Meredith Village Sav. Bank v. Simpson*, 22 Kan. 414. *Compare St. Joseph, etc.*, R. Co. v. Smith, 19 Kan. 225.

Michigan. — *Smith v. Hosmer*, 84 Mich. 564; *Tremper v. Brooks*, 40 Mich. 335, 29 Am. Rep. 535. And see *Cohnen v. Sweeney*, 105 Mich. 643.

Minnesota. — *Schmidt v. Gayner*, 59 Minn. 303.

Missouri. — *Smith v. St. Louis, etc.*, R. Co., 151 Mo. 391; *Heath v. Missouri, etc.*, R. Co., 83 Mo. 617; *Wade v. Ringo*, 62 Mo. App. 414.

Nebraska. — *Veith v. Ress*, 60 Neb. 52.

New Jersey. — *Little v. Dusenberry*, 46 N. J. L. 614, 50 Am. Rep. 445.

New York. — *Matter of Christian Jensen Co.*, 128 N. Y. 550; *Miller v. Loeb*, 64 Barb. (N. Y.) 454; *De Groot v. Jay*, 30 Barb. (N. Y.) 483; *Winfield v. Bacon*, 24 Barb. (N. Y.) 154; *Riggs v. Whitney*, (C. Pl. Gen. T.) 15 Abb. Pr. (N. Y.) 388; *Taylor v. Baldwin*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 166; *Van Rensselaer v. Emery*, (Supm. Ct.) 9 How. Pr. (N. Y.) 138; *Parker v. Browning*, 8 Paige (N. Y.) 388, 35 Am. Dec. 717; *Noe v. Gibson*, 7 Paige (N. Y.) 513; *Vincent v. Parker*, 7 Paige (N. Y.) 65; *Fallon v. Egberts Woolen Mills Co.*, 56 N. Y. App. Div. 585; *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232.

Ohio. — *Tobias v. Tobias*, 51 Ohio St. 519; *Spinning v. Ohio L. Ins. etc., Co.*, 2 Disney (Ohio) 336.

Pennsylvania. — *Wray v. Hazlett*, 6 Phila. (Pa.) 155, 23 Leg. Int. (Pa.) 340.

Texas. — *Kreisle v. Campbell*, 89 Tex. 104.

Vermont. — *Vermont, etc.*, R. Co. v. Vermont Cent. R. Co., 46 Vt. 792.

Virginia. — *Melendy v. Barbour*, 78 Va. 544.

Washington. — *Meeker v. Sprague*, 5 Wash. 242.

Wisconsin. — *Blum v. Van Vechten*, 92 Wis. 378; *Matter of Day*, 34 Wis. 638. *Compare Kinney v. Crocker*, 18 Wis. 74.

In Tennessee Leave Is Not Necessary where the court in which suit is brought has jurisdiction of the subject-matter and parties, if the appointing court has not prohibited such suit; but having obtained judgment the plaintiff must seek its satisfaction through the court. *Burke v. Ellis*, 105 Tenn. 702. See, however, in accord with the text, *Brien v. Paul*, 3 Tenn. Ch. 357; *Payne v. Baxter*, 2 Tenn. Ch. 517.

Presumption of Knowledge of Necessity for Leave to Sue. — See *Vanderbilt v. Central R. Co.*, 43 N. J. Eq. 669.

1. *Barton v. Barbour*, 104 U. S. 126.

2. **Suit Without Leave — Contempt.** — *Thompson v. Scott*, 4 Dill. (U. S.) 508; *Taylor v. Baldwin*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 166; *De Groot v. Jay*, 30 Barb. (N. Y.) 483; *Burke v. Ellis*, 105 Tenn. 702; *Payne v. Baxter*, 2 Tenn. Ch. 517.

3. **Restraining Suit Without Leave.** — *Tink v. Rundle*, 10 Beav. 318; *Ex p. Clarke*, 1 Russ. & M. 563; *Batchelor v. Blake*, 1 Hog. 98; *Wardle v. Lloyd*, 2 Molloy 388; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 59 Fed. Rep. 523; *Montgomery v. Enslen*, 126 Ala. 654.

4. *Montgomery v. Enslen*, 126 Ala. 654.

5. *Fallon v. Egberts Woolen Mills Co.*, 56 N. Y. App. Div. 585. And see *Fleming v. Gillespie*, 7 Okla. 430.

An Action of Trover may, without leave of court, be brought against a receiver who at the time of the sale of property covered by a mortgage, also sold other property not embraced therein. *Kenney v. Ranney*, 96 Mich. 617. And see *Gutsch v. McIlhargey*, 69 Mich. 377.

6. *City Water Co. v. State*, 88 Tex. 600.

Suit Against Agent of Corporation. — The owner of property may, without leave of court, maintain replevin against the agent of a corporation in whose hands such property is, though receivers have been appointed for the corporation, where the corporation had no interest in the property although it had been used in and about its business. *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63.

7. **Personal Judgment.** — *Robinson v. Kirk-*

b. DISCRETION OF COURT AS TO LEAVE. — It rests in the discretion of the court to allow a party claiming rights against its receiver to bring an independent action against him or to compel such party to proceed in the action in which the receiver has been appointed.¹ Leave to sue a receiver is, however, granted by a court of chancery almost as of course unless it is clear that there is no foundation for the claim.²

c. EFFECT OF FAILURE TO OBTAIN LEAVE. — The failure to obtain leave to sue a receiver at law is not a jurisdictional omission, or a defense to the action, at least where there is no attempt to interfere with actual possession of property which the receiver holds under the order of the court of chancery.³ The plaintiff in such an action would only render himself liable to have his proceeding arrested by the appointing court in its discretion and in the exercise of its equitable jurisdiction on the application of the receiver,⁴ by action directed against the litigant personally, and not the court in which the proceeding is pending.⁵ Failure to obtain leave of court before suing a receiver is, therefore, merely an irregularity which, though punishable as a contempt, may be cured or waived at any stage of the proceedings.⁶

The Rule in the United States Courts, however, is, where leave to sue is required, that it is a jurisdictional prerequisite, whether the action be for receivership property or a money demand merely, without which no court of law can entertain an action against a receiver.⁷

d. RULE BY STATUTE. — By statute in several states the rule requiring leave of court before the institution of a suit against a receiver has been changed or modified, and such statutes should of course be consulted. By Act of Congress it is provided that receivers of property appointed by any court of the United States may be sued in respect of any act or transaction done or performed in carrying on the business connected with such property without the previous leave of the court in which such receiver or manager was appointed; provided, however, that such suit shall be subject to the general equity jurisdiction of the court in which the receiver was appointed, so far as the same shall be necessary to the ends of justice.⁸ And this statute applies

wood, 91 Ill. App. 54; *Woodruff v. Jewett*, 37 Hun (N. Y.) 205.

1. *Mechanics' Nat. Bank v. Landauer*, 68 Wis. 44.

May Allow Action to Proceed to Judgment. — When an action at law is brought against a receiver without applying for leave of court, the possession of the receiver is not necessarily a valid defense at law, and the court of chancery, if applied to for an injunction, may, in its discretion, allow the action to proceed to judgment and to be defended by the receiver. *Bryan v. Cormick*, 1 Cox Ch. 422; *Angel v. Smith*, 9 Ves. Jr. 335; *Anonymous*, 6 Ves. Jr. 287; *Brooks v. Greathed*, 1 Jac. & W. 176; *Aston v. Heron*, 2 Myl. & K. 390; *Randfield v. Randfield*, 3 De G. F. & J. 766; *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63.

2. *Hills v. Parker*, 111 Mass. 508, 15 Am. Rep. 63.

3. **Effect of Failure to Obtain Leave** — *England*. — *Angel v. Smith*, 9 Ves. Jr. 335.

Connecticut. — *Lamphear v. Buckingham*, 33 Conn. 237.

Illinois. — *Mulcahey v. Strauss*, 151 Ill. 70.

Iowa. — *Allen v. Central R. Co.*, 42 Iowa 683.

Kansas. — *St. Joseph, etc., R. Co. v. Smith*, 19 Kan. 225.

Massachusetts. — *Nichols v. Smith*, 115 Mass. 332; *Paige v. Smith*, 99 Mass. 395; *Ballou v. Farnum*, 9 Allen (Mass.) 47.

New Hampshire. — *Barter v. Wheeler*, 49 N. H. 9, 6 Am. Rep. 434.

New York. — *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Camp v. Barney*, 4 Hun (N. Y.) 373.

Ohio. — *Tobias v. Tobias*, 51 Ohio St. 519.

Vermont. — *Lyman v. Central Vermont R. Co.*, 59 Vt. 167; *Newell v. Smith*, 49 Vt. 255; *Blumenthal v. Brainerd*, 38 Vt. 402, 91 Am. Dec. 349; *Sprague v. Smith*, 29 Vt. 421, 70 Am. Dec. 424.

Wisconsin. — *Kinney v. Crocker*, 18 Wis. 74.

4. **Proceeding May Be Arrested.** — *Lyman v. Central Vermont R. Co.*, 59 Vt. 167; *Kinney v. Crocker*, 18 Wis. 74.

5. *Lyman v. Central Vermont R. Co.*, 59 Vt. 167.

6. **A Contempt Which May Be Cured or Waived.** — *Taylor v. Baldwin*, (Supm. Ct.) 14 Abb. Pr. (N. Y.) 166; *De Groot v. Jay*, 30 Barb. (N. Y.) 483; *Hubbell v. Dana*, (Supm. Ct.) 9 How. Pr. (N. Y.) 424; *Le Fevre v. Matthews*, 39 N. Y. App. Div. 232; *James v. James Cement Co.*, (Supm. Ct. Spec. T.) 8 N. Y. St. Rep. 490.

Waiver by Receiver's Intervention in Suit. — *Holbrook v. Ford*, 153 Ill. 633, 46 Am. St. Rep. 917, *affirming* 50 Ill. App. 547.

7. **Rule in United States Courts.** — *Barton v. Barbour*, 104 U. S. 126.

8. **Federal Statute.** — See Act of March 3, 1887 (24 U. S. Stat. at L. 552). See as construing this Act, *In re Tyler*, 149 U. S. 164;

to dispense with leave to sue a receiver appointed by a court as well where the action is brought in a state court as where the receiver is sued in a federal tribunal.¹

Effect of Judgment of State Court. — Where, accordingly, a receiver appointed in a federal court is sued in a state tribunal, a judgment so rendered, the state court having jurisdiction of the parties and the subject-matter, is final and conclusive.² The time and mode of the payment of such judgment by the receiver must, however, be controlled by the court appointing the receiver.³

e. RECEIVER'S DEFENSES. — In the matter of defenses to actions against him, a receiver stands upon the same footing as the party over whom he has been appointed. He may interpose the same defenses which such party might have pleaded, and, *vice versa*, no others are in general available.⁴

3. Enforcement of Judgment Against Receiver. — A judgment against a receiver cannot, in the absence of statute, be carried into effect except by consent and direction of the court which has charge of the estate.⁵ Nor does a statute which merely provides that actions against receivers may be instituted without leave of court authorize the execution of process on judgments recovered.⁶

XXIII. COLLATERAL ATTACK — **1. Appointment of Receiver.** — It is a rule of very general recognition that the appointment of a receiver is not subject to attack in a collateral proceeding.⁷ And the rule is the same although the bill on which the appointment was made is so irregular or imperfect as to require

McNulta v. Lochridge, 141 U. S. 327; *Swope v. Villard*, 61 Fed. Rep. 417; *In re Barnard*, 61 Fed. Rep. 531; *Central Trust Co. v. St. Louis, etc.*, R. Co., 59 Fed. Rep. 385; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 59 Fed. Rep. 523; *The St. Nicholas*, 49 Fed. Rep. 671; *Central Trust Co. v. St. Louis, etc.*, R. Co., 41 Fed. Rep. 551; *Missouri Pac. R. Co. v. Texas Pac. R. Co.*, 41 Fed. Rep. 311, 42 Am. & Eng. R. Cas. 34; *Glover v. Thayer*, 101 Ga. 824; *U. S. v. Douglas*, 113 N. Car. 190; *Dillingham v. Russell*, 73 Tex. 47, 15 Am. St. Rep. 753, 37 Am. & Eng. R. Cas. 1; *Bennett v. Northern Pac. R. Co.*, 17 Wash. 534.

1. Statute Construed. — *Erb v. Morasch*, 177 U. S. 584; *St. Louis, etc.*, R. Co. *v. Holbrook*, (C. C. A.) 73 Fed. Rep. 112; *Central Trust Co. v. East Tennessee, etc.*, R. Co., 59 Fed. Rep. 523; *Central Trust Co. v. St. Louis, etc.*, R. Co., 40 Fed. Rep. 426; *McNulta v. Lockridge*, 137 Ill. 270, 31 Am. St. Rep. 362; *Reinhart v. Sutton*, 58 Kan. 726; *Proctor v. Missouri, etc.*, R. Co., 42 Mo. App. 124; *Meyer v. Harris*, 61 N. J. L. 83; *Schonberg v. Cowen*, 7 Ohio Dec. 522, 7 Ohio N. P. 152; *Hill v. Baltimore, etc.*, R. Co., 7 Pa. Dist. 473; *Fordyce v. Withers*, 1 Tex. Civ. App. 540; *Stolze v. Milwaukee, etc.*, R. Co., 104 Wis. 47.

Judgments After Discharge. — It has been held, however, that a state cannot authorize judgments to be rendered against receivers of a federal court after their discharge. *Fordyce v. Du Bose*, 87 Tex. 78.

2. Central Trust Co. v. St. Louis, etc., R. Co., 41 Fed. Rep. 551.

3. Marshaling Controlled by Appointing Court. — *Central Trust Co. v. St. Louis, etc.*, R. Co., 41 Fed. Rep. 551. The marshaling of the assets, it was held in this case, and the orderly distribution of the fund or property according to the rights and equities of the several parties in interest, is not to be interfered with by the judgment or process of the state court.

4. Defenses Which Receiver May Interpose. — *Davis v. Duncan*, 19 Fed. Rep. 477; *Honegger v. Wettstein*, 94 N. Y. 252.

Receiver Cannot Waive Technical Defense. — *McEvers v. Lawrence*, Hoffm. (N. Y.) 173.

5. Enforcing Judgment Against Receiver. — *Abbey v. International, etc.*, R. Co., 5 Tex. Civ. App. 261.

6. Abbey v. International, etc., R. Co., 5 Tex. Civ. App. 261. See also *In re Tyler*, 149 U. S. 164.

7. Appointment Not to Be Collaterally Attacked — *England*, — *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Woodward v. Lincoln*, 3 Swanst. 626.

United States. — *Van Antwerp v. Hubbard*, 8 Blatchf. (U. S.) 285; *Shinney v. North American Sav., etc.*, Co., 97 Fed. Rep. 9; *Young v. Wempe*, 46 Fed. Rep. 354.

Alabama. — *Montgomery v. Enslen*, 126 Ala. 654; *Florence Gas, etc.*, Co. *v. Hanby*, 101 Ala. 15; *Coner v. Bray*, 83 Ala. 217.

California. — *Chetwood v. California Nat. Bank*, 113 Cal. 649.

Illinois. — *Richards v. People*, 81 Ill. 551; *Rand v. Mutual F. Ins. Co.*, 58 Ill. App. 528.

Indiana. — *Hatfield v. Cummings*, 152 Ind. 280, 50 N. E. Rep. 817; *Cook v. Citizens' Nat. Bank*, 73 Ind. 256.

Iowa. — *Metropolitan Nat. Bank v. Commercial State Bank*, 104 Iowa 682.

Kansas. — *Missouri Pac. R. Co. v. Love*, 61 Kan. 433; *Greenawalt v. Wilson*, 52 Kan. 109.

Louisiana. — *Metropolitan Bank v. New Orleans Brewing Assoc.*, 51 La. Ann. 1525.

Maine. — *American Bank v. Cooper*, 54 Me. 438.

Michigan. — *Skinner v. Lucas*, 68 Mich. 432; *Howard v. Palmer*, Walk. (Mich.) 391.

Minnesota. — *Basting v. Ankeny*, 64 Minn. 133; *Spooner v. Bay St. Louis Syndicate*, 44 Minn. 401.

amendment,¹ or though the appointment of the receiver is in certain respects irregular or erroneous.²

But the Jurisdiction of the Appointing Court to appoint a receiver may be questioned in any action in which the appointment or the alleged receiver's title is involved,³ for in such case the appointment is an absolute nullity, and not voidable merely.⁴ So also where it was shown that the appointment of a receiver was unauthorized, obtained by collusion, and for the purpose of defrauding creditors, it was held that the appointment might be set aside in a collateral proceeding instituted for the purpose.⁵

2. Receiver's Title and Authority. — The receiver's title cannot be collaterally attacked on the ground that his appointment is illegal, so long as there is a subsisting order appointing him.⁶

3. Receiver's Sales. — A sale by the receiver made under order of court cannot, where there has been no fraud, be attacked collaterally.⁷

4. Orders Entered in Receivership Proceeding. — The validity of a receiver's acts pursuant to orders of court entered in the receivership proceedings may not, as a rule, be questioned or attacked in an ancillary or collateral proceeding.⁸

XXIV. SUSPENSION OF RECEIVER'S FUNCTIONS. — Where an appeal is taken

Missouri. — *Neun v. Blackstone Bldg., etc., Assoc.*, 149 Mo. 74; *Greeley v. Provident Sav. Bank*, 103 Mo. 212.

New Jersey. — *Richards v. West*, 3 N. J. Eq. 456.

New York. — *Jones v. Blun*, 145 N. Y. 333; *Atty.-Gen. v. Guardian Mut. L. Ins. Co.*, 77 N. Y. 275; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Moat v. Holbein*, 2 Edw. (N. Y.) 188.

Ohio. — *Egbert v. Third Ward Bldg. Assoc. Co.*, 9 Ohio Dec. 646.

Oregon. — *McNary v. Bush*, 35 Oregon 114.
Washington. — *Carroll v. Pacific Nat. Bank*, 19 Wash. 639; *Smith v. Hopkins*, 10 Wash. 77.

Wisconsin. — *Davis v. Shearer*, 90 Wis. 250.
1. *Shields v. Coleman*, 157 U. S. 168.

2. *Olmstead v. Distilling, etc., Co.*, 73 Fed. Rep. 44 (*following Brown v. Lake Superior Iron Co.*, 134 U. S. 530); *Neun v. Blackstone Bldg., etc., Assoc.*, 149 Mo. 74; *Egbert v. Third Ward Bldg. Assoc. Co.*, 9 Ohio Dec. 646.

Order on Insufficient Showing Erroneous but Not Void. — *Edrington v. Pridham*, 65 Tex. 616.

The Violation of a Statute forbidding the appointment of the clerk of the court as receiver except by written consent of parties does not render the appointment open to collateral attack. *Moore v. Taylor*, 40 Hun (N. Y.) 58.

3. Where Title Involved Appointment May Be Questioned. — *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009; *State v. Ross*, 122 Mo. 435; *Gray v. Levy*, 75 Hun (N. Y.) 96; *Hardt v. Levy*, 72 Hun (N. Y.) 225; *Springs v. Bowery Nat. Bank*, 63 Hun (N. Y.) 505; *Thurber v. Miller*, 11 S. Dak. 124.

4. *Whitney v. Hanover Nat. Bank*, 71 Miss. 1009; *State v. Ross*, 122 Mo. 435; *Gray v. Levy*, 75 Hun (N. Y.) 96; *Thurber v. Miller*, 11 S. Dak. 124.

5. *Remington Paper Co. v. Watson*, 46 La. Ann. 793.

6. No Collateral Attack on Title and Authority. — *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104; *Ames v. Birkenhead Docks*, 20 Beav.

332; *Woodward v. Lincoln*, 3 Swanst. 626; *Naglee v. Lyman*, 14 Cal. 450; *Richards v. People*, 81 Ill. 551; *Cook v. Citizens Nat. Bank*, 73 Ind. 256; *American Bank v. Cooper*, 54 Me. 438; *Howard v. Palmer, Walk.* (Mich.) 391; *Andrews v. Steele City Bank*, 57 Neb. 173; *Richards v. West*, 3 N. J. Eq. 456; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Moat v. Holbein*, 2 Edw. (N. Y.) 188.

7. Collateral Attack on Receiver's Sales — *United States.* — *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352; *Farmers' L. & T. Co. v. Central R. Co.*, 5 McCrary (U. S.) 421; *Bradly v. Williams*, 3 Hughes (U. S.) 26.

Nebraska. — *Schaberg v. McDonald*, 60 Neb. 493.

New York. — *Hackley v. Draper*, 60 N. Y. 88; *McCotter v. Jay*, 30 N. Y. 80; *People v. Sturtevant*, 9 N. Y. 265, 59 Am. Dec. 536; *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202; *Battershall v. Davis*, 31 Barb. (N. Y.) 323; *Gould v. Mortimer*, (Supm. Ct. Spec. T.) 26 How. Pr. (N. Y.) 167; *Brown v. Frost*, 10 Paige (N. Y.) 243; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 259.

Wisconsin. — *Anderson v. Chicago Title, etc., Co.*, 101 Wis. 385; *Brande v. Bond*, 63 Wis. 140.

Rights of Stockholder of Corporation. — An order for the sale, by a receiver of a corporation, of the corporate property, cannot be questioned in a collateral action brought by a stockholder of the corporation, whose property is to be sold. *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

That Justice of Court Is Judgment Creditor No Ground of Collateral Attack. — *Libby v. Rosekrans*, 55 Barb. (N. Y.) 202.

8. *Rand v. Mutual F. Ins. Co.*, 58 Ill. App. 528; *Libby v. Rosekrans*, 55 Barb. (N. Y.) 219; *Capital City Mut. F. Ins. Co. v. Boggs*, 172 Pa. St. 91; *Neeves v. Boos*, 86 Wis. 313. See also *Russell v. East Anglian R. Co.*, 3 Macn. & G. 104.

Assessment of Stockholders Pursuant to Order of Court. — *Cumberland Lumber Co. v. Clinton Hill Lumber Mfg. Co.*, 57 N. J. Eq. 627.

from an order appointing a receiver, pending a determination of which a supersedeas is ordered or granted, the functions, powers, and duties of the receiver are thereby suspended.¹

XXV. TERMINATION OF RECEIVER'S FUNCTIONS — 1. Final Decree. — The functions of a receiver are, as a rule, terminated by a final decree in the cause, whereupon the receiver ceases longer to act in the capacity of receiver, but becomes a trustee as to the property in his possession for the person entitled thereto under the decree.² This rule applies, it has been held, though there is no formal order made discharging the receiver.³ The property, therefore, becomes liable in the hands of the receiver for the debts of the person entitled to it.⁴ But when a fund is in the hands of a receiver, his office as receiver is not *functus officio* until his liability as to the fund is determined, and his subsequent appointment by an insolvent court as permanent trustee for the party whose property he had sold as receiver does not release him from responsibility to the court of equity for the faithful discharge of his trust as receiver.⁵

2. Entry of Adverse Judgment. — It has been held that the entry of a judgment adverse to the party who procures the receiver's appointment terminates the duties or functions of a receiver, but does not wholly discharge him.⁶

3. Abatement of Action. — The mere abatement of the action does not of itself result in the determination of the receivership. A receiver's functions can only be determined by a formal order of court.⁷

4. Removal and Discharge — a. IN GENERAL. — The court which appoints a receiver has also power to remove or discharge him.⁸ Formerly it was the inflexible rule in chancery that the court alone which appointed a receiver had the power to remove or discharge him.⁹ But in the *United States*, where a cause in which a receiver has been appointed has been removed from the state to the federal courts, the power of removal and discharge of the receiver is vested in the latter tribunals.¹⁰

b. DISCRETION OF COURT. — It has been held that the removal or discharge of a receiver rests within the discretion of the court.¹¹ The discretion of the court referred to, however, is not an arbitrary or capricious discretion,

1. **Suspension of Receiver.** — *Continental Nat. Bldg., etc., Assoc. v. Scott*, 41 Fla. 421; *State v. Johnson*, 13 Fla. 33.

2. **Final Decree.** — *Very v. Watkins*, 23 How. (U. S.) 469; *Glenn v. Gill*, 2 Md. 1.

3. *Very v. Watkins*, 23 How. (U. S.) 469. But see *Visage v. Schofield*, 60 Ga. 680.

4. **Turning Property Over to Trustee in Insolvency.** — Where the person entitled under final decree to the property has taken the benefit of an insolvent law, the receiver will be ordered to turn over the property to the trustee under such insolvent law. *Glenn v. Gill*, 2 Md. 1; *Very v. Watkins*, 23 How. (U. S.) 469.

5. *Henry v. Kaufman*, 24 Md. 11, 87 Am. Dec. 593.

6. **Adverse Judgment.** — *State v. Gibson*, 21 Ark. 140; *Field v. Jones*, 11 Ga. 413; *Colwell v. Garfield Nat. Bank*, 119 N. Y. 412; *Ireland v. Nichols*, (N. Y. Super. Ct. Spec. T.) 9 Abb. Pr. N. S. (N. Y.) 71; *Beverley v. Brooke*, 4 Gratt. (Va.) 187.

7. **Abatement of Action.** — *Newman v. Mills*, 1 Hog. 291.

8. **Removal of Receiver.** — *Hitz v. Jenks*, 16 App. Cas. (D. C.) 530; *Crawford v. Ross*, 39 Ga. 44; *Matter of Colvin*, 3 Md. Ch. 300; *Lehigh Coal, etc., Co. v. Central R. Co.*, 35 N. J. Eq. 426; *McCullough v. Merchants' L. & T. Co.*, 29 N. J. Eq. 217; *Ferry v. Central New York Bank*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.)

446. But see *State v. Claypool*, 13 Ohio St. 14, decided under the Ohio Act of February 24, 1845, incorporating the state bank, etc.

Discharge and Appointment of Another Receiver. — *New York, etc., Tel. Co. v. Jewett*, 115 N. Y. 168.

9. *Young v. Montgomery, etc.*, R. Co., 2 Woods (U. S.) 619.

10. *Hinckley v. Gilman, etc.*, R. Co., 100 U. S. 153; *Mahoney Min. Co. v. Bennett*, 4 Sawy. (U. S.) 289; *Atkins v. Wabash, etc.*, R. Co., 29 Fed. Rep. 161; *Texas, etc., R. Co. v. Rust*, 17 Fed. Rep. 280.

11. **Removal in Discretion of Court.** — *Milwaukee, etc.*, R. Co. v. *Soutter*, 2 Wall. (U. S.) 510; *Copper Hill Min. Co. v. Spencer*, 25 Cal. 16; *Crawford v. Ross*, 39 Ga. 44; *Matter of Colvin*, 3 Md. Ch. 300; *Detroit First Nat. Bank v. E. T. Barnum Wire, etc.*, Works, 58 Mich. 315, 60 Mich. 487; *Ferry v. Central New York Bank*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 445; *Conner v. Belden*, 8 Daly (N. Y.) 257; *Young v. Rollins*, 90 N. Car. 125; *Cincinnati, etc.*, R. Co. v. *Sloan*, 31 Ohio St. 1; *Brockman v. Consolidated Bldg., etc., Co.*, 7 Ohio Dec. 291; *Bayly v. Gaines*, (Va. 1887) 2 S. E. Rep. 739.

Revocation of Order of Appointment on Ground of Want of Equity in Bill Discretionary. — *Cohen v. Meyers*, 42 Ga. 49.

but a lawful and reasonable discretion.¹ It has been held, accordingly, that the discharge of a receiver may, in a sense, be a matter of right, as where the primary object of the action was to foreclose a mortgage, the amount of which, together with interest, had been fixed by the court, and the mortgagor was ready and willing to pay such amount. In such circumstances the right of the mortgagor to pay such sum, and have the receiver discharged and the property restored, has been held to be absolute, and not subject to the discretion of the court.²

5. Causes for Removal—*a. WHERE IMPROPER PERSON APPOINTED.*—Where it is made to appear that an improper person has been appointed receiver, such receiver should be removed and a new appointment made.³

b. BIAS OR INTEREST.—Mere interest in the subject-matter of the litigation is no more a conclusive ground for the removal of a receiver than it is an absolute disqualification for his appointment.⁴ But where it develops that a receiver has an interest in the subject-matter in the suit in conflict with the impartial management of the property, he will be removed from his position.⁵

c. MISCONDUCT OR DERELICTION OF DUTY.—A receiver may be removed for such misconduct or misbehavior with reference to the trust as amounts to gross dereliction of duty.⁶ But if the removal of a receiver is sought on the ground of misconduct, he should not only have reasonable notice in writing, but also be served at the same time with a written statement, specifying the grounds on which his removal is sought, in order that he may have an opportunity to be heard.⁷

d. FAILURE TO ACCOUNT.—A receiver may be removed for dereliction of duty in the matter of passing his accounts.⁸

1. Milwaukee, etc., R. Co. v. Soutter, 2 Wall. (U. S.) 510; Conner v. Belden, 8 Daly (N. Y.) 257; Cincinnati, etc., R. Co. v. Sloan, 31 Ohio St. 1. And see DISCRETION, vol. 9, p. 473.

2. Right to Discharge Absolute. — Milwaukee, etc., R. Co. v. Soutter, 2 Wall. (U. S.) 521.

3. Improper Appointment. — Phinizy v. Augusta, etc., R. Co., 56 Fed. Rep. 273; Wood v. Oregon Development Co., 55 Fed. Rep. 901; Wilson v. Barney, 5 Hun (N. Y.) 257.

4. Interest. — Monroe Bank v. Schermerhorn, Clarke (N. Y.) 366.

Receiver's Advance of Own Funds. — The mere fact that a receiver advances his own funds to redeem the receivership estate from a sale for taxes does not disqualify him for interest in the subject-matter. Roby v. Title Guarantee, etc., Co., 166 Ill. 336.

5. Interest in Conflict with Fair Management. — Frupp v. Chard R. Co., 11 Hare 260, 22 L. J. Ch. 1084; Etowah Min. Co. v. Wills Valley Min., etc., Co., 106 Ala. 492; Williamson v. Wilson, 1 Bland (Md.) 427. And see Cookes v. Cookes, 2 De G. J. & S. 530; *In re Premier Cycle Mfg. Co.*, 70 Conn. 473.

The Appointment of a Director of a Corporation as receiver thereof will be revoked where it is shown that he had knowledge of and had acquiesced in the corporate mismanagement by reason of which the suit had been begun, and was also improperly interested in contracts made by the company. Keeler v. Brooklyn El. R. Co., (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 166.

Action for Foreclosure. — Where, subsequent to the appointment of a second mortgagee as receiver in an action by the third mortgagee to foreclose, the second mortgagee institutes foreclosure on his own mortgage, a new re-

ceiver will be appointed for both actions on objection to the competency of the second mortgagee. Putnam v. McAllister, (Supm. Ct. Spec. T.) 57 N. Y. Supp. 404.

6. Misconduct. — *In re St. George*, 19 L. R. Ir. 566; Mitchell v. Condy, W. N. (1873) 232; Handy v. Cleveland, etc., R. Co., 31 Fed. Rep. 689; Atkins v. Wabash, etc., R. Co., 29 Fed. Rep. 161; McCullough v. Merchants L. & T. Co., 29 N. J. Eq. 217; Keeler v. Brooklyn El. R. Co., (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 166.

Parties Acquiescing in Receiver's Misconduct Estopped. — See Griffith v. Griffith, 2 Ves. 400.

Instances of Misconduct Held Insufficient to Justify Removal — *Receiver of Mortgage Company Acting as Selling Agent of Trustees in Mortgages Executed by Company to Secure Its Debentures.* — Fowler v. Jarvis-Conklin Mortg. Co., 63 Fed. Rep. 888.

Mere Imprudence Without Fraud. — Fowler v. Jarvis-Conklin Mortg. Trust Co., 66 Fed. Rep. 14.

Unintentional Misstatements of Company's Condition. — Clarke v. Central R., etc., Co., 66 Fed. Rep. 16.

Fraud and Misconduct of Agents. — Clarke v. Central R., etc., Co., 66 Fed. Rep. 16.

Misconduct in Capacity Other than That of Receiver will not be gone into against a receiver upon an examination of charges relating to his conduct as an officer of the court. U. S. v. Church of Jesus Christ, 6 Utah 9.

7. Reasonable Notice. — Dougherty v. Jones, 37 Ga. 348; Smith v. Trenton Delaware Falls Co., 4 N. J. Eq. 505. And see Howard v. Lowell Mach. Co., 75 Ga. 325.

8. Failing to Account. — Bertie v. Abingdon, 8 Beav. 53; *In re St. George*, 19 L. R. Ir. 566.

e. INSUFFICIENCY OF SECURITY. — Where a receiver's security became insufficient, it was held that he would be removed upon a failure to increase the amount thereof or give other sureties.¹

f. INCAPACITY TO PERFORM DUTIES. — A receiver will be removed where he has become physically incapacitated for the performance of his duties.² But where the duties of a receiver are not yet performed, he will not on his own application, assigning as reasons the pressure of other business engagements and consequent inability to give the affairs of the trust estate the attention they require, be excused from the performance of duties which he has voluntarily undertaken to perform.³

g. DISAGREEMENT OF JOINT RECEIVERS. — Where there was such disagreement between two joint receivers appointed to manage and operate property, as resulted in a conflict of policy and authority, embarrassments of the business, and an unnecessary duplication of expenses, it was held that both receivers should be removed and a single receiver appointed in their place.⁴ But mere disagreement over personal matters or "incompatibility of temper" is not ground for removal of joint receivers, where the differences and dissensions do not work injury to the estate.⁵

h. REMOVAL BY CONSENT. — It has been held that upon a *bona fide* consent of the parties to the litigation, the receiver and a person proposed to be appointed receiver, the existing receiver may be removed and a new receiver appointed; but a removal by consent will not be made where it appears to be an attempt to traffic in the office of receiver.⁶ Nor will one receiver be removed in order that another may be substituted, where the latter is the agent of private parties interested in the litigation.⁷

i. CONSOLIDATION OF RECEIVERSHIPS. — Where there are several receiverships covering an entire estate, all will be removed but one, whose authority will be extended over the whole.⁸ And where one receiver for a portion of a debtor's property has already been appointed, a different receiver for another portion of the estate will not be appointed on a subsequent application, but the receivership in the first suit will be extended over the second.⁹

j. INSUFFICIENT CAUSE FOR REMOVAL. — A receiver once appointed will not be removed for the sole reason of relationship to one of the parties.¹⁰ But if a relative of a party is guilty of favoritism or partisanship, he will be removed as receiver.¹¹ Nor is it alone a sufficient ground for removal that the receiver has employed, as counsel, the counsel of one of the parties to the action,¹² or that he has employed the defendant, a judgment debtor, as his assistant in making collections.¹³

6. When Receiver Will Be Discharged — *a.* NO FURTHER NECESSITY FOR RECEIVER. — It is a general rule that the receiver will be discharged where

1. Failure to Give Increased Security. — *Shackelford v. Shackelford*, 32 Gratt. (Va.) 481.

2. Becoming Incapable of Performing Duties. — *Richardson v. Ward*, 6 Madd. 266.

3. Pressure of Other Business as Ground of Excuse. — *People v. Bushwick Chemical Co.*, (Supm. Ct. Gen. T.) 18 N. Y. Supp. 542.

4. Joint Receivers Disagreeing. — *Meier v. Kansas Pac. R. Co.*, 5 Dill. (U. S.) 476.

5. Conner v. Belden, 8 Daly (N. Y.) 257.

6. Consent. — *Farran v. Morris*, 1 Ir. Ch. N. S. 680.

7. *Sanders v. Lisle*, 1r. R. 4 Eq. 43.

8. Consolidating Receiverships. — *Kelly v. Rutledge*, 8 Ir. Eq. 228.

9. *State v. Jacksonville, etc.*, R. Co., 15 Fla. 275; *Howell v. Ripley*, 10 Paige (N. Y.) 43.

10. Relationship. — *Shainwald v. Lewis*, 8

Fed. Rep. 878; *Wetter v. Schlieper*, (C. Pl. Spec. T.) 7 Abb. Pr. (N. Y.) 92.

11. *Williamson v. Wilson*, 1 Bland (Md.) 427.

12. Employing Counsel of One of the Parties. — *Smith v. New York Consol. Stage Co.*, (C. Pl.) 18 Abb. Pr. (N. Y.) 419; *Monroe Bank v. Schermerhorn, Clarke* (N. Y.) 366.

In *Hynes v. McDermott*, 14 Daly (N. Y.) 104, it was said: "It is only when the receiver is acting adversely to one of the parties, that it has ever been supposed there was any impropriety in employing the counsel of the other."

Where the interests of the parties are in exact harmony there is no impropriety in employing the attorney of one of the parties. *U. S. v. Church of Jesus Christ*, 6 Utah 9.

13. *Ross v. Bridge*, (Supm. Ct. Gen. T.) 24 How. Pr. (N. Y.) 163.

there is no further necessity for the receivership.¹ So, also, there may be a discharge of the receiver as to a portion of an estate, where it is made to appear that it is unnecessary for the purposes of the receivership that it should be continued over all.² It has been held that where a receiver has been appointed, but no property has come into his hands and his appointment has been vacated, he is entitled to his discharge.³

b. INTEREST OF PARTIES. — Where it is for the interest of all concerned, the receiver will be discharged;⁴ and where a receiver has been appointed at the instance of a single creditor, the latter cannot, upon the satisfaction of his demand, have the receiver discharged as a matter of right, but the court will consider the interest of all concerned.⁵

c. DISMISSAL OF BILL — DISCONTINUANCE, ETC. — Where the bill or complaint upon which a receiver is appointed is dismissed for want of equity, the receiver may be discharged.⁶ But it is not necessary, in order to secure the discharge of a receiver, that the equities of the bill should be entirely negated. If the court becomes satisfied that there is no reasonable necessity for a receiver, the appointment may be revoked.⁷ Nor does the dismissal of the bill or the discontinuance of the proceedings of itself operate to discharge the receiver, though as between the parties to the suit the receiver's functions are ended. He is still an officer of the court, whose possession is the possession of the court, and who may be required by the court to account to it for the funds and property in his hands.⁸ The discontinuance of the suit in which the receiver was appointed will, however, entitle him to apply for his discharge and to pass his accounts, so that he may pay over the balance, if any, in his hands, and exonerate himself and his sureties from further liability, unless the interests of the parties require that he should continue in the receivership to protect their rights.⁹

1. Where No Further Necessity for Receivership.

— *Tempest v. Ord*, 1 Madd. 89; *Davy v. Gronow*, 14 L. J. Ch. 134; *Bainbridge v. Blair*, 3 Beav. 421; *Jones v. Smith*, 40 Fed. Rep. 374; *Bogardus v. Moses*, 181 Ill. 554; *Sewell v. Cape May, etc., R. Co.*, (N. J. 1887) 9 Atl. Rep. 785, 30 Am. & Eng. R. Cas. 155; *Duncan v. George C. Treadwell Co.*, 82 Hun (N. Y.) 376; *Ferry v. Central New York Bank*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 445; *Vermont, etc., R. Co. v. Vermont Cent. R. Co.*, 50 Vt. 500. And see *Farmers Nat. Bank v. Backus*, 67 Minn. 43; *Keokuk Northern Line Packet Co. v. Davidson*, 13 Mo. App. 561.

A court of equity may appoint a receiver to preserve the property of an intestate or testator, by appointing a receiver pending a litigation in the Orphans' Court for probate and administration. But when letters *pendente lite* have been granted, the powers of a receiver previously appointed cease to exist, and he will be directed to deliver the property to such administrator and be discharged. *Matter of Colvin*, 3 Md. Ch. 278.

A Receiver Appointed for the Benefit of Two Infant Tenants in Common will not be discharged on one coming of age. *Smith v. Lyster*, 4 Beav. 228.

2. Discharge as to Portion of Property. — *Magrath v. Veitch*, 1 Hog. 110.

3. No Property Coming to Receiver's Hands. — *People v. Bushwick Chemical Co.*, 63 Hun (N. Y.) 633, 18 N. Y. Supp. 542.

4. Discharge for Interest of All Concerned. — *McHenry v. New York, etc., R. Co.*, 25 Fed. Rep. 114; *Popper v. Scheider*, (N. Y. Super. Ct. Spec. T.) 7 Abb. Pr. N. S. (N. Y.) 56.

Where, with the consent of the management, a receiver of the property of a bank was appointed on the ground of insolvency owing to the peculiar character of the times, and an application was subsequently made for the discharge of the receiver on the ground that the bank had become solvent and that the rights of the creditors would be thereby subverted since their claims could be paid at once, it was held proper to discharge the receiver. *Ferry v. Central New York Bank*, (Supm. Ct. Spec. T.) 15 How. Pr. (N. Y.) 445.

5. Fay v. Erie, etc., R. Bank, Harr. (Mich.) 195.

6. Bill Dismissed for Want of Equity. — See *Blondheim v. Moore*, 11 Md. 365; *Voshell v. Hynson*, 26 Md. 92.

Reversal of Decree. — Where a decree appointing a receiver is reversed without qualification, his office ceases. *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627.

7. Crawford v. Ross, 39 Ga. 44.

8. Dismissal or Discontinuance Not Ipso Facto Discharge. — *State v. Gibson*, 21 Ark. 140; *Fountain v. Mills*, 111 Ga. 122; *Baker v. Baker*, 36 N. Y. App. Div. 485. And see *Moyer v. Badger Lumter Co.*, 10 Kan. App. 142.

Abatement of Suit. — An abatement by the death of a coplaintiff is not cause for the discharge of a receiver who was appointed on process; but it would be otherwise if the cause had abated by the death of the defendant against whom the process issued. *Woods v. Creaghe*, 1 Hog. 174; *McCosker v. Brady*, 1 Barb. Ch. (N. Y.) 329.

9. May Apply for Discharge on Discontinuance. — *Murrough v. French*, 2 Molloy 497; *Largan*

d. WHERE APPOINTMENT IRREGULAR OR IMPROPER. — Where the appointment of a receiver was irregular or improper or improvidently made, the receiver, upon such facts being made to appear, may be discharged.¹ But the appointment of a receiver in supplementary proceedings by a court of competent jurisdiction is not rendered void merely by a subsequent countermand of the execution upon which the proceeding was based.²

e. FRAUDULENT AND COLLUSIVE APPOINTMENT. — Where a receiver is appointed as a result of fraud and collusion between the parties, the receivership should be set aside so far as it affects the interests of creditors or third persons.³

f. WHERE PLAINTIFF NEGLECTS TO PROCEED. — Where the plaintiff neglects to proceed with the cause after obtaining the appointment of a receiver, the receiver will be discharged.⁴

7. Effect of Change of Receiver. — A mere change of the incumbent in the office of receiver does not affect the status of claims arising during the receivership against the property.⁵

v. Bowen, 1 Sch. & Lef. 296; Whiteside *v.* Prendergast, 2 Barb. Ch. (N. Y.) 472.

1. Irregular or Improper Appointment. — *In re* Lloyd, 12 Ch. D. 448; Niemann *v.* Niemann, 43 Ch. D. 198; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. (U. S.) 523; Howard *v.* La Crosse, etc., R. Co., Woolw. (U. S.) 49; McHenry *v.* New York, etc., R. Co., 25 Fed. Rep. 114; Copper Hill Min. Co. *v.* Spencer, 25 Cal. 11; Crawford *v.* Ross, 39 Ga. 44.

2. Countermanding Execution. — Palmer *v.* Colville, 63 Hun (N. Y.) 536.

3. Fraudulent Appointment. — Walters *v.* Anglo-American Mortg., etc., Co., 50 Fed. Rep. 316; Sage *v.* Memphis, etc., R. Co., 18 Fed. Rep. 571; Stirlen *v.* Jewett, 165 Ill. 410; O'Mahoney *v.* Belmont, 62 N. Y. 133; Lottimer *v.* Lord, 4 E. D. Smith (N. Y.) 183; Wilson *v.* Barney, 5 Hun (N. Y.) 259; Metcalf *v.* Moses, 35 N. Y. App. Div. 596, 161 N. Y. 587, *modifying* judgment 22 Misc. (N. Y.) 664; San

Antonio, etc., R. Co. *v.* Adams, 11 Tex. Civ. App. 198.

Officers of a Corporation Who Have Defrauded It cannot cause a suit to be begun by a confederate, and have another confederate appointed receiver, and so prevent the attorney-general of the state from proceeding against their company. People *v.* Bruff, (Supm. Ct. Spec. T.) 9 Abb. N. Cas. (N. Y.) 153.

Receiver as Agent of Corporation. — Where a receiver is appointed for a corporation through the fraud and collusion of the corporation or its officers or agents, the receiver will be treated as the agent of the company and the latter will be held liable for his acts. Texas, etc., R. Co. *v.* Gay, 88 Tex. 111.

4. Neglecting to Proceed with Cause. — National Mechanics' Banking Assoc. *v.* Mariposa Co., 60 Barb. (N. Y.) 423.

5. Change of Receiver. — Bond *v.* State, 68 Miss. 648; *In re* Fifty Four First Mortg. Bonds, 15 S. Car. 304.

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